APRIL 1992

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

APRIL 1992

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

Secretary of Labor, MSHA v. Klamath Pacific Corporation, Docket No. WEST 91-515-M. (Judge Merlin, Settlement of February 21, 1992)

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. KENT 91-1231. (Judge Melick, March 18, 1992)

There were no cases filed in which review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 21, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-515-M
KLAMATH PACIFIC CORPORATION	:	

BEFORE: Ford, Chairman; Backley, Doyle, Holen, and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). On February 21, 1992, Commission Chief Administrative Law Judge Paul Merlin issued a Decision Approving Settlement, pursuant to a motion to approve settlement filed by the Secretary of Labor, with respect to eight citations issued to Klamath Pacific Corporation ("Klamath Pacific"). The Secretary stated in the motion, filed December 3, 1991, that Klamath Pacific agreed to the terms of the settlement. In accordance with the motion, the judge assessed a lump sum civil penalty of $956.80, a reduction in the penalties, $1,472.00, originally proposed by the Secretary. On December 16, 1991, the Commission received a letter from Klamath Pacific stating that it "contest[ed] all alleged violations." On March 11, 1992, Klamath Pacific filed a letter with Judge Merlin stating that three of the citations "should be dropped," because it did not violate the regulation cited in those citations. For the reasons discussed below, we reopen this proceeding, vacate the judge's decision approving settlement, and remand this matter to the judge for further proceedings.

The judge's jurisdiction in this proceeding terminated when his decision approving settlement was issued on February 21, 1992. 29 C.F.R. § 2700.65(c). The judge's decision became a final decision of the Commission 40 days after issuance. 30 U.S.C. § 823(d)(1). The Commission did not act on Klamath Pacific's March 11, 1992, letter within the period provided in the Mine Act for considering requests for discretionary review due to processing error. Under these circumstances, we deem Klamath Pacific's March 11 letter to be a request for relief from a final Commission decision.

Relief from a final judgment or order of the Commission is available to a party under Fed. R. Civ. P. 60(b)(1) & (6) on the basis of inadvertence, mistake, surprise, excusable neglect, or any other reason justifying relief. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply, "so far as practicable" and "as appropriate," in the absence of applicable Commission rules). See, e.g., Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506, 508 (April 1988). Klamath Pacific's letters suggest that the decision approving settlement may have been entered in error. Accordingly, we conclude that this matter should be reopened and remanded in order to afford Klamath Pacific the opportunity to present its position to the judge, who shall determine whether final relief from the decision approving settlement is warranted.

For the foregoing reasons, we reopen this matter, vacate the judge's order approving settlement, and remand this matter to the judge for appropriate proceedings. Klamath Pacific is reminded to serve counsel for the Secretary with copies of its filings in this proceeding. 29 C.F.R. § 2700.7(a).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 2 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 91-691
	:	A.C. No. 11-00585-03796
v.	:	
	:	No. 10 Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
David R. Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq., the "Act," charging the Peabody Coal Company (Peabody) with one violation of the mandatory standard at 30 C.F.R. § 70.100(a). The general issue before me is whether Peabody violated the cited standard and, if so, what is the appropriate civil penalty to be assessed.

The citation at bar, No. 9941679 charges as follows:

> The results of five (5) respirable dust samples collected by the operator as shown by computer message No. 001 dated April 15, 1991, indicates the average concentration of respirable dust in the working environment of the designated occupation and mechanized mining unit No. 003-0 (036) was 2.1 milligrams per cubic meter which exceeded the applicable limit of 2.0 milligrams per cubic meter.

The cited standard provides as follows:

> Each 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 of each mine is exposed at or below 2.0 milligrams of respirable dust 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).

The Secretary's evidence is undisputed. Lewis Raymond, Chief of the Weighing Branch and supervisory physical scientist at the Pittsburgh Technical Support Center of the Federal Mine Safety and Health Administration (MSHA) testified concerning the quality control procedures followed by MSHA in handling respirable dust samples. According to Raymond under the MSHA respirable dust measurement program the operator is required to collect dust samples for high risk occupations. The operator or its agent also completes a data card and sends it along with the sealed respirable dust cassette and filter to MSHA for weighing and analysis. The cassettes are opened by MSHA lab personnel, the filter is removed, and the weight of the filter is recorded. The data is electronically transmitted to the MSHA Information Systems Center in Denver, Colorado. When the average concentration of the five (5) samples exceeds 2.0 milligrams per cubic meter of air (mg/m^3) a notice of non-compliance is generated.

Thomas Tomb is Chief of the Dust Division at the MSHA Health and Safety Technology Laboratory in Pittsburgh. He has a Bachelor of Science degree in physics and a master's degree in Industrial Hygiene. According to Tomb, given a finding by the MSHA lab of an average concentration of 2.1 mg/m^3 based on five samples, there is an 86 percent confidence level that the amount of respirable dust in the mine atmosphere is above the 2.0 mg/m^3 level allowed by the regulations.

As previously noted, Peabody does not challenge the admissibility of this evidence but maintains that such evidence, based upon an 86 percent confidence level that the actual respirable dust concentration exceeded the legal limit of 2.0 mg/m^3, is insufficient to establish a violation of the cited standard. The issue as framed by Peabody is whether a violation of the 2.0 mg/m^3 standard can be proven by five samples with an average weight of 2.1 mg/m^3, when it is conceded that there is only an 86 percent probability that an average 2.1 mg/m^3 actually represents a violation of the standard. Respondent maintains that at the 86 percent confidence level, more than one out of 10 results would falsely show a non-existent violation, and that this Commission should establish as a "matter of policy" that such proof is not sufficient.

The only support for Respondent's position however are cases involving statistical epidemiological studies where courts have held as inadmissible those epidemiological studies having less

than a 95 percent confidence level. See Deluca v. Merrell-Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990) and Whelan v. Merrell-Dow Pharmaceuticals, Inc., 117 FRD 299 (D.D.C. 1987). In the case at bar however, there is no evidence indicating that an 86 percent level of confidence applied to respirable dust sampling is not the generally accepted criterion for reliability in this field. Indeed the only expert testimony in this regard is to the contrary. Under the circumstances I find that the Secretary has proven by a preponderance of the evidence through credible expert testimony applying statistical analysis establishing that from the average weight of 2.1 mg/m^3 of the five respirable dust samples taken in this case it can be inferred that the samples exceeded the 2.0 mg/m^3 standard. There is sufficient connection between the evidentiary facts at an 86 percent confidence level and the ultimate fact sought by Secretary to be inferred. Secretary v. Garden Creek Pocahontas Co., 11 FMSHRC 2148 (1989); Secretary v. Mid Continent Resources, 6 FMSHRC 1132 (1984). See also Curtis and Wilson, The Use of Statistics and Statisticians in the Litigation Process, 20 Jurimetrics Journal 109 (Winter (1979). The violation is therefore proven as charged.

Considering the minute differences herein between a violative and nonviolative condition and considering all of the criteria under section 110(i) of the Act, I find that a civil penalty of $100 is appropriate.

ORDER

Citation No. 9941679 is affirmed. Peabody Coal Company is hereby directed to pay a civil penalty of $100 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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/fb

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APR 3 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 92-73
	:	A.C. No. 36-00926-03905
v.	:	
	:	Homer City Mine
HELEN MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Richard W. Rosenblitt, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Ronald B. Johnson, Esq., Volk, Frankovitch, Anetakis, Recht, Robertson & Hellerstedt, Wheeling, West Virginia, for the Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing the parties filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $1,300 to $600 was proposed. I have considered the representations and documentation submitted in this case at hearing, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $600 within 30 days of this order.

Gary Melick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 3 1992

RONNY BOSWELL, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 90-112-DM
NATIONAL CEMENT COMPANY, Respondent	:	SE-MD-90-04
	:	Ragland Plant

DECISION UPON REMAND

Before: Judge Maurer

On February 26, 1992, the Commission remanded this matter to me, affirmed in part, vacated in part, and with special instructions on how to proceed with the remand.

Basically, on January 11, 1990, complainant was "disqualified" from his job as a utility laborer, a position which he had occupied for a sum total of approximately 10 years at respondent's cement plant in Ragland, Alabama.

National Cement "disqualified" Boswell from his position as a utility laborer pursuant to a "Disciplinary Action Report" (Respondent's Ex. No. 1) dated January 11, 1990. This report indicated five grounds for Boswell's disqualification: (1) a kiln incident on August 8, 1989; (2) a clay shredder incident on October 1 and 2, 1989; (3) a radio incident on October 22, 1989; (4) a kiln incident on December 22, 1989; and (5) a bobcat and wheelbarrow incident on January 1, 1990.

