

APRIL 1984

Commission Decisions

4-06-84	Green Hill Mining Company	KENT 83-251	Pg. 796
4-20-84	Jack Gravely v. Ranger Fuel Corp.	WEVA 83-101-D	Pg. 799
4-24-84	Turner Brothers, Inc.	CENT 83-12	Pg. 805

Administrative Law Judge Decisions

4-04-84	Mineral Coal Sales, Inc.	VA 83-26	Pg. 809
4-06-84	Claude C. Wood Company	WEST 81-172-M	Pg. 852
4-06-84	Westmoreland Coal Company	WEVA 83-244	Pg. 864
4-10-84	Rockline, Incorporated	WEST 81-339-M	Pg. 865
4-10-84	Magma Copper Company	WEST 81-399-M	Pg. 870
4-11-84	Badger Coal Company	WEVA 81-36-R	Pg. 874
4-12-84	MSHA/Milton Bailey v. Arkansas-Carbona Co.	CENT 81-13-D	Pg. 917
4-12-84	MSHA/James Mc. Taylor v. Buck Garden Coal Co.	WEVA 83-241-D	Pg. 919
4-13-84	Monterey Coal Company	LAKE 84-19-R	Pg. 921
4-17-84	Todilto Exploration & Development Corp.	CENT 79-91-RM	Pg. 929
4-19-84	Monterey Coal Company	LAKE 84-30	Pg. 936
4-19-84	Westmoreland Coal Company	WEVA 83-266-R	Pg. 939
4-20-84	Peabody Coal Company	KENT 83-86	Pg. 942
4-20-84	Forrie Everett v. Industrial Garnet Extractives	YORK 83-7-DM	Pg. 998
4-23-84	United States Fuel Company	WEST 84-40-R	Pg. 1004
4-23-84	Bethlehem Mines Corporation	PENN 83-198	Pg. 1011
4-24-84	Superior Rock Products	WEST 81-261-M	Pg. 1045
4-26-84	Metric Constructors, Inc.	SE 80-31-DM	Pg. 1050
4-26-84	Belcher Mine, Inc.	SE 84-4-M	Pg. 1052
4-26-84	George Jack v. Mid-Continent Resources, Inc.	WEST 83-72-D	Pg. 1059
4-27-84	FMC Corporation	WEST 81-264-RM	Pg. 1068
4-30-84	U.S. Steel Mining Company	WEVA 82-390-R	Pg. 1071

APRIL

The following cases were Directed for Review during the month of April:

Secretary of Labor, MSHA v. Monterey Coal Company, Docket No. LAKE 83-61;
(Judge Koutras, February 23, 1984)

Secretary of Labor, MSHA v. Green Hill Mining Company, Docket No.
KENT 83-251; (Judge Merlin, Default Order, February 27, 1984)

Review was Denied in the following cases during the month of April:

Elias Moses v. Whitley Development Corporation, Docket No. KENT 79-366-D;
(Judge Steffey, March 13, 1984)

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. WEST 83-73;
(Judge Morris, March 6, 1984; PDR dismissed as premature)

COMMISSION DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 6, 1984

SECRETARY OF LABOR, MINE SAFETY :
AND HEALTH ADMINISTRATION (MSHA) :
: :
v. : Docket No. KENT 83-251
: :
GREEN HILL MINING CO., INC. :

DIRECTION FOR REVIEW AND ORDER

The document titled "Notice" filed by the respondent operator on March 7, 1984, is deemed to be a petition for discretionary review and is granted. 30 U.S.C. 823(d) (1976 & Supp. V 1981).

The controversy arises under the Federal Mine Safety and Health Act of 1977. 30 U.S.C. 801 et seq. Following an inspection of the operator's mine, the Mine Safety and Health Administration (MSHA) of the Department of Labor issued four citations alleging violations of 30 C.F.R. sections 77.410, 77.1000, 77.1102 and 77.1109. Subsequently, MSHA issued a notification of the penalties it proposed for those citations, totalling \$134.00. Respondent contested and the matter came before this independent Commission for adjudication. Thereafter, the Secretary of Labor filed a proposal of penalty in the total amount of \$134.00 with the Commission.

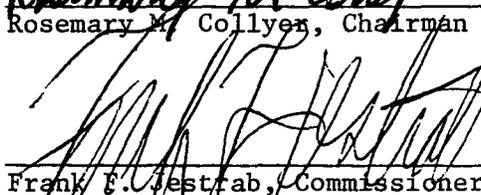
The Rules of Procedure of this Commission require respondent to file an answer to the Secretary's proposal of penalty within 30 days. 29 C.F.R. § 2700.28. When no answer was received within 30 days, the Commission's Chief Administrative Law Judge issued an Order to Show Cause to respondent on September 28, 1983, explaining the requirement for an answer and allowing 30 additional days to file the answer or show good reason for failure to do so. The Chief Judge gave notice that failure to respond to the Order to Show Cause would result in a default judgment. Receiving no response to the Order to Show Cause, the Chief Judge entered an Order of Default on February 27, 1984, requiring respondent to pay the sum of \$134.00 immediately.

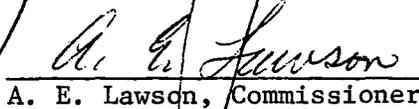
The operator seeks review of the default order and requests that it be amended to reflect a settlement. The operator represents that it paid to MSHA the penalty of \$134.00 on or about August 10, 1983, since it did not care to pursue the matter further. In response to the operator's petition for discretionary review, the Secretary objects to the operator's request for relief, noting that the Secretary did not discuss or agree to settlement at any time. He notes that the respondent's "unsolicited check" was forwarded by the Regional Solicitor's office in Tennessee to MSHA for deposit pending resolution of the case in keeping with the policy of the Department of Labor. The respondent's submission includes a copy of the negotiated check.

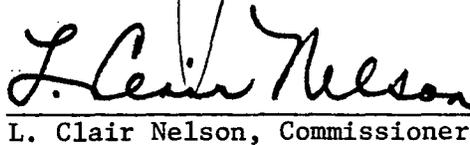
As noted above, this Commission is independent of the Department of Labor and MSHA. When he issued his Order to Show Cause, the Chief Judge of the Commission was not aware of the payment by the operator to MSHA of the full amount of the penalties. Because the operator did not respond to the Order to Show Cause, the Chief Judge was unaware also of that payment when he issued his Order of Default. Under these circumstances we find the Order of Default entered by the judge and his assessment of a total penalty of \$134.00 to be appropriate. We note, however, that the operator already has complied with the Chief Judge's order to pay the amount of \$134.00, which is the precise amount that the Department of Labor proposed for the cited violations.

Accordingly, the Order of Default issued by the Chief Judge on February 27, 1984, is affirmed.


Rosemary M. Collyer, Chairman


Frank E. Jestrab, Commissioner


A. E. Lawson, Commissioner


L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 20, 1984

JACK E. GRAVELY :
 :
 v. : Docket No. WEVA 83-101-D
 :
 RANGER FUEL CORP. :

DECISION

This case is before us on Jack Gravely's petition for discretionary review of an administrative law judge's decision which dismissed his discrimination complaint against Ranger Fuel Corporation. 6 FMSHRC 38 (1984). Gravely contends that Ranger illegally discharged him from his position as foreman at the Beckley No. 2 mine, in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 115(c) (Supp. V, 1981), because it blamed him for a roof fall which occurred on his shift. According to Gravely, Ranger discharged him in retaliation for his failure to take a crew in by a dangerboard to support the area of weak roof which later fell. Ranger argued that it had not discharged Gravely because of the roof fall. It claimed that Gravely's performance over the prior several months had been consistently unsatisfactory, and that it had discharged him following two incidents within one week in which his inadequate supervision had resulted in the destruction of suction pumps. Ranger's position was that it had no objections to Gravely's actions on the night of the roof fall, when he had his crew begin roof support work at the dangerboard, and that its officials blamed him for the roof fall only because of his failure to properly support the weak roof on a prior shift.

We granted review because we perceived certain deficiencies in the judge's analysis of this case. ^{1/} Review of the record discloses substantial evidence to support the judge's crucial factual findings. Applying the analytical framework we have established for discrimination cases to the facts at issue here, we affirm the judge's dismissal of Gravely's complaint.

^{1/} Ranger filed in opposition to Gravely's petition for discretionary review, alleging in part that the petition was not timely filed. Section 113(d)(2)(A)(i) of the Mine Act requires that petitions for discretionary review be filed within 30 days after issuance of a judge's decision. 30 U.S.C. § 823(d)(2)(A)(i). The 30th day following issuance of the judge's decision in this case fell on

(footnote continued on next page)

At the time of his discharge, Gravely had been employed by Ranger for almost 18 months. During this time he held a number of different supervisory assignments. The mine manager testified that these changes occurred because of problems with Gravely's performance in each job, and Ranger's continuing efforts to find a position for which he was suited.

Ranger provided several examples of Gravely's poor performance and disciplinary record, including instances of excessive or unexcused absenteeism and inadequate supervision of his crew, resulting in off center cuts and destruction of equipment. Gravely disputed the occurrence of some of these examples, denied that he had been disciplined for others, and claimed that some were not his fault.

During the last week of July 1982, while Gravely was working as a construction foreman on the night (hoot owl) shift, an area of "bad top" was encountered in the last open crosscut between the No. 1 and No. 2 entries of the No. 1 face. Harrison Blankenship, the assistant mine foreman (who worked on the day shift), testified that on July 26 he left instructions and a sketch with the evening shift foreman, Larry Burgess, telling Burgess to instruct Gravely to set "turn cribs" in the No. 1 entry intersection. "Turn cribs" are roof support cribs placed in an arc configuration to narrow the intersection and prevent a roof fall. Burgess testified that when he attempted to pass these instructions on to Gravely, Gravely told him that he already knew what to do.

Footnote No. 1 Cont'd.

a Sunday. The petition was received, and therefore filed (29 C.F.R. §2700.70(a)), on the 31st day following the issuance of the judge's decision. We have previously held that, in appropriate circumstances, petitions received after the 30th day (but before the 40th day when decisions become final orders of the Commission by operation of law) can nevertheless be accepted and considered by the Commission. Valley Rock & Sand Corp., 2 BNA MSHC 1673 (Docket No. WEST 80-3-M, etc., March 29, 1982); Victor McCoy v. Crescent Coal Co., 2 FMSHRC 1202 (1980). See Duval Corp. v. Donovan, 650 F.2d 1051 (9th Cir. 1981). We hereby hold that where the 30th day following the issuance of a judge's decision falls on a Saturday, Sunday, or Federal Holiday, good cause exists for accepting a petition for review received by the Commission on the first business day thereafter. This policy does not significantly lessen the time available to the Commission for considering petitions for review and also avoids unnecessarily shortening the time available to parties for determining whether to file or for preparing a petition for review. Accordingly, the operator's request that the petition be dismissed because it was received 31 days after the issuance of the judge's decision is denied.

Gravely denied receiving any specific instructions from Burgess or Blankenship before his July 27 shift. He testified that when he reached the section and his crew independently discovered the bad top, he notified shift foreman Dennis Myers of the condition, and he and his crew spent the rest of the shift attempting to support the roof. They did not set "turn cribs" as Blankenship said he had ordered, but "breaker cribs" extending across the No. 1 entry, immediately outby the crosscut. During the shift, one of the miners on Gravely's crew ran over and destroyed a submersible suction pump valued at \$2500 to \$3000.

The next morning Blankenship discovered that the cribs had not been set the way he wanted. He testified that the use of the breaker cribs would cause a roof fall in the intersection and crosscut, and turn cribs could prevent one. He did not believe the roof was in immediate danger of falling, so he again left instructions for the setting of turn cribs. Although the No. 1 entry was now blocked off by the breaker cribs that had been put up the night before, the intersection was still accessible through the crosscut from the No. 2 entry. Sometime that day, however, the roof in the crosscut began to work, and somebody (none of the witnesses knew who) placed a dangerboard in the No. 2 entry outby the crosscut. When Gravely and his crew began work on July 28, they began shoring up the roof at the dangerboard, and moving toward the crosscut. Before they reached it, however, the roof fell in the crosscut.

On July 29 and 30, Gravely's crew worked on cleaning up the roof fall. On July 30, another miner on the crew ran over a second suction pump in the same mud hole as the one that had been destroyed earlier in the week. Although at first it appeared that the second pump had also been destroyed, it later was repaired at a cost of \$854. The next morning Blankenship discussed the pump incidents with mine manager Walter Crickmer, and he and Crickmer agreed that Gravely should be fired. Both men testified that the discharge was motivated primarily by the fact that Gravely had allowed the destruction of two pumps within a week, but that Gravely's prior unsatisfactory work history also played a part in their decision. Although they denied that the roof fall alone was the motivating factor, Blankenship maintained that the fall had been caused by Gravely's failure to set turn cribs on July 27, and said that it was part of the chain of events "that led to the discharge."

In his decision, the judge found that Gravely had a history of disciplinary problems throughout his tenure at Ranger. Although he acknowledged that Ranger's poor recordkeeping practices caused it problems in documenting its assertions, he stated that he found the testimony of the three Ranger management employees who testified about Gravely's poor disciplinary record to be believable. He stated that he was unable to conclude that Ranger had fabricated the specific examples of Gravely's disciplinary problems as an

"after the fact" justification for his discharge. The judge concluded that the record showed that Ranger discharged Gravelly "after a series of incidents which finally convinced mine management that Mr. Gravelly should not continue on as a foreman." 6 FMSHRC at 89.

The judge additionally found that Gravelly's failure to take his crew inby a dangerboard on July 28, two days before his discharge, was not a motive for the discharge. Relying on testimony of both management employees and the miners on Gravelly's crew, the judge found that there was no expectation by Ranger that Gravelly take the crew inby the dangerboard, and that Gravelly's belief that he had been expected to do so stemmed entirely from the fact that Gravelly believed that assistant mine foreman Harrison Blankenship blamed him for the roof fall. However, the judge concluded that Blankenship's opinion that Gravelly was responsible for the roof fall was not based on Gravelly's failure to support the roof on the night of July 28, as Gravelly claimed, but on what Blankenship perceived as Gravelly's failure to follow his instructions for supporting the roof on July 27.

Although there was conflicting testimony about the specific instructions that Gravelly had received on July 27, there is clearly substantial evidence in the record to support the judge's finding, based in part on specific credibility determinations, that Blankenship believed that Gravelly had failed to follow his instructions on that shift. Therefore, it is apparent that to the extent that Gravelly's contribution to the roof fall was one of the bases for his discharge, that contribution was not the alleged protected activity of refusing to work inby the dangerboard, but rather was the failure to properly support the roof on July 27.

Under the analytical guidelines we established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence (1) that he engaged in protected activity and (2) that some adverse action against him was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed. 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d. 194 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

The judge in this case did not expressly determine whether Gravelly's refusal to take his crew inby the dangerboard on July 28 was protected activity under the Mine Act. However, he clearly found that the refusal was not a motivating factor in Gravelly's

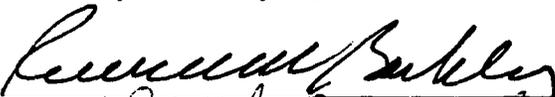
subsequent discharge, Ranger having rebutted Gravely's arguments to the contrary. Substantial evidence supports the judge's finding. Given these facts, Gravely failed to establish a prima facie case under our Pasula analysis. Because no prima facie case was established, it was not necessarily required that the judge reach the second stage of our discrimination analysis and determine whether Ranger proved an affirmative defense.

In this case, the judge did not separately discuss Ranger's assertion that it fired Gravely because of the destruction of two suction pumps within a week by miners under his supervision. It is not clear from the decision whether the judge's failure to address this issue separately was based on his belief that the evidence had been introduced to establish Ranger's affirmative defense or on his determination that the destruction of the pumps was part of the "series of incidents" which he held led to Gravely's discharge. However, we believe that the decision can be sustained in either event. The burden was on Gravely, as the complainant, to establish that his discharge was motivated, at least in part, by protected activity. Because he failed to meet that burden, a separate determination of the validity of any other asserted reason for the discharge was not necessary to the judge's holding. Furthermore, even if Gravely had established a prima facie case, we believe that Ranger's evidence demonstrated that it would have discharged him in any event because of the destruction of the pumps.

Therefore, we affirm the judge's order dismissing Gravely's complaint, on the basis that there is substantial evidence in the record to support the judge's factual findings which do not establish a prima facie case of discrimination.



Rosemary M. Collyer, Chairman



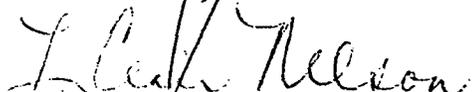
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 24, 1984

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

:
:
:
:
:
:
:

Docket No. CENT 83-12

v.

TURNER BROTHERS INC.

DECISION

The operator's petition for discretionary review of the administrative law judge's decision in this matter was granted on December 29, 1983. 30 U.S.C. § 823(d)(2)(Supp. V 1981). The operator's petition raised two issues: whether a Commission administrative law judge has the authority to assess a penalty greater than that proposed by the Secretary of Labor, 1/ and whether a Commission administrative law judge has the authority to assess additional penalties based on a perceived "cavalier attitude" and "contempt" that the operator and its counsel displayed in the litigation of the matter before the administrative law judge. These latter conclusions by the judge were based on the respondent's failure to appear at the scheduled hearing or otherwise notify the judge of its intention not to appear. 2/

Pursuant to the Commission's Rules of Procedure, the failure to file a brief in support of a petition for review that has been granted can result in dismissal of the proceeding. 29 C.F.R. § 2700.8(b) and .72(a). Because the operator failed to file a timely brief, the Commission issued an order advising the operator of the possible effect of its failure to comply with the Commission's rules, and specifically ordering the operator to submit its brief and a motion for leave to file the brief out of time with an explanation for the delay. The operator's response to the Commission's order was to submit a "brief." 3/ Contrary to the Commission's order, a motion to accept the late-filed brief was not filed.

1/ It is well established that, in a case contested before the Commission, the Commission and its judges are not bound by the penalty assessment regulations adopted by the Secretary. "The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact." Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), pet. for review filed, No. 83-1630 (7th Cir. April 8, 1983).

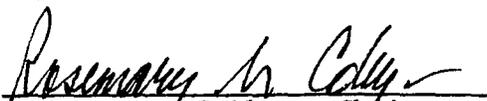
2/ The judge noted that the operator's counsel had also failed to appear at another hearing before a different Commission judge one week prior to the hearing set in this case.

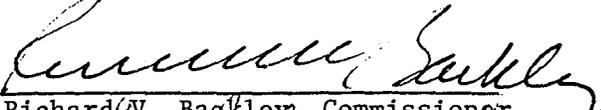
3/ The operator's submission was a four paragraph, one and one-half page restatement of its petition for review.

Due to the operator's failure to comply with the Commission's rules and orders, and consequent failure to prosecute this matter, the operator's petition for discretionary review is dismissed in part. Because the second issue raised in the petition relates to a matter which is "contrary to law or Commission policy," 30 U.S.C. § 823(d)(2)(B)(Supp. V 1981), and for which we have an independent concern, we have retained jurisdiction in part.

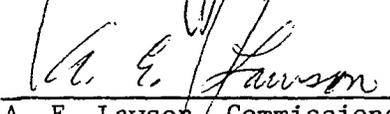
The judge's decision contains an assessment of a total of \$600 in additional penalties based on the "cavalier attitude" and "contempt" that the operator and its counsel displayed towards the Mine Act, the Department of Labor's Mine Safety and Health Administration inspectors, and the Commission. While we may well empathize with the judge's reaction, the proper recourse available to the judge in this situation would be that set forth in Commission Rule 80, governing the standards of conduct for individuals practicing before the Commission, and providing for the institution of disciplinary proceedings in appropriate circumstances. 29 C.F.R. § 2700.80. The need to scrupulously follow the Commission's rules on disciplinary procedures previously has been stressed by the Commission. Secretary of Labor ex rel. Roy A. Jones v. James Oliver & Wayne Seal, FMSHRC Docket No. NORT 78-415, March 27, 1979; Canterbury Coal Co., 1 FMSHRC 335 (May 1979). Due to the limitations set forth in the Act as to the criteria to be applied in assessing penalties, as well as the need for faithful adherence to the Commission's Rules, we vacate that portion of the judge's decision assessing six additional penalties of \$100 per violation due to the attitude of the operator and its counsel. Our decision today does not foreclose the institution of proceedings by the judge below under section 2700.80 if he is of the view that this is appropriate.

Accordingly, we dismiss for lack of prosecution the operator's appeal challenging the judge's assessment of penalties totalling \$5,100 based on the statutory criteria specified in section 110(i). The judge's decision stands as the final order of the Commission in this regard. The portion of the judge's decision assessing a total of \$600 in penalties for the "cavalier attitude" displayed by the operator and its counsel is vacated.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank F. Jestrab, Commissioner


A. E. Lawson, Commissioner


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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 4 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 83-26
Petitioner	:	A.C. No. 44-05226-03501
	:	
v.	:	Docket No. VA 83-36
	:	A.C. No. 44-05226-03503
MINERAL COAL SALES, INC.,	:	
Respondent	:	Docket No. VA 83-39
	:	A.C. No. 44-05226-03502
	:	
	:	Docket No. VA 83-44
	:	A.C. No. 44-05226-03504
	:	
	:	Mineral Siding

DECISIONS

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Bobbie S. Slusher, President, Mineral Coal Sales, Inc., Norton, Virginia, pro se, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory standards promulgated pursuant to the Act. Respondent contested the proposed assessments, and the cases were heard in Wise, Virginia, on November 22, 1983. The parties were afforded an opportunity to file post-hearing proposed findings and conclusions, and the arguments presented therein have been carefully considered by me in the course of these decisions.

Issues

A critical issue raised by the respondent in these proceedings is one of jurisdiction. In its answer to the

proposals for assessment of civil penalties, the respondent asserted that its Mineral Siding facility is not a "mine" within the meaning of the Act. In a motion filed by the respondent seeking dismissal of these cases for lack of jurisdiction, the respondent again asserts that its facility is not a "mine" within the meaning of the Act. Relying on the Commission's decision in Secretary of Labor v. Oliver M. Elam, Jr., Company, Inc., 2 MSHC 1572 (1981), the respondent contends as follows:

(1) Respondent is the owner and operator of a commercial loading facility on the N&W-Southern Railway which loads coal onto rail cars.

(2) Respondent's customers are coal brokers who pay it to load coal onto the rail cars.

(3) The brokers arrange for delivery of the coal by truck to the facility, and then for delivery by rail car to their customers.

(4) The facilities for loading coal consist of a hopper, a crusher, conveyor belts, and a front-end loader.

(5) Respondent does not purchase and market the coal that it loads, but rather acts as a third-party which merely loads coal for transportation to customers from disinterested brokers.

(6) Respondent crushes the coal to facilitate its loading business.

Assuming that the respondent is subject to the Act, the next question presented is (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of any civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalties to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business,

(5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Discussion

The citations which are in issue in these proceedings are as follows:

Docket No. VA 83-26

Section 104(a) Citation No. 2039607, issued on December 28, 1982, cites an alleged violation of 30 CFR 50.30, and the condition or practice is stated as follows:

The operator of this active mine has not submitted a quarterly employment report for the 3rd quarter of 1982 (July-Sept.). This mine re-opened 07-01-82.

Docket No. VA 83-36

Section 104(a) Citation No. 2153470, issued on March 1, 1983, cites an alleged violation of mandatory health standard 30 CFR 71.803, and the condition or practice is stated as follows:

A periodic noise exposure survey for the last 6 months has not been submitted to MSHA at Norton, Virginia. There are 2 employees to be surveyed at this active mine.

Docket No. VA 83-39

Section 104(a) Citation No. 2039612, issued on January 17, 1983, cites an alleged violation of 30 CFR 50.30. The described condition or practice is as follows:

The employment reports filed for the 3rd and 4th quarters of 1982 were inaccurate in that each report showed "none" for the average number of workers and "none" for the total number of employee-hours worked. The on-shift record book showed the mine operated during each month of each quarter reported for.

Docket No. VA 83-44

Section 104(a) Citation No. 2153469, issued on March 1, 1983, cites an alleged violation of 30 CFR 77.1705, and the condition or practice is as follows:

The superintendent Donald P. Slusher has not attended a first aid refresher class in the last calendar year. The last training was on 05-23-1981.

Petitioner's Testimony and Evidence

Donald R. Saylers, Supervisory Inspector, MSHA Norton, Virginia, Subdistrict Office, testified as to his background and experience, and he confirmed that he supervises nine inspectors in the performance of their inspection duties. He identified Hobert Bentley as the inspector who issued the citations at issue in this case, and he confirmed that Mr. Bentley is deceased.

Mr. Saylers confirmed that he was familiar with the citations issued by Mr. Bentley, and that he reviewed and discussed them with him prior to his death. He also confirmed that he was familiar with Mrs. Slusher's loading facility, and he stated that she operated the Clifton Mining surface mine sometime during 1974 to 1976, and changed its name to Mineral Developers sometime during the period 1976 to 1979. At the time she started the facility, Mineral Developers was stripping coal, and after mining ceased at the facility, the surface facility continued on and was known as Mineral Siding (Tr. 30-34).

Mr. Saylers identified Exhibits P-1, P-2, and P-3 as MSHA Legal Identity reports on file in his office for the facility in question. With regard to Exhibit P-3, showing a transfer of the site on July 1, 1982, from Summit Resources back to Mineral Coal Sales, Mr. Saylers explained that Summit Resources was under a Federal court order to permit MSHA entry to the property for inspections, but that he was informed that Summit Resources no longer was there and that Mrs. Slusher had again resumed responsibility of the loading facility (Tr. 35).

Mr. Saylers confirmed that he has visited Mrs. Slusher's loading facility on numerous occasions, the last time being three months prior to this hearing. He stated that at that time the facility was not in operation because the stationary crusher on the loading facility which is used to size coal was broken down. Mr. Saylers identified a photograph of Mrs. Slusher's residence, which is also used as the mine offices of Mineral Coal Sales and Hubbard Enterprises, and he confirmed that the structure is on the mine site (Exhibit P-4).

Mr. Saylers stated that the coal is transported to the facility by truck, and it is then weighed and dumped at

several stockpile locations. He identified exhibits P-5 and P-6 as photographs of some of the stockpiles. He confirmed that the coal which is brought in by trucks is dumped in separate stockpiles, and he "assumed" that this is because it is from different coal seam sources (Tr. 39).

Mr. Saylers identified exhibit P-8 as a trailer adjacent to the scale where the coal is weighed before it is dumped, and exhibit P-7 as a sulphur machine and ash oven used to determine the sulphur and ash content of the coal. He observed this testing equipment in the trailer where the scaleman weighs the coal. He also identified exhibit P-9 as a photograph of the front-end loader which is used to load the coal from each of the stockpiles into the hopper of the portable loading unit. He described the loading process as "unique" in that the railroad cars which are being loaded remain stationary as the mobile loading unit loads each car. The front-end loader is used to load the coal from the particular stockpiles which are nearby, but each railroad car is not loaded with coal from the same pile. The front-end loader may load coal taken from different piles into the hopper before it is loaded on any particular railroad car, and Mr. Saylers "assumed" that this loading procedure involved the mixing of coal which has been taken from different coal seams and stockpiled by seam. He confirmed that he observed the front-end loader taking coal from two different stockpiles and dumping into the loading hopper (Tr. 39-42).

Mr. Saylers explained further that exhibit P-9 is a photograph of the front-end loader dumping coal into the hopper as shown in exhibit P-11. After it is dumped into the hopper, the coal goes through a crusher, comes out onto the belt line of the mobile loading unit as shown in exhibit P-11, and is then dumped directly into the railroad car. The mobile loading unit is on a track so that it can adjust the two directional belt lines into the particular car which is being loaded (Tr. 43-44).

Mr. Saylers stated that on the basis of his observations of the loading process at Mrs. Slusher's facility, as well as his experience and knowledge of the coal mining industry it is "a fair assumption" that a coal "blending process" takes place at the facility. He based his conclusion on the fact that after the coal is stockpiled in separate piles, and after it is tested for sulphur and ash content, the mixing or blending takes place when coal is taken from different piles and loaded into a common hopper for loading onto the railroad cars in its "mixed or blended" state. His experience indicates that the mixing of coal from different piles where the sulphur or ash content may vary, results in a mix or blend of the desired final ash or sulphur content. Further,

Mr. Saylers indicated that in his 23 years of experience in the coal industry, he has never known a railroad car of coal being sold without some kind of predetermined ash or sulphur content specifications being placed on it by the purchaser (Tr. 45-48).

Mr. Saylers identified exhibit P-10 as a photograph of a separate stationary "grading tippie" used to make stoker coal, lump coal, or "egg coal" for domestic use. He described the term "making coal" as the grading process which takes place after the coal is dumped into the hopper by a loader. The coal moves along the belt shown in exhibit P-10 where it is sized by means of a screen. Different sized screens are used to produce different coal products (Tr. 43). He confirmed that this particular operation is separate from the operation used to load the railroad cars (Tr. 44).

In further explanation of the separate grading tippie, Mr. Saylers stated that its primary use is for retail "house coal" where customers may buy a truck load or so, but he confirmed that he had no knowledge as to whether or not that coal was from the piles loading onto the railroad cars. Although he stated that the coal came "out of the yard--out of their stocking area," he personally never observed such coal being processed through the separate grading tippie used for domestic sales(Tr. 49).

On cross-examination, Mr. Saylers confirmed that when he visited the respondent's facility in July 1982, he was there to inspect the facility in accordance with a court order issued against Summit Resources (Tr. 51). He also confirmed that at no time has MSHA ever been refused entry onto the facility by anyone connected with the respondent Mineral Coal Sales Inc. (Tr. 52).

Mr. Saylers testified that he again visited the facility in December 1982 when the citation for failure to file certain reports were issued, and that since Mrs. Slusher was in Florida, he dealt with a foreman who was on duty (Tr. 58). He testified as to certain observations which he made while he was there. He confirmed that the setting on the crusher in question was already set, and at no time has he ever observed anyone adjusting the crusher for different sizes (Tr. 60). He also confirmed that he observed coal being dumped and weighed, and he did not inquire as to the names of any of the persons doing this work because it is MSHA's view that anyone working at the facility is "an employee of that mine site" (Tr. 62). He did confirm that the person who was operating the test equipment in the trailer advised him that he "worked for Jimmy Hubbard" (Tr. 66).

Mr. Saylers stated that he has personally never observed the separate stationary tipple in operation, but has observed a loader putting coal into it from the highway while driving by, and he assumed that it was running (Tr. 68-69).

Mr. Saylers testified that when he was at the facility he observed Donald Price Slusher, Mrs. Slusher's brother-in-law, and Michael Slusher, her nephew, performing work in connection with the mobile loading unit. Price was operating the unit, and Michael was doing some maintenance work (Tr. 70). He confirmed that he was not with the inspector in March 1983, when he issued the citations for failure to take a noise survey and failure by Mr. Slusher to take first aid training, but that he did discuss the citations with the inspector who issued them (Tr. 75).

Mr. Saylers stated that except for the mobile loading unit which runs on rails, the respondent's loading facility is no different from other loading facilities which he has observed. The only thing that sets them apart, is that other facilities he has observed utilize stationary loading equipment. When asked to characterize the respondent's facility, Mr. Saylers responded as follows (Tr. 79-81):

A. I said it was a unique situation, but it is no different from any other loading facility except this one is mobile, runs on a rail, and the others are stationary.

Q. What would you classify it? Is it a prep plant or is it a cleaning plant?

A. It's a loading facility.

Q. It's not a prep plant? It's not a cleaning facility?

A. I couldn't say that it's a cleaning facility.

MR. CRAWFORD: Just talk about the machinery that loads the coal.

JUDGE KOUTRAS: Hold it. I've got a rubber-tired front-end loader; that's P-9. P-11 is a mobile loading unit with a hopper, bridge crusher and conveyor belt -- that's what somebody said on the back. What are you asking him?

MS. SLUSHER: I'm asking him what he classifies this as.

JUDGE KOUTRAS: He doesn't have to classify this as anything. What he has to do is identify it. What is it? What MSHA has done is classify your whole loading operation, including all these pictures, in one big bag and they say it's a custom preparation plant isn't that so, Mr. Crawford?

MR. CRAWFORD: That's basically it.

JUDGE KOUTRAS: At this time you're asking him how you classify the machinery as shown in P-11.

THE WITNESS: It's a loading facility.

BY MS. SLUSHER:

Q. Does it have a picking table?

A. We have several loading facilities that don't have a picking table.

Q. But does this particular one have a picking table?

A. If it does I'm not aware of it.

Q. Does it have any method for extracting impurities out of the coal?

A. It's not a cleaning plant. I said it's a loading facility.

Q. It has no method of separation then?

A. No, ma'am. That's only done in a cleaning plant.

Q. So when you talk about processing -- when you say coal is processed, what are you talking about?

A. Processed can be anything; anything that you do to the coal.

Q. If I dump it, it's processed?

A. Blending, mixing, sizing, testing; anything that you do to it is processing.

JUDGE KOUTRAS: This particular mobile unit, all it does is load? It doesn't do these other things?

THE WITNESS: No.

MR. CRAWFORD: It was stated previously there was a crusher on there.

THE WITNESS: There is a crusher; that's right.

MS. SLUSHER: We don't dispute the crusher.

BY MS. SLUSHER:

Q. But you have not observed anything whatsoever that makes it look like anything other than just crush the coal and put it on the car?

A. I have observed a particular size being put on the railroad car, yes.

Q. But not custom adjustments or anything like that?

A. I have not observed --

JUDGE KOUTRAS: When it comes your turn, if you can convince me that the only thing P-11 does is crush the coal to one consistency from time immemorial to load then that's all it does. What that means -- we'll see what it means.

MS. SLUSHER: I guess I've belabored the point more than I should.

JUDGE KOUTRAS: I guess that's the point you're trying to make. It just sizes coal to one size. It processes coal to one size?

MS. SLUSHER: Right.

In response to further questions as to what he may have observed when he visited the facility, Mr. Saylers testified as follows (Tr. 83).

BY MS. SLUSHER:

Q. Was there any conversation with anybody about -- as far as the dumping concerning individual piles of coal being from individual operators?

A. I talked with -- I guess he was a scale man -- where the coal come from first of all because I was concerned and interested. A lot of times I find out new mines and so forth from asking questions. He told me that most of the coal

was coming out of the State of Kentucky; that's where it was being trucked from. He said there was different seams, different qualities of coal. That's why it was being separated. I didn't pursue why you dump it here and why you dump it there, because like I said, again, it's none of my business. The thing that concerns me was the way -- method they were dumping it -- the way they were ramping it, some of the trucks backing up on the ramps. I'm more safety oriented than I am blended coal, you know.

MS. SLUSHER: That's what I'm getting at -- he was saying it was dumped in individual piles. That implication is that they tested it first and then put in in the piles. Now what our position is that it was brought in and dumped and then tested to pay the operator, the people we got the coal from; not for any other purpose. That's the reason it was kept in separate piles.

MR. CRAWFORD: What was your observation? You observed the latter. Is that correct?

THE WITNESS: Yes. I observed it after the coal was being dumped in the particular piles. I observed the guy taking samples and I asked him what are you doing. He said we're checking to see what the ash is and we're checking to see what the BTU is because, you know, the different seams of coal --

MR. CRAWFORD: The government would have no objection to stipulate as to that observation that the testing occurs after the stockpiling.

MS. SLUSHER: I have no further questions.

REDIRECT EXAMINATION

BY MR. CRAWFORD:

Q. You did say in your previous testimony that you were at the site of Mineral Siding facility on December 28th, 1982 in relationship to this one citation regarding employment? Do you recall that situation?

A. Yes.

Q. When you were there did you observe the facility being operated?

A. Yes.

Q. And there were employees there performing certain tasks in loading coal. Is that correct?

A. Yes, sir, there was.

Q. And about how many?

A. There was two men at the loading facility and there was one man at the -- weighing coal and there was another man there that was directing the trucks where to dump and so forth.

Q. At the loading facility what were these two employees doing?

A. Well, we observed them in preparation for starting and then also observed one man running the front-end loader and one man was running the loading facility itself.

Q. The mobile --

A. Yes.

Q. So you did observe employees at the site at that time?

A. Yes.

Q. Concerning the mobile loading facility we discussed previously, there was a crusher located on there. Is that accurate?

A. Yes, sir.

Q. Can that be adjusted to certain sizes of coal?

A. All of the stationary crushers that I have been acquainted with are adjustable.

Q. We're talking about the crusher on the mobile loading facility. Is that correct?

A. Yes. Of course, they just installed a new one and I don't know what type they put on. I'm assuming that it is adjustable, but I can't say that it is.

Q. In reference to the laboratory, the trailer type facility that was located at the Mineral Siding facility, you observed it being utilized and in operation in conjunction with what was happening at the facility?

A. Yes, sir.

MR. CRAWFORD: I have no further questions.

JUDGE KOUTRAS: Do you have anything else?

MS. SLUSHER: Again, he did not observe anything being adjusted on the crusher.

THE WITNESS: At the time I observed it, no.

Respondent's Testimony and Evidence

Price Slusher, confirmed that he is the brother-in-law of Bobbie S. Slusher, and he testified that he is presently employed by Mineral Coal Sales, Inc. He stated that during the period July 1, 1982 to March 1, 1983, he was employed by Interwise and was not under the control of Mineral Coal Sales, and was not paid by Mineral Coal Sales. He stated that in his employment with Mineral Coal Sales, he acts as the facility foreman or superintendent, and his duties include mechanical work and the operation of the tipple. He had the same duties when he was employed by Interwise (Tr. 131).

Mr. Slusher stated that his involvement with the coal loading as an employee of Mineral Coal Sales begins when he receives instructions from Kim Reed with regard to the loading of coal. He identified Mr. Reed as an employee of Jim Hubbard, and Mr. Slusher stated that the crusher has no picking table, and that there is no available method for separating the coal or making any coal sizing adjustments to the crusher, and that "they're all run through the same thing -- the same sizes" (Tr. 132). He further described his duties as follows (Tr. 132-133):

Q. Kim Reed is an employee of Hubbard who instructs you what cars to load?

A. That's right.

Q. Where is the coal? Is the coal all together in one pile or many piles?

A. No, it's in many piles. It's in separate piles and he instructs us most of the time by a little note telling us what bucketful to pick up here and what bucketful to pick up in another pile and another pile, however his mixture is that he wants.

Q. Do you have any idea why the coal is put in separate piles?

A. It's because of a different grade coal.

Q. Different grades. Does that mean from different operators or --

A. Different operators.

Q. Do you have any knowledge of who owns that coal?

A. No. Not at the point till it comes to my dock. Then Hubbard Enterprises, I suppose owns it from there on.

Q. You're not familiar where the coal is coming from as far as an individual mine?

A. No.

Q. Are you familiar with what custom preparation of coal is? Do you understand custom preparation of coal?

A. I don't know what you mean by that.

Q. Well, do we do anything that makes that coal specifically -- as Mineral Coal Sales, does Mineral Coal Sales do any process that prepares that coal for a special person or a special customer?

A. No, not in our process we don't. As I say, all we do is load what they say to load.

Q. And we don't get involved with picking out or taking out any kind of impurities or washing?

A. No.

Q. Does Hubbard Enterprises exercise any jurisdiction over Price Slusher? Does he instruct you as to your duties?

A. No, other than just what coal to load.

Q. And he doesn't pay you?

A. No.

Q. He doesn't furnish any side benefits to you?

A. No.

Q. Are you aware of who owns Hubbard Enterprises?

A. Jim Hubbard, I suppose.

Q. To your knowledge has Mineral Coal ever had any interest in Hubbard Enterprises?

A. No.

Mr. Slusher testified that mining first began at the respondent's facility sometime in 1979, and that Mineral Developers constructed the loading dock and operated the facility. Mineral Developers and Mineral Coal Sales are owned by the same individual (Tr. 134). Mr. Slusher stated that he was employed by Mineral Developers as a foreman, and after mining ceased, coal loading continued under the same procedures followed at the present time (Tr. 135). Coal was simply loaded for a fixed fee, and no testing or coal quality services were provided by the respondent (Tr. 135).

On cross-examination, Mr. Slusher testified that when he worked for the Interwise Corporation from July 1, 1982 to March 1, 1983, the company was owned by a Mr. Shelcy Mullins. Mr. Mullins is not related to him, and Mr. Mullins usually came to the site to check the work and instruct him on what he wanted done. Mr. Slusher stated further that he performed maintenance work and operated the loader, and was paid by checks issued by Interwise (Tr. 136).

With regard to the present coal loading procedures, and the instructions from Hubbard Enterprises employee Kim Reed, Mr. Slusher stated as follows (Tr. 137-139):

A. Kim will usually bring a whole pad out -- a little piece of paper out and he'll have wrote down on it how many buckets of this coal or how many buckets of that coal out of each pile, you know, how many buckets full he wants to put in the cars. And that's what we do. And he'll usually have on there four cars or five cars or whatever he wants loaded of that mixture, you know.

Q. And then he may come along and give you different instructions for a different set of cars?

A. That's right. He'll make any other instructions wrote on the same piece of paper.

Q. To your knowledge, what happens to the coal after you load it?

A. Other than the railroad pulls it out, that's as far as I know.

Q. Did Mr. Hubbard ever mention to you where it goes or who he sells it to?

A. No, he sure doesn't.

Q. Do you have any idea?

A. I haven't any idea where it goes to. It's not many operators that will tell you that.

Q. You also stated that the coal is stock-piled in many piles as it comes in from independent operators or other different types of miners?

A. That's right.

Q. Do you know where they come from or where the coal comes from at all?

A. No, sir, I sure don't.

Q. In this area of the country?

A. They'll say Kentucky or they'll say -- they won't go into no specific details of where the coal come from.

Q. Do you do any of the testing?

A. No.

Q. You're aware that there is some type of testing going on at that facility?

A. Well, yeah -- they don't tell us anything about the testing.

Q. Who does know about the testing?

A. Kim Reed does.

Q. But they come in with different grades according to wherever the particular truckloads came from, whether it be Kentucky or wherever?

A. That's right.

Q. And then you load them per instruction from Mr. Hubbard?

A. That's right.

Q. A different number of railroad cars per instruction?

A. Right.

Q. Different mixes, different shovelfuls or according to what is instructed and they may vary from day to day?

A. That's right.

Q. So then there are different mixtures or blends that occur that are loaded on these railroad cars?

A. That's right.

With regard to any exposure to potential hazards by employees on the facility, Mr. Slusher testified as follows (Tr. 139-141):

Q. What if someone was injured on the premises? Who would have any type of training or control -- you are a foreman that's part of the loading process here. What if an injury would occur or dangerous situation might occur in your operation? What control do you have over that?

A. Yes, I've had first aid training and also as far as I know everybody on the dock has had first aid training.

Q. What about -- you don't perform the testing but you mentioned that Hubbard Enterprises is involved in that. Is that accurate?

A. That's right.

Q. Some of them do the testing that occurs in the facility at the testing trailer or whatever -- laboratory there?

A. That's right.

Q. Do employees of Hubbard do any other things besides just the testing? Do they help in the loading?

A. No, they don't help in the loading.

Q. But they are involved in the testing of stockpiles or the coal as it comes in to determine what grade it is. Is that correct?

A. Yes.

Q. So as a truck pulls up and unloads a load of coal they may be out there adjacent to it somewhere taking a sample to test. Is that correct?

A. That's correct.

Q. So they could be affected by what's happening in the yard as far as the movement of those large trucks and dumping of those piles and possibly a dangerous circumstance could develop. Is that correct?

A. Most of the time when they're taking a sample they pick between trucks. They're not right there when a truck dumps as a general thing. They're not there when a truck actually is in the process of dumping.

Q. Do they ever come into your work area as you're loading the coal -- after the coal is brought in and stockpiled and they maybe perform tests and then -- of course, how you load it. You go with a front-end loader and take a shovelful here and a shovelful there. Are they out there when you're doing that process at all?

A. They might pass through.

Q. How about when you're actually loading it into the mobile loader which is loading the railroad cars out there? Are they at any time out there testing coal to make sure that it's going in at the correct grade or anything like that?

A. No, they're not there.

Q. They do that before?

A. Yes.

Q. So they are out in the work area when you are taking different buckets?

A. They're more or less passing through. They don't stay out there or anything like that.

Q. But they would be proximate to the front-end loader that's working out in that area or could be?

A. Could possibly.

In response to further questions, Mr. Slusher indicated that he personally had no way of knowing whether different blends of coal were being mixed on any given day. He also indicated that when he was employed by Interwise, all of the equipment he used and worked on belonged to Interwise, and any citations issued by MSHA should have been served on that company (Tr. 144). He confirmed that the policy of Mineral Sales Company is to conduct morning safety inspections of the facility (Tr. 145).

Mr. Slusher testified further that Mineral Coal Sales has operated the present loading facility since March 1983, and that he and Michael Slusher are the only employees. At the time Interwise operated the facility, they had two employees, and Hubbard Enterprises also has two employees. He confirmed that at any given time, a total of four employees work at the facility. The trucks which haul the coal in are owned by independent truckers (Tr. 153-154). The loader shown in the photographic exhibit is owned by Mineral Sales, but it is not the same loader which was operated by Interwise in March 1983, and he described the differences in the two loaders (Tr. 155).

Kim Reed, testified that he is employed by Hubbard Enterprises, and has been so employed since June 1982. He is a state certified dock foreman, and has been certified by the State of Virginia as "an approved competent" miner since 1981. Mr. Reed confirmed that he was present and working on the facility during the time Interwise and Mineral Coal Sales were involved in the loading operations (Tr. 161).

Mr. Reed testified that Hubbard Enterprises is owned and operated by Mr. James Hubbard and his wife. They work together in their office on the facility, and Mrs. Hubbard serves as the secretary. Mr. Reed examined a copy of a letter dated June 8, 1983, from Mr. Hubbard to MSHA official James Belcher, and he expressed agreement with the statement made there by Mr. Hubbard (Tr. 162-163).

Mr. Reed explained the procedures he follows when coal is delivered to the premises as follows (Tr. 164-166):

A. When the coal comes in I have another employee that helps me and I'm the foreman over him. When the coal comes in we weigh it. People that regularly haul we have certain places set for them to dump. We tell them where to dump. If they bring in a different quality or a different seam that I don't know of, I call Jim and tell him where to have me dump the coal. Then we sample the coal -- the guy that helps me goes down and samples the coal, gets the samples off of it. He prepares the samples and I run the samples and then I get the analysis. Then if Jim wants to -- if he needs to know in a hurry the analysis I pick up the phone and I call him. I tell him what the coal line is -- whether he wants them to continue to hauling or discontinue. Then I have a pad that I keep down and I write all the samples down and at the end of the day or the next morning I take the samples down to the office, lay them on the secretary's desk so she can copy the samples down -- analysis.

Q. So actually you don't -- you take it off the pile, the individual piles. You don't take it off of a thing that's been stacked together or blended together on the site, do you?

A. No, ma'am, we do not. We take it off of the truck.

Q. They say in this letter that they run ash and sulfur and BUT and FSI. Is that correct?

A. Yes.

Q. Is there any other test that's done?

A. No, there's not.

JUDGE KOUTRAS: What's FSI?

THE WITNESS: It's free swelling index.

BY MS. SLUSHER:

Q. Do you do any fluidity tests?

A. No, ma'am, we do not.

Q. Do we have the capacity in the lab to do the fluidity test?

A. No, ma'am, we did not.

JUDGE KOUTRAS: Was that a slip of the tongue when you said we?

MS. SLUSHER: Well, that's my equipment.

BY MS. SLUSHER:

Q. Do you make any reports to any companies concerning what's in the pile? When you take a sample off the pile here do you make a report to any end users of the coal what's in that pile?

A. To the people we ship the coal to?

Q. Yes.

A. No. The only thing we do -- the only report taken is the car -- after the car is loaded we sample the cars. That is the only -- we take the car samples and I give them to -- take them to the office. And then Jim relays the message and reports to them. I don't give analyses to none of the companies that we ship to. As a matter of fact, he has ordered me not to give them. If he's out of town or anything when they call I don't give them to them.

Mr. Reed confirmed that the laboratory personnel are employees of Hubbard Enterprises, and that Mr. Hubbard buys all supplies and pays for all required maintenance on his equipment. Mr. Reed also confirmed that each morning he instructs the loader operator as to how many cars of coal to load, and he also instructs him as to which piles the coal should be taken from (Tr. 166-167).

Mr. Reed stated that extraction of dirty coal or impurities does not take place, and the tipple is not adjusted on a daily basis to size the coal. All coal orders are shipped "on a certain size," and adjustments for sizing are not done. With regard to the stationary tipple, Mr. Reed stated that it is used to "grade out coal for domestic use" (Tr. 167). He explained that that this coal is "house coal" which is made available "as a more or less convenience to the people" (Tr. 168). Mr. Reed confirmed that Mr. and Mrs. Slusher have no interest in Hubbard Enterprises, and that the respondent is paid on the basis of the coal tonnage that is loaded and does not own the coal (Tr. 168).

On cross-examination, Mr. Reed stated that his duties as a State certified foreman for Hubbard Enterprises consist of direct supervision over one other employee of Hubbard who is involved in testing. He also indicated that he has no authority over the "loader man and tipple man" employed by the respondent.

Mr. Reed confirmed that when Interwise Corporation was operating on the property it did its own testing and loading of its own coal and Hubbard Enterprises tested and loaded the coal which it owned (Tr. 169). In further explanation of his duties while in the employ of Hubbard Enterprises, Mr. Reed stated as follows (Tr. 171-172):

Q. Part of your job is to tell Mr. Slusher at Mineral Sales, Incorporated how to load the coal -- what mixture of each pile. Is that correct?

A. Yes, sir.

Q. Each stockpile, you said, comes from a different type of mine?

A. Different seam.

Q. Do you test that coal to see just what quality it is?

A. That's right, we do.

Q. And you said that Jim Hubbard makes that determination and tells you what king of mix he wants for any particular load?

A. That's true.

Q. Why does he request that? Do you have any idea? Who tells him, in other words?

A. The people he ships to; the people that buy the coal off of him each month. They send him a letter stating how much -- the quantity of coal and the quality of coal that they need.

Q. Do you know anybody that he ships to?

A. Yes, sir, I do.

Q. Could you name a few?

JUSGE KOUTRAS: You can't take the Fifth Amendment in this proceeding if that's what you're thinking about. I don't want you to get in trouble. Is there any proprietary confidence?

MS. SLUSHER: Confidentiality -- that's one reason -- I'm not trying to play ignorant when I say I don't know, but I really don't want to know because of the brokers and operators.

JUDGE KOUTRAS: If he knows -- answer the question.

THE WITNESS: We shipped to Shelton Coal Company, A.T. Massey, United Coal and Coke, John McCall, Jefferson Coal, that's about it.

JUDGE KOUTRAS: He rattled off four or five people that coal is shipped to.

BY MR. CRAWFORD:

Q. They request by letter to Mr. Hubbard?

A. Yes, sir.

Q. What type of coal they want sent?

A. That's right.

Q. And he tells Mr. Slusher with Mineral Coal Sales how to mix it?

JUDGE KOUTRAS: No, he tells Mr. Reed.

THE WITNESS: I go down there every morning.

BY MR. CRAWFORD:

Q. You tell Mr. Slusher?

A. Yes. Jim tells me how many cars he needs loaded that day and as far as the mixture for the quality of coal. I write it down and I take it out and give it to Mr. Slusher.

Mr. Reed confirmed that after the railroad cars are loaded he again samples the coal in each car to determine whether or not the customer who ordered it from Mr. Hubbard is actually getting "the type or grade of coal" that he contracted for

(Tr. 173). With regard to the stationary "tipple," he identified it as a "separator" and indicated that the respondent does not use it. He explained that the separator is used to separate stoker, egg, and lump house coal by means of screens which "shakes down" the coal through holes in the screen. Separate screens are used for fines and lump coal up to four inches depending on the customers preference (Tr. 175).

Mr. Reed stated that the house coal processed by the separator is sometimes sampled, and he identified the testing and sampling equipment as machines used for testing for ash, sulfur, and BTU content, and a bunsen burner, a pulverizer, and a sample crusher (Tr. 175). Mr. Reed indicated that this test equipment is owned by Mrs. Slusher, but had no knowledge as how she is compensated for the use of the equipment by Hubbard Enterprises (Tr. 176). He also confirmed that Mrs. Slusher owns the stationary domestic coal screening equipment, and Mrs. Slusher confirmed that she is paid one dollar a ton for the domestic coal processed and sold by Hubbard (Tr. 178). Mr. Reed also confirmed that Hubbard Enterprises has an office in the same residence where Mineral Coal Sales maintains its office, and he assumed that Hubbard pays rent to Mrs. Slusher for this office space (Tr. 185).

Posthearing Submissions

Respondent filed an affidavit from James W. Hubbard, owner of Hubbard Enterprises. Mr. Hubbard states that he is in the business of buying and selling coal. He confirmed that Hubbard Enterprises and Mineral Coal Sales operate as independent business units, and are not connected by any common stock ownership.

Mr. Hubbard states that his coal is purchased from many independent operators or truckers for sale to his customers. He states further that Mrs. Slusher's Mineral Siding loading facility is used to load the coal, and that he pays Mrs. Slusher \$2 per ton of loaded coal. This payment is based on the truck weights as they cross the scale, and is not dependent on the type or quality of coal purchased or sold by Hubbard Enterprises. He outlined the procedure used in the buying and selling of the coal, in pertinent part as follows:

I. I arrange with small operators or truckers who purchase coal and then resell it to buy their coal. We agree on a price range provided it is a certain grade of coal. When the trucks deliver the coal, it is dumped on the ground in individual piles, according to the operator or seller of the coal. To see if the coal is

the same as represented to me and to protect myself to keep from losing money and buying bad coal, I will sample the coal after it is dumped. If it is obviously not what I agreed to buy, then I will contact the owner of the coal and tell them I will pay a lesser amount or they can pick up the coal. This separation into piles permits me to do this. After the coal is loaded onto the cars, I have car top samples taken from time to time. This is to protect Hubbard Enterprises in case there is some question as to what is in the cars. Over the years it has been a problem in the industry of operators and coal people doing what is called layering, that is putting the good coal on top of the trucks or cars, covering up inferior coal in the bottom of the trucks or cars. A preliminary sampling of the truck loads dumped might not reveal this problem but sampling of a loaded car would show this up. In other words when it is stirred up by loading, what you thought was good coal might be poor quality.

II. I do not furnish any analysis to my customers. They will give me an order for so many tons of coal and I will load the cars. I know what they need from having done business with them the last six years. In the event a customer ask for analysis, Standard Lab is hired to sample toe coal and give a copy of the analysis to the customer only. We get orders from many different customers for so many cars of coal per week. The only people who see these orders are myself, my wife, and our daughter. No one else has access to any of this information. I am filing with this affidavit samples of confirmation of orders from Shelton Coal Company dated September 19, 1983 and September 29, 1983. The size of 1 1/4" is the standard sizing and no adjustment is made on the crusher for any of my loading.

III. The stationery unit on the premises is used for domestic coal sales. It is primarily an accommodation of the public and the same service provided at any domestic coal yard in the country. It does not constitute any large amount of our business. We pay Mineral \$1.00 per ton for each ton of coal run thru [sic] this unit. The coal

coming in is marked for domestic use. I do not sample it. It is a completely separate operation from the loading onto the railroad cars. The reason that I decided to make house coal was because people were telling me they were having a hard time finding coal to heat their homes.

In response to the information provided by Mr. Hubbard's affidavit, MSHA asserts that in Part II of his affidavit, Mr. Hubbard's statement that "I know what they need from having done business with them the last six years," is a suggestion by Mr. Hubbard himself that his company mixes or provides coal to meet customer specifications.

Responding to the samples of confirmation orders dated September 19 and 29, 1983, submitted by Mr. Hubbard from the Shelton Coal Company, MSHA asserts that these are only modifications of orders and do not represent the contents of the original purchase orders. In support of this, MSHA submitted as Exhibit No. 12, a copy of an original purchase order, dated September 20, 1983, from Shelton Coal Company to Hubbard Enterprises. MSHA states that this order clearly shows that Shelton requested more than just tonnage in that the coal purchased was to be of (1) 13,000 BTU; (2) 10 Ash; (3) 1 Sulfur; (4) 2700 Fusion and (5) 60 Grind and a size of 1 1/4 x 0" Nutslack.

MSHA argues that the mineral siding facility is more than just a loading facility as was the situation in Secretary v. Oliver Elam, Jr. Co., 4 FMSHRC 5 (January 7, 1982). MSHA asserts that it is a facility where weighing, testing, storing, mixing or blending of coal occurs, not for the purpose of facilitating the loading process but for the purpose of preparing or milling the coal to meet customer specifications. MSHA concludes that this is coal preparation, in that a process occurs, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, which is undertaken to make coal suitable for a particular use or to meet market specifications.

Findings and Conclusions

Jurisdiction

In Secretary of Labor v. Oliver Elam, Jr., Company, Inc., 2 FMSHRC 1572 (1981), the Commission affirmed a Judge's decision that Elam was not a "mine" subject to the 1977 Mine Act. The

facts in Elam are surprisingly similar to those presented in the instant case. Elam owned and operated a commercial dock, and 40 to 60 percent of its loading tonnage was attributable to coal. Four or five coal brokers paid Elam to load coal onto barges at the dock, and the brokers, who were not mine operators, arranged for delivery of the coal by truck to the dock, and then for delivery by barge to their customers. Elam's facilities for loading coal consisted of a hopper, a crusher, and conveyor belts. The coal was delivered to and stockpiled on Elam's property, where it was weighed by the broker's employees and placed in the hopper. A conveyor carried the coal from the hopper to the crusher where it was broken into essentially one size. The crusher could not be adjusted for variable sizing and has no grates to sort the crushed coal. The crushing was done because the conveyor belts were covered and could always accommodate large pieces of coal. From the crusher another conveyor carried the coal to the barges, but occasionally the crusher was by-passed and coal was loaded directly into the barges. All coal whether crushed or not was loaded on the barges. Elam did not prepare coal to market specifications or for particular uses, nor did it separate waste from coal or add any material to it. Thus, all of Elam's activities with respect to coal related solely to loading it for shipment.

In rejecting MSHA's assertion that Elam was a "mine," the Commission stated as follows at 2 FMSHRC 1573, 1574:

*** we find it significant that the types of activities comprising 'the work of preparing the coal' have consistently been categorized as 'work . . . usually done by the operator.' Thus, inherent in the determination of whether an operation properly is classified as 'mining' is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities. In Elam's operations, simply because it in some manner handles coal does not mean that it automatically is a 'mine' subject to the Act.

Rather, as used in section 3(h) and as defined in section 3(i), 'work of preparing coal' connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities,

undertaken to make coal suitable for a particular use or to meet market specifications. In the present case, although Elam performs several of the functions included in the 1977 Act's definition of coal preparation (i.e., storing, breaking, crushing, and loading), it does so solely to facilitate its loading business and not to meet customers' specifications nor to render the coal fit for any particular use. We therefore conclude that Elam's facility is not a 'mine' subject to the coverage of the 1977 Mine Act.

In addition to the Elam decision, respondent relies on several past opinions rendered by the Secretary's Solicitor's Office, to support its argument that the Mineral Siding facility is not a "mine" within the meaning of the Act. Exhibit R-1 is a copy of a March 31, 1972, advisory opinion by the Office of the Solicitor, U.S. Department of the Interior, pursuant to the 1969 Coal Act, with regard to whether or not a coal processing operation in Pennington Gap, Virginia (Geisler Coal Sales, Inc.) was a "coal mine" within the meaning of section 3(h) of the Act. Based on the facts presented to the Solicitor's Office at that time, it was concluded that Geisler was not a coal mine or a mine operator subject to the Act. Subsequently, by letter dated October 10, 1980, the U.S. Department of Labor's Solicitor's Office advised the United States Attorney's Office in Roanoke, Virginia, that since it was determined that MSHA had no enforcement jurisdiction over Geisler, any efforts to collect civil penalties against Geisler should be stopped and the matter closed (Exhibit R-1).

The Geisler opinion was based on the following facts which appear at pages 1 and 2:

1. Mr. Geisler does not mine coal, nor does he own a 'coal mine' per se. He purchases coal from one mine located in Virginia and 'sizes' the coal by the use of a vibrating screen. One part of the 'sized' coal is loaded into railroad cars and shipped to his purchaser. The remaining lump coal is retained in a storage yard for domestic sales. Approximately 150 tons of coal per day are processed or 'sized.'

2. Geisler has one employee and considers his business to be a 'coal grading plant.' The Virginia Department of Taxation classifies Geisler as a 'coal merchant.'

3. He has no state or Federal mine identification number.

The opinion goes on to recite the statutory definitions of the terms "coal mine" and "work of preparing the coal." The Solicitor concluded that Mr. Geisler's business did not fall within these definitional categories because he had nothing directly to do with the extraction of coal from its natural deposits in the earth, and that such extraction is a prerequisite to coming within those categories of a "coal mine." Citing the dictionary definitions of the terms "custom" and "coal preparation," the Solicitor made the following conclusions:

Thus, by the use of the phrase 'custom coal preparation facilities,' it appears that Congress intended to extend the coverage of the Act to processors of coal who prepare the coal to the order or specifications of the mine operator who extracted such coal, whether the processor is independent of, or owned by, the coal mine operator. We reach this conclusion after a careful examination of the legislative history and evaluation of the overall purpose of the Act. The Act was primarily intended to promote health and safety in coal mines and thus assure a steady and reliable supply of coal in interstate commerce. Congress was well aware of the nature of the coal mining industry and the fact that most large mining operations include surface facilities for processing coal, either on or off the 'area of land' where the coal is extracted.

In other cases, however, such facilities are owned by a subsidiary of the mining company, or by an independent processor whose function is to process the coal for the mining company, or a group of mines or mining companies, but such processors never actually 'own' the coal. It would have been anomalous and inconsistent with the purpose of the Act to extend coverage to preparation

facilities on the mine property but not to cover those off the mine property but which are owned by or under contract to the mining company, because such facilities must operate to ensure that the mined coal is 'custom prepared' to the specifications of the mine operator or of the purchaser of the coal from the mine operator.

On the other hand, it is our view that Congress did not intend to extend the coverage of the Act to independent processors who merely purchase mine run coal from one mine, or several mines, and on its own initiative, subject to no 'personal order or specification' of the mine operator who extracts the coal has been processed according to the processors own plans or specifications. Such a processor is much more in the nature of a wholesaler than that of a producer. It is clear that Congress intended to bring within the Act the primary producers and 'custom' processors of coal to ensure a reliable supply of coal in interstate commerce.

The Solicitor summarized his advisory opinion as follows:

- A. Processors of coal who prepare the coal to the order or specifications of the mine operator who extracted the coal, whether the processor is independent of, or owned by the coal mine operator, are covered by the Act.
- B. 'Custom coal preparation facilities' owned by a subsidiary of the mining company, or by an independent processor whose function is to process the coal for the mining company, or a group of mines or mining companies, but such processor never actually 'owns' the coal (or expressed in a different manner, is performing a service for the mining company), are covered by the Act, whether on or off of the mine property.
- C. Processors who purchase mine run coal from one mine, or several mines, and on its own initiative, subject to no 'personal order or specification' of the mine operator who extracts the coal, and who process the coal for sale on the open market, or to occasional

purchasers, or to its own customers or purchasers, after the coal has been processed according to the processors own plans or specifications, are not subject to the Act. Such processors fall more within the classification of a wholesaler or retailer than that of a mine operator who extracts the coal and has it processed to meet the order or specifications of the mine operator or the customers or purchasers from the mine operator who extracts the coal.

Also included as part of Exhibit R-1 is a copy of an April 6, 1972, memorandum to all MSHA District Managers advising them that the above mentioned paragraphs A through C should be followed in determining the application of the 1969 Coal Act to custom cleaning plants.

Exhibit R-2 is a copy of a March 26, 1982, advisory opinion by MSHA's Associate Solicitor for Mine Safety and Health, Arlington, Virginia, concerning the application of the Act to Chance and Montgomery Coal Co., Inc., No. 1 Tipple, Jonesville, Virginia, and the pertinent portion of that opinion states as follows:

It is our understanding that the facility consists of a tipple and a crusher. Clean coal is initially delivered to the facility by commercial carrier and then stockpiled before loading onto railroad cars for shipment to consumers. The tipple carries the coal to a crusher where it is broken into one size. The coal is not sized according to any operator's or consumer's specification, but crushed merely to better facilitate loading of the larger pieces of coal. We further understand that the facility is not located on or adjacent to any mine property and is not an integral part of any mining operation.

Generally, MSHA has jurisdiction over a loading facility where coal preparation activity takes place. However, as a result of Secretary of Labor v. Oliver M. Elam, Jr., Company, 4 FMSHRC 5 (Jan. 7, 1982), MSHA is currently reexamining loading facilities over which it is asserting jurisdiction to determine the nature and purpose of the work that takes place at these facilities. MSHA makes jurisdictional determinations based upon the factual circumstances of each situation.

In light of the Elam decision and based on the information currently available, it is our view that MSHA should no longer exercise jurisdiction over the facility. If at any future time the nature of the activity at the facility changes, we reserve the right to reevaluate this determination. A copy of this determination will be sent to the Occupational Safety and Health Administration for their consideration.

Relying on the Elam decision, as well as well as the decisions in Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979) cert. denied 444 U.S. 1015 (1980); and Secretary v. Alexander Brothers, Inc., 4 FMSHRC 541 (1982), MSHA argues that the testing and blending of coal at the respondent's facility constitutes "mining" under the Act. Further, MSHA asserts that whether brokers or direct customers purchase the coal is not relevant. MSHA maintains that it is the processing of coal by mixing or blending and sizing to meet certain specifications for the market that constitutes mining activity whether it be for the brokers or their customers or whether such mining activity is performed by respondent Mineral Coal Sales, Inc., or its contractor.

MSHA's position is that the respondent is a "mine operator" within the meaning of the Act, and that its facility is a type of custom preparation facility or a facility where coal is processed, mixed, or blended in order to meet certain customer specifications (Tr. 7).

Respondent's position is that it operates a commercial loading dock, and from time-to-time loads coal for individual coal brokers for a fee of \$2 a ton. Respondent denies that it is in any way involved in the purchase and sale of any coal, or that it is any way connected with the hauling or railroad transportation of the coal. Respondent maintains that its sole function is to insure that the coal is placed on the rail cars, and for that service it is paid \$2 a ton, and denies that it is in any way connected with any coal preparation.

Respondent maintains that it has two employees on its payroll, and that Hubbard Enterprises is the actual coal broker for whom respondent loads the coal onto railroad cars for transportation to customers. Respondent asserts that Hubbard Enterprises has employees who weigh the coal and direct its dumping as it comes on to respondent's property. Respondent states that Hubbard Enterprises also conducts the coal analysis, and respondent denies any contacts with any of the customers who purchase the coal from Hubbard Enterprises (Tr. 8).

Exhibit P-1 is an MSHA Legal Identity Report, dated May 22, 1979, and it reflects Mineral Coal Sales, Inc., was operating a facility known as Mineral Siding, and the commodity is shown as "coal," and Mrs. Bobbie S. Slusher is shown as President of Mineral Coal Sales, Inc., and the Mine ID No. is shown as 44-05226.

Exhibit P-2 is an "updated" MSHA Mine Status and Inspection Data form dated January 11, 1982, and it reflects a change in the mine name from Norton Tipples to Mineral Siding, and the company name is shown as Summit Resources, Inc. The form also shows that the mine is a producing bituminous surface mine, with a surface loading dock. The Mine ID No. is again shown as 44-05226.

Exhibit P-3 is an "updated" MSHA Mine Status and Inspection Data form dated July 1, 1982, and it reflects a change in the mine name back to Mineral Siding, and the company name is shown as Mineral Coal Sales, Inc. The form reflects that the mine is a bituminous mine, with a loading dock. The Mine ID No. is again shown as 44-05226. A notation on the form states "change of ownership, Mineral Siding is presently being operated by Mineral Coal Sales, Inc., Summitt Resources, Inc., terminated their lease of Mineral Siding."

After careful consideration of all of the testimony and evidence adduced in these proceedings, I conclude and find that the respondent is in fact a "mine operator" within the meaning of the Act. I also conclude and find that it is an "operator" within the definitional parameters set out by the Commission in its Elam decision. On the facts here presented, the record establishes that the coal loading process carried out by the respondent in this case includes a procedure and practice whereby the coal that is ultimately loaded and shipped to the customers of Hubbard Enterprises is coal that is mixed to their particular specifications and standards. While I consider the respondent's "mining operation" to be a rather low key family operation, it does in fact qualify as a "mine" under the Act. My view here is that the operations carried out by Hubbard Enterprises and Mineral Coal Sales, Inc., consist of small family oriented business ventures which may not compare in size and scope with some other mining operations inspected by MSHA's enforcement staff. However, I take these cases as I find them, and here, I am constrained to find that the respondent is a "mine operator" within the meaning of the Act, and is subject to MSHA's enforcement jurisdiction.

I reject the respondent's assertion that it falls within the exceptions noted by the Commission in its Elam decision.

Contrary to the respondent's arguments, and contrary to the posthearing affidavit filed by Mr. Hubbard, it seems clear to me that Hubbard sells its coal according to certain pre-determined quality specifications, and that the respondent here processes and loads that coal for shipment to Hubbard's customer's in accordance with the customers customized orders. In short, I conclude that the mining operation carried out by the respondent includes the custom blending and loading of coal to meet the specific specifications and needs of Hubbard's customers. The credible testimony of Mr. Reed, as well as the candid admission by Mr. Hubbard in his affidavit that he knows the needs of his customers, are sufficient to establish that the coal which is loaded for shipment by the respondent in this case is custom-blended and loaded by the respondent to meet the specific needs of the market. Given these circumstances, I conclude and find that the facts presented in Elam are different from those presented here, and the respondent may not look to Elam for refuge. While I recognize that one may logically argue that the respondent's "mining operation" is de minimis, and that MSHA should devote its enforcement efforts to more important matters, respondent is within MSHA's enforcement jurisdiction.

Fact of Violations

Dockets VA 83-26 and VA 83-39

Respondent is charged with two violations of the reporting requirements of 30 CFR 50.30, which provides in pertinent part as follows:

- (a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in § 50.30-1 and submit the original to the MSHA Health and Safety Analysis Center, P.O. Box 25367, Denver Federal Center, Denver, Colo. 80225, within 15 days after the end of each calendar quarter.

Citation No. 2039607, issued in December 28, 1982, charges the respondent with a failure to submit a report showing the number of miners employed at the mine for the third quarter of 1982, namely the months of July, August, and September. The inspector noted that the mine was reopened on July 1, 1982, and it seems clear to me that this information was obtained from the information shown on exhibit P-3, the updated MSHA form showing that the respondent assumed operation of the facility after Summit Resources, Inc.'s lease was terminated.

Citation No. 2039612, issued on January 17, 1983, charges the respondent with filing inaccurate employment reports for the third and fourth quarters of 1982, namely July through September, and October through December, because the reports which were submitted indicated that no employees were working at the facility, when in fact the mine records showed that the mine was in operation during all of these months.

In defense of Citation No. 2039607, Mrs. Slusher does not dispute the fact that the facility was operating during the months of July through August 1982. Her claim is that the employees were on the payroll of Interwise, Inc., and that the inspector who issued the citation assumed that they were employees of Mineral Coal Sales, Inc. (Tr. 103). Inspector Sayler testified that it made no difference who the employees were employed by, and he suggested that since the only information available to MSHA indicated that the mine identification number was recorded in the name of the respondent Mineral Coal Sales, Inc., any violation would be charged to that mine operator. Since Mrs. Slusher was shown as the mine operator on MSHA's records, the violation was properly issued to her company (Tr. 104). When asked whether Mrs. Slusher's company, Mineral Coal Sales, Inc., would still be issued and charged with the violation even if the inspector knew as a matter of fact that another corporate entity was operating the facility, Mr. Saylers answered in the affirmative, and he indicated that the mine operator of record would be held accountable by MSHA for any violations (Tr. 104).

In further defense of the reporting citations, Mrs. Slusher stated that she filed the forms "under protest," in order to achieve abatement and to avoid a possible \$1,000 a day fine for each day she failed to comply. She confirmed that she wrote the words "none" on the forms to indicate that during the reporting quarters in question she was not the mine operator and in fact had no employees working for her company. She furnished copies of these reporting forms, and they are part of the record. She also furnished copies of reports she filed with the State of Virginia Employment Commission indicating that she had "no employees after June 28, 1982," or for the quarters ending June 30, 1982, September 30, 1982, or December 31, 1982 (exhibit R-5).

When asked whether the cited standard required a mine operator to file accurate reports, MSHA's counsel conceded that filing an inaccurate report does not, in and of itself, constitute a violation (Tr. 108). Further, Inspector Saylers

conceded that while section 50.30 says nothing about the accuracy of the reports filed, it was obvious that the inspector who issued Citation No. 2039607 did so because he believed that the mine was operational during the cited quarters, and that the information that no employees worked during this time period was simply not true (Tr. 110).

And, at Tr. 192:

JUDGE KOUTRAS: Correct me if I'm wrong. Your position seems to be in this case as long as these activities are taking place at the facility, meaning at the physical place where they're taking place, you're going to hold Mineral Sales responsible for it?

MR. CRAWFORD: The known operator.

JUDGE KOUTRAS: You keep using the word known operator. Let's assume, again going back to my hypothetical, that Hubbard was the known operator and had an ID number. Who would you hold accountable then on a jurisdictional basis?

MR. CRAWFORD: Well, both.

JUDGE KOUTRAS: You think Mr. Hubbard would be in here complaining he doesn't do custom preparation and all that business. He's going to wake up one morning and be surprised that he's a mine operator subject to this Act. Isn't that possible?

MR. CRAWFORD: That's very possible.

MSHA's Part 45 regulations, particularly section 45.3(a) does not mandate that an independent contractor obtain a mine identification number. It simply states that such contractors may obtain a number from MSHA by filing certain information. It would seem to me that in cases such as the ones at hand where a contractor has a continuing presence on the mine site, and has employees working around trucks and loaders weighing, dumping, and stockpiling coal, MSHA would take the initiative and require that contractor to stand up and be counted so that any violations attributable to its operation will be served directly on the contractor. On the facts of this case, it could very well be that Hubbard is as much a "mine operator"

as the named respondent in these proceedings. However, by continuing to ignore Hubbard's presence on the property for "administrative convenience," and because its easier to cite Mrs. Slusher, any safety infractions attributable to Hubbard are simply ignored.

Inspector Saylers stated that under MSHA's Part 45 Independent Contractor regulations, if an independent contractor does not file the required report, the mine owner is subject to a violation. In short, the inspector's position is that an operator such as Mrs. Slusher would be held accountable for not reporting the number of employees that an independent contractor has working on the mine site, and the reason for this is that MSHA would have no information as to the identification of any independent contractors who may be present on the property (Tr. 116).

On the facts of this case, MSHA knows full well that Hubbard Enterprises, Inc., is a separate corporate entity engaged in coal sales on Mrs. Slusher's property. Simply because Hubbard has failed to request a mine identification number to facilitate MSHA's computer tracking of its operation, MSHA acts as if Hubbard does not exist. For the lack of a number, Hubbard may continue to operate with impunity, while the respondent in this case is held accountable for failure to file forms which have absolutely no rational relationship to the safety or health of anyone on the property, including Hubbard's employees, and the independent trucking concerns which deliver coal to the property everyday. I would venture a guess that if a trucker is found to have defective brakes, MSHA would cite the respondent because the trucker has no mine identification number. If Hubbard's employees are run over by the trucks while the coal is being weighed, MSHA would cite the respondent because Hubbard has no mine identification number. It occurs to me that MSHA has a positive responsibility and a duty to insure that all corporate entities who are present and working at any mine site are subjected to the same enforcement standards as the owner of the property. The practice of looking to the property owner as a matter of administrative convenience is simply wrong, and MSHA should address itself to this. Although MSHA's counsel did a fine job as an advocate for MSHA's position, the following excerpt from the trial transcript is an example of what I believe to be MSHA's institutional attitude in cases of this kind (Tr. 117):

JUDGE KOUTRAS: Is Hubbard Enterprises a figment of Ms. Slusher's imagination? I mean does the independent contractor have

to put a sign up there to alert the district office that an independent contractor is working at the facility?

MR. CRAWFORD: I don't think so, but I don't think it's the burden of the MSHA inspector that has the responsibility for health and safety to try to make that determination when it's not always easy to make that determination.

Price Slusher, Mrs. Slusher's brother-in-law, testified that from July 1, 1982 to March 1, 1983, he was employed by Interwise Corporation. He identified the owner of Interwise as Mr. Shelcy Mullins, and confirmed that Interwise had two employees on its payroll. He also confirmed that Mr. Mullins usually came to the property to instruct him as to his duties, and his paychecks came from Interwise (Tr. 136). Mr. Slusher also confirmed that Mineral Coal Sales has operated the present loading facility since March 1983.

Mr. Slusher clarified the ownership of Interwise, and she indicated that the company was operated by Kathy Crawford and not by Shelcy Mullins. She stated that at the time the citations were served, Interwise was operating the mine (Tr. 151). When asked to explain why Interwise was never previously mentioned in any of her prior protests, and why the citations were issued with Mineral Sales' mine identification number, Mrs. Slusher answered "you tell me" and "I don't know" (Tr. 151). Mrs. Slusher explained further that Interwise intended to purchase the facility but could not consummate the final purchase because of certain financial problems. Interwise operated the facility on a "trial basis" for a period of six months, and she received a dollar a ton for all coal processed by Interwise (Tr. 156), and took the operation back on March 1, 1983, when the financing fell through (Tr. 152). Mrs. Slusher also indicated that she explained this to MSHA when she went to an assessment conference at the Norton Office, but that MSHA took the position that Mineral Coal Sales was responsible for the citations (Tr. 151). She further explained that since Interwise was operating the facility, she had no employment or payroll records, and that is why she stated "none" on the reports in question (Tr. 153).

Mrs. Slusher confirmed that from March 1, 1983, to date, she has operated the facility as Mineral Sales, Inc., and has only had two employees, her nephew and brother-in-law (Tr. 154). She also confirmed that Interwise had two employees when it operated the facility, and Hubbard Enterprises has two employees currently working on the property (Tr. 154).

Mrs. Slusher stated that at the time she was receiving a fee of a dollar a ton from Interwise, the facility was hers, and she candidly conceded that "Interwise in a sense was substituted in the place of Mineral Coal at the point as far as the loading was concerned." She confirmed that from July 1, 1982, to March 3, 1983, Interwise "had the payroll and exercised jurisdiction over the employees on the loading, saw that the loading got done and that the loading unit or the mobile was serviced and maintained. They kept fuel on the premises and did whatever was necessary to get the car loaded." Hubbard Enterprises was also operating during this period of time, and Mrs. Slusher stated that as the owner of the property and facility, including the rail siding, mobile tipple, and scales, she collected the rents from her leases to Interwise and Hubbard. In short, Mineral Sales, Inc., owned the facility, and leased it to Interwise, who did the loading of the coal, and to Hubbard, who tested it (Tr. 157-158). She confirmed that she had no written contract with Interwise, but would not have entered into such an arrangement had she not thought Interwise would not go ahead and consummate the sale of the facility (Tr. 160).

Section 110(a) of the Act provides that a civil penalty shall be assessed against any mine operator for violations which occur in the mine. Since I have concluded that the named respondent in these proceedings is a mine operator within the meaning of the Act, the respondent is legally responsible for the citations issued. As correctly argued by the petitioner in this case, the test in Elam is not based on whose employees do what activities at a facility or what business entity does what at the facility but what activities are performed at the facility and for what purpose. Here, respondent argues that the facility was operated by Interwise Corporation at the time the citations were issued. However, the record establishes that the respondent Mineral Sales Inc., was the owner of the facility and simply permitted Interwise to operate it on a "trial basis" pending the obtaining of financing to purchase the facility. Further, Mineral Sales, Inc. was the record owner and operator of the facility, and it seems clear to me that it may be held accountable and responsible for any violations and citations which may be issued by MSHA inspectors after inspection of the mining activities taking place on the premises.

The reporting requirements of section 50.30, mandate that each mine operator complete and submit a form to MSHA in accordance with the instructions and criteria found in section 50.30-1. If an individual worked during any day of a calendar quarter, the operator is required to file the form. In support of the violations, MSHA's counsel cites

part of the language found in section 50.30-1(a)(iii), in support of his argument that whether the employees directly work for the respondent Mineral Sales, Inc., or another co-operator of the facility is irrelevant since it is only necessary that employees work at the facility.

While I agree with counsel's argument, the criteria in 50.30-1, are not without ambiguity. For example, the last sentence of the cited subsection left out by counsel does not require the reporting of personnel in shops and yards associated with other sub-units, and subsection (2) speaks in terms of average number of persons working during the quarter, and then speaks about employees on the payroll. Taken in this context, and particularly where the terms "persons," "individuals," and "employees" are used in different subsections of the criteria, I can understand the respondent writing in "none" when she believed that Interwise was the corporate entity actually required to file the forms in question. However, I consider this as mitigating the violations, rather than an absolute defense. Accordingly, both citations ARE AFFIRMED.

Docket No. VA 83-26

In this case, the respondent is charged with failing to submit a noise survey for two employees who were working at the mine. The citation was issued on March 1, 1983, the day on which Mrs. Slusher claims she took the operation back from Interwise. Her defense is that the two employees in question were not employed by her company, but by Interwise. Mrs. Slusher argues that since she had no employees on her payroll for the previous six months in question, she obviously was not responsible to survey them (Tr. 120). Inspector Saylers explained that since MSHA's records indicated that the mine was reopened on July 1, 1982, and that it was operated by Mrs. Slusher, a citation would be issued on that information alone (Tr. 120). Mr. Saylers confirmed that when Inspector Bentley issued this citation, he obviously assumed that the two employees on the premises worked for Mrs. Slusher's company, and that they needed to be surveyed for noise exposure (Tr. 120). Mrs. Slusher's rebuttal is that since the two employees did not work for her, she was not responsible for the noise survey (Tr. 120). Mrs. Slusher explained further that in order to avoid any section 104(b) withdrawal orders, she surveyed the two employees, Price Slusher, her brother-in-law, and Mike Slusher, her nephew, and she conceded that as of the date of the issuance of the citation, they were her employees, but prior to this date, they were not (Tr. 121).

Inspector Sayers testified that notwithstanding the fact that the people working at the facility were not employed by Mineral Coal Sales, Inc., they were still employed at a mine where a loading facility was being operated, and since they were employees of that mine, this activity was required to be reported to MSHA (Tr. 77). Inspector Sayers confirmed that when he visited the facility on December 28, 1982, he observed two men weighing coal, directing the trucks where to dump the coal, operating front-end loaders, etc. (86). From all of this activity, he concluded that employees were in fact employed at the facility in question.

Respondent's defense to the noise citation is rejected. As indicated earlier in this decision, the respondent was the record owner and operator of the facility and is liable for the violation. Further, the language of section 71.803, is that "each operator shall conduct periodic surveys of the noise levels to which each miner in each surface installation and at each surface worksite is exposed." Thus, any miners who are present on the property and are exposed to potential noise are required to be surveyed by the mine operator. In this case, that operator was the named respondent. Accordingly, the citation IS AFFIRMED.

Docket No. VA 83-44

In this case, the respondent is charged with a violation of section 77.1705 because superintendent Donald Slusher did not receive first aid training. The citation was issued on the day that Mrs. Slusher took the operation back from Interwise, and her defense is that Interwise should have provided the necessary training. Mrs. Slusher points out that the citation was issued on the very day that she took the operation back from Interwise. She concedes that Price Slusher was in fact her employee on that date (Tr. 122). Inspector Sayer testified that Price Slusher's last training date was May 23, 1981, and that he had until December 30, 1982, to finish the refresher course. Had the work "calendar year" not been part of the cited standard language, he would have had until May 23, 1982, to obtain the required training (Tr. 122).

Mr. Slusher testified as to his many years of experience in the mining industry, including the fact that he had taken first aid training courses in the past. I have no reason to doubt this fact, and I have considered this as part of the mitigation of the violation. However, the fact remains that under MSHA's regulations, Mr. Slusher had not availed himself of the required retraining for first aid. Accordingly, the respondent's defense here is rejected. I conclude that as the operator of the facility the respondent is liable for the violation, and the citation IS AFFIRMED.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business.

The parties have stipulated that the respondent carries on a small operation and that the proposed penalties will not adversely affect its ability to continue in business. Apart from that, I conclude that the record here supports a conclusion that the respondent operates a small, family oriented facility, and that the penalties imposed will not adversely affect its ability to remain in business.

Gravity

None of the citations in these proceedings were found by the Inspector to be "significant and substantial." I conclude that they were all nonserious violations, and petitioner has not established otherwise.

Negligence

While I have considered Mrs. Slusher's assertions that she in good faith did not believe that she was a "mine operator" at the time the violative conditions occurred, and that she relied on the Commission's Elam decision as well as other opinions from the Solicitor's Office for that belief, the violations have nonetheless been attributed to her as the mine operator of record. I have considered her defense as mitigating the violations here, and I conclude that they all resulted from a low degree of negligence.

Good Faith Compliance

MSHA's counsel candidly conceded that the respondent's actions with respect to all of the citations issued in these cases stem from the fact that she relied in the Elam decision and believed that she was not subject to MSHA's enforcement jurisdiction. Under the circumstances, counsel agreed that this could be considered in mitigating the respondent's good faith in complying with the law (Tr. 124-125). MSHA's counsel stated his position as follows (Tr. 126):

MR. CRAWFORD: We're not trying to be unreasonable. I think we're trying to go after the operator who controls the operation, supervises and controls it. And the point is through renting or through leasing, whatever, she does control the operation there on that facility. She can deny Hubbard tomorrow, as she said in her interrogatories. They have first right but not exclusive right and she does control what happens there. And so in the name of paperwork sometimes it's ridiculous to file

another paper on an independent contractor in that type of circumstance. But I think our main concern is obviously health and safety and going to the party which we feel has control over the operations. Now she could tell him to get out tomorrow and bring someone else in and we would have no control or no -- it wouldn't be clear as to who controls that equipment and that machinery.

I conclude that the respondent exercised good faith in abating all of the violations in question once the citations were issued. Petitioner's arguments that the respondent did not show good faith in connection with citation 2039612, because it resulted in the issuance of a section 104(b) order after the inspector found that the respondent "made no effort to abate" the reporting citation is rejected. Faced with the threat of a \$1,000 a day penalty for not capitulating and admitting that she had employees on her payroll, Mrs. Slusher finally submitted the reports under "protest." Again, I find that these actions stemmed from her belief that she was not subject to the Act. Taken in this light, I cannot conclude that the citation is any different from the others, nor can I conclude that the respondent should be penalized additionally for exercising her rights.

History of Prior Violations

Respondent's history of prior violations is shown in Exhibit P-A, an MSHA computer print-out listing seven prior violations issued to the respondent for the period April 20, 1981 through April 19, 1983. Four of the listed violations are those in issue in these proceedings. The remaining three are all section 104(a) "non-S&S" citations, for which the respondent has made no payments. Under the circumstances, I cannot conclude that respondent's history of prior violations is such as to warrant any additional increases in the penalties assessed by me in these proceedings.

Penalty Assessments

In Docket No. VA 83-39, I take note of the fact that MSHA's proposal for assessment of civil penalty seeks a civil penalty assessment for \$90 for Citation No. 2039612, issued on January 17, 1983, and this citation is listed as "Exhibit A" to MSHA's proposal. However, that same exhibit lists the citation as a section 104(b) Order, when in fact the citation for which a penalty assessment is sought is a section 104(a) "non-S&S" citation. A copy of this citation is included as part of the pleadings, as well as a copy of a section 104(b) Order, No. 2039617, dated January 24, 1983. Under the circumstances, since this apparent discrepancy is not further explained, for purposes of any civil penalty assessment, I have considered only the section 104(a) citation, No. 2039612, issued on January 17, 1983.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2039607	12/28/82	50.30	\$20
2153470	3/1/83	71.803	20
2039612	1/17/83	50.30	20
2153469	3/1/83	77.1705	20
			<u>\$80</u>

ORDER

Respondent IS ORDERED to pay the civil penalties assessed by me for the violations in questions, in the amounts shown above, and payment is to be made within thirty (30) days of the date of these decisions and Order. Upon receipt of payment by MSHA, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

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/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 6 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 81-172-M
Petitioner	:	A.C. No. 04-04401-05002
v.	:	
	:	Camp Connell Rock Quarry Mine
CLAUDE C. WOOD COMPANY,	:	
Respondent	:	

DECISION

Appearances: Theresa Fay Bustillos, Esq., Office of the Solicitor U. S. Department of Labor, San Francisco, California for Petitioner; Erv Rifenburg, Claude C. Wood Company, Lodi, California, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating various safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits was held on April 13, 1983 in Stockton, California.

Petitioner filed a post trial brief and respondent stated its contentions in its closing argument.

ISSUES

The issues are whether respondent violated the regulations and, if so, what penalties are appropriate.

STIPULATION

At the commencement of the case the parties stipulated as follows:

1. The Claude C. Wood Company is, and at all relevant times hereinafter, was the owner and operator of the Camp Connell Rock Quarry Mine.

2. The Claude C. Wood Company and the Camp Connell Rock Quarry Mine are subject to the jurisdiction of the Mine Safety and Health Administration (hereinafter referred to as MSHA).

3. The Camp Connell Rock Quarry Mine is a rock quarry mine which produces crushed stone.

4. The Administrative Law Judge has jurisdiction of this case.

5. Copies of the subject citations, terminations and alleged violations in issue are authentic and may be admitted into evidence for the purpose of establishing their issuance by MSHA but are not admitted into evidence for the purpose of establishing the truthfulness or relevancy of any statement asserted therein.

6. True and correct copies of the citations and terminations were served upon the representatives of the operator.

7. All alleged violations were abated in good faith.

8. Imposition of the penalty will not affect the operator's ability to continue in business.

9. During the two year period prior to June 25, 1980 (the date of the issuance of the citations) the Claude C. Wood Company had been assessed one violation.

10. The Claude C. Wood Company is a medium size operator. The Claude C. Wood Company operates at approximately 16,002 manhours per year. At the time of the issuance of the citation, the Camp Connell Rock Quarry operated at approximately 6,000 manhours per year.

11. At the time of the issuance of the citation, the Camp Connell Rock Quarry Mine had approximately 6 employees.

Citation 380433

This citation alleges a violation of 30 C.F.R. 56.14-1, which provides:

Guards

56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The pivotal issues presented here are whether the pinch points of the head pulley were unguarded. If so, could those pinch points be contacted by workers who might be injured by that condition.

The evidence of both parties as it relates to this citation is unclear. Accordingly, it is necessary to extensively review the record.

MSHA's evidence: During the inspection MSHA Inspector McGarrah was accompanied by John Rosen, an MSHA lab technician, and Richard Ashby, the plant manager (Tr. 13, 16-19).

The plant has three rock crushers. They are known as the primary, the secondary and the final. The final crusher, known by the brand name of Kue-Ken, reduces the rock to certain dimensions. From the Kue-Ken the rock goes onto a short conveyor belt which then spills it onto a stacker conveyor belt (Tr. 21). The plant manager identified the place where the citation was issued as being "the first conveyor belt coming from the Kue-Ken crusher" (Tr. 38-40).

The day after the citation was issued Rosen made a sketch of the Kue-Ken crusher. He and the inspector "stood there" and discussed it (Tr. 21-22). The sketch was made primarily to consider dust problems at the site.

The stacker conveyor belt was setting on a short stand near the ground and the head pulley was close by (Tr. 24). The first conveyor belt came from just above ground level up to almost chest high, a distance of about four feet (Tr. 25). The head pulley was a few inches larger than the two-foot wide belt (Tr. 26).

In his direct examination, the inspector testified the head pulley was unguarded and within easy reach of anyone passing by or working in the area (Tr. 27). But when called as a rebuttal witness he amplified his testimony by stating that a frame on the conveyor would partially obstruct a person from contacting the pinch points (Tr. 211). The rebuttal also developed that there was a guarded V-belt drive between the motor and the gear reducer (Tr. 214). In addition, a worker in a crouched position would have to go around the guarded V-belt behind the speed reducer to get his hand into the head pulley (Tr. 215).

At one time the MSHA inspector observed a laborer shoveling rock on the bottom side of the stacker. But at that point the laborer was on the opposite side of the head pulley and in no danger. In addition to the laborer, the inspector also observed the plant operator near the area of the unguarded head pulley (Tr. 27, 28).

These particular head pulleys do not need to be cleaned. Possibly it is necessary to shovel the areas around them whenever rocks spill (Tr. 28).

If an employee was shoveling rock from underneath the head pulley he would be close enough, due to the lack of a guard, to catch a shovel or piece of clothing. He could be between several inches to several feet away (Tr. 29-30). The inspector observed some spill but it was not an excessive amount (Tr 29). It was obvious that the head pulley lacked a guard (Tr. 30).

Respondent's witness, Wayne Renaud, indicated this portable plant had been used in six or seven different locations. It has been inspected by MSHA and OSHA each time it has been set up (Tr. 122, 123). The citation issued here identified this as the No. 1 conveyor from the Kue-Ken crusher.

You cannot get into this area unless you crawl on your hands and knees (Tr. 126, 151). A 48 inch by 48 inch stand prevents access to the head pulley (Tr. 150). The company has never been cited for an unguarded head pulley at the location circled on exhibit P3 (Tr. 126).

Respondent's witness Rifenburg indicated it would be "extremely difficult" to reach the head pulley circled in red on exhibit P3 (Tr. 184). According to Rifenburg the moving machine parts are protected by the guard that covers the drive belt to the speed reducer (Tr. 191).

Discussion

I credit respondent's evidence concerning this citation. Respondent's personnel have assembled this equipment on numerous occasions. Further, they are constantly working with these conveyors.

On the other hand, after carefully reviewing the Secretary's evidence, I conclude that it is not persuasive. In his direct testimony the inspector indicated that a worker could readily come into contact with the unguarded pinch points. But in his rebuttal testimony he indicated the access would be, at least partially, blocked by a frame on the conveyor (Tr. 211). The witness drew an arrow to what he calls the unguarded pinch points as shown on exhibit P3. But the drawing itself fails to show the lack of a guard. In addition, the oral evidence does not develop the nature, the dimension, and scope of the unguarded area. Conversely, the evidence does not develop how a worker could contact the pinch points.

Respondent's witnesses Renaud and Rifenburg both establish that this pinch point was not accessible. Their evidence is confirmed when the inspector, in rebuttal, appears to indicate that to reach the pinch points it is necessary to reach underneath the gear drive and the bottom of the conveyor (Tr. 215).

In sum, I conclude that the pinch points of the head pulley were guarded by location. Since a worker could not contact them, it follows that such a worker could not be injured.

The Secretary's post trial brief cites John Peterson, 2 FMSHRC 3404, (1980), and Schneider's Ready Mix, Inc., 2 FMSHRC 1092, (1980), to the effect that it is not a defense to establish that the likelihood of an accident is remote. I agree. But in this case a decision upholding the citation would, in my view, rest in speculation.

It is true that the inspector observed a worker in close proximity, but he also indicated the worker was "in no danger where he was working" (Tr. 28).

The Secretary further cites his evidence that if an employee was shoveling rock from this location he would be close enough to catch a shovel or piece of clothing (Tr. 29). True, the witness develops that point but I find from the evidence that the worker did not have access even at that location. In short, I cannot ignore the inspector's testimony establishing a lack of access.

Exhibit P3, drawn by MSHA technician Rosen, the day after this citation was issued, fails to depict that the head pulley was unguarded. Further, the exhibit fails to show the obstruction which prevented partial or full access to the pinch points.

The exhibit, in combination with the oral testimony, fails to prove a violation.

In sum, I conclude that no violation has been established and the citation should be vacated.

Citations 380436 and 380437

These citations allege violations of 30 C.F.R. 56.6-20(e) at two locations. The cited standard provides:

56.6-20 Mandatory. Magazines shall be:

(e) Electrically bonded and grounded
if constructed of metal.

MSHA's evidence indicates Inspector McGarrah inspected respondent's 8 by 8 by 10 (foot) powder magazine. The metal magazine was constructed with a double hinge door (Tr. 58, 59).

On the day of the inspection blasting agents, dynamite and prill were stored inside the magazine (Tr. 59). It was one-third full (Tr. 61). The inspector and the plant manager looked around and raked the grass but they could not find any bond or ground rod for the powder magazine (Tr. 69, 70).

The detonator magazine at the site was likewise constructed of metal, setting on the ground, and about 80 percent full (Tr. 113, 114). Although the inspector did not measure it, the magazine measured approximately 3 feet in all dimensions (Tr. 114). The inspector and the plant manager checked but they could not find an electric ground rod leading from the detonator magazine (Tr. 117).

A magazine is electrically grounded when an 8 foot copper rod is driven into the ground. And the rod is connected to the metal magazine with a heavy copper wire (Tr. 69). Copper is used because it furnishes a path of least resistance to channel any electricity into the ground (Tr. 69-71).

In the absence of a ground, lightning or a stray electrical current could ignite the powder in the magazine (Tr. 72).

Respondent's witness Rifenburg indicated that the powder magazine was in compliance because it was grounded by skid contact when resting on the decompressed granite mineral soil (Tr. 180-182). In contrast, a non-mineral soil does not act as a conduit (Tr. 182).

Discussion

Respondent contends that its metal powder magazines were sufficiently and legally grounded when they rested on the organic soil.

As the Secretary notes in his brief, this contention was addressed by Judge John A. Carlson in Gallagher and Burke, Inc., 2 FMSHRC 3399, (1980). In the cited case Judge Carlson ruled that "a metal magazine merely resting on the earth is not 'grounded'. The term 'grounded' has a commonly accepted meaning when applied to electrical safety." 2 FMSHRC at 3401. Further,

the standard for explosives magazines ... expressly mandates grounding; and we must assume that that means adherence to common grounding practice. Had the drafters of the standard believed that metal magazines needed no grounding beyond simply resting on the earth, they would not have mentioned grounding at all. 2 FMSHRC at 3401.

I concur in Judge Carlson's views. Citations 380436 and 380437 should be affirmed.

Citations 380438 and 380439

These citations allege violations of 30 C.F.R. 56.6-5 at the two magazines. The cited standard provides:

56.6-5 Mandatory. Areas surrounding magazines and facilities for the storage of blasting agents shall be kept clear of rubbish, brush, dry grass or trees (other than live trees 10 or more feet tall), for a distance not less than 25 feet in all directions, and other unnecessary combustible materials for a distance of not less than 50 feet.

MSHA's evidence proves that this wooded area had dry brush and grass on all sides and within 25 feet of the powder magazine (Tr. 62, 63, 65). The grass varied in height up to 2 feet. In addition, dry brush had blown around the magazine (Tr. 63, 104). A fire in this immediate vicinity could cause the blasting agents in the magazine to explode and cause death or serious injuries (Tr. 66, 67).

The operator should have known of this condition (Tr. 68).

During the hearing the parties stipulated that all of the evidence relating to the powder magazine also applied to the detonator magazine (Tr. 112).

Respondent's witness Rifenburg does not deny the presence of brush and dry grass in the area. But he stated that the new locations of the magazines, 25 feet away, are equally subject to the hazards of a fire in this forest (Tr. 176, 177, 181, 182).

Discussion

The uncontroverted evidence establishes violations of the regulation. These violations were abated by moving the magazines. There is no grass or dried brush in their new locations as shown in exhibits R6, R8, R10 and R14.

I agree with respondent's position that these magazines are subject to a fire hazard from sources other than those in the immediate vicinity (Tr. 218). However, I decline to rule that, as a matter of law, MSHA's regulation has no relation to safety. Respondent's arguments relate to the imposition of a penalty rather than to whether the regulation was violated.

Citations 380438 and 380439 should be affirmed.

Citation 380440

This citation alleges a violation of 30 C.F.R. 56.6-20(f), which provides:

56.6-20 Mandatory. Magazines shall be:

- (f) Made of nonsparking materials on the inside, including floors.

The MSHA inspector observed that boxes of powder were stacked on a heavy steel wire on the floor of the powder magazine (Tr. 73). The bolts and steel heads all appeared to be of a sparking material. They had not been covered to make them non-sparking (Tr. 74). Nails had been driven into the walls (Tr. 74). A spark could ignite the powder (Tr. 74-76).

The inspector had not seen steel nails and bolt heads in powder magazines (Tr. 75).

Respondent's witness Rifenburg states that the sparking regulation is "left over from black powder days." Further, that due to a change in technology, the regulation no longer applies (Tr. 178).

Witness Rifenburg further filed a copy of Title 27, Code of Federal Regulations, Part 181, containing regulations dealing with commerce in explosives and published by the United States Department of the Treasury. I take official notice of such federal regulations.

Discussion

Under the regulations promulgated by the United States Department of the Treasury, it is true that blasting agents, such as ammonium nitrate fuel oil, may be stored in Type 5 storage facilities, 30 C.F.R. § 183(e). It is further true that while non-sparking materials are required in Type 1 through Type 4 storage, such materials are not required in Type 5 storage facilities, 30 C.F.R. 181, 187, et seq. However, the MSHA regulations take precedent over the Treasury Department regulations. I note the Treasury regulations yield when they state, in part, that "[T]he storage standards prescribed by this subpart confer no rights or privileges to store explosive materials in a manner contrary to state or other law," 30 C.F.R. 181, 181.

Respondent's contentions basically address the wisdom of the standard, an issue discussed, infra. Further, respondent's contentions concern gravity and negligence. These are issues to be considered in assessing a penalty.

MSHA may, under its rulemaking power, wish to reconsider its regulation. But since the facts establish a violation, I am obliged to affirm the citation.

Citations 380442 and 380443

These citations allege violations of 30 C.F.R. § 56.6-20(i) which provides that:

56.6-20 Mandatory. Magazines shall be:

- (i) Posted with suitable danger signs so located that a bullet passing through the face of the sign will not strike the magazine.

MSHA's inspector testified the powder magazine was not posted with any danger signs. The plant manager indicated that he did not know of any such signs and, although they searched in each direction, they did not find any signs (Tr. 76, 77).

One purpose of such signs is to warn hunters they are in a danger area (Tr. 77, 78).

Respondent's witness Rifenburg indicated the company posts danger signs in public access areas during any blasting. All radio transmissions are prohibited within a certain area. This is a United States Forest Service regulation (Tr. 179, 204).

Respondent asserts that its mine is within the confines of Stanislaus National Forest. Respondent's Exhibit 12, a map of the forest, supports respondent's assertion that it may be difficult to keep the public off of its property. Therefore, being unable to prevent public access they try to camouflage the magazines to keep them out of the public's eye (Tr. 219-220). Conversely, the posting signs MSHA requires can only serve to alert the public to such storage facilities. Witness Rifenburg states that a principal concern of his company and its industry is the theft of explosives (Tr. 218).

Respondent basically asserts that in view of its unique location in the national forest, it would be wiser not to enforce this regulation.

Respondent's contentions are rejected. The Commission views the regulatory scheme of the Act as being premised upon the proposition that compliance with the safety standards adopted by the Secretary protects the nation's miners, Penn Allegh Coal Company, Inc., 3 FMSHRC 1392, 1399, footnote 10 (1981).

To overturn this regulation would in effect question the wisdom of the Secretary's standard. I find no decisions by this Commission directly discussing the doctrine, but a long line of OSHA Review Commission cases reiterate that principle. In short, they do not consider it to be a portion of their adjudicatory function to question the wisdom of a standard. Cornish Dress Mfg. Co., BNA 3 OSHC 1850, CCH 1975-76 OSHD para. 20, 246 (No. 6765, December 23, 1975); The Budd Company, 7 OSAHRC 160, 165, BNA 1 OSHC 1548, 1551, CCH 1973-1974 OSHD para. 17,387 (Nos. 199 and 215, March 8, 1974, aff'd. 513 F 2d 201 (3d Cir. 1975)). I adhere to that doctrine.

Citations 380442 and 380443 should be affirmed.

Civil Penalties

The six criteria for assessing a civil penalty are set forth in 30 U.S.C. § 820(i).

The stipulation indicates respondent was assessed a single violation during the two years prior to these citations. The stipulated facts confirm that respondent is a medium-sized operator. The imposition of a penalty will not affect the operator's ability to continue in business. In those citations that are affirmed, I conclude the operator was negligent because the violative conditions could have been known to the company. Respondent demonstrated good faith in rapidly abating after notification of the violations. In relating to gravity, I conclude that the penalties proposed for Citations 380436, 380437 (electrical bonding), 380438 and 380439 (dry brush) are proper. On the other hand there appears to be no hazard and hence no gravity involved in connection with Citation 380440 (sparking material). That citation should be assessed at \$1.00. There is a certain ambivalence relating to the gravity of posting the magazines. I believe the proposal for such violation should be reduced by one half.

The final computation is summarized as follows:

<u>Citation</u>	<u>Original Assessment</u>	<u>Disposition</u>
380433	\$ 26	Vacated
380436	18	\$ 18
380437	18	18
380438	28	28
380439	28	28
380440	44	1
380442	18	9
380443	18	9

Brief

The Solicitor has filed a detailed brief which has been most helpful in analyzing the record and defining the issues in the case. However, to the extent that such brief is inconsistent with this decision, it is rejected.

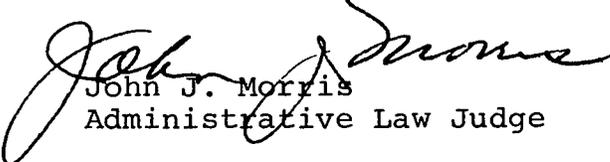
ORDER

Based on the facts found to be true in the narrative portions of this decision and based on the conclusions of law as stated herein, I enter the following order:

1. Citation 380433 for the alleged violation of 30 C.F.R. § 56.14-1 and all proposed penalties therefor are vacated.
2. The following citations are affirmed and penalties are assessed as stated after each such citation:

<u>Citation</u>	<u>30 C.F.R. Section Violated</u>	<u>Penalty</u>
380436	56.6-20 E	\$ 18
380437	56.6-20 E	18
380438	56.6-5	28
380439	56.6-5	28
380440	56.6-20 F	1
380442	56.6-20 I	9
380443	56.6-20 I	9

3. Respondent is ordered to pay the sum of \$111 within 40 days of the date of this order.


John J. Morris
Administrative Law Judge

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 6 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 83-244
Petitioner : A. C. No. 46-01283-03521
 :
v. : Hampton No. 3 Mine
 :
WESTMORELAND COAL COMPANY, :
Respondent :

ORDER OF DISMISSAL

Before: Judge Steffey

Counsel for the Secretary of Labor filed on March 26, 1984, in the above-entitled proceeding a motion to withdraw the petition for assessment of civil penalty filed in Docket No. WEVA 83-244 on the ground that the violation of 30 C.F.R. § 75.305, for which a penalty was being sought, was alleged in Citation No. 2037679 which has been vacated as having been issued in error.

The motion for permission to withdraw explains that a prior violation of section 75.305 had previously been written and respondent had been allowed to abate that alleged violation in a manner which was still being followed at the time the instant violation of section 75.305 was written citing respondent for the identical violation which had previously been abated in a manner which was satisfactory to MSHA at that time. It is believed that the instant violation was written in error since respondent was still adhering to the procedures which had been previously approved. In such circumstances, I find that good cause has been shown to warrant granting of the motion to withdraw.

WHEREFORE, it is ordered:

The motion to withdraw is granted, the petition for assessment of civil penalty is deemed to have been withdrawn, and all further proceedings in Docket No. WEVA 83-244 are dismissed.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 10 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 81-339-M
Petitioner : A.C. No. 35-03057-05001 R
 :
v. : Rockline Inc., Pit & Plant
 :
ROCKLINE, INCORPORATED, :
Respondent :

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor,
U.S. Department of Labor, Seattle, Washington,
for Petitioner;
Mr. Carl Linebarger, President, Rockline, Inc.,
The Dalles, Oregon,
Pro Se.

Before: Judge Vail

STATEMENT OF THE CASE

This civil penalty case is brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979)("the Act"). Petitioner seeks an order assessing a civil monetary penalty against the respondent for allegedly refusing to allow an authorized inspector of the Mine Safety and Health Administration ("MSHA") onto the property where respondent was operating its portable crusher. In its answer, respondent alleges, in effect, that there was no violation of the Act.

A hearing in this case was initially set for July 13, 1982, but was continued at the request of respondent's counsel due to his illness. The case was reset for September 20, 1983, in Portland, Oregon, where respondent's President, Carl Linebarger, appeared, without counsel, and stated that he would represent the respondent in this matter as he did not wish to incur the additional expense of legal fees. Both parties waived the right to file briefs.

FINDINGS OF FACT

1. Rockline, Incorporated ("Rockline"), is a corporation for which Carl Linebarger is the president and majority stockholder.

2. Rockline is a small portable crushing operation employing four employees and Linebarger. On April 22, 1981, the crusher and other equipment used in mining rock was located on land leased from the Port of the Dalles, Oregon. The operation had been located at this site for approximately two years. In addition to the crusher located there, respondent had constructed a large building and moved in a trailer to be used as an office.

3. Respondent has no history of a prior MSHA inspection or violations at the site involved in this case. However, respondent had experienced a prior MSHA inspection and received violations at a different location in 1979.

4. At approximately 9:30 in the morning, on April 22, 1981, MSHA inspector Robert Funk arrived at respondent's mine site for the purpose of conducting a safety and health inspection. He drove through an entrance, past the trailer (office), and a blue building located near the entrance. He continued down to where the rock crusher was located. A truck was being loaded at the crusher when Funk drove up. A conversation was had between Funk and Linebarger at the crusher site and then they drove in their separate vehicles back to an area near the trailer. Linebarger got out of his truck and told Funk he would not allow him to inspect the operation at this location.

5. Funk returned to his office and issued citation No. 587744 to respondent on April 22, 1981, alleging a violation of 103(a) of the Act. 1/

DISCUSSION

At the hearing, MSHA inspector Funk described the events that led up to the issuance of the citation in this case. He testified that after arriving at respondent's mine at about 9:30 a.m. on April 22, 1981, he drove his government vehicle through the entrance past a large blue building on the right and a trailer located on the left of the road. He continued on this

1/ Section 103(a) provides in pertinent part:

Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines ... In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided ... [and the authorized representative] shall have a right of entry to, upon, or through any ... mine.

road approximately 300 yards to where the crusher was located. The vehicle he was driving had United States government license plates and markings on the door. When he arrived at the crusher, a truck was being loaded. Linebarger motioned Funk to park his car near his pickup which he did. Funk got out of his car and walked over to Linebarger and attempted to introduce himself and present his card. Funk testified that Linebarger started yelling at him and asking Funk if he "could read the signs" and that he was "yelling" and "cussing" MSHA and the government in general (Transcript at 19).

Linebarger told Funk to follow him up to the office. After arriving at the trailer, again Linebarger raised his voice and said, "The only reason I don't shoot you right where you stand is, I want to take four or five of you government S.O.B.'s with me." Funk stated he thought there was a rifle in a rack on the back window of Linebarger's pickup (Tr. at 22). Then Linebarger stated that the only way he would allow an inspection would be if he (Funk) was accompanied by a U.S. Marshall (Tr. at 23). Funk got back in his car and left the premises.

Linebarger denies that he made the above statements except as to the need for Funk to bring a U.S. Marshall to inspect (Tr. at 39, 55). Linebarger testified that there was a 4 x 8 foot sign posted near the office which read "Salesmen, Visitors, Please Apply at Office. Do not Enter Shop or Work Area Without Permission." (Exhibit R-1).

Linebarger testified that when Funk arrived at the crusher, he parked his vehicle in front of the crusher blocking the access of trucks to be loaded and requiring the crusher to be shut down (Tr. at 54, 55). Linebarger told Funk to move his car and to follow him up to the office. He stated that he explained to Funk that Linebarger had rules and regulations to go by for the health and safety of his employees and the public and if Funk wouldn't follow them, he (Linebarger) would refuse to allow Funk to conduct an inspection unless he was accompanied by a U.S. Marshall (Tr. 38, 39).

Respondent submitted evidence of prior inspections at different plants in 1974 by Mining Enforcement and Safety Administration ("MESA"). He had received several citations in which reference was made that, "The cooperation of all persons contacted during the inspection was greatly appreciated" (Exh. R-8). It is Linebarger's position that he had been inspected in the past and always cooperated with the enforcement agency.

The evidence further revealed that the respondent had been inspected by MSHA in 1979 at a different location and received six citations which were all abated (Exh. P-2).

Although there is conflicting testimony in this case as to what was said by the parties on the date of the attempted inspection, I find there is no dispute that the inspector was refused the opportunity to inspect respondent's operation. This is an obvious violation of section 103(a) of the Act which specifically provides that frequent inspections shall be made without a requirement of advance notice and that the inspectors have a right to entry to, upon, or through any mine. On June 17, 1981, the United States Supreme Court held that the Mine Act provides for nonconsensual warrantless inspections and that such inspections do not violate the Fourth Amendment. Donovan v. Dewey, 49 U.S.L.W. 4748 (U.S. June 17, 1981), No. 80-9011, U.S. (1981). In Secretary v. Waukesha Lime and Stone Company, Inc., 3 FMSHRC 1702 (July 6, 1981), the Commission decided that a refusal to permit an inspection is a violation of the Act for which a penalty must be imposed.

In light of the foregoing, I find a penalty is warranted in this case. The respondent does not deny that he refused the inspector access to conduct an inspection on his premises but instead argues that the inspector should have read the posted signs and stopped at the office prior to driving down to the crusher. I am not persuaded that the respondent's position is supported by the facts in this case. The inspector denies seeing the sign alleged to have been erected at the entrance and as evidenced by photos submitted at the hearing (Exhs. R-1, R-2, R-3 and R-4). It is difficult to believe these signs were not noticed by the inspector, if they were actually at their alleged location near the entrance to the property. However, I have carefully considered the conflicting testimony of inspector Funk and Linebarger regarding the signs and conversations on April 22, 1981. Based upon my observation of the witnesses at the hearing and the evidence submitted, I find that the testimony of the inspector to be more credible than that of Linebarger. Even assuming, however, that the signs were located as alleged by respondent, entry onto the premises by the inspector is not to be predicated upon acquiring prior approval. This is a very small operation and the crusher was located near the entrance. It is reasonable for the inspector to drive to that location to observe the operation. It does not appear reasonable and rational for the respondent to refuse an MSHA inspection, if the only basis is that the inspector may have parked in the wrong area, as alleged by Linebarger, or driven by signs directed to "Visitors and Salesmen".

PENALTY

The petitioner seeks a penalty against respondent of \$1,000.00 based upon a special assessment. For some unexplained reason, the petitioner's records indicated that the respondent

had no history of prior inspections or citations. However, at the hearing, evidence was submitted that there were six prior citations issued and abated as a result of an inspection by MSHA of the respondent at a different location (Exh. P-2). This fact does not indicate a pattern of past behavior on respondent's part to prevent MSHA inspections. Also, there is evidence of respondent's cooperation with MESA, the prior mine safety and health enforcement agency. These facts would persuade me that the circumstances in this case, although unjustified, are not evidence of a pattern of behavior or attitude suggesting the imposition of a penalty in the amount suggested by the petitioner. I find that a penalty of \$500.00 is reasonable in this case.

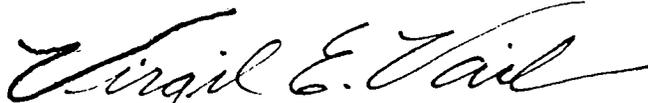
CONCLUSIONS OF LAW

1. The respondent is subject to the jurisdiction of the Act. The undersigned Judge has jurisdiction over the parties and subject matter of these proceedings.

2. Respondent violated section 103(a) of the Act as alleged in Citation No. 587744.

4. A reasonable penalty in this case is \$500.00.

Citation No. 587744 is AFFIRMED and respondent is ordered to pay a civil penalty of \$500.00 within 40 days of the date of this decision.



Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 10 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 81-399-M
Petitioner : A.C. No. 02-00842-05014
v. : Docket No. WEST 83-123-M
: A.C. No. 02-00151-05504
: :
MAGMA COPPER COMPANY - : San Manuel Mine
SAN MANUEL DIVISION, :
Respondent :

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California,
for Petitioner;
N. Douglas Grimwood, Esq., Twitty, Sievwright &
Mills, Phoenix, Arizona,
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

The above cases were consolidated for hearing and decision since they involve the same parties and mining division. One citation is included in Docket No. WEST 83-123-M, and one is involved in WEST 81-399-M. Pursuant to notice, the case was heard in Phoenix, Arizona, on March 7, 1984. Both parties waived filing posthearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS AND CONCLUSIONS COMMON TO BOTH
DOCKET NUMBERS

1. At all times pertinent to these proceedings, respondent was the owner and operator of an underground copper mine and mill in Pinal County, Arizona, known as the San Manuel Division, Magma Copper Company.

2. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the subject mine and mill, and I have jurisdiction over the parties

3. Respondent is considered a large mining company with a moderate history of past violations. It was stipulated by the parties that any penalty imposed as a result of these two citations should neither be increased or decreased because of this history.

4. Payment of the proposed penalties in these two cases would not affect the respondent's ability to remain in business.

5. The two citations involved in this matter were issued on the dates indicated on said citations.

6. In the case of each citation involved herein, the violation was abated promptly and in good faith.

7. Whether a cited violation is properly designated as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed. The penalties hereinafter assessed are based on the criteria in section 110(i) of the Act.

Docket No. WEST 83-123-M

Citation No. 2086656, issued May 17, 1983, charges a violation of 30 C.F.R. § 57.11-1 ^{1/} because walkways between No. 1 and 5 manways in panel 2 had holes in their surfaces that created a hazard of falling to miners traveling to their work place.

MSHA inspector Arthur Swanson testified that undercut miners going to their working areas and supply trammers carrying material to the working areas would use these travelways (Transcript at 10). Some logging (planks) had been installed over several holes to provide places for miners to walk but where there was only one plank 12 inches wide, the inspector was of the opinion that a miner carrying material to the working areas could trip and fall possibly breaking a leg. The holes were described as being an average of two feet deep (Tr. at 14).

Respondent contends that undercuts, as involved in this case, create an extremely difficult place to work as this is a transitory condition. Usually there are rough rocks, timbers, hoses and other items running through the area. Respondent did not deny the conditions as described by the inspector, or the photographs submitted as exhibits, but argued that it does not constitute an access problem as contemplated by the statute.

^{1/} Mandatory. Safe means of access shall be provided and maintained to all working places.

I find that there was a dangerous situation created by the placing of one 12 inch logging for walkway over the hole that is two feet deep. The miners carrying material would have a difficult time balancing their loads and walking across this board. Placing additional boards in these areas makes sense and is certain to provide much safer access. I conclude that a violation was shown which was not significant and substantial. The condition was corrected and additional planking placed over the holes shortly after they were brought to respondent's attention. I conclude that an appropriate penalty for this violation is \$50.00.

Docket No. WEST 81-399-M

Citation No. 599945, issued March 25, 1981, charges a violation of 30 C.F.R. § 57.9-3 ^{2/}, because the brakes were not working on an Atlas locomotive, Serial No. 3596, in the ball mill section of the respondent's rod mill.

The evidence shows that the cited piece of equipment is a battery powered locomotive traveling back and forth on level tracks for a distance of approximately 1600 feet. The locomotive pulls cars carrying balls used in the grinding process of the mill. One locomotive pulls four to five cars on approximately six to eight trips during a 16 hour period. The train would not travel in excess of 5 miles per hour.

Inspector Swanson testified that he observed a sign on the battery motor of the locomotive reading "caution, no brakes." When asked the question of how long the locomotive had been without brakes, a member of the mine's management stated, "approximately two weeks" (Tr. at 22).

Jerrold Semmons, respondent's assistant general mill foreman, testified that he was aware of the fact that the locomotive was being operated without brakes. However, he stated, "The individual that was operating the train -- was told to operate at a slow speed, and if it was needed to stop the train immediately, to plug it; in other words, throw it in reverse." (Tr. at 37). A repair order had been written to repair the brakes but because of the parts being unavailable, it was necessary to fabricate the parts in the respondent's shop. Respondent argues that because of the restricted area in which this locomotive operated and its slow speed, there was not a hazard created and that it was not a significant and substantial violation.

^{2/} Mandatory. Powered mobile equipment shall be provided with adequate brakes.

I agree that the violation should not be considered significant and substantial. I do find that the operation of this locomotive without the brakes working is a violation of § 57.9-3. "Plugging" the engine is not adequate brakes under the standard as the locomotive had been originally equipped with a shoe type brake and these should be repaired. The respondent knew this condition had existed for over two weeks as testified to by Mr. Semmons. I conclude that an appropriate penalty for this violation is \$75.00.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation Nos. 2086656 and 599945 are affirmed, but the significant and substantial designations are REMOVED.

2. Respondent shall pay within 40 days of the date of this decision civil penalties for the following violations found herein to have occurred: Citation No. 2086656 in the amount of \$50.00, and Citation No. 599945 in the amount of \$75.00 for a total amount of \$125.00.



Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

APR 11 1984

BADGER COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 81-36-R
	:	Order No. 631937; 9/22/80
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 81-37-R
MINE SAFETY AND HEALTH	:	Citation No. 631938; 9/22/80
ADMINISTRATION (MSHA),	:	
Respondent	:	Grand Badger No. 1 Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 81-277
Petitioner	:	A. C. No. 46-04819-03010
	:	
v.	:	Docket No. WEVA 81-285
	:	A. C. No. 46-04819-03009 F
BADGER COAL COMPANY,	:	
Respondent	:	Grand Badger No. 1 Mine

DECISION

Appearances: David J. Romano, Esq., Young, Morgan, Cann & Romano, Clarksburg, West Virginia, for Contestant/Respondent;
Covette Rooney, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Steffey

An order was issued in this proceeding on December 19, 1980, consolidating for hearing and decision the issues raised by the filing of Badger Coal Company's application for review in Docket No. WEVA 81-36-R and its notice of contest filed in Docket No. WEVA 81-37-R. The order also consolidated for hearing and decision any civil penalty issues which would be raised when and if the Secretary of Labor should thereafter file one or more petitions for assessment of civil penalty with respect to the violations alleged in Order No. 631937 and Citation No. 631938.

A hearing was held in Elkins, West Virginia, on January 27, 1981, through January 29, 1981, at which time the parties introduced evidence with respect to the issues raised in both the notice of contest and civil penalty proceedings. Two petitions

for assessment of civil penalty were subsequently filed in April 1981 in Docket Nos. WEVA 81-277 and WEVA 81-285. When counsel for Badger Coal Company filed his answer to the petitions for assessment of civil penalty, he appropriately requested that the civil penalty cases be forwarded to me so that the issues raised in those cases could be decided on the basis of the evidence which had already been submitted in this consolidated proceeding. Therefore, this decision will dispose of all issues raised in all of the cases listed in the caption of this decision.

Because of illness, the reporter was unable to prepare a transcript of the hearing. Therefore, on January 13, 1982, I submitted to the parties 31 proposed findings of fact and asked them to determine whether they could agree upon those findings for the purpose of deciding the issues in this proceeding. Although a considerable period of time was used by me and the parties in reviewing our respective notes and revising language so as to arrive at findings on which both parties could agree, I believe that the time utilized was justified because a second evidentiary hearing, involving expenditure of additional time and money and use of witnesses with eroded memories, was avoided.

Counsel for Badger Coal Company filed his brief on October 31, 1983, and counsel for the Secretary of Labor filed her reply brief on November 25, 1983. The issues discussed by both counsel are those normally raised in such proceedings: (1) Was Order No. 631937 validly issued under imminent-danger section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(a)? (2) Did the violations alleged in Order No. 631937 and Citation No. 631938 occur? (3) If violations did occur, what civil penalties should be assessed under section 110 (i) of the Act?

STIPULATED FINDINGS OF FACT

The 31 findings of fact agreed upon by the parties are given below:

1. Badger Coal Company operates the Badger No. 1 Mine which is located in Upshur County, West Virginia. Badger's No. 1 Mine produces approximately 1,200 tons of coal daily. Badger is an affiliate of the Pittston Company Coal Group. Badger also owns and operates three other mines which produce about 3,500 tons of coal daily. Badger employs about 45 underground miners and 13 surface employees at the Badger No. 1 Mine and employs a total of 348 miners at all of its mines. It has been stipulated that Badger is subject to the provisions of the Federal Mine Safety and Health Act of 1977 and that the administrative law judge has jurisdiction to hear and to decide the issues raised by the filing on September 22, 1980, of Badger's application for review and notice of contest in Docket Nos. WEVA 81-36-R and WEVA 81-37-R, respectively.

2. On Friday, September 19, 1980, Richard L. Lambert, a shift maintenance foreman, working on the 4-p.m.-to-11 p.m. shift, reported to Guy Steerman, the chief electrician, that the ground monitoring circuit for the 1 Left Panel Section would not trip the Line Power VCB-1 vacuum breaker switchhouse. It was agreed that Lambert would report to work on the day shift on Saturday for the purpose of repairing the defective vacuum breaker switchhouse. Lambert was certified by MSHA as a qualified underground electrician and, by September 20, 1980, he had 10 years and 8 months of mining experience, and had been a shift maintenance foreman for 3 years and 9 months.

3. Lambert came to the mine on Saturday, September 20, 1980. Before entering the mine, Lambert went into the fenced enclosure around the surface substation and shut off all power to underground equipment. He locked the gate on the fenced enclosure and placed the key behind a high-voltage warning sign. At about 8 a.m. Lambert entered the mine accompanied by two mechanics. They traveled to the A Panel vacuum switchhouse which was located about 4,800 feet from the surface substation.

4. Lambert found a loose connection on the shunt trip coil and believed that was the cause of the malfunction. In order to test the performance of the coil, Lambert called Steerman on the surface at about 9 a.m. and asked Steerman to go to the surface substation and unlock the gate with the key behind the high-voltage sign so as to energize the main power circuit which is a high-voltage system transporting 12,470 volts. Steerman complied with Lambert's request and Lambert called Steerman again and reported that the vacuum breaker was still malfunctioning and that Lambert was returning to the surface to attend a foremen's meeting which had previously been scheduled. The two mechanics were sent to the West Mains Section to work on a continuous-mining machine. Lambert met Roger Davis, a section foreman, at the entrance to A Panel and they traveled to the surface together.

5. After the foremen's meeting, Lambert and Steerman discussed the vacuum switchhouse and concluded that the shunt trip circuit was causing the malfunction. Lambert asked Steerman to remain on the surface after Lambert went back underground so that Steerman could turn the power on and off as needed while Lambert sought to determine the cause of the malfunction of the vacuum breaker.

6. Lambert and Davis returned to the A Panel vacuum switchhouse. Davis stayed with Lambert to assist him and because he did not want to leave him alone while Lambert was working on the vacuum circuit breaker. Lambert and Davis removed the cover from the breaker compartment. Removal of the

cover caused the tripping of interlock switches which turned off all power to the compartment. Lambert visually examined the interior of the compartment and Davis left the scene for about 10 minutes in order to check on the progress of Davis' crew members who were plastering stoppings and working on the track rails in A Panel. When Davis returned to the switchhouse, Lambert told Davis that Steerman had asked Lambert to check the terminal board located on the inside of the open compartment. Lambert taped the interlock switches in closed position so that they could not prevent power from entering the compartment while the cover was removed. Lambert called Steerman to reenergize the switchhouse. Lambert thereafter instructed Davis to hold in the capacitor trip switch button while Lambert measured the low voltage on the terminal board.

7. About 1 p.m. Lambert and Davis heard someone being paged on the mine telephone located about one block outby the switchhouse. Davis left to answer the phone and had just picked up the receiver when Davis heard a loud buzzing noise and a moan from Lambert. Davis dropped the phone and ran to the switchhouse where he found Lambert slumped over the switchhouse with his upper body and both arms inside the compartment.

8. Although the power had been cut off, Davis opened an emergency disconnect on the back of the switchhouse. As Davis was pulling Lambert from the compartment, Davis noticed that Lambert's left hand was grasping an unshielded insulated wire in the open compartment. Davis left Lambert on the mine floor and telephoned outside for help and thereafter administered first aid with assistance of other miners while Lambert was transported to the surface. An ambulance took Lambert to the hospital where he was pronounced dead at about 2:15 p.m.

9. Badger notified MSHA of Lambert's death and at about 8:30 p.m. five MSHA employees came to the Grand Badger No. 1 Mine to initiate an investigation of the fatality. The five persons were: Richard Vasicek, chief of special enforcement program; Jim McCray, supervisory coal mine inspector; Jim Cross, coal mine electrical inspector; Paul Moore, mining engineer; and Robert Wilmoth, coal mine inspector. The investigators used their time Saturday night to interview Badger's employees. Most of the questions were asked by Vasicek and a West Virginia state inspector whose name was Grant King.

10. The investigation was not completed on Saturday. On Monday, September 22, 1980, three employees--Paul Moore, mining engineer; John Phillips, coal mine electrical inspector; and Paul Hall, chief of MSHA's electrical section--from MSHA's Morgantown, West Virginia, office went to the mine to continue the investigation. Moore was the only MSHA employee at the mine on Monday who had also been to the mine on Saturday night. Hall,

Phillips, and Moore, along with some Badger employees, went underground and determined, after about 3 hours of trouble shooting, with the vacuum circuit breaker deenergized, that the malfunction reported by Lambert was caused by open circuits in the auxiliary breaker switch. The open circuits prevented the tripping circuit from deenergizing the circuit breaker. The malfunction was traced to the auxiliary breaker switch after various checks and deductions had been made to eliminate four other possible causes of the problem, namely, a circuit breaker, a capacitor trip device, some relays, and the shunt trip coil, all of which are shown in a diagram on Exhibit 2.

11. After Hall, Phillips, and Moore had participated in isolating the defective components in the vacuum circuit breaker on 1 Left A Panel, the three MSHA employees discussed and evaluated all of the information which they had gathered on September 22, 1980, as well as the summaries of the interviews which had been obtained through the interviews of Badger's employees on Saturday night. Hall, Phillips, and Moore decided to cite Badger for three different violations of the mandatory safety standards.

12. Two of the alleged violations were cited in imminent-danger Withdrawal Order No. 631937 dated September 22, 1980, issued under sections 107(a) and 104(a) of the Act. The condition or practice stated in the order is as follows:

Work was being performed on energized electrical equipment, the 1 Left Panel vacuum circuit breaker, when it was not necessary for the circuit to be energized during testing and trouble shooting (75.509). A lock installed by Richard Lambert shift maintenance foreman to lock out a set of disconnects, was removed by Guy Steerman, Chief Electrician, after Lambert had completed some minor repairs to the 1 Left A Panel vacuum circuit breaker. Lambert was available underground and had asked Steerman by telephone to remove the lock and reenergize the main circuit breaker supplying power underground (75.511). These conditions were determined during an investigation of an accident resulting in the electrocution of Richard Lambert, shift maintenance foreman. Mine management shall insure that all qualified electricians will be prevented from working on energized electrical equipment except when it is absolutely necessary to have the power on to trouble-shoot or test. Otherwise trouble shooting and testing shall be done with the electrical circuits deenergized. Also, locks and tags shall only be removed by persons who installed them when they are available at the mine.