In my original decision, reported at 13 FMSHRC 207 (February 1991) (ALJ), I found that the complainant had engaged in protected activity by refusing to perform work and asking for a "safety review"[1] related to the kiln incident of August 8, 1989, and the bobcat and wheelbarrow incident of January 1, 1990.

---

[1]/ Under the collective bargaining agreement at the plant, a miner has the right to call for a safety review if he believes that a situation is unsafe, and cannot be disciplined for refusing to perform an unsafe task. Under the safety review procedure, representatives of the union and company meet to review the situation. If the two sides cannot agree, they may request a review by the Department of Labor's Mine Safety and Health Administration.

Furthermore, I found that the disqualification from his position as a utility laborer was motivated at least in major part by that protected activity. I therefore had concluded that Boswell was discriminated against in violation of section 105(c) of the Mine Act. That ultimate conclusion necessarily implicitly included antecedent determinations that National Cement had not successfully rebutted the complainant's prima facie case nor had it met its burden of proof with regard to any affirmative defense.

It is the wheelbarrow portion of the January 1, 1990 incident that we are concerned with at this point on remand, as well as the respondent's putative affirmative defense that protected activity aside, it would have disciplined Boswell, in any event, for his unprotected activity alone.

Initially, Boswell was instructed by his foreman, James Allen, to use a bobcat to remove three bobcat buckets full of 3-inch diameter alloy steel mill grinding balls from the mill basement at the plant. A bobcat is a relatively small machine with a scoop bucket on the front that allows you to pick up material. It doesn't have a steering wheel, but rather is steered with foot and hand controls. It requires good coordination and some getting used to in order to properly operate it. It is sort of a miniature bulldozer or front-end loader.

In any event, Boswell drove the bobcat to the mill and then called Allen to say he was afraid to run it up and down the ramp. The mill basement, where the grinding balls were located is accessed by a 20-30 degree inclined ramp, 12 feet wide and 30-40 feet long, which was strewn with loose clinkers (small marbles or rocks) at the time Boswell inspected it. Boswell did not believe he had been adequately trained to operate the bobcat in these conditions and did not feel he would be safe operating it up and down the inclined ramp.

When Boswell balked at using the bobcat, he was then instructed by Allen to use a wheelbarrow instead. Complainant testified that Allen told him to take a wheelbarrow and go down into the mill basement, load these steel balls into it and push it up the ramp. Boswell says you can't even walk up and down that ramp without holding onto the side, much less while pushing a wheelbarrow. He says "nobody can." That conclusion is seriously disputed by respondent. Mr. Allen, who claims to have done it himself at one time, was asked at Tr. 92:

> Q. And do you deem it unsafe to put the balls in a wheelbarrow and take them up that ramp?
>
> A. Not if you only -- you know, you only put so many in there. Just what you can push up there. That's it.

When Boswell in turn claimed retrieving the balls from the mill basement was unsafe using the wheelbarrow, Allen attempted to change his mind and more or less cajole him into doing it. Allen testified that he told him he would get him some help. He told him to first sweep the inclined ramp free of clinkers in order to have better footing, and finally, he told him he could carry loads as little as ten pounds per trip. I find this last to be patently ridiculous since if that were the case, he could have just put a steel ball in each of his pants pockets and walked up the ramp, holding onto the side if he wished. The wheelbarrow would have been an unnecessary encumbrance. Itself would outweigh the 10 pounds of balls by a factor of 4 or 5 at the least.

The Commission noted that the undersigned failed to address Allen's testimony in this regard in my original decision. I had presumed that the incredulity of this scenario was so obvious that no comment was necessary. We have to remember that Allen needed to get three full bobcat bucket loads of 3-inch diameter steel balls out of the mill basement. This is a lot of balls. It would have been of very little practical help to him to have Boswell carry them up out of there in a wheelbarrow or otherwise, two or three balls at a time. This alternative makes no sense, unless perhaps we view it as an attempt to embarrass or pressure Boswell into taking a chance with his personal safety in order to get the job done. What Allen really wanted Boswell to do was use the bobcat and get it over with. Accomplish the mission. Get the balls out of the basement. He finally got another miner named Echols to run the bobcat up and down the ramp. He took out the three bobcat bucket loads of balls that night.

To be very clear about this, it is my considered opinion that nobody believes, least of all Allen and Boswell, that he was merely being asked to bring up ten pounds, i.e., two or three balls at a time in his wheelbarrow or pockets or however he could carry them.

As an objective matter, I did not initially and do not now find that the wheelbarrow alternative Boswell was presented with, and by that I mean bringing up a substantial load of steel balls out of the basement, was unsafe. Perhaps it could have been done safely, without incident or injury. But I do find that Boswell thought it was unsafe and in accordance with established procedures at the cement plant, he could and did ask for a "safety review," as was his right to do. This was not a simple matter of refusing to perform a task. Boswell called the union safety man at home and determined that he could come to the plant right away to settle the matter. But his supervisor, Allen, would not allow him the "safety review" he sought. Allen instead told him to "let it go" and reassigned him to get on a bulldozer and push rock. Boswell did as he was told and went to push rock.

Therefore, I do not view this strictly as a reasonable or unreasonable refusal to work. Rather, I view it as a reasonable exercise of Boswell's right to ask for a "safety review" of the task. Up to that point I believe he was well within the protection of the Mine Act. When the company foreman decided not to pursue the "safety review" and simply reassigned him to another task, they could not thereafter be heard to complain that he had refused to work.

After all, we don't know what would have happened if the company would have conducted the requested "safety review." Perhaps the union safety man would have seen it the company's way and advised Boswell to perform the requested task. In any event, it is apparently undisputed that Boswell's request for a "safety review" regarding the bobcat and wheelbarrow incident was protected activity. Protected activity that formed part of the basis for his subsequent "disqualification." The admittedly protected activity of seeking a "safety review" is inextricably tied up with the work refusal itself. In my opinion, it is impossible to separate the two. There would have been no request for a "safety review" absent a dispute about the alleged unsafeness of the requested task.

The "safety review" is a right without a remedy if the company never in fact provides one when requested. Not only that, but if a worker asks for too many of them (in this case, two in five months), he could be subject to disciplinary action. Seemingly, that is the "lesson" to be learned by the worker caught in this type of dilemma.

I am mindful that for our purposes, the miner must have a good faith, reasonable if only a subjective belief that the requested work is unsafe for him to perform. I am of the opinion that Boswell held such a belief and that the operator did nothing to address his concerns. Purportedly, that is the function of a "safety review" at this plant.

I am also mindful that such a "safety review" procedure could become a source of misuse and abuse by a worker, but there is no evidence of that in this case.

Accordingly, I conclude that Boswell's belief that it was unsafe for him to push a loaded wheelbarrow up a 20 degree inclined ramp was at least subjectively reasonable and entitled him to preliminarily seek a "safety review" of the job which request was refused or ignored by the respondent. Therefore, I find that Boswell engaged in protected activity on January 1, 1990, in connection with his refusal to use the wheelbarrow, and adverse action motivated in part by that protected activity occurred shortly thereafter.

If an operator cannot, as here, show either that no protected activity occurred or that the adverse action taken was in no part motivated by protected activity, it may nevertheless affirmatively defend by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Basically, I believed and still believe Boswell was "disqualified" for the reasons the respondent stated they disqualified him in their "Disciplinary Action Report" of January 11, 1990 (Respondent's Ex. No. 1). Most particularly, for calling the "safety review" in August 1989 and the last straw, again on January 1, 1990. Ten days after that he was reprimanded and disqualified as a utility laborer. Both of these incidents are clearly protected activity under the Mine Act.

The other three instances cited in the Disciplinary Action Report were essentially nonissues, i.e., throw-ins. None of these incidents taken separately or together provides any credible unprotected justification for the adverse action taken against Boswell. See the earlier ALJ decision at 13 FMSHRC 207 for my rationale concerning these incidents.

As for Boswell's allegedly poor work history going back to 1980, and his inability to get along with his foreman, Mr. Allen, forming the basis for a viable affirmative defense in this case, I am not persuaded. I think they are bound by their own Disciplinary Action Report, i.e., they took the action against Boswell for the reasons they say they did, on January 11, 1990.