A subsequent action sheet was issued on September 24, 1980, stating:

Order No. 631937 is hereby modified so that the following statement is added. Richard Lambert was not wearing protective apparel while he was troubleshooting and testing the low voltage control circuit of the Line Power 12,470 VAC vacuum breaker S.N. 4986. Lambert was exposed to and contacted internal high voltage components which were energized.

Phillips signed Order No. 631937 but its issuance was with the full concurrence of Hall and Moore.

13. Order No. 631937 is comprised of Exhibits 4 and 4A in this proceeding. Exhibit 4 has two lines after the words "Area or Equipment" for entry of the designated area covered by the withdrawal order. Exhibit 4 shows that something was described on the first of those two lines, but those words have been scratched out. Exhibit O in this proceeding is a copy of Withdrawal Order No. 631937 which was attached to Badger's application for review filed in Docket No. WEVA 81-36-R. On Exhibit O, after the words "Area or Equipment", there appears an entry reading "The 1 Left vacuum circuit breaker serial No. 4986".

14. The pink and yellow copies of Order No. 631937 were handed to Badger's safety director, Larry Fortney, by Phillips. Fortney testified that the yellow copy was placed on Badger's bulletin board and is no longer available as no effort is made by Badger to preserve the copy placed on the bulletin board. The pink copy of Order No. 631937 was introduced in evidence as Exhibit B and the pink copy also has after the words "Area or Equipment" the same entry that appears on Exhibit O, namely, "The 1 Left vacuum circuit breaker serial No. 4986". Although the entry on the pink copy contains the same words as those which appear on the Xerox copy, which was attached to Badger's application for review, the Xerox copy, or Exhibit O, is not a true Xerox copy of the original order because a secretary who works for Badger rewrote Exhibit O to obtain a clear copy for use as an exhibit to accompany the application for review.

15. When Phillips was cross-examined during his first appearance as a witness, he stated that he might have scratched out the entry on Order No. 631937 after the words "Area or Equipment" but that he could not specifically recall having done so.

16. Phillips testified, when called as an adverse witness by Badger's counsel, that his handwriting appears on Order No. 631937 and that he simply wrote on the official form the language which he, Hall, and Moore had drafted. Phillips also stated that after he wrote the order, he tore the white, pink, and yellow copies out of his book of forms and placed them in

front of him. Then Phillips, Hall, and Moore decided that the order dealt with a "practice" instead of a "condition" and it was concluded that the language appearing after the words "Area or Equipment" should be obliterated from the order. Phillips stated that the original white copy which is now in MSHA's file in the Morgantown office shows obliteration of the entry after "Area or Equipment". The only explanation Phillips could give for the fact that the pink copy presented in evidence as Exhibit B by Badger's counsel showed that the entry after the words "Area or Equipment" had not been obliterated was that he placed the copies back in his book to scratch out the entry after "Area or Equipment" and he thinks that he may have placed the pink copy under his green copy which does not contain on its back the substance which acts like carbon paper.

17. Phillips' green copy of Order No. 631937 was introduced in evidence as Exhibit C. A careful comparison of the pink copy of Order No. 631937, or Exhibit B, with the green copy shows that the handwriting on the green and pink copies is identical and that the only difference between them, besides their color, is the fact that the green copy has had the entry after the words "Area or Equipment" scratched out, whereas the pink copy still shows an entry after the words "Area or Equipment".

18. Order No. 631937 was terminated by James Cross on October 2, 1980, as shown in Exhibit 4B. Cross testified that Badger did not request that the order be vacated. Cross had gone to the mine for other purposes and, while there, asked to see a list of miners who had signed a sheet indicating that they would not trouble shoot while equipment is energized unless absolutely necessary and would have the same person who locks and tags power out of the mine to remove the lock and tag and restore the power. All miners had signed sheets, which comprise Exhibit 6 in this proceeding, to show that they would comply with the aforementioned procedures. Although all electricians or miners had signed the sheets by September 24, 1980, the order was not terminated until October 2, 1980.

19. The third violation, referred to in Finding No. 11 above, for which Phillips, Moore, and Hall determined to cite Badger was a violation of section 75.803 which was alleged in Citation No. 631938 issued September 22, 1980. That citation is Exhibit 5 in this proceeding and the condition described in the citation is:

The ground check circuit provided to monitor the continuity of the grounding circuit from the A Panel vacuum breaker to the A panel power center was inoperative in that the auxiliary breaker switch would not properly operate to allow the tripping circuit to energize the shunt trip coil

which deenergizes the circuit breaker. This condition was determined during an investigation of a fatal electrical accident. Mine management was aware of this condition and was in the process of repairing the ground wire monitoring system when the accident occurred.

Citation No. 631938 was terminated on September 23, 1980, by a subsequent action sheet which is Exhibit 5A in this proceeding and which states:

The ground check circuit provided to continuously monitor the continuity of the grounding circuit from the A Panel Vacuum Breaker to the A Panel power center was made operative by providing another vacuum breaker and transporting the defective breaker to the surface.

20. Hall, Phillips, and Moore testified in support of the issuance of Order No. 631937. They claimed that an imminent danger was involved in the death of Lambert because there was a practice at Badger's No. 1 Mine which was a continuing imminent danger in that the electrician who turned off high voltage was allowing another electrician to reenergize the equipment for purposes of trouble shooting and testing. Hall said that the imminent danger existed while Lambert was trouble shooting with the power on, but that the imminent danger did not exist when he checked the equipment on Monday, September 22, 1980, because the vacuum breaker had been deenergized. Hall said that MSHA can issue an imminent danger order when an inspector finds that a practice is causing an imminent danger even though it may take days, as it did in this instance, to determine whether the imminent danger has been abated. Hall also said that the imminent danger in this instance continued to exist while the list (Exh. 6) was circulated in order for the miners to sign their names to the list to show that they would not have another person to reenergize high voltage equipment if a different person had shut off the power and tagged or locked out the disconnects involved.

21. In support of MSHA's citing of a violation of section 75.509, MSHA's witnesses stated that section 75.509 permits a person to trouble shoot or test electrical equipment while it is energized only when such trouble shooting is necessary and they claimed that trouble shooting and testing with the power on was not necessary for Lambert to determine why the vacuum breaker would not cut off the power in the 1 Left A Panel. MSHA's witnesses primarily supported their contention that it was unnecessary for Lambert to trouble shoot with the power on by stating that the team of men who examined the vacuum breaker on September 22, 1980, determined the cause of the malfunction

while the power was off. The names of the people who participated in the examination were: Wayne Myers, Badger's chief electrical engineer; Blaine Yeager, Badger's maintenance superintendent; Guy Steerman, Badger's chief electrician at the No. 1 Mine; Mike Hall, chief of MSHA's Electrical Section; Jim Cross, an MSHA electrical inspector; John Paul Phillips, an MSHA inspector and certified electrician; and Benny Comer, a West Virginia electrical inspector. Those seven men studied a printout of the vacuum breaker before going underground and determined the manner in which they would check all of the various circuits and components to determine the problem. They worked 3-1/2 hours and finally decided that the auxiliary switch was at fault because of excessive mechanical wear. Although the trip counter showed only 230 operations, the switch should have worked thousands of times without becoming defective as a result of mechanical wear. MSHA's witnesses stressed the fact that voltage potential can be checked with an ohmmeter which is equipped with a battery to provide its own power. MSHA's witnesses said that checking with a voltmeter, which requires energization of equipment, is unnecessary for locating defective components.

22. MSHA's witnesses supported their citing of a violation of section 75.511 by stating that Lambert had violated that section when he asked Steerman to reenergize the equipment which Lambert had deenergized at the substation and locked out. Moore testified that only the electrician who deenergizes equipment before working on it may remove the locks or tags and reenergize the equipment. Hall testified that Steerman's reenergizing the vacuum breaker was a contributing factor to Lambert's electrocution even though Lambert knew that the vacuum breaker was energized at the time he came into contact with the high-voltage circuits. Hall interpreted the last sentence of section 75.511 to mean that the person who deenergizes equipment must be the person who reenergizes it so long as that person is anywhere at the mine site. MSHA's witnesses took the position that Lambert was "available" to reenergize the equipment even though the vacuum breaker was located 4,800 feet from the surface substation where Lambert had turned off the power.

23. MSHA's witnesses supported their citing respondent for a violation of section 75.803 by testifying that Badger's management knew that the vacuum circuit breaker was inoperable but continued to operate equipment in the mine after Badger's management became aware of the fact that the ground monitoring system was not working. Citation No. 631938 specifically acknowledges the fact that mine management was aware of the fact that the ground monitoring system was not working and states that management was in the process of repairing the ground wire monitoring system when the fatal accident occurred.

24. Guy J. Steerman, in September 1980, was chief electrician at the Badger No. 1 Mine. Steerman was certified by MSHA as a qualified electrician for both underground and surface mining operations and Steerman had 10 years mining experience by September 20, 1980. Steerman testified that Lambert had already checked the vacuum breaker with an ohmmeter and had been unable to determine the cause of the malfunction in the shunt trip coil. Lambert had also advised Steerman that there was continuity in the ground monitoring system. In such circumstances, Steerman asked Lambert to check terminal Nos. 15 and 16 with a voltmeter to determine if there was power on the shunt trip coil. Steerman did not think it was hazardous to check the low-voltage terminal board of the vacuum circuit breaker with the power on. The low-voltage terminal board was sufficiently segregated from the high-voltage components of the vacuum circuit breaker that Steerman did not consider Lambert to be working on high-voltage components when he was checking the low-voltage terminal board. Steerman did not know that Lambert had removed the protective insulated shield covering the high-voltage compartment in which the high-voltage vacuum circuit breaker was located. If Steerman had known that Lambert had removed the insulated shield over the high-voltage components, he would have instructed Lambert to replace the insulated shield before conducting further testing or trouble shooting. Therefore, Steerman did not think Badger had violated section 75.509 or section 75.803. Steerman stated that Lambert knew by talking to Steerman on the phone when the power was on and when it was off. Steerman thought that there was no essential difference between Lambert's telling Steerman to turn the power on and off and Lambert's coming out of the mine for the purpose of turning the power on and off. Therefore, Steerman did not think Badger had violated section 75.511.

25. Lowell Junior Tinney, general superintendent of Badger's No. 1 Mine, testified that he also suggested that Lambert check terminal Nos. 15 and 16 with the power on and that he had no reason to doubt Lambert's ability or his care in avoiding exposure to the high-voltage circuits. Tinney thinks that an electrician should be able to ask another person to turn the power on and off because he thinks that when an electrician is 4,800 feet from the place where the power is turned on and off, that person is "unavailable" for personally turning the power on or off within the meaning of section 75.511. Tinney also believed that Badger was following the provisions of section 75.509 because he believed that it was necessary for Lambert to check the low-voltage circuits with the power on in his effort to determine what was wrong with the shunt trip coil.

26. Larry Fortney, Badger's safety director, testified that the inspectors gave him both the yellow and pink copies of Order No. 631937 and that neither of those copies had any

words scratched out on the line beginning with the words "Area or Equipment". On the contrary, both copies specified that the "Area or Equipment" involved was "The 1 Left vacuum circuit breaker serial No. 4986". It was Fortney's understanding that abatement of the order was dependent upon Badger's replacing the existing vacuum breaker with a new one. That is what was done to abate the order. Fortney additionally said that the inspector who abated the order also asked for the list of men who had signed Exhibit 6 stating that they would personally reenergize any equipment which they had personally deenergized.

27. Wayne Myers, Jr., is head of Pittston's Electrical Department. He has had 32 years of experience in designing and working on complex electrical equipment. He wrote the specifications for the vacuum breaker involved in this proceeding and had the breaker constructed by Line Power Company of Bristol, Virginia. Myers first thought that the defect in the vacuum breaker was in the auxiliary switch. The switch was replaced on Tuesday, September 23, 1980, the day after MSHA's three employees (Phillips, Hall, and Moore) had written the order and citation involved in this proceeding. The vacuum breaker worked perfectly and West Virginia and MSHA personnel were called to Badger's repair shop on Wednesday, September 24, 1980, for a demonstration, but the vacuum breaker again malfunctioned. Myers and his assistants replaced the vacuum bottle and all parts which were suspect and again the vacuum breaker seemed to be working satisfactorily, but it again malfunctioned when West Virginia and MSHA personnel were called for a second demonstration on Thursday, September 25, 1980. Myers then found that a ratchet in the operating handle was failing to create enough force to close the vacuum bottle which was supposed to activate the rod which, in turn, operated the auxiliary switch. The cam was not making a full rotation. The ratchet was redesigned on Friday and Saturday. On Monday, September 29, 1980, the redesigned parts were installed and the vacuum breaker thereafter worked perfectly.

28. Myers said that Badger's personnel had not violated any of the mandatory safety standards. He said that the ground monitoring system was working at all times and that Lambert was aware of the fact that the monitoring system was working. While the vacuum breaker was failing to cut off power, the fault was not in the ground monitoring system; consequently, Myers did not think a violation of section 75.803 had occurred.

29. Myers said that he believed section 75.511 should be interpreted to give some meaning to the word "unavailable" in the last sentence of that section. Myers pointed out that it could take an electrician from 2 to 2-1/2 hours to travel from the equipment on which he was working to the place where the power had been cut off and locked out or tagged. Myers believed

that the person who cuts off the power is "unavailable" to reenergize the equipment when he is so far away from the power cut-off point that it takes him 2-1/2 hours to go to the power point and reenergize equipment. Myers said that requiring an electrician to spend 2-1/2 hours to turn power on and off would tend to make the electrician impatient and tempt him to check equipment with the power on rather than take the time and effort required to go back to the power point and reenergize or deenergize equipment. Therefore, in Myers' opinion, Lambert was in compliance with section 75.511 when he asked Steerman to turn the power on. So long as Lambert gave the instructions about energizing and deenergizing equipment, Lambert was at all times aware of when the power was on and when it was off. Myers said that Lambert knew that the power was on at the time Lambert was electrocuted and that Lambert's act of asking Steerman to turn the power on for him had nothing whatsoever to do with the occurrence of the fatal accident.

30. Myers also believed that Lambert had engaged in trouble shooting and testing with the power on in full compliance with section 75.509 because, in Myers' opinion, Lambert had determined that a problem existed in the vicinity of the shunt trip coil, which is a low-voltage section of the vacuum circuit breaker, and that Lambert having previously done testing and trouble shooting for sometime with the power off, was not acting unreasonably in doing further testing and trouble shooting on the low-voltage terminal board with the power on. As a matter of fact, all three of MSHA's experts and the other experienced personnel (including several electrical engineers) who examined the vacuum circuit breaker for 3-1/2 hours on Monday, September 22, 1980, had failed to find the cause of the malfunction. The fact that a large number of experts could not find the problem with the power off was, in Myers' opinion, rather positive proof of the fact that Lambert was trouble shooting and testing with the power on at a time when it was "necessary" within the meaning of section 75.509. As noted in Finding No. 27, supra, the malfunction was not fully determined until several days later when it turned out to be a mechanical problem in the design of the ratchet lever by Line Power Manufacturing Company and not an electrical problem.

31. It was stipulated at the hearing that during the 24 months preceding the citing of the alleged violations in this proceeding, respondent had paid penalties with respect to 52 alleged violations. There is no history showing that respondent has previously violated sections 75.509, 75.511, or 75.803.

The Question of the Validity of Order No. 631937

Badger's Arguments

Badger's brief (pp. 2-7) argues that Order No. 631937, whose provisions are quoted in Finding No. 12, supra, is invalid because its issuance is unsupported by the law and the facts. Section 107(a) provides as follows:

(a) If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Badger's arguments also refer to section 107(c) which provides as follows:

(c) Orders issued pursuant to subsection (a) shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger and a description of the area of the coal or other mine from which persons must be withdrawn and prohibited from entering.

Order No. 631937 was issued on September 22, 1980, by three MSHA employees, namely, John Phillips, a coal-mine electrical inspector, Paul Moore, a mining engineer, and Paul Hall, chief of the electrical section in MSHA's Morgantown, West Virginia, office (Finding Nos. 10 and 11, supra). The order alleged violations of 30 C.F.R. §§ 75.509 and 75.511. Section 75.509 provides as follows:

All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing.

Section 75.511 provides:

No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

Badger's brief (p. 4) correctly notes that the language given under the words "Condition or Practice" in Order No. 631937 alleges only that Badger had violated section 75.509 by performing testing and trouble shooting on electrical equipment when it was not necessary to do so. The order also alleges that Badger had violated section 75.511 in that the certified electrician, Richard Lambert, who locked out the disconnecting device in a surface substation providing power to an underground vacuum circuit breaker, asked the chief electrician to unlock the device and restore power for purposes of trouble shooting. The inspectors issued a modification of Order No. 631937 on September 24, 1980, but that modification simply added words to the effect that Lambert was not wearing protective apparel while he was trouble shooting the low-voltage control circuit on a vacuum circuit breaker (Finding No. 12, supra).

Badger's brief concludes that the language in Order No. 631937 does not comply with section 107(c) of the Act because it does not, in the words of that section, "* * * contain a detailed description of the conditions or practices which cause and constitute an imminent danger." Badger contends, therefore, that anyone reading the order would believe that it does no more than cite Badger for violations of sections 75.509 and 75.511. At the hearing, MSHA's witnesses explained that an imminent danger was associated with Lambert's death "* * * because there was a practice at Badger's No. 1 Mine which was a continuing imminent danger in that the electrician who turned off high voltage was allowing another electrician to reenergize the equipment for purposes of trouble shooting and testing" (Finding No. 20, supra).

Although Order No. 631937 when first written by Phillips on September 22, 1980, specified under the words "Area or Equipment" that "[t]he 1 Left vacuum circuit breaker serial

No. 4986" was the area from which miners should be withdrawn, or the hazardous equipment which should be withdrawn, the inspectors decided that, since the order dealt with a "practice" instead of a "condition", that the language referring to the 1 left vacuum circuit breaker should be obliterated from the order.

Phillips, at first, stated that while he might have scratched out the words "1 left vacuum circuit breaker serial No. 4986" from the order, he did not specifically recall having done so (Finding No. 15, supra). When Phillips was subsequently recalled as an adverse witness by Badger's attorney, he recalled specifically having put the copies of the order back into his book of forms to scratch out the words under "Area or Equipment". The only explanation which Phillips could give for the fact that the pink copy given to Badger did not show any scratching out of the words "1 Left vacuum circuit breaker serial No. 4986" under "Area or Equipment" was that he may have placed the pink copy under his green copy which does not contain on its back the substance which acts like carbon paper (Finding No. 16, supra).

Larry Fortney, Badger's safety director, testified that the inspectors gave him both the yellow and pink copies of Order No. 631937 and that neither of those copies had any words scratched out on the line beginning with the words "Area or Equipment". On the contrary, both copies specified that the "Area or Equipment" involved was "[t]he Left vacuum circuit breaker serial No. 4986". Fortney understood that abatement of the order required Badger to remove the defective vacuum circuit breaker and replace it with another vacuum circuit breaker which functioned properly and Fortney said that was the action Badger took to abate the order (Finding No. 26, supra).

Badger's brief (p. 5) argues that the lack of specificity and detail in Order No. 631937 renders it defective as a matter of law because it does not specify what constituted an imminent danger at the time the order was issued. Badger further contends that the inspectors, after hearing that the order had been contested, contrived the argument that the imminent danger consisted of a "practice" at the mine of having someone energize equipment other than the individual who had deenergized it. Badger also argues that the inspectors did not really obliterate the words "1 Left vacuum circuit breaker serial No. 4986" on the same day they wrote the order, but decided to obliterate those words from the order after they realized that the 1 left vacuum circuit breaker did not constitute an imminent danger at the time the order was written. Badger's brief (p. 6) points out that the inspectors have always taken great precautions to notify Badger when changing or altering any previous citation or

order and that MSHA's failure to notify Badger of the obliteration of "1 Left vacuum circuit breaker serial No. 4986" supports Badger's contention that the obliteration occurred after the inspectors learned that the order was going to be contested.

Badger's brief (p. 6), in support of its argument, cites a decision by Judge Boltz in CF&I Steel Corp., 3 FMSHRC 99 (1981), 1/ in which Judge Boltz found that no imminent danger existed in circumstances where the operator had detected a hazardous concentration of methane, had turned off all power to the area, and had withdrawn all miners except those working to correct ventilation before the inspector arrived at the scene of an alleged imminent danger. Badger argues that since it was removing the defective circuit breaker at the time the order was written, that the conclusions of Judge Boltz in the CF&I case should be applied in this case, that I should find that no imminent danger existed in Badger's mine, and that the order should be vacated as having been issued in error.

The Secretary's Arguments

The Secretary's brief (p. 4) argues that imminent-danger Order No. 631937 was properly issued because "* * * there was in existence at the Grand Badger No. 1 Mine a practice considered normal procedure, wherein a person performing electrical work locked out the equipment and once the work was completed, then instructed someone over the station phone, to remove the lock and reenergize the power." The Secretary also cites a decision

1/ Badger's brief (p. 7) cites other cases to the same effect, at least to the extent that I was able to locate them and read them. Badger's citations are to the Mine Safety and Health publication by the Bureau of National Affairs. I prefer to read the cases in the Commission's books of decisions. Therefore, when lawyers cite cases only by reference to the Mine Safety and Health publication, it is necessary for me to go to the library to determine the docket numbers and exact dates of the decisions so that I can locate them in the Commission's books of decisions which are issued each month. Badger's failure to give the names of the cases cited on page 7 of its brief and its incorrect use of page citations for some of the cases made it impossible for me to find the citations in the Mine Safety and Health publication or elsewhere. I recognize that a judge's decision becomes a final decision of the Commission after 40 days if the Commission fails to grant a petition for discretionary review, but I still think a lawyer ought to make it clear in his citations that he is referring to a judge's decision which has become final, as opposed to decisions which have been issued by the Commission after determining that discretionary review should be made.

by Judge Koutras in Consolidation Coal Co., 2 FMSHRC 49 (1980), in which he held that the coal company seeking review of an imminent-danger order has the burden of proving that an imminent danger did not exist. Judge Koutras stated in the Consolidation case that "* * * the order is properly vacated where the applicant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued" (2 FMSHRC at 64).

The Secretary's brief (p. 5) contends that the practice of having a different person reenergize equipment from the person who deenergized the equipment comes within the definition of imminent danger in section 3(j) of the Act which provides, "[t]he existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The Secretary's brief (p. 6) also quotes from the Legislative History of the Federal Coal Mine Health and Safety Act of 1969, page 215, or from page 89 of Senate Report No. 91-411, which provides as follows:

The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceedings or notice. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes, may be critical or disastrous. After the miners are free of danger, then the operator can expeditiously appeal the action of the inspector.

The Secretary's brief (p. 7) also quotes from the court's decision in Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741 (7th Cir. 1974), in which the court agreed with the Board's statement that imminent danger relates to the "proximity of the peril to life and limb" (504 F.2d at 743). The court also approved of the Board's discussion of imminent danger in the following language (504 F.2d at 743):

"[w]ould a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger."

The Secretary's brief (p. 8) concedes that the inspectors who wrote imminent-danger Order No. 631937 did not see the "practice" which constituted the imminent danger which was cited in the order, but the Secretary argues that the employees who issued the order were experienced electricians and one of them was a mining engineer. It is contended, therefore, that they had the "education and experience" referred to in the quotation from the Freeman case to recognize that Badger's practice of having another person reenergize equipment from the person who deenergized the equipment indicated the existence of an impending accident or disaster, threatening to kill or cause serious injury at any moment, if that practice were allowed to continue in existence.

The Secretary, therefore, asks me to apply Judge Laurenson's reasoning in Itmann Coal Co., 2 FMSHRC 1643 (1980), in which he upheld the validity of an imminent-danger order issued in circumstances where an inspector saw a miner walk under unsupported roof. The Secretary argues that even though the miner was not under the hazardous roof when the order was issued, Judge Laurenson upheld the order because there was a practice at Itmann's mine for miners to walk under the unsupported roof. The Secretary also cites Peabody Coal Co., 1 FMSHRC 1785 (1979), in which the Commission upheld issuance of an imminent-danger order several days after data were collected showing existence of a dangerous concentration of carbon monoxide after a fire had occurred at Peabody's mine.

The Infirmities in Order No. 631937 Require Its Vacation

There are at least several reasons for vacating Order No. 631937. First, the order, as modified by the inspectors, fails to comply with section 107(a) by determining "* * * the extent of the area of such mine throughout which the danger exists" so as to withdraw miners from the area of danger. As the order was originally issued, it made limited sense by declaring that the area of danger was the "1 Left vacuum circuit breaker serial No. 4986". It is a fact that the circuit breaker in question malfunctioned on Friday, September 19, 1980, and caused the death of an electrician when he was trouble shooting the low-voltage circuits on the circuit breaker on Saturday, September 20, 1980. All power to the circuit breaker was cut off at the moment of the electrician's death and the circuit breaker was not energized again until after it was removed from the mine on Monday, September 22, 1980.

The inspector who wrote the order, which was issued with the concurrence of two other MSHA employees, testified that no imminent danger existed on Monday, September 22, 1980, when the inspectors examined the circuit breaker, because the circuit breaker had been deenergized. The inspectors apparently

recognized that they could not sustain the citing of an imminent danger on a deenergized piece of equipment, so they thereafter removed from the order any reference to "the area of such mine throughout which the danger exists" and contended that the order was withdrawing the "practice" at the mine of having a person reenergize equipment other than the person who deenergized the equipment.

Once the inspectors had changed their minds about the concept underlying the issuance of the order, it was incumbent upon them to notify Badger's personnel of the fact that they were not withdrawing a piece of hazardous equipment from the mine, but were, instead, withdrawing the "practice" of having a person reenergize equipment other than the person who deenergized the equipment. The Secretary's brief (p. 13) argues that the inspectors' failure to inform Badger of the obliteration of any area from which miners were to be withdrawn was not prejudicial to Badger. The theory behind the claim of no prejudice is that the inspectors required Badger to have all electricians sign a statement that they would not have someone else reenergize equipment which they had deenergized before working on it. The Secretary, therefore, argues that Badger knew that the real imminent danger cited in the order was the practice with respect to reenergization of equipment and that the order was not officially terminated until all of the electricians had signed a statement (Exh. 6) showing that they would not ask another electrician to reenergize equipment which they had deenergized.

The Secretary's contention that Badger was not prejudiced is hard to sustain within the concept of an imminent danger. The Secretary has defended his action in issuing the order by citing legislative history to the effect that the primary reason for issuing imminent-danger orders is to remove miners from the area of danger. When Badger removed the circuit breaker from the mine, it thought it had removed all miners from the area of danger because Badger's copy of the order continued to specify that the "area throughout which the danger exists" was the "1 Left vacuum circuit breaker serial No. 4986". The order was written on September 22, 1980, but Badger did not succeed in getting all the electricians to sign the statement about deenergization of electric equipment until September 24, 1980, but throughout that time, miners were allowed to work in the mine because the inspectors had not advised Badger that the entire mine was hazardous until the "practice" which caused the imminent danger ceased to exist.

The confusion pertaining to the area from which miners were required to be withdrawn was augmented by the fact that another inspector had issued a withdrawal order pursuant to section 103 (k) of the Act on September 20, 1980, after the electrician, Richard Lambert, had been electrocuted. That order had initially

been issued by specifying that the "entire mine" was the area from which miners should be withdrawn, but the order was modified 3 hours after it was issued to specify that the area from which miners were to be withdrawn was the section where circuit breaker with serial No. 4986 was located. Therefore, two withdrawal orders had been issued and both of them required Badger to withdraw miners only from the area where the defective circuit breaker was situated, but, according to the Secretary, the miners throughout the entire mine were under the peril of an imminent danger while Badger, over a 2-day period, was obtaining signatures of the electricians who worked at the mine.

Since the primary purpose for issuing Order No. 631937, or any other imminent-danger order, is to withdraw miners from the area of danger, the inspectors completely failed to carry out their obligation under the Act by failing to specify the "entire mine" as the area from which the miners should be withdrawn until such time as all electricians were made aware of the requirement that they never have another person reenergize equipment which they had deenergized for the purpose of working on it. In other words, the miners were continuing to work at the mine throughout the period during which the imminent-danger order was in effect. Many of the electricians did not sign the statement saying that they would not have another person deenergize equipment until September 24, 1980. Therefore, if the "practice" was as widespread and as hazardous as it would have had to be to justify the issuance of an imminent-danger order, the inspectors cannot justify allowing the miners to continue working for 2 days while the electricians were being made aware of the imminent danger which existed throughout that period.

There are other aspects about Order No. 631937 which support a finding that it should be vacated. Badger did not request that the order be terminated because Badger thought it had eliminated the dangerous condition causing the imminent danger when it withdrew the defective circuit breaker from the mine. Therefore, the imminent-danger order was technically in effect until it was officially terminated on October 2, 1980. At that time, the justification for terminating the order was that "[m]anagement has given specific instructions to each qualified electrician at the mine to comply with the instructions mentioned in the order." Since the order was not terminated until October 2, 1980, the inspectors had allowed the miners to continue working in the mine from September 22, 1980, the day the order was issued, to October 2, 1980, without Badger's having any idea that its mine or personnel were under some sort of binding withdrawal order.

The cases cited by the Secretary in support of his action of having issued Order No. 631937 are not persuasive. In the Itmann case, supra, the area from which miners were withdrawn

was unsupported roof at a point where a roof fall had occurred. There is no doubt as to what constituted the imminent danger in that case. The danger was the falling of unsupported roof. The "practice" which the miners were barred from doing was the act of walking under the unsupported roof. Itmann was required to erect timbers and planks to prevent miners from going under the unsupported roof before the order was terminated (2 FMSHRC at 1648). Therefore, the "practice" of walking under the hazardous roof was necessarily terminated at the same time the bulwark was constructed to stop the miners' "practice" of walking under unsupported roof.

Judge Laurenson distinguished his finding of an imminent danger in the Itmann case from his finding of no imminent danger in Sharp Mountain Coal Co., 3 FMSHRC 115 (1981), by pointing out that the imminent danger order in the Itmann case was written moments after the inspector saw a miner walk under unsupported roof, as compared with the imminent-danger order in the Sharp Mountain case in which the order was written 11 days after the inspectors had observed nonpermissible caps and fuses in Sharp Mountain's coal mine. Judge Laurenson held that the mere existence of nonpermissible caps and fuses did not create an imminent danger and that the inspectors had failed to find that Sharp Mountain's owners were actually using the nonpermissible caps and fuses at all, much less using them in a hazardous manner.

The inspectors in this proceeding acted like those in the Sharp Mountain case in issuing an imminent-danger withdrawal order without having seen any electrician have another person reenergize equipment which he had just deenergized for the purpose of working on it. The inspectors had simply interviewed the chief electrician after Richard Lambert's death and had learned that the chief electrician had turned the power off and on after having received, by telephone, Lambert's instructions to do so. At no point in Order No. 631937 did the inspectors state that the imminent danger cited in their order was Badger's "practice" of having equipment reenergized by a person other than the one who deenergized it. The conditions and practices described in the order simply allege that Badger had violated sections 75.511 and 75.509. Those violations, by themselves, do not normally result in an imminent danger and the inspector who wrote the order agreed at the hearing that an imminent danger did not exist at the time they were examining the defective circuit breaker because the power was off. Nevertheless, at the time the order was written, the alleged practice of having equipment reenergized by a person other than the person who deenergized it did exist and continued to exist until September 24, 1980, when all electricians had signed the statement saying that they would not test equipment with power on unless it was necessary to do so and would not ask someone else to reenergize equipment which they had personally deenergized.

In the Peabody case, supra, cited by the Secretary, in support of his arguments that Order No. 631937 was properly issued under section 107(a) of the Act, the imminent-danger order was issued 3 days after a fire had occurred, but instrument tests were being made at the time the order was issued and those tests showed that carbon monoxide and inadequate oxygen continued to exist in the mine at the time the order was issued. The order was not terminated until such time as instrument readings showed that the levels of carbon monoxide and oxygen were within acceptable limits.

In Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975), the court stated that an inspector has a difficult job because he has to be concerned about safety while coal companies are concerned about production and profit. Therefore, the court stated that an inspector's imminent-danger order should be sustained unless the evidence shows that he has clearly abused his discretion. I agree with the court's statement and I have never held that an imminent-danger order was invalid unless I believed that the inspector had clearly abused his discretion in issuing it. The evidence in this proceeding shows that the inspectors clearly abused their discretion by stretching the concept of an imminent danger beyond its reasonable limits.

The inspectors clearly abused their discretion in this case (1) by failing to describe circumstances which actually created an imminent danger, (2) by failing to advise Badger that the "1 Left vacuum circuit breaker serial No. 4986" was not the equipment which had to be withdrawn and was not the area from which miners had to be withdrawn, (3) by failing to advise Badger that they were withdrawing a "practice" of having another person reenergize equipment who had not deenergized it in the first instance, and (4) by failing to withdraw any miners from the mine while the alleged imminent danger was being eliminated by having the electricians, over a 2-day period, sign a statement that they would not trouble shoot or test equipment with the power on unless absolutely necessary, and would not have another person reenergize equipment which they had deenergized (Exh. 6). For the foregoing reasons, I find that Order No. 631937 was improperly issued and should be vacated as hereinafter ordered.

The Question of Whether Section 75.509 Was Violated

Badger's Arguments

Although I have found above that Order No. 631937 should be vacated, the Commission has held that violations cited in withdrawal orders survive vacation of the orders (Island Creek Coal Co., 2 FMSHRC 279 (1980), and Van Mulvehill Coal Co., 2

FMSHRC 283 (1980)). Therefore, it is necessary to determine whether Order No. 631937 validly cited a violation of section 75.509 (Finding No. 12, supra).

Badger's brief (p. 7) emphasizes the word "work" in section 75.509 which provides that "[a]ll power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing." Badger states that the language of section 75.509 is quite clear and easily interpreted because it obviously prohibits the performance of work on energized equipment and allows trouble shooting or testing of energized equipment when necessary. Badger avers that the Secretary has made the decision that doing work on energized equipment is so hazardous that it should be absolutely prohibited, but the Secretary has also recognized that an electrician may use his discretion to trouble shoot or test energized equipment when he deems it necessary to do so.

Badger claims that the foregoing interpretation is reasonable because the Secretary has other regulations which restrict the performance of work on electrical equipment by anyone other than a properly qualified and properly trained electrician. Badger correctly notes that a qualified electrician will try to determine what is wrong with electrical equipment while the equipment is deenergized, if possible, just as Lambert attempted to do so in this proceeding (Finding Nos. 2, 3, and 4, supra).

Badger's brief (p. 9) stresses the fact that each qualified electrician is allowed, under the provisions of section 75.509, to use his own discretion in determining when it is necessary to trouble shoot or test electrical circuits with the power on. Badger recognizes that MSHA's Underground Manual does not have the force of regulations (King Knob Coal Co., Inc., 3 FMSHRC 1417 (1981)), but notes that the policy for application of section 75.509, as stated in the manual, is as follows (Exhibit P):

Section 75.509 applies when electrical work
is to be performed on a machine or a machine trail-
ing cable. * * *

"Trouble shooting or testing" for the purpose
of Section 75.509 would include the work of locating
a problem in the electric circuits of an energized
machine, but would never include the actual repair
of such circuits with the machine energized.

MSHA's Electrical Manual makes similar policy statements about the application of section 75.509 and states that examples of trouble shooting or testing which may be performed with equipment energized includes "[v]oltage and current testing" (Exhibit 8, page 48).

Badger's brief (p. 10) argues that Lambert, the electrician who is charged with having violated section 75.509, was doing precisely the kind of trouble shooting or testing which MSHA's manuals define as permissible activities under section 75.509. Badger's brief (p. 11) concludes, therefore, that Lambert did not violate section 75.509 and that the citation should be vacated.

The Secretary's Arguments

The Secretary's brief (p. 10) contends that Lambert, as a trained and certified electrician, should have been able to determine the cause of the circuit breaker's malfunction without having the circuit breaker energized. As proof that it was not necessary to have the circuit breaker energized to determine the cause of the malfunction, the Secretary notes that the investigating team of seven persons was able to determine the cause of the malfunction with the power off by using an ohmmeter. The Secretary concedes that it took the team 3-1/2 hours to find the malfunction, but argues that time is not a factor to be considered where safety is involved.

The Secretary cites Judge Kennedy's decision in Consolidation Coal Co., 2 FMSHRC 866 (1980), and argues that Judge Kennedy's holding in that case to the effect that a restricted application of section 75.509 "* * * is contrary to the exception which permits troubleshooting with the power on where the evidence shows, as it does here, that without the power on the trouble found was not reasonably susceptible of correction" (2 FMSHRC at 867). The Secretary supports his argument by stating that section 75.509 "* * * prohibits trouble shooting with the power on only where it can be shown that the trouble encountered is reasonably susceptible of repair without power on" (Secretary's brief, p. 11). The Secretary says that the foregoing assertion was proven to be correct in this proceeding because (Br., p. 11):

* * * The testimony offered on behalf of MSHA at trial establishes the fact that the problem was reasonably susceptible of being located and repaired without power. Thus, the more limited meaning of the regulation--trouble shooting without power on--rather than the exception, was applicable in this case.

The Secretary also notes that Lambert was not wearing any type of protective clothing and that if he had worn protective clothing, the accident might not have resulted in his death.

The Preponderance of the Evidence Does Not Support a Finding of a Violation of Section 75.509

MSHA did not challenge at the hearing the fact established by Badger to the effect that Lambert was a well-qualified electrician who had had nearly 11 years of experience as an underground electrician and who had been a shift maintenance foreman for 3 years and 9 months (Finding No. 2, supra). He had discovered the malfunction in the circuit breaker on Friday and had advised the chief electrician of that fact. Lambert also volunteered to come in on the following Saturday for the purpose of repairing the malfunction. He cut off all power to the circuit breaker and locked the gate which had to be opened before anyone could reenergize the circuit breaker (Finding Nos. 2 and 3, supra). After examining the circuit breaker with the power off, he found a loose connection on the shunt trip coil and believed that was the cause of the malfunction. At that time, he had the chief electrician, Guy Steerman, to reenergize the circuit breaker so that he could trouble shoot or test the performance of the coil. Lambert's testing failed to show that the malfunction had anything to do with the loose wire which he had previously discovered (Finding No. 4, supra).

Lambert's checking of the circuit breaker was interrupted by his attendance of a foremen's meeting on the surface of the mine. After the meeting, Lambert discussed the malfunction of the circuit breaker with the chief electrician and another management employee. During the discussion, Lambert was asked to check two terminals in the low-voltage portion of the circuit breaker with a voltmeter (Finding Nos. 5 and 6, supra).

Lambert returned underground and examined the circuit breaker for an additional period without having the equipment energized. Lambert then removed the cover from the circuit breaker to facilitate his examination of the low-voltage terminal board, but, in doing so, he also removed the insulated protective shield over the high-voltage portion of the circuit breaker (Finding No. 24, supra; Exhs. H and 10). Lambert then had Steerman reenergize the circuit breaker so that he could check the low-voltage terminal board. Steerman did not know, when he reenergized the circuit breaker, that Lambert had removed the protective shield over the high voltage portion of the circuit breaker (Finding No. 24, supra).

The preponderance of the evidence, therefore, shows that a well trained and qualified electrician had tried to determine the cause of the malfunction after considerable examination of the deenergized circuit breaker. He had then discussed the problem with his supervisor, the chief electrician, and with another supervisory employee who had requested that the low-voltage terminal board be checked (Finding No. 25, supra).

Lambert's having the circuit breaker reenergized was done only after he had exhausted his ability to locate the malfunction without energizing the equipment to test some components suspected of being defective. In such circumstances, the evidence shows that Lambert was following the provisions of section 75.509.

The Secretary's argument to the effect that the investigating team found the cause of the malfunction by trouble shooting and testing with the power off is not supported by the preponderance of the evidence. It is true that an investigating team composed of an electrical engineer and six other persons having a great deal of electrical training and experience examined the circuit breaker for 3-1/2 hours with the power off and thought that they had traced the malfunction to excessive wear in the auxiliary switch. They formed that erroneous conclusion despite the fact that the trip counter on the circuit breaker showed only 230 operations when, in fact, the switch should have worked for thousands of times before wearing sufficiently to malfunction because of excessive wear (Finding No. 21, supra).

The Secretary's claim that the investigating team had discovered the cause of the malfunction by deenergized trouble shooting is refuted by the fact that when the malfunctioning circuit breaker was removed from the mine so that a new auxiliary switch could be installed, the circuit breaker continued to malfunction. Thereafter, Badger's personnel replaced a vacuum bottle and other parts but the circuit breaker continued to malfunction. After 3 days of testing with the power on and off, it was finally determined that there was a design flaw in the operating handle on the circuit breaker. It was necessary for the manufacturer of the circuit breaker to redesign and reconstruct the parts in the operating handle before the circuit breaker ever performed properly (Finding No. 27, supra; Exhs. J and N).

The preponderance of the evidence shows that the investigating team of seven electricians could not and did not find the cause of the malfunction with the power off the circuit breaker. Moreover, modified Order No. 634063, which was issued on September 20, 1980, under section 103(k) of the Act, withdrew miners from the area of the defective circuit breaker until the malfunction was corrected, but that order was terminated 5 days before the circuit breaker was actually repaired with the statement that "[t]he auxiliary switch for the breaker control circuit of the Line Power 12,470 vacuum circuit breaker S.N. 4986 has been repaired by a factory service representative" (Exh. A, p. 4). The termination of Order No. 634063 was written by the same inspector who wrote the order citing Badger for a violation of section 75.509. The inspector's entry on the termination sheet shows that he did not actually know what was wrong with the circuit breaker having Serial No. 4986.

In the circumstances discussed above, the Secretary is also incorrect in contending that the statement by Judge Kennedy in his Consolidation decision, supra, is inapplicable to the facts in this proceeding. The circuit breaker which malfunctioned in this instance was a very complex piece of equipment which had been designed by Badger's chief electrical engineer and constructed by Line Power Manufacturing Company in accordance with his specifications. Consequently, the belief expressed by Judge Kennedy in the Consolidation case may appropriately be used in this proceeding, namely, that a restricted application of the provisions of section 75.509 is irreconcilable with the exception in that section "* * *" which permits troubleshooting with the power on where the evidence shows, as it does here, that without the power on the trouble found was not reasonably susceptible of correction" (2 FMSHRC at 867).

Inasmuch as Badger's electrical maintenance foreman tried to determine the cause of the malfunction with the power off, and performed trouble shooting and testing with the power on, only after such testing with the power on became essential for locating the malfunction, I find that Badger did not violate section 75.509 as alleged in Order No. 631937.

The Question of Whether Section 75.511 Was Violated

Badger's Arguments

Badger's brief (p. 11) begins its discussion of the alleged violation of section 75.511 by first quoting the pertinent portion of section 75.511 with emphasis on the word "persons", as used throughout the section, as follows:

No electrical work shall be performed * * * except by a qualified person or by a person trained to perform electrical work * * *. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work * * * such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons, or if such persons are unavailable, by persons authorized by the operator or his agent. [Emphasis supplied by Badger.]

Badger argues that the Secretary's interpretation of section 75.511 is unreasonable because he argues that only the person who locks out power to equipment is permitted to remove the lock if that person is anywhere at the mine site. Badger's brief contends that the use of the word "persons" in the plural shows that the Secretary understands that in many instances several persons will be performing electrical work or testing on equipment. In such circumstances, Badger's brief (p. 12) claims that when more than one person is working on the equipment,

the regulation clearly permits any of the persons who are working on the equipment to reenergize the equipment for testing because each of them would be a person who would be aware of the dangers involved and of the precautions to be taken.

Badger further notes that the disconnecting device here involved was located 4,800 feet from the circuit breaker so that Lambert would have had to make a round trip of almost 2 miles just to cut the power on and off to the circuit breaker. Badger argues that the purpose of the regulation is to insure that reenergizing does not occur accidentally when individuals are performing electrical testing or work on machinery.

Badger claims that if the Secretary intended that the person who deenergizes equipment must be the person who reenergizes that equipment, if that person is anywhere at the mine site, he should have written section 75.511 to so provide. Badger's brief (p. 13) contends that the Secretary did not so provide because he recognized that it is necessary in an industrial society for workers to rely upon each other in the performance of difficult and dangerous tasks--such as crane operators who move heavy loads while being directed by fellow workers.

Finally, Badger argues that the last sentence of section 75.511 should be interpreted to mean that the person who deenergized equipment is unavailable at the mine site for the purpose of reenergizing the equipment, if the person who originally deenergized the equipment is 1.8 miles, or a greater distance than that, from the place where the disconnects were opened and locked out.

The Secretary's Arguments

The Secretary's brief (p. 9) maintains that section 75.511 should be interpreted exactly as written, that is, that the person who locks out or tags equipment is required to be the person who removes the lock and restores power to the equipment. The Secretary contends that no exception should be granted just because the disconnecting device is a considerable distance from the equipment being worked on because the safety considerations are more important than the factors of time or distance.

The Preponderance of the Evidence Shows that a Violation of Section 75.511 Occurred

I do not believe that Badger's argument to the effect that the use of the word "persons" in the plural in section 75.511 means that if several persons are working on electrical equipment, any single person may be permitted to reenergize equipment regardless of whether he is the individual who deenergized the equipment in the first instance. The initial sentence in section 75.511 provides that no "person" shall perform work on electrical

equipment unless he is qualified to do so or is directly supervised by a qualified person. The next two sentences of section 75.511 switch to the use of the word "persons" in the plural, but the next two sentences also refer to "disconnecting devices" in the plural and to "locks" and "tags" in the plural. Therefore, I believe that the use of the word "persons" in the plural has no significance other than an intent by the Secretary to be all inclusive so that no one is likely to conclude that any particular type of disconnecting device or tag is exempt from the provision that the person who deenergizes is also required to be the person who reenergizes.

The interpretation advocated by Badger would promote lack of safety because any one of "several" persons working on equipment could decide that it was time to test or trouble shoot with the power on and proceed to turn on the power before it was entirely clear to all persons that power was going to be restored.

Badger's other argument, however, has considerable appeal, that is, that Lambert was still, in effect, in charge of turning the power on and off because Steerman was standing by the telephone for the sole purpose of receiving specific instructions from Lambert as to when Lambert wanted the circuit breaker energized and when he wanted it deenergized. Badger is correct in contending that the purpose of section 75.511 is to assure that reenergizing does not occur accidentally when individuals are performing electrical testing or work on equipment. Section 75.511 is a statutory provision which appeared as part of section 305(f) of the Federal Coal Mine Health and Safety Act of 1969. House Report No. 91-563, reprinted in the Legislative History of the Federal Coal Mine Health and Safety Act of 1969 explained the intent of section 75.511 as follows (Leg. Hist., p. 1078 or Report, p. 48):

* * * Switches must be locked in an open position where the power is disconnected to prevent accidental reclosing. The persons performing the work must retain possession to the key to guard against such reclosing.

Although the legislative history supports Badger's claim that the purpose of section 75.511 is to assure that equipment on which a person is working will not be accidentally reenergized, the remaining portion of Badger's argument fails to provide that assurance. When all of the facts are considered, it is clear that Lambert and Steerman violated both the spirit and the letter of section 75.511.

The first point which is important is that when Lambert deenergized the circuit breaker on the morning of September 20, 1980, he opened the switch on the surface to stop power from

flowing to the underground circuit breaker which was located 4,800 feet from the disconnecting switch. Lambert then locked the gate through which a person had to pass to close the disconnecting switch, but Lambert violated the letter and spirit of section 75.511 by placing the key to the lock behind a high-voltage sign instead of retaining possession of the key to assure that someone else did not know the hiding place of the key so as to remove it from behind the high voltage sign for the purpose of entering the area where the disconnecting switch was located.

If Lambert had kept the key in his possession, as was intended by Congress when it drafted section 75.511, Lambert would have been unable to call Steerman later in the morning for the purpose of asking Steerman to reenergize the circuit breaker. Since Steerman did not participate in the locking out of power to the circuit breaker, Badger's argument is flawed in contending that Lambert and Steerman complied with the spirit, if not the letter, of section 75.511, because both of them were among the "persons" who locked out the power for the purpose of working on the circuit breaker.

The second point which is important is that, after lunch, when Lambert returned underground to work on the circuit breaker, he asked Steerman to stay near the telephone which was close to the disconnecting switch in the substation so that Lambert could give Steerman instructions as to when Lambert wanted the circuit breaker energized and when he wanted it deenergized. At that point in Lambert's work on the circuit breaker, no person (in the singular or plural) actually locked out the power because Steerman did not consider it necessary to lock out the power since he was within sight of the substation at all times (Finding Nos. 5 and 6, supra). The only exception in section 75.511 to the requirement that the power be "locked out" is "* * * where locking out is not possible". Since Lambert had locked out the power in the first instance before going underground on the morning of September 20, there is no doubt but that the disconnecting switch was capable of being locked out. Therefore, Lambert and Steerman clearly violated section 75.511 when neither one of them locked out the power in the afternoon when Lambert returned underground to work on the circuit breaker. As a matter of fact, section 75.511 does not specifically refer to the reclosing of the switch or the reenergizing of equipment. The last sentence of section 75.511 refers only to the fact that the persons who install the locks or tags shall be the persons who remove the locks or tags.

For the reasons given above, I find that the preponderance of the evidence supports a finding that Badger violated section 75.511. Since I have found that Badger violated section 75.511 by failing to lock out the power to the circuit breaker, it is actually unnecessary for me to decide the arguments about

Lambert's unavailability and whether a person other than the one who deenergizes may reenergize if the disconnecting switch is 4,800 feet from the equipment being tested, but I shall give my views on those points so that Badger may argue them before the Commission if a petition for discretionary review should be granted by the Commission.

I agree with the Secretary that the matter of reenergizing high-voltage equipment which is being worked on or tested is a matter of vital importance to the safety of the miners. The question of the distance between the equipment and the disconnecting switch should not be allowed to take precedence over the importance of assuring that equipment does not accidentally become reenergized while it is being worked on or tested. I also agree with the Secretary that so long as the person who locks out equipment is available at the mine, he is available for the purpose of removing the locks and reenergizing the equipment. As indicated above, Congress intended that the person who locks out the equipment be the person who is going to perform the work and Congress also intended that the person who locks out the equipment be the person who retains possession of the key. The aforesaid considerations assure that the person who has the key will also be the person who removes the lock. If Lambert had retained possession of the key, as intended by Congress, it could hardly have been argued that he was "unavailable" for the purpose of removing the lock.

DOCKET NO. WEVA 81-37-R

The Question of Whether Section 75.803 Was Violated

Badger's Arguments

The violation of section 75.803 was alleged in Citation No. 631938 issued September 22, 1980, pursuant to section 104(a) of the Act. The condition or practice described in the citation is given in full in Finding No. 19, supra. Briefly, the violation cited was the failure of Badger to have an operative fail-safe ground check system which would remove power from the mine in case a grounding circuit was broken. Section 75.803 provides as follows:

On and after September 30, 1970, high-voltage, resistance grounded systems shall include a fail safe ground check circuit to monitor continuously the grounding circuit to assure continuity and the fail safe ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken, or other no less effective device approved by the Secretary or his authorized representative to assure such continuity, except that an extension of time, not in excess of 12 months, may be permitted by the Secretary on a mine-by-mine basis if he determines that such equipment is not available.

Badger's brief (p. 15) states that MSHA cited it for a violation of section 75.803 because Badger continued to mine coal after it was determined that the circuit breaker had malfunctioned. Badger claims that it learned of the problem during the 4 p.m. to midnight shift on Friday, September 19, 1980, and that the next shift was a maintenance shift which began at 8 a.m. and ended at 4 p.m. on Saturday, September 20, 1980. Badger states that the only persons in the mine on Saturday were two men who were working on a continuous-mining machine and some other men who were doing track work (Finding nos. 4 and 6, supra). Badger's brief (p. 15) concedes "* * * that the vacuum circuit breaker was not doing what it should have been capable of doing, but this was due to a design defect and not a failure on the part of Badger, or a failure to continuously monitor the grounding circuit." Badger also notes that the miners who were working in the mine on Saturday were aware of the fact that Lambert was working on the circuit breaker during their shift.

Badger also contends that any finding of a violation of section 75.803 must rest on the basis that the circuit breaker was being tested in the mine as opposed to removing it to the surface for testing. Badger asserts that finding a violation on the failure to remove the circuit breaker to the surface would be a strained construction of the section and would be unwarranted in the circumstances which existed in this instance.

The Secretary's Arguments

The Secretary's brief (pp. 13-14) argues that Citation No. 631938 correctly alleges a violation of section 75.803. The Secretary claims that the fail-safe ground check circuit would not cause the circuit breaker to open or shut off power because the auxiliary switch was inoperative. It is further asserted that if the auxiliary switch does not work, then the ground monitor system cannot cause the circuit breaker to trip when either the ground check wire or ground wire is broken. The Secretary maintains that since the fail-safe ground check system could not do the job it was intended to do, there was a violation of section 75.803.

The Preponderance of the Evidence Supports a Finding of a Violation of Section 75.803

There is some confusion by the parties as to what is being charged by the Secretary with respect to the violation of section 75.803. As I have hereinbefore explained in the portion of this decision devoted to the discussion of the imminent-danger issues, the MSHA employees who participated in citing Badger for a violation of section 75.803 did not actually know at the time they cited Badger for a violation of section 75.803 what was causing the circuit breaker to malfunction. The Secretary's brief (pp. 13-14) continues to allege that the circuit breaker did not work

because the auxiliary switch was defective. As explained in Finding Nos. 27 through 30, the actual cause of the circuit breaker's malfunction was a mechanical problem in the design of the ratchet lever constructed by Line Power Manufacturing Company. Therefore, Citation No. 931938 contains some factual statements which are not supported by the preponderance of the evidence.

The fact remains, however, as conceded by Badger in its brief (p. 15), that the circuit breaker would not turn off the power as it was supposed to do. Badger's electrical engineer, who designed the circuit breaker, also conceded that the circuit breaker would not cut off the power, but he argued that Badger had not violated section 75.803 because the ground monitoring system was working in a technical fashion because it was monitoring the continuity of the grounding circuit. Consequently, the difficulty with the parties' arguments is that neither one specifically addresses the defects in the other's arguments. All that is required to violate section 75.803 is for the fail-safe ground system not to "* * * cause the circuit breaker to open when either the ground or pilot check wire is broken."

It is technically correct, as Badger claims, that the failure of the circuit breaker to cut off power was not specifically related to the ground or pilot check wire because the actual trouble was confined to the design flaw in the ratchet lever as stated in Finding Nos. 27 through 30, supra. Nevertheless, it is also correct, as the Secretary argues, and as Badger concedes, that the circuit breaker was not doing what it was constructed to do. Section 75.803, like section 75.511, is a statutory provision which was a part of the 1969 Act, as indicated above. The legislative history or House Report No. 91-563 states with respect to section 75.803 or section 308(d) of the Act (History, p. 1081 or Report, p. 51) that "[s]ubsection (d) requires that fail-safe ground check system be installed with each underground high-voltage circuit to remove the power in case the grounding circuit is broken."

It is obvious, therefore, that Congress intended for the fail-safe ground check system to cut off the power in case a grounding fault occurs. The use of the term "fail safe" is meaningless if it can be argued that the fail-safe ground check system was working and yet could not cut off the power because of a mechanical problem, instead of an electrical problem.

Although MSHA failed to terminate Order No. 631937 for the right reason, it did terminate Citation No. 631938 for the correct reason, namely, that the fail-safe ground check system was restored to proper operation by the removal of the defective circuit breaker from the mine and replacement by a circuit breaker which worked properly. In other words, regardless of

the technicality of what was actually inoperative about circuit breaker Serial No. 4986, it is a fact that the fail-safe ground check system was restored to an operative condition when the defective circuit breaker was removed from the mine and replaced with an operative circuit breaker. Therefore, I find that a violation of section 75.803 occurred as alleged and that Citation No. 631938 should be sustained because it is a fact that the circuit breaker was an integral part of the fail-safe ground check system in that it prevented the system from doing the job it was placed in the mine to do, namely, cut off power when an electrical fault occurred.

Since Badger's notice of contest filed in Docket No. WEVA 81-37-R was filed to challenge the question of whether a violation of section 75.803 had been properly alleged in Citation No. 631938, Badger's notice of contest will hereinafter be denied and Citation No. 631938 will be affirmed as having properly alleged a violation of section 75.803.

CIVIL PENALTY ISSUES

DOCKET NO. WEVA 81-285

The Secretary's petition for assessment of civil penalty filed in Docket No. WEVA 81-285 seeks assessment of civil penalties for the violations of sections 75.509 and 75.511 alleged in imminent-danger Order No. 631937 hereinbefore considered. I have previously found that no violation of section 75.509 occurred. Therefore, the Secretary's petition for assessment of civil penalty will hereinafter be dismissed to the extent that it seeks assessment of a penalty for the violation of section 75.509.

In assessing a penalty for the violation of section 75.511, which I have found did occur, I shall use the six criteria listed in section 110(i) of the Act, rather than the penalty formula explained in 30 C.F.R. § 100.3 and used by the Secretary for the purpose of proposing civil penalties (Rushton Mining Co., 1 FMSHRC 794 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); U.S. Steel Corp., 1 FMSHRC 1306 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); Peabody Coal Co., 1 FMSHRC 1494 (1979); Co-Op Mining Co., 2 FMSHRC 784 (1980); and Sellersburg Stone Co., 5 FMSHRC 287 (1983)).

Assessment of a Penalty for the Violation of Section 75.511

Size of Badger's Business

The parties stipulated to the facts given in Finding No. 1, supra. The production tonnage and other facts given in Finding

No. 1 support a conclusion that Badger is a large operator and that any civil penalties assessed in this proceeding should be in an upper range of magnitude insofar as they are determined under the criterion of the size of Badger's business.

The Question of Whether the Payment of Penalties Will Cause Badger To Discontinue in Business

Badger did not present any evidence at the hearing pertaining to its financial condition and none of the stipulated findings of fact address the question of whether the payment of penalties would cause Badger to discontinue in business. The Commission held in the Sellersburg case, supra, that a judge may conclude that payment of penalties would not cause a company to discontinue in business if it fails to present any evidence in support of that contention. Therefore, I find that any penalties which may be assessed in this proceeding need not be lowered under the criterion that Badger is in a difficult financial condition.

History of Previous Violations

It was stipulated in Finding No. 31, supra, that during the 24 months preceding the occurrence of the violations alleged in this proceeding that Badger had paid penalties with respect to 52 alleged violations. It has been my experience that the occurrence of 52 violations over a period of 2 years is not unusual for a large operator. Also it has always been my practice to consider the question of whether an operator has previously violated the same section of the regulations for which I am required to assess a civil penalty in a given case. Badger has not previously violated sections 75.511 or 75.803. If Badger had had no history of previous violations, I would have reduced any penalty otherwise assessable; if Badger had had a history or previously violating sections 75.511 or 75.803, I would have increased the penalty somewhat. Therefore, Badger's rather favorable history of previous violations justifies a finding that the penalties otherwise assessable be neither increased nor decreased under the criterion of history of previous violations.

Good-Faith Effort To Achieve Rapid Compliance

MSHA required Badger to obtain the signatures of all its electricians on a piece of paper to show that all of them would trouble shoot or test equipment with the power on only when absolutely necessary and would personally unlock and reenergize any equipment which they had deenergized in the first instance. That list contains 65 names or signatures and they were all obtained within a 2-day period (Exh. 6). Since the electricians worked on three different shifts, it appears that Badger obtained their signatures in an unusually short period of time,

especially when it is considered that Badger thought that abatement of the violation was based entirely upon its having promptly removed from the mine the defective circuit breaker which had originally been cited as the source of the imminent danger alleged in Order No. 631937 (Finding No. 26, supra).

In the circumstances described above, I believe that any penalty hereinafter assessed for the violation of section 75.511 should be reduced by \$100 for Badger's outstanding effort to achieve rapid compliance.

Negligence

Badger's brief (p. 16) refers to some inspectors' statements evaluating gravity and negligence which were submitted as a part of Badger's brief. MSHA failed to introduce the inspectors' statements as a part of the record and they were not submitted as a part of the Secretary's petition for assessment of civil penalty in Docket No. WEVA 81-285. The inspectors testified at the hearing, however, that they believed the violation of section 75.511 contributed to Lambert's electrocution (Finding No. 22, supra). Therefore, I do not believe that the inspectors' statements submitted as a part of Badger's brief make any allegations which were not made at the hearing.

I have already held that the complexity of the circuit breaker and the unusual design flaw which caused the circuit breaker to malfunction justified Lambert's having performed trouble shooting with the power on. In trying to evaluate the question of Badger's negligence with respect to the violation of section 75.511 here under consideration, it is necessary to consider whether Lambert would have acted any differently from the way he did act if he had personally gone back to the surface substation for the purpose of removing the lock and reenergizing the circuit breaker. The evidence certainly shows that Lambert knew the power was on at the time he was trouble shooting and fell into the high-voltage portion of the circuit breaker (Finding Nos. 6 and 24, supra).

It is undisputed that Lambert, upon his own initiative, removed the insulated protective board which covered the high-voltage portion of the circuit breaker. Lambert did not discuss with Steerman on the telephone that he had removed the insulated board and Steerman stated that he would have instructed him to replace the board before trouble shooting with the power on if he had known that Lambert had removed the board (Finding No. 24, supra). Exhibits E, H, and 10 in this proceeding show that the insulation board covered nearly all of the interior of the high-voltage portion of the circuit breaker and support to some extent Badger's claims that Lambert had sufficient room to trouble shoot on the low-voltage portion of the circuit breaker without coming into contact with the high-voltage components.

The facts in this proceeding are somewhat like those in Nacco Mining Co., 3 FMSHRC 848 (1981), in which the Commission held that the operator was not negligent when a foreman with proper training, who had previously shown good judgment in discharging his responsibilities, acted aberrantly by exposing himself to unsupported roof, in a wholly unforeseeable manner, which resulted in his death. I do not believe, however, that the Commission's finding of no negligence in the Nacco case should be applied in this proceeding because, in this proceeding, other supervisors also contributed to Lambert's trouble shooting and testing with the power on by asking Lambert to check the low-voltage terminal board. The other supervisors were fully aware of the proximity of the low-voltage terminal board to the high-voltage portion of the circuit breaker. Therefore, they should have made certain that Lambert did his own locking and unlocking of the disconnecting switch in the substation. Steerman's failure to lock out the switch while he was awaiting for instructions from Lambert on the telephone could have resulted in an inadvertent reenergizing of the circuit breaker at a time when Lambert was not prepared to trouble shoot with the power on. If Steerman had been distracted by some other event at the mine, there is a possibility that the disconnecting switch could have become thrown accidentally so as to catch Lambert with the power on in the circuit breaker at a time when he was not prepared to trouble shoot or test with the power on.

Additionally, if Lambert had come to the surface to reenergize the circuit breaker because of Steerman's refusal to reenergize the circuit breaker for Lambert, Steerman's adherence to strict safety rules might well have caused Lambert to work around the circuit breaker with an increased amount of care which might have prevented his coming into contact with the high-voltage components which caused his death. It is also possible that if Lambert had come to the surface to reenergize the circuit breaker, he would have mentioned that he had removed the protective shield over the high-voltage components and that would have given Steerman the opportunity to learn of his lack of prudence so that he could have instructed Lambert to replace the protective shield before he did any trouble shooting or testing with the power on.

It is true that the discussion above is based on speculation, rather than facts, but there have been many deaths by electrocution in coal mines and it is difficult to show that management was not in any way negligent in the way power was turned off and on to the circuit breaker while Lambert was trouble shooting and testing. Therefore, I find that the violation of section 75.511 was associated with ordinary negligence.

The Secretary's brief (p. 15) argues that Badger was grossly negligent in allowing the violations of section 75.509 and

75.511 to occur. The Secretary's discussion of gross negligence includes an argument that Lambert had no reason to feel that he had to trouble shoot or test the circuit breaker with the power on. I have hereinbefore shown that the evidence fails to support that contention.

I am agreeing with the Secretary's argument to the extent of finding that Badger showed ordinary negligence in connection with the violation of section 75.511, but I do not think that Steerman's participation in the turning of power on and off to the circuit breaker rises to the level of gross negligence because it is a fact that Steerman did remain by the telephone near the substation so as to be able to act immediately to any instructions which Lambert might give him. If Steerman had gone back to his office and waited for calls from Lambert or had been indifferent about the hazards associated with taking directions from Lambert as to the deenergization and reenergization of the circuit breaker, I would agree that the violation was associated with gross negligence.

Based on the discussion of negligence above, I find that the portion of the penalty to be assessed for the violation of section 75.511 under the criterion of negligence should be \$1,000.

Gravity

When it is considered that Lambert was working on a circuit breaker whose high-voltage components carried 12,470 volts and that the low-voltage portion of the circuit breaker was located about 12 inches from the insulated high-voltage components (Exhs. E and H), a finding must necessarily be made that it was very serious for Badger's management to fail in any way to follow explicitly all safety precautions associated with trouble shooting or testing such equipment. Badger's arguments to the effect that Lambert's death was not in any way caused by Badger's failure to follow the lock-out procedures required by section 75.511 is based entirely on conjecture because there were no eye witnesses to Lambert's electrocution (Finding Nos. 7 and 8, supra). While it is true that my discussion above under the heading of "Negligence" was also based on speculation, Badger's claim that Lambert slipped and fell into the high-voltage components because of his carelessness in removing the insulated protective shield over the high-voltage components is also based on pure speculation. It is just as possible that Lambert was trying to test the low-voltage portion of the circuit breaker and accidentally touched a high-voltage component with the result that he was severely shocked and fell head first into the circuit breaker (Finding No. 7, supra). Inasmuch as the violation was one of extreme gravity, I believe that the portion of the penalty associated with gravity should be \$2,000.

Summary

I have hereinbefore found that Badger is a large operator, that payment of penalties will not cause it to discontinue in business, that it has a favorable history of previous violations, that it showed an outstanding effort to achieve rapid compliance requiring a reduction in the penalty otherwise assessable in the amount of \$100, that the violation was associated with ordinary negligence warranting a penalty of \$1,000, and that the violation was very serious so as to merit a penalty of \$2,000. The penalties under negligence and gravity amount to \$3,000 which should be reduced by \$100 under rapid good-faith abatement to \$2,900. The total penalty, of course, takes into consideration that Badger is a large operator.

DOCKET NO. WEVA 81-277

The Secretary's petition for assessment of civil penalty filed in Docket No. WEVA 81-277 seeks assessment of a penalty for the violation of section 75.803 alleged in Citation No. 631938 issued under section 104(a) on September 22, 1980. I have already found that a violation of section 75.803 occurred because the fail-safe grounding system could not deenergize power on September 19, 1980.

The findings made above as to the criteria of the size of Badger's business, the fact that payment of penalties will not cause Badger to discontinue in business, and Badger's favorable history of previous violations are also applicable to a determination of the penalty for the violation of section 75.803.

Good-Faith Effort To Achieve Rapid Compliance

Citation No. 631938 was written at 5 p.m. on September 22, 1980, and the citation gave Badger until the next day, September 23, 1980, as the time within which the violation should be abated. The inspector wrote a subsequent action sheet on September 23, 1980, terminating the citation on the ground that the defective circuit breaker had been removed from the mine and replaced with a circuit breaker which would allow the fail-safe grounding system to cut off power if a fault should occur. Inasmuch as Badger abated the violation within the time given by the inspector, I find that Badger demonstrated an average good-faith effort to achieve rapid compliance and that the penalty to be assessed for the violation of section 75.803 should neither be increased nor decreased under the criterion of good-faith abatement.

Negligence

Badger's chief electrician had drawn up the specifications which were followed by Line Power Manufacturing Company in constructing the defective circuit breaker. The counter on the

circuit breaker showed that it had successfully worked 230 times so that Badger's management had no reason to believe that it had a defective design problem in the ratchet lever. Even after the circuit breaker malfunctioned, a team of seven electrical experts failed to find the actual cause of the malfunction after spending 3-1/2 hours trying to do so with the power off (Finding No. 21, supra). After the circuit breaker was removed from the mine, the parts which the seven experts thought were defective were replaced, but the circuit breaker still continued to malfunction. Badger's chief electrician and the manufacturer's employees worked the remainder of the week of September 21, 1980, before finally discovering on Thursday, September 25, 1980, that the malfunction was caused by a design flaw in the ratchet in the operating handle. The ratchet was redesigned on Friday and Saturday and a new one, which worked successfully, was installed on Monday, September 29, 1980. The evidence shows, therefore, that Badger's management did not know and could not have foreseen that the circuit breaker would malfunction in the way that it did.

The Secretary's brief (p. 16), however, argues that Badger was grossly negligent in allowing the power to remain on in the mine while miners worked for the remainder of the 4 p.m. to midnight production shift on Friday, September 19, 1980, which was the shift during which Lambert found that the circuit breaker would not cut off power when he tested it for that purpose (Finding No. 2, supra). Badger's brief (p. 15) is silent about the fact that miners were allowed to work for the remainder of the 4-p.m.-to-midnight production shift after the defective circuit breaker was discovered, but argues that the only persons who worked in the mine while Lambert was trying to discover the defect in the circuit breaker on the 8 a.m.-to-4 p.m. maintenance shift on Saturday, September 20, 1980, were seven miners who worked on a continuous-mining machine and some other miners who worked on a haulage track. Badger's brief claims that the miners working on September 20, 1980, were aware that the circuit breaker was being worked on and that the power would be cut on and off during their shift.

Badger's chief electrical engineer conceded that the circuit breaker would not cut off power as it was supposed to at the time Lambert discovered that the circuit breaker was malfunctioning (Finding Nos. 2 and 28, supra). Since Lambert had reported the malfunction to Badger's chief electrician, there is no way for Badger to deny that miners were allowed to work on the 4 p.m.-to-midnight production shift on Friday, September 20, 1980, without having proper protection from an electrical fault if one had occurred. It is also true that two mechanics were allowed to work on a continuous-mining machine on Saturday, September 20, 1980, at the time Lambert was trying to determine what was wrong with the circuit breaker. While power was off part of the time, it was also on part of the time. Therefore, any miners working on electrically powered equipment

were subjected to a possible injury if power had come on at a time when they were not expecting it.

Therefore, the preponderance of the evidence supports the Secretary's argument that Badger's management knew the circuit breaker would not cut off power in case of an electrical fault and yet Badger allowed the miners to work on the 4 p.m.-to-midnight shift on Friday and allowed two mechanics to work on a continuous-mining machine on Saturday without having the protection to which they were entitled. In such circumstances, I find that there was a high degree of negligence associated with the violation of section 75.803 and that a penalty of \$3,000 should be assessed for that violation under the criterion of negligence.

Gravity

While the miners working in the mine were undoubtedly exposed to a possible shock hazard because of the malfunctioning circuit breaker, no one other than Lambert was actually working close to a high-voltage circuit. Some electrical fault would have had to occur before any miner working on either the 4 p.m.-to-midnight shift on Friday or the 8 a.m.-to-4 p.m. shift on Saturday could have been injured. Lambert was not working on the circuit breaker on Friday and his exposure to electrocution on Saturday was not increased by the fact that two mechanics were working on a continuous-mining machine. Therefore, the gravity of the violation of section 75.803 should be examined primarily from the standpoint of the miners who were working in the mine on the 4 p.m.-to-midnight shift on Friday. Some electrical fault would have had to occur before any of the miners working on Friday would have been exposed to a shock hazard. There is no evidence to show that such a fault occurred or that any other electrical equipment in the mine was defective. Therefore, the gravity of the violation of section 75.803, while serious, was not as extreme as Lambert's exposure was when he was trouble shooting in close proximity to 12,470 volts with the power on. For the foregoing reasons, a penalty of \$750 will be assessed under the criterion of gravity for the violation of section 75.803.

Summary

Bearing in mind that Badger is a large operator, that payment of penalties will not cause it to discontinue in business, that it has a favorable history of previous violations, that it demonstrated an average effort to achieve rapid compliance, that there was a very high degree of negligence associated with the violation warranting assessment of a penalty of \$3,000, and that the violation was sufficiently serious to justify a penalty of \$750, a total penalty of \$3,750 will hereinafter be assessed for the violation of section 75.803.

The Request for Finding No. 34

When the parties were suggesting changes in the proposed findings of fact which had been mailed to them, Badger's counsel requested in a draft filed on July 19, 1983, that I include as part of the stipulated findings one which he had suggested as No. 34 in the draft that he had submitted for my consideration. The Secretary's counsel was opposed to inclusion of that proposed finding, and I was also of the opinion that it was more in the nature of a conclusion than a finding of fact. Badger agreed to my omitting it as one of the parties' stipulated findings, but requested in a letter filed on August 29, 1983, that I reconsider the proposed finding at the time I wrote my decision in this proceeding.

I believe that my decision shows that it would be inconsistent with other portions of the decision for me to make Badger's proposed finding No. 34 a part of this decision. Therefore, the request that I make finding No. 34 a part of this decision will hereinafter be denied.

WHEREFORE, it is ordered:

(A) Badger Coal Company's application filed in Docket No. WEVA 81-36-R for review of imminent-danger Order No. 631937 issued September 22, 1980, is granted and Order No. 631937 is vacated to the extent that it alleged the existence of an imminent danger.

(B) Badger Coal Company's notice of contest filed in Docket No. WEVA 81-37-R challenging the validity of Citation No. 631938 issued September 22, 1980, is denied and Citation No. 631938 is affirmed.

(C) The Secretary's petition for assessment of civil penalty filed in Docket No. WEVA 81-285 is dismissed insofar as it seeks assessment of a penalty for the violation of section 75.509 alleged in Order No. 631937 issued September 22, 1980, and granted to the extent that it seeks assessment of a civil penalty for the violation of section 75.511, and Badger Coal Company, within 30 days from the date of this decision, shall pay a civil penalty of \$2,900.00 for the violation of section 75.511 alleged in Order No. 631937 issued September 22, 1980.

(D) The Secretary's petition for assessment of civil penalty filed in Docket No. WEVA 81-277 seeking assessment of a civil penalty for the violation of section 75.803 alleged in Citation No. 631938 issued September 22, 1980, is granted, and Badger Coal Company, within 30 days from the date of this decision, shall pay a civil penalty of \$3,750.00 for the violation of section 75.803 alleged in Citation No. 631938.

(E) Badger Coal Company's request that a proposed finding No. 34 be made a part of this decision is denied.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 12 1984

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 81-13-D
ON BEHALF OF	:	
MILTON BAILEY,	:	MSHA Case No. MADI CD 80-11
	:	
Complainant	:	Bradley-Stephen No. 1 Mine
v.	:	
	:	
ARKANSAS-CARBONA COMPANY,	:	
	:	
and	:	
	:	
MICHAEL WALKER,	:	
	:	
Respondents	:	

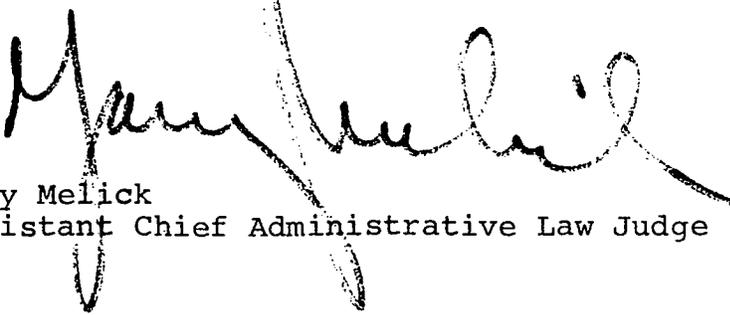
DECISION

Before: Judge Melick

This proceeding is before me on remand from the Commission, 5 FMSHRC at 2056, for a determination in accordance with that decision of the date on which Mr. Bailey informed the Secretary that he no longer sought reinstatement and of the back wages and interest to be awarded Mr. Bailey.

While the Secretary notes that Mr. Bailey informed the Secretary's representative in April 1983, that he no longer sought reinstatement, Mr. Bailey claims back wages only until April 12, 1982, when the Respondents ceased business operations. The Complainant has therefore recomputed a claim, in accordance with the Commission's directive, for \$21,399.96 in back wages and \$5,091.93 in interest. The claim is not disputed by the Respondents and is therefore accepted as final.

Wherefore, the Respondents, Arkansas-Carbona Company and Michael Walker are hereby ordered jointly and severally to pay to Complainant upon receipt of this decision, the total amount of \$26,491.89.



Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 12 1984

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
ON BEHALF OF :
JAMES McNEIL TAYLOR, : MSHA Case No. HOPE CD-83-25
Complainant :
v. : No. 4 Mine
BUCK GARDEN COAL COMPANY, :
Respondent :

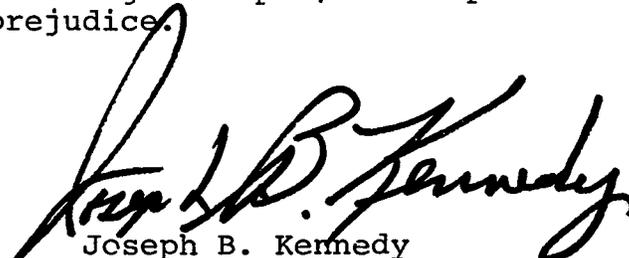
DECISION

Before: Judge Kennedy

The parties move for approval of the captioned wrongful discharge matter upon a showing that the matter has been compromised and settled to the satisfaction of the complainant-miner.

Based on the independent evaluation and de novo review of the circumstances, I find the settlement proposed is in the best interest of complainant and in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion to withdraw the complaint be, and hereby is GRANTED. It is FURTHER ORDERED that in accordance with the terms of the settlement the operator FORTHWITH pay the lump sum of \$1,000 to complainant, James McNeil Taylor, and thereafter pay to complainant the sum of \$250 on the first day of each succeeding month for a period of sixteen (16) months, until the total sum of \$5,000 has been paid to complainant. Finally, it is ORDERED that, subject to payment of the sums agreed upon, the captioned matter be DISMISSED with prejudice.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 13 1984

MONTEREY COAL COMPANY, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. LAKE 84-19-R
: Citation No. 2319275; 10/20/83
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. LAKE 84-20-R
ADMINISTRATION (MSHA), : Order No. 2319279; 10/26/83
Respondent :
: Docket No. LAKE 84-42-R
: Order No. 2319279-03; 12/22/83
: :
: No. 1 Mine
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 84-31
Petitioner : A.C. No. 11-00726-03545
v. :
: Monterey No. 1 Mine
MONTEREY COAL COMPANY, :
Respondent :

DECISION

Appearances: Carla K. Ryhal, Esq., Houston, Texas, for
Contestant/Respondent;
Deborah A. Persico, Esq. and Robert A. Cohen, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Respondent/Petitioner.

Before: Judge Broderick

STATEMENT OF THE CASE

Contestant, Monterey Coal Company ("Monterey"), filed notices contesting Citation No. 2319275 issued October 20, 1983 and Order No. 2319279 issued October 26, 1983. It also filed a motion to consolidate the cases and to expedite proceedings. The contested order was subsequently modified and Monterey contested the modification. The Secretary of Labor ("Secretary") filed a civil penalty petition seeking penalties for the violations alleged in the citation and order.

Pursuant to notice, the cases were heard in St. Louis, Missouri, on January 26 and 27, 1984. The cases were ordered consolidated for the purposes of hearing and decision. Paris O. Webb, Arthur Boeck, and Edward J. Lubrant testified on behalf of the Secretary. Jeffrey Thomas Padgett, Jack Lehmann, Lennis Isenberg, Richard Mottershaw, Ollie Cox and Charlie Pate testified on behalf of Monterey. Both parties have filed posthearing briefs.

Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Monterey was the operator of Mine No. 1, an underground coal mine in Macoupin County, Illinois.

2. Monterey is a large operator. The subject mine employed approximately 650 miners.

3. The subject mine had a prior history of 378 paid violations within the 24 months prior to the alleged violations contested herein. This history included 23 violations of 30 C.F.R. § 75.200 and one violation of 30 C.F.R. § 75.516. No violations of 30 C.F.R. § 75.900-1 were shown on the history. I do not consider this history such that penalties otherwise appropriate should be increased because of it.

4. The alleged violations were abated by Monterey promptly and in good faith.

5. The assessment of civil penalties in this case will not affect Monterey's ability to continue in business.

CITATION NO. 2319275

6. On October 20, 1983, a Federal coal mine inspector issued a citation under section 104(d)(1) of the Act, charging that the main trolley wire was not supported on well installed insulators and was in contact with a metal overcast and two roofbolt plates. A violation of 30 C.F.R. § 75.516 was charged.

7. On October 20, 1983, there were numerous missing and broken insulated hangers supposed to insulate and support the main trolley wire in the subject mine. The trolley wire sagged in some locations because of missing hangers.

8. The trolley wire referred to above was in contact with a metal overcast at the No. 1 West entry of the Main North track. It was also in contact with roof bolt plates at about the 109 crosscut. This caused arcing when the trolley pole passed these areas.

9. The hazard created by the conditions described in Findings No. 7 and 8 is that the arcing could cause a fire in contacting combustible materials or could cause an explosion in the presence of methane or float coal dust in suspension.

10. There was no evidence of methane or float coal dust in the area cited at the time the citation was issued.

11. The condition of the trolley wire described in Findings No. 7 and 8 had existed for some days. Monterey should have been aware of it as a result of its preshift examinations and weekly hazard examinations.

ORDER NO. 2319279

12. On October 26, 1983, Inspector Webb issued a withdrawal order under section 104(d)(1) of the Act for an alleged violation of 30 C.F.R. § 75.900-1. The condition cited was a hazardous roof condition in the Number 66 crosscut off the 4 East track entry which contained the transformer-rectifier including a circuit breaker, making operation, inspection, examination and testing of this equipment unsafe.

13. On December 22, 1983, the order referred to above was amended to show that it also charged a violation of 30 C.F.R. § 75.200.

14. On October 26, 1983, the roof in the Number 66 crosscut off the 4 East track entry appeared to be sagging. There were cracks in the roof and rashing on both ribs. One roof bolt was missing.

15. The Number 66 crosscut contained the transformer-rectifier equipment designed to convert alternating current into direct current. This equipment included circuit breakers.

16. The roof in question consisted of limestone 7 to 8 feet thick. There were two slip fractures in the roof between the limestone roof and the shale. Geologic tests performed subsequent to the order showed no instability in the roof itself.

17. To abate the order, rock was scaled from the roof and from the ribs. Sixteen posts and six crossbars were installed to support the area.

18. The condition described in Finding No. 14 posed the hazard of a roof or rib fall to any miner entering the crosscut.

19. The condition described in Finding No. 14 was obvious, had existed for some time and should have been known to Monterey.

STATUTORY PROVISION

Section 104(d)(1) of the Act provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation if of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

REGULATORY PROVISIONS

30 C.F.R. § 75.516 provides: "All power wires (except trailing cables on mobile equipment, specially designed cables conducting high-voltage power to underground rectifying equipment or transformers, or bare or insulated ground and return wires) shall be supported on well-insulated insulators and shall not contact combustible material, roof, or ribs."

30 C.F.R. § 75.900-1 provides: "Circuit breakers used to protect low-and medium-voltage circuits underground shall be located in areas which are accessible for inspection, examination, and testing, have safe roofs, and are clear of any moving equipment used in haulageways."

30 C.F.R. § 75.200 provides in part:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs . . .

ISSUES

1. Whether the violations charged in the citation and order occurred as alleged?
2. If so, whether the violations were of a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard?
3. If the violations occurred, whether they were caused by Monterey's unwarrantable failure to comply with the mandatory standards?
4. If the violations occurred, what is the appropriate penalty for each of them?

CONCLUSIONS OF LAW

1. Monterey is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the No. 1 Mine, and I have jurisdiction over the parties and the subject matters of these proceedings.
2. The conditions described in Findings of Fact No. 7 and 8 constitute a violation of the mandatory safety standard in 30 C.F.R. § 75.516.

DISCUSSION

There is no real dispute concerning the inspector's allegation that the trolley wire was not properly supported on well-insulated insulators. The management representative who accompanied the inspector admitted as much (Tr. 218-19). I also conclude that the fact that the trolley wire was in contact with a metal overcast and roof bolt plates constituted a violation of the standard, since these are part of the "roof." The fact that the overcast and roof bolt plates are not combustible does not establish that the standard was not violated. The term "combustible" in the standard does not modify "roof."

3. The conditions found in Findings No. 7 and 8 created the hazard described in Finding No. 9. The arcing could cause a mine fire or explosion. This hazard was reasonably likely to result in an injury of a reasonably serious nature. Therefore, it was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

4. The violation referred to in Conclusion No. 2 resulted from the unwarrantable failure of Monterey to comply with the safety standard in question.

DISCUSSION

The conditions cited were obvious to observation and had clearly existed for a long period of time. Monterey knew or should have known that the conditions existed and failed to abate them because of lack of reasonable care. See Zeigler Coal Company, 7 IBMA 280 (1977).

5. The violation was serious and resulted from Monterey's negligence. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$900.

6. The condition found in Findings No. 14, 15 and 16 constituted violations of 30 C.F.R. § 75.900-1 and of 30 C.F.R. § 75.200.

DISCUSSION

There is little doubt but that the roof conditions in the crosscut No. 66, in which the transformer-rectifier equipment was present, were unsafe. The only genuine issue raised by Monterey was the seriousness of the hazard. There were cracks in the roof, and a large rock was scaled down in the abatement. The ribs were rashing and substantial amounts of material were taken from the ribs.

7. The violations referred to above in Conclusion No. 6 were serious. The hazard to which they contributed was reasonably likely to result in an injury of a reasonably serious nature. The fact that the roof was solid limestone, and was unlikely to massively fall does not establish that a fall of some size would not have occurred. The scaling down of rock from the roof and removing substantial material from the ribs in the abatement process is strong evidence that a fall resulting in injury was likely. The violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

8. The violations referred to in Conclusion No. 6 above resulted from the unwarrantable failure of Monterey to comply with the safety standards in question.

DISCUSSION

Monterey argues that the failure of mine examiners to record the conditions demonstrates that Monterey had no reason to know of them. Since the conditions were obvious and long-standing, the failure only demonstrates that Monterey's examination program was seriously deficient.

9. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for these two violations is \$2,000, or \$1,000 for each violation.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, IT IS ORDERED

1. Citation No. 2319275 issued on October 20, 1983, is AFFIRMED and the Notice of Contest is DENIED.

2. Order No. 2319279 issued October 26, 1983, is AFFIRMED and the Notice of Contest is DENIED.

3. Order No. 2319279-03 issued December 22, 1983, modifying Order No. 2319279, is AFFIRMED and the Notice of Contest is DENIED.

4. Monterey shall within 30 days of the date of this decision pay the following civil penalties for the violations of mandatory standards found herein to have occurred.

<u>CITATION/ORDER</u>	<u>30 C.F.R. STANDARD</u>	<u>PENALTY</u>
2319275	75.516	\$ 900
2319279	75.900-1	1,000
2319279-3	75.200	1,000
	Total	<u>\$2,900</u>

James A Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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**Deborah A. Persico, Esq., and Robert A. Cohen, Esq., Office of
the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard,
Arlington, VA 22203 (Certified Mail)**

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 17 1984

TODILTO EXPLORATION AND DEVELOPMENT CORPORATION,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. CENT 79-91-RM
	:	Citation/Order No. 151433;
	:	1/31/79
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Haystack Underground
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. CENT 79-310-M
v.	:	A.C. No. 29-01650-05003
	:	
	:	Haystack Underground
TODILTO EXPLORATION AND DEVELOPMENT CORPORATION,	:	
Respondent	:	

DECISION

Appearances: U. Sidney Cornelius, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for Petitioner;
Mr. G. Warnock, President, Todilto Exploration & Development Corporation, Albuquerque, New Mexico, Pro Se.

Before: Judge Vail

STATEMENT OF THE CASE

This is a consolidated civil penalty and contest of citation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The case was originally heard by Judge Jon D. Boltz on May 21, 1981. On July 21, 1981, Judge Boltz issued a decision in which he found that the respondent had not violated 30 C.F.R. § 57.5-50, the noise standard applicable to metal-nonmetallic underground mines. 1/ The issue decided was whether, in order to be

1/ The judge's decision is reported at 3 FMSHRC 1824 (1981).

"feasible" within the meaning of § 57.5-50(b) cited in Citation No. 151433, an engineering control must reduce a miner's exposure to the permissible levels set forth in subsection (a) of the standard. The Judge answered this question in the affirmative.

The Secretary filed a petition with the Commission seeking discretionary review of the Judge's decision. The Secretary's petition was granted on August 28, 1981.

The Commission issued its decision on November 9, 1983, wherein they disagreed with Judge Boltz's findings on "feasibility" and held that an engineering control may be "feasible" even though it fails to reduce a miner's exposure to noise to the permissible levels set out in the standard. ^{2/} This decision was consistent with a prior Commission decision in Callanan Industries, Inc., 5 FMSHRC 1900 (York 79-99-M, November 9, 1983). In the Todilto decision, the Commission determined that a question remained as to whether the Secretary had proven a violation of the standard for failure to implement a feasible engineering control consistent with their findings in Callanan Industries, Inc., supra. The case was remanded to me on November 16, 1983, to allow the parties an opportunity to present additional evidence and submit further arguments in light of the considerations set forth by the Commission in Callanan.

On December 1, 1983, I advised the parties that I intended to set this matter for a rehearing on January 20, 1984, in Albuquerque, New Mexico. Respondent replied by letter received on December 12, 1983, stating that they had no additional evidence to offer in this case. The Secretary subsequently indicated that he also had no new evidence to offer and was willing to submit the matter for decision based on the existing record. Both parties waived further briefing of the issues. This was subsequently confirmed in a stipulation received on February 10, 1984. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. On January 31, 1979, Donald L. Harlen, an authorized representative of Mine Safety and Health Administration (MSHA), conducted an inspection of the Haysack Underground Uranium Mine operated by the respondent.

^{2/} The Commission decision is reported at 5 FMSHRC 1894 (1983).

2. Inspector Harlen, using a dosimeter, conducted a noise survey on a jackleg percussion rock bolt drill being operated in the 440 South drift of respondent's mine.

3. As a result of a full shift noise sample, it was determined that the drill operator was exposed to an average of 114 dBA which was determined to be 2634 percent in excess of that permitted by standard § 57.5-50(b).

4. The inspector also measured instantaneous exposures as high as 118 dBA with a sound level meter.

5. During the time period of this inspection and noise sample, the jackleg drill operator was wearing both ear plugs and foam muffs. The drill was not equipped with a muffler of any kind.

6. As a result of the noise monitoring tests, the inspector issued Citation No. 151433 citing a violation of § 57.5-50(b) and alleging the drill operator was exposed to a noise level which was 2634 percent of the permissible limit for an eight hour period.

7. Subsequently, MSHA terminated the citation after respondent installed a muffler on the jackleg drill. The cost of this type of muffler was \$110.00. Sound level meter readings taken during operation of the drill with the muffler installed measured 110 and 113 dBA which still exceeded the permissible level under the standard.

ISSUE

The question before me is whether, the Secretary proved respondent violated § 57.5-50(b) for failure to implement a "feasible" engineering control.

REGULATORY PROVISIONS

30 C.F.R. § 57.5-50 provides:

(a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a party hereof, or by

a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetallic Mine

PERMISSIBLE NOISE EXPOSURE

Duration per day, hours of exposure	Sound level dBA, slow response
8 -----	90
6 -----	92
4 -----	95
3 -----	97
2 -----	100
1 1/2 -----	102
1 -----	105
1/2 -----	110
1/4 or less -----	115

No exposure shall exceed 115 dBA. Impact or impulsive noise shall not exceed 140 dB, peak sound pressure level.

* * * * *

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

(Emphasis added.)

DISCUSSION

The Commission, in its decision in the Callanan, case, interpreted the term "feasible" as contained in § 56.5-50(b). ^{3/} They concluded that economic as well as technological factors must be taken into account in determining whether a noise control is "feasible" under the standard. Also, they rejected the argument that a "cost-benefit analysis", as that term is commonly understood and used, is the appropriate analytical method for determining whether a noise control is required (5 FMSHRC 1901).

Further, the Commission concluded that the determination of whether use of an engineering control to reduce a miner's

^{3/} This standard is identical to the § 57.5-50(b) being considered in this case as applied to metal-nonmetallic underground mines.

exposure to excessive noise is capable of being done, involves consideration of both technological and economic achievability. The three suggested components of a feasible engineering control to reduce noise levels are: (1) That it result in a reduction of the noise level to which a miner is exposed, (2) That it is technologically achievable, and (3) That it be economically achievable. The Commission further held that the test of economic feasibility of the control is to be determined by consideration of whether the economic costs are wholly out of proportion to the expected benefits (3 FMSHRC 1907, 1908).

In addition to the above, the Commission suggests the following in order for the Secretary to establish his case in a noise level case:

Our next consideration is the appropriate burden of proof to be applied. We hold that in order to establish his case the Secretary must provide: (1) sufficient credible evidence of a miner's exposure to noise levels in excess of the limits specified in the standard; (2) sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source; (3) sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control; (4) sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and (5) a reasoned demonstration that, in view of the elements 1 and 4 above, the costs of the control are not wholly out of proportion to the expected benefits. After the Secretary has established each of the above elements, the operator in rebuttal may refute any of the components of the Secretary's case. The burden borne by the operator is one of production; the burden of proof remains on the Secretary.

The facts in the present case are not in dispute. Respondent in its reply brief to petitioner's request for discretionary review states as follows: "With only minor variations, the Secretary's statement of the technical aspects of this case are correct." (Respondent's brief at 3).

As to the first requirement necessary to be proven by the Secretary, the record establishes that the operator of the jackleg drill was exposed to an excessive noise level amounting to a noise dose over an eight hour period which was 2634 percent in excess of that permitted by the standard. This was based upon an average of 114 decibels ("dBA")(Tr. 16-18). This establishes without any question, an exposure in violation of that provided in the standard.

The next consideration is whether the Secretary presented credible evidence as to the availability of a technologically achievable engineering control capable of reducing the drill operator's exposure to excessive noise. Although Judge Boltz made no specific findings in this regard, the facts show that a muffler for the jackleg drill was available and in fact was installed in order to abate the citation. The evidence also shows that after installation of the muffler, the sound level meter showed noise exposure range between 110 and 113 dBA. This reading compared with the prior noise level readings of 114 dBA and higher reflect a reduction in the noise level even though not sufficient to bring the level to that required by the standard. This clearly shows that the muffler was a technologically achievable engineering control capable of reducing the drill operator's noise exposure.

The third consideration is whether the muffler as a feasible engineering control is economically achievable. The muffler installed on the drill in this case is stated by the respondent to cost \$110.00 which is certainly not an unreasonable cost. In light of the reduction in noise level from 114 dBA to 110 to 113 dBA, I find that the cost at \$110 is neither prohibitively expensive nor wholly out of proportion to the benefit achieved by its use. The reduction in noise level, even though not large, is significant over an extended period of time. Also, the standard distinctly states that when the employees exposure exceeds that listed in the table, "feasible administrative or engineering controls shall be utilized" (emphasis added). As I have found that the muffler meets the requirement of being both technologically achievable and not unreasonable in cost, it was feasible.

The Commission stated in Callanan, supra, that economic feasibility of a control, such as the muffler in this case, is to be determined by consideration of whether the economic cost is wholly out of proportion to the expected benefit (5 FMSHRC 1909). I find, as stated above, that the cost in this instance of \$110 is reasonable for the benefits achieved.

Therefore, based upon the credible evidence in this case, and the Commission's decision in Callanan, I find that the Secretary has proven the respondent violated mandatory standard § 57.5-50(b) by failing to implement the feasible engineering control (muffler) which was available to it. The fact that the muffler did not reduce the noise level to that required by the standard is not a proper reason for an operator to avoid the control and go directly to personal protection equipment. The standard contemplates the use of such personal equipment only after all other "feasible" engineering controls are installed to achieve the best results possible.

PENALTY

The evidence establishes that the respondent's history of prior violations is neither substantial or significant and does not warrant either raising or reducing the penalty for the violation at issue here. The proposed penalty by the Secretary is appropriate for the size of the operator and would not affect its ability to continue in business. The operator was negligent in failing to install the available control (in this case the muffler) to reduce the noise level of the operator of the jackleg drill. However, the gravity does not appear great, in that personal protection equipment was being utilized. The operator demonstrated good faith by achieving rapid compliance by installing a muffler on the drill. I find that the proposed penalty of \$114 is appropriate in this case.

ORDER

Respondent is ORDERED to pay a civil penalty of \$114 within 40 days of the date of this decision.



Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

APR 19 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 84-30
Petitioner : A.C. No. 11-00726-03544
v. :
: No. 1 Mine
MONTEREY COAL COMPANY, :
Respondent :

SUMMARY DECISION

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking a "single penalty" assessment of \$20 for an alleged violation of mandatory safety standard 30 CFR 75.1403-5(g), as cited in a section 104(a) citation, No. 2201219, issued on November 3, 1983, by MSHA Inspector George J. Cerutti.

Respondent filed a timely answer to the proposal denying that a violation occurred, and asserting that the cited standard does not apply to the facts presented in this case. At the same time, the respondent filed a motion to consolidate this case with six previously consolidated cases involving these same parties. Those cases involved similar facts and identical issues as those presented in the instant case. Petitioner did not object to the motion to consolidate. However, since the hearings in the prior cases had been concluded, and the decisions were about to be issued, this case was not included among those disposed of by my previous decisions.

In view of the foregoing, I conclude that this case should be disposed of by the application of the Commission's summary decision rule 64, 29 CFR 2700.64.

Discussion

Citation No. 2201219, describes the following "condition or practice":

A clear travelway at least 24 inches wide wasn't provided along the Main North Belt Conveyor on the east side. Rock and coal was present at the following locations 112 to 108 crosscuts, 106 to 103, 101 and 102, 99 to 94, 86 to 85, 82 to 81, 75 to 72, 69 to 59, 57 to 51, 44 to 39, 36 to 28, 24 to 25, 15 to 12.

A notice to provide a safeguard was issued 9-4-75.
1 WHW.

On February 23, 1984, I issued decisions in Monterey Coal Company v. MSHA and MSHA v. Monterey Coal Company, Dockets LAKE 83-68-R, etc., in which I vacated several citations under the same factual circumstances which are presented in the instant case. In my prior decisions, I concluded that the statutory and regulatory intent of section 30 CFR 75.1403-5(g), is to address hazardous conditions connected with belt conveyors which transport men and materials other than coal, and that any logical interpretation of this section necessarily excludes coal as a "material" within the scope of the cited regulatory criteria (decision, pg. 35).

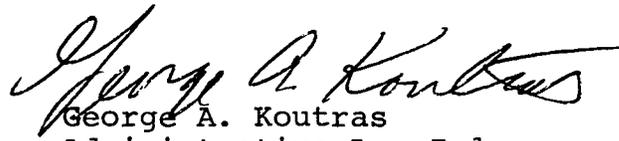
I take note of the fact that MSHA has not sought review of my decisions pursuant to Commission Rule 29 CFR 2700.70. My decisions became final 30 days after their issuance on February 23, 1984, and since they were not appealed, they are final and controlling in the instant case.

Conclusion

The facts and issues in this case are identical to those presented in my previous dispositive decisions. I incorporate by reference my previous findings and conclusions concerning the interpretation and application of mandatory standard section 75.1403-5(g), including my reasons for vacating the citations in those cases. Under the circumstances, I conclude and find that the citation issued in this case must also be vacated.

Order

IT IS ORDERED that Citation No. 2201219, November 3, 1983, IS VACATED, and this case is dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 19 1984

WESTMORELAND COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 83-266-R
v.	:	Order No. 2147593; 8/19/83
	:	
SECRETARY OF LABOR,	:	Hampton No. 3 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-76
Petitioner	:	A.C. No. 46-01283-03532
	:	
v.	:	Hampton No. 3 Mine
	:	
WESTMORELAND COAL COMPANY,	:	
Respondent	:	

DECISIONS

Appearances: Kevin McCormick, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner/Respondent;
F. Thomas Rubenstein, Esq., Westmoreland Coal Company, Big Stone Gap Virginia, for Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a proposal for assessment of a civil penalty filed by MSHA against Westmoreland Coal Company pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment for an alleged violation of mandatory

safety standard 30 CFR 75.301. The alleged violation was stated in a section 104(d)(2) Order served on Westmoreland by MSHA Inspector Vaughan Gartin on August 19, 1983.

Westmoreland Coal Company contested the civil penalty proposal, and also filed a separate Notice of Contest pursuant to Section 105(d) challenging the legality of the order. The cases were consolidated for trial in Madison, West Virginia, and were heard at the conclusion of a consolidated trial of two other docketed cases concerning these same parties.

Discussion

Section 104(d)(2) Order No. 2147593, 1:50 a.m., August 19, 1983, cites a violation of 30 CFR 75.301, and the condition or practice is described as follows:

The required minimum amount of air 9,000 CFM, could not be obtained with an approved anemometer on the return side of the last open crosscut between the No.'s 4 and 5 entries of the 019-0 8 Right section in that when measured only 5,850 CFM was present. Coal was being mined in the No. 5 entry. Said section supervised by Russell Welch.

The inspector found that the violation was "significant and substantial," and he ordered the withdrawal from the 019-0 8 right section.

The inspector cited a previous order, No. 2140708, issued on February 18, 1983, as the "initial action," underlying the order which he issued on August 19, 1983.

Order No. 2147593 was abated at 3:00 p.m., August 19, 1983, and the abatement action states:

23,400 CFM was obtained in said last open crosscut.

On September 28, 1983, the inspector modified Order No. 2147593, to delete the "significant and substantial" finding, and to delete his previous gravity finding of "Reasonably Likely," to reflect a finding of "unlikely." The modification notice reflects that these corrections were the result of a "violation conference held in this office on this date."

Findings and Conclusions

When these proceedings were called for hearing, the parties advised me that they proposed to dispose of these cases by mutual consent and agreement of the parties, and they presented their arguments on the record for my consideration.

MSHA's counsel asserted that during his interview with Inspector Gartin in preparation for trial the inspector informed him that he had made a mistake in the method he used to determine his allegation that only 5,850 CFM's of air was present at the time he took an air reading with an anemometer in the cited crosscut as stated in his citation. The inspector conceded that had he correctly computed the amount of air present in the area, the respondent/contestant would have been in compliance with the requirements of section 75.301. In short, the inspector conceded that the order was mistakenly issued, and he produced a copy of a modification of the order which indicates that he has vacated it.

In view of the foregoing, MSHA's counsel moved to withdraw and dismiss its proposal for assessment of civil penalty filed in the penalty case. At the same time, Westmoreland's counsel moved to withdraw its notice of contest.

After due consideration of the oral joint motions filed by the parties, they were granted from the bench.

ORDER

MSHA's motion to withdraw its proposal for assessment of civil penalty IS GRANTED, and the case is dismissed.

Westmoreland's motion to withdraw its notice of contest IS GRANTED, and it is dismissed.

In view of the foregoing, the contested section 104(d) (2) order, No. 2147593, issued on August 19, 1983, IS VACATED.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 20 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 83-86
Petitioner : A.C. No. 15-03987-03502
: :
v. : Docket No. KENT 83-66
: A.C. No. 15-03987-03501
PEABODY COAL COMPANY, :
Respondent : River Queen Strip

DECISIONS

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Michael O. McKown, Esq., Peabody Coal Company,
St. Louis, Missouri, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These cases concern civil penalty proposals filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for three alleged violations of certain mandatory safety standards promulgated pursuant to the Act.

The respondent contested the proposed assessments, and the cases were heard in Evansville, Indiana. The parties waived the filing of written post-hearing arguments, but their oral arguments made on the record during the course of the hearing have been reviewed and considered by me in the course of these decisions.

Issues

The principal issue presented in these proceedings is (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals

for assessment of civil penalties filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Discussion

The citations at issue in these proceedings are as follows:

Docket No. KENT 83-66

Following an investigation of a fatal accident which occurred at the mine, an MSHA inspector issued Section 104(a) Citation No. 1035414, on March 29, 1983, for an alleged violation of mandatory safety standard 30 CFR 77.404(a). The condition or practice described by the inspector on the face of the citation states as follows:

The TD 25 International dozer was not maintained in a safe operative condition in that the mechanism for stopping the engine from inside the cab was inoperative.

Docket No. KENT 83-86

Following an investigation of a second fatal accident which occurred at the mine, an MSHA inspector issued Section 104(a) Citation Nos. 2075266 and 2075267, on September 9, 1983.

Citation No. 2075266 alleges a violation of mandatory safety standard 77.1000, and the condition or practice is as follows:

The operator was not following the Ground Control Plan in that: hazardous high wall conditions had not been corrected before men were allowed to work in the area Pit No. 001-0. This citation was issued during a fatal accident investigation. This is the responsibility of Ben Rheu day shift,

Gary Hulsey evening shift, Carol McIntosh,
morning shift pit foreman.

Citation No. 2075267 describes an alleged violation of mandatory safety standard 77.1005, and the condition or practice is as follows:

Loose hazardous material had not been removed from the face of the highwall in pit no. 001-1 for a distance of approximately 150 feet. This citation was issued during a fatal accident investigation. This is the responsibility of Ben Rheu (day shift) Gary Hulsey (evening shift), Carol McIntosh, morning shift pit foreman.

KENT 83-86 - Petitioner's testimony and evidence

MSHA Inspector George W. Siria, confirmed that he conducted an investigation on September 3, 1982, into the circumstances surrounding a fatal accident which had occurred at the mine in question the previous day. As a result of that investigation, he issued two citations, and he identified copies of the citations which he issued, exhibits P-1 and P-2 (Tr. 10-11). He identified copies of the respondent's surface mine ground control plan, exhibit P-3, and he explained why he issued citations for violations of sections 77.1000 and 77.1005 (Tr. 12-15).

Mr. Siria confirmed that he is not a surface mining inspector, and while his experience is in underground mines, he stated that "I do know something about highwalls" (Tr. 16). Upon inspection of the 150 foot highwall in question, he stated that "it looked bad," and while conceding that he never worked as a surface mine inspector, he confirmed that MSHA Inspector Herald Utley and Subdistrict Manager Hudson Sorrel were with him when he conducted his investigation (Tr. 17).

Mr. Siria reviewed his Citation No. 2075266, for a violation of section 77.1000, and when asked why he did not make any negligence findings on the face of the citation which he issued, he replied "I don't really know why," and that "it looks like I made a mistake here" (Tr. 18). He stated that he intended to mark "high negligence." He confirmed that the respondent abated the citation in a timely manner (Tr. 20).

On cross-examination, Mr. Siria testified as to his background and training, and he confirmed that in the prior two-year period he had not inspected any surface mines, but only conducted one prior fatality involving a surface mine highwall (Tr. 24).

Mr. Siria described the mine highwall in question as being 70 to 80 feet high, and he described the methods used to strip the overburden. He stated that the length of the highwall was some 1000 to 1500 feet, but he had no idea how long it had been in place, nor could he recall the prevailing weather conditions prior to the accident (Tr. 26). He indicated that his main objective in conducting an inspection of the highwall would be to look for loose, overhanging rock, and to determine whether it had been removed (Tr. 27). He conceded that a rockfall could occur without any prior danger signs being noticed (Tr. 28), and he conceded that prior to the accident in question he had never previously inspected the highwall in question (Tr. 28). He also conceded that a rockfall could change the condition of a highwall, but that he did observe loose, hazardous materials on the highwall in question after the accident (Tr. 29).

Mr. Siria stated that with the exception of the cited 150 foot highwall area, the remaining portion of the highwall looked properly scaled, and when asked "Can you see any reason why that 150 area would not be properly scaled?," he replied "no" (Tr. 29). Mr. Siria confirmed that the basis for his opinion that the highwall was dangerous was that someone was killed by a rock which rolled down and struck the victim (Tr. 32). However, he indicated that he would have issued the citation even if the accident had not occurred, and this was because of his observation of the condition of the highwall. After the accident, he believed the highwall looked safer because the stripping shovel had "brushed the highwall out and knocked the loose rocks away" (Tr. 33). He confirmed that he had not observed the conditions of the highwall prior to the accident, and that he only observed it after the accident occurred. He conceded that a rockfall can change the appearance of a highwall, but that any such changes would only occur in the immediate fall area and not along the entire 150 length of the 80 foot highwall in question (Tr. 35). Mr. Siria also stated that the condition of the highwall was such that he would have issued a violation even if there were no fatality (Tr. 35).

In response to further questions, Mr. Siria stated that he had no knowledge that miners Mike Montgomery or Robert Penrod were told to work in the accident area knowing that the hazardous highwall condition existed. Mr. Siria confirmed that his belief that a hazardous highwall condition existed prior to the accident was based solely on his observations after the accident occurred (Tr. 36). Mr. Siria described the rock which struck the victim as four foot wide, and he stated that the rock "was rolling as it struck the victim" (Tr. 39).

MSHA Inspector James Utley, testified that he is a supervisory surface mining inspector. He confirmed that he was summoned to the mine approximately 15 to 20 minutes after the accident in question, and that he was at the mine on September 2 and 3, 1982. When he arrived at the pit area on September 2, he went to the accident scene and he observed the rock which struck the victim. The victim was still there, and the accident scene had not changed from the time he was called until his arrival. He identified the citation issued by Inspector Siria (Tr. 56).

Mr. Utley described the highwall as he observed it when he arrived at the scene on September 2nd as follows (Tr. 57-59):

A. The highwall at the time we looked at it had an area near the top where a rock had turned loose and fallen into the pit. It was a little bit rough for an area of, oh, 150 feet long in the area where the accident had occurred.

Above the highwall there was an area approximately 150 feet long where the dirt or soil had not been drug off by the bucket of the stripping shovel the way that it usually had been done.

Q. If I understand you correctly, are you stating that the face had not been cleaned for 150 feet?

A. I wouldn't say that it had not been cleaned. It was just a little rough.

Q. Okay, and that on top of the highwall it hadn't been --

A. The top of the highwall had not been drug off, to use the term that we use, with the bucket of the stripping shovel.

* * * *

Q. Where you able to determine whether the fatal accident in this case, the rock falling, caused the rough condition of the highwall that you observed?

A. No, the rock falling didn't cause the condition.

Q. And prior to your making that statement --

A. Well, the rock that turned loose and came down, came down the highwall in the area where the fatality occurred, but the area of the highwall that was a little rough was approximately 150 feet long.

Q. Okay. Did it encompass the area where the rock had fallen?

A. Yes.

Q. Did this rock fall midway that area or to one side or the other or do you remember?

A. I believe it was nearer the west end of the area.

Q. And was that an area further removed from the mining operations going--was the mining operations moving from west to east or east to west?

A. At that time the shovel was stripping from west to east.

Mr. Utley stated that if the condition of the highwall as he observed it after the accident had looked that way prior to the accident, he believed it would have been a violation as stated by Inspector Siria in the citation. Mr. Utley confirmed that he was familiar with the respondent's ground control plan, and he confirmed that no mine inspection took place prior to the accident on September 2, and his inspection and on September 3, included only the accident scene (Tr. 61).

On cross-examination, Mr. Utley stated that his prior surface mining experience was in connection with "engineering work" with a stripping contractor or as an "engineering technician" in underground mines. He confirmed that he has never served as a pit boss, operated a stripping shovel, or worked in a surface mine (Tr. 62-63). He also confirmed that Mr. Siria does not work for him in his normal inspection duties (Tr. 63). He went on to describe several conditions which change the appearance or condition of a highwall (Tr. 64-68).

Mr. Utley confirmed that he personally questioned no one about the highwall conditions during the fatality investigation, and that Mr. Siria did most of the interviewing. Mr. Utley

also confirmed that he had no personal knowledge of the condition of the highwall prior to the accident, and that he did not know whether or not loose, hazardous materials were in fact present on the highwall for a distance of 150 feet prior to the accident (Tr. 69). He did state that he inspected company records pertaining to the condition of the highwall for the dates prior to the accident, but had no copy of those records, could recall no particular notations for the pit in question, and could recall no statements to the effect that the highwall was a "rough area" (Tr. 69-70). He also could not recall being contacted by any MSHA assessment officer concerning the condition of the highwall after the citation was issued (Tr. 71). He then explained that he did recall such a contact, and he also recalled that with the exception of the 150 area, the highwall was in generally good condition (Tr. 72).

In response to further questions, Mr. Utley believed that assuming no accident occurred, the highwall was in such a state that required it to be scaled. He was also of the opinion that mine management should have known that it should have been scaled (Tr. 73). He further explained his position as follows (Tr. 74-82):

JUDGE KOUTRAS: Now when they take that bucket and scrap the highwall, am I to assume the purpose of that is to take down any loose, unconsolidated material?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Now let's assume that a mine operator takes the bucket, and let's assume that in this case the bucket had scraped the entire 150 feet across this highwall, scraped it, and then the rock fell. Would they then be susceptible to the charge that they hadn't properly scaled the highwall?

THE WITNESS: No, sir.

JUDGE KOUTRAS: In other words the scraping with the bucket, is that an acceptable means of scaling down and taking down loose, unconsolidated material?

THE WITNESS: It is at the top of the highwalls.

JUDGE KOUTRAS: So you just assume that that bucket is going to make the swipe and take everything?

THE WITNESS: No, sir, the bucket is also used to run up the face of the highwall to remove loosened dirt.

JUDGE KOUTRAS: Was there any indication in this case that there was any overhanging material?

THE WITNESS: No, sir.

JUDGE KOUTRAS: Okay. Now let's assume that the bucket had done the required cleaning of the area that you described as rough; am I to assume that that scraping process also would have taken out the rock that subsequently fell?

THE WITNESS: It is a possibility but no guarantee.

JUDGE KOUTRAS: I assume the bucket just scrapes rather than digs.

THE WITNESS: Yes, when it is scaling a highwall.

JUDGE KOUTRAS: Am I also to assume then when we use the term "unconsolidated loose" we literally mean that. I mean it doesn't literally go in and dig out big rocks, does it, that are imbedded into --

THE WITNESS: No, sir. Usually the material has been shot and is small, loose, and unconsolidated with no large boulders in it.

* * * *

MR. STEWART: I guess if the crack appeared suddenly, I would agree that management can't know about the crack appearing suddenly.

JUDGE KOUTRAS: Okay.

MR. STEWART: But management certainly can know from working in the area what conditions may lead to the cause of these sudden cracks that they later claim that they had no way of knowing.

JUDGE KOUTRAS: And you say the rough condition of the highwall as it existed shortly after the incident led the inspectors to believe that they hadn't scaled it properly.

MR. STEWART: That is correct.

JUDGE KOUTRAS: And that had they scaled it properly the crack wouldn't have appeared, the rock wouldn't have fallen, and the man wouldn't have been killed.

MR. STEWART: That is our basis.

JUDGE KOUTRAS: That is right.

MR. STEWART: But we are not necessarily saying that had they scaled it properly the crack would not have appeared, in fact.

JUDGE KOUTRAS: That is right. So had they scaled it properly there wouldn't have been a citation, correct?

MR. STEWART: That is correct.

JUDGE KOUTRAS: Okay. Had they scaled it properly in the eyes of these two inspectors, in the eyes of MSHA, then the crack suddenly appeared, and the rock fell, and the man gotten killed, then they wouldn't have been cited?

MR. STEWART: That is my understanding of their testimony.

JUDGE KOUTRAS: Okay. If you look at this narrative finding, it says, "The crack in the highwall appeared suddenly after the examination had been made" --

I don't know what examination they are talking about -- "therefore management was not aware of it, and allowed the man to work in the area." Now that is totally nonsensical. And not only that it is nonsense because I don't understand it --

MR. MCKOWN: Well, Your Honor --

JUDGE KOUTRAS: I understand it. That is not evidence, I am just reading from the narrative finding of the special assessment officer number code name 21, whoever he is. If you ever find out, tell him what I said about his assessment.

MR. STEWART: I certainly will, Your Honor.

JUDGE KOUTRAS: The other thing that he concluded is that if the operator had not allowed men to work in the area prior to correcting hazardous highwall conditions the accident may not have occurred.

So here in the citation is that hazardous highwall conditions had not been corrected, meaning the rough area which you claim, MSHA claims, should have been scaled and taken down and taken care of.

Robert W. Penrod, testified that he has been employed at the mine in question as a "shooter," and that his duties entail loading and blasting, but that he is now a welder. He confirmed that on September 2, 1982, he was working as a shooter at the base of the highwall pit in question. He stated that the victim was a good friend of his, and Mr. Penrod described the condition of the highwall as follows (Tr. 88-95):

Q. Mr. Penrod, did you have an occasion to look at the highwall prior to the death of your fellow employee?

A. Yes, sir, I did.

Q. In the area in which you were working in?

A. Yes, sir.

Q. Would you describe to the court what it looked like.

A. At the time when we noticed the highwall we -- just a little before the accident, we had noticed a big crack in the wall, and we was watching it because you could tell that there was a little bulge there, but it was cracked. And at the time we didn't see it working -- and what I mean working is that when you see a part of the highwall starting to work it usually has dust; it usually looks like a little stream of dust flowing from it, and we know then that the wall is working; and we kind of avoid the area. And at the particular area that we had been in, the highwall hadn't been scraped or scaled, what we call, you know, kind of clean and loose material; it hadn't been. It was ahead of us, but at the area that we was at at that time it was not.

Q. How do you know it hadn't been?

A. Well, from being in the pit many times or around the mines as much as we have, you can tell from looking at it. In some instances you can tell when they've scraped the highwalls, the teeth marks, and at the top, especially on a highwall like this, is rounded off like, you know where they drag the bucket back over the highwall to break loose all the loose material. You could tell by looking at the highwall.

Q. So how were you able to tell that this one hadn't been scaled at the location that you worked in?

A. In the location we had, it was obvious you could tell because of the highwall we was at there was loose material; and plus right down from it you could tell where it was, where they had been dragging the highwall and cleaning it. But at the area we was at, they hadn't done it.

Q. Okay. Were you instructed to work in that area?

A. Yes, sir, at the time. Yes, sir.

Q. Who instructed you to work there?

A. Well, our drill foreman at the time was Bob Barrett.

Q. Bob Berry?

A. Bob Barrett.

* * * *

Q. Now you stated that you observed a crack in the highwall but didn't see it working.

A. No, sir, I didn't see it working.

Q. What--did you observe any other changes in the highwall?

A. No, sir, not at that time I didn't.

Q. At any time?

A. Well, right before the -- I mean, if you are talking about right before I seen the rock hit him, you know, I had turned around and looked; and it all broke loose and came down.

Q. And you saw the rock actually strike the victim?

A. Yes, sir.

Q. When you saw it coming down, what did you do, if anything?

A. Well, I had just talked to Mike; and he walked away from the truck; and I had to walk to the back end --

JUDGE KOUTRAS: Who was Mike?

THE WITNESS: Mike Dulin, the man that was killed.

JUDGE KOUTRAS: Okay.

THE WITNESS: And I turned back and looked, and I looked up, and I seen this rock falling, and hollered for Mike to run, and I took one step towards him -- I don't know why -- but he never did hear me because of the drills that we work beside are so loud that he didn't hear me.

And he looked up, and he seen them coming, and he turned around and took one step, and the rock just wiped him out.

Q. And you say the drills were operating at the time?

A. Yes, sir, at the time.

Q. Do you know what position Mr. Dulin was employed in?

A. He was a shooter, as I was.

Q. The same?

A. Yes, the same.

Q. How far away from the base of the pit were you at the time the rock broke loose?

THE WITNESS: Are you saying from the base of the highwall?

MR. STEWART: Yes.

A. (By Mr. Penrod) I was standing about twenty five to thirty feet away from the highwall.

Q. Out away from it in the pit area?

A. Yes, in the pit area.

Q. Do you recall -- Withdraw that question. Do you know that distance the highwall had not been scraped, in your opinion?

A. No, sir.

Q. Do you have an approximate distance it was?

THE WITNESS: Oh, you mean the length of it?

MR. STEWART: Yes.

A. (By Mr. Penrod) Really no.

Q. Was it 10 feet, was it a long way, or a short way?

A. Well, if you are talking about the area we were in, it could be 150 to 200 feet, you know. The area we drilled in, the area we drilled in that day was all in that area, so I would say it would be 150 maybe 200 feet, that area we was in.

Q. And had the highwall been scraped in any of that area?

A. Not in the area we was at, no, sir.

Q. So that is approximately 200 feet that the highwall had not been scraped.

A. Yes, sir.

Q. Now within that 200 feet where did this rock break loose? Did it break loose in the middle or what?

A. Yeah, I could say it was in that area or maybe like closer to the part where it had scraping on it. It was close to the middle of the area that we was in. I can remember.

Q. So if I understand you, you observed the highwall before the accident.

A. Yes, sir.

Q. And you saw it after the accident.

A. Yes, sir.

Q. Were there any other changes in the highwall after the rock broke loose?

THE WITNESS: You mean --

MR. STEWART: Throughout the entire length.

A. (By Mr. Penrod) Not that I know of.

Q. Did rock break loose any place else along that highwall that you observed?

A. Not that I can remember, no, sir.

Q. Mr. Penrod, did you report the condition of that highwall to anyone?

A. Not at the time, no, sir, I did not.

Q. And why not?

A. Because from the time we noticed the crack until the accident there wasn't that much time in between it, you know.

Q. What about the overall condition of the highwall in the area you were working in? Why didn't you report that?

A. Well, it was, I mean, I'm not saying I failed in the reporting it; but it was obvious everybody could tell by looking at it. You know, it had never been scraped or anything but --

Q. Was Peabody Coal Company in a habit of failing to scrape the highwall?

A. Well, they had failed before, yes they have.

Q. But that is not, is that something they usually do?

A. Yeah, they usually scrape the highwall.

Q. They usually scrape it.

A. Yes, sir.

Q. Do they usually clean off the top?

A. Yes, sir.

Q. Do you know any reason why that hadn't been done on, September 2?

A. No, sir, I do not.

Q. Was the shovel there?

A. Yes, sir.

Q. Was it operating?

A. Yes, sir.

On cross-examination, Mr. Penrod confirmed that he is a member of the mine safety committee, and has served as chairman. However, he resigned and was not a member at the time of the highwall accident. He stated that he was aware of his right to refuse to work in an unsafe environment. He confirmed that he knew the accident victim for four years and considered him to be an experienced miner and safe worker. Mr. Penrod also considers himself to be a safe worker (Tr. 98).

Mr. Penrod confirmed that he was in the pit on the day of the accident and that he visually observed it while there. He stated that he usually "keeps an eye on it" while working in the pit, and even though it is the pit foreman's job to inspect the highwall, Mr. Penrod indicated that he personally watches it (Tr. 99). Mr. Penrod confirmed that he was aware of his safety rights on the day of the accident, and when asked why he did not report the highwall conditions to management, he responded as follows (Tr. 100-101):

Q. Now, when you noticed this area that you considered not to be properly scaled, why didn't you report it to management?

A. Because at the time I didn't pay that much attention to --

JUDGE KOUTRAS: Hold it just a minute.
All right. Go ahead.

THE WITNESS: As I went to the pit, I noticed the highwall. But as we do a lot of things, we -- on our daily routine you go ahead and work; and you just kind of watch it.

It's just -- a lot of things like anybody else's job, sometimes it's a daily thing that happens. You just don't pay much attention to it.

Mr. Penrod confirmed that the shovel operator scales the highwall as he "dead-heads" back after exposing the highwall, and that this is done to take down loose material on a bad wall. He also indicated that "sometimes after you strip a wall it will break loose again. It happens down there" (Tr. 102). He did not observe the shovel operator either scale or not scale the highwall in question, and he relied on what he observed after the accident. He confirmed that highwall conditions may change and may vary, and that this is due to sandrock and mud which may be encountered during the stripping operation (Tr. 102).

Mr. Penrod stated that approximately 15 or 20 minutes before the accident occurred, he "noticed there was a problem with this crack." He confirmed that he and the accident victim engaged in some "joking conversation," and he explained further as follows (Tr. 104-106):

A. No. He -- like I say, he was -- he was aggravated or something because I told him about getting the Red Hots. And we was making light. And he turned around and walked over to his truck.

Q. So you didn't feel that this was such a dangerous condition that you needed to report it to your supervisor?

A. Not at the time, no.

Q. And you didn't report it to your supervisor or any concern that you had about that area that was not properly scaled?

A. We hadn't did it, no, sir.

Q. How far into the shift was this accident, did it occur?

A. I don't know. It was about 2 o'clock, I recon. I'm not sure about that.

Q. And what time does your shift start?

A. It starts at 8:00.

Q. And when does it end?

A. Four o'clock.

Q. So it was near the end of your shift?

A. Pretty close to the end.

Q. Have you ever known Mr. Dulin to work in an unsafe condition?

A. Times I've been around him, no, he wouldn't work in no unsafe conditions that I could think of. No, sir.

Q. How about you? Have you ever worked in unsafe conditions?

A. I've been in them; yes, sir.

Q. Okay. Have you -- did you feel that you were in unsafe conditions that day?

A. When?

Q. Prior to the accident occurring.

A. I say this is the everyday routine. When you go into the pit, sometimes you just don't pay no attention to it -- because not trying to change some -- but if you have to worry about it all the time, you can't stay in there. It would drive you nuts. So you just go ahead and do it and not worry about it. You just . . .

Q. But you are aware that you could have refused to work?

A. Yes, sir.

Q. And you did, in fact, fail to report to Mr. Barrett --

A. Yes. From the time that I spotted the crack until Dulin was killed, I didn't -- the thought of getting the Red Hots and that part of my job that I was doing, I failed to report it.

In response to further questions, Mr. Penrod indicated that after a highwall is scaled or stripped, it can still break loose, and he could not remember whether the highwall in question had recently broken loose. He believed that his supervisor should be able to tell if a highwall had been scaled or unscaled, but this would depend on how long he was present in the pit area (Tr. 107).

Mr. Penrod stated that at the beginning of his work shift on the day of the accident, the highwall looked like it was not scaled, but he observed no crack. The crack appeared later at the end of the shift, but he detected no movement of the rock and said nothing to the accident victim about the crack. Mr. Penrod did not know whether or not the victim saw the crack (Tr. 109).

Michael R. Montgomery, confirmed that on September 2, 1982, he worked at the mine in question as a shooter, and was working in the pit with the accident victim. Mr. Montgomery indicated that he had worked as a shooter for about two months prior to the accident, and during that time worked with the victim (Tr. 112). Mr. Montgomery confirmed that he observed the highwall in question during his shift, and he stated as follows (Tr. 113).

Q. Mr. Montgomery, did you have an occasion to observe the highwall prior to this fatal accident?

A. That morning I looked at the highwall like I normally do. I checked the highwall just looking at it. The highwall in that particular area wasn't scaled really good; but, you know, there was a lot of the pit -- it didn't look any worse than it had been looking coming up through the pit. I didn't observe anything hanging loose.

Q. How did the top of the highwall look? Did you have any occasion to go to the top of the highwall?

A. I wasn't up on top of the highwall that particular day. The only observation that I got was from the bottom. You know, just looking up I didn't notice anything that loose that morning.

Q. Had it been dragged?

A. Ah, I guess it had. But in that particular section it wasn't -- it hadn't been done as cleanly as it had in some other areas of the wall.

Q. Now, did you observe the fall of the rock that struck Mr. Dulin?

A. Yes. I was watching Mr. Dulin -- well, I was looking over towards that drill. It was getting on to 4 o'clock in the afternoon. And normally we were getting ready to put off a shot then, and so we were trying to keep our patter squared up, -- I don't know whether you are familiar or not --

Q. No.

A. -- with the terminology. But, anyway, I was looking over towards the drill. And I was watching Mr. Dulin. I watched him load the hole. And I was just seeing where the other drill helper was. And, yeah, I saw the rock as it was about two-thirds of the way down the wall there. I saw it. And, of course, I yelled; but I was inside the drill with the thing running and everyghint, so he -- there wasn't any way with all the noise and everything. But I saw it.

Mr. Montgomery stated that at the time he saw the rock strike the victim, he was in an enclosed cab some 70 feet from the highwall and that the victim was approximately 50 feet away from him. The stripping shovel "was on up the pit a pretty good distance," and he estimated that it was 400 yards away. He confirmed that he observed no rocks fall from the highwall during the time prior to the one that struck the victim (Tr. 116).

On cross-examination, Mr. Montgomery confirmed that he is a UMWA member and that he considers himself to be an experienced surface miner. During the time he worked with

the victim, he found him to be an experienced miner and a safe worker (Tr. 118). He further described the condition of the highwall as follows (Tr. 118-120):

Q. Now, you stated on direct examination that the highwall had been dragged but not as cleanly as the other sections of the highwalls. What do you mean by dragged exactly?

A. Well, as I understand it, they take the bucket -- I've watched them -- they take the bucket and go up to the top of the wall. And they will drag all the loose stuff. And in that particular area, it wasn't as cleanly -- I mean, there was stuff up there, but it wasn't -- I didn't observe it to be hanging loose. It wasn't -- some places where they clean it off, you know, it looks like a dozer has been along there. You know, they really have done a good job of it in certain area.

Q. So you were saying that this was dragged but just not as well as in certain other areas?

A. Right.

Q. And you stated -- did you see any loose material on the highwall?

A. I didn't observe any loose material about to fall. You know, there was stuff sitting up there. But from where I was at my vantage point, you know, --

Q. What would have happened if you would have seen loose material? What would you have done?

A. I would have notified my foreman.

Q. Okay. Would you have gotten out of the pit?

A. Would I have gotten out of the pit?

Q. Yes. Would you have gotten away from that area?

A. I would have gotten away from the wall, yes. I probably wouldn't have gotten out of the pit. But I would have gotten what I consider a reasonable distance from the wall.

Q. But you never had any occasion prior to Mr. Dulin's accident to report a hazardous condition to mine management?

A. Ever or --

Q. No, I mean just that day.

Q. That day. No. Huh-uh.

Mr. Montgomery indicated that mine management usually took care of previous safety conditions he has reported, and he stated that he is not afraid to make complaints. He confirmed that his supervisor was present in the vicinity of his work area at least a half an hour prior to the accident, and while he had an opportunity to report any unsafe condition to his supervisor at that time, Mr. Montgomery stated "I hadn't observed anything to report" because he was in the drill (Tr. 121). Mr. Montgomery confirmed that the respondent has corrected highwall conditions in the past, that the highwall is scaled by the shovel for safety reasons, and that highwall conditions do change and he explained those changes (Tr. 121-122). He confirmed that he had no indications prior to the fatal rock fall that it was going to fall (Tr. 122). He also confirmed that the highwall was damp, that conditions were wet, and that "the highwall had been dragged to some extent." However, he stated that "I didn't see anything about to fall" (Tr. 123).

In response to further questions, Mr. Montgomery stated that since he was in a drilling machine in the middle of the pit, he would not have observed the highwall as close as a chooter, and he described what he observed as follows (Tr. 125-126):

A. Well, that day, you know, when I looked at that that morning -- you can look at a wall and tell if they've done anything to it or not, you know. They had done some work on it.

Q. Was that --

A. I'm just saying that it wasn't as clean as it was in other areas of the highwall.

Q. Because the area that you were working in, you say, was not as clean as others?

A. Right. I think right up in front of us there was clean area. I don't remember real well, but it seems like there was an area that was really scaled nice right up past that, you know.