At the hearing, on September 5, 1990, I specifically asked Mr. Cedric Phillips, the personnel director for the respondent, if the allegations contained in that report were the only grounds the company relied on to disqualify Boswell from his utility laborer position. He replied: "Yes sir. Those are the ones that were used." (Tr. 161). He then went on to state that "Ronny [Boswell] and James [Allen] wasn't getting along together" and therefore, "Ronny needed to be removed from his job and from his shift." (Tr. 162). Thats it. That is the sum total of the evidence that anything other then the grounds stated in

Respondent's Exhibit No. 1 were used to disqualify Boswell. On the other hand, Boswell's unrebutted testimony was that he worked for James Allen for the last 8 years and had no more problems with supervision and supervisors than anyone else did.

Lastly, I will turn to the seven earlier incidents concerning Boswell's work which were not even mentioned in the January 11, 1990 report, but which are included in the hearing record as respondent's exhibits.

Respondent's Exhibit No. 5 dated May 27, 1980, Respondent's Exhibit No. 6 dated April 27, 1981, Respondent's Exhibit No. 7 dated December 10, 1981, Respondent's Exhibit No. 8 dated December 14, 1981, and Respondent's Exhibit No. 9 dated April 16, 1982, I deem too remote in time to have any bearing whatsoever on his 1990 "disqualification."

There were two further incidents written up during 1988. One on May 24, 1988 (Respondent's Exhibit No. 10) is on a piece of scratchpad on which is written a Mr. Harvey Hyde's note that Boswell had refused to follow a supervisor's orders concerning signing the change sheets for cement silos. There is no further elucidation in the record of what this is all about, nor is there any mention of it in connection with the 1990 "disqualification." Respondent's Exhibit No. 11 is also signed by one Harvey Hyde and appears to be more serious. It is on a "Disciplinary Action Report" form and again has to do with following procedures or failing to follow procedures about changing cement from one silo to another. Again, it has been dumped into the record cold and has no readily discernible connection with the adverse action the respondent took against Boswell on January 11, 1990.

As noted by the Commission in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982), it is not our function to pass on the wisdom or fairness of such purported justifications, but only to determine whether they are credible and whether they would have motivated the operator as claimed. Assuming all these earlier incidents happened, and taking them at face value within the four corners of the documents presented, I conclude that respondent has failed to prove that it would have disqualified Boswell over any of these incidents separately or together. The elapsed time alone between these incidents and the complained of adverse action casts substantial doubt on that claim.

Accordingly, considering the entire record of proceedings made in this case yet again and in particular the Commission's Decision and remand instructions to me of February 26, 1992, I conclude and find that:

1. The wheelbarrow incident did constitute a protected work refusal; and

2. National Cement Company failed to prove that it would have disqualified Boswell in any event for his unprotected activities alone, and this is so whether these activities are considered separately, in any combination thereof or in toto.

With regard to the adverse action in this case, complainant was unrepresented by counsel at the hearing and was unable in my opinion to sustain his burden of proving his entitlement to back pay. However, the Commission has concluded that Boswell suffered an adverse action in this respect as well. "[T]he evidence shows that Boswell earned more because he worked more, but that he nevertheless suffered a loss in his base pay rate." Slip Op. at 8.

Therefore, in addition to the remedies previously ordered in my original decision of reinstatement to his former position and expungement of his personnel record, I am herein ordering back pay paid to the complainant in the amount of $1.08 per hour for every hour he has worked between the date of disqualification and the date of reinstatement to the position of utility laborer, plus interest.

ORDER

It is **ORDERED** that:

1. The respondent shall pay to complainant Ronny Boswell back wages in the amount of $1.08 per hour for every hour he has worked from January 11, 1990 until the date of reinstatement to the utility laborer position, with interest thereon computed in accordance with the Commission's Decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd, 895 F.2d 773 (D.C. Cir. 1990). The parties shall confer within 15 days of the date of this decision, in an effort to stipulate the amount due complainant under this order. If they are unable to so stipulate, complainant shall submit within 20 days of the date of this decision, its statement of the amount due. Respondent may respond within 10 days thereafter.

2. The terms of my earlier Order dated February 7, 1991, are reiterated here.

3. This decision upon remand will not become final until a subsequent order is issued awarding back pay and declaring the decision to be final.

Roy J. Maurer
Administrative Law Judge

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dcp

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APR 6 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-449 A.C. No. 05-03836-03539
v.	:	
TWENTYMILE COAL COMPANY, Respondent	:	Foidel Creek

DECISION

Before: Judge Lasher

In this proceeding the Secretary of Labor (MSHA) originally sought assessment of penalties for a total of five alleged violations pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.SC. § 820(a) (1977). Thereafter, on March 2, 1992, the parties filed a Motion to Approve Settlement of four of the five Citations involved in this docket and such is being approved in my Decision Approving Partial Settlement issued simultaneously herewith. The fifth and remaining Citation, No. 9996580, is being submitted on the basis of a written "Stipulation" submitted by the parties on March 2, 1992, which I conclude is sufficient upon which to base this decision since the sole issue is (1) legal rather than factual and (2) is one on one which I have previously ruled in this matter in denying Respondent's motion for summary decision.

The Stipulation in pertinent part provides:

1. On October 10, 1990, Citation No. 9996580 was issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977 ("the Act").

2. The Citation alleged a violation of 30 C.F.R. § 70.100A as follows:

> Based 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, Code 036 in mechanized mining unit 006-0 was 2.1 milligrams which exceeded the applicable limit of 2.0 milligrams. See attached computer printout dated

October 5, 1990. Management will take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory. Approved respiratory equipment shall be made available to all persons working in the area.

3. The Citation alleged that the condition significantly and substantially contributed to the cause and effect of a mine safety or health hazard.

4. The miners, who were the subject of the sampling on which the Citation was based, were not wearing respirators at the time the sampling was conducted.

5. The average concentration of respirable dust on which the Citation was based was 2.1 mg/m^3.

6. On September 4, 1991, Twentymile filed a Motion for Summary Decision as to the issue of the appropriateness of the "Significant and Substantial" designation.

7. On October 2, 1991, the Administrative Law Judge denied such motion.

8. A hearing in this matter is scheduled for March 20, 1992.

9. The parties agree and stipulate that the only issue for hearing in this matter is whether a citation based upon an average respirable dust concentration of 2.1 mg/m^3 may properly be designated as "Significant and Substantial." Twentymile wishes to seek review of such issue by the Commission. The parties believe that a hearing is not necessary on such issue, since the issue is a legal one based upon the Congressional findings contained in the legislative history of the Federal Mine Safety and Health Act and the regulatory history.

10. To that end, the parties agree and stipulate that a violation of the cited standard existed and that, if the citation is designated "Significant and Substantial," the appropriate penalty is $276.00, the full proposed penalty.

11. The parties further agree and stipulate that the decision of the Administrative Law Judge on partial summary decision regarding the issue of the designation of the citation as significant and substantial may be incorporated in the order of the Judge so that review may be sought at this time.

In paragraph 10 of the Stipulation, Respondent concedes the violation charged of 30 C.F.R. § 70.1000(a) which provides:

> (a) Each 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 of each mine is exposed at or below 2.0 milligrams of respirable dust 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).

In my Order Denying Motion for partial summary decision dated October 2, 1991, referred to in paragraph 11 of the Stipulation and re-adopted here, I found the position of the Secretary in opposition to the motion meritorious and adopted it, citing the decision of Commission Chief Administrative Law Judge Merlin in Consolidation Coal Company, 13 FMSHRC 1076 (July 1991) as dispositive of the issue. [1]

Judge Merlin's opinion, relying on prior Commission and Federal Circuit Court precedents, is incisive on the question posed here and the holdings and rationale contained therein are, as suggested in my Order Denying Motion referred to paragraph 11 of the Stipulation, incorporated here by reference. In particular, I note and quote from Judge Merlin's decision the section thereof entitled "Precedents," to wit:

> In Consolidation Coal Company, 8 FMSHRC 890 (June 1986), the Commission decided that a respirable dust concentration of 4.1 mg/m^3 constituted a significant and substantial violation. In so holding, the Commission adopted principles which appropriately serve as a guide for resolution of the present matter. Similarly, the Court

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[1] As the parties have stipulated, the only issue here is whether a "citation based upon an average respirable dust concentration of 2.1 mg/m^3 may properly be designated as 'Significant and Substantial'." In the instant case and in the Consolidation case before Judge Merlin, the dust concentration was the same--2.1 mg/m^3.

of Appeals which affirmed the Commission in Consolidation Coal Company v. Federal Mine Safety and Health Review Commission, 824 F.2d 1071 (D.C. Cir. 1987), further elucidated the precepts which govern this inquiry.

In Consolidation Coal Company, the Commission recognized the unambiguous legislative purpose to prevent disability from pneumoconiosis or any other occupation-related disease. The Commission stated that Congress intended the 2.0 mg/m^3 standard to be the maximum permissible exposure level in order to achieve its goal of preventing disabling respiratory disease. 8 FMSHRC at 897. The respirable dust violation was then analyzed to determine whether it was significant and substantial in accordance with the four-step test enunciated by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981); and Mathies Coal Company, 6 FMSHRC 1 (1984). The respirable dust violation was admitted (first step) and the Commission held that any exposure above the 2.0 mg/m^3 level established a measure of danger to health (second step). 8 FMSHRC at 898. In finding a reasonble likelihood that the hazard would result in illness (third step), the Commission stated that although a single incident of overexposure would not in and of itself establish a reasonable likelihood, the development of respiratory disease was due to cumulative overexposure with precise prediction of whether and when respiratory disease would develop being impossible. 4 FMSHRC at 898. Accordingly, the Commission held that if the Secretary proves an overexposure in violation of § 70.100(a) a presumption arises that there has been established a reasonable likelihood that the health hazard will result in illness. 8 FMSHRC at 899. Finally, the Commission found there was no serious dispute that the illness in question would be of a reasonably serious nature (fourth step). 8 FMSHRC at 899. Because the four elements of the significant and substantial test would be satisfied in any case where there was a violation of § 70.100 (a), the Commission held that when the Secretary finds a violation of § 70.100(a), a presumption that the violation is significant and substantial is appropriate. The presumption may be rebutted by proof of non-exposure. 8 FMSHRC at 899.

Upon review, the Court of Appeals affirmed the Commission and upheld its adoption of the presumption that all respirable dust violations of § 70.100(a) are significant and substantial. The Court stated in pertinent part as follows:

> * * * The determination of the likelihood of harm from a violation of an exposure-based health standard necessarily rests on generalized medical evidence concerning the effects of exposure to the harmful substance, rather than on evidence specific to a particular violation.
>
> * * * Once the Commission had determined on the basis of medical evidence that any violation of the respirable dust standard should be considered significant and substantial, it would be meaningless to required that the same findings be made in each individual case in which a violation occurs. * * *
>
> * * * * *
>
> The Commission's adoption of the presumption at issue here is consistent with the congressional intent in enacting the Mine Act, and specifically with Congress's use of the "Significant and Substantial" language.

824 F.2d at 1084, 1085.

Current precedents sustain the validity of the presumption that exposures above the 2.0 mg/m^3 limit set forth in Section § 70.100(a) are significant and substantial. Accordingly, in terms of the issue presented, it is held that a citation based upon an average respirable dust concentration of 2.1 mg/m^3 may properly be designated as "Significant and Substantial." [2]

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[2] The presumption being rebuttable it is further noted that there is no evidence to rebut the same, such as the wearing of protective equipment by employees otherwise exposed. See Stipulation, paragraph 4.

ORDER

1. Citation No. 9996580, including the "Significant and Substantial" designation in Section 10c thereof, is **AFFIRMED.**

2. Respondent **SHALL** within 40 days from the date hereof **PAY** the stipulated penalty [3] of $276 to the Secretary of Labor.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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[3] See Stipulation, paragraph 10.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

APR 6 1992

TOM K. SPERRY, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 91-473-DM
v.	:	
	:	WE MD 91-12
AMES CONSTRUCTION, INC., Respondent	:	

DECISION

Appearances: Tom K. Sperry, pro se, Nephi, Utah,
for Complainant;
Lawrence R. Dingivan, Esq., Jill Dunyon-Hansen, Esq.,
Salt Lake City, Utah,
for Respondent.

Before: Judge Lasher

This matter was initiated by Mr. Sperry's complaint filed with the Commission on July 8, 1991, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (1982), (herein "the Act"). His initial Section 105(c)(2) complaint was, on June 13, 1991, found by the Federal Mine Safety and Health Administration (MSHA) to lack merit. Complainant then filed the instant action with the Commission. Mr. Sperry's complaint with MSHA alleged:

> I was promised in October of 1990 to be rehired around February of 1991. I talked to this Company several times through the winter of 90-91 with no problems at that time. On February 4, 1991, I was told by Russ that I would not be rehired, that he had talked to Pete Smyle and Leon DeWitt and they had changed there [sic] mind about putting me back to work this season.
>
> I am sure that this action is because of a discrimination complaint I brought against them through your office.
>
> I have been in touch with my Labor Union in Reno. They said that if they put me back to work that they would find some way to get rid of me at a later date. The person at Reno is Chuck Billings Bus. Agent.

Contentions

Complainant contends that after being laid off in a reduction in force on October 19, 1990 (Ex. C-2), he was not thereafter rehired by Respondent because of his protected activities in filing an MSHA complaint on September 26, 1990 (Ex. C-4) [1] and making other on-the-job safety complaints to his employer. Complainant also alleges that his layoff was discriminatory. (T. 20).

Respondent contends it laid off Complainant for lack of work and that it did not rehire him because he was an unsafe employee.

Findings and Conclusions

Based on the preponderance of the reliable and probative evidence introduced on the record at the hearing in this matter, the following findings of fact are made:

Respondent at material times was a contractor for Newmont Gold Company. (Ex. C-4). Its work was seasonal - depending on when various of its contracts would be completed and new contracts would commence. At times a reduction of force would be necessary and employees would be laid off. (T. 139, 149, 161-162).

Complainant (approximately 39 years old) commenced employment with Respondent at Newmont Mine No. 3 as an equipment operator (operating a No. 631 Caterpillar scraper) in the fall of 1989. His immediate supervisor most of the time thereafter was foreman (now Superintendent) Lavene "Pete" Smyle. (T. 25, 107-108). Complainant operated a "water wagon" for most of his employment beginning in approximately January 1990. (T. 27).

During his employment, Complainant engaged in various activities protected under the Act.

a. A discrimination complaint was filed under Section 105(c) by Mr. Sperry on September 26, 1990 (see MSHA Final Report; Ex. C-4). This complaint was voluntarily withdrawn on October 2, 1990 (Ex. C-4). As general information, it is noted that MSHA's "Final Report" states with respect to this complaint:

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[1] Complainant voluntarily withdrew this complaint on October 2, 1990. (Attachment to Ex. C-4).

> The incidents took place over an extended period of time beginning approximately in October of 1989. The complainant was engaged in protected activity. The complainant did communicate his belief of a protected activity to mine management. The specific discriminatory act that the complainant alleges mine managemwent has undertaken is a failure to recognize his concern over his evaluation of possible maintenance problems associated with brakes on scrapers and water trucks as well as equipment for dust control.
>
> * * * * *
>
> Management and the complainant were instructed that MSHA would not be placed in a position to arbitrate controversy regarding labor disputes. Both parties were also instructed that any resolution of the complaint would have to be voluntary on the part of Mr. Sperry. [2]

b. Complainant advised a fellow employee how to get in touch with the Nevada Mine Safety office in Reno, Nevada. Respondent's foreman, DeWitt, told Complainant he "was wrong" in doing this. (T. 51-52).

c. Complainant made various complaints to his supervision, such as for inadequate brakes on equipment. (T. 52). [3]

It is not clear and was not established by Mr. Sperry that other alleged safety problems he observed were both (1) reported to management, and (2) actually unsafe or (3) reasonably

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[2] See also T. 61-63, indicating Complainant's reasons for withdrawing the complaint, such as his belief that "things were going to improve" and his belief that Russell Harvey (Respondent Project Director) would satisfactorily address his problems.

[3] Complainant's testimony concerning a conversation with a foreman named Mike Beck concerning inadequate brakes on a CAT compactor has been scrutinized and is found not to constitute a safety complaint. (T. 55-58). Mr. Sperry's testimony frequently was unclear, irrelevant, disjointed, rambling, and speculative in nature. On cross-examination, at times he was hesitant. (T.65, 66, 67, 68-70).

perceived by him to be unsafe. [See T. 27-28 (cut curtains); 31, 46-48 (dental appointment problem); 82-83].

d. Complainant himself apparently contacted the Nevada Mine Safety office (T. 27, 31). Whether Respondent was aware of these contacts by Mr. Sperry was not established, however. (T. 31).