Q. Past that area, towards the direction you were going?

A. Yeah.

* * * *

A. From just what I have observed, normally once they have removed the overburden as far over as they are going to remove it, they usually, as they move the machinery up, they will scale it as they go, you know.

And at Tr. 127-128:

JUDGE KOUTRAS: Did you at anytime have any conversation with Mr. Penrod or Mr. Dulin concerning the condition of the highwall?

THE WITNESS: Not concerning the condition of the highwall.

JUDGE KOUTRAS: Several times in response to questions of either Counsel McKown or Mr. McKown asked you with regard to whether or not you observed any loose, hazardous rock, your response was: Nothing that looked like it was going to fall.

THE WITNESS: I guess you want a clarification on that?

JUDGE KOUTRAS: Yes. And my follow-up question to that is do you usually wait until the rock starts falling before you consider it to put you in peril?

THE WITNESS: No. No. The only thing that I can say is that the wall had not been good for some time up to there. By that, I meant that it didn't look any worse to me that particular day that it had been looking.

JUDGE KOUTRAS: All right.

THE WITNESS: I felt that it had not been scaled as well as it should be. But, you know, we'd been living with it.

JUDGE KOUTRAS: Based on the condition of the highwall that you observed that day, what if Mr. Barrett had said to you, Mike, -- if I can take the liberty of calling you Mike -- Mike, instead of putting you on the drill today, we're going to make you a loader and a shooter. Would you have insisted that the highwall be scraped better than it was, or would you have any fears of going and working and doing the job of loading and shooting?

THE WITNESS: If I had been Mr. Dulin, it would be me instead of him because I would have done the job. I didn't observe anything -- I'll put it this way: Once I sat on that drill, I didn't look at the top of that wall during the day because of where I was at. I didn't have any need to. Maybe I should have, to help watch for my fellow workers; but I was in the middle of the pit; I was a safe distance from it; and I didn't feel -- I just didn't observe the wall. If I had been a shooter, I know that I would have watched that wall closer.

JUDGE KOUTRAS: Well, okay. But the question was: If it wasn't as clean as it usually is, would you have insisted that they make it a little cleaner before you proceeded to work as a driller or loader?

THE WITNESS: If I had seen that falling off a wall, yeah, I would have gotten out of the area.

KENT 83-86 - Petitioner's testimony and evidence

MSHA Inspector George Siria confirmed that he issued Citation No. 2075267 on September 3, 1982, exhibits P-5 and P-6, citing a violation of section 77.1005 for failure by the respondent to remove loose hazardous materials from the highwall in question. He confirmed that the citation was issued at or about the same time as the previous one

and that it concerned the same highwall condition connected with the fatal accident. Mr. Siria stated that the highwall appeared "to be loose" and that "I figured if it was loose it was hazardous to anybody working underneath it." He described the highwall as being composed of dirt, topsoil, and limestone, and he indicated that "it was just loose material that had not been scaled off" (Tr. 132).

Mr. Siria stated that in his opinion, the top of the highwall had not been scaled or "cleaned off," and he confirmed that he found "high negligence" because "it was very obvious to me and I thought it should have been to the company also" (Tr. 133). He stated that the 150 foot area which he cited did not appear to be scaled at the top or face of the highwall, and that he saw loose rocks. He also stated that "If I had been working in the pit, I would have been afraid of it" (Tr. 135).

On cross-examination, Mr. Siria conceded that he has never observed the stripping shovel at the pit in question, and he confirmed that he never observed the shovel scale or not scale the highwall in question, and that he relied on what he observed from the top and bottom of the highwall after the accident. He indicated that his opinion that the highwall had not been scaled was based on his observations of loose rock and adjacent area which had not been scaled (Tr. 136). Based on his experience, he believed the highwall to be "obviously dangerous" (Tr. 137). He stated further that he observed overhangs and cracks in the 150 foot highwall area in question, and did not believe that the highwall was ever scaled and that he simply did not notice it (Tr. 138). He confirmed that during abatement "they really did a good job" of scaling (Tr. 140).

MSHA Inspector James H. Utley confirmed the citation issued by Inspector Siria, and he also confirmed that on September 3, 1982, he walked the top of the highwall in the area where the fatal rock fall accident occurred. He described an area approximately 150 feet long "where the loose material on top of the highwall had been partially dragged off." He stated that the stripping shovel had dragged some of the loose material off, but that in the immediate face area where the rock fell it was "a little rough" (Tr. 150). When asked to explain further, he stated that the material he observed at the top of the highwall "was there in its normal state. It was there when the Earth was formed, I guess; and it had not been removed" (Tr. 151). He then stated that no one from the company explained to him why that area looked different from other areas which had been dragged or scaled, but that he recalled no conversations with any company officials about the citation which was issued (Tr. 151).

On cross-examination, Mr. Utley stated that part of the 150 foot highwall was scaled and part was dragged, and he was of the opinion that there was a difference in these two procedures. He was of the opinion that "maybe somebody got a little behind or in a hurry, and they failed to drag the top of the highwall the way they had been doing it in the past," but he conceded that he did not interview any of the stripping shovel operators (Tr. 153). In response to further questions, Mr. Utley stated as follows (Tr. 155-156):

Q. How do you define overhang?

A. How do I define overhang?

Q. Yes.

A. An overhang would be an area of the highwall that protrudes out past the average face of it. And it would have an area beneath it so that it could turn loose and fall.

Q. Did you see overhangs on this 150-foot area?

A. Yes. There were some areas that could be defined as overhangs.

Q. And how do you identify material as being loose and unconsolidated? What do you rely on to come up with that conclusion?

A. Well, loose and unconsolidated material to me would be material that had been drilled and shot that was ready to be stripped by the strip shovel. Also there can be geologic deposits that are loose and unconsolidated in their normal state.

Q. And, of course, you didn't see the shovel make a pass through that area of the highwall?

A. No, sir.

Q. And, of course, you didn't see the condition of the highwall prior to the accident occurring?

A. No, sir, I didn't.

Respondent's testimony and evidence - KENT 83-86 and KENT 83-66

Kerry Teague testified that he was a drill foreman on the day of the accident in question, and that he observed the highwall and was looking for loose material. He stated that on September 3, 1982, when he observed the highwall, he found it to be in good condition and properly scaled. He confirmed that when he observed it on September 2, 1982, he saw no loose rocks or other material (Tr. 168). He confirmed that he has known the accident victim for "all of his life," and he considered him to be an experienced and safe worker, and did not believe that he would work in an unsafe environment (Tr. 169).

On cross-examination, Mr. Teague confirmed that the entire pit in question was under his supervision, and he stated that he traversed the pit area by truck and by walking. He confirmed that his shift starts at midnight and that it is dark, and that any lighting present would be generated by the lights on the particular pieces of equipment operating in the pit area. He explained the movement of the stripping shovel on the day of the accident, and he stated that 50 or 60 feet of overburden was stripped that day. He also indicated that at the time of the accident, the shovel had moved approximately 36 to 45 feet along the highwall. He also confirmed that he did not remain in the area after 8:00 a.m. on the day of the accident (Tr. 175). He confirmed that he next went to work at 12 midnight after the time of the accident, and that the area was still cornered off, and that he performed no work at the location of the accident (Tr. 176).

In response to further questions, Mr. Teague stated that the area where the accident occurred had been stripped for two days prior to the time of the accident (Tr. 179). He confirmed that when loose materials are encountered it is "stripped down," and that this is done "if it is hazardous," and that "we do take care of it" (Tr. 180). When asked to explain when such loose material "is not hazardous," he stated "I can't" (Tr. 181). He confirmed that he was not present when the accident occurred, and that his observations of the conditions of the highwall were based on what he saw on the previous shift and on the shift after the accident (Tr. 181).

Robert Barrett, testified that on September 2, 1982, he was the drill foreman at the pit in question, and he explained his duties (Tr. 184). He confirmed that he had six people working for him that day, including the accident victim, and he considered him to be a safe and good worker

(Tr. 186). He stated that blasting and weather conditions can change the condition of a highwall, and he confirmed that the presence of a crack would indicate that a rock may fall, and he confirmed that he has observed a rockfall occurring without any warning (Tr. 187).

Mr. Barrett confirmed that he inspected the highwall on September 2, 1983, and observed no unsafe conditions or loose, unconsolidated materials. He also confirmed that he observed no conditions which in his opinion would cause him or anyone else to fear for their safety. He believed the highwall was adequately scaled and stripped, and he explained the procedures for doing this (Tr. 188-189). He confirmed that no one raised any safety concerns about the highwall conditions on the day of the accident, and he did not feel that he was in any danger working in the highwall area on the day of the accident (Tr. 193).

On cross-examination, Mr. Barrett stated that the pit foreman makes entries in the preshift examination books, and that he too has made such entries. He confirmed that he made no entries, but that the pit foreman did and that he examined the book (Tr. 195). He explained the mining cycle and how the coal is stripped with the shovel (Tr. 196-202).

In response to further bench questions, Mr. Barrett stated as follows (Tr. 209-210):

JUDGE KOUTRAS: Several witnesses have testified in this case, and you haven't heard their testimonies, but they described the highwall on September 2nd as being "rough," "not like I would like it to be," "not like it usually is," "not like part of it was," all kinds of descriptions were given. But there seems to be a vast difference of opinion as to whether or not there was loose, hazardous materials on the highwall. And I have some difficulty sometimes comprehending where everybody is testifying in this case, whether it be a mine management pit foreman or some guy who is rank and file down there doing the job, doing the actual working at the foot of the highwall. And I detect that everybody is not all on the same wavelength as to what loose, hazardous material is all about. And I hear testimony, for example, that: "We're all aware of it"; and "When I see the first rock coming down,

I turn tail and run"; and you've indicated that you inspected -- you said something about driving by in your truck. Now, I don't know whether that means you drive by and inspect it or you actually get up on top. But the point I'm trying to make is: Do people just accept the highwalls and try to have everybody fend for himself?

THE WITNESS: No. It's a team operation. Anytime anybody -- and this is encouraged -- a man facing an unsafe condition should report it.

JUDGE KOUTRAS: Well, what I can't understand is how do you account for the fact that two federal inspectors went out there to the top of the highwall, and they described loose, hazardous materials to me. And you went out there and looked at the same highwall, and you didn't see any loose, hazardous materials. How do you account for the people looking at the same highwall at about the same time and coming to different conclusions as to what they observed?

THE WITNESS: I can't answer that. The only thing that I can answer is my personal feeling towards it. It was a safe wall.

Edward Carlisle, mine superintendent, testified as to his background and experience, and he described how the highwall is created and mined, how the conditions could change, and what steps are taken to identify dangerous conditions (Tr. 213-220). He confirmed that he was acquainted with the accident victim and that he considered him to be an experienced and safe worker (Tr. 220).

Mr. Carlisle confirmed that he was in the pit in question on the morning of the accident, and that he arrived there shortly before 7:00 a.m. and drove through the area. He stated that he saw nothing that morning which caused him any alarm for the safety of the miners working in the pit (Tr. 221). He considered the scaling and stripping of the highwall that morning to be "satisfactory" (Tr. 221), and that "we had done the best that we could with what we had to do" (Tr. 222). He also believed that the area where the accident occurred was scaled adequately (Tr. 222), and he described how the highwall scaling is done (Tr. 223-225).

Mr. Carlisle confirmed that no MSHA or state inspectors were in the pit area on the morning of the accident and that he observed no conditions that would lead him to believe that there was a violation of the ground control plan. Further, he indicated that no one reported any unsafe highwall conditions to mine management prior to the accident (Tr. 227), and he stated that apart from the accident in question, there have been no prior highwall fatalities at the mine in question (Tr. 228).

On cross-examination, Mr. Carlisle confirmed that the pit foreman had noted some problems with the highwall conditions in the area where a truck was located at another area (Tr. 235), and he testified as to his inspection duties, including the area where he would inspect the highwall conditions (Tr. 241-243). In response to further questions, he stated as follows (Tr. 244-246):

JUDGE KOUTRAS: I've heard some testimony about the highwall location where this M 191 truck was working, and apparently someone had made some notation in the company -- either preshift or on-shift inspection report -- that on that very day the highwall condition by the M 191 was hazardous and that employees were told to stay away from it. Okay?

THE WITNESS: Yeah, it might have been on that day. I don't know.

JUDGE KOUTRAS: Well, let's assume that there was a similar notation at the precise location Mr. Dulin was working in on September the 2nd. What would you then say about the condition of the highwall?

THE WITNESS: Well, we would have got the people away from it.

JUDGE KOUTRAS: Well, what leads an examiner to come to a conclusion that the highwall in one location is hazardous and that it should be dangered off; but yet in another one it is not loose or is in good shape, or what? What --

THE WITNESS: If it is solid and you can't see any cracks or movement in it, then you can just on your own judgment look and see if it is going to fall or not. That's about the only way.

JUDGE KOUTRAS: Okay. Now, I'm going to ask you the same question that I asked one of the other witnesses. You inspected the highwall that very same morning?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And about 20 minutes after the accident one federal inspector appeared on the scene, and he looked at it, and he inspected it, and he climbed to the top or at least within the next day or so, and assuming no conditions changed, their testimony is that there was loose, hazardous, unconsolidated material that hadn't been taken down.

Now, how can your counsel explain that you, as the superintendents saw the same condition and said that it was in good shape, it was scaled down, and there wasn't any problem? Yet the two inspectors looked at the very same condition or the same area, and they come to an opposite conclusion?

THE WITNESS: After the rock fell out, on either side of it, yes, there was loose material then because it made it when it came out.

JUDGE KOUTRAS: For a hundred and fifty feet?

THE WITNESS: No, sir.

KENT 83-66 - Petitioner's testimony and evidence

MSHA Inspector George Siria confirmed that a fatal accident occurred at the mine on March 25, 1982, and that upon investigation of that incident he issued a citation on March 29, 1982, charging a violation of section 77.404. He also confirmed that another inspector terminated the citation after abatement of the cited condition (Tr. 6). Mr. Siria confirmed that he operated the throttle of the machine in question, and that when it was "cold" it would shut off, but when "hot," it would not. He stated that he did this either the day of the accident, or the next day (Tr. 7). He also stated that his inquiry did not establish that the cited condition had actually been reported to mine management prior to the accident, but that two months earlier the cited dozer would not shut off, and that "the practice of shutting off was getting out on the track and shutting it off, putting it in neutral and shutting it off" (Tr. 8).

Mr. Siria stated that his investigation indicated that the accident victim had previously shut the machine off by climbing out on the track, and when he first observed the machine, the gear was between second and third, rather than the neutral or "lock-out" position. He concluded that the victim had pushed the lever from outside opening the throttle, and that instead of shutting the machine off, the machine went forward throwing the victim off (Tr. 8-9).

On cross-examination, Mr. Siria stated that he has never operated any surface mine heavy equipment, including an International TD 25 Dozer, and that he did not examine the cited machine in question in any detail. He did examine the throttle and linkage, and while he did sit in the cab, he did not test the brakes or transmission, nor did he start the machine up (Tr. 9). He did not use the throttle when the machine was running, and he relied on statements given to him during his investigation to support his conclusion that the throttle did not work. He confirmed that he had no personal knowledge as to whether the throttle worked or not, nor did he have any idea as to why "hot" and "cold" made any difference to shift linkage (Tr. 10).

Mr. Siria stated that the dozer transmission lock-out device was operative, and he stated that he sat in the machine cab and he described the operating positions of the transmission shift lever (Tr. 11-12). He stated that not all equipment defects necessarily render a machine "unsafe" and in violation of the cited safety standard, and he defined "safe" as "where it would not be likely to harm someone that was operating it" (Tr. 13). He believed that the failure or inability to throttle down the machine was unsafe because this was the only means for shutting it off, but he conceded that the machine could be stopped from inside the cab by dropping the blades to turn it off, and that this alternative method would be safe (Tr. 13).

Mr. Siria conceded that there were no eye witnesses to the accident and that MSHA did not know how it occurred. He stated that the accident victim was 62 years old, had 31 years of mining experience, six of which were as a dozer operator. He did not investigate the victim's health, and he found it surprising that anyone would fail to lock out the dozer transmission. He explained further as follows (Tr. 16):

Q. And you feel that that throttle was the cause of his death?

A. Yes.

Q. Please explain.

A. The throttle in addition to him not locking it up. If the throttle had worked and he had shut the dozer off like it was designed to do, then he wouldn't have been out on the -- If that was what he was doing, and we presume this was what he was doing from the statements of other people. And other people have shut it off the same way.

Q. But he also had the alternative of using the hydraulic, you admit that?

A. Yes.

In response to further questions, Mr. Siria confirmed that MSHA's accident investigation indicated that when the accident was first discovered the machine motor was still running (Tr. 16). He confirmed that during the accident investigation it was determined that several other miners had operated the dozer in question approximately a month or so before the accident and that they had problems shutting the engine down from inside the cab of the machine.

Mr. Siria confirmed that MSHA's accident investigation report concludes that "the machine was not kept in a safe operating condition in that the mechanism for stopping the engine from inside the cab was inoperative" (Tr. 23). In response to further questions concerning this conclusion, he stated as follows (Tr. 23-27):

JUDGE KOUTRAS: Did anybody ever determine that the mechanism for stopping the engine from inside the cab was inoperative?

THE WITNESS: Yes, your Honor. It --

JUDGE KOUTRAS: I'm asking you a question. Did anybody ever determine that the mechanism for stopping the engine from inside the cab was inoperative?

THE WITNESS: Who do you mean by anybody?

JUDGE KOUTRAS: Well, let's say during the course of these investigations. I take it that once the machine was found that someone did something with the machine. Right?

THE WITNESS: The machine was idle and the citation was abated about a month and a half later.

JUDGE KOUTRAS: No. During the course of the investigation of the fatality did someone make a determination that this machine that the engine could not be stopped from inside the cab?

THE WITNESS: From the statements. I don't know. They were there before I got there. I don't know really if anyone checked it out. I don't know if another inspector checked it out or not to see what the problem was there. Personally, I didn't crank it up and try to shut it off.

* * * *

JUDGE KOUTRAS: Thank you. Here is a bulldozer that is found operating with a closed throttle and it had just run over somebody and is against the embankment. And based on the investigative report, two eye witnesses, two persons that were summoned to the scene or went to the scene and found the victim got up there and did something to the machine. They shut the engine off, or they put it -- I'm talking about during the course of the investigation of the fatality, did anybody ever tear the machine apart or make any determination that the mechanism for stopping the engine from inside the cab was, in fact, inoperative as of the time of the fatality? Did anybody ever make that determination?

THE WITNESS: Not in my presence.

JUDGE KOUTRAS: Did anybody ever do it? In your presence or out of your presence.

THE WITNESS: No.

JUDGE KOUTRAS: Would that be a logical investigative step to take to find out what's wrong with the machine. It's for somebody to tear it down and find out what was wrong with it. In your opinion, would that be a logical thing to do? Or would it be illogical?

THE WITNESS: The logical part of it would be to fix it so it would shut the machine off like it should be.

JUDGE KOUTRAS: Before you can fix anything you've got to find out what's wrong with it, don't you?

THE WITNESS: Mainly what was wrong with it.

JUDGE KOUTRAS: Did --

THE WITNESS: When they investigated it the linkage was out of adjustment and some dirt and stuff would cause it not to let the lever go down far enough, and worn parts in the linkage would cause it too.

JUDGE KOUTRAS: I note from Exhibit P-1 that the citation was terminated on May 4th, and Inspector Sparks says that the TD 25 International dozer appears to be in safe operating condition. This is a month or so after the fatality, the citation is terminated. Do you know what they did to terminate the --

THE WITNESS: I don't know. But that was my -- When this was printed I got back to my regular duties and I don't go back to this anymore unless I got assigned to it. I was on another accident.

* * * *

JUDGE KOUTRAS: But no one tore the machine down during the time that the accident happened and the time that you issued the citation --

THE WITNESS: No.

JUDGE KOUTRAS: -- to specifically find out if the mechanism did not, in fact, stop it from inside.

THE WITNESS: That's true.

During a bench colloquy as to why the throttle mechanism was not examined, MSHA's counsel stated as follows (Tr. 29-31):

JUDGE KOUTRAS: Well, I don't -- how about the other particular ones. The TD 25 International, all are designed to be cut off from inside the cab?

MR. STEWART: That's correct.

JUDGE KOUTRAS: And the reason this one wasn't was what?

MR. STEWART: Our contention is that the throttle mechanism did not work properly. That is the piece of machine that cuts it off from inside the cab.

JUDGE KOUTRAS: At the time of the investigation did someone dismantle that throttle and take a look at it and come to the conclusion that you just stated?

MR. STEWART: No. Apparently, Peabody did.

JUDGE KOUTRAS: He says, no. Nobody ever did.

THE WITNESS: No. during the investigation, no. Not while I was there.

JUDGE KOUTRAS: Has anybody to this day ever come to the conclusion that that's what caused this piece of equipment not to be shut off from inside the cab?

MR. STEWART: I don't. I'm not aware of any finding that that was what stopped it.

JUDGE KOUTRAS: Doesn't that seem like a very logical step in the investigative process?

MR. STEWART: Well, your Honor, I believe that this situation --

JUDGE KOUTRAS: If someone were to say to you that there was an accident caused by defective brakes, wouldn't the first step be to pull the brakes off and see if they're defective?

THE WITNESS: This happened. They did.

JUDGE KOUTRAS: They did what?

THE WITNESS: They --

JUDGE KOUTRAS: They pulled the throttle off and they found that it was defective?

THE WITNESS: Well, they put a new one on and it worked. Evidently that was all because the citation was abated by the Service Inspector about a month and a half later. That was an extra dozer anyhow they didn't use it all of the time.

William Jarvis stated that in 1982 he worked as a tractor operator at the mine in question. He testified that approximately two months before the accident he operated the TD 25 dozer and found that one cutting clutch was inoperative and that one of the brakes was bad. At the conclusion of one of his work shifts he advised his foreman that he would not operate the dozer because of these conditions, and that he had to shut the engine off by manipulating the throttle linkage on the fuel pump from outside the cab of the machine. At that time, he placed the machine in neutral gear but it did not lock it out (Tr. 31-33).

Mr. Jarvis stated that the throttle linkage inside the cab of the dozer was designed to shut off the engine, but at the time he used it he had to step out on the machine crawler in order to press the fuel pump throttle linkage down further in order to shut the engine down (Tr. 34). He also stated that he had never experienced this problem in the past while operating many tractors (Tr. 35).

On cross-examination, Mr. Jarvis confirmed that he had no knowledge as to whether the bulldozer in question was in the maintenance shop for repairs after his experience with it, and he had no knowledge as to whether any repairs were made on the machine. He again confirmed that he shut the engine off at the end of his shift by means of the throttle linkage from outside the cab of the machine.

Mr. Jarvis stated that he could not recall reporting the throttle linkage problem to his foreman, and he did not believe that the machine at that time was unsafe for him since he could have used the hydraulic blade to stop the engine (Tr. 37). Mr. Jarvis indicated that one had to back out of the cab of the machine, and he described the locations of the heater and the lock-out lever (Tr. 38). He also indicated that it was cool during March, and that he would usually stay in the cab of the machine to eat lunch because it was warm and that he would have no reason to shut down the engine until the end of the shift (Tr. 40).

In response to further questions, Mr. Jarvis testified as follows (Tr. 43-44):

JUDGE KOUTRAS: Mr. Jarvis, let me ask you this. As a bulldozer operator, do you consider having to get out of that cab and fooling with the linkage on the fuel pump an ideal way of shutting off that machine?

THE WITNESS: No.

JUDGE KOUTRAS: What is the acceptable way of shutting off that machine?

THE WITNESS: From inside the cab with a hand throttle.

JUDGE KOUTRAS: And have you shut off such machines from inside the cab with hand throttles in the past?

THE WITNESS: Yes.

JUDGE KOUTRAS: Ruling out getting out on the crawler with the --

THE WITNESS: Yes.

JUDGE KOUTRAS: How many times have you stopped the machine by dropping the front blade and raising up the engine and choking it out, assuming that's what it does, doesn't it?

THE WITNESS: Well, if you can get it raised up enough you can.

JUDGE KOUTRAS: How -- What's the proper -- What's the best way? What's the most acceptable was as a dozer operator to stop that machine by dropping the blade or doing it from the inside?

THE WITNESS: Shutting it off with the hand throttle.

James Jones testified that he has worked for the respondent at the mine in question for approximately 5 1/2 years and that for the past 4 years he has operated bulldozers. He confirmed that in March 1982, he operated the TD 25 International bulldozer which was cited in this case. He stated that he operated it during the 4:00 p.m. to midnight shift on March 24, 1982, just prior to the accident, and that the machine was brought to him by a mechanic and that the engine was running.

His regular bulldozer was down for repairs and the TD 25 in question was a substitute. He operated it for the rest of the shift with no problem, but at the end of the shift he could not shut the engine off by means of the throttle and had to raise the blade, thereby "choking" the engine out in order to shut it off. This was done from inside the machine and he considered this a safe procedure as long as he was in the machine. He confirmed that he had not previously operated the dozer in question, and that he always used the hand throttle from inside the cab to shut the engine down on other bulldozers he had operated (Tr. 44-50).

On cross-examination, Mr. Jones confirmed that he is a UMW member, and he stated that he did not report the fact he could not shut the engine down on the TD 25 dozer with the bad throttle to mine management, and he confirmed that the victim had operated the same machine several months prior to the accident (Tr. 52-54). Mr. Jones confirmed that when the machine was brought to him it had recently been out of the shop, and except for the throttle, everything was in working order. He did not discover the throttle condition until the end of the shift, and he did not believe that he was in any danger by not being able to shut the engine down by means of the throttle (Tr. 55).

Gary Bowles testified that he has been employed by the respondent for 17 1/2 years, and that for the past five years he has been a mechanic. He confirmed that he was familiar with the TD 25 bulldozer in question, and that he has performed maintenance work on it. He stated that the throttle linkage from inside the cab of the machine is the primary way to shut the engine down and in those instances when the engine would not shut down the throttle linkage was the problem (Tr. 58-60).

Mr. Bowles testified that he was summoned to the scene of the accident on March 25, 1982, and was at that time serving as a mine safety committeeman. When he arrived at the scene of the accident the bulldozer in question had been trammed back from the embankment where it had come to rest and the engine was idling. He climbed into the cab of the machine and tried to shut the engine off with the throttle but could not do so. He dropped the blade of the machine to the ground and "killed" the engine. He confirmed that the throttle linkage on the bulldozer in question was a common problem (Tr. 60-63).

Mr. Bowles confirmed that a complete new throttle linkage system was installed on the machine in question

after the accident, and that while he did not perform the work, the day shift mechanic showed him the old linkage which had been taken off the machine (Tr. 63). When asked whether he believed the machine with a defective throttle linkage was a safe piece of equipment, he replied (Tr. 63-64):

A. It wasn't safe as -- Well, it wasn't unsafe as far as operating it, but it was a part of that equipment design to, for the purpose of shutting it off, it made it unsafe in the sense of the word that when to sometimes kill that engine you had to get out on the tracks to kill it.

Q. Or lowering the blade.

A. Or lowering the blade.

On cross-examination, Mr. Bowles stated that he knew the victim, and while he had no personal knowledge that he was aware of the throttle linkage problem, he had heard that the victim had been told about the problem. Mr. Bowles stated that he had no reason to know why the victim may have left the machine in gear (Tr. 64-66).

When asked his opinion as to how the accident may have happened, Mr. Bowles stated (Tr. 67-68):

* * * he was going to get out of his dozer and eat dinner. And he got out of the -- When the engine wouldn't shut off with the throttle, when he got out of the tractor he either locked the engine or transmission in gear or didn't take it out. And when he pulled on the throttle to throttle the engine down and kill it he pulled it the wrong way. And being a man 62 years old he couldn't -- he couldn't get out of the way fast enough and he couldn't jump back fast enough to get off the dozer.

Respondent's testimony and evidence - KENT 83-66

Donald Holt, respondent's Eastern Division Safety Director, testified that while he was not present during the actual accident investigation in this case, he conducted his own investigation by interviewing personnel, reviewing MSHA and State reports, and listening to tapes of the accident investigation interviews (Tr. 72).

Mr. Holt stated that he examined the TD 25 dozer in question, and that he was familiar with mandatory standard section 77.404(a). In his opinion, a machine can have a defect and still be considered safe. He indicated that simply because a machine mechanical part is out of adjustment, or has a "slight defect," this would not render it unsafe (Tr. 73). Mr. Holt considered the accident victim to be an experienced and safe worker, and he had a reputation for being conscientious (Tr. 75).

Mr. Holt stated that the inability to shut down an engine by use of a throttle was not a safety hazard or a violation of section 77.404(a), because there was an alternative way of checking out the engine and the victim knew this (Tr. 75).

Mr. Holt offered two "theories" of his own as to how the accident could have happened. He indicated that the victim's age, lack of agility, and poor eyesight all contributed to the accident. Mr. Holt stated that the victim may have been caught up in the crawler of the machine when he attempted to stop it from creeping after leaving it to go to his pick-up truck which was nearby, or he may have accidentally accelerated the machine by inadvertently striking the throttle when he slipped while getting out of the cab during the lunch break (Tr. 76-85).

Mr. Holt was of the opinion that a defective throttle would not render the machine in question unsafe, and he conceded that the throttle in question was determined to be defective and that it was replaced (Tr. 85).

On cross-examination, Mr. Holt could not state whether or not a properly operating throttle could have prevented the accident (Tr. 87). He confirmed that his theories as to how the accident occurred were premised on the fact that the machine engine was running. When asked whether his opinions would have been different if there was a way to shut the engine down, Mr. Holt could not answer, but he considered that his opinions as to how the accident may have happened do not assume that the throttle was bad (Tr. 88).

Stipulations

The parties stipulated as to jurisdiction, and they agreed that the respondent is a large mine operator, and that the proposed civil penalties, if affirmed, will not adversely affect the respondent's ability to continue in business (Tr. 3).

Findings and Conclusions

KENT 83-66

In this case, the respondent is charged with a violation of mandatory safety standard 30 CFR 77.404(a), which provides as follows:

(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Petitioner's counsel argued that the testimony and evidence adduced here establishes that there was a problem with the bulldozer throttle linkage, that two months prior to the accident the operators of that equipment noted a problem with the throttle linkage, and that a mechanic had worked on it several times prior to the accident. Further, counsel asserted that the mechanic had been instructed by his supervisor to work on the linkage, that the supervisor knew there was a problem concerning the failure of the throttle linkage to cut off the machine, and that this is established by the fact that alternative means were sought to shut the machine off. Counsel concludes that the respondent has presented no evidence that there was nothing wrong with the throttle linkage (Tr. 96-97).

Respondent's counsel asserted that "this throttle linkage is sort of a mysterious piece of equipment because sometimes it works and sometimes it doesn't." Counsel suggests that there is no indication that the throttle linkage failed to work on the day of the accident, and his view of this case is that it is one of interpretation of section 77.404(a) (Tr. 98).

Respondent's counsel argues that for a machine to be in violation of section 77.404(a), it must be established that it has a defect which is likely to result in an injury. Counsel submits that given the fact that the throttle linkage in question did not work properly, this condition could not reasonably result in an injury. Citing the testimony of Mr. Holt and Mr. Siria that not all equipment defects necessarily render the equipment unsafe, counsel points to the fact that in this case there was an alternative method of shutting off the machine from inside the cab by means of the hydraulic system, and that the experienced accident victim was more than likely aware of this alternative method (Tr. 98). Even assuming a violation, counsel asserts that a very low penalty should be assessed because of the fact that mine management was not advised of any defects, and had no knowledge of any defective throttle (Tr. 99).

As I noted during the course of the hearings, I find it rather lamentable that with all of the investigative resources available to both the Federal and State agencies and "committees" who participated in the post-accident investigation in this case, no one actually dismantled the throttle linkage device and subjected it to any "shop-tests" to determine whether it was in fact defective. The accident report prepared by the Kentucky Department of Mines and Minerals, exhibit R-1, contains a list of 33 individuals, including five MSHA representatives, and a form entitled "Complete Story of Accident," contains a narrative by the two state inspectors who prepared it, as to how the accident may have occurred. The "Conclusion of State Investigating Committee" is stated in pertinent part, at page seven of the report as follows:

It is the conclusion of the investigating team, the victim was run over by a TD-25 International Dozer that he was operating.

* * *

Apparently the victim positioned himself on the left crawler and was trying to shut off the engine by moving the linkage to the throttle. In this attempt, he evidently moved the rod in the wrong direction revving up the engine. The dozer being in gear started moving, rolling the victim from off the track forward between the blade and the left crawler. The lower portion of his body was crushed by the weight of the machine. There had been prior reports of the linkage throttle being out of adjustment and the engine could not shut off by using the throttle. On the day of the accident the engine could not be shut off by means of the throttle. The dozer was checked the day following the accident and it could be shut off but this may have been due to the engine being cool. (Emphasis added.)

The thrust of MSHA's case is that the cause of the accident was a defective throttle mechanism, and that by failing to take the bulldozer out of service, the violation occurred. Yet, no one ever determined that the throttle was in fact defective. Since the investigation produced information that the throttle may have been out of adjustment, or that it reacts differently when the machine is hot or cold, it seems to me that someone should have impounded the throttle, taken it apart, and determined precisely what the problem was. In this case, abatement was achieved by replacing the throttle

with a new one, and I suppose the old one was either discarded or "traded in" on the new one. As an analogy, if someone were to tell me that an accident was caused by defective brakes, the first question I would ask is whether or not the brakes were tested to determine whether they were in fact defective. Why the throttle was not subjected to any tests by mechanical experts still remains a mystery.

Notwithstanding my comments above, I conclude and find that there is ample evidence in this case to support the citation in question. Although there were no eyewitnesses to the accident, Mechanic Bowles testified that when he arrived at the accident scene, the machine had been trammed back from an embankment where it had come to rest after running over the victim, and that the engine was still running. He stated that he climbed into the cab and was unable to shut the engine off by means of the throttle. He then dropped the blade of the machine, thereby "killing the engine." He confirmed that the throttle linkage on such machines was a common problem, and that in those instances where the engine could not be shut down, the throttle linkage was the problem. Although the mechanic who installed the new throttle mechanism to achieve abatement showed him the old one which was taken off, MSHA did not produce the mechanic to testify at the hearing, and no further information was forthcoming as to the actual condition of the old one. Mr. Bowles was of the opinion that "killing the engine" from outside the machine because the throttle linkage would not do the job for which it was designed while one was seated inside the cab was unsafe.

James Jones testified that he operated the bulldozer in question on the shift immediately before the accident, and he confirmed that the machine had recently been in the shop for repairs and was a substitute machine being used while the regular one was down for maintenance. He stated that the machine was brought to him by a mechanic and that the engine was running. He operated it for the rest of the shift, and when his work was completed, he could not shut the machine down by using the throttle inside the cab and had to "kill the engine" by raising the blade, thereby "choking the motor." He never experienced similar problems with other bulldozers, and was always able to shut the engine off by means of the throttle from inside the cab of those machines. Mr. Jones confirmed that he did not report the throttle condition to anyone at the end of his shift, and he did not believe he was in any danger because he could not shut the engine down by means of the throttle.

William Jarvis testified that two months prior to the accident, he operated the same bulldozer which was involved in the accident, and at the conclusion of one of his work shifts he advised his supervisor that he would not operate the machine again because of an inoperative cutting clutch, and a bad brake. Mr. Jarvis also stated that he could not shut the engine off from inside the cab by means of the throttle, and that he had to step out of the cab and onto the machine crawler to manipulate the fuel pump throttle linkage before the engine would shut off. Mr. Jarvis could not recall informing his supervisor about the throttle condition, and he too confirmed that he had not previously experienced a throttle problem with other machines.

Respondent's sole rebuttal to the violation is the testimony of Mr. Holt, and he advanced several "theories" as to how the accident may have occurred. However, he candidly conceded on cross-examination that his theories "leaves the throttle linkage out of it completely" (Tr. 86). The issue here is whether or not there was a violation of the cited standard, and the cause of the accident is not the critical issue. Since there were no eyewitnesses, and since none of the witnesses who testified in this proceeding had any first-hand knowledge as to the chain of events or circumstances which caused the fatality, Mr. Holt's "theories," do not rebut the credible testimony by three witnesses which clearly establishes that the throttle mechanism on the machine in question did not do the job for which it was intended.

After careful consideration of all of the credible testimony and evidence adduced in this case, I conclude and find that the petitioner has established the fact of violation by a preponderance of the evidence. It seems clear to me that the throttle linkage mechanism in question was defective and malfunctioning, and that the bulldozer engine could not be shut down by the usual and normal method of activating the throttle from inside the operator's cab. As a matter of fact, on the very day of the accident, a mechanic could not shut the engine down by means of the throttle and had to use the "alternative" method of dropping the blade to choke the engine.

While I have taken note of the fact that no one actually tested the old throttle mechanism to determine what actually caused it to malfunction, on the record here presented there is more than ample evidence to support the conclusion that the throttle was defective. Aside from the mechanic who arrived at the scene shortly after the accident, operator James Jones testified that he operated the very same bulldozer on the shift immediately preceding the accident and could not

shut the engine down by means of the throttle. Further, since the use of the "alternative" method of choking the engine appears to be a known and acceptable practice, it logically follows that the respondent had prior knowledge of a problem with the throttle mechanism in question. If this were not the case, there would be no need to use the alternative method.

I further conclude and find that a defective throttle which requires an operator to stand on the machine crawler to manipulate the throttle linkage by hand places him in an unsafe position, particularly when the engine is running and he is attempting to shut the engine down from this position. Any sudden forward or backward movement of the machine caused by over-manipulation of the linkage would probably cause the man to lose his balance. On the facts of this case, while it may not be absolutely clear as to what may have caused the accident, it does seem clear the victim was run over by the machine. Had the throttle been fixed when the operators were experiencing prior problems in shutting down the engine, any temptation by the operators to stand on the crawler to manipulate the throttle by hand would have been removed. Thus, I conclude and find that the throttle in question was not maintained in a safe operating condition, and that this in fact resulted in the bulldozer in question being operated in an unsafe condition. Since it was not taken out of service as required by the cited regulation, the violation is established. The citation IS AFFIRMED.

Gravity

I conclude and find that the violation here was very serious. Failure of the throttle mechanism to do the job that it was supposed to do, namely, facilitate the shutting down of the machine engine from inside the operator's cab without resort to outside manipulation or the use of the "alternative" blade-dropping procedure, contributed to the severity of the violation. As indicated above, while there is no direct evidence that the victim was standing on the crawler and was thrown off when he attempted to manipulate the throttle mechanism, this conclusion is more reasonable than any of the theories offered by the respondent.

Inspector Siria marked the "S&S" block on the face of the citation which he issued. While his testimony in support of this finding may be rather skimpy, on the facts of this case the defective throttle mechanism in question did prevent the machine from being shut down from inside the operator's compartment. Given this fact, I conclude that it was reasonably likely that this condition contributed to, or was the proximate cause of the accident in question. Accordingly, the inspector's "S&S" finding IS AFFIRMED.

Negligence

I conclude and find that the violation here resulted from the failure by the respondent to exercise diligence in seeing to it that the throttle mechanism was operating properly. Since the testimony in this case indicates prior problems with the throttle in question, and that other operators had to use an alternative means of shutting down the engine by either standing on the crawler or dropping the blade of the machine, it seems clear to me that the respondent knew or should have known about the violative condition. I conclude that the violation resulted from a high degree of negligence on the respondent's part.

Good Faith Compliance

The cited machine was taken out of service and the repairs were made. Although the citation was actually terminated and abated on May 4, 1982, by another MSHA inspector, there is no suggestion that any delay was attributable to respondent's lack of good faith in achieving compliance once the violation issued, and that is my finding on this issue.

Findings and Conclusions

CENT 83-86 - Fact of violations

Citation No. 2075266, charges the respondent with a violation of 30 CFR 77.1000, for failure to follow its ground control plan by allegedly failing to correct certain hazardous highwall conditions before men were allowed to work in the cited area. Section 77.1000 provides as follows:

Each operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

Inspector Siria confirmed that the particular ground control plan provision purportedly violated by the respondent was the one found on page three, under 77.1004(b), (exhibit P-3). I take note of the fact that the ground control plan provisions are identical to MSHA's mandatory standards, and the particular one relied on by Inspector Siria states as follows:

77.1004(b). Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted.

I take note of the fact that the respondent's ground control plan provision simply parrots the language of the identical mandatory section 77.1004(b). Although the inspector stated that he reviewed the plan before deciding which portion to cite, he conceded that he could have cited a violation of 30 CFR 77.1001, but decided to cite section 77.1000 because of the failure to follow the plan provision.

Citation No. 2075267, charges the respondent with a violation of 30 CFR 77.1005, for an asserted failure to remove loose hazardous material from the face of the highwall in question for a distance of approximately 150 feet. Section 77.1005, provides as follows:

(a) Hazardous areas shall be scaled before any other work is performed in the hazardous area. When scaling of highwalls is necessary to correct conditions that are hazardous to persons in the area, a safe means shall be provided for performing such work.

(b) Whenever it becomes necessary for safety to remove hazardous material from highwalls by hand, the hazardous material shall be approached from a safe direction and the material removed from a safe location.

In support of the citations, petitioner's counsel argued that even though Inspector Siria may not have known about the condition of the highwall prior to the accident, the testimony of the two miners in this case establishes that the highwall condition "did not look good." Conceding that one of the miners was of the opinion that the highwall had not been scaled, while the other one stated that it appeared that it had been scaled "but not very good," counsel nonetheless asserted that a violation may still be established on the basis of the second miner's testimony alone. Counsel suggests that, at best, the differences in the testimony only goes to the degree of the violation, and may not serve to eliminate the presence of the violation (Tr. 249). Counsel also maintains that the respondent has presented little rebuttal

or contradictory testimony concerning the condition of the highwall as described by the petitioner's witnesses. Counsel asserts that respondent's management witnesses testified as to general mine problems, and what the highwall looked like on the shift prior to the accident, but had no knowledge as to what it looked like at the time the accident occurred, nor did they rebut the evidence presented by the petitioner as to how the highwall looked before and after the accident (Tr. 250). Counsel maintains that MSHA has established both violations.

Respondent's position with respect to the citations is that the highwall in question was in fact inspected prior to the fatal accident by the drill foreman on the prior shift and by the mine superintendent, and that they found the highwall to be free of any hazardous conditions, including any readily observable or detectable hazards. Further, respondent's position is that the highwall was properly scaled and stripped, and that prior to the accident in question it was safe and comported with all of the requirements found in Part 77 of MSHA's safety standards dealing with highwalls (Tr. 163). Counsel pointed out that the pit foreman who actually supervised the work of the accident victim died of a heart attack (Tr. 162). However, based on the testimony of its experienced witnesses, respondent is of the view that the highwall conditions did not give rise to the issuance of any violations in this case.

In further support of its case, respondent's counsel argued that the crux of the matter concerns the condition of the cited highwall prior to the accident, and that any knowledge of this condition on the part of Inspectors Siria and Utley came after the incident during their investigation. Further, counsel asserted that, as testified to by the witnesses, events such as weather and nearby blasting operations would result in changes to the highwall. Counsel also argues that the testimony of Inspectors Siria and Utley, and Mr. Penrod, that no scaling was done, was contradicted by the testimony of Mr. Montgomery, as well as Mr. Carlisle, Mr. Barrett, and Mr. Teague. Since Mr. Siria and Mr. Utley had limited or no practical surface mining experience, as compared with the many years of daily practical surface pit experience by the respondent's witnesses, counsel suggests that their testimony outweighs that presented by the petitioner in support of the violations. Finally, counsel cites a prior decision of mine in which I concluded that a violation had not occurred in circumstances similar to the instant case, MSHA v. S.A.M. Coal Co., Inc., Docket No. SE 81-21, June 3, 1982, 4 FMSHRC 1051 (June 1982).

In this case, it is clear that the citations were issued after a fatality occurred at the respondent's mine. The citations issued after MSHA had completed an investigation into what may have caused the rock fall. Typically, fatal accident investigations invariably result in the issuance of citations and recriminations which all too often are after-the-fact attempts by the parties to exonerate each other from responsibility. Invariably, MSHA takes the view that since someone was killed, the respondent mine operator was obviously at fault and should be held accountable. The respondent mine operator reacts by taking a defensive posture that "accidents happen," and that simply because an accident happens, it should not be assumed that the operator has violated the law and should pay the price. Once the case comes on for hearing before the Judge, the parties attempt to litigate the matter on the basis of speculative theories and hypothesis.

Citation No. 2075266 was issued after the accident occurred. Based on certain information obtained during the course of the investigation, Inspector Siria issued the citation and charged the respondent with failing to follow its ground control plan. The particular plan provision relied on by Inspector Siria was a provision that requires the respondent to "take down overhanging highwalls and banks" and to otherwise insure that "unsafe ground conditions are corrected." I am convinced that had the rock which killed the miner in this case not fallen, there would have been no citation. Once the rock fell and struck the miner, MSHA felt compelled to hold someone accountable.

The cited ground control plan requires that overhanging highwalls and banks be taken down. Here, the citation was issued by an inspector with little or no experience in the inspection of surface mines or highwalls. As a matter of fact, when he issued the citation, he made no negligence findings, and did not mark the appropriate block on the face of the citation. At the hearing, after having an opportunity to ponder on it, he conceded that he didn't know why he failed to make any negligence findings, and he conceded that he made a mistake. Recognizing the fact that an inspector's job is difficult enough without a Judge second-guessing him, here the citation issued after an investigation. I would think that MSHA would assign an inspector who is experienced in surface mining inspections to conduct the investigation and issue any citations which may be warranted. I am not particularly impressed by after-the-fact excuses, and it places the Judge in the untenable position of making credibility findings based on speculative testimony.

On the facts and circumstances surrounding this particular citation, the inspector conceded that he had never inspected the highwall prior to the rock fall in question, and he admitted that such a fall can change the appearance of the highwall. Even though the inspector charged that men were allowed to work in the pit area in question before any hazardous conditions had been corrected, he admitted that he had no evidence or knowledge that any miners were assigned any such duties by mine management personnel who knew that any hazardous conditions existed. The inspector's sole basis for this allegation was the fact that a rock fell and struck a miner.

There is no testimony by the inspector who issued the citation that any overhanging highwalls or banks ever existed prior to the accident. As a matter of fact, Supervisory MSHA Inspector Utley, who accompanied Inspector Siria during his post-accident investigation, testified that he saw no indication of any overhanging highwall materials. MSHA's counsel conceded during the course of the hearing that if the crack which appeared suddenly and without warning caused the rock fall which resulted in the fatality, mine management would have no way of knowing in advance about the crack. Counsel also candidly conceded that even if the highwall had been properly scaled, there was no way to assure that a sudden crack would not unexpectedly appeared.

The testimony by the miners who were in the pit at the time of the accident, including an eyewitness and member of the safety committee, establishes that once the crack became visible and known, those miners working under it, including the victim, were not necessarily concerned because "it was not working" and they observed no visible changes in the highwall conditions. In short, the testimony of miners who worked in the pit, and directly under the area where the rock fell, indicates that they were not particularly concerned with the conditions of the highwall and they had no reason to believe that they were in any danger. Of course, once the rock fell and struck the victim, and once MSHA embarked on an official inquiry, it is a natural tendency for the very same people who had no concern for the conditions prior to the incident in question, and who failed to give any warning to the victim in advance or withdrawing from the zone of danger, to now infer or imply that the highwall was not scaled or that the conditions which prompted the rock fall were obviously ignored.

After careful consideration of all of the evidence and testimony in this case, I conclude and find that MSHA has

failed to establish by any credible evidence that the respondent failed to follow its ground control plan by failing to correct any hazardous highwall conditions, particularly the taking down of overhanging materials, before men were allowed to work in the pit. Accordingly, Citation No. 2075266 IS VACATED.

Citation No. 2075267 was issued approximately five minutes after the previous one, and it charges the respondent with failing to remove "loose hazardous material" from the face of the highwall for a distance of approximately 150 feet. The cited standard, section 77.1005, requires in pertinent part that "hazardous areas shall be scaled before any other work is performed in the hazardous area." This language is similar to the language used by Inspector Siria in the previous citation where he charged the respondent with failing to correct hazardous highwall conditions before men were allowed to work in the area.

Mr. Siria testified that the highwall "appeared to be loose," that the top had not been scaled, and that overhangs were present. This testimony is contrary to that given by Mr. Siria in support of the previous citation he issued. There, he said absolutely nothing about any overhanging conditions, and Inspector Utley, who was with him, testified that he saw no indications of any overhanging materials. Further, MSHA's counsel conceded that there are no allegations that overhangs were present on the highwall, or that the top of the highwall was not cleaned off or scaled (Tr. 158,159).

When asked whether he was contending that the face of the highwall had not been cleaned for a distance of 150 feet, Inspector Utley replied that "I wouldn't say that it had not been cleaned. It was just a little rough." Although he indicated that he believed that someone had "got a little behind or in a hurry" and that "they failed to drag the top of the highwall the way they had been doing in the past," Inspector Utley admitted that he did not interview any of the shovel or stripper shovel operators (Tr. 153). Mr. Siria interviewed none of the shovel operators, and the petitioner did not summon them for testimony. It occurs to me that if there is a question as to whether a highwall had ever been scaled or cleaned at some time prior to an accident, one critical item of evidence would be some testimony from shovel or scraper operators who do that type of work. I find it lamentable that the inspectors here did not contact the shovel operators to determine whether they did in fact scrape or clean the highwalls. A possible answer as to why this was not done may lie in Mr. Siria's statement that "it was a proven fact that it was bad because it had killed a person, and so I thought that would be proof enough really" (Tr. 13).

When asked whether he had spoken to anyone who may have observed the highwall prior to the accident, Mr. Siria identified Mr. Penrod and Mr. Montgomery. Both of these individuals were "hole loaders," and their testimony concerning the highwall consists of their observations immediately prior to the rock fall.

Mr. Penrod testified that the highwall area ahead of where he was working had been scaled, dragged, and cleaned, but that his immediate work area was not. While he could not state the distance that the highwall had not been scraped, he did indicate that in his immediate work area, the distance was approximately 150 to 200 feet. Although he did indicate that the respondent had failed in the past to scrape the highwall, he also indicated that the respondent usually scraped and cleaned the wall and the top. He also confirmed that the shovel operator scales the highwall to take down loose material. However, he could not state whether he did or did not observe the shovel operator scale the wall. His observations of the highwall conditions were only what he saw after the accident, and he conceded that highwall conditions do change.

Mr. Montgomery's testimony is that when he observed the highwall during his shift it did not appear that it had been scaled "really good," that it looked "no worse" than other pit areas, and that he observed no loose hanging material. He also indicated that the area where the rock fell "hadn't been done as cleanly as it had in some other areas of the wall."

Respondent's defense is based on the testimony of a drill foreman who said that he observed the highwall the day after the accident and found it to be in good condition and properly scaled, a drill foreman who stated that he inspected the highwall on the day of the accident and observed no unsafe conditions or loose, unconsolidated materials on the highwall, and the mine superintendent who testified that he drove through the pit area on the morning of the accident and found nothing to alarm him because in his opinion the highwall area where the accident occurred had been adequately scaled.

Respondent's witnesses, for the most part, testified as to how scaling and stripping of the highwall is normally done. MSHA's eye witnesses who were in the vicinity of the rock fall and who saw the accident, testified that while they observed a crack which apparently appeared unexpectedly after the work shift had begun, they did not believe it was hazardous because they detected no movement, and opted not to withdraw from the area, not to say anything to their foremen, and not to caution the victim that he should be alert to any possible danger. Of course, once the rock came loose and began rolling towards the victim, it was too late, and he could not hear the warnings from his fellow miners.

On the basis of all of the testimony and evidence adduced in this case, and after viewing all of the witnesses during the course of the hearing, I am convinced that the accident resulted from an unforeseeable and unexpected event, namely the sudden appearance of a crack in the highwall which caused a large rock to roll down and strike the victim. I am further convinced that there was nothing anyone could do to prevent the accident. Even if it could be established without any doubt that scaling and stripping had taken place immediately before the crack appeared, the accident would probably have still happened.

I take note of the fact that the respondent's ground control provision, 77.1005, only provides for corrective action "where hazardous highwall conditions exist that would endanger persons in the area." The comparable MSHA mandatory standard section 77.1005, requires scaling in "hazardous areas," and the regulatory language requires that this scaling work be done in a safe manner when scaling of highwalls is necessary to correct conditions that are hazardous to persons in the area. As I have often observed, such regulatory language leaves much to the imagination. Rather than simply requiring the removal of loose, unconsolidated materials from highwalls, the language contains a condition precedent that requires that someone make a judgment call that a hazard is initially present. Typically, that judgment is made after the highwall collapses and someone is hurt. This case is a classic example of this. Three miners, including the victim, worked in an area where a crack appeared, but no one was concerned until a rock began to roll down the highwall towards the victim. None of the miners saw fit to alert the pit foreman about the crack, and they opted not to withdraw from the work area. For its part, mine management was satisfied that a prior cursory inspection of the highwall detected no unusual conditions. Once the accident occurred, MSHA arrives on the scene, and after an investigation by two nonsurface mine inspectors who failed to establish first-hand whether any scaling work had actually been done, citations were issued based on observations which lend themselves to differences of opinion and sheer conjecture as to whether or not the required scaling had taken place.

It is not unusual in cases of this kind where there had been a fatality, for the parties to speculate as to what may have happened. However, in the context of a specific citation charging a violation of a specific mandatory standard, I am compelled to decide the case on the basis of credible evidence. On the facts of this case, the critical question is whether or not the highwall had been scaled and loose

material taken down for a distance of 150 feet as charged in the citation. While I am not convinced that MSHA has established through any credible testimony that the immediate highwall area where the crack appeared and the rock fell were not properly scaled, neither has the respondent established that it was. MSHA's case as to what the highwall looked like after the accident occurred supports a finding that loose, unconsolidated materials were present along the highwall perimeters adjacent to the rock fall area.

I conclude and find that the testimony of Mr. Penrod, Mr. Montgomery, and Inspectors Siria and Utley, establish that the highwall areas adjacent to, and in the proximity of the actual rock fall area were not scaled so as to remove all loose and unconsolidated materials. I am not convinced that these adjacent areas were changed in any marked degree by the rock which fell, nor am I convinced that the respondent has established that it inspected the highwall and that actually scaling of the entire cited area had taken place. Accordingly, while I conclude and find that MSHA has not established that the immediate area above the actual rock fall had not been scaled, I do find that it has presented enough credible testimony to support a finding that some of the adjacent areas did contain loose hazardous materials which had not been scaled or stripped. Accordingly, to that extent the citation IS AFFIRMED.

Gravity

I conclude and find that violation no. 2075267 was serious. Failure to adequately scale the loose hazardous materials which were present in the areas adjacent to the rock fall area presented a hazard to miners who had to travel and work under the highwall area in question.

Inspector Siria marked the "S&S" block on the face of the citation which he issued. The failure by the respondent to adequately scale the highwall area in question would reasonably likely result in injuries in the event that the unscaled materials fell. Accordingly, the inspector's finding IS AFFIRMED.

Negligence

I conclude and find that the violation here resulted from the failure by the respondent to exercise reasonable care to insure that the cited highwall area was adequately scaled. Accordingly, I conclude that the violation resulted from ordinary negligence.

I take note of the fact that in exhibit R-2, MSHA's assessment officer notes that in a telephone interview with Inspector Utley on November 23, 1982, Mr. Utley stated that mine management could not have known about the crack which appeared in the highwall, and that management "makes a diligent effort to promote a good safety program."

The issue here is whether or not the areas adjacent to the rock fall and crack area were adequately scaled. Under the circumstances, the fact that the sudden appearance of the crack could not have been predicted, does not absolve the respondent from its responsibility to insure that the cited areas were otherwise adequately scaled of loose hazardous materials.

Good Faith Compliance

The record reflects that the loose materials in question were timely removed from the highwall area in question a day after the citation issued, and three days earlier than the time fixed by the inspector. Accordingly, I conclude that the respondent exhibited more than adequate good faith abatement efforts in achieving compliance.

Size of Business and Effect of Civil Penalties on the Respondent's to Remain in Business.

The parties have stipulated that the respondent is a large mine operator and that any penalty assessments for the violations in question will not adversely affect its ability to remain in business. I adopt these stipulations as my findings and conclusions in both of these docketed cases.

History of Prior Violations

Respondent's history of prior violations for the mine in question is reflected in MSHA's computer print-out, exhibit P-4. This information reflects that for the period March 29, 1980 through March 28, 1982, the respondent paid civil penalty assessments for a total of 45 violations. None of these were for prior violations of section 77.1000, but two were for prior violations of section 77.404(a). However, no further information was forthcoming as to what these two were all about.

For an operation of its size and scope, I cannot conclude that respondent's history of prior violations is such as to warrant any additional increases in the civil penalties assessed by me in these cases.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and considering the statutory criteria found in section 110(i) of the Act, I conclude that the following civil penalties are reasonable and appropriate for the two violations which have been affirmed:

KENT 83-66

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
1035414	3/29/83	77.404(a)	\$2,500

KENT 83-86

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2075267	9/9/83	77.1005	\$ 850

ORDER

Respondent IS ORDERED to pay civil penalties in the amounts shown above within thirty (30) days of the date of these decisions, and upon receipt of payment by MSHA, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Darryl A. Stewart, Esq., U.S. Department of Labor, Office of the Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 20 1984

FORRIE W. EVERETT, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. YORK 83-7-DM
: :
INDUSTRIAL GARNET EXTRACTIVES, : MSHA Case No. MD 83-59
Respondent :

DECISION

Appearances: Forrie W. Everett, South Paris, Maine, pro se;
Carol A. Guckert, Esq., Portland, Maine, for
Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged on July 1, 1983, from the position he had with Respondent because of activity protected under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Respondent denied that Complainant's discharge was related to protected activity. Interrogatories were served on Complainant by Respondent which Complainant failed to answer. Respondent filed a motion to Dismiss on March 12, 1984, because of this failure. I reserved my ruling on the motion. Pursuant to notice the case was heard in Auburn, Maine, on March 22, 1984. The case was consolidated for hearing with the case of Lawrence Everett v. Industrial Garnet Extractives, Docket No. YORK 83-6-DM, but since the cases involve separate alleged discriminatory discharges, they will be decided separately. Forrie Everett testified on his own behalf; Scott Andrews, Bruce Sturdevant, Scott Hartness and Richard Kusheba testified on behalf of Respondent. The parties were given the opportunity to file posthearing briefs, but neither party has done so. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Complainant was hired as a maintenance worker by Respondent in April, 1982. Respondent began operating the subject plant in 1979, taking over an existing facility built in about 1925. Ore

is delivered from a mine site to the plant where it is crushed and separated. It is then dried and screened into different sizes.

Prior to his employment with Respondent, Complainant had been employed in a construction company, operating heavy equipment, driving and working with heavy steel. He did maintenance on the machinery, on steel frames and on trucks. His job at Respondent required him to do maintenance on various kinds of machinery, such as rock dryers, elevators, small motors, vehicles and heavy equipment. It also included welding. When he was hired he earned about \$4.25 per hour and worked from 40 to 55 hours per week.

When he was first hired, he was regarded as a good worker and received early pay raises. Beginning in about January, 1983, the foremen began complaining that he did not complete assigned work. Machine operators complained that the repair work he did on their machines was not done properly. In March, 1983 and in June, 1983, two different foremen recommended that Complainant be discharged.

There was considerable confusion at Respondent's plant as to supervisory authority. Complainant was hired by Scott Hartness, Respondent's Vice President in charge of production. On many occasions, perhaps "most of the time" (Tr. 11), Hartness assigned jobs to Complainant and discussed maintenance problems with him. Scott Andrews was second shift foreman beginning in January or March, 1983, and became "foreman for new construction" in June 1983. While he was second shift foreman, Complainant, who worked days, was not under his supervision "unless his shift overlapped" (Tr. 71). When Andrews became foreman for new construction he did not have any employees assigned to him directly, but had to get employees working under other foremen after clearing it with them. Bruce Sturdevant was plant foreman beginning in August, 1982. He was in charge of the machine operators, bagging operators and, "at times, the maintenance staff" (Tr. 81). In about May, 1983, Wally Hinch was maintenance foreman in charge of all maintenance personnel. He quit after about 1 month in this position. Complainant expressed uncertainty about the identity of his immediate supervisors during his employment, and the record before me makes his uncertainty understandable.

On about June 21, 1983, Complainant's brother Lawrence Everett, an electrician working at Respondent's plant, was discharged. Lawrence Everett filed a discrimination complaint with the Federal Mine Safety and Health Administration and Complainant talked to the MSHA investigator about his brother's complaint. This interview, however, occurred after Complainant himself had been discharged.

Complainant sustained three work related injuries at Respondent's plant. In September, 1982, he sustained an eye injury when the band attached to his safety glasses was caught on a piece of steel and the glasses cut his eye. He lost 2 or 3 days from work. In early, 1983, while grinding, a piece of steel entered his eye beneath the safety glasses. He did not lose time from work. In June 1983, he injured his thumb when he was working on a machine on top of an elevator and the operator started the machine. Complainant did not lose time from work.

After the second eye injury, Complainant complained to Scott Hartness about the inadequate glasses. Hartness replied that they were cheap.

In April or May, 1983, Complainant was directed by Hartness and Sturdevant to perform welding on a fuel tank which had fuel spilled on the outside of the tank. A fire occurred, and Complainant complained to Sturdevant.

On about June 29, 1983, Complainant was directed by Scott Andrews to weld a steel leg while standing in the bucket of a front-end loader 12 feet in the air. He refused to do it, because he believed it was unsafe. However, he did begin to get the equipment ready to weld the legs on using a contractor's crane to lift the tank. At about 4:15 p.m., Complainant and another employee began to weld the first leg on the tank. The proposed legs were different sizes, however, and before they completed welding the first leg, it was the end of the shift and they went home. On June 30, 1983, Complainant began working about 7:00 a.m. He was using a rented portable welder. The job proved complicated and was not finished when Scott Andrews approached Complainant about 4:30 p.m. He told Complainant that the rented welder would have to be returned by 5:00 o'clock and suggested they use the company's small AC welder. Both Complainant and the crane operator told him the job could not be done with the small welder. Andrews took the rented welder, the tank was put back down, the one leg was cut off, and Complainant went home. Andrews told Complainant not to cut off the leg, but Complainant did so, because he thought it would be bent otherwise. There was a heated discussion between Complainant and Andrews before Complainant went home. Andrews was upset and when he returned to the office he told Sturdevant what happened, and that he was going to discharge Complainant. Hartness was home sick at the time.

When Andrews came to work the following day, he "pulled Forrie Everett's time card" and told Everett that he had fired him. He states that he fired Complainant for loafing on the job and not following his supervisor's instructions.

On about June 21, 1983, Complainant signed a statement prepared by his brother concerning alleged unsafe practices at the subject plant. Andrews was not aware of this statement at the time Complainant was discharged.

After his discharge, Complainant was off work about 1 week during which he received unemployment compensation. Since then, he has worked for the J. P. Cullinan Oil Company and has been earning about the same wages as he made while with Respondent. He does not seek reinstatement.

ISSUES

1. Was Complainant's discharge motivated in any part by activities protected under the Mine Safety Act?

2. If so, did Respondent establish that it would have discharged him in any event for unprotected activities alone?

3. If Complainant's discharge was in violation of the Act, what remedies is he entitled to?

CONCLUSIONS OF LAW

To establish a prima facie case of discrimination under the Act, Complainant must show that he was engaged in activity protected by the Act, and that his discharge was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Bush v. Union Carbide Corporation, 5 FMSHRC 993 (1983).

If the Complainant establishes a prima facie case, the burden is on the employer to show that the discharge was also motivated by unprotected activity and that he would have discharged Complainant for the unprotected activity alone. Pasula, supra.

PROTECTED ACTIVITY

Complainant's discussion with the MSHA investigator concerning his brother's discrimination case would have been protected, but it took place after Complainant was discharged. His signing the affidavit prepared by his brother concerning alleged safety violations was protected activity. There is no evidence that Scott Andrews who discharged Complainant was aware of it. Therefore, I conclude that his discharge was not motivated in any part because of this activity.

Complainant's complaint to Scott Hartness about the inadequate safety glasses, his complaint to Sturdevant about being required to weld a tank with fuel oil spilled on it, and his refusal to perform a welding task while standing in the bucket of a raised front-end loader were all protected activities.

UNPROTECTED ACTIVITY

Respondent has alleged that Complainant shirked his duties; that he did poor quality work, much of which had to be done over; that he avoided work and worked slowly; that he refused to follow directions. If these acts occurred, none of them can be treated as protected activities under the Act.

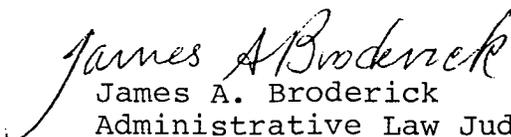
COMPLAINANT'S DISCHARGE

Andrews stated that he discharged Complainant "mostly for loafing on the job and not following supervisor's instructions" (Tr. 63). He also stated that after his heated discussion with Complainant on June 30, he (Andrews) "was pretty riled up," and that he "didn't think there was any reason for any foreman having to put up with the stuff that I'd just went through . . ." (Tr. 75).

There is no evidence that Complainant's complaint to Hartness about inadequate safety glasses, his complaint to Sturdevant about welding on an oily fuel tank, or his signing the affidavit on his brother's behalf were motivating factors in the discharge. However, Complainant's refusal to weld from the bucket of the loader occurred during the task which preceded the discharge. I conclude that it was part of the motivation for the discharge. There were obviously other motivating factors, however. Complainant had a long history of doing work which was deemed unsatisfactory by management. He resented authority, and refused to follow orders. He berated Andrews when the portable welder was taken from him. I conclude on the basis of all the evidence that he would have been discharged for unprotected activity alone, namely for refusing to follow orders and for berating his supervisor. Therefore, no violation of section 105(c) of the Act has been established.

ORDER

Based upon the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED for failure to establish a violation of section 105(c) of the Act.


James A. Broderick
Administrative Law Judge

Distribution:

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Carol A. Guckert, Esq., 477 Congress Street, Portland, ME 04101
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 23 1984

UNITED STATES FUEL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 84-40-R
: Citation No. 2072262; 1/10/84
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : King No. 4 Mine
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: Timothy M. Biddle, Esq., and Rochelle M. Gunner, Esq., Crowell & Moring, Washington, D.C., for Contestant;
Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Fauver

Pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., U.S. Fuel contests a citation issued by the Secretary on January 10, 1984. The citation alleges that U.S. Fuel violated section 105(c)(3) of the Act by failing to comply with my December 15, 1983, order to reinstate Albert DiCaro.

The citation required abatement by January 13, 1984. U.S. Fuel filed this contest on January 11, and an expedited hearing was held on January 12.

At the hearing, I ordered a stay of enforcement of the citation pending further notice in this proceeding.

The parties have agreed that there are no issues of material fact and the case is appropriate for decision on the record.

ISSUE

The controlling issue is whether my December 15, 1983, order requiring reinstatement was enforceable by the Secretary (MSHA) on January 10, 1984.

BACKGROUND

On May 26, 1983, I issued a decision on liability in DiCaro v. United States Fuel Company, Docket No. WEST 82-113-D: (1) adjudicating that U.S. Fuel violated section 105(c) of the Act by discharging Mr. DiCaro and (2) holding the record open for further proceedings on issues of relief, such as back pay, attorney fees, and costs. A hearing was held on the relief issues, and on December 15, 1983, I issued a decision granting relief. The order part of the decision ordered U.S. Fuel to offer Mr. DiCaro reinstatement to his former position, provided he presented medical evidence that he was able to work as a miner. It also ordered the parties to attempt to stipulate certain back pay questions and, if they could not stipulate, to submit their respective proposed amounts to me not later than 20 days from the date of the decision. The order stated that I was retaining jurisdiction over the case for the 20-day period and "until a ruling on any counter-proposals filed in such period."

In early January 1984, Mr. DiCaro appeared at U.S. Fuel's offices in Utah, presented a medical statement of his fitness for duty, and requested reinstatement under my December 1983 order. U.S. Fuel refused, stating that it would not reinstate him unless the Commission in a final decision so ordered and that U.S. Fuel had directed counsel to seek review of my decisions (of May and December, 1983).

On January 10, 1984, a federal inspector appeared at U.S. Fuel's offices and issued Citation No. 2072262, the citation which is contested in this proceeding. The citation states:

By decision of Administrative Law Judge William Fauver of the Federal Mine Safety and Health Review Commission issued December 15, 1983, United States Fuel Company is required to offer employment to Albert DiCaro upon receipt of a medical release. The decision of Administrative Law Judge Fauver is effective upon issuance unless stayed by the Federal Mine Safety and Health Review Commission. The decision and order of relief constitute an order issued pursuant to section 109(c) of the Federal Mine Safety and Health Act of 1977, P.L. 91-173. United States Fuel is in violation of this order by failing to comply after Albert DiCaro submitted the necessary medical release stipulated in the order.

On January 10, 1984, the citation was modified as follows:

Citation No. 2072262 is hereby modified to reflect that a violation of section 105(c)(3) has occurred instead of section 109(c) as stated in the citation. Attorneys for the Department of Labor have also deemed that the citation be extended until January 13, 1984. Notice of the extension was also given to William Vrettos by phone.

STATUTORY PROVISIONS

Pertinent parts of the statute are as follows:

First, in section 113, which creates the Commission:

* * * * *

(c) The Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph.

(d) (1) An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this Act.

(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this Act which shall meet the following standards for review:

(A) (i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(I) A finding or conclusion of material fact is not supported by substantial evidence.

(II) A necessary legal conclusion is erroneous.

(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.

(IV) A substantial question of law, policy or discretion is involved.

(V) A prejudicial error of procedure was committed.

(iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge

had not been afforded an opportunity to pass. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.

(B) At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion (by affirmative vote of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved. If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph.

* * * * *

(The provisions of section 557(b) of title 5, United States Code, with regard to the review authority of the Commission are hereby expressly superseded to the extent that they are inconsistent with the provisions of subparagraphs (A), (B), and (C) of this paragraph.)

* * * * *

Second, in section 106, which provides for judicial review:

SEC. 106. (a) (1) Any person adversely affected or aggrieved by an order of the Commission issued under this Act may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside.

* * * * *

Finally, in section 105(c), the anti-discrimination section:

* * * * *

(c) (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a) (3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a) (3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

* * * * *

OPINION

The statutory distinction between temporary and final reinstatement orders is significant in considering the issue here. Section 105(c)(2) provides that a temporary reinstatement order "shall order immediate reinstatement . . . pending final order on the complaint." In contrast, section 105(c)(3), which authorizes permanent reinstatement orders, states, "such order shall become final 30 days after its issuance." In addition, the Commission's Rules provide that an administrative law judge's temporary reinstatement order "shall be effective upon receipt or actual notice" (29 C.F.R § 2700.44(a)), but do not contain such a provision for a judge's order granting permanent reinstatement. I note, also, that in Gooslin v. Kentucky Carbon Corp., 3 FMSHRC 1707, 1711 n. 5 (1981), in directing review of a judge's decision, the Commission specified that his temporary reinstatement order was to "remain in effect pending our decision" on review. This type provision does not appear in the Commission's review orders in cases in which the judge did not issue a temporary reinstatement order but, on the merits, did issue a permanent reinstatement order.

Considering the statutory language, and the Commission's rules and practices, I conclude that reference to an "order" of the Commission in section 105(c)(3) means a final order of the Commission and that an order of an administrative law judge does not become a final order of the Commission until 40 days have passed without the Commission ordering review of the judge's order. On the date of the citation, January 10, 1984, my order of December 15, 1983, was not a final order of the Commission because 40 days had not elapsed since its issuance. Also, since not even 30 days had elapsed since its issuance, even if "order" as used in section 105(c)(3) meant a judge's order (rather than a final order of the Commission, as I hold), the December, 1983 order had not become effective under section 105(c)(3).

CONCLUSIONS OF LAW

1. My order of December 15, 1983, was not a final order of the Commission as of January 10, 1984, and was not effective as an enforceable order as of that date.
2. The Secretary's citation issued on January 10, 1984, is invalid because the December 15, 1983 order was not enforceable on January 10, 1984.

ORDER

WHEREFORE IT IS ORDERED that Citation No. 2072262, issued and modified on January 10, 1984, is hereby VACATED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 23 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 83-198
Petitioner : A.C. No. 36-05065-03507
: :
v. : Windber Mine 78
: :
BETHLEHEM MINES CORP., :
Respondent :

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
R. Henry Moore, Esq., Rose, Schmidt, Dixon
& Hasley, Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The petitioner seeks a penalty assessment of \$650 for an alleged violation of mandatory safety standard 30 CFR 75.1105, as noted in a Section 104(a) notice no. 2015155, served on the respondent on January 18, 1983, by MSHA Inspector Samuel J. Burnatti.

The respondent filed a timely answer in this matter and a hearing was conducted in Johnstown, Pennsylvania, on December 1, 1983.

Issues

The principal issue presented in this proceeding is (1) whether respondent violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed in this proceeding, and,

if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 6-10):

1. Respondent is a coal mine operator subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
2. The Section 104(a) citation in issue in this case, as well as a subsequently issued Section 104(b) order, were duly served on the respondent's agents at the mine in question by an authorized representative of the petitioner.
3. Respondent's Windber Mine 78 produces coal on an intermittent basis and at the time the citation issued its annual coal production was 417,145 tons. The parent corporation, Bethlehem Mines Corporation had an overall 1982 annual coal production of over seven million tons, but that its 1983 coal production is expected to be significantly reduced.
4. Assuming the fact of violation is established, a reasonable civil penalty assessment will not adversely affect the respondent's ability to continue in business.
5. From approximately 1976 to December 1, 1983, MSHA has issued no prior Section 104(b) Orders at the Winder Mine 78.

During the two-year period preceding the date of the issuance of the citation in issue in this case, respondent has been assessed for 84 violations, none

of which were for violations of mandatory standard 30 CFR 75.1105.

6. During the period 1976 to December 1, 1983, 37 different MSHA inspectors inspected the Windber Mine 78, during 688 inspection" days.

During the period between February 10, 1982, and January 18, 1983, the North Main Section of the Windber Mine 78 was inspected on 16 occasions and no citations or orders were issued for alleged violations of mandatory standard 30 CFR 75.1105, with respect to the battery charging station.

Discussion

Citation No. 2015155 states the following condition or practice:

When checked with a smoke cloud the current of air ventilating the North Main charging station was not being coursed directly to return in that the current of air was entering the #3 intake entry and coursing up into the working section.

The inspector fixed the abatement time as 8:00 a.m., January 19, 1983.

On January 19, 1983, at 8:50 a.m. the inspector issued a Section 104(b) Order No. 2015156, in which he stated as follows:

Little or no effort was made to direct the current of air ventilating the North Mains battery charging station to return.

On January 20, 1983, a second MSHA inspector, David B. Alsop, terminated Citation No. 2015155, and the justification for this action states as follows:

The current of air ventilating the North Main charging station was being coursed into the return air course. A 14 foot piece of plastic pipe 3 inches in diameter was extended out into the charging station and extending back to the 4 inch vent pipe in the stopping wall. Also, an 8 foot

piece of deflector canvass was installed on the outby side of the charging station. A hole was left in the 4 inch pipe at the stopping to allow air to enter there and also at the end of the 3 inch pipe.

Petitioner's testimony and evidence

MSHA Inspector Samuel J. Burnatti testified as to his background and experience, which includes service as a ventilation specialist since May 1983. He confirmed that he conducted an inspection at the mine on January 18, 1983, and that he issued the citation in issue for a violation of section 75.1105, exhibit P-1. He also confirmed that at the time of his inspection he was accompanied by respondent's representative Tom Korber, and UMWA representative Rex Morgart (Tr. 17-20).

Mr. Burnatti stated that he issued the citation after observing a battery charging unit partially out in the intake entry, and the current of air that was ventilating the unit was not being coursed to the return. He confirmed this by making four smoke tube readings. He identified exhibit P-7 as a sketch of the area and the charging unit in question. He stated that he drew the sketch, and he explained the notations on the sketch as the locations where he made the smoke tube tests. He stated that four of the tests indicated that the air used to ventilate the unit was going into the intake, but that a test made directly at the wall at the back of the charging station and directly in front of a pipe protruding from the wall, indicated that the air at that location went out through the pipe (Tr. 20-23).

Mr. Burnatti testified that section 75.1105 requires that all ventilation of the battery charging station will be coursed directly to the return, and since his smoke tests indicated that it was not, he issued the citation. He indicated that the intent of the cited section is to insure that any hydrogen gas from the batteries, or any smoke which may result from any equipment fires would be pulled through the pipe in the wall into the return air and out of the mine (Tr. 24).

Mr. Burnatti stated that at the time he observed the cited condition the charging unit was energized with the power on, but that no equipment was in the charging station itself. He indicated that the "three inch vent pipe" notation on his sketch was an error, and that the pipe was a four inch pipe (Tr. 25). He identified exhibit P-5 as a copy of notes which he made, and he explained his notations (Tr. 28-31).

Mr. Burnatti confirmed that he made several suggestions as to how the violation could be abated, and these included the use of a "fly curtain," and extending the pipe further out from the wall. He also suggested moving the unit from out in the entry to a location along the left side wall of the station, but not in the corner, or moving it across the station to the right side wall. He indicated that moving the unit was not necessary to abate the citation, and he denied that he insisted that it be moved. Although he indicated that he was not totally familiar with the state law requirements for venting the charging unit, he did state that the state inspectors do not want the unit in by the batteries being charged because it creates a hazard (Tr. 31-33). He indicated that the respondent could have moved the unit "into the left side" of the charging station "or moved it across to the right side," and that this would have abated the citation and would have also complied with state law (Tr. 33). He marked these locations with an "x" mark on his sketch (Tr. 35).

Mr. Burnatti stated that he has observed other battery charging units in the mine, and that they are placed "basically in the same area, but they are not outby, the end of this tin or the rib." He stated that the other units he has observed "are in by the crosscut in by the tin" (Tr. 36).

Mr. Burnatti indicated that in the instant case the location of the charging unit was a violation of section 75.1105, because the way it was positioned the intake air was going directly over it, and since "it was slightly outby the edge of the tin, as long as that air is passing over, and going up into the section, I can't see how you could achieve compliance" (Tr. 37). Under the circumstances, the smoke tests he made were "a formality" (Tr. 36).

Mr. Burnatti stated that he initially fixed the abatement time at "roughly twenty-two hours" (Tr. 32), but that when he returned to the area the next day, he observed that a three inch pipe had been inserted into the existing four-inch pipe and extended outby from the wall, and he identified its location on his sketch. He also described an opening or gap between the two pipes, and confirmed that he made another smoke tube test at that time (Tr. 38). He stated that a Kersey battery powered tractor was in the station, and when he took smoke readings directly over the tractor battery and the charging unit itself, he determined that the air exiting the charging station was going back into the intake escapeway (Tr. 39). When he inquired as to why the condition had not been corrected, Mine Foreman Andy Salata advised him that some work had been done on the pipe and that he "assumed it was okay" (Tr. 39).

Mr. Burnatti confirmed that he issued the Section 104(b) order because he believed that extending the time further would pose a possible fire or ignition hazard, and the Kersey battery was being charged at this time. He also believed that the respondent was not diligent in attempting to meet his initial abatement time because it took little time to install the three-inch pipe, and a smoke test would have indicated where the air was going. He denied that the issuance of the order had a disruptive effect on mining operations, and he believed that general laborers could have been used to achieve timely abatement and work could have continued at the face while the corrections were being made (Tr. 41).

Mr. Burnatti explained his "negligence" and "gravity" findings on the face of his citation as follows (Tr. 41-42):

Q. With reference to the negligence, you have marked low, could you explain to the Court, what made you decide that the negligence with reference to the 104a, was originally low?

A. Well, I felt in this case, here, that due to the fact that you are talking slight movement or low volume of air, to detect it, you almost need a smoke cloud and that's why my -- normally, without the use of a smoke cloud, it wouldn't be detected by a foreman, or anybody else, and the smoke clouds are not normally carried with them.

Q. So that's why you considered the negligence low?

A. Yes.

Q. With reference to gravity, would you explain to the Court, why you marked the reasonably likely box, and the lost work days, or restricted duty?

A. I felt that it would be reasonably likely, was the fact that this condition would continue to exist, and the fact that that area was dry, and you have electrical equipment and cable, and the fact that the number three entry is the primary intake escape way, for the north mains section, was my reasons there, then the lost work days, and restricted duty, I felt that possibly, it would be the smoke, I don't feel that it would be fatal or permanent disabling,

due to the fact that the section does employ another escapeway, an alternate escapeway, and this unit, I think, I believe is only four or five cross cuts outby the working section.

Q. And you have the number 7, indicating the number of persons affected, are those the same seven people you talked about working at the face?

A. Yes.

Mr. Burnatti explained that the location of the charging unit placed it slightly past the tin wall of the charging station into the number 3 entry, and that when he returned to the area the day after he issued the citation the unit had not been moved (Tr. 44). He further explained his "negligence" findings as follows (Tr. 45):

JUDGE KOUTRAS: You have never seen a mine operator take a smoke cloud reading to determine whether or not the movement of air over a battery charger station?

THE WITNESS: No, I've never seen it.

JUDGE KOUTRAS: Are you suggesting from that, had they taken one, and detected that the air was not being forced into the return, that they should have alerted them, they should have done something to the battery charging station?

THE WITNESS: Yes, and I feel that the fact, the way that the charging unit itself is positioned, should alert them.

On cross-examination Mr. Burnatti conceded that the sketch of the location of the charging unit which is in his notes, exhibit P-5, seems to place it further within the area of the tin wall than it appears on his sketch made in August 1983, exhibit P-7. The later sketch places the unit further into the entry, and he conceded that the two sketches "are slightly different" (Tr. 50). He indicated that the later sketch represented the location of the unit on both January 18 and 19, 1983 (Tr. 49).

Mr. Burnatti stated that he was certain that the pipe he observed at the time the citation issued on January 18, 1983, was a four inch pipe, rather than a three inch pipe as initially noted (Tr. 51-52). He also indicated that the

pipe he first observed at the back wall of the charging station, while "slightly" protruding from the wall, was "flush" to the wall. He reiterated that the purpose of that pipe was to vent the battery charging station, which he described as a "three-sided tin enclosure" (Tr. 53-54).

Mr. Burnatti stated that on the day he issued the citation there were three or four miners on the section, but that mining was not taking place on that shift (Tr. 57). He confirmed that he checked the battery charging unit and found nothing wrong with it (Tr. 58), and he explained his concern over a possible fire and gas hazard as follows (Tr. 58-60):

Q. Fire hazard, now did you check the battery charging unit, to see if it was defective in any way?

A. I checked in a general way, yes.

Q. And was it -- it was perfectly okay?

A. I wouldn't say it was perfectly, but it was found to be okay.

Q. Did you find anything wrong with it?

A. No.

Q. Now, if this event occurs, well, are you saying that the actual occurrence of a fire, is reasonably likely here?

A. If the condition would stand uncorrected, yes.

Q. Well, the condition that you saw was improper ventilation, how does that cause a fire?

A. That would take your smoke, or your hydrogen gas, out into your intake entry, which in turn travels up into your working section.

Q. Then you are not saying that the occurrence of a fire, or the occurrence of production of hydrogen gas is reasonably likely, you are just saying if -- in the event that those occur, the smoke might go up the intake?

A. Yeah, or with the hydrogen gas, you could have an explosion.

Q. But if those events occurred, well, the first day that you were there, there wasn't anything being charged, was there?

A. No, no equipment was being charged.

Q. So without anything being charged, the first day that you were there, there was no hydrogen gas, obviously?

A. No, sir.

Q. And you didn't take any samples to test that first day?

A. No, sir.

Q. The second day that you were there, there was a unit on charge, did you take any samples that day to see if there was hydrogen gas being produced?

A. No, sir.

Q. So you don't know the second day whether or not, there was any being produced at all?

A. No.

Q. In addition to hydrogen -- isn't hydrogen sulphite produced by batteries sometimes, when they are being charged?

A. I'm not sure, I just know that they emit hydrogen gas.

Q. And of course, to have an explosion from hydrogen gas, you have to have a source of ignition, do you not?

A. Yes, sir.

Q. And in this case, the source of ignition is the battery charging unit, if it is close to the hydrogen gas, is that correct?

A. Well, it doesn't necessarily have to be close, if that gas is passing over it, and it should short, or the piece of equipment itself, short out, that's your ignition.

Q. Okay, the first day, there wasn't a piece of equipment according to you, and the charging unit seemed to be in good condition, is that correct?

A. Yes.

Mr. Burnatti confirmed that the respondent made some effort to timely abate the citation, but he believed it was a "little effort." He also confirmed that company officials advised him that they could not move the charging unit "because the state said that they couldn't." He indicated that company officials asked him to speak with the state inspector who was there at the time the order was issued, but that he did not do so (Tr. 62). He also indicated that he did not check the Kersey machine that day to see if there was anything wrong with it (Tr. 63).

Mr. Burnatti stated that he was on the same section on January 14, 1983, prior to the time the citation was issued, but since he was in the face area he "probably" did not visit the cited battery charging station and would not have walked past it (Tr. 65). He confirmed that he did not measure the amount of air going by the charging station in the intake at the time he issued the citation, but he agreed "there was probably a considerable amount of air" present (Tr. 65).

Mr. Burnatti confirmed that after issuing the citation he discussed with Mr. Korber ways to correct the conditions, and these included installing "a solid check up, and enclosing it, a fly check to redirect the air current, or to move the charging unit itself, or enlarge the pipe." He also suggested that the pipe in the wall be extended or enlarged (Tr. 66-67). He explained how the tractors and scoops travel to the charging station, and he confirmed that the sizes of the vent pipes which he noted were approximate, and while he had a ruler in his possession, he did not measure the pipes in question (Tr. 67-71). He explained that the four inch pipe in the wall was about four and a half feet off the floor, and the extended three inch pipe was hung from the ceiling with a wire (Tr. 72).

Mr. Burnatti explained the direction of the air ventilating the charging station, and estimated the dimensions of the station as 16 feet deep and 20 feet wide (Tr. 74-78). He stated that power for the charging unit comes from a trailing cable from the section load center power station located inby in the working section. No batteries are stored in the charging station, and all of the batteries are charged

while on the equipment. The charging unit is on skids and can be moved by pulling it with a tractor or by hand (Tr. 96-97).

David Alsop, MSHA training specialist, testified that prior to April 1, 1983, he worked on ventilation and respirable dust for eight years. He testified as to his MSHA training and background, and he confirmed that he visited the mine in question on January 19, 1983, to conduct a respirable dust inspection (Tr. 109-111).

Mr. Alsop identified exhibits P-2 and P-4 as copies of the terminations of the citation and order issued by Inspector Burnatti. He explained that since he was at the mine, mine management asked him to look at the work done to abate the order. After checking with his supervisor at MSHA's district office, he did so and abated the citations. He stated that he observed that the respondent had installed a canvas check curtain and extended a three inch pipe some 14 feet to force the air ventilating the battery charging station into the return. He confirmed this by means of a smoke tube, and since compliance was achieved, he terminated the order (Tr. 114-116).

Mr. Alsop identified the 14 foot long extended pipe as a plastic pipe extending from a four inch pipe in the wall. The extended plastic pipe extended out over the top of the charging unit, and when he checked the air current at several locations in the station he found that it was going into the pipe (Tr. 117). He explained the location of the pipe and curtain by marking it on the sketch (Exhibit P-7, Tr. 118).

On cross-examination, Mr. Alsop stated that when he abated the order, a UMWA representative was with him, and he expressed satisfaction over the respondent's abatement efforts (Tr. 120). He terminated the citation because that is what he believed had to be done in order to process the citation through the assessment office (Tr. 124-125).

Rex A. Morgart, testified that he is employed by the respondent and that he serves as the Chairman of the UMWA Mine Safety Committee. He confirmed that he was the walkaround representative who accompanied Mr. Burnatti during his inspection on January 18, 1983. He stated that he could not recall whether a tractor or a scoop was parked in the battery charging station at the time the citation was issued. He also stated that the charging unit was on, but that Mr. Korber tagged it out when Mr. Burnatti advised him that there was a problem (Tr. 256-257).

Joseph D. Hadden, Jr., Senior Mining Engineer, Ventilation Division, MSHA Pittsburgh Health and Technology Center, testified that he has been employed in the ventilation division for eleven years. He stated that he holds a BS degree in mining from the University of Pittsburgh, and that he has first and second grade mine papers in the State of Pennsylvania, mine foreman papers from the State of West Virginia, and that he is a registered professional engineer in the State of Pennsylvania (Tr. 261).

Mr. Hadden confirmed that he is familiar with the facts and testimony in this case, and that based on his interpretation of section 75.1105, all of the air (100%), used to ventilate the battery charging station is to be directed directly into the return air course (Tr. 262). When asked how that was possible, he offered the following suggested methods (Tr. 262-263):

A. One method would be is what was discussed here earlier today. Moving the stopping wall back so that the crosscut is deeper so, that this turbulent zone would be further removed from where the equipment would be at.

Another method would be to increase the size of the pipe, the vent pipe, so that it would increase the air quantity that was flowing in the crosscut into the return.

A third possibility would be to enclose the front of the charging station, with a door. And, through that door have a small opening. It would act as a regulator, to allow a measured quantity of air to flow into the enclosure and then out the vent pipe and into the return.

Q. And, upon what do you base those ideas or that criteria? Has that been tested by MSHA, or has that ever been done anywhere else?

A. The third idea, there were a series of tests run eight or nine years ago, and there is publication out on it. Called, "Controlling smoke from a fire-proof structure underground." And, this was the basis of those tests.

So, if a fire did develop, say, in the battery charging station, the fire or combustion couldn't enter the intake air stream where it would be transported up to the face.

On cross-examination, Mr. Hadden further explained his recommendations for achieving compliance with his citation (Tr. 263-272; 275-280).

Respondent's testimony and evidence

Thomas F. Korber, respondent's shift mine foreman, testified as to his background and experience, and he confirmed that he accompanied Inspector Burnatti during his inspection of January 18, 1983. After examining Mr. Burnatti's sketch, exhibit P-7, he stated that the cited charging unit was located "right at the corner" of the charging station tin wall and that it did not extend beyond that point. He also indicated that a three inch pipe which extended from the station wall, over and across the belt, and into the return, was a "normal setup" for a battery charging station at the mine. The only difference from other mine charging stations was the fact that other stations were deeper (Tr. 129-131).

Mr. Korber stated that when he first went to the charging station area on January 18, 1983, a Kersey tractor or scoop was being charged, but coal was not being produced that day. Two men were on the section, and they were bolting (Tr. 133). Mr. Korber stated that when he saw that Inspector Burnatti had questioned the charger unit, he pulled the power from the section power center and tagged out the charging unit plug so that it would not be energized (Tr. 134). However, he did not remove the equipment which was being charged.

Mr. Korber testified that when Inspector Burnatti tested the air with his smoke tube, it was not going out of the pipe in the wall very well, and there was "very little suction." Mr. Korber checked and found that one of the pipe joints was loose, and after putting it back together the air was "drawing better at that point," but Mr. Burnatti was not satisfied since he insisted that all of the air had to be vented through the pipe (Tr. 135).

Mr. Korber stated that in the past most MSHA inspectors did not use smoke tubes, and they simply put their hand over the pipe to determine if there was any suction. If suction was present, they never questioned the ventilation. He stated that a three-inch pipe was at the wall, and he told Mr. Burnatti he would install a larger one to induce better suction (Tr. 136).

Mr. Korber stated that after the citation issued he contacted his supervisors Andy Salata and Bobby Breck, and they advised him not to move the charging unit "because

we would have trouble with the state." Prior MSHA inspectors who looked at the mine charging stations "out where it was located here" never advised him that he was in violation of the law (Tr. 138).

Mr. Korber stated that his boss instructed him to get material so that the next shift could remove the three inch pipe from the wall and install a four inch pipe. He returned to the charger unit location the next day with Mr. Burnatti and the power plug was still out, but the tractor or scoop was still parked at the charger. Mr. Korber indicated that Mr. Burnatti was upset because the charger had not been moved "inside" and that he indicated that "we do very little to show good faith to abate his violation" (Tr. 139). Mr. Burnatti informed him that he wanted the charger moved in because he was still going to take his smoke test over the charger, the unit, and the batteries. Mr. Korber was of the opinion that the air flow on the next day improved with the installation of the larger pipe (Tr. 140).

Mr. Korber stated that it was difficult to see where the smoke was going when the tube was broken because of air swirling caused by turbulence. The fourteen foot piece of pipe was installed after Mr. Burnatti left on the day after the citation issued (Tr. 141). However, Mr. Korber was not present when Mr. Alsop abated the violation (Tr. 142). He explained his actions the day after the citation issued as follows (Tr. 142-143):

Q. Now, you weren't there when the actual, when Mr. Alsop came in to abate the violation, were you?

A. No.

Q. What was done to abate it, as far as you know?

A. After Mr. Burnatti left, myself and Mr. Salata discussed what we would do. We saw, in order to, so that we could use that piece of equipment that was being charged, which it wasn't being charged then because, I had the power off. But, so that we could get it out of there and start using it again, and start charging pieces of equipment again, we decided, you know, we better put that fourteen foot extension on there to satisfy the federal. So, that's, and then we put a check across, partially across the intake there.

Q. As it is shown on P-7?

A. Yes.

Q. Now, just to clarify things. The second day, when you went in there the Kersey, or the tractor, or the scoop was still there, was it charging?

A. Not the second day, no.

Q. You said you tagged it out, or put a piece of paper, with your name on it?

A. Yes.

Q. When you unplugged it, what was your intention by doing that?

A. I saw that we was going to have a problem, you know, with the federal, and I didn't want to, anything to be disturbed there, so I took the power off of it.

I figured the power better be off of it, and stay off of it until we settled this dispute here, and you know, I told everybody not to bake the tractor, or the scoop out of that charging station, just leave everything alone.

Q. When you say you told everybody, who did you tell?

A. Well, my tag on the plug, nobody could put it back in. It had my name on it so I had to remove it. But, I told the other shifts, the foreman on the other shift, and then there would be no question about it.

On cross-examination, Mr. Korber described the battery charging station tin walls as follows (Tr. 143-144):

Q. Mr. Korber, with reference to the tin wall that was in the battery charging station, did that tin wall extend out into the crosscut, out into the intake entry?

A. No.

Q. Was it flush with the rib, I mean, did it end exactly where the rib ended?

A. It was, it come out, the whole way out the crosscut, it just made somewhat of a curve. Not clear out into the intake entry, no.

Q. But, it did not stop at the rib line? The tin wall?

A. It come out, more or less, right beside the rib line, it just made a curve, it just, the last piece of tin, what I'm saying, was just bent to make the curve.

Q. And, where did the charging unit end? Did it follow that curve?

A. It was right at the end of the tin?

Q. Where the tin ends, when you say the end of the tin, do you mean the curve?

A. Right at the curve piece, right at the curve piece.

Q. Where it started to curve?

A. Um-hmm.

Mr. Korber stated that after the four inch pipe was installed he did not test the air ventilating the charging station, but he believed that the next shift did. However, he did not know whether records were made of the tests, and he was not aware of the test results. He indicated that one of the shift foremen told him that the larger pipe was drawing out more of the air (Tr. 145-147).

Mr. Korber confirmed that no one moved the charger unit to ascertain whether moving it would take care of the problem (Tr. 154). In response to further questions, Mr. Korber testified as follows (Tr. 154-158):

JUDGE KOUTRAS: So, why didn't, on an experimental basis, was it ever suggested to anyone, "Hey, let's move it in and see if it works?" Because, if you moved it in and it didn't work, no one did that did they?

THE WITNESS: No.

JUDGE KOUTRAS: No one actually moved this unit back to see whether that would take care of the problem?

THE WITNESS: No, sir. Right.

JUDGE KOUTRAS: Okay. And, the reason you didn't is because you were afraid that you were going to run afoul the state people, right?

THE WITNESS: Yes.

JUDGE KOUTRAS: You indicated earlier that on prior inspections, when other MSHA inspectors were in there, all they did was go up and put their hand on the pipe to see if there was suction, that satisfied them?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Mr. Burnatti was the only one that went in there and used a smoke tube?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: So, as far as I know, the first inspectors that went in there, and put their hand against suction, didn't know whether that air that was ventilating, whatever the heck it was ventilating, and it actually went out that return, did they?

THE WITNESS: Not in the sense of looking at smoke, no. But, also, I'm not saying that they didn't check. They did check both sides of the pipe.

JUDGE KOUTRAS: My point is this, if there's a scoop, or a piece of equipment in that area, being charged, and an inspector walks in there, sees two batteries being charged by this very same unit, and he walks up and puts his hand against that pipe that's on that wall, and feels that there is some suction there, are you suggesting to me, that in that situation you won't get a citation? That inspector is perfectly content that the air is being ventilated in that?

THE WITNESS: They were.

JUDGE KOUTRAS: That's what happened?

THE WITNESS: They were, yes, sir. I went with many of them, and yes, they did. That's exactly what they did.

JUDGE KOUTRAS: That's exactly what they do. But, this man that came in there to inspect, used something else, he used a smoke tube?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And, he found that it wasn't going through that pipe, all of it wasn't going through?

THE WITNESS: Not enough to suit him, yes.

JUDGE KOUTRAS: To suit him. I could care less whether it suits him or not. I'm concerned whether it suits the --

THE WITNESS: No, but, what I'm saying is that the other inspectors that came into the mine, and I accompanied many of them, it suited them the way it was.

JUDGE KOUTRAS: What, in your opinion, is the proper way to check to see whether or not air is going through the return? Put your hand against the pipe, or to break smoke tubes?

THE WITNESS: We've never broke any smoke tubes, no.

JUDGE KOUTRAS: I didn't ask you that. What do you think is the proper way to determine?

THE WITNESS: Well, I am saying, my proper way, if I had a three or four inch pipe there, and it wasn't broken anywhere, and it was drawing, yes, that would satisfy me.

JUDGE KOUTRAS: That would satisfy you?

THE WITNESS: Yes.

With regard to Mr. Burnatti's smoke tube tests, Mr. Korber stated as follows (Tr. 162-164):

JUDGE KOUTRAS: When he tested it, he said that he tested it in five different places. You heard his testimony?

THE WITNESS: Yes.

JUDGE KOUTRAS: He broke five smoke tubes?

THE WITNESS: That's what he says, yes.

JUDGE KOUTRAS: On the 18th?

THE WITNESS: Yes.

JUDGE KOUTRAS: Do you question that? Did he break five?

THE WITNESS: I wouldn't say five. He broke smoke tubes.

JUDGE KOUTRAS: He broke smoke tubes. Did he break some over the batteries that were on the scoop?

THE WITNESS: Yes.

JUDGE KOUTRAS: And, where did the smoke go?

THE WITNESS: When he broke the smoke tube over the batteries on the scoop, some smoke would go out the pipe, some would swirl around and it was hard to say where it was going.

JUDGE KOUTRAS: This was visually?

THE WITNESS: Yes. It was, you have an amount of turbulence in that crosscut where your charger is, any charger is, and it's hard to say where the smoke goes.

JUDGE KOUTRAS: Was there turbulence over the batteries?

THE WITNESS: Yes.

JUDGE KOUTRAS: Why was there turbulence over the batteries?

THE WITNESS: That's about halfway in the crosscut.

JUDGE KOUTRAS: So, the batteries --

THE WITNESS: Back, way back against the wall you won't have turbulence, no.

And, at Tr. 166-168:

THE WITNESS: I'm telling you, the way it swirls, some is going to swirl around and start going out the pipe, and some is going to swirl around and go down the intake.

JUDGE KOUTRAS: The same thing would apply to the battery charging unit, wouldn't it?

THE WITNESS: Yes.

JUDGE KOUTRAS: It will swirl. Some will go one way, and some will go the other?

THE WITNESS: On the charging unit?

JUDGE KOUTRAS: Right.

THE WITNESS: Most of it would swirl around and go down the intake because, it's further out.

JUDGE KOUTRAS: None of it would go in the return?

THE WITNESS: I'd say, very little.

JUDGE KOUTRAS: Okay. Now, it's stated, it says that air currents used to ventilate that the assembly requires you to ventilate the batteries and the battery charging unit, and it says it has to go to the return. So, would you agree that in that situation with the swirling going down the entry, none of it goes to the return?

THE WITNESS: Just over the batteries.

JUDGE KOUTRAS: Over the charging unit?

THE WITNESS: Over the charging unit, yes. Very little would go to the return.

JUDGE KOUTRAS: Very little would go to the return, right?

THE WITNESS: Yes.

JUDGE KOUTRAS: It would be a violation, wouldn't it?

THE WITNESS: According to that day, I would say, yes.

JUDGE KOUTRAS: Why was he insistent that you move that unit, do you know?

THE WITNESS: Well, because when he was breaking his smoke tube over top of it, most of the smoke was going down the intake.

JUDGE KOUTRAS: So, he assumed that if you moved the unit, and then he broke his tube, most of it would go through the return, is that a fair assumption?

THE WITNESS: I would say that's what he assumed.

JUDGE KOUTRAS: But, nobody did that to see if he was right or wrong?

THE WITNESS: No, we didn't.

JUDGE KOUTRAS: Wouldn't that be a logical step for you to take, and if he was proved right then you would have the state people on your hands, right?

THE WITNESS: Yes.

JUDGE KOUTRAS: So what? Now, you've got the federal people on your hands. So, who are you going to pacify?

THE WITNESS: Yeah but, then your just playing a game, when the state comes you just pull it back out, and when the federal comes you just push it back in.

Andrew Salata, mine foreman, respondent's mine 78, testified as to his background and experience, including the preparation of mine ventilation plans (Tr. 199-201). Mr. Salata stated that he first learned about the citation on the afternoon of January 18, 1983, when Mr. Korber informed him that Inspector Burnatti wanted the charging unit moved. The state inspector was at the mine that day, and Mr. Salata indicated that he discussed the matter with him "a little bit" (Tr. 202). Mr. Salata informed Mr. Korber that the charger couldn't be moved because "I can't violate the state law" (Tr. 201).

Mr. Salata confirmed that he did not discuss the violation with Mr. Burnatti on January 18, but the next day he met with him at the charging station and Mr. Burnatti informed him that he was not satisfied with the amount of air going into the return.

Mr. Salata explained his problems with the state mine inspector's as follows (Tr. 205-206):

Q. Now, to your knowledge, had any other inspector required Mine 78 to move it's charger further into the crosscut?

A. At first, we kept our chargers right back against the stopping. In 1978, the state come out and they said they do not want the chargers there because, there's a good potential for an ignition.

They say, "you take your charger, move it out into the intake air. You charge your batteries in your regular charging station."

We had it sitting out there for, approximately, two and a half to three years. This was the way that it was always done.

Then it come around, about three years ago, they said you just move them, just inby, move them just inby.

JUDGE KOUTRAS: This was the state?

THE WITNESS: The state and the federal all agreed to this, they agreed. They'd walk by it constantly. And, we've never had a problem with the charging stations.

Now, again, they want to move it in. This is why I talked with Frank Bahopin that day. And, he says, "You can't move them in any. The closer you put them the closer to the ignition source you're going to be."

Also, I mentioned the pipe, he definitely would not buy the pipe because, they have a flier out on that since 1978.

I can't, you suggested in making a choice, if I made a chance, if the air would have passed over, we'd have kept it going, if I'd had an ignition, I'm just as liable with the state as I am with the federal.

Referring to Inspector Burnatti's sketch, exhibit P-7, Mr. Salata described the air flow and ventilation system through the charging station, and he stated that since the

air is swirling it would be impossible to test to see what amount is going in one direction and what amount is going in the other (Tr. 209).

On cross-examination, Mr. Salata indicated that a larger sized pipe against the wall of the charging station would remove more air into the return, and that where possible, charging stations are located directly against the return. He conceded that the state now allows him to move the charging unit "a little bit more inby," and that this occurred "two weeks later." He also indicated that Mr. Burnatti only suggested that the charging unit be moved, and he did not say that he had to move it in order to abate the citation (Tr. 215-216).

Steven P. Sanders, respondent's chief mine electrician, testified as to his mine experience and training. He confirmed that he was familiar with the battery charging station, and he explained how the charging unit functions. He confirmed that it was an A.C. unit, and he stated that the type of charging units used in the mine produce very little gas. As compared to a D.C. unit, the A.C. unit produces less heat and the units are provided with several short circuit protective devices, including fusing devices (Tr. 216-223). He also confirmed that the charging units are inspected weekly, and that his records indicate that the unit in question was last inspected January 3 and 12, 1983, prior to the issuance of the citation (Tr. 223). The inspections did not reveal any dangerous conditions on the units (Tr. 223). None of the units at the mine have ever caught fire, and none "never even get hot" (Tr. 224).

On cross-examination, Mr. Sanders stated that while he didn't open the charging unit in question on January 18, 1983, he conducted a visual inspection and detected no bare or frayed edges, and "everything was restrained properly." He did not recall a piece of equipment being charged that day (Tr. 224-225).

Charles F. Ream testified that he was the second shift mine foreman on the day the citation was issued, and he stated his prior mine experience (Tr. 225-227). Mr. Ream described the work that was performed to abate the citation, and it included the dropping of electrical trolley wires, the use of 120 feet of pipe, the knocking out of a six-inch solid block wall with a sledge hammer, and sealing it with cement. He indicated that two men worked four hours to do the work, and that the entire job took eight man hours to complete (Tr. 228-229). After the four inch pipe was installed, he

tested the air with smoke tubes, and he did so over the batteries of the tractor or scoop which was at the charging station, as well as over the charger itself, and he indicated a 60% improvement in the air flow over what it was with the three inch pipe (Tr. 230).

On cross-examination, Mr. Ream conceded that he did not take a smoke test directly over the battery charging unit, but took it inside the charging station "up towards the wall," about ten feet from the wall. He confirmed that he also used a smoke tube to test the air before he took the three inch pipe out, and he did so to determine how much of an improvement he would have with the four inch pipe (Tr. 232). He confirmed that he was not present on January 18 or 19, 1983, when Mr. Burnatti was at the mine (Tr. 234).

Robert DuBreucq, mine superintendent, testified as to his background and experience, and he confirmed that he and the mine foreman drafted and approved the mine ventilation plan (Tr. 2340-236).

Mr. DuBreucq stated that after he was informed that the citation was issued, he instructed Mr. Ream to install a larger pipe, and he confirmed that charging stations at the mine were set up identically to the one cited by Mr. Burnatti. Mr. DuBreucq confirmed that he called state inspector Frank Behopin on the evening of January 18, 1983, and he came to the mine the next day to speak to Mr. Burnatti, but missed him (Tr. 238).

Mr. DuBreucq identified exhibit R-1 as a State of Pennsylvania memorandum dated June 13, 1978, and he explained the interpretation concerning the location of charging units as follows (Tr. 239-241):

Q. Do you know who Walter J. Vicinelly is?

A. Director of Deep Mine Safety.

Q. That's for the State of Pennsylvania?

A. Yes.

Q. This memo is dated June 13, 1978?

A. Yes.

Q. Now, I direct your attention to the second page of this. Well, prior to going any further, I would move for Respondent's Exhibit 1 into evidence. I think the relevance has been shown that it was handed to him by the state inspector as a body, and the interpretation of state law.

Q. On the second page of this, the paragraph that is underlined here, "accordingly, whenever the charging battery in the chargers are ventilated by the same split of air, the air must pass first over the charger, and then over the batteries before entering the return air." Now, that document doesn't say that they have to be as far apart as possible, or that they have to be at the beginning, at the entrance to the crosscut. Did Mr. Behopin discuss that with you at all, as to--

A. No, his interpretation of this, and the prior, according to what I'm told anyway, the prior state inspector of '78, their interpretation was, you put the charger out on the corner, the batteries as far back the wall as possible. The more you maximize the distance between the two, the less likely you ever have a problem of the charger igniting gasses off the battery.

Q. Did Mr. Behopin, on January 19th, tell you what position he would take on the moving of the charging unit?

A. He said he didn't want it moved. And, that he would talk to the federal people about it.

Q. Did Mr. Behopin say that he would take any action if you did move?

A. He said it was the old cop routine again, you know, he don't want it moved and that's it. But, he will, you know, Frank is a reasonable man, and Frank said he would talk to the federal and get this resolved, you know.

Q. Do you know whether he talked to Mr. Burnatti that day?

A. He talked to Burnatti, and other people, what they said, they never told me.

Q. Now, did there come a time, sometime later, when Mr. Behopin said that he would permit you to move the chargers further into the crosscut?

A. This issue here went on for at least two weeks. And, then again, there was conversation between the state and MSHA, at least what I'm told,

I don't know directly of them, but, there was conversations on this daggone thing that we're on, and about three weeks later, the issue disappeared. That's how it is. It isn't that we radically moved the charger anywhere, or radically did anything. The issue simply disappeared.

Mr. DuBreucq stated that prior to Mr. Burnatti's inspection, other MSHA inspectors would check the vent pipe to determine whether the air was going through the pipe. This was done by breaking a smoke tube near the pipe, and no one expected all of the air in the station to vent through that pipe (Tr. 245).

Inspector Burnatti was recalled by the bench, and he stated that on January 18, 1983, his notes reflect that no equipment was in the charging station, but that at the time the order issued the next day, a Kersey tractor was there (Tr. 285). He also stated that he was not present when the respondent was abating the condition, and he explained as follows (Tr. 287-289):

JUDGE KOUTRAS: Right. So, as far as you were concerned, since they still didn't have the-- and the broke some additional smoke tubes, and you found that they were still having the same problem, as far as you were concerned they hadn't achieved compliance?

THE WITNESS: No.

JUDGE KOUTRAS: And, based on what you saw, you didn't think that they did very much work there?

THE WITNESS: Um-hmm. Little or none.

JUDGE KOUTRAS: Little or none? Had Mr. Ream told you, or had you inquired of Mr. Ream, and he told you that they did four hours, that they dropped the trolley wire, they did all these things, and he testified too, would your position be different?

THE WITNESS: No.

JUDGE KOUTRAS: Why?

THE WITNESS: Because, I don't feel that's an honest effort to correct the condition.

JUDGE KOUTRAS: Well, what else can they do, as of that point?

THE WITNESS: Well, for one thing, I made suggestions, you know, I don't want to keep harping on this charging unit but, as long as you continue to let that unit sit there, okay? There is no way in hell, excuse the expression, that you're going to gain compliance.

JUDGE KOUTRAS: Well, that's the whole point though. So, you did stress the moving of the unit?

THE WITNESS: Oh, yes.

JUDGE KOUTRAS: And, that's why I asked them why they didn't do it to experiment.

THE WITNESS: I also suggested deflective canvas, building a wall, they suggested building a wall across the entire intake entry, which is ridiculous. But, again, if they want to do it that way that's their prerogative.

JUDGE KOUTRAS: All right. You heard the testimony about the swirling. That due to the location of this place, some of the air is going to go down the entry, and all of it is not going to go through the exhaust pipe, that's true isn't it? And, that's why you issued the citation?

THE WITNESS: Yes. Like he testified, like Mr. Hadden testified, that's standard, that's true.

JUDGE KOUTRAS: And, your interpretation is that a hundred percent, that every bit of air that goes in is used to ventilate the battery charging station, or the batteries, has to go out that?

THE WITNESS: Yes, that's my training, CMI training, that's what it was. The air current ventilating the charging station must be directed to the return, and that's the air current. If it's out there in that turbulence, I can't help that. That's the air current.

JUDGE KOUTRAS: So, your theory was that that was part of the problem stationed where it was, and had they moved it further in it wouldn't be sitting there, is that right?

THE WITNESS: That's true. Possibly."

JUDGE KOUTRAS: Would that cause them a logistical problem?

THE WITNESS: I don't know what you mean.

JUDGE KOUTRAS: What I'm saying is, is the position of the battery charging unit, why does the operator insist on having it there?

THE WITNESS: Well, their reasoning was due to the state.

JUDGE KOUTRAS: Forget the state. Does it make it easier, or more difficult to charge a piece of equipment? Does it make any difference?

THE WITNESS: It doesn't matter. The piece of equipment comes with so many lengths of cable, to reach the machine, so, it can be positioned anywhere. And, does it matter? No, I'd say it's no matter of a convenience for anybody.

Findings and Conclusions

In this case the issue is whether or not the respondent violated the provisions of cited mandatory standard 30 C.F.R. § 75.1105, which states as follows:

Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction.

The petitioner's proposal for assessment of civil penalty seeks a penalty assessment of \$650 for the violation cited in the section 104(a) Citation No. 2015155, issued by Inspector Burnatti on January 18, 1983. The subsequent section 104(b) Order issued by Inspector Burnatti when he found that the cited

conditions were not abated to his satisfaction is not in issue in this civil penalty case, and the petitioner does not include that Order as part of its proposal for assessment of civil penalty. However, while the question of timely abatement and whether or not the inspector abused his discretion in not extending the abatement time is not directly at issue in this case, I have taken respondent's abatement efforts into consideration in considering the element of good faith compliance found in section 110(i) of the Act. In short, I have considered this question in the assessment levied by me for the violation in question.

Fact of violation

In defense of the citation, the respondent argues that since the three-inch pipe was drawing some air to the return on January 18, there was no violation. Respondent asserts that MSHA's interpretation of the second sentence of section 75.1105, that all air currents used to ventilate areas enclosing a battery charging station shall be coursed into the return is a "new" interpretation and contrary to its previous policy which did not require all air currents to be vented into the return. According to the respondent, this prior policy was consistent with the evidence at hearing that it was not possible to course all air currents to the return.

Respondent's defense is rejected. I cannot conclude from the record here that the respondent has established that MSHA's policy was that all air need not be coursed into the return. Simply because other inspectors prior to Mr. Burnatti's inspection saw fit not to utilize smoke tubes to determine where the air was being coursed is insufficient to establish any such asserted policy. To the contrary, I find the testimony of MSHA's witnesses on this issue to be credible, and I accept their interpretation of the standard in this case. The designated language of section 75.1105, requires air currents used to ventilate such battery charging areas to be coursed directly into the return. The language seems clear to me, and respondent has not established that the intent of the cited standard was to permit less than all of the air to be coursed into the return.

Section 75.1105 requires that air used to ventilate battery charging stations be directed into the return. The standard is clear on its face. It does not state that only "some of the air" or "most of the air" must be coursed into the return. It simply states "air." The inspector's interpretation is that all such air must be coursed into the return, and I accept this

as a logical interpretation and application of the standard. Respondent concedes that all of the air was not coursed into the return. Further, petitioner has established a prima facie case by a preponderance of the credible testimony presented to support the citation, and the respondent has not rebutted this showing by the petitioner. Accordingly, the citation IS AFFIRMED.

Although I recognize the respondent's plight in attempting to pacify certain State mining inspectors who insisted that the cited battery charging unit not be moved from the location where the inspector found it, this fact does not excuse the citation, nor may it serve as an absolute defense to the citation, nor may it serve as an absolute defense to the citation. However, I have considered this fact as mitigating the respondent's culpability, and I have taken it into consideration in negligence findings.

Good Faith Compliance

In their posthearing briefs, the parties include the question of the validity of a section 104(c) Order of Withdrawal, No. 2015156, issued by Inspector Burnatti on January 19, 1983, after he found that "little or no effort" was made to abate the conditions which prompted him to issue his section 104(a) citation, No. 2015155, on January 18, 1983.

Although the issue of "good faith" compliance is relevant in this civil penalty case, the validity of the order is not an issue here. The question presented is whether or not the respondent violated section 75.1105, as alleged in the section 104(a) citation, No. 2015155, issued by Inspector Burnatti on January 18, 1983. MSHA's proposal for assessment of civil penalty is limited to that citation, and does not include the order. In short, I conclude that MSHA is bound by its pleadings, and may not now seek to expand on its civil penalty proposal by adding the order.

In its posthearing brief, MSHA argues that the respondent exhibited "bad faith" in abating the citation. MSHA's conclusion in this regard is based on the fact that Inspector Burnatti issued a section 104(b) withdrawal order. Further, MSHA asserts that the inspector was never informed of respondent's abatement efforts, nor was he informed concerning how many hours were spent on the abatement work, or whether a work stoppage had to occur in order to work on the abatement.

After observing the witnesses during the hearing, and upon close examination of all of the testimony in this case, I am convinced that Inspector Burnatti was chagrined because the respondent failed to move the cited unit to another location, and that the respondent initially resisted other recommendations which he purportedly suggested. For its part, the respondent resisted moving the unit because to do so would violate state law. MSHA concedes that the state law "is in conflict" with the Federal standards. Viewed in this context, I cannot conclude that on the facts of this case, respondent made "little or no effort" to abate the cited conditions.

While it may be true that the respondent should have conducted more extensive smoke tests once its initial abatement efforts were completed to insure that all of the air coursing over the unit was going out of the return, the record here does support a finding that the respondent did in fact perform work to achieve compliance.

The record here indicates that the respondent had never previously been issued a section 104(b) order for failure to abate any cited conditions in its mine, and this includes a period of some seven years during which the mine was inspected. I am convinced that Inspector Burnatti honestly believed that simply moving the unit would have achieved compliance. However, when this move met with resistance, he obviously believed that "little or no effort" was made by the respondent to achieve abatement. However, faced with an obvious conflict with the state mining inspectors, I cannot conclude that the respondent's reluctance to initially move the unit to another location constitutes "little or no effort" to abate.

Shift foreman Korber confirmed that as soon as the battery charging unit was cited, he pulled the power and tagged the unit power plug to prevent anyone from using it until the cited conditions could be corrected. Mr. Korber then immediately his supervisors who instructed him to obtain the necessary materials to abate the conditions. A new ventilation pipe was installed, and a check curtain was installed in an attempt to correct the cited ventilation problem.

Shift foreman Ream described the work which was performed in correcting the cited conditions, and this work included the use of 120 feet of pipe, the knocking out and re-sealing of a cinder block wall, and the re-arranging of certain wiring. He testified that it took two men four hours to do this work.

MSHA Inspector Alsop abated the citation on January 20, 1983. Since he did, I assume he was satisfied with the respondent's abatement efforts, and he confirmed that the UMWA walkaround representative expressed satisfaction over the respondent's abatement efforts.

In view of the foregoing, I conclude and find that the violation was abated in good faith, and this is reflected in the civil penalty assessed by me in this case.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business.

Based on the stipulations by the parties, I conclude that the respondent, as a corporate operator, is a large mine operator. However, its Winber Mine 78 operation is a small-to-medium sized operation.

The parties have stipulated that a reasonable penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business. Since I believe that the penalty assessed by me for the violation in question is reasonable, I conclude and find that it will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The parties have stipulated to the respondent's prior history of violations, and this is recited at pages 2-3 of this decision. For an operation of its size, I cannot conclude that this compliance history warrants any additional increase in the civil penalty assessed by me for the violation in question.

Negligence

Inspector Burnatti conceded that he found "low negligence" in connection with the section 104(a) citation, and he explains his reasons for this finding (Tr. 41). Respondent has established through credible evidence and testimony, which is not rebutted by the petitioner, that it located the battery charger in question where it did because a State inspector insisted that it not be moved from that location. I have considered this fact in mitigation of the penalty assessed for the violation. However, I believe that with a little more diligence, including the use of smoke tubes as a preventive measure, as well as some experimentation concerning the possible relocation of the battery charging unit, the respondent may have avoided the MSHA

citation. Accordingly, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this supports a finding of ordinary negligence.

Gravity

Inspector Burnatti testified that when he first observed the battery charging unit, he visually inspected it and found nothing defective. He confirmed that since no equipment was being charged at that time, no hydrogen gas was present. He made no tests for the presence of any such gas, and this was true even when he went back the next day and found a piece of equipment being charged. His concern was that in the event of a fire, the ventilation which caused the air going over the charging unit to go down the intake rather than the return would carry smoke to the working section. He then indicated that even if this were to occur, no "fatal or permanent disabling" injuries would result because the section had a second alternative escapeway available for the miners working in the section.

Respondent's chief electrician Sanders testified that he visually inspected the battery charging unit the day the citation issued and found nothing wrong with it. He also confirmed that he had last inspected that unit on January 3, and 12, 1983, and found it to be in proper operating condition. He explained the operation of the unit, and detailed the functioning of the protective fusing and short circuit fuses and other devices which are engineered to preclude overheating and fires. UMWA walkaround representative Morgatt, who also serves as the chairman of the mine safety committee, testified that he was with the inspector when the citation issued, and that shift foreman Korber immediately tagged out the unit when informed of the citation. Mr. Morgatt could not recall whether any equipment was being charged at that time, and he did not indicate that he observed anything wrong with the unit itself.

After careful consideration of all of the evidence adduced in this case, I conclude and find that the violation was serious. In the event of any arcing or sparking during the battery re-charging procedure, it seems clear to me that any resulting fire or short circuiting would present the possibility of contaminated air being coursed into the working faces.

Significant and Substantial

I conclude and find that the inspector's finding that the violation was significant and substantial should be affirmed. Although I have considered the respondent's arguments concerning

the positioning of the battery charging unit in question, the fact is that any fire or other incident resulting from all of the air not being venting into the return would jeopardize the health and safety of miners on the section and would reasonably likely result in a hazard to the miners. Accordingly, the inspector's finding in this regard IS AFFIRMED.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$350 is appropriate for the violation in question.

Order

The respondent IS ORDERED to pay a civil penalty assessment of \$350 within thirty (30) days of the date of this decision, and upon receipt of payment by the petitioner, this case is dismissed.



George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 24 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 81-261-M
Petitioner : A.C. No. 42-01711-05001
v. :
 : Mt. Pleasant Pit Mine
SUPERIOR ROCK PRODUCTS, :
Respondent :

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Respondent did not appear.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating various safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits was held on September 7, 1983 in Salt Lake City, Utah. Respondent failed to appear at the hearing and further failed to respond to the Order To Show Cause issued on September 9, 1983.

Issues

The issues are whether respondent violated the regulations and, if so, what penalties are appropriate.

Citation 583694

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 56.14-6 which provides:

56.14-6 Mandatory. Except when testing the machinery, guards shall be securely in place while machinery is being operated.

MSHA's Inspector William W. Wilson has been in the agency's employ since 1978. His mining experience began with Phelps Dodge Corporation in 1968 (Tr. 3-5).

On November 21, 1980, witness Wilson inspected respondent's single bench sand and gravel operation (Tr. 5, 6). Kenneth Allred, who identified himself as the vice-president and general manager, stated the mine had been operating since the previous summer (Tr. 6).

The inspector did not know about the existence of the mine until he saw it while he was travelling over U. S. Highway No. 89 (Tr. 7). In viewing the plant, the inspector observed a Caterpillar generator and a Clarke front-end loader. Generators and loaders of this type are manufactured in the State of Illinois (Tr. 7).

The inspector wrote this citation because the guard for the 48 inch high shaker pulley and D belt were not in place. This condition constituted a hazard to workers on the walkway (Tr. 8-12, Exhibits 1, 2 3). Personnel could be caught on the moving parts. There were two, sometimes three, employees on the site (Tr. 12, 13). The inspector considered this citation and all except one of the remaining citations to be significant and substantial (Tr. 13-15).

Citation 583695

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 56.14-1, which provides:

Guards

56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The MSHA inspector took photographs showing that the chain drive belt (45 inches from the walkway) feeding the shakers and the D-belt assembly was not guarded. Exhibit 1 shows the highly visible unguarded condition (Tr. 15, 17). If the two or three employees were standing on the walkway, they could be caught in the chain drive and pulley assembly (Tr. 16).

Citation 583697

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 56.14-1, cited above.

The MSHA inspector testified that the west side of the D belt assembly underneath the shaker was not guarded (Tr. 17). In addition, the area was accessible to employees (Tr. 17, Exhibit 3). There

were footprints within 17 inches and the assembly was six to seven inches above ground level (Tr. 19). In this area and in the previously cited areas an employee could contact the pinch points without tripping or lunging (Tr. 19).

Citation 583698

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 56.12-13(b). The cited section in full provides as follows:

56.12-13 Mandatory. Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:
(a) Mechanically strong with electrical conductivity as near as possible to that of the original; (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Inspector Wilson observed and photographed certain uninsulated electrical wires at the worksite. Bare metal was showing in more than one place (Tr. 20-24, Exhibits 4-9). This condition was adjacent to a travelled walkway (Tr. 24). The upper wire on Exhibit 8 was 53 inches above the ground (Tr. 24).

Citation 583699

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 56.4-24(b), which provides:

56.4-24 Mandatory. Fire extinguishers and fire suppression devices shall be:
(b) Adequate in number and size for the particular fire hazard involved.

Inspector Wilson could not locate any fire extinguishers on the property (Tr. 26, 27). Any fire would not be controlled. (Tr. 26).

Inspector Wilson would not consider this violation as significant and substantial if he was writing the citation on the day of the hearing (Tr. 27).

Citation 583700

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 56.26-1, which provides:

56.26-1 Mandatory. The owner, operator, or person in charge of any metal and non-metal mine shall notify the nearest Mining Enforcement in Safety Administration Metal and Nonmetal Mine Health and Safety sub-district office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether operations will be continuous or intermittent.

When any mine is closed, the person in charge shall notify the nearest sub-district office as provided above and indicate whether the closure is temporary or permanent.

According to Inspector Wilson, company representative Allred stated the company had been in operation and the inspector observed that himself. Allred did not claim the company had registered under another name. In fact, Allred pleaded ignorance of MSHA's regulation (Tr. 27, 28).

Discussion

The evidence offered in connection with each citation establish a violation of the relevant regulation. Accordingly, each citation should be affirmed.

I further rely on the inspector's judgment and affirm the significant and substantial assertion as to all of the citations except number 583699, (fire extinguishers). In connection with this citation, the inspector indicated at the hearing that he did not consider that violation to be significant and substantial. Accordingly, the allegations of significant and substantial as to Citation 583699 are stricken.

Civil Penalties

The six criteria for assessing a civil penalty is set forth in 30 U.S.C. § 820(i).

The Secretary's Office of Assessments proposes no penalty points for respondent's size or history of previous violation. Negligence points are assessed for all citations except number 583699 (fire extinguishers). The assessment points proposed for gravity appear to be in order.

The Office of Assessment failed to credit respondent with any good faith, but each citation shows respondent abated the violative condition. By virtue of that fact, the Secretary's proposed assessments appear to be excessive.

The proposed assessments should be modified as follows:

<u>Citation No.</u>	<u>Original Proposed</u>	<u>Disposition</u>
583694 (guards not secured)	\$ 44	\$ 25
583695 (unguarded belt)	44	25
583697 (unguarded D belt)	44	25
583698 (splices not insulated)	34	20
583699 (fire extinguishers)	8	6
583700 (failure to report)	8	6

ORDER

Based on the facts and conclusions of law recited herein, I affirm the following citations and assess the penalties as noted thereafter:

1.	<u>Citation No.</u>	<u>Penalty</u>
	583694	\$ 25
	583695	25
	583697	25
	583698	20
	583699	6
	583700	6

2. Respondent is ordered to pay the sum of \$107 within 40 days of the date of this order.


 John J. Morris
 Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Mr. William Curl, President, Superior Rock Products Company, 440 West 700 South, Mt. Pleasant, Utah 84647 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 26 1984

SECRETARY OF LABOR, : DISCRIMINATION" PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 80-31-DM
Complainant :
v. : Florida Mining & Concrete Co.
: :
METRIC CONSTRUCTORS, INC., :
Respondent :

DECISION ON REMAND

Before: Judge Koutras

Statement of the Proceeding

On February 29, 1984, the Commission issued its decision in this matter and remanded the case for additional findings concerning certain remedial aspects of the case. These additional matters are discussed at pages eight and nine of the Commission's decision served on the parties, and they include the question of payment of overtime as part of the back pay award, and the question of payment of appropriate expenses incurred by the complainants for their attendance at the hearings held before the Commission Judge who decided the case.

In response to my Order of March 7, 1984, the parties have stipulated and agreed that the relief due the complainants, as encompassed by the Commission's decision and remand, has been settled by mutual agreement of the parties without the necessity of additional hearings or discovery. In this regard, the parties have filed a joint stipulation whereby they stipulate that the amounts of back pay, interest and hearing expenses that would be owed by the respondent to the complainants under the Commission's decision of February 29, 1984, are as follows:

<u>Name</u>	<u>Back Wages</u>	<u>Interest</u>	<u>Expenses</u>
Joe E. Brown	\$2736.75	\$1642.05	\$72.00
James W. Parker	-0-	-0-	-0-
John W. Parker	3823.25	2293.95	72.00
David Mixon	3823.25	2293.95	-0-
Johnny Denmark	3823.25	2293.95	-0-
James McGuire	3223.25	1933.95	72.00
Van T. McGuire	3836.25	2301.75	48.00
	<u>\$21,266.00</u>	<u>\$12,759.60</u>	<u>\$264.00</u>

In support of their joint stipulation, the parties advise that the back wage figures include amounts representing overtime compensation computed at one and one-half times the basic hourly wage rate for every hour that would have been worked over forty (40) per week. The expenses represent the travel expenses incurred by the complainants in attending the three days of hearings in Tallahassee, Florida, away from their homes in Perry, Florida, which were the only expenses incurred by the complainants in attending the hearings.

ORDER

Respondent IS ORDERED to pay the compensation listed above, as agreed to by the parties, and payment is to be made within thirty (30) days of the date of this decision and order.


George A. Koutras
Administrative Law Judge

Distribution:

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/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 26 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 84-4-M
Petitioner : A.C. No. 08-00729-05502
v. :
: Belcher Mine
BELCHER MINE, INC., :
Respondent :

DECISION

Appearances: K. S. Welsch, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia,
for Petitioner;
Mr. Warren C. Hunt, President, Belcher Mine,
Inc., Aripeka, Florida, for Respondent.

Before: Judge Kennedy

This matter came on for an evidentiary hearing in St. Petersburg, Florida on Thursday, February 16, 1984. The proposal for penalty was based on a closure order that charged the gantry rig supporting the conveyor belt on an aggregate crusher was in imminent danger of collapse. (See PX-3 attached.) The penalty proposed was \$750.

The Unvarnished Facts

On the evening of Monday, August 1, 1983, an MSHA inspector, Alonzo Weaver, was present at the Belcher Mine for the purpose of making an illumination inspection. While he was waiting for darkness, he observed a bulldozer being used to position and reposition a Pettibone Universal crusher that was operating a dragline to extract and crush gravel from a pit located on the edge of the Gulf of Mexico. He particularly noticed that the dozer had a bad clutch so that whenever it accelerated to push against the crusher's draw bar it would buck and jerk causing the tall gantry rig on the crusher and conveyor belt to sway and vibrate. The inspector apparently called these circumstances to the attention of Mr. Miles, the operator's foreman. Miles asked the inspector to accompany him to the crusher. There the inspector observed that the two six-inch steel channels that supported the gantry rig were anchored through a pinion

but that the "eyes" had rusted through to the point that they provided little or no support for the gantry and the five to eight ton conveyor belt. (See PX-4 attached.)