It is clear that in filing the MSHA complaint and in advising a co-worker as to the whereabouts of Nevada's Mine Safety office, Complainant engaged in safety activities protected by the Mine Act, and that these activities were known to Respondent's management.

With respect to the layoff, the evidentiary presentation was limited. The record does clearly indicate that the employment expectations of Respondent's employees were not of a permanent nature since the work was seasonal. (T. 40, 139, 149, 161-162). Further, Respondent proved that 23 employees were laid off for lack of work in a reduction in force between September 20, 1990, and November 21, 1990. This group of 23 included Complainant who was laid off on October 19, 1990. (T. 92, 148-150, 152; Exs. R-2, R-6).

Complainant produced no probative or convincing evidence, that his layoff was discriminatorily motivated. [4]

I am unable to conclude from the evidence of record that Respondent was in any way motivated by Complainant's protected activities in laying him off as part of the reduction in force in October 1990. Thus, no basis is found to conclude that the "discriminatory layoff" change of the Complainant has merit.

We turn now to Complainant's charge that Respondent's refusal to rehire him was discriminatory. As Respondent contends in its brief, the provisions of the labor agreement (see T. 50, 84-87, 91-92, 97-103, 105) between Complainant's employer and his union do not govern the determination whether discrimination occurred. The rules, remedies, burdens of proof, and analytical formulae for determining such are set forth in the Mine Act and specific precedents established by the Federal Mine Safety and

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[4] It appears from the record that Complainant's primary--indeed, initial--intent in filing the instant complaint was to allege discrimination in Respondent's refusal to rehire him after the layoff.

Health Review Commission and the federal courts. In order to establish a prima facie case of mine safety discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United States Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-1938 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983); Donovan v. Stafford Const. Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test); and Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (Dec. 1986).

In terms of the required prima facie case in discrimination, Complainant clearly established the first elements thereof, i.e., that he had engaged in protected safety activities and the Respondent's management was aware thereof prior to the time he was laid off and subsequently not rehired. The first of the two issues posed is whether the adverse action taken by Respondent against Complainant was "in any part" motivated by Complainant's protected activities. The affirmative defense provided under the Commission's discrimination formula raises the second issue: Even assuming arguendo that Respondent was in part motivated by Complainant's protected activities, was it also motivated by his unprotected activities (unsafe job performance) and would it, in any event, have not rehired him for this alone.

Under the 1977 Mine Safety Act, discriminatory motivation is not to be presumed but must be proved. Simpson v. Kenta Energy, Inc., and Jackson, 8 FMSHRC 1034, 1040 (1986).

In this connection, Respondent's management witnesses convincingly testified that they were not motivated by Complainant's protected activities in laying him off and refusing to rehire him.

In contrast, the evidence introduced by Complainant failed to establish a motivational nexus between the allegedly discriminatory adverse actions taken against him and his mine safety activities was not convincing. [5]

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motivation may be established if the facts support a reasonable inference thereof. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510, 2511 (Nov. 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-1399 (June 1984). The weight of the evidence in this record is not probative that Respondent was illegally motivated in whole or in part, nor is there support for drawing an inference of such discriminatory intent.

The record reveals that the decision not to rehire Complainant was effectively made by his foreman, Mr. Smyle. He credibly attributed this decision to the fact that he did not consider Mr. Sperry to be a safe employee. (T. 116-117, 164, 171-172). Respondent made out a relatively strong case that Complainant did not perform his duties in a safe manner. Thus, Complainant Sperry was shown to have been involved in an incident--in the Spring of 1990 when he was under the supervision of his first foreman--where he pulled his water wagon out in front of a large truck. (T . 110-155). [6] He was being considered for discharge because of this incident when Foreman Smyle, who was short of help, said "Send him down to me, I can work with him." (T. 112). Complainant thereafter, in June 1990, received a verbal warning from Mr. Smyle for overwatering a curve which resulted in a truck sliding off the road. (T. 113-114). Significantly, after this, Mr. Smyle received complaints (T. 114, 168) from other drivers that Sperry was overwatering. He testified:

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[5] Based on observation of the demeanor of the witnesses and Complainant, the various reasons appearing elsewhere in ths decision, and the relatively convincing testimony of Respondent's witnesses (Mr. Smyle, in particular, was closely cross-examined), the accounts of Complainant have been determined not to carry the same degree of reliability as those of Respondent's witnesses.

[6] According to Complainant, he also was "accused" of "getting in the way of trucks"--in September 1990. (T. 51).

> Shortly after that, yes, we had some more complaints, and I don't recall the date, but I know it was on a Monday morning safety meeting, I went into the bus and told him specifically that he had to watch this, that the drivers were complaining. And he told me specifically, "Why don't they tell me?"
>
> And I said, "That's not their job. That is my job." (T.114). [7]

Respondent also presented evidence that Complainant turned in front of another truck driver, Jay Pace, after which Mr. Smyle told Complainant that he would have "to start paying more attention and be more careful or we're going to have a fatality." (T. 115-116).

The preponderance of the reliable and probative evidence in this record indicates that Complainant was, as Respondent alleges, an unsafe employee in the performance of the duties he performed for Respondent and that this was its motivation in not rehiring him. [8]

In reaching the conclusion that Complainant failed to establish that his layoff and not being rehired were discriminatorily motivated, consideration also has been given to the fact that the instant record overall does not reflect a pattern on the part of Respondent's management personnel to engage in such conduct. A history of retaliatory reaction to the expression of safety complaints was not persuasively shown. Complainant points out several instances of what he considered hostile words or action taken by management personnel toward him. Yet, such were not demonstrated to be beyond normal workplace occurrences. There was no evidence of retaliation against other employees who had engaged in safety activities or who expressed safety complaints.

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[7] See T. 128-129.

[8] As the Commission pointed out in Bradley v. Belva Coal Company, 4 FMSHRC 981, 991 (June 1982): "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

ULTIMATE CONCLUSIONS

Respondent's motivation in laying off Complainant was economic and in not rehiring him was because he was unsafe and the decision to take such actions was justified. These adverse actions were not wholly or in part discriminatorily motivated. Thus, Complainant has failed to establish a prima facie case of discrimination under Section 105(c) of the Mine Act.

Even assuming arguendo, that if it were established by a preponderance of the reliable probative evidence, that Complainant's layoff and Respondent's refusal to rehire him were motivated in part by his protected activities, Respondent established by a clear preponderance of such evidence that it was also motivated by business reasons and Complainant's unprotected activities and that it would have taken the adverse actions in any event for such.

ORDER

Complainant having failed to establish Mine Act discrimination on the part of Respondent, the Complaint herein is found to lack merit and this proceeding is **DISMISSED.**

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 13 1992

LOCAL UNION 2122, DISTRICT 20, UNITED MINE WORKERS OF AMERICA, Complainants	:	COMPENSATION PROCEEDING
	:	Docket No. SE 91-26-C
v.	:	Oak Grove Mine
U. S. STEEL MINING COMPANY, INCORPORATED, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Weisberger

The Stay Order issued on July 18, 1992, is hereby lifted.

On March 31, 1992, Complainant's filed a Motion to Withdraw based on a stipulation of settlement filed January 31, 1992. Pursuant to 29 C.F.R. § 2700.11, this Motion is granted, based on the assertions set forth in the Motion.

It is **ORDERED** that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 15 1992

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 88-144-R
	:	Order No. 2895540; 1/27/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Martinka No. 1 Mine
	:	Mine ID 46-03805
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 88-212
	:	A. C. No. 46-03805-03852
v.	:	
	:	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION UPON REMAND APPROVING SETTLEMENT
ORDER OF DISMISSAL

Before: Judge Maurer

The Secretary proposes to vacate Order No. 2895348 because the evidence available at the retrial of this case on remand would not support the fact of violation using the criterion announced by the Commission in Southern Ohio Coal Co., 14 FMSHRC 1 (January 1992). I accept the Secretary's representations in this regard and accordingly, Order No. 2895348 IS **VACATED**.

The other matter previously included in the civil penalty proceeding was Order No. 2895540, which was modified to a section 104(a) citation and assessed a civil penalty of $500 by my Decision and Order of October 16, 1989, which can be found at 11 FMSHRC 1992 (October 1989) (ALJ). Counsel of record for respondent assures me that this $500 has been long ago paid.