The inspector immediately recognized the hazard this condition presented to both the crusher operator who worked immediately under and around the gantry and the dozer operator who drove the dozer around and under the conveyor belt. The inspector asked the foreman what he knew about the condition and the foreman told him the broken and fractured anchor had been in that condition for a week or more. Miles also said he felt the condition was so hazardous he was afraid to go near it. When the inspector asked Miles why the operator was not using the spare crusher, Miles said it was "down" and that he had been told to use the Universal to keep up with demand for aggregate production.

Miles asked the inspector to treat their conversation in confidence as he feared for his job if the operator found out that he had reported the violation. The inspector told him he would be protected and then issued an imminent danger closure order.

At the closeout conference a few days later the superintendent, Bob King, argued the condition was of recent origin and that in any event it was not hazardous because the dozer operator was protected by roll bars. The inspector did not agree but in the administration's "spirit of cooperation" reduced the gravity by limiting the finding of exposure to one miner, and the seriousness to lost workdays or restricted duty instead of death or a disabling injury as required by a finding of imminent danger. 1/

The Tarnished Hearing

At the hearing, the inspector changed his mind and testified the condition could have resulted in death or a disabling injury to either the crusher or dozer operators. Pursuant to departmental policy, however, the inspector repeatedly evaded my questions about what Miles said about the hazardous condition. Weaver finally testified that "all

1/Inspectors are so torn between their sworn duty to enforce the law and the administration's policy of "cooperative enforcement" that it is well nigh impossible for them to reconcile their findings of violation with their attempts to trivialize gravity and culpability. Too often the law's policy of deterrence has been undermined by the administration's policy of appeasement.

Miles said was that he would shut the crusher down and contact Mr. King. That was all he said. I don't recall whether he said anything about how long it had been there." This was not true. The solicitor made no attempt to correct the false testimony.

On cross examination, the operator, who was not represented by counsel, succeeded in establishing that the inspector had in all probability examined the crusher in question about two weeks earlier but had not cited the condition he found on August 1. Just before the noon break, the operator also announced he would produce two witnesses, Miles, the foreman, and Bob King, the superintendent who would testify that the inspector was wrong in stating that "in his opinion" the condition had existed for several weeks.

To clarify confusion over how many crushers were at the site, the trial judge directed the solicitor to furnish the operator and the judge with copies of the inspector's contemporaneous notes. The inspector had represented that these notes would disclose the serial numbers for three crushers, not two, as claimed by the operator. As it turned out, the notes of the earlier inspection on July 14 were not available--counsel said they were in Birmingham, Alabama. Consequently, the solicitor copied and furnished only the notes of the August 1, 1983 inspection together with the inspector's "Willful Violation Review" memorandum.

At the time the solicitor offered to furnish the August 1 notes he knew Mr. Miles was to be a witness for the operator on the issues of gravity and prior knowledge. He also knew that Mr. Weaver's notes stated that "an employee" of the operator told him on August 1 that the condition on the anchor had "Been that way for a week or more"; that the employee was "Scared to get near it"; and that the only employee the inspector had talked to on August 1 about the anchor was Mr. Miles. But again the solicitor made no attempt to correct the inspector's false testimony.

When the hearing resumed after the noon break, the trial judge asked Mr. Weaver who the employee referred to in his notes was. The inspector and the solicitor simultaneously "objected" to the question one on the ground it was "hearsay" and the other invoking the "informer privilege." When both the solicitor and the inspector admitted the "employee" referred to was in the courtroom and had been identified as one of the two individuals who would testify on behalf of the operator the objections were overruled.

In elaboration of his position, the solicitor indicated that it is the Secretary's policy to assert the informer privilege even if that results in suppressing evidence relevant and material to the gravity of the charge and to the credibility of an operator's defense. I found this the most bizarre twist on the policy of "cooperative enforcement" yet encountered. I have many times noted the commonality of interest between the so-called prosecution and defense in these cases but never before realized the informer privilege was being used to suppress evidence necessary to a fair determination of the degree of culpability of an operator.

I find it hard to accept that the solicitor is so legally obtuse and ethically confused as to believe a grant of confidentiality to an informer takes precedence over a witness's solemn oath to tell the truth. Or that the informer privilege justifies palming off perjured testimony in an adjudicatory proceeding.

I make these observations and findings because I am disturbed, as I believe the Commission will be disturbed, to learn of the extremes to which the solicitor may go in turning a deaf ear to false and misleading testimony. It may be that in the eyes of the solicitor there is no conflict between "cooperative enforcement" and "vigorous enforcement." It may also be that "cooperation pays higher dividends than confrontation" but when the "dividend" is death or a disabling injury the law demands an honest accounting. Cutting corners with the truth through a cynical assertion of the informer privilege is sharp practice. If countenanced through some misguided plea to "live and let live" miners will instead die and public confidence in the fair administration of justice will be sharply diminished. I urge the solicitor to abandon the view that "truth is a lie that hasn't been found out."

It is hornbook law that the informer privilege may not be used to suppress evidence if it appears either from evidence in the case or otherwise that an informer may be able to give testimony necessary to a fair determination of the guilt or innocence of a party. The interest in protection against reprisal never outweighs the public interest in a full and true disclosure of the facts in a Commission proceeding. Section 105(c) provides specific protection against any attempt by an operator to retaliate against an informer witness.

The solicitor knew or should have known of the procedures available under the law to bring his perceived dilemma

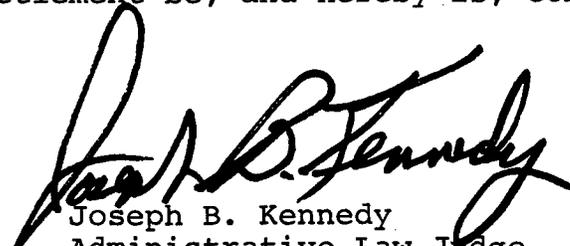
to the in camera attention of the trial judge. The issue was not novel and the method for its resolution is clearly set forth in Supreme Court Standard 510(c)(2) to the Federal Rules of Evidence. The solicitor can hardly claim ignorance of the law as a defense to his abusive use of the informer privilege.

For these reasons I must condemn in the strongest terms possible the subornation that occurred and serve warning that if it happens again I shall feel compelled to refer the matter to the Commission and the criminal division for such disciplinary action as they deem appropriate.

The Operator's Rectitude

Whatever the ethical astigmatism of the prosecution, respondent's president, Mr. Warren C. Hunt, quickly ascertained that Mr. Miles was trying to carry water on both shoulders. Whereupon he withdrew his defense, declined to present his witnesses and agreed to settle the matter for the full amount of the penalty proposed. Upon motion duly made, an order approving settlement was entered from the bench.

The premises considered, therefore, it is ORDERED that the decision to approve settlement be, and hereby is, CONFIRMED and the matter DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

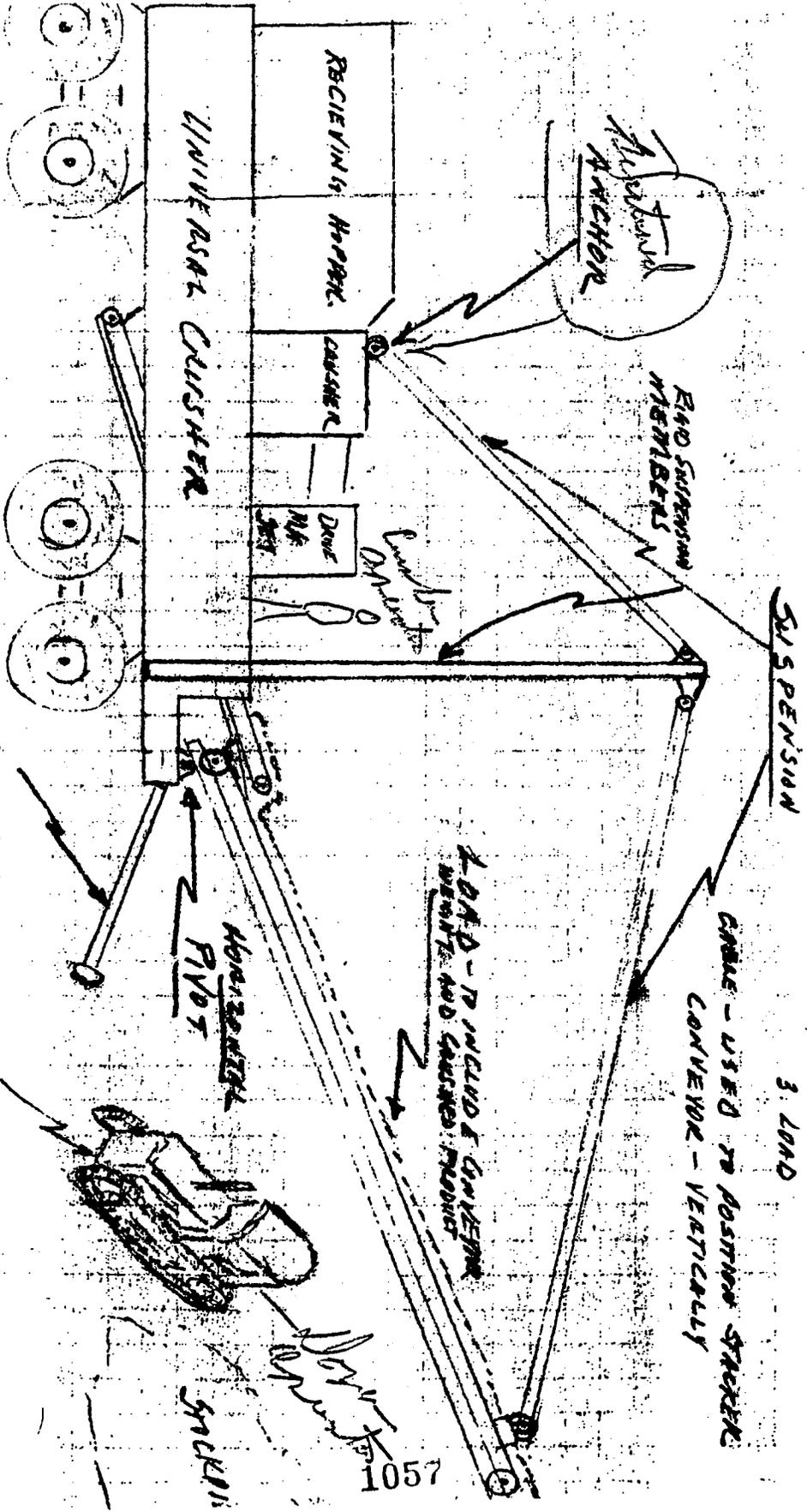
Attachment

Distribution:

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Mr. Warren C. Hunt, President, Belcher Mine, Inc., P.O. Box 86, Aripeka, FL 33502 (Certified Mail)

/ejp



- PHASES OF CRUSHER
1. ANCHOR
 2. SUSPENSION - A FRAME & CABLE
 3. LOAD

SCHEMATIC

LOAD BY BELT - 50 T/HR

CRUSHER DRAW BAR

TRACTION USED TO MOVE CRUSHER, JAW & SELF PROPELL

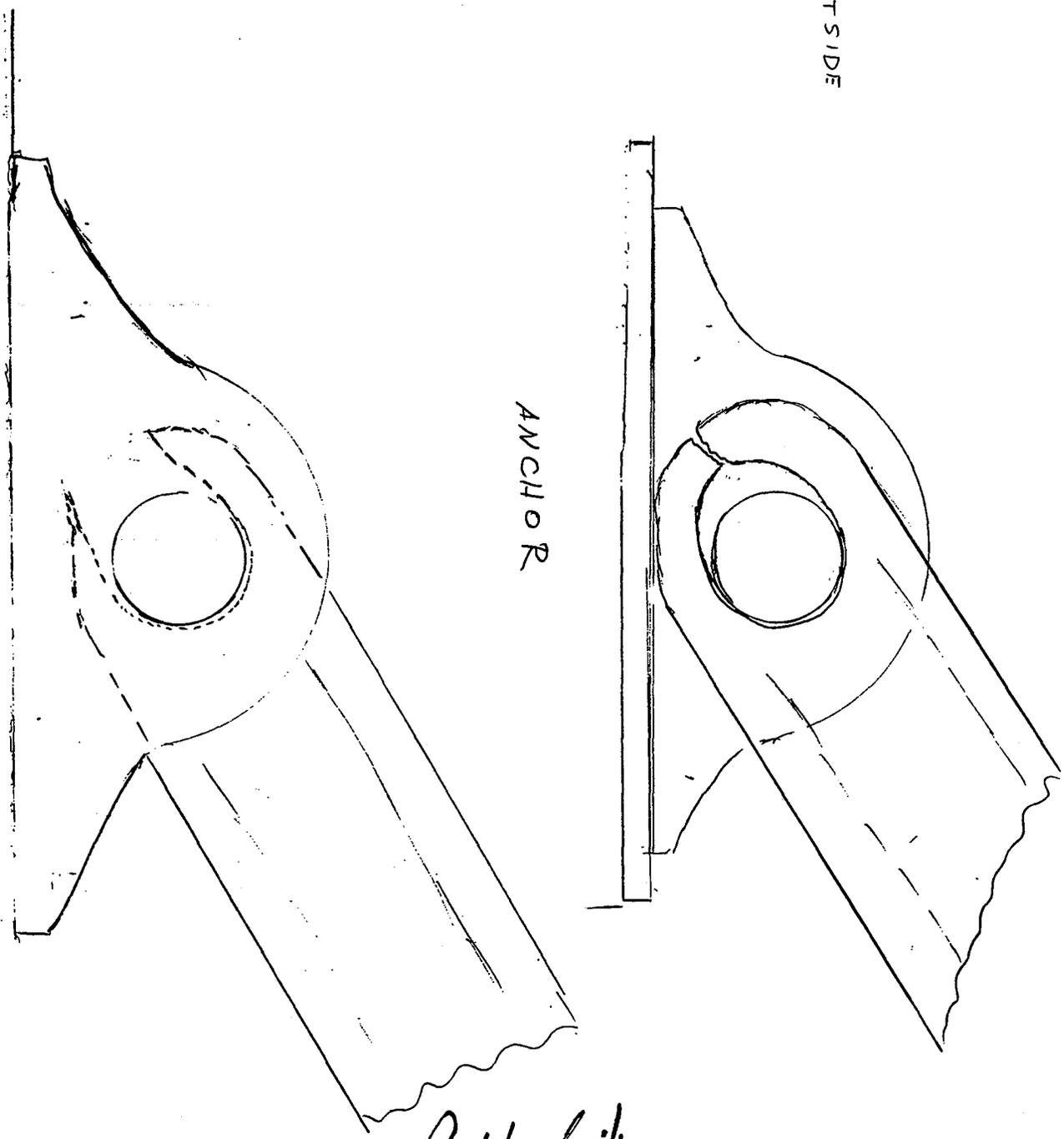
10-3

7-40

LEFT SIDE

CRUSHER

ANCHOR



Right Side

7-4

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 26 1984

GEORGE A. JACK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 83-72-D
	:	
MID-CONTINENT RESOURCES,	:	MSHA Case No. DENV 83-13
INC.	:	
Respondent	:	Coal Basin No. 5 Mine

DECISION

Appearances: George A. Jack, Indiana, Pennsylvania, pro se;
Edward Mulhall, Jr., Esq., Delaney & Balcomb
Glenwood Springs, Colorado, for Respondent

Before: Judge Carlson

This case arose upon a complaint of discriminatory discharge filed by George A. Jack with the Secretary of Labor under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the Act). The Secretary, after investigation, declined to prosecute the complaint. Mr. Jack then brought this proceeding directly before this Commission under section 105(c)(3) of the Act.

Mr. Jack alleges that he was discharged by Mid-Continent Resources (Mid-Continent) in violation of section 105(c)(1) of the Act. 1/ Specifically, he complained that he was fired

1/ Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

from his job as an underground miner because he reported that he had been injured in an accident. He seeks reinstatement and back pay.

A hearing on the merits was held in Denver, Colorado on February 3, 1984. Complainant appeared pro se; respondent appeared through counsel. Both parties waived post-hearing briefs.

ISSUES

The fundamental questions to be decided are:

(1) Whether the proceeding must be dismissed because the miner's original complaint was filed with the Mine Safety and Health Administration after the statutory time period for filing had elapsed.

(2) Whether, if a valid complaint was filed, the miner was discharged by the mine operator in violation of section 105(c)(1) of the Act, as alleged.

(3) What relief the miner is entitled to receive if the discharge was unlawful.

TIMELINESS OF THE COMPLAINT

Section 105(c)(2) of the Act provides that an aggrieved miner has sixty days after a discriminatory event in which he "may" file his complaint with the Secretary of Labor. Mr. Jack was discharged on June 17, 1982. Mid-Continent urges that the present proceeding is not properly before the Commission because the miner failed to make his original complaint to the Secretary until March of 1983. The record shows that Mr. Jack signed his complaint on March 9, 1983 (respondent's exhibit 5). The form was received by the Denver, Colorado office of the Secretary's Mine Safety and Health Administration on March 15, 1983. Since these dates are not in dispute, it is clear that the complaint was filed long after the close of the sixty day period mentioned in the statute.

Relying on the Act's legislative history, the Commission has held that the sixty day time limit is not jurisdictional. The Congressional purpose was to prevent stale claims, but late filings by a miner may be excused "under justifiable circumstances." Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (1982). Questions of timeliness must thus be decided on a

"case by case basis, taking into account the unique circumstances of each situation." David Hollis v. Consolidation Coal Company, _____ FMSHRC _____, Docket No. WEVA 81-480-D (January 9, 1984).

In the present case I find the complainant's delinquency excusable.

The evidence shows that Mr. Jack moved from Colorado to Pennsylvania within a week after his discharge. His testimony revealed a good deal of genuine confusion between his workman's compensation claim and his mine safety complaint. He was of the apparent belief that forms filed with the Colorado workman's compensation authority, for example, were somehow essential to the filing of complaint under the mine Act; and he had some difficulty in securing copies of the compensation form. Because of his move, he also had difficulty in determining which MSHA office should handle his complaint. The complainant's testimony on these matters is generally credible. I am convinced that Mr. Jack misunderstood his rights under the Act and was confused about the proper manner in which to proceed. I also note that no evidence indicates that Mid-Continent was prejudiced by the late filing.

REVIEW OF THE EVIDENCE

The undisputed evidence shows that complainant was interviewed by Mid-Continent for employment in its underground coal mine on June 7, 1982. He came to the mine with a letter of recommendation from an official in a Pennsylvania mine where he formerly worked. Mid-Continent hired him as an experienced miner. He spent two days, June 10 and 11, 1982 in orientation and training on the surface.

The complainant did not report for work on his next scheduled days, June 14 and 15, 1982, a Monday and Tuesday. He did report on June 16. He worked as part of a five man crew removing cable and doing other tasks preparatory to closing down a part of the mine.

According to Mr. Jack's account, which Mid-Continent does not dispute, in mid-afternoon he was laying boards under the tires of a diesel-powered buggy as it attempted to cross a bridge. The crew foreman was driving; the remaining four members of the crew were on the bridge. As the buggy moved across, a part of the bridge collapsed and Mr. Jack fell several feet. He complained of a back injury and was instructed by the foreman to walk to the surface. He did so.

On the following day he did not go to the mine. He called the personnel office and spoke ultimately to Marvin Meyers, the personnel director. Mr. Jack told Meyers that he was absent because he had been injured in the accident the previous day; Mr. Meyers told Mr. Jack that he was terminated. Later that day, Meyers sent a letter informing Jack that he was discharged.

Beyond those few facts, witnesses for the parties agreed on virtually nothing. Complainant maintains that he was fired because he "reported a mine accident," the bridge collapse. He also claims that during the course of the day he also voiced complaints about unsafe practices or conduct. According to his testimony, he twice complained to the crew foreman when the vehicle used by the crew was allowed to "drift back" while miners were behind it. He also complained, he said, that a cable he and the foreman were taking up was energized at 32,000 volts. Further, Mr. Jack insisted that both management and his fellow miners were biased against him because he was hired during a hiring freeze when the operator had made known that operations were to be cut back.

According to Mr. Jack, he was unable to work on June 14th and 15th because of altitude sickness. He claimed he had not adjusted to the 10,000 foot altitude of the mine. Since he had been in Colorado for less than a week, he said he knew no physicians. He visited a chiropractor who gave him a "disability certificate" which he in turn gave to Wally Wareham, the mine superintendent, on June 16th when he returned to work. The chiropractor's statement indicated that Mr. Jack was incapacitated on June 14th and 15th with "stomach upset and back pain" (Respondent's exhibit 2). Mr. Jack also maintained that he telephoned the mine on both the 14th and 15th to report his inability to work. He also testified that Grant Brady, safety director for Mid-Continent, had informed him that he was entitled to miss two days of work in six months with a doctor's excuse.

Mid-Continent provided a markedly different version of the circumstances leading to dismissal. Nannette C. Grys, the company's personnel clerk at the time in question, testified that she helped Mr. Jack fill out all his personnel papers on June 9, 1982. She claims that the complainant was "definitely intoxicated" at that time, and that she reported that impression to Marvin Meyers, the personnel director.

During his own testimony, Mr. Meyers stated that he put the complainant on the payroll only because he had been instructed to do so by Mid-Continent's president. Mr. Meyers stated, however, that the information from Ms. Grys "alerted" him to watch Mr. Jack's work attendance.

The implemented labor agreement with Mid-Continent's miners, he testified, places newly hired employees in probationary status for their first 60 days of work, (Article 11.2, respondent's exhibit 3). Under Article 6.2.9., according to Meyers, probationary employees could be discharged for any cause deemed sufficient by the company. That article is one of a series specifying causes for discharge. The text confirms his testimony. It permits discharge for:

Any cause determined sufficient by the company as to an employee on probationary status within sixty (60) days of work by the employee after his employment.

Mr. Meyers agreed generally with the complainant's account of the telephone conversation between the two of them on the morning of June 17. Meyers insisted, however, that he had decided to discharge Jack before the call was received. He made the decision because the miner had missed his first two days of actual work in the mine, and had not called in on those days as company policy required. Despite the company's power to dismiss probationary employees for any cause, Meyers indicated that he may not have dismissed Mr. Jack had the miner called in to explain his absence.

Mr. Meyers further declared that he knew nothing of the accident on June 16th until Jack mentioned it during the telephone call on the following day. Moreover, he knew nothing of any safety complaints at the time he made his decision to fire the miner. He had heard nothing of the complaint about the vehicle backing incident or the electrical cable incident until he heard complainant's testimony at the trial, he testified.

Mr. Meyers knew that Mr. Jack had not called on June 14 or June 15 because all such telephone reports are tape recorded when made, and are then noted in a log by the mine clerk. The log, Mr. Meyers testified, contained no entries for calls on June 14 or 15.

As to what happened after Mr. Meyers told Mr. Jack that he was fired, there is little dispute. Meyers sent Jack a letter formally advising him that he was terminated for "being absent from work without good cause" (respondent's exhibit 1). Mr. Jack returned his equipment and supplied a company paramedic with information for state workman's compensation claim.

On August 26, 1983 a hearing officer for the Workmen's Compensation Division of the Colorado Division of Labor issued an order declaring that Mr. Jack was entitled to total temporary disability from June 17, 1982 (complainant's exhibit 1). Mr. Jack returned to Pennsylvania shortly after his discharge by Mid-Continent.

A miner alleging a discriminatory discharge must prove by a preponderance of the evidence (1) that he engaged in "protected activity" and (2) that the discharge was motivated at least in part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (1980), rev'd. on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). It is further essential that a miner seeking the protection of the Act have actually communicated a complaint concerning safety to a representative of the operator. Dunmire v. Northern Coal Co., 4 FMSHRC 126 (1982).

Complainant in the present case maintains that in his call to the personnel office on June 17, 1984 he stated that he was unable to report to work because of his injury suffered the previous day. There is no evidence that Mr. Jack gave voice to any specific or general concern relating to safety or health. The chief purposes of his call, rather plainly, were to explain why he would not be at work and to protect his rights to compensation for a job-connected injury. Similarly, it is not clear that he articulated any express safety complaint to the foreman who was present when he fell from the bridge, receiving his injury. According to his own account, the only conversation appeared to relate to whether he should go to the surface and how he should get there. The question thus raised is whether the reporting of an accident and resulting injury by the injured miner may be construed as a safety-related complaint. The general answer must be in the affirmative. Cf. Mooney v. Sohio Western Mining Co., _____ FMSHRC _____ (1984), Docket No. CENT 81-157-DM, March 7, 1984; Moses v. Whitley Development Corp., 4 FMSHRC 1475 (1982). Under most circumstances an injury report from a miner hurt in a mine accident is, by its very nature, a safety complaint. Mr. Jack's telephone conversation with Mr. Meyers on June 17 involved a protected act.

In the present case we must also consider whether Mr. Jack's comments concerning the "backing" incident and the energized cable incident constituted protected activity. I must conclude that they did. In both instances he made complaints within the hearing of his foreman or leadman about safety concerns. The problem, of course, is that the miner's formal pro se complaint filed in this proceeding did not raise these specific occurrences. I hold, however, that the issues raised by these incidents were

tried by the consent of the parties and I therefore amend the pleadings to conform to the evidence under Rule 15(b) of the Federal Rules of Civil Procedure. 2/ Mr. Jack's complaints about the unsafe backing of the vehicle and the handling of an energized cable were manifestly protected activity.

Upon the entire record I conclude that the complainant failed to establish the second essential element of his proofs: that his protected activities furnished any part of the motive for his discharge.

The weight of the evidence establishes that despite Mr. Jack's having engaged in protected activity, the decision to dismiss him was based entirely upon his unprotected activity. In this regard, I found Mr. Meyers' testimony wholly convincing. His explanation of his motives emerged in a straightforward way. It was plain that he would not have hired Mr. Jack in the first place, had he had his way, because the mine was at that time reducing, not increasing, its work force. The additional information that the new miner was intoxicated when he filled out his employment papers did nothing to enhance Mr. Meyers' views on the wisdom of the hire. 3/ At that point, understandably, he became "alert" to the possibility that Mr. Jack would present a problem with absenteeism. Given this background, one can easily appreciate Mr. Meyers' reaction when he learned that the miner had missed his first two days' work underground. One can believe, in other words, that Meyers had decided to fire Mr. Jack before the latter's telephone call on June 17 and that the call merely accelerated the pronouncement of that decision.

Coincidentally, I believe Mr. Meyers' assertion that at the time he formed his resolve to dismiss the complainant he had neither knowledge of the accident of June 16, nor knowledge of any other safety complaint. Thus, there was no connection between the miner's protected activity and the decision to discharge. Such a nexus is essential to a showing of a discriminatory discharge. Where a mine official who makes a decision to fire a miner has no prior knowledge that the miner made a safety or health complaint, it is axiomatic that protected activity cannot have furnished any part of the motive for the adverse action.

2/ Mr. Jack's testimony on these matters was brought out under cross-examination and was at no time challenged as being beyond the scope of the pleadings.

3/ Mr. Jack denied that he was intoxicated. At the time of her testimony, however, Mrs. Grys had long since ceased to work for Mid-Continent and had moved to Colorado Springs (Tr. 94-96). I believed her testimony because, among other reasons, she had no discernible stake in the outcome of the case. Besides, even if she had been mistaken in her belief that the miner was intoxicated, I have no doubt that Mr. Meyers took her report at face value. It is Mr. Meyers' state of mind that is important here.

Some other elements in this case deserve passing mention. Mr. Jack's medical excuse from a chiropractor enjoyed some evidentiary prominence at the hearing. It did not, however, figure significantly in my decision. The evidence shows that Mr. Meyers did not see the excuse until after his June 17, 1984 declaration that Mr. Jack was dismissed. Whether Mr. Jack gave it to the mine superintendent on June 16 when he reported back to work is of little importance, as is Mid-Continent's emphasis on the fact that the document bears a date of June 17, a day after the complainant allegedly gave it to the company. This is so because the persuasive evidence shows that Mr. Meyers decided to fire Mr. Jack on the basis that the miner failed to give telephone notice on June 14 and June 15, as required by company rules, that he would not be at work.

I must also make an observation concerning Mid-Continent's work rules as set out in respondent's exhibit 3. This "Proposed Labor Agreement," was implemented on August 5, 1981. The evidence shows the provisions contained in the document were originally conceived as a part of the collective bargaining process when the company's employees were represented by a labor union. They were ultimately put in effect, however, on an essentially unilateral basis by management after the work force had determined to dispense with union representation. Mr. Meyers maintains that Mr. Jack was terminated as a probationary employee under Article 6.2.9 which declares that probationary employees may be discharged for "any cause determined sufficient by the company." He also testified that in the normal course of his interviews of a new employee he routinely gives the employee a copy of the work rules. Mr. Jack, however, insisted that he had never received a copy of the rules booklet, and therefore suggests that he could not properly be discharged under its provisions.

First, I think it unlikely that Mr. Meyers did not give the miner a copy of the booklet. Second, even if he neglected to do so, that omission would not vary the outcome of this proceeding. This Commission has no power to determine whether an adverse employment action is fair or unfair except to the extent that unfairness may in some way relate to a protected activity. Here it is plain that Mr. Meyers acted upon a good faith assumption that Mr. Jack knew that absentees were to give telephone notice of their absences in advance of the beginning of the work shift, and knew that probationary employees were subject to dismissal in the company's discretion. Thus, even if Mr. Jack did not receive the booklet, it cannot be said that that omission affected Mr. Meyer's motive in effecting the discharge. It does not, in other words, give rise to any credible inference that Meyers' real reason for the firing was based in any part on a safety complaint.

CONCLUSIONS OF LAW

Upon the entire record and upon the factual determinations embodied in the narrative portion of this decision, the following conclusions of law are made:

- (1) That this Commission has jurisdiction to hear and decide this matter.
- (2) That the complainant engaged in protected activity within the meaning of the Act at the times pertinent herein.
- (3) That complainant's engagement in such protected activity did not furnish any part of the motive of respondent Mid-Continent in discharging complainant from his employment as a miner.
- (4) That the complainant was not discharged for engaging in protected activity under Section 105(c) of the Act.

ORDER

Accordingly, this complaint of discrimination is ORDERED dismissed with prejudice.


John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 27 1984

FMC CORPORATION,	:	CONTEST OF ORDER/CITATION
Contestant	:	
v.	:	Docket No. WEST 81-264-RM
	:	Order No. 577585; 4/7/81
SECRETARY OF LABOR,	:	Docket No. WEST 81-265-RM
MINE SAFETY AND HEALTH	:	Order No. 577586; 4/7/81
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 82-15-RM
	:	Order No. 578606; 9/9/81
	:	
	:	Docket No. WEST 82-60-RM
	:	Citation No. 578884; 11/16/81
	:	
	:	Docket No. WEST 82-61-RM
	:	Order No. 578885; 11/16/81
	:	
	:	Docket No. WEST 82-62-RM
	:	Citation No. 578907; 11/18/81
	:	
	:	Docket No. WEST 82-121-RM
	:	Order No. 578961; 2/10/82
	:	
	:	Docket No. WEST 82-122-RM
	:	Order No. 578880; 2/10/82
	:	
	:	Docket No. WEST 82-123-RM
	:	Order No. 578879; 2/10/82
	:	
	:	FMC Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-11-M
Petitioner	:	A.C. No. 48-00152-05050 V
v.	:	
	:	Docket No. WEST 82-64-M
FMC CORPORATION,	:	A.C. No. 48-00152-05054 V
Respondent	:	
	:	Docket No. WEST 82-134-M
	:	A.C. No. 48-00152-05056
	:	
	:	Docket No. WEST 82-152-M
	:	A.C. No. 48-00152-05058 V
	:	
	:	Docket No. WEST 83-10-M(A)
	:	A.C. No. 48-00152-05504
	:	
	:	FMC Mine

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

These matters came on for a prehearing/settlement conference on April 10, 1984. As a result of the scrutiny and analysis afforded at this hearing, the Secretary agreed to modification of the section 104(d) violations to section 104(a) citations and the operator agreed to a substantial increase in the penalties proposed for eight of the eleven charges. As to the remaining three, the operator requested time to submit its justification for a lesser increase in the amount of the penalty than that proposed by the trial judge.

The matter is now before me on the operator's motion to approve settlement which includes its justification for increasing the penalties on the three excepted violations from \$500 to \$1,000 instead of \$2,000. The Secretary recommends acceptance of the operator's circumstances in mitigation of the trial judge's initial proposal.

Based on a further independent evaluation of these matters, I find the settlement now proposed by both parties is in accord with the purposes and policy of the Act. Accordingly, it is ORDERED that the motion be, and hereby is, GRANTED.

It is FURTHER ORDERED that:

1. The following section 104(d) Citations/Orders be, and hereby are, modified to section 104(a) citations:

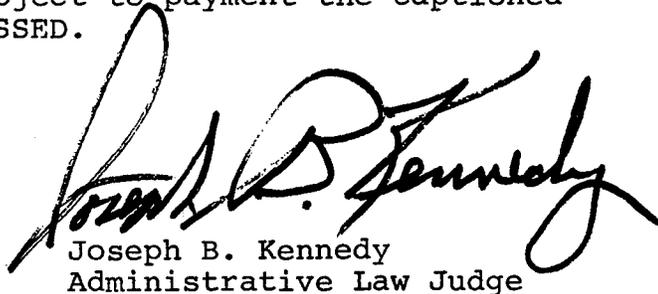
Number

577585
577586
578606
578911
578885
578967
578961
578880
578979

2. The penalties agreed upon be allocated among the violations charged as follows:

<u>Number</u>	<u>Amount</u>
577585	\$1,000
577586	1,000
578606	1,000
578911	1,000
578884	300
578885	300
578967	300
578907	150
578961	1,000
578880	1,000
578879	1,000
Total	<u>\$8,050</u>

3. The operator pay the total amount of the settlement agreed upon, \$8,050, on or before Friday, May 11, 1984 and that subject to payment the captioned matters be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 30 1984

U. S. STEEL MINING CO., INC., : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 82-390-R
: Citation No. 2024280; 8/18/82
SECRETARY OF LABOR, : Morton Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), ;
Respondent :
UNITED MINE WORKERS OF :
AMERICA, :
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 83-95
Petitioner : A. C. No. 46-01329-03519
v. : Morton Mine
U. S. STEEL MINING CO., INC., : Docket No. WEVA 83-82
Respondent : A. C. No. 46-05907-03502
: Shawnee Mine

DECISION

Appearances: Louise Q. Symons, Esq.,⁴ Pittsburgh, Pennsylvania, for Contestant/Respondent; Matthew J. Rieder, Esq., and David E. Street, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner; Joyce A. Hanula, Legal Assistant, Washington, D. C., for Respondent United Mine Workers of America.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on May 11, 1983, through May 13, 1983, in Beckley, West Virginia, pursuant to section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977.

The contest proceeding involves a dispute as to whether U. S. Steel Mining Co., Inc. (USSM), must allow a health specialist, who works full time for the United Mine Workers of America, to be the miners' representative to accompany a Federal inspector under the provisions of section 103(f) of the Act. The petition for assessment of civil penalty filed in Docket No. WEVA 83-95 seeks assessment of a civil penalty for the violation of section 103(f) which is being challenged in the contest proceeding and also seeks assessment of a penalty for an alleged violation of 30 C.F.R. § 70.101. The petition for assessment of civil penalty filed in Docket No. WEVA 83-82 seeks assessment of a penalty for an additional alleged violation of section 70.101 (Tr. 205), but with respect to USSM's Shawnee Mine instead of USSM's Morton Mine, which is the mine involved in both Docket No. WEVA 82-390-R and Docket No. WEVA 83-95.

UMWA's representative participated at the hearing in only that phase of the consolidated proceeding pertaining to the walk-around issues. Therefore, a hearing with respect to the alleged violation of section 103(f) of the Act was first held and then a hearing was held with respect to the two alleged violations of section 70.101. This decision will first dispose of the walk-around issues raised in Docket No. WEVA 82-390-R and the portion of the civil penalty case in Docket No. WEVA 83-95 pertaining to the alleged violation of section 103(f). Thereafter the decision will dispose of the issues pertaining to the alleged violations of section 70.101.

Docket No. WEVA 82-390-R

Findings of Fact

The testimony of the witnesses and the documentary evidence support the following findings of fact:

1. Leo Ingram, an MSHA inspector, went to USSM's Morton Mine on August 18, 1982, to perform a respirable-dust inspection on the longwall section (Tr. 7). He had made prior inspections at the Morton Mine and knew that the persons who normally accompanied him, as the miners' representative under the provisions of section 103(f) of the Act, were Donny Samms, James Carter, and Steve Holly (Tr. 12), but on August 18, 1982, Ingram saw William Willis at the mine along with Donny Samms. Ingram knew that Willis was a UMWA District 17 safety inspector. Shortly after Ingram had begun his work of placing respirable-dust pumps on some of the miners, he was advised by Samms and Willis that Willis would be accompanying him that day as the miners' representative and that Samms would be going underground with him, but would be traveling under the provisions of West Virginia law, while Willis would be accompanying him under the provisions of the Act (Tr. 9; 18). Ingram had no objections to having Willis accompany him as the miners' representative (Tr. 9).

2. Samms and Willis soon thereafter advised Ingram that USSM was not going to allow Willis to go with him as the miners' representative. Ingram asked Lawrence Burke, the mine superintendent, if he was refusing to allow Willis to accompany him and Burke replied "Yes". Willis expressed a belief that USSM's refusal to allow him to accompany the inspector was a violation of section 103(f). Ingram was not certain as to the course of action he should take and made a telephone call to his supervisor to obtain advice. After receiving instructions from his supervisor to the effect that a violation had occurred, Ingram wrote Citation No. 2024280 under section 104(a) of the Act at 8:45 a.m. on August 18, 1982, alleging a violation of section 103(f) of the Act, and stating as follows (Exh. 1):

The operator refused to allow a representative of the miners, William Willis, United Mine Workers of America District 17 safety inspector, to travel with an authorized representative of the Secretary of Labor during a respirable dust technical inspection.

The citation gave USSM 30 minutes within which to abate the alleged violation. By the time a half hour had passed, the chief mine inspector of USSM's Decota District, Carl Peters, had sent word to Ingram that Willis would be allowed to accompany him. Upon receiving USSM's approval for Willis to travel with him, Ingram terminated the citation with the following explanation (Exh. 1):

The representative of the mine operator, Mike Sinozich, has agreed to allow the representative, William Willis, to travel with the authorized representative of the Secretary of Labor during a respirable dust technical inspection.

3. Ingram was accompanied underground by Samms, Willis, and Michael Sinozich, USSM's safety inspector. All four of them went to the longwall section where coal was being produced, but Samms did not remain with the inspection party the whole period they were underground. Samms left the section sometime before noon, but Ingram does not know exactly what time it was (Tr. 13). Ingram did not ask Willis to accompany him and never has asked anyone to accompany him, but he knows that he is permitted under the Act to allow more than one miners' representative to travel with him (Tr. 14; 17). Willis advised Ingram that he wanted to look into the dust problem on the longwall section and Ingram thinks that Willis did make a suggestion about the placement or direction of water sprays on the longwall mining equipment, but he did not recall what it was (Tr. 15). Ingram was aware that he is not permitted under the Act to give advance notice of inspections and he has never done so (Tr. 16).

4. James Carter was unemployed at the time of the hearing, but on August 18, 1982, he was employed at the Morton Mine as a supply man. He was also on the union's safety committee and had called Willis on the evening of August 17, 1982, to come to the mine on the morning of August 18, 1982, because the union wanted him to accompany the inspector on that day if the inspector returned to the mine on that day (Tr. 19-20). Carter knew that Ingram had been notified that Willis would accompany him on the inspection, but Carter had to go underground to work before the issue of his being denied admittance to the mine had been resolved (Tr. 21). While Carter agreed that it was the practice of his local union to give USSM 24 hours' notice, if possible, when an employee of UMWA is asked to come to the mine to participate in an inspection which the local union wants to make at the mine, Carter stated that the 24-hour notice did not pertain to a request that a UMWA employee come to the mine to accompany an inspector under section 103(f) of the Act, but Carter could not specify a time prior to August 18, 1982, when a UMWA employee had been requested to come to the mine to be the miners' representative for accompanying an inspector (Tr. 26; 28).

5. William Willis, the UMWA safety inspector, who was called by the local union to walk around with Ingram on August 18, 1982, corroborated Ingram's and Carter's testimony as to the fact that he was called by the local union, or safety committee, on the evening of August 17, 1982, and that he took a chance that Ingram would be at the mine again on August 18, 1982, to obtain additional respirable-dust samples because production had been below normal on August 17 when Ingram had previously tried to obtain samples (Tr. 29-31). Willis has had the same training as that given to MSHA's inspectors, in addition to other training, and he is a certified mine foreman under West Virginia law (Tr. 29). Willis testified that he gave someone in the Morton Mine office notice that he was there on August 18, 1982, to go on an inspection with Ingram, but he could not recall the name of the person he notified (Tr. 31).

6. Willis' testimony does not differ significantly from Ingram's as to what occurred after he, Sinozich, and Samms went underground with Ingram, except that Willis made it clear that Samms was performing his own inspection under West Virginia law by examining the respirable-dust pumps so as to make it clear that he (Willis) was the sole representative of miners to accompany Ingram (Tr. 34; 36-37). According to Willis, Samms left the longwall face and went to the head entry where he was eating lunch by the time he, Sinozich, and Ingram arrived at the head entry to eat lunch. Willis also claimed that Sinozich and Samms got into a heated argument about what Samms' duties were on August 18 and that Samms told Sinozich at lunch time that he had called his section foreman for a ride so that he could leave the longwall section and return to his regular working place (Tr. 36).

Willis also stated that Samms was still at the head entry about 1 p.m. when he, Sinozich, and Ingram returned to the longwall face, but Willis also claimed that Carter came in a vehicle and picked up Samms so as to take Samms to his regular place of work (Tr. 36).

7. Willis claims to have made two suggestions as to the dust problem on the longwall section. One suggestion was about changing the position of the water sprays which were being welded to the longwall mining equipment (Tr. 35) and the other was about using a curtain to deflect dust away from the operator of the equipment and the jack setters (Tr. 37). At one point in his testimony, Willis denied that his visit to the longwall section had anything whatsoever to do with the fact that Ingram was there because he had come to the mine after receiving from the local union a complaint about the dust problem on the longwall section. Willis said he had received the complaint prior to June 1982 but had delayed filing it with a West Virginia State inspector because he wanted to give USSM time to make some changes which he had been advised were going to be made (Tr. 45; 52). Willis subsequently insisted that he had gone into the mine to assist Ingram with his inspection and to make suggestions to both Ingram and USSM's management as to what could be done to alleviate the respirable-dust problem on the longwall section (Tr. 50). Willis eventually justified his accompanying Ingram by saying that he wanted personally to observe the conditions on August 18, 1982, so that he would have documentation (through the results of the analyses of the inspector's samples) to assist him in determining what additional steps would need to be taken to eliminate the dust problem (Tr. 56). The three respirable-dust samples obtained by Ingram on August 18, 1982, did show that the longwall section was in compliance with the respirable-dust standards (Tr. 78).

8. Willis was not aware of the fact that UMWA's office in Washington, D.C., had filed with MSHA on April 5, 1978, a certification as to the persons who were considered to be the miners' representatives at the Morton Mine when it was owned by Carbon Fuel Company (Tr. 44; 53; UMWA Exh. 1). A copy of the certification was served on Carbon Fuel on March 24, 1978. The mine was owned by Carbon Fuel in 1978. That certification specifies certain persons who are considered to be miners' representatives at the Morton Mine and one of the persons so designated is "the UMWA Safety Division, including District Safety Inspectors". Willis was aware of the fact that he could have inspected the longwall section any time before and after August 18, 1982, under the provisions of the National Bituminous Coal Wage Agreement of 1981 (Tr. 56-57; UMWA's Exh. 2). Willis is a full-time UMWA employee and was not paid by USSM for the time he traveled with the inspector on August 18, 1982, and did not expect to be paid anything by USSM (Tr. 57). USSM did, however, pay Samms for the entire shift (Tr. 77).

9. Michael Sinozich is a mine inspector for USSM at the present time and he held that same position when the Morton Mine was owned by Carbon Fuel Company (Tr. 62-63). When Sinozich arrived at the mine on the morning of August 18, 1982, he went into the lamp room to obtain his light and saw William Willis and Donny Samms there (Tr. 63). He knew that Willis was one of UMWA's safety inspectors (Tr. 75) and advised Willis that he was not supposed to be on mine property without having given previous notification that he was coming (Tr. 64). When Willis told Sinozich that he had come to travel with the inspector that day as the miners' representative, Sinozich disagreed with that assertion and replied that Samms was the miners' representative for traveling with the inspector (Tr. 64-65). Sinozich's testimony does not differ substantially from other witnesses as to USSM's refusal to allow Willis to travel with the inspector and USSM's reversal of that refusal after Ingram issued a citation for an alleged violation of section 103(f) of the Act (Tr. 65-66).

10. Sinozich's testimony does differ from Willis' testimony in some respects. Sinozich claims that Samms was with the inspection party in the face area of the longwall section up to 11:30 a.m. and that Samms left the longwall section about 12:30 p.m. after he had eaten lunch at the head entry (Tr. 69-70). Sinozich also stated that he was surprised when Samms left the longwall section because Samms had not at any time explained to him that he (Samms) was there under a provision of West Virginia law. Additionally, Sinozich stated that his understanding of West Virginia law is that the miners have a right to participate in the taking of respirable-dust samples by USSM, but have no right to monitor or check the samples taken by MSHA. Sinozich did not think that Samms had any reason to go with the inspector to check the pumps placed on three miners in the longwall section on August 18 because USSM was not engaged in taking respirable-dust samples in the longwall section on that day (Tr. 71-72).

11. Sinozich's testimony also differs from Willis' and Ingram's testimony to the extent that Sinozich testified that Willis made no recommendations to him about changes in the ventilation system or changes in engineering for the purpose of controlling dust on the longwall section. Sinozich stated that Samms checked the pumps placed on three miners by Ingram, but that Willis did not check the pumps (Tr. 78-79). Sinozich also testified somewhat inconsistently as to Willis' role underground by first stating that it was too noisy to discuss technical aspects of the dust problems on the longwall section (Tr. 70), while subsequently conceding that the longwall equipment was not running at times while the water sprays were being installed or repositioned and by conceding that the members of the inspection crew did talk at times (Tr. 74; 76-77). Sinozich denied that he

had a heated discussion with Samms as claimed by Ingram (Tr. 69). Sinozich also testified that at no time did he tell Samms that he was forbidden to go on the inspection or that he should not continue to be with the inspection party for the full shift (Tr. 69).

12. Carl Peters is USSM's chief mine inspector for the Decota District. He has held that position since June 12, 1982, and prior to that he was director for health and safety for Carbon Fuel Company (Tr. 80). Peters corroborated Willis' testimony to the extent of agreeing that Willis had discussed with him in June of 1982 at the West Virginia mine office the respirable-dust conditions on the longwall section and that he had advised Willis of the steps USSM was taking to alleviate the problem, but he denied that Willis had expressed an intention of coming to the mine to accompany an MSHA inspector at any time with respect to the respirable-dust problem in the longwall section (Tr. 80-81).

13. Peters stated that the miners' representatives for traveling with inspectors under section 103(f) of the Act are chosen by the union and that USSM has no right to participate in the union's choice of representatives and that USSM does not have any right to approve the union's choice of its representatives (Tr. 86). On the other hand, Peters stated that he does not recall having been served by UMWA with a statement of the persons who are considered to be miners' representatives (Tr. 82). Peters also stated unequivocally that Willis is not a miners' representative to accompany inspectors at the Morton Mine (Tr. 85). Peters stated that the miners' representatives are selected at the mines and that the mine foremen know who they are and that it is a routine understanding that when an inspector appears at the mine, one of the known representatives will automatically accompany the inspector (Tr. 86). Peters stated that the reason they initially refused to allow Willis to accompany Ingram was based on the "surprise" of being hit with "an International safety rep without proper notification. * * * It threw the whole system off" (Tr. 87).

Consideration of the Parties' Arguments

Introduction

USSM filed its brief on September 9, 1983, UMWA filed its initial brief on September 12, 1983, and the Secretary of Labor filed his brief on September 14, 1983. UMWA filed a reply brief on September 30, 1983.

When the parties first replied to a prehearing order issued October 15, 1982, they indicated that they would like to submit the issues to me for decision on the basis of a stipulation of facts. UMWA filed a notice of intervention on November 5, 1982.

After I had granted some extensions of time within which to file the proposed stipulations, I was subsequently advised in a letter filed on February 10, 1983, that the parties had been unable to reach agreement on a stipulation of facts and that the case would have to be scheduled for hearing.

The issues discussed in the parties' briefs show that they are still disputing the basic facts in this proceeding. USSM's brief (p. 2) states that the issue raised is:

If a miner's representative is available to accompany a federal MSHA inspector, is an operator required to also permit a representative of the international union to join the inspection party absent a request by the inspector?

UMWA's brief (p. 4) expresses the issue as follows:

The underlying issue in this case is whether USSM should be permitted to interfere in any way with the selection of the miners' representative under section 103(f) of the Act. For the reasons that will be outlined in this brief, the UMWA urges this Court to interpret 103(f) so as to prohibit any interference on the part of the operator with the selection of the miners' representative. [Emphasis added by UMWA.]

The Secretary's brief (p. 11), on the other hand, expresses the issue as follows:

Thus, the entire case boils down to the question of whether the Union's failure to follow the technical requirements of 30 C.F.R. § 40.3 would deprive the operator's miners of the right to have the Union's safety and health specialist be their walkaround representative when they need him to act in that capacity, as they did here when the local safety committeemen could not resolve a potentially serious health hazard and sought the benefit of Mr. Willis' expertise. The Secretary submits that the appropriate conclusion, already reached by one Review Commission Judge, is that the miners' health is the more important concern.

It is apparent from the parties' arguments that UMWA and the Secretary have addressed only very briefly the issue raised in USSM's brief. USSM's original notice of contest did not expressly state the issues raised by Citation No. 2024280 and in my prehearing order of October 15, 1982, I stated that I did not know what issue USSM was raising and noted that if the issue

was merely the question of whether an operator has to pay a miners' representative who is accompanying an inspector engaged in making a spot inspection, that question had already been laid to rest by the court's decision in UMWA v. FMSHRC, 671 F.2d 615 (D. C. Cir. 1982), cert. den., 74 L.Ed 2d 189 (1982).

USSM clarified the issues being raised in this proceeding by filing a letter on October 29, 1982. A copy of the letter was sent to both the Secretary and UMWA. In that letter USSM specified two issues it was raising in this proceeding as follows:

(a) The facts in this case are that USSM allowed the elected representative of the miners to accompany the inspector and paid him for the time involved. The issue in this case is whether the operator must also allow a representative from the district office of the union to accompany the miners. UMWA v. FMSHRC, 671 F.2d 615 (1982), did not discuss the issue of whether the operator must permit two representatives of the miners on an inspection party, one from the local and one from the national office.

(b) The facts in this case will establish that the local union never listed William Willis as a representative of the miners pursuant to 30 CFR §40, and that the local union failed to notify mine management that they requested the assistance of Mr. Willis pursuant to Article III, Section (e) (1) of the basic labor agreement.

USSM's brief (p. 5) distinguishes the Commission's holding in Consolidation Coal Co., 3 FMSHRC 617 (1981), by pointing out that in that case the inspector requested the assistance of UMWA's national safety representative and Consol objected to the request on the ground that the national representative had not been designated on the form filed pursuant to 30 C.F.R. § 40.3. USSM argues that none of the parties in this proceeding based their actions on the notice of representation. Therefore, USSM argues that the Commission's holding in the Consol case is inapplicable to the facts in this proceeding.

USSM is incorrect in arguing that the Consol case is inapplicable to the issue stated in paragraph (b) above because the Commission held in the Consol case "* * * that failure of a person to file as a representative of miners under Part 40 does not per se entitle an operator to deny that person walk-around participation under section 103(f)" (3 FMSHRC at 619). As I have noted in Finding No. 8, supra, the union did file with MSHA, under the Federal Coal Mine Health and Safety Act of

1969, a certification of miners' representative for the Morton Mine. While a copy of the certification was served on Carbon Fuel Company, the union did not update the certification by serving a copy on USSM after USSM assumed ownership of the Morton Mine. The fact that the union's certification is somewhat defective in terms of service of process is immaterial in light of the Commission's holding in the Consol case to the effect that complete failure to file a certification under section 40.3 is not a sufficient reason for an operator to deny walkaround rights under section 103(f).

USSM's brief seems to have dropped the issue about UMWA's failure to file a certification pursuant to section 40.3 of the regulations because the only issue specifically articulated in the brief is the one pertaining to the safety committee's alleged appointment of two miners' representatives to accompany the inspector under section 103(f) of the Act. To the extent that USSM may still be arguing that it had a right to deny Willis the right to walkaround with the inspector on August 18, 1982, because he had not been listed in a filing made pursuant to section 40.3, I believe that that argument must be rejected under the Commission's holding in the Consol case, supra.

Rights of UMWA under the Wage Agreement

In USSM's letter filed on October 29, 1982, USSM also contends, in paragraph (b), supra, that the union violated the notice provisions of Article III, Section (e)(1) of the Wage Agreement which provides as follows (UMWA Exh. 2, pp. 12-13):

(1) Subject to the routine check-in and check-out procedures at the mine, the officers of the International Union, the District President of the District involved, and authorized representatives of the International Union's Safety Division and Department of Occupational Health shall be afforded the opportunity to visit a mine to consult with management or the Mine Health and Safety Committee and to enter the mine at the request of either management or the Mine Health and Safety Committee.

It is obvious that the only "notice" UMWA is required to give under Section (e)(1) of the Wage Agreement is that it will follow the "routine check-in and check-out procedures" at the Morton Mine. Presumably all persons who went into the mine on August 18 followed the routine check-in and check-out procedures because no witness was asked any questions about checking in and out of the mine, but USSM's counsel did elicit from UMWA's witness Carter the fact that it is the local union's practice to give USSM 24 hours' notice of an intent to make an inspection of the mine if the inspection is going to be made under the Wage Agreement, but

Carter also insisted that the local union's practice of giving 24 hours' notice did not pertain to a request that a safety inspector from the international union be named as the miners' representative to accompany an MSHA inspector under section 103(f) of the Act (Finding No. 4, supra).

UMWA's brief (p. 5) indicates that the provision USSM should have cited in the Wage Agreement with respect to giving USSM notice is Article III, Section (d)(4) of the Wage Agreement which provides (UMWA Exh. 2, p. 11):

(4) The Committee shall give sufficient advance notice of an intended inspection to allow a representative of the Employer to accompany the Committee. If the Employer does not choose to participate, the Committee may make its inspection alone.

UMWA's brief (p. 5) argues that USSM is confusing the miners' rights under the Wage Agreement with their rights under the Act. UMWA's brief (p. 6) contends that the Safety Committee cannot give USSM advance notice as to when a miners' representative, who doesn't work at the mine, will appear at the mine to accompany an inspector under section 103(f) because the safety committee is not given advance notice of inspections by MSHA and that it would be contrary to section 103(a) of the Act for MSHA to give the safety committee advance notice. ^{1/} Therefore, UMWA contends that USSM, in arguing that USSM is entitled to 24 hours' advance notice when a representative of the international union is being asked to accompany an inspector, is asking the safety committee to do something which is beyond the safety committee's ability to do. UMWA further argues that it is the union's right under section 103(f) to appoint a miners' representative who does not work for the operator if that person has more expertise to appraise a safety or health problem than one of the miners who works for the operator. UMWA contends that section 103(f) specifically provides that the miners' representative has to be paid for accompanying an inspector only if he is an employee of the operator whose mine is being inspected. UMWA notes that there is no issue in this case about whether USSM has to pay the person who accompanied the inspector because Willis is a full-time UMWA employee and did not expect to be paid by USSM for accompanying the inspector (Finding Nos. 5 and 8, supra).

^{1/} Section 103(a) of the Act, in pertinent part, provides:
" * * * In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, * * *".

While UMWA's arguments are legally correct in contending that UMWA is not given any advance notice as to when inspections are going to take place, it is a fact that the safety committee thought that Inspector Ingram would return to the mine on August 18, 1982, to obtain additional respirable-dust samples because the longwall section had not been operating at a normal production level on August 17 when the inspector had previously been at the mine to obtain respirable-dust samples.

The safety committee called Willis on the evening of August 17 and asked him to come to the mine to accompany the inspector on August 18 if the inspector returned. The record contains nothing to show why the safety committee could not also have called USSM's mine inspector, or chief mine inspector, or mine foreman, or mine superintendent so as to notify at least one of those individuals that the committee wanted to have Willis, instead of Samms, be the miners' representative on the morning of August 18 if Inspector Ingram should appear for the purpose of obtaining respirable-dust samples as anticipated by the safety committee.

Moreover, there is some doubt in the record as to whether Willis gave USSM any notice at all on August 18 that he had come to the mine to accompany the inspector. The only notice which UMWA purports to have given USSM prior to Samms' advising Inspector Ingram that Willis was going to be the miners' representative is contained in the following statement by Willis during direct examination by his counsel (Tr. 31-32):

Q Could you tell me what happened when you arrived on the mine site on August 18th?

A I went to the mine office and informed management that I was there to go on inspection with Mr. Ingram.

Q Who of mine management did you inform?

A I don't remember who was in the office.

Q You can't remember the name of the person?

A No

Since Willis was acquainted with USSM's mine superintendent, mine inspector (Tr. 30-33), and chief mine inspector (Tr. 39), it is strange that he was unable to identify the person in the mine office whom he had notified of his being present for the purpose of accompanying Inspector Ingram.

Sinozich, USSM's mine inspector, is the first person in USSM's management who became aware of Willis' presence and he did not know that Willis had been asked to be the miners' representative to accompany the inspector when he went to obtain his cap light before going underground and saw Willis and Samms in the lamp room. Sinozich immediately advised Willis that Willis was not supposed to be on mine property without having given USSM prior notice (Tr. 64). In view of Sinozich's fast adverse reaction to Willis' presence, it is somewhat doubtful that Willis actually gave any of USSM's management personnel notice on the morning of August 18 that he had come to the mine for the purpose of accompanying an inspector until the reason for his presence was challenged by Sinozich in the lamp room. The only reason which Willis could give for failure to give notification prior to the morning of August 18 was that he had been called by the safety committee the night before and did not have time to give notice. If it was possible for the safety committee to call Willis at night to ask him to come to the mine to accompany an inspector, it would have been just as possible for Willis or the safety committee to call some person in USSM's management to advise that person that Willis was planning to come to the mine on the morning of August 18 to accompany an inspector who was expected to be there to take respirable-dust samples.

Despite the safety committee's lack of concern about giving USSM any prior notice of the fact that Willis had been asked to be the miners' representative on August 18, there is nothing in section 103(f) of the Act which requires either the safety committee or anyone to give USSM advance notice as to the identity of the miners' representative until the time the inspector is ready to go underground. Therefore, despite the union's lack of ordinary courtesy and consideration, I find that Willis had a right to be the miners' representative for the purpose of accompanying the inspector on August 18, 1982, even if Willis gave no prior notification until his presence at the mine was challenged by Sinozich.

USSM's brief (p. 4) argues that if it is required to allow anyone chosen by the miners as their representative to go underground, USSM would be required to let anyone so designated to accompany the inspector even if that person were a mining engineer from a competitive company or Willis' wife and children. USSM's brief notes that a person under 18 years of age is barred from entering the mine by West Virginia law.

It is possible, of course, that the safety committee might choose a person who has no expertise at all as the miners' representative, but that is not likely to happen. Moreover, if the safety committee should make an absolutely absurd selection as the miners' representative, USSM's management would be obligated to object to the selection, just as USSM's management did

in this case. Any time that USSM objects to a given miners' representative the inspector necessarily becomes the person to approve or disapprove that appointment. In this case, the inspector was sufficiently in doubt as to Willis' legal right to be the miners' representative that he called his supervisor to clarify the position he should take. In this case, the supervisor instructed the inspector to write a citation, but it is highly unlikely that the inspector or his supervisor would conclude that a citation should be written if a miners' representative should decide that he wanted to take his wife and children with him for the purpose of accompanying an inspector. It is also highly doubtful that an inspector would cite USSM for a violation of section 103(f) if USSM should object to the appointment of a mining engineer employed by a competitive company as the miners' representative.

In short, while I think the safety committee and Willis could have been more cooperative in providing USSM's management with more advance notice than was given in this case, I do not believe that the safety committee is precluded from asking that one of its safety inspectors from the international union be allowed to accompany an inspector as the miners' representative in cases such as this one in which it has been shown that the local union's miners' representatives felt inadequate to be helpful to the inspector in taking respirable-dust samples on the longwall section which had been out of compliance with the respirable-dust standards for about 1 year.

USSM's chief mine inspector was at least aware of the union's concern about the longwall section's noncompliance with the respirable-dust standards and acknowledged that Willis had discussed the problem with him on one occasion (Finding No. 12, supra). Therefore, the choice by the safety committee of Willis as the miners' representative on August 18, 1982, was not an action which should have been of any great surprise or distress to USSM's management, despite the chief mine inspector's claims to the contrary (Tr. 87).

I agree with the arguments in UMWA's brief, discussed above, that the notice provisions in the Wage Agreement pertain only to inspections which the safety committee wishes to perform under the provisions of the Wage Agreement and that UMWA is not bound by those notice requirements when the safety committee is choosing the miners' representative to accompany an inspector pursuant to section 103(f) of the Act.

The Question of Whether There Were Two Miners' Representatives on August 18, 1982

USSM's brief (p. 3) contends that section 103(f) of the Act contemplates that each party will have one representative to

accompany the inspector unless the inspector feels that he needs additional help. USSM concludes, therefore, that since the inspector did not specifically request Willis' assistance, the safety committee improperly insisted on having both Willis and Samms accompany the inspector. USSM argues that once the miners choose their representative, that person remains their choice until they inform management that a new representative has been chosen. USSM states that once the selection has been made, no additional representative may accompany the inspector unless he requests assistance. It is a fact that Inspector Ingram did not request either Samms or Willis to accompany him and he testified that he felt perfectly competent to obtain respirable-dust samples on the longwall section without the assistance of anyone (Tr. 14).

The Secretary's brief (p. 10) argues that Samms was not the only employee at the Morton Mine who had been designated as the miners' representative to accompany the inspector and that no one on August 18 was under the impression that Samms was the miners' representative to accompany the inspector on that day. The Secretary agrees that Samms went underground with the inspector, along with Willis and USSM's mine inspector, Sinozich, but contends that Samms was going to the longwall section to check the respirable-dust pumps under West Virginia law. Therefore, the Secretary claims that USSM's contention that the inspector had to request an additional representative before Samms could go has no application in the circumstances existing in this case.

UMWA's brief (pp. 8-9) contends that only one miners' representative, Willis, accompanied the inspector on August 18. UMWA states that Samms went underground with the inspection team, consisting of the inspector, Sinozich, and Willis, but that Samms did not remain with the inspection party because he was making an independent check of the respirable-dust pumps and left the inspection party before the inspection was completed. Additionally, UMWA argues that the union never requested that two representatives accompany the inspector and that the inspector knew before going underground that only Willis was the union's representative for accompanying the inspector.

At first glance, USSM appears to have a valid argument with respect to its "two representatives" claims. It is a fact that both Samms, a previously identified miners' representative, and Willis, the special miners' representative chosen to accompany the inspector on August 18, did go underground with the inspector. It is also true that, while Samms claims to have been going underground under a provision of West Virginia law, USSM's witness, Sinozich, claimed that West Virginia law only allows a miners' representative to participate in the taking of respirable-dust samples by an operator. Sinozich stated that since MSHA

was taking the dust samples, instead of USSM, that Samms did not have a right under West Virginia law to check the respirable-dust pumps which had been placed on three miners by Inspector Ingram (Finding No. 10, supra).

None of the four briefs filed in this proceeding cites the provision of West Virginia law which is allegedly involved. Therefore, I assume that no party is entirely certain whether Samms had a legitimate right under West Virginia law to go underground on August 18 to check the respirable-dust pumps placed on three miners in the longwall section. Nevertheless, the inspector was aware of the fact that Samms claimed to be going under West Virginia law and he specifically stated that he believed Samms' announcement that he was going underground under West Virginia law took the matter out of the inspector's hands entirely. The following testimony shows beyond any doubt that the inspector thought he was being accompanied by a single miners' representative (Tr. 18):

Q As far as you were concerned, on August 18th who was the miners' representative that went with you?

A On August 18th, sir, after I issued the citation Mr. Willis was the designated miners' representative. I was instructed that we believed at the time of the conference that he had a right to travel.

Q And even though Mr. Willis had been designated as the miners' representative for that day, I understood you to say that Mr. Samms also went along?

A Yes, sir.

Q So you had two people with you who worked for the union. Mr. Samms didn't work for the union; he worked for United States Steel. Is that right?

A Yes.

Q Whereas Mr. Willis is employed by UMWA as I understand it?

A Yes, sir. Mr. Samms informed me that he was going to monitor my dust sampling inspection under provision of the state law which I'm not familiar with and that took it out of my hands. As far as I was concerned with him, he was going under the state law and Mr. Willis was going under the Mine Health and Safety Act.

Willis' recollection of the discussion about, there being two miners' representatives is summarized in the following answer to a question asked by UMWA's legal assistant (Tr. 32-33):

A And discussions went on, and I think Mike [Sinozich] -- I'm pretty sure but I think he talked to Carl Peters, and Mike said, "He told me that he was going to object to you going with Mr. Ingram on this inspection." And I told Mike that I was the authorized representative of the miners, and he said that Mr. Samms was. Mr. Samms said, "No, Mike", said, "Bolts [Willis] is the representative of the miners." He said, "I'm going to go and look at the samples, under state law. The court decision was recently handed down by Judge Harvey." He said then he wasn't going to let me go.