That being the case, the captioned contest proceeding is moot and both of the above proceedings are now **DISMISSED.**

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 15 1992

JEFFERY A. PATE, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 91-104-D
WHITE OAK MINING COMPANY, Respondent	:	BARB CD 90-36
	:	White Oak Mining

DECISION

Appearances: Mitch Damsky, Esq., Birmingham, Alabama, for the Complainant;
David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., Birmingham, Alabama, for the Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a discrimination complaint filed by the complainant, Jeffery A. Pate, against the respondent, White Oak Mining Company (White Oak), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Mr. Pate filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA). Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and Mr. Pate then filed his complaint with the Commission. Pursuant to notice, a hearing was conducted in Birmingham, Alabama, on November 6, 1991. Subsequently, respondent filed a posthearing brief on January 15, 1992, which I have considered along with the entire record of proceedings in this case in making the following decision.

The complainant alleges that he was discharged or "constructively discharged" (quit) from his job with White Oak for refusing to perform a task which he believed to be unsafe and dangerous. The respondent ascribes other motives to complainant's refusal to work.

The fundamental issue in this case is whether the complainant's work refusal amounted to protected activity under section 105(c) of the Mine Act.

DISCUSSION

Pate began his "employment" at White Oak in March or April of 1990, and that "employment" ended on June 27, 1990. He was never an "employee" per se of White Oak, but rather was a subcontractor/laborer. He was paid a flat $10 per hour and neither social security nor withholding taxes were deducted from his pay. White Oak was also contractually not responsible for his insurance coverage or his personal injuries on the job. Basically he performed manual labor for a flat fee and was paid the gross amount by check every 2 weeks without deductions.

He also received no benefits or training of any kind while employed there, including the safety training mandated by the Mine Act.

Complainant was unhappy with just about everything at White Oak. He didn't like the fact that he was not considered a full-time, regular employee. He was unhappy that the company didn't deduct taxes from his paycheck as they would a regular employee. He had to pay his own insurance, social security, taxes, etc., out of his gross wages. Pate was most unhappy with the fact that one Jerry Hill was hired as a loader operator after him in time, but in Pate's words "they gave him the good jobs and stuck me with all of the bad jobs." He was also upset with the fact that of the three loader operators, Hill included, he was assigned the loader that was the least modern, i.e., was not air-conditioned.

What Mr. Pate really wanted out of White Oak was to be considered a regular, full-time loader operator ensconced in an air-conditioned cab. One thing he in particular did not want to be doing was shoveling the belt line around the stacker-blender tailpiece. This was hot, sweaty, heavy labor. It was unpleasant work, as well as being dangerous work if the guard or guards were not in place around the stacker-blender.

Over the relatively short period of time which was Pate's tenure at White Oak he also had complained about dust while he was operating the loader. He alleges they didn't keep the area watered down. And in fact, the company was cited on June 11, 1990, for poor visibility because of the dust. With regard to this dust, Pate also claims he asked for a respirator to no avail. However, I find as a fact that the company routinely supplied or at least made available the paper dust masks that they kept a supply of in the office on site. Pate had on at least one occasion refused to use this type of mask, claiming that it "smothered" him. The testimony was, however, that several other employees did use them and managed to keep breathing.

Most relevant to the instant case, he had previously complained (prior to June 27, 1990) to MSHA Inspector Early about lack of guarding around the stacker-blender belt line tailpiece where he on occasion had to shovel around the end of the belt line. He had already caught his shirt in the belt line once and he was afraid that with no guards and the belt line running while he was shoveling coal back on there, if he missed a step or lost his balance, he could fall in and possibly get rolled around back under the tailpiece. I believe it is generally conceded that it is not a recommended practice to work around this area of moving belt with the guards removed. However, Mr. Whitfield, the White Oak supervisor who ultimately fired Pate, opined that it wouldn't be dangerous. He is the lone dissenter in that respect.

In any case, on the day Pate was fired, the brakes had gone out on the loader he was operating, so he parked it and Mr. Boyd, another White Oak supervisor, instructed him to go shovel around the stacker-blender tailpiece. After going there and observing the conditions, Pate refused to perform the work because it had no guards up and he had previously spoken to Inspector Early by telephone and was told that if he thought the condition was dangerous, he didn't have to do it. He could refuse to do it. And so he did. Boyd then told him to go to the office. Once he got there he spoke with Messrs. Hollis and Whitfield. Pate told Whitfield that he didn't have to go down there and endanger his life shoveling around that unguarded belt line and that he wasn't going to do it. Whitfield told him that if he was refusing to do the job, he was in effect, fired.

To be sure, there was more on Pate's mind than the unguarded tailpiece. For one thing, when he was assigned to shovel along the belt line, Jerry Hill was still operating one of the loaders, an air-conditioned one at that. Pate admits he was angry about that and I believe it formed part of the basis for his work refusal. But only part.

The general principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 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 Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was

motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

In the instant case, we have narrowed the scope of the inquiry to a much sharper focus than the general principles cited just above. It is undisputed herein that Pate refused to perform a specific work assignment on June 27, 1990, and as a direct result of that work refusal, he was fired. The ultimate issue presented for decision then is whether Pate's work refusal was protected under the Mine Act. See, e.g., Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 229-30 (February 1984) aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985); Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 132-33 (February 1982).

It is also well settled that the refusal by a miner to perform work is protected activity under section 105(c) of the Mine Act if it results from a good faith belief that the work involves safety hazards, and if that belief is a reasonable one. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982). See also, e.g., Metric Constructors, supra.

Further, where reasonably possible, the reason for the work refusal must be communicated to the operator. The miner must communicate his belief that a hazardous condition exists or at least attempt to do so. Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Conatser v. Red Flame Coal Co., 11 FMSHRC 12 January 1989); Dunmire & Estle, supra, 4 FMSHRC at 133-35. See also, e.g., Miller v. Consolidation Coal Co., 687 F.2d 194, 195-97 (7th Cir. 1982) (approving the Dunmire & Estle communication requirement).

As the Commission emphasized in Simpson: "[T]he right to make safety complaints and to refuse work under the Mine Act is premised on the belief that communication of hazards and response to such hazards are the means by which the Act's purposes will be attained." 8 FMSHRC at 1039 (citations omitted).

I find as a fact that the guard that was supposed to be around the stacker-blender tailpiece was not in place on June 27, 1990. Pate is most emphatic, of course, that it was missing. But even Mr. Whitfield concedes the guards were not always in

place. Sometimes they are working on the tail pulley assembly or the belt line and someone neglects to replace the guard(s) when they finish. Whitfield explained that usually there were guards around the stacker-blender. He testified that there was a screen at the tail pulley and handrails around the outer perimeter. But on June 27, 1990, when Pate was instructed to shovel around the stacker-blender, one guard was conceivably off of it at that time because repairs were being made or had just been made to the equipment. He estimated that if the guard or guards were down, that it would have taken probably 30 minutes to reinstall them.

I also find that Pate had a good faith, reasonable belief that the work he had been ordered to do and subsequently refused to do, was hazardous. Mr. Saunders, an independent safety trainer hired by the operator to provide their workers with safety training, agrees. He opined that it would not be prudent to shovel along that area of belt line if the guards were not there. In fact, he stated he wouldn't do it. Furthermore, Inspector Early had told the company in Pate's presence to put the guards up on or about June 1, 1990. This formed part of the basis for Pate's belief that the unguarded tailpiece was dangerous. "[B]y him verbally telling them that they needed to put some guards around that, I figured it was dangerous." (Tr. 41).

Finally, I am making a credibility choice in favor of Pate and finding that when he refused to work, he informed Whitfield that he was refusing because there were no guards on the belt line and that is why he was refusing, at least in the main. I am mindful that he had other, unrelated grievances with the company. I am also mindful that Whitfield testified that Pate made no complaint about guards prior to being fired. But on the day in question, June 27, 1990, there was a third person present at that conversation. Mr. Hollis was there and he was also present in the courtroom and even testified at the trial of this case. He could conceivably have corroborated Whitfield's testimony. The inference I draw from the fact that he didn't is that he wouldn't or couldn't.

Accordingly, I conclude that the discharge of Pate by Whitfield on June 27, 1990, violated section 105 of the Mine Act.

REMEDIES

On August 30, 1990, the operator offered to reinstate Pate, provide him with the required mine safety training and pay him $1000 in back pay. Pate turned down that offer of reinstatement and since there is a duty on the part of the complainant to mitigate his damages, I find that the ending date for Pate's

entitlement to back pay is August 30, 1990. Of course, his entitlement to back pay between the period June 27 - August 30, 1990, is also reduced by any amounts he actually earned in other employment during that time period.