Q Did he give you a reason?

A He said Donny Samms was the local union safety committeeman, and he usually travels with the inspector. * * *

The testimony of Sinozich as to the question of whether Samms went underground under West Virginia law consists of a short answer to a single question asked by USSM's counsel (Tr. 71):

Q Did Mr. Samms at any time indicate to you that he was acting under state law?

A No, he did not.

Sinozich also expresses on transcript page 71 his opinion that West Virginia law does not permit the miners to participate in the taking of samples by an MSHA inspector (Finding No. 10, supra).

There is some additional testimony which should be considered in determining whether the preponderance of the evidence supports a finding that two miners' representatives accompanied Inspector Ingram on August 18, 1982. Willis' testimony shows that Samms made a very significant effort to disassociate himself with the inspector's activities after they went underground. According to Willis, Samms went immediately to the face area of the long-wall section and checked two respirable-dust pumps and was on his way back to check a third pump when the other three persons (Inspector Ingram, Willis, and Sinozich) in the inspection party made their way to the face area. Moreover, Willis stated that Samms remained away from the inspection party all morning and

was eating his lunch at the head entry when Ingram, Willis, and Sinozich came to the head entry to eat their lunch. Additionally, Willis stated that Sinozich and Samms became involved in a heated argument at the head entry as to what duties Samms purported to be doing at that time, whereas Sinozich denies that he ever had any sort of argument with Samms on August 18 (Finding Nos. 6 and 11, supra).

The inspector's testimony indicates that Samms did not remain with the inspection party and that Samms left the longwall section about noon (Finding No. 3, supra).

Based on the preponderance of the evidence discussed above and my observations of the witnesses' demeanor, I find that Samms did advise Sinozich that he was going underground to check the respirable-dust samples under West Virginia law and that the inspector was aware of having with him only one miners' representative, namely, Willis. Therefore, the record does not support USSM's argument that the safety committee insisted on having two miners' representatives accompany the inspector on August 18, 1982. Since Sinozich had been advised by Samms that Samms was going with the inspection party to check respirable-dust samples under West Virginia law, he had ample opportunity to assert that Samms could not go under West Virginia law and would either have to be considered as a second miners' representative to accompany the inspector under section 103(f) or be denied the right of going underground except to work on his own section.

There is every indication that if the union had been confronted with a choice of having Willis go as the miners' representative or having Willis denied the right to go because Samms was also insisting on going as the miners' representative, the union would have elected to send Willis under section 103(f) and would have dealt with USSM's claim that Samms couldn't go underground to check respirable-dust pumps under West Virginia law. Since the union was not given the chance to make that decision on August 18, 1982, I do not believe that USSM should be permitted to argue on the basis of the record in this proceeding that the safety committee insisted on sending two miners' representatives to accompany the inspector on August 18, 1982.

As noted above, Inspector Ingram was completely unaware of any claim by USSM that he was permitting two miners' representatives to accompany him on August 18. He unequivocally testified that as far as he was concerned only Willis was the miners' representative to accompany him on August 18 and that Samms took the matter of his being one of the inspection party out of the inspector's hands by announcing that he was going underground to check respirable-dust samples under West Virginia law (Tr. 18).

Finally, I do not think that section 103(f) requires that the inspector must request an additional representative before two representatives may go with him. Section 103(f) simply states that "[t]o the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives." [Emphasis supplied.] That sentence means that the inspector may permit more than one representative for each party regardless of whether he actively requests that more than one person accompany him. In this case, however, the inspector was never asked to permit more than one representative to accompany him because, so far as he was concerned, the safety committee had elected to send only Willis as the miners' representative. Consequently, USSM simply cannot raise the "two miners' representatives" argument in this proceeding because the preponderance of the evidence fails to support such an argument.

A Violation of Section 103(f) Occurred

On the basis of the discussion above, I have found that the safety committee had a right to select a safety inspector from the international union as its miners' representative under section 103(f) of the Act on August 18, 1982. Therefore, the inspector properly cited USSM for a violation of section 103(f) when USSM refused to allow UMWA's safety inspector to accompany the inspector. The order accompanying this decision will hereinafter affirm Citation No. 2024280 issued August 18, 1982, which alleged that a violation of section 103(f) had occurred.

DOCKET NO. WEVA 83-95

The Secretary's petition for assessment of civil penalty filed in Docket No. WEVA 83-95 seeks assessment of two civil penalties, the first one being for the violation of section 103(f) of the Act alleged in Citation No. 2024280 considered above in Docket No. WEVA 82-390-R, and the second one being for a violation of 30 C.F.R. § 70.101 alleged in Citation No. 9917507 dated September 1, 1982. Assessment of a penalty for the violation of section 103(f) must be done on the basis of the record developed in the contest proceeding in Docket No. WEVA 82-390-R because the civil penalty issues were consolidated for hearing in the contest proceeding. Evidence was introduced by USSM and the Secretary in Docket No. WEVA 83-95 with respect to the violation of section 70.101 alleged in Citation No. 9917507.

USSM's Argument that a Judge Is Bound by the Provisions of 30 C.F.R. § 100.4

Since Inspector Ingram did not check the block on Citation No. 2024280 appearing after the words "Significant and Substantial", the Assessment Office proposed a "single penalty assessment"

of \$20 under 30 C.F.R. § 100.4 which provides as follows:

An assessment of \$20 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness, and is abated within the time set by the inspector. If the violation is not abated within the time set by the inspector, the violation will not be eligible for the \$20 single penalty and will be processed through either the regular assessment provision (§ 100.3) or special assessment provision (§ 100.5).

USSM attached to its brief, filed in Docket No. WEVA 83-95, a copy of its petition for discretionary review of a decision by Judge Broderick issued in U. S. Steel Mining Co., Inc., 5 FMSHRC 934 (1983). In that U. S. Steel decision, Judge Broderick held that the " * * * Commission is not bound by the Secretary's regulations setting out how he proposes to assess penalties" (5 FMSHRC at 936). USSM relies on the arguments made in its petition for discretionary review filed in Judge Broderick's case in Docket No. PENN 82-328 in support of its claim that I am bound by the provisions of section 100.4 and must, therefore, assess a penalty of only \$20 for the violation of section 103(f) because that is the penalty which the Secretary proposed for that violation in Docket No. WEVA 83-95 when he proposed the penalty under section 100.4.

The first argument which USSM's petition (p. 2) makes is that an " * * * operator has no remedy at law" if an inspector erroneously checks the "significant and substantial" block on a citation. USSM claims that if a manager's conference held under section 100.6 of the regulations fails to result in a reversal of the inspector's error, the operator may contest the penalty under section 100.7 where lawyers will become involved, but USSM claims that if the lawyers do find that the inspector made an error in checking the "S & S" block, the operator will be unable to obtain relief because " * * * the Administrative Law Judges are not willing to approve a settlement motion for the single penalty assessment because they do not agree with the new penalty criteria" (Petition, p. 2).

There are at least two fallacies in USSM's first argument. First, section 100.7 of the regulations and section 105(d) of the Act are designed to provide the operator with a forum where he can present evidence and arguments in support of his claims that the inspector improperly checked "S & S". When USSM sought review of the inspector's citing of USSM for a violation of section 103(f), USSM's attorney checked a block on a form which states, "I wish to contest and have a formal hearing on all the violations listed in the Proposed Assessment." USSM was provided with an

extensive hearing on the inspector's having cited USSM for a violation of section 103(f). There is nothing in the Act or in Part 100 of the regulations which provides that once a hearing has been held, the judge is precluded from using the evidence in that hearing to assess a civil penalty under section 110(i) of the Act.

The second error in USSM's first argument is that USSM incorrectly states that administrative law judges will not approve a settlement motion involving a single penalty assessment of \$20 under section 100.4. I have approved several settlements involving \$20 assessments proposed by the Secretary pursuant to section 100.4. See, e.g., Eureka Mining Corp., Docket No. LAKE 83-5, issued January 27, 1983; R B Coal Company, Inc., Docket No. KENT 83-24, issued July 13, 1983; and D & D Coal Company, Inc., Docket No. KENT 83-25, issued October 17, 1983. There are other errors in USSM's first argument, but they will hereinafter be noted in my discussion of USSM's other allegations.

USSM's second argument begins with the observation that the case law to date has arisen only under section 100.3 "* * * which has an elaborate scheme for considering the six penalty criteria" (Petition, p. 2). USSM concedes that the Commission and its judges are not bound by the provisions of section 100.3 "* * * because both parties may have more information after a full hearing than the assessment office had originally" (Petition, p. 2). USSM's petition (p. 3) tries to distinguish section 100.3 from section 100.4 by asserting that there is considerable discretion in applying the six criteria described in section 100.3 but little discretion in applying section 100.4's two criteria which only pertain to whether the violation was "S & S", that is, reasonably likely to result in a reasonably serious injury, and whether the violation was abated within the time given by the inspector. The aforesaid difference in the range of discretion between the two sections is said by USSM to make the present case law inapplicable to section 100.4.

USSM refers to the Commission's language in Sellersburg Stone Co., 5 FMSHRC 287 (1983), in which the Commission held that it is not bound by the Secretary's assessment formula, and USSM claims that the preamble to the regulations relied on by the Commission in that case specifically refers to section 100.3, not to section 100.4. USSM's petition (p. 3) further states that the word "may" used in the first sentence of section 100.4 implies that application of the section may be discretionary, but USSM claims that the word "may" is restricted to making the two required findings as to nonseriousness and timely abatement. USSM claims that the Secretary stated in the final rule that the term "single penalty assessment" was being used to clarify that \$20 is the only penalty an operator could receive under section 100.4.

In addition to the lack of discretion permitted in applying section 100.4, as opposed to section 100.3, USSM's petition (p. 4) argues that section 100.4 enunciated a new agency policy which is binding upon the operator and the agency. USSM argues that a judge cannot ignore the new test devised by the agency whose rules he is supposedly applying and substitute his own test. USSM continues its argument by saying that a judge cannot create law because he does not agree with the existing regulation and that a judge "* * * must base his decision on the testimony he has heard" (Petition, p. 4).

If USSM is going to base its arguments on the "case law" pertaining to penalty assessments, it ought to start with the procedures used by the Secretary of the Interior to carry out the provisions of section 109(a)(c) of the Federal Coal Mine Health and Safety Act of 1969 which provided, in pertinent part, as follows:

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. * * *

The Secretary devised a formula for applying the six criteria listed in section 109(a)(1) of the 1969 Act. Those same criteria are also listed in section 110(i) of the 1977 Act. Operators challenged the penalties proposed by the Secretary under the 1969 Act on the ground that he had not made the findings required by section 109(a)(3), supra. Several circuit courts considered the matter. The District of Columbia Circuit, in National Independent Coal Operators' Assn. v. Morton, 494 F.2d 987 (1974), affirmed the method employed by the Secretary of the Interior under which the Secretary proposed penalties without making formal findings as to the six criteria, but the regulations permitted the operator to request a hearing before an administrative law judge who would make findings as to the six criteria. The court held that the operator was afforded due process under the regulations then in effect. The Third Circuit, in Morton v. Delta Mining, Inc., 495 F.2d 38 (1974), reversed the method being used by the Secretary of the Interior because the court believed that section 109(a)(3) required the Secretary to make findings as to the six criteria when he proposed civil penalties.

The Supreme Court affirmed the D. C. Circuit's decision in National Independent Coal Operators' Assn. v. Kleppe, 423 U.S. 388 (1976), and reversed the Third Circuit's decision in Kleppe

v. Delta Mining, Inc., 423 U.S. 403 (1976). In each case the Court held that the Secretary of the Interior had proceeded under a valid regulatory scheme which permitted an operator to request a hearing and obtain a decision making the findings required by section 109(a)(c) of the 1969 Act.

The legislative history of the 1977 Act shows that Congress was displeased with the enforcement of the 1969 Act with respect to assessment and collection of civil penalties. For example, Senate Report No. 95-181, at page 41 (or page 629 of the Legislative History of the Federal Mine Safety and Health Act of 1977 prepared for the Subcommittee on Labor of the Committee on Human Resources) stated as follows:

In overseeing the enforcement of the Coal Act the Committee has found that civil penalty assessments are generally too low, and when combined with the difficulties being encountered in collection of assessed penalties (to be discussed, infra), the effect of the current enforcement is to eliminate to a considerable extent, the inducement to comply with the Act or the standards, which was the intention of the civil penalty system.

The Report thereafter reviewed the civil penalty system as it was administered by the Secretary of the Interior and found that the procedures for assessing penalties needed revision to prevent the parties from settling cases in which hearings had been requested by agreement of the parties to reduce proposed penalties by an excessive amount. The Report also was concerned about undue delay in completing civil penalty cases because of the procedure in the 1969 Act under which an operator could obtain de novo hearings in the district courts. Report No. 95-181 outlined the amendments to the 1969 Act which were deemed necessary to eliminate the defects in the civil penalty system. On page 45 (or page 633 of the Legislative History), the Report states as follows:

To remedy this situation, Section [110(k)] provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission. Similarly, under Section 111(k) a penalty assessment which has become the final order of the Commission may not be compromised except with the approval of the Court. By imposing these requirements, the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties.

The Report further states on page 45 that: .

S. 717 provides a number of means by which the method of collecting penalties is streamlined. Section [110(i)] provides that the civil penalties are to be assessed by the Mine Safety and Health Review Commission rather than by the Secretary as prevails under the Coal Act (Sec. 109(a)(3)). * * *

The discussion above of the changes which Congress made in amending the 1969 Act shows that Congress did not intend for the Commission to be bound by any formulas which the Secretary of Labor may promulgate for the purpose of proposing 2/ penalties under section 105(a) of the Act. Section 110(i) specifically provides for the Commission to assess all civil penalties under the Act and section 110(i) specifically states that in assessing civil penalties, the Commission "shall consider" the six criteria. On the other hand, section 110(i) provides that "* * * [i]n proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

It is clear from the provisions of the 1977 Act that the Secretary of Labor has authority under the Act only for proposing penalties. If an operator does not agree with the assessment procedures promulgated by the Secretary in either section 100.3 or section 100.4, he may ask for a hearing before the Commission. Once the Commission or one of its judges holds a hearing, the operator is bound by the results of that hearing and the Commission and its judges are required to assess civil penalties under the provisions of section 110(i) of the Act regardless of what the Secretary may have proposed in the way of penalties prior to the time the hearing is held. Moreover, the operator must take his chances, as any litigant does, as to whether he will be any better off after he seeks a hearing than he would have been if he had paid the Secretary's proposed assessments based on any provision of Part 100.

Congress specifically amended the 1969 Act to require that the parties obtain the Commission's approval of any settlement reached after an operator has requested a hearing before the Commission. Since the Act was specifically amended to prevent undue lowering of civil penalties through settlement negotiations or otherwise, it is certain that Congress did not intend for the

2/ See the Commission's discussion of the Secretary's role of proposing penalties versus the Commission's role of assessing penalties in MSHA on behalf of Milton Bailey, 5 FMSHRC 2042 (1983).

Commission's hands to be tied in approving or disapproving settlements, or in assessing penalties, simply because the Secretary has promulgated a provision for determining a so-called single penalty assessment of \$20 in section 100.4 which only refers to two of the six criteria which the Commission is required to use in assessing civil penalties.

For the reasons given above, I reject USSM's arguments to the effect that I am bound by the provisions of 30 C.F.R. § 100.4. I shall hereinafter assess a penalty for the violation of section 103(f) of the Act alleged in Citation No. 2024280 under the six criteria as required by section 110(i) of the Act.

Consideration of the Six Criteria

The parties entered into some stipulations at the hearing held in Docket No. WEVA 82-390-R. Those stipulations were that USSM is subject to the Act, that I have jurisdiction to hear and decide the issues, and that USSM is a large operator (Tr. 92). Since it has been stipulated that USSM is a large operator, I find that any penalties to be assessed in this proceeding should be in an upper range of magnitude to the extent that they are based on the criterion of the size of USSM's business.

Ability To Pay Penalties

USSM did not introduce any evidence pertaining to its financial condition. The Commission held in the Sellersburg case, supra, that if an operator fails to present evidence concerning its financial condition, a judge may presume that the operator's ability to continue in business will not be adversely affected by the payment of civil penalties. Therefore, it will be unnecessary to reduce any penalties otherwise assessable under the other criteria on the basis of a finding that payment of penalties might cause USSM to discontinue in business because the lack of any financial evidence in this proceeding permits me to conclude that payment of penalties will not cause USSM to discontinue in business.

History of Previous Violations

It has been my practice to consider under the criterion of history of previous violations the question of whether the operator in a given proceeding has previously violated the same section of the regulations or Act which is before me for assessment of a penalty. The legislative history discussed above shows that Congress agrees that such a practice is acceptable (History, p. 631). USSM's counsel stated at the hearing that USSM has not previously violated section 103(f) of the Act (Tr. 92). Therefore, the penalty to be assessed for the violation of section 103(f) should reflect consideration of USSM's lack of a history of having previously violated section 103(f) of the Act.

Good-Faith Effort To Achieve Rapid Compliance

Citation No. 2024280 was written at 8:45 a.m. on August 18, 1982, and provided a termination due date of August 18, 1982, at 9:15 a.m. The inspector terminated the citation at 9:15 a.m. and gave as the reason for the termination that USSM had agreed to allow Willis to accompany him (Exh. 1). Willis testified that Sinozich, on whom the citation had been served, waited for about 32 or 33 minutes before calling the main office to find out whether Sinozich should allow Willis to enter the mine with the inspector (Tr. 34). Sinozich testified that he called his supervisor, Carl Peters, after the citation was issued, but Sinozich did not state how long he waited after the citation was issued before calling Peters (Tr. 66). Sinozich stated, however, that Peters told him he would call Sinozich back in a few minutes to give him an answer. It is possible that the 32- or 33-minute period mentioned by Willis was running while Sinozich waited to get an answer from Peters. Since Inspector Ingram terminated the citation at 9:15 a.m., which was the time period originally given for abatement, I believe that the preponderance of the evidence supports a finding that USSM showed a good-faith effort to achieve compliance.

It has been my practice to increase a penalty otherwise assessable under the other criteria if there is evidence in a given case to show that the operator failed to make a timely effort to abate a given violation. On the other hand, if an operator demonstrates some outstanding effort to abate an alleged violation, I normally reduce the penalty otherwise assessable under the other criteria. If the operator takes no unusual action, but abates the violation within the time given by the inspector, I neither raise nor lower the penalty otherwise assessable under the other criteria. Since USSM demonstrated a normal effort to achieve compliance, the penalty will not be raised or lowered under the criterion of good-faith abatement.

Negligence

The evidence shows that the inspector was sufficiently in doubt about whether USSM's refusal to allow Willis to accompany him was a violation of section 103(f), that it was necessary for the inspector to call his supervisor for guidance (Tr. 10). Both Sinozich and Peters maintained throughout the hearing that Willis was not entitled to be a miners' representative because of his failure to give advance notice that he was coming (Tr. 64; 81; 85). I have found above in my decision in Docket No. WEVA 82-390-R that Peters was aware of Willis' interest in the elimination of the respirable-dust problem in the longwall section and that Peters should not have been greatly surprised when Willis appeared at the mine on August 18, 1982, for the purpose of accompanying the inspector.

On the other hand, the union is not entirely without fault in bringing about the state of confusion which had a great deal to do with Sinozich's and Peters' original decision to deny Willis permission to enter the mine as the miners' representative. The safety committee had called Willis on the evening of August 17 to ask Willis to come to the mine to accompany the inspector if the inspector appeared as they anticipated. Yet, neither the safety committee nor Willis bothered to provide any of USSM's management personnel with any notice of any kind until the safety committee on the morning of August 18 advised the inspector that Willis was the miners' representative to accompany the inspector. The safety committeeman, Carter, could not recall any previous time when one of UMWA's safety inspectors had been called to the mine to act as the miners' representative for purposes of accompanying an inspector (Tr. 28). Therefore, the safety committee knew that it was going to follow a procedure which was uncommon and a large part, if not all, of the confusion which resulted when Willis made his previously unannounced appearance ^{3/} on the morning of August 18, 1982, could have been avoided if the safety committee had at least explained on the evening of August 17 that it was going to select Willis as the miners' representative to accompany the inspector if the inspector made an appearance on August 18 as the safety committee expected. Moreover, Samms created additional confusion by announcing that he was going in with the inspection party under the provisions of West Virginia law (Tr. 18; 33). That was an unusual act on the part of the safety committee and could have affected Sinozich's ability to consider the issues in an atmosphere conducive to calm and rational decision-making.

Based on the considerations discussed above, I find that USSM's management was dealing with some new circumstances and acted in a way which can hardly be categorized as negligent, especially since both Sinozich and Peters believed that they were taking actions which were entirely in compliance with section 103(f) of the Act. Therefore, the penalty otherwise assessable under the other criteria will not be increased under the criterion of negligence.

3/ I am not holding that section 103(f) of the Act requires the safety committee to give USSM advance notice as to the identity of the miners' representative. I am simply pointing out that USSM's management might have acted differently in this case if it had had some advance time within which to consider the fact that the safety committee intended to select a miners' representative other than the ones who were normally chosen for the purpose of accompanying the inspectors. Since USSM claims no right whatsoever to participate in UMWA's selection of miners' representatives (Tr. 86), I cannot see any advantage in the safety committee's failure to give USSM as much notice as possible of the fact that it is planning to choose a miners' representative other than the one who is normally selected.

Gravity

It has been unnecessary to consider the arguments in the parties' briefs in dealing with the five criteria discussed above because the Secretary's brief pertaining to the violation of section 103(f) does not discuss the penalty issues at all and USSM's brief simply contends that I am bound to assess a \$20 penalty under section 100.4. USSM's arguments about section 100.4 have already been considered above. UMWA's brief (p. 9) does discuss the penalty issues by correctly arguing that I am not bound by section 100.4 of the regulations. UMWA's brief also argues that a penalty in an amount higher than \$20 ought to be assessed because of USSM's having delayed the commencement of the inspection.

The record does not specifically show that Inspector Ingram would have gone underground any sooner than he did if he had not been confronted with USSM's refusal to allow Willis to go underground to accompany him. The record shows that the inspector went about his normal duties of placing respirable-dust pumps on three miners on the longwall section (Tr. 9). The miners on the production shift went underground at the usual time and the longwall section was producing coal at the time the inspection crew arrived in the longwall section. Since the respirable-dust samples obtained on August 18 were valid and showed that the longwall section was in compliance with the respirable-dust standards (Tr. 78), the delay, if any, which might have occurred in the time when the inspection crew went underground, does not seem to have adversely affected the inspector's work or Willis' ability to examine the conditions in the longwall section. Willis claims to have seen the engineering changes which were being made in the water sprays and claims to have made at least two suggestions pertaining to control of respirable dust (Tr. 36-37). In such circumstances, the record does not support a finding that anyone was adversely affected by the fact that the inspector may not have gone underground as soon as he would have if it had not been necessary to issue a citation and wait about half an hour for the citation to be abated.

The criterion of gravity, therefore, must be considered primarily from the standpoint of whether USSM's initial refusal to allow Willis to go underground caused the union to be frustrated prospectively in its efforts to provide a miners' representative to accompany inspectors under section 103(f).

In Consolidation Coal Co., Docket Nos. PENN 82-221-R and PENN 82-259, issued July 28, 1983, I assessed a penalty of \$100 for a violation of section 103(f), but in that case, Consol deliberately refused to pay a miners' representative for accompanying an inspector during a spot inspection and did so for the

sole purpose of bringing that issue before a circuit court other than the District of Columbia Circuit which had already decided the issue adversely to Consol's position. There was some negligence in the Consol case, as compared with no negligence heretofore found in this case, because USSM was dealing with a novel situation which arose unexpectedly, whereas Consol deliberately refused to pay a miners' representative in order to create a case for purpose of perfecting an appeal to a circuit court. There was also a greater degree of gravity in the Consol case than there is in this case because USSM paid Samms for going underground at the same time USSM was contesting Willis' right to go underground with Samms and the inspector. Finally, Consol was seeking a reinterpretation of section 103(f) with respect to an issue which had already been decided by the D. C. Circuit and as to which the Supreme Court had already denied a petition for certiorari, whereas USSM is seeking an interpretation of section 103(f) with respect to an issue which has not been specifically decided by the Commission, that is, whether the safety committee has to give USSM any advance notice before selecting a UMWA safety inspector (who is a full-time UMWA employee) as the miners' representative to accompany an inspector pursuant to section 103(f).

Assessment of Penalty

The discussion above shows that a large operator is involved, that the payment of penalties will not cause the operator to discontinue in business, that the operator demonstrated a good-faith effort to achieve compliance, that the operator has no history of a previous violation of section 103(f), that the violation was associated with no negligence, and that the violation was associated with a very low degree of gravity. Therefore, a civil penalty of \$25 will hereinafter be assessed for the violation of section 103(f) alleged in Citation No. 2024280 dated August 18, 1982.

Docket Nos. WEVA 83-82 and WEVA 83-95

The petition for assessment of civil penalty filed in Docket No. WEVA 83-82 seeks to have a penalty assessed for a single alleged violation of 30 C.F.R. § 70.101 (Tr. 205). The petition for assessment of civil penalty filed in Docket No. WEVA 83-95 seeks to have a penalty assessed for the violation of section 103(f) of the Act which has already been considered in the preceding portion of this decision. The petition for assessment of civil penalty filed in Docket No. WEVA 83-95 also seeks assessment of a civil penalty for an alleged violation of section 70.101. The primary difference between the two alleged violations of section 70.101 is that the violation alleged in Docket No. WEVA 83-82 pertains to mechanized mining Unit No. 002 in USSM's Shawnee Mine, while the violation alleged in Docket No. WEVA 83-95 pertains to mechanized mining Unit No. 024 in USSM's Morton Mine.

Findings of Fact

The testimony of the witnesses and the documentary evidence submitted by the parties support the following findings of fact. Since this is a consolidated proceeding, the findings here will be numbered in sequence with the 13 findings of fact made in the preceding portion of this decision.

14. On October 20, 1982, an MSHA inspector issued Citation No. 9914583, pursuant to section 104(a) of the Act, alleging that USSM had violated section 70.101 in its Shawnee Mine because (Tr. 207; Exh. 20):

[b]ased on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit 002-0 was 1.7 milligrams which exceeded the applicable limit of 1.4 milligrams. Management shall take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted.

15. On November 22, 1982, an MSHA inspector issued a subsequent action sheet which stated (Tr. 209; Exh. 23):

[b]ased on five valid samples, the respirable dust concentration on the [d]esignated occupation in mechanized mining unit 002-0 is within the applicable limit of 1.4 milligrams.

16. The respirable-dust standard for the 002 Unit had been reduced to 1.4 from the normal standard of 2.0 milligrams per cubic meter of air under the provisions of section 70.101 which provides as follows:

§ 70.101 Respirable dust standard when quartz is present.

When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz into the number 10.

Example: The respirable dust associated with a mechanized mining unit or a designated area in a mine contains quartz in the amount of 20%. Therefore, the average concentration of respirable dust in the mine atmosphere associated with that mechanized mining unit or designated area shall be continuously maintained at or below 0.5 milligrams of respirable dust per cubic meter of air ($10/20 = 0.5 \text{ mg/m}^3$).

USSM had been notified on April 27, 1982, pursuant to section 70.101, that the respirable-dust standard for the 002 Unit in the Shawnee Mine had been reduced to 1.4 milligrams per cubic meter of air on the basis of a quartz analysis showing that the mine atmosphere contained 7 percent quartz ($10/7 = 1.4 \text{ mg/m}^3$) (Tr. 223; Exh. 36).

17. On September 1, 1982, an MSHA inspector issued Citation No. 9917507, pursuant to section 104(a) of the Act, alleging that USSM had violated section 70.101 in its Morton Mine because (Tr. 108; Exh. 4):

[b]ased on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit 024-0 was 1.9 milligrams which exceeded the applicable limit of 1.6 milligrams. Management shall take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted.

18. On November 29, 1982, an MSHA inspector issued a subsequent action sheet which stated (Tr. 114; Exh. 8):

[b]ased on five valid samples, the respirable dust concentration on the designated occupation in mechanized mining unit 024-0 is within the applicable limit of 1.6 milligrams.

19. On October 26, 1981, USSM had been notified that the respirable-dust standard for the 024 Unit in the Morton Mine had been reduced to 1.6 milligrams per cubic meter of air on the basis of a quartz analysis showing that the mine atmosphere contained 6 percent quartz ($10/6 = 1.6 \text{ mg/m}^3$) (Tr. 108; 136; Exh. 11).

20. MSHA normally places respirable-dust-sampling devices on persons in each mechanized mining unit at least once each year (Tr. 103). The samples are weighed in MSHA's field offices (Tr. 104) and if there is a weight gain of .5 milligrams for

samples obtained with an MSA sampler or .8 milligrams for samples obtained with a Bendix sampler, the samples are sent to the Pittsburgh Technical Support Center for quartz analysis (Tr. 106; 244; 249).

21. USSM is critical of MSHA's quartz-sampling program because it argues that mining conditions change on a daily basis (Tr. 522) and that the amount of quartz in the mine atmosphere changes constantly (Tr. 181). Therefore, USSM declares that it is unrealistic for MSHA to fix a respirable-dust standard for an entire year based on a quartz analysis of a single respirable-dust sample. MSHA defends its once-a-year sampling procedure by stating that MSHA has examined data collected over a 6-to-8-year period and has found that in 80 to 81 percent of the cases, where repeat samples were analyzed for quartz content, the repeat samples showed a quartz content equal to or greater than the quartz content revealed by the original sample (Tr. 246).

22. MSHA also claims that it sent all operators a notice dated March 10, 1981 (Exh. 39), which advised them that the new quartz standard had been put into effect and that notice advised the operators that they could request a repeat survey if they believed that there was less quartz in the environment than existed at the time the reduced standard was put into effect. MSHA also defends the fairness of its sampling program by noting that if the reduction in the respirable-dust standard applies to quartz analysis for a single work position, the reduced standard will be applied only to that work position (Tr. 249).

23. USSM also objects to MSHA's quartz-sampling program because the quartz analyses are based entirely on samples taken by MSHA inspectors and complains that MSHA will not perform a quartz analysis on any of the samples taken by the operator (Tr. 194-195; 225-228). USSM also objects that it is not specifically advised when MSHA plans to take samples for quartz analysis and that the inspectors themselves cannot tell USSM for certain which of the samples they are taking on a given day will be analyzed for quartz (Tr. 314). Moreover, USSM claims that the inspectors do not know what the exact mining parameters are at the time the samples are being taken and that when USSM receives a notice that a quartz analysis of a given sample has required the respirable-dust standard to be reduced because of the percentage of quartz in the mine atmosphere, USSM cannot find out what specific sample was analyzed for that particular reduction of the respirable-dust standard (Tr. 315).

24. MSHA defends its refusal to use the operator's samples for quartz analysis primarily by arguing that the operator submits samples on a bimonthly basis and that if the respirable-dust standard is adjusted upward or downward with bimonthly

frequency, MSHA would not have control over the long-term variation in respirable dust or quartz levels. MSHA contends that frequent changes in the standard would work to the detriment of miners because the particular respirable-dust control plan would never be adjusted to the levels that would insure that the miners were protected from quartz exposures (Tr. 253; 282). One MSHA inspector testified that on one occasion when he was obtaining respirable-dust samples, USSM's section foreman controlled the mining sequence so as to avoid extracting from 18 to 24 inches of rock normally taken in an entry where extra height was needed for the purpose of placing longwall mining equipment in that entry (Tr. 351).

25. One of USSM's witnesses testified that USSM requested that repeat samples for quartz analysis be taken at its No. 9 Mine. When the inspector came to the No. 9 Mine to obtain the samples, USSM was considerably perturbed because the inspector asked the persons wearing the samplers to get into as much dust as possible so that the inspector would be able to acquire enough weight for a quartz analysis without his having to make additional trips to the No. 9 Mine for that purpose. USSM's witness stated, however, that the portion of the No. 9 Mine, where the repeat sampling was performed, was closed for economic reasons and that the results of the request for resampling were never reported to USSM (Tr. 535; 538; 544). USSM does not claim to have made any requests for repeat sampling for quartz with respect to the 002 Unit in the Shawnee Mine or the 024 Unit in the Morton Mine which are involved in this proceeding (Tr. 529; 538).

26. Quartz analyses of samples taken in the Shawnee Mine on April 12 and April 13, 1982, showed that the mine atmosphere contained 15-percent quartz on one day and 7-percent quartz on the next day (Tr. 229-230). Therefore, the quartz concentration may vary as much as 8 percent within a 2-day period. As a result of the two aforesaid quartz analyses, USSM received notification on April 27, 1982, that the respirable-dust standard had been reduced to .6 milligrams per cubic meter because of the 15-percent quartz analysis and to 1.4 milligrams per cubic meter because of the 7-percent quartz analysis (Exhs. 35 and 36). The 7-percent quartz analysis was performed on April 22, 1982, while the 15-percent quartz analysis was performed on April 20, 1982. Therefore, USSM was allowed to utilize the 1.4 milligram standard because that standard was based on the last information available to MSHA (Tr. 511).

27. At least one of USSM's witnesses conceded during cross-examination that USSM has enough knowledge about the conditions in its mines to be able to determine the mining parameters which are in existence on any given day when MSHA inspectors are

obtaining respirable-dust samples (Tr. 526-527). The section foremen have eyes in their heads and cannot possibly be unaware of the fact that an MSHA inspector has placed respirable-dust pumps on the members of their crew on a given day (Tr. 345).

28. Although USSM's cross-examination of MSHA's inspectors raised the generalized objections to MSHA's respirable-dust program which have been covered above, the primary contention raised by USSM in the respirable-dust aspect of this proceeding is that exposure for 2 months to 1.7 milligrams of respirable dust per cubic meter of air on a standard of 1.4 milligrams in Docket No. WEVA 83-82, or exposure for 2 months to 1.9 milligrams of respirable dust per cubic meter of air on a standard of 1.6 milligrams in Docket No. WEVA 83-95, is not a significant and substantial violation as the term "significant and substantial" has been defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) (Tr. 416; 496-498). MSHA presented as witnesses the inspectors who classified the respirable-dust violations described in the preceding sentence as being significant and substantial and another witness who considered the violations to be significant and substantial because excessive dust causes an injury which is permanently disabling, because each exposure is additive, and because the dust ingested remains in the lungs, but that testimony was largely based on what the witnesses had read or heard (Tr. 155; 207; 329-331; Exhs. 4, 15, and 20).

29. The most persuasive testimony with respect to whether the respirable-dust violations alleged in Citation Nos. 9917507 and 9914583 are significant and substantial was given by Dr. Thomas Richards who is an MD employed by the National Institute of Occupational Safety and Health (NIOSH) (Tr. 411). He works in NIOSH's Division of Respiratory Diseases and his experience has been in examining workers who have been exposed to various types of conditions which produce pulmonary problems (Tr. 412-413). He said that the U. S. Public Health Service has identified silicosis as one of the major diseases which needs to be prevented and has set a goal of 1985 as the year after which there should be no new cases of silicosis developing in the United States because it is a preventable disease (Tr. 414).

30. Richards testified that quartz and silica are terms which may be used interchangeably. When silica gets into the lungs, it causes scarring or fibrosis. Over a period of time, exposure to silica can be predicted to cause a person to develop silicosis. When that condition becomes severe, it is called progressive massive fibrosis and can cause premature death. Damage caused by the fibrosis, once it occurs, is irreversible and there is no treatment for it. There is a dose-and-response relationship. The frequency of the exposure and the concentration of the dust increases the risk of developing silicosis (Tr. 424-425). As an extreme example of what can

happen when a person is exposed to almost pure silica dust, Richards referred to a man who had a job requiring him to take 24 bags of silica-bearing material and pour them into a drum. He did that for 1 hour on 60 occasions per year. After 2 years, he developed symptoms of silicosis and in another 2 years he died (Tr. 425).

31. Richards testified that coal workers' pneumoconiosis from pure carbonaceous dust can cause progressive massive fibrosis and result in early death. He said that coal workers are also exposed to silica coming from layers of rock above and below a coal seam or between coal seams which are mined simultaneously. Shale, for example, is from 40 to 60 percent silica and sandstone can be even higher in silica content than shale. He stated that autopsy surveys show that up to 18 percent of persons who have developed coal workers' pneumoconiosis show nodules in their lungs which are typical of silica exposure (Tr. 426-427).

32. Richards frankly admitted that he does not know for certain that there is a significant and substantial risk to a miner for a single brief exposure to respirable dust in excess of the standard given in section 70.101, but he said that the available medical evidence and logic supports a conclusion that a single exposure has a significant and substantial adverse effect on a miner's health. He said that silica in the air is breathed in and out to some extent and some of it may be coughed up, but some of it will go down to the distal portions of the lungs, the alveoli, where the scarring process is initiated. He explained that there is a dose response and that he did not know the low end of the response, but there is a definite additive effect in each daily dose so that, at some point, a miner has to pay the price of the added effect. Richards said there was no medical proof to show that a single exposure caused no problem any more than there is medical proof to show that a single exposure produces a definite measurable, adverse effect (Tr. 435-436). Richards said that "[s]ilicosis is a man-made disease, and if men didn't go down in the mines to work, they wouldn't have it. So, I think they ought to be very strict on the rules on it" (Tr. 500).

Consideration of Arguments

USSM's brief (pp. 2-3) states that the issues raised in Docket Nos. WEVA 83-82 and WEVA 83-95 are whether the violations of section 70.101 alleged by MSHA were significant and substantial and what penalties are appropriate for the conditions described in Citation Nos. 9914583 and 9917507 (Finding Nos. 14 and 17, supra).

It should be noted that Judge Kennedy's decision in U. S. Steel Mining Co., Inc., 5 FMSHRC 46 (1983), held that a

respirable-dust violation involving a quartz content of 11 percent was a significant and substantial violation. USSM did not file a petition for discretionary review of Judge Kennedy's excellent decision although he decided most of the same issues raised in this proceeding. For example, he held, contrary to USSM's contentions, that MSHA's use of a single annual sample for determining the quartz content in the mine atmosphere is in accordance with the procedure established by the Act. Judge Kennedy's U. S. Steel decision also contains a superb explanation of MSHA's respirable-dust program along with a discussion of the statutory requirements under which MSHA's program is administered.

Judge Broderick's decision in U. S. Steel Mining Co., Inc., 5 FMSHRC 1334 (1983) (petition for discretionary review granted July 27, 1983), held that a respirable-dust violation involving a quartz content of 7 percent was a significant and substantial violation. Judge Broderick's decision also appropriately observed (5 FMSHRC at 1336):

* * * I should note that the precise issue raised by Respondent in this case was raised by it in the case of Secretary v. U. S. Steel Mining Co., Inc., supra, before Judge Kennedy. A decision by a tribunal of competent jurisdiction is res judicata in a subsequent proceeding between the same parties involving the same issue. 46 Am. Jur. Judgments § 397 (1969); 1B Moore's Federal Practice § 0.405 (1982). Factual differences not essential to the prior judgment do not render the doctrine inapplicable. Montana v. United States, 440 U.S. 147 (1979); Hicks v. Quaker Oats Co., 662 F.2d 1158 (5th Cir. 1981). Respondent had a full and fair opportunity to litigate this issue before Judge Kennedy and to petition the Commission for review. Based on the doctrine of res judicata, it should be precluded from relitigating it here. The government, however, did not raise this issue, and the case was heard on the merits. My conclusion here is based on a consideration of the evidence in the case before me. Respondent should not be permitted to endlessly raise this issue, however. I accept and adopt the analysis and conclusions of Judge Kennedy that exposure to respirable dust with quartz content that exceeds 100 micrograms per cubic meter of air constitutes a significant risk of a serious health hazard. See also Consolidation Coal Co. v. Secretary, 5 FMSHRC 378 (1983) (ALJ).

All of the averments made by Judge Broderick are also true in this proceeding. The Secretary's counsel did not object in this proceeding to a third litigation by USSM of the issue of whether

a respirable-dust violation based upon a quartz content of more than 5 percent constitutes a significant and substantial violation under the definition of that term set forth by the Commission in its National Gypsum decision (Finding No. 28, supra). Like Judge Broderick, I hereinafter find, on the basis of the evidence presented in this proceeding, that the violations of section 70.101 alleged in Citation Nos. 9914583 and 9917507 were significant and substantial as that term has been defined by the Commission in its National Gypsum decision.

USSM's Claims of Bias or Unfairness

Although USSM's brief (p. 3) begins its arguments with a contention that the Secretary failed to meet his burden of proof in this proceeding by establishing that respirable-dust violations are reasonably likely to result in a reasonably serious injury, pursuant to the Commission's National Gypsum test of significant and substantial violations, USSM continually makes allegations about the unfairness of MSHA's respirable-dust sampling program. The record, as a whole, shows that USSM's claims of unfairness have no merit.

USSM claims, for example, that MSHA takes samples of respirable dust for quartz analysis under conditions which it will not disclose to USSM (Br., p. 3). USSM cites transcript page 315 in support of that allegation. On that page MSHA's witness Nesbit conceded that USSM had no way to know which sample an inspector is taking will be analyzed for quartz, but the truth of the matter is that the inspector does not know, when he is taking a sample, whether it will be analyzed for quartz either, because the sample has to be weighed in the field office's laboratory to determine if the weight gain is as much as .5 or .8 milligrams. If the required weight gain is shown to be present, the sample is sent to Pittsburgh for quartz analysis. If the analysis shows that the mine atmosphere contained more than 5 percent quartz, the respirable-dust standard is reduced accordingly (Finding Nos. 16, 19, and 20, supra).

USSM's unequivocal statement (Br., p. 3) that MSHA "* * * will not disclose to the operator" the conditions under which a sample is taken is not supported by the record. The inspectors fill out a Form 2000-86 when they are taking respirable-dust samples. Those forms show the mining conditions when samples are being taken (Exhs. 12 and 33). USSM's cross-examination of MSHA's witness Nesbit tried to get him to concede that MSHA would not make those forms available, but he repeatedly stated that it was not MSHA's policy to deny operators' requests for those forms (Tr. 311; 313-314). Moreover, the inspector who took the respirable-dust sample which caused the respirable-dust standard to be reduced in the 024 Unit of

the Morton Mine because of the presence of 6 percent quartz, explained exactly what conditions existed on the section at the time he was taking that respirable-dust sample. He even recalled that the section foreman declined to cut coal in the entry where from 18 to 24 inches of rock are taken for purposes of obtaining increased height for the use of highwall mining equipment (Finding No. 24, supra). His statements, together with those of witness Nesbit, show that USSM's section foremen know when respirable-dust samples are being taken by an MSHA inspector (Tr. 345).

USSM complains that MSHA takes only one sample a year and requires USSM to maintain a reduced respirable-dust standard on the basis of that single sample for an entire year (USSM's Br., p. 3). If MSHA takes only a single sample once a year to obtain a quartz analysis, the taking of that sample would have to be such an infrequent occurrence that USSM could easily have its section foremen write down all of the mining parameters which exist when sampling is occurring. Thereafter, if USSM is advised that its respirable-dust standard is being reduced because of the presence of more than 5 percent quartz, it could obtain from the inspector the date on which the sample analyzed for quartz was obtained and could determine from its own records exactly what conditions existed on the day the sample was taken.

USSM's brief (p. 5) also contends that MSHA will not honor its requests for the taking of additional samples for quartz analysis, but the only testimony in the record which supports that allegation is contained in a question asked by USSM's counsel of MSHA's witness Nesbit (Tr. 310):

Q Isn't it true that you heard testimony in a previous case in which U. S. Steel Mines had requested MSHA to come out and re-do quartz sampling on a number of occasions and were turned down?

A Yes, I did.

Despite witness Nesbit's affirmative answer to the question quoted above, he stated that it was MSHA's policy to take repeat samples for quartz analysis when the operator requests that repeat sampling be done (Tr. 310). While USSM did present some testimony in this proceeding about MSHA's performing repeat sampling at USSM's request, that testimony pertained to a section in USSM's No. 9 Mine. Moreover, the request for resampling was granted, but USSM was shocked because the inspector who took the samples requested that the miners wearing samplers get into as much dust as possible so that the inspector would be able to get a weight gain of at least .5 milligrams and thereby avoid having to come back for additional samples on successive days (Finding Nos. 20 and 25, supra).

USSM's witness who made that statement did not know the outcome of his complaint to his own supervisory personnel with respect to the inspector's instructions about getting into as much dust as possible. I doubt seriously that MSHA would condone the inspector's request that miners get into as much dust as possible, but if USSM wants me to make a finding that MSHA refused to sample on the basis of the aforementioned testimony, I need something more certain than the equivocal testimony presented by USSM in support of its claim that MSHA has refused to take repeat samples for quartz analysis, especially since USSM did not claim that it asked for repeat sampling to be done in the 024 and 002 Units which are involved in this proceeding (Finding No. 25, supra).

Judge Broderick's decision in U. S. Steel Mining Co., Inc., 5 FMSHRC 1334, 1335 (1983), contains a finding which shows that MSHA took a sample for determining quartz content at USSM's Maple Creek No. 1 Mine on October 26, 1981, and took another sample for quartz analysis on February 10, 1982, and then, in response to USSM's request, conducted resampling for quartz analysis from February 22 to March 1, 1982. MSHA's witness Nesbit did not agree during cross-examination by USSM that MSHA had refused to provide USSM with information as to the conditions which existed when respirable-dust samples are obtained and he also refused to agree with USSM that MSHA has a practice of denying requests for information or resampling (Tr. 313-314).

My review of the record shows, therefore, that MSHA has granted some of USSM's requests for resampling for quartz analysis and the finding in Judge Broderick's decision shows that MSHA responded to USSM's request for resampling. As opposed to the information showing that MSHA does grant requests for resampling, the record contains a single question, answered in the affirmative, to the effect that in some other unidentified proceeding someone seems to have testified that MSHA denied one or more of USSM's requests for resampling for quartz. In such circumstances, the preponderance of the evidence fails to support USSM's claim that its requests for resampling have been denied in a manner to justify a finding on the basis of the record in this case that MSHA's quartz-sampling program is so unfair that it should be found to be invalid.

USSM's brief (p. 5) also asserts that MSHA's respirable-dust sampling program is erratic and inaccurate because respirable-dust samples taken on successive days showed that the mine atmosphere contained 15 percent quartz when sampled on one day and 7 percent quartz when sampled on the next day. As was pointed out in Finding No. 24, supra, it is necessary for USSM to cut from 18 to 24 inches of rock in one entry in order to obtain sufficient height for use of longwall mining equipment.

On a day when large quantities of rock are being cut, the quartz content can be expected to increase. That is the reason that on the day the inspector was obtaining a respirable-dust sample in the 024 Unit of the Morton Mine, USSM's section foreman declined to allow the continuous-mining machine to be operated in the entry where 18 to 24 inches of rock are taken (Tr. 351).

USSM also contends (Br., p. 5) that it was expensive for USSM to maintain a reduced standard based on a 15-percent quartz content, but the testimony of USSM's own witness shows unequivocally that USSM was required to comply with a reduced respirable-dust standard based on a quartz content of 7 percent. USSM was not required, even for a single day, to maintain a reduced respirable-dust standard based on a 15-percent quartz content in the mine atmosphere (Tr. 511).

At one time in her arguments made at the hearing, counsel for USSM referred to what "[w]e have found in our research" (Tr. 190). That reference serves to remind me of the fact that USSM knows exactly what conditions prevail in its mines when it is producing coal. If USSM is ever certain that the quartz content in a given mine has actually been incorrectly analyzed by MSHA, it is quite obvious that USSM has the facilities to prove to MSHA that a mistake has been made. In view of the evidence showing that MSHA has responded to USSM's requests for resampling on past occasions, I am confident that USSM would be able to get repeat sampling done when a really meritorious situation shows that a mistake has been made.

USSM's Argument that MSHA Looks Only at Peaks and Ignores Valleys

USSM's brief (p. 4) notes that during the period from January 1981 to August 1982, the 002 Unit in its Shawnee Mine had an average concentration of 1.3 milligrams per cubic meter of air and USSM concludes from that observation that over the year, the miners in that section were working in an atmosphere which was within the respirable-dust standard set by MSHA. USSM then observes that during that same period, however, on any particular set of five samples, one sample may have been above 2 milligrams per cubic meter of air, so that, on that day, the miners were exposed to more than the allowable standard. USSM then argues that the exposure to more than the allowable standard for 1 day is not considered a violation by MSHA. USSM concludes from the foregoing observations that MSHA's use of a 2-month period to determine exposure levels causes one to look only at the peaks and ignore the valleys. USSM says that it cannot understand how the Secretary can honestly argue that exposure to more than the allowable limit on a single day is a significant and substantial violation because MSHA is totally disregarding periods of time when the average concentration is well below the allowable standard.

There are a number of fallacies in the above-mentioned arguments. First, the transcript references given by USSM show that MSHA's witness Nesbit was being asked questions about his Exhibits 40 and 41 which are graphs showing how many of USSM's own samples were above and below the allowable standard of 1.4 milligrams for Unit 002 in the Shawnee Mine which had a respirable-dust standard of 1.4 milligrams when the mine atmosphere had a 7-percent quartz content. The graph in Exhibit 40 does show that USSM's samples indicate the mine had a mean of 1.36 milligrams, but the samples depicted in Exhibit 40 were not taken at a time when USSM's 002 Unit had a reduced standard based on a quartz content greater than 5 percent. Nesbit said that before the 002 Unit was placed on a reduced standard, USSM's samples were above the 2 milligram standard 36 percent of the time. Exhibit 41 is a graph showing the results of USSM's samples taken after the 002 Unit was required to maintain a reduced standard of 1.4 milligrams because the 002 Unit had a 7-percent quartz content in the mine atmosphere. Nesbit stated that after USSM was placed on the reduced standard, USSM's samples were above the 1.4 milligram standard 46 percent of the time (Tr. 247; 302-303).

USSM incorrectly claims that MSHA looks only at the peaks and ignores the valleys because the graphs in Exhibits 40 and 41 very carefully indicate both the peaks and valleys and one of the purposes of the graphs is to show that USSM's miners were exposed to an excessive amount of respirable dust when from 36 to 46 percent of the samples were taken. USSM is correct in stating that statistics may be used to make all sorts of arguments, depending on which side of a given issue the person is who wishes to make the arguments. The important point in this proceeding, however, is that the lungs of the miners working in the 002 Unit do not know that, on an average day, they have been breathing an atmosphere which contains no more respirable dust than the standard which is in effect for a given period of time. USSM did not succeed in showing that there are any errors in Dr. Richards' claims that studies indicate that a miner's chances of having progressive massive fibrosis increase when he is exposed to high concentrations of respirable dust. Three samples shown in Exhibit 40 had a respirable-dust content which was between 2.5 and 3 milligrams and three other samples had a respirable-dust content of 6 or more milligrams. On those 6 days, the miners in the 002 Unit were especially likely to breathe into the alveoli of their lungs enough silica or quartz to initiate the scarring process or fibrosis which may lead to progressive massive fibrosis which cannot be arrested (Finding Nos. 30-32, supra).

There is considerable inconsistency in USSM's arguments about MSHA's ignoring the valleys because MSHA's respirable-dust program uses the respirable dust in five samples submitted

by the operator for determining whether the operator is in compliance with the respirable-dust standard. Since the samples are taken by the operator, the operator has absolute control over the conditions in its mine at the time the samples are taken. MSHA does not cite the operator for a violation if one of the five samples is greatly out of line with the respirable-dust standard so long as the remaining four samples do not raise the average milligrams of respirable dust above the allowable standard at any given time (Exhs. 16; 22; 29; 32; 37; 38). Therefore, it is simply incorrect for USSM to argue that MSHA considers only the peaks and ignores the valleys. MSHA's averaging process gives equal weight to both valleys and peaks in determining whether the miners have been exposed to more milligrams, on the average, than is permitted by the applicable respirable-dust standard.

Finally, USSM's argument that its samples showed that the 002 Unit, on the average, was within compliance with the applicable standard for more than a year is based on its own samples and those samples were taken for only 5 days during each 2-month period. The fact that some of USSM's samples had a respirable-dust content of more than 6 milligrams at a time when USSM's section foremen knew that they were obtaining samples to prove compliance with the allowable standard is a strong indication that the miners may be exposed to much greater concentrations than 6 milligrams on days when USSM is not trying to obtain samples to prove compliance with the respirable-dust standard applicable to its mines on those days.

The Violations Were Properly Designated as Significant and Substantial

The discussion above has shown that MSHA's dust-sampling program is being administered in a fair and valid manner and that USSM has ample opportunity to take its samples under favorable conditions for bringing its mine into compliance with the respirable-dust standard applicable to the various sections in its mines. I find that MSHA proved that the two violations of section 70.101 alleged in Citation Nos. 9914583 and 9917507 occurred (Finding Nos. 14 and 17, supra).

The remaining question to be decided is whether MSHA proved that the violations, in the words of section 104(d)(1) of the Act, "* * * could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard". The Commission applied its National Gypsum definition of the term "significant and substantial" in its recent decisions in Mathies Coal Company, 6 FMSHRC 1 (1984), and in Consolidation Coal Company, 6 FMSHRC 189 (1984). The Commission stated in footnote 4 of its Mathies decision and in footnote 8 of its Consolidation decision that it has pending before it a

challenge to the application of National Gypsum to a health standard, as opposed to a safety standard, and it stated that it intimates " * * * no views at this time as to the merits of that question" (Footnote 4 in Mathies).

The Commission held in the Consolidation case, supra, that an inspector may properly designate in a citation issued pursuant to section 104(a) of the Act that the alleged violation is significant and substantial as that term is used in section 104(d)(1) of the Act. While the Commission has not determined whether a health standard may be designated as "significant and substantial" within the meaning of that definition given by the Commission in the National Gypsum case, the quotation below from section 104(d)(1) of the Act shows that Congress made no distinction in providing that an inspector may designate either a health or a safety standard as being significant and substantial:

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that * * * such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, * * * he shall include such finding in any citation given to the operator under this Act. [Emphasis supplied.]

The language quoted from section 104(d)(1) above shows that MSHA had the authority to include in Citation Nos. 9914583 and 9917507 findings that the violations of section 70.101 were significant and substantial. Although the Commission's definition of significant and substantial as given in the National Gypsum case has been held by the Commission as being applicable, up to now, only to a safety standard, it is my belief that the definition is equally applicable to a violation of a health standard and that the Commission's National Gypsum definition of significant and substantial can be applied to a violation of a health standard. The Commission, in both its Mathies and Consolidation decisions, supra, considered the National Gypsum definition in four steps.

The first step is a consideration of whether MSHA proved that violations occurred. USSM's counsel conceded at the hearing that USSM had violated section 70.101 if the language given in that section is applied to the samples which USSM submitted from the 002 Unit in its Shawnee Mine and the 024 Unit of its Morton Mine (Tr. 144). I have already considered in the foregoing portions of this decision USSM's claims about the lack of fairness in MSHA's respirable-dust program and I have found

them to be without merit. Since the preponderance of the evidence shows that MSHA is fairly administering the program and that USSM has been given ample opportunity to obtain all the information MSHA has in connection with the citations issued, I find that the violations of section 70.101 alleged in Citation Nos. 9914583 and 9917507 occurred.

The second step to be considered in determining whether a health violation is significant and substantial is whether the violation contributed a measure of danger to a discrete health hazard. There can be no doubt but that breathing excessive quantities of respirable dust exposes the miners to developing silicosis or pneumoconiosis which are serious and which can cause premature death (Finding Nos. 30-32, supra).

The third step to be considered in determining whether a health violation is significant and substantial is whether there is a reasonable likelihood that the hazard contributed to will result in injury. Dr. Richards' testimony was based, in part, on studies which supported his statements that breathing respirable dust exposes miners' lungs to a scarring process known as fibrosis. Richards could not state that an exposure for a 2-month period to 1.9 milligrams when the standard is 1.7 milligrams or to 1.7 milligrams when the standard is 1.4 milligrams would produce a measurable response in a given miner's lungs, but the studies show that continual exposure may produce silicosis or pneumoconiosis. When the respirable dust lodges in the alveoli of the lungs, it remains there forever and each exposure adds to the scarring process so as to produce the lesions associated with progressive massive fibrosis. USSM's cross-examination of Richards failed to disprove any of his claims as to the hazards associated with breathing excessive quantities of respirable dust. Therefore, I find that the preponderance of the evidence supports a finding that there is a reasonable likelihood that the hazard contributed to will result in injury.

The fourth step to be considered in determining whether a violation is significant and substantial is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. USSM's brief (pp. 6-7) claims that there is simply no definite proof that an exposure to a few tenths of a milligram of respirable dust in excess of the applicable standard for a 2-month period is reasonably likely to result in an injury of a reasonably serious nature. It is asserted that MSHA's quartz-compliance program is a house of cards built upon assumptions that cannot withstand scrutiny. The evidence in this case contradicts USSM's arguments because MSHA's witnesses successfully defended the validity of the respirable-dust program (Finding Nos. 21-22; 24; 26, supra).

The very nature of silicosis and pneumoconiosis defies specific proof as to the exact extent of injury which will result from a single 2-month exposure to respirable dust in excess of the applicable standard. It is the average person's lack of familiarity with health hazards that causes him to accept more readily a contention that a safety hazard is likely to produce a serious injury than an assertion that a health hazard will result in a reasonably serious injury.

For example, a miner may work under unsupported roof for years and never be injured because he was fortunate in not happening to be under any rocks which were loose enough to fall on him. Despite that particular miner's good fortune, there are overwhelming statistics which show that many miners are killed by roof falls each year. Therefore, an inspector's claim that working under unsupported roof is reasonably likely to result in a reasonably serious injury is not doubted because there are many instances every year which demonstrate beyond any doubt that noncompliance with a roof-control plan may be designated as a significant and substantial violation without there being much chance that anyone will challenge such a designation.

The evidence in this case is just as persuasive as any which could be offered in support of a designation of working under unsupported roof as a significant and substantial violation. Dr. Richards did not equivocate about believing that each exposure to more than 5 percent of quartz in the mine atmosphere is a serious health hazard. No roof-control specialist could have been any more positive as to the likelihood of an injury of a reasonably serious nature from a single minute of standing under unsupported roof than Dr. Richards was as to the possibility of injury of a reasonably serious nature from a 2-month exposure to excessive respirable dust. A single minute under unsupported roof is reasonably likely to result in a fatality, but there is no certainty that it will. It is just as true that a 2-month exposure to more than 1.4 milligrams of respirable dust when 7 percent quartz is present may start fibrosis, but there is no absolute certainty that it will. Yet, exposure to excessive dust does cause miners to develop fibrosis. Once that process is started, each exposure thereafter contributes to the cumulative effects until progressive massive fibrosis results. Then, even if the miner stops working in a coal mine, the disease will continue to cause increasing inability for the lungs to perform their function of purifying the blood and the miner will die prematurely (Finding Nos. 30-32, supra).

I find that Dr. Richards' testimony was sufficiently positive and sufficiently based on valid scientific studies to support a finding that the violations alleged in Citation Nos. 9914583 and 9917507 were properly designated as significant and

substantial under the Commission's definition set forth in the National Gypsum case, as amplified in the Mathies and Consolidation cases, supra.

Assessment of Penalties

USSM's brief (p. 7) makes only one contention as to the assessment of penalties in the event I should find that violations occurred. That contention is that since the violations were not proven to be significant and substantial, I am required to reduce the penalty for each violation to the single penalty assessment of \$20 as provided for in 30 C.F.R. § 100.4. I have already considered that argument at some length in connection with the violation of section 103(f) alleged in Citation No. 2024280. Of course, since I have found that the violations of section 70.101 were significant and substantial, the provisions of section 100.4 are not applicable in assessing penalties, even if I had not already found that there is no merit to USSM's contentions that judges are bound in evidentiary proceedings to assess penalties of only \$20 for nonserious violations.

The Secretary's brief makes only one comment about assessment of penalties for the violations of section 70.101. That comment is that "[i]n view of the criteria contained in §110(i) of the Act, a penalty of \$100 would be appropriate for each Citation" (Br., p. 26). In his U. S. Steel decision, 5 FMSHRC at 1336, supra, Judge Broderick assessed a penalty of \$200 for a violation of section 70.101 in circumstances showing that the average concentration was 1.8 milligrams when the standard was 1.4 milligrams with a 7-percent quartz content in the mine atmosphere. The violation in Judge Broderick's case is almost exactly the same as the one in this case for the 002 Unit in the Shawnee Mine where the concentration of respirable dust was 1.7 milligrams when the standard was 1.4 milligrams with a 7-percent quartz content in the mine atmosphere. In his U. S. Steel decision, supra, 5 FMSHRC at 77, Judge Kennedy assessed two civil penalties of \$99 each for two violations of section 70.101 at a time when the quartz content in USSM's Maple Creek No. 2 Mine had been found to be 11 percent.

I have already shown in previously considering the six criteria in this decision, at page 25, supra, that USSM is a large operator and that payment of penalties will not cause USSM to discontinue in business. The remaining four criteria will be examined for purpose of assessing the penalties for violations of section 70.101.

History of Previous Violations

The evidence introduced by MSHA shows that USSM had only one previous violation of the respirable-dust standards for the

024 Unit in the Morton Mine (Exh. 13) and only one previous violation of the respirable-dust standard for the 002 Unit in its Shawnee Mine (Exh. 28). A single previous violation for each unit at a time when the respirable-dust standards were being reduced on the basis of MSHA's finding of a quartz content of more than 5 percent shows that USSM was making an effort to keep its miners from being exposed to excessive respirable dust. Therefore, the penalty will not be increased for either violation under the criterion of history of previous violations.

Good-Faith Effort To Achieve Compliance

USSM was given 21 days to abate the violation cited for the 024 Unit in the Morton Mine (Exh. 4) and 30 days to abate the violation cited for the 002 Unit in the Shawnee Mine (Exh. 20). USSM succeeded in abating each violation when it submitted five samples for purposes of abatement. The samples were not collected within the abatement period in the Morton Mine but since USSM had acquired the Morton Mine from Carbon Fuel Company only a short time before the citation was written, I do not believe that the penalty should be increased for USSM's failure to abate the violation within the 21-day period given in the citation, especially when it is considered that USSM's samples, when submitted, did show that it had succeeded in meeting the reduced standard.

USSM took five samples for abatement of the violation in the 002 Unit in its Shawnee Mine about 20 days before expiration of the abatement period. An advisory was sent to USSM before expiration of the abatement period showing that USSM had succeeded in meeting the reduced standard for the 002 Unit. Therefore, USSM demonstrated a good-faith effort to achieve compliance with respect to the violation alleged in Citation No. 9914583 and the penalty should not be increased under the criterion of good-faith effort to achieve compliance.

Negligence

The inspector who cited the violation in the 024 Unit of the Morton Mine classified USSM's negligence as "low" (Exh. 4) and the inspector who cited the violation in the Shawnee Mine classified USSM's negligence as "none" (Exh. 20). MSHA's witness Nesbit expressed no disagreement with the inspector who had classified USSM's violation in the Shawnee Mine as nonnegligent (Tr. 329). As I have previously indicated, USSM did make an effort to bring both the 002 Unit and the 024 Unit into compliance with reduced standards within a short period of time and the evidence in this proceeding shows only one previous violation for each unit. I find that the preponderance of the evidence supports a finding that USSM was nonnegligent in exceeding the reduced standard applicable for both units. Therefore, the penalty will not be increased under the criterion of negligence with respect to either violation.

Gravity

In each instance, the inspector who cited the respective violations of section 70.101 indicated that he considered the violation to be serious because he checked blocks on the citation showing that he believed the violations to be permanently disabling and to affect from 2 to 4 persons (Exhs. 4 and 20). Witness Nesbit stated several times during his direct testimony and cross-examination that he considered the violations to be serious because, once respirable dust has entered a miner's lungs, it will remain there for the remainder of his life so as to disable the miner or cause premature death (Tr. 271; 329; 331; 342). All of Dr. Richards' testimony was devoted to explaining why exposures to respirable dust when a quartz content of more than 5 percent is present is a serious violation (Tr. 411-506).

All of the discussion above under the heading of the term "significant and substantial" shows why exposures to excessive respirable dust is a serious violation. Therefore, I find that the preponderance of the evidence supports a finding that both violations of section 70.101 were serious. Although I have found above that no portion of the civil penalty should be assessed under the criteria of history of previous violations, good-faith effort to achieve rapid compliance, or negligence, it is appropriate that a penalty of \$125 be assessed for each violation in view of the fact that a large operator is involved and the fact that both violations were serious.

WHEREFORE, it is ordered:

(A) The notice of contest filed by U. S. Steel Mining Co., Inc., in Docket No. WEVA 82-390-R is denied and Citation No. 2024280 dated August 18, 1982, is affirmed.

(B) Within 30 days from the date of this decision, U. S. Steel Mining Co., Inc., shall pay civil penalties totaling \$275.00 which are allocated to the respective violations as follows:

<u>Docket No. WEVA 83-82</u>	
Citation No. 9914583 10/20/82 § 70.101	
(Tr. 205)	<u>\$125.00</u>
Total Penalties Assessed in Docket No.	
WEVA 83-82	\$125.00

Docket No. WEVA 83-95

Citation No. 2024280 8/18/82 § 103(f) \$ 25.00
Citation No. 9917507 9/1/82 § 70.101 125.00

Total Penalties Assessed in Docket No.
WEVA 83-95 \$150.00

Total Penalties Assessed in This Proceeding .. \$275.00

(C) The motion filed on May 5, 1983, by the Secretary of Labor to amend the petition for assessment of civil penalty in Docket No. WEVA 83-82, so as to substitute correct attachments for the erroneous attachments which were originally filed with the petition for assessment of civil penalty, is granted.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

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