Therefore, I am herein ordering back pay paid to the complainant in the amount of $10 per hour for every hour he would have worked between June 27, 1990 and August 30, 1990, but for his violative discharge, reduced by any earnings he actually made during that period. Interest is also payable on that award, computed in accordance with the Commission's Decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd, 895 F.2d 773 (D.C. Cir. 1990).

Reinstatement is no longer possible. White Oak terminated its operations on December 30, 1990, and has not employed anyone since that time and has no employees now.

Pate is also entitled to reimbursement for reasonable attorney fees and costs associated with prosecuting his case.

ORDER

It is **ORDERED** that:

1. The parties shall confer within 15 days of the date of this decision, in an effort to stipulate the amount due complainant under this order. If they are unable to so stipulate, complainant shall submit within 20 days of the date of this decision, its detailed, itemized statement of the amount due. Respondent may respond within 10 days thereafter. In the event that a contested issue of fact arises as to the proper type or quantum of damages due the complainant, a hearing on that issue or issues will be required, and will be held in the immediate future.

2. This decision is not final until a further order is issued with respect to complainant's relief.

Roy J. Maurer
Administrative Law Judge

Distribution:

Mitch Damsky, Esq., 3600 Clairmont Avenue, Birmingham, AL 35222 (Certified Mail)

David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., 2400 AmSouth, Harbert Plaza, Birmingham, AL 35203-2602 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 15 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 92-136 A. C. No. 15-11620-03527
v.	:	
	:	Hall No. 2 Mine
PYRAMID MINING, INCORPORATED, Respondent	:	

PARTIAL DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Frank Stainback, Esq., Holbrook, Wible, Sullivan, & Mountjoy, P.S.C., Owensboro, Kentucky for Respondent.

Before: Judge Weisberger

This civil penalty proceeding was scheduled for hearing in Owensboro, Kentucky, on April 1, 1992. At the commencement of the hearing I was advised by counsel that they were in the process of negotiating a settlement. Subsequently the particulars of the settlement, and the motion to approve it were placed on the record.

Citation Nos. 9897840, 3416900, and 3416892

Counsel for the Secretary indicated that Citation Nos. 9897840, 3416900 and 3416892 were to be vacated and asked that the petition for assessment of civil penalty for these citations be withdrawn. Pursuant to 29 C.F.R. § 2700.11 the Secretary's Motion is granted.

Citation No. 3416891

This Citation alleges a significant and substantial violation of 30 C.F.R. § 77.1104 in that combustible materials, hydraulic oil, and grease, were permitted to accumulate around the engine of a caterpillar. It was represented that at the time of the inspection, the equipment was not in actual use, and had been taken out of service, as a hose had blown prior to the inspection. It also was represented that the operator was in the process of cleaning the accumulation on the equipment. It was proposed to reduce the penalty from the proposed assessment $79 to $20, and amend the citation to be not significant and substantial. I accepted the representations of the parties and

concluded that the settlement is appropriate under the criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977.

Citation No. 3416984

Citation No. 3416984 alleges a violation of 30 C.F.R. §77.404(a) in that no safety devices were provided to keep a dolly carriage from coming loose from the overhead rail. The citation further alleges that the operator's negligence was moderate. At the hearing, it was represented that the hoist in question was installed in accordance with the specification of the manufacturer. It was proposed to reduce the penalty of $79 to $43, and to indicate that the operator was not negligent. I accepted the representations of counsel and concluded that the proposed settlement is appropriate under the terms of Section 110(i) of the Act.

Citation No. 3416898

Respondent, on March 19, 1992, filed a motion to continue the hearing with respect to Citation No. 3416898. In a telephone conference call on March 26, 1992, with counsel for both parties, counsel for the Secretary indicated that she did not oppose this motion. Accordingly, and for the reasons set forth in the motion, the motion was granted.

ORDER

It is **ORDERED** that: (1) Citation Nos. 9897840, 3416900, and 3416892 be **DISMISSED**; (2) Citation No. 3416891 be amended to indicate a violation that is not significant and substantial; (3) Citation No. 3416984 be amended to indicated that the operator was not negligent; (4) Respondent shall pay $63 within 30 days of the date of this decision as a civil penalty; (5) further proceedings with regard to Citation 3416898 be stayed, pending the filing of a petition of assessment of civil penalty with regard to Citation No. 3416897.

Avram Weisberger
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 15, 1992

UNITED MINE WORKERS OF AMERICA ON BEHALF OF LOCAL 5922, Complainants	:	COMPENSATION PROCEEDING
	:	Docket No. WEVA 92-289-C
	:	No. 2 Mine
TOP KAT MINING, INCORPORATED, and W P COAL COMPANY, Respondents	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

This case is before me pursuant to section 111 of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement of this matter which states in relevant part:

1. In order to finally and fully resolve this matter, W P Coal Company agrees to pay, within 30 days of the signing of this Stipulation by counsel for the UMWA, the employees identified in Exhibit A attached hereto, or their heirs or assigns, the amounts of pay set out therein.

2. W P Coal Company will process the payment of such amounts listed in Exhibit A and will notify the International Health and Safety Representative when the checks have been prepared.

3. If any person believes that the names of a person employed at the No. 2 Mine on August 22, 1992, has been incorrectly excluded from Exhibit A, such person shall notify counsel for the UMWA within 45 days of the signing of this Stipulation by Counsel for the UMWA. Such counsel shall immediately notify counsel for W P Coal Company and counsel for the parties will seek to resolve the merits of such claim. If such person was incorrectly excluded from the list in Exhibit A, he or she will be paid according to the appropriate formulas utilized in developing Exhibit A. During such 45 day period the parties may file supplemental stipulations if necessary, to supplement Exhibit A.

4. The UMWA shall withdraw its Complaint in this matter within 30 days of the end of the 45 day period after execution of this Stipulation by its counsel, assuming agreement has been reached regarding any persons who may have notified UMWA counsel in accordance with Paragraph 3.

5. Entry into this Stipulation does not constitute an admission by W P Coal Company for any purpose but is made solely to avoid further litigation in this matter.

6. Payment, of the amounts set out in Exhibit A, to the persons listed therein, will be a full and complete accord and satisfaction of all claims by such persons against W P Coal Company arising under Section 111 of the Act. Payments of amounts to persons, pursuant to the provision of Paragraph 3, will be a full and complete accord and satisfaction of all claims by such persons against W P Coal Company arising under Section 111 of the Act. All persons paid as set out in Exhibit A, or pursuant to agreement under Paragraph 3, release W P Coal Company, its successors and assigns, and its affiliated subsidiaries and parents, from any and all liability arising under Section 111 of the Act related to any orders issued on August 22, 1992, by MSHA, or compensation after such date related to the idling of the mine.

7. Persons not listed in Exhibit A, but who were employed by Top Kat Mining Inc. at the No. 2 Mine on August 22, 1992, and who fail to comply with the requirement to bring their claims to the attention of counsel for the UMWA within 45 days of the signing of the Stipulation by counsel for the UMWA, waive any and all claims against W P Coal Company arising under Section 111 of the Act as it relates to any order issued by MSHA on or about August 22, 1991.

8. The parties hereto agree that they will not issue any press release or otherwise in like manner attempt to publicize the matters contained herein and resolved hereby.

Based on the foregoing and noting that both parties have signed the agreement, I conclude that the proffered settlement is appropriate under the provisions of the Mine Act.

Accordingly, the motion for approval of settlement is **GRANTED** and it is **ORDERED** that this case be **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

Attachment: Exhibit A

Distribution:

Mary Lu Jordan, Esq., UMWA, 900 15th Street, NW., Washington, DC 20005 (Certified Mail)

Mr. Robert D. King, President, Top Kat Mining, Inc., Box 52, Peach Creek, WV 25639 (Certified Mail)

Joseph Mack III, Esq., Thorp, Reed & Armstrong, One Riverfront Center, Pittsburgh, PA 15222 (Certified Mail)

Mr. Vernon Cornett, President, W P Coal Company, Box 570, Omar, WV 25638 (Certified Mail)

/gl

EXHIBIT A

EMPLOYEE	HOURS OWED	HOURLY RATE	TOTAL DUE
L. Blevins	8	16.9150	135.32
T. Hodges	16	16.9150	270.64
C. Blankenship	8	16.6150	132.92
G. Conley	8	16.9150	135.32
W. Lowe	8	16.6150	132.92
D. Hall	8	16.6150	132.92
J. Vinson	8	16.6150	132.92
R. Santos	8	16.6150	132.92
R. Acord	8	16.6150	132.92
R. Sheppard	8	16.6150	132.92
J. Ghee	8	16.6150	132.92
R. James	8	16.6150	132.92
V. Maynard	8	16.6150	132.92
T. Daniels	8	16.6150	132.92

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 17 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 91-416
	:	A. C. No. 11-00590-03831
v.	:	
	:	Mine No. 26
OLD BEN COAL COMPANY, Respondent	:	
	:	Docket No. LAKE 91-720
	:	A.C. No. 11-00589-03790
	:	
	:	Mine No. 24

DECISION

Appearances: Miguel Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Petitioner;
Gregory S. Keltner, Esq., Old Ben Coal Company, Fairview Heights, Illinois for Respondent.

Before: Judge Weisberger

These two consolidated civil penalty proceedings are before me based upon petitions filed by the Secretary (Petitioner) alleging violations of 30 C.F.R. § 316 and 400. Subsequent to notice, the cases were heard in St. Louis, Missouri, on January 28, 29 and 30, 1992. At the hearing, Robert Stamm, James D. Britton, George Dvorzank, Robert M. Montgomery, and Mark Eslinger, testified for Petitioner. Jeffrey Lane Bennett, Joseph W. Rizor, Roger Griffith, Clarence H. Woodford, Robert Mcatee, David Stritzel, and Donald William Mitchell, testified for the Operator (Respondent). The parties filed post hearings briefs on March 26, 1992.

I. Order No. 3538631 (Docket No. LAKE 91-416), and Citation No. 3220697 (Docket No. LAKE 91-720).

Findings of Fact and Discussion

On November 2, 1990, Robert Stamm, an MSHA inspector, inspected Respondent's Mine No. 26, an underground coal mine. At the time of the inspection, a diesel-powered scoop was being operated on the 12th CM-2 (007-0) working section. There was loose coal in the articulation area, and under the torque

converter, diesel engine, and winch. The coal had a depth ranging from 2 to 4 inches. The loose coal under the engine and torque converter extended approximately 3 feet by 6 feet. In the area of the articulation, the extent of the coal accumulation was approximately 2 feet by 3 feet. Under the winch, the extent of the accumulation was approximately 2 1/2 feet by 3 feet.

Stamm opined that the coal that had accumulated was combustible, inasmuch as it was being sold in order to be burned, and in addition, combustible hydraulic oil was mixed with the coal. He further an indicated that the combustible material was likely to propagate a fire.

George Dorznak, the Chief of Mechanical Safety Division for MSHA, indicated that ignition could occur if the electric wires on the scoop would short. He indicated that this could easily occur if the wires should lie on a sharp corner of the machine. In this situation, over a period of time, the wires can rub against the corner causing it to tear and short. He also indicated that a collision or a roof fall could cause the wires to short. He further explained that if the shaft of the articulation joint should break, it could cause a cut in the electric wires. Should the hydraulic lines be cut at the same time, a fire could result. Also, ignition could occur should one of the scoop's shafts or bearings become overheated.

Stamm issued a section 104(d)(2) order, citing an accumulation of coal in violation of 30 C.F.R. § 75.400.

On May 10, 1991, James D. Britton, an MSHA inspector, inspected Respondent's underground No. 24 Mine, and observed a diesel eimco scoop being operated in proximity to the C shaft. Dry loose coal, coal covered with oil, and loose rock was present on several parts of the scoop. Oil, from a "film", (Tr. 81, 83) to up to 5 inches in depth, was located in the operator's compartment, under and around the engine, water tank, and drive compartment, and on hoses, conduits, and the frame of the transmission and engine. In addition, there was loose coal saturated with oil. Britton issued a citation alleging an accumulation of coal and oil on the scoop car in violation of section 75.400 supra.

Both citations present the identical issue i.e., whether 30 C.F.R. § 75.400 supra has been violated. Section 75.400 supra, provides, as pertinent, that coal dust and other combustible materials shall be cleaned up and not be permitted to accumulate "...in active workings, or on electric equipment therein." This language is identical to that found in section 304(a) of the Federal Mine Safety and Health Act of 1977 (P.L. 95-164, "the 1977 Act"), and section 304(a) of its predecessor, the Federal Coal Mine Health and Safety Act of 1969

(P. L. 91-173, "the 1969 Act").[1] Neither the 1969 Act, nor the 1977 Act, nor the regulatory equivalent, (section 75.400 supra) contains any definition of the term "electric equipment".

Further, the legislative history of the 1977 Act, and 1969 Act does not shed any light on the Congressional intent as to the meaning to be accorded the term "electric equipment." Hence, reliance is placed on its common meaning. Webster's Third New International Dictionary, (1986 Edition) ("Webster's"), defines "electric" as "2a: operated by an electric motor [an~~~refrigerator][2].

The diesel scoops in question are used to haul and load materials. Each scoop contains a set of 4 lights that are powered by an alternator. Conduits containing wires make an electric connection between the alternator and the scoop by way of a switch. It is Petitioner's position that, since the scoops have an electric component, they are to be considered electric equipment. For the reasons that follow I find this position to be without merit.

Each scoop is operated by a diesel engine, and no electricity is involved in its operation. The scoop's alternator is used only to operate the scoop's lights, and this electric lighting system is not connected to, and operates independent of the operation of the scoop itself. Also, it is clear that the scoops perform their function of loading and hauling material independent of their electric component. Accordingly, considering the common meaning of the term electric equipment, I

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[1]In order for Petitioner to prevail, it must first be established that any accumulations herein were either in "active workings" or on "electric equipment". Neither the order nor the citation in issue alleged, as a basis for the violations cited, that there were any accumulations in "active workings". Nor does Petitioner urge that the violation herein be predicated upon accumulations located in active workings which are defined as "...any place in a coal mine where miners are normally required to work or travel;" (30 C.F.R. § 75.2(g)(4)) Since the only accumulations cited were those found on the two scoop cars in question, the issue for resolution is whether these scoops are electric equipment within the purview of section 75.400.

[2]Donald William Mitchell was called as an expert witness by Respondent in the hearing on Citation No. 35364831 (Docket No. LAKE 91-416, infra). He testified that, based on his experience in the mining industry, the term "electric equipment" is commonly defined as any piece of equipment powered by an electric source or cable. Due to his extensive experience, considerable weight was placed upon his testimony in this regard.

conclude that the scoops in question are not electric equipment. Hence, I find that Respondent did not violate Section 75.400 supra as alleged. Accordingly, Order No. 3538631 and Citation No. 3220697 are to be dismissed.

II. Citation No. 3536483 (Docket No. LAKE 91-416).

Findings of Fact and Discussion

A. Introduction

On August 4, 1990, Robert N. Montgomery, an MSHA ventilation specialist, inspected Respondent's mine No. 26. He indicated that seals[3]/ were being constructed with the use of concrete cement blocks 6 inches high, 8 inches wide, and 16 inches long. He said that the blocks were rolled in Block Bond, and then laid in 3 separate rows on top of a concrete footer that was 30 inches wide and 36 inches high. Montgomery stated that he was able to insert a .025 inch thick gage 2 1/2 to 3 inches between the horizontal joints of the seals, and that the "opening" extended "several inches" horizontally "in a number of places" (Tr.36). He also indicated that there was no "visible" mortar between the joints (Tr.36).

According to Montgomery, mortar is a cement product containing sand, or mixed with sand and water, and is used to provide a joint between blocks. In essence, he indicated that this is the common definition of mortar in the mining industry. According to Montgomery, Block Bond is a sealant, and not interchangeable with mortar.

Mark Eslinger, an MSHA supervisory mining engineer in charge of a group of ventilation specialists, accompanied Montgomery in his inspection. He indicated that he did not see mortar between the joints of the cement blocks. Eslinger testified that in the mining industry, mortar means a mixture of cement, sand, and water, which is sometimes pre-mixed, and that the "common way" to apply mortar is to trowel it (Tr. 101).

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[3]In general, seals are constructed in a mine to seal off the gob or other areas that are no longer being ventilated. Specifically, seals are constructed to prevent the buildup of gases in an abandoned area from entering the rest of the mine. As such, as explained by Eslinger, seals should be structurally sound, and made of material that is non-combustible. Also, in order to prevent an explosion in the abandoned area from propagating into the working areas of the mine, the seals should be constructed of material that is able to withstand an explosion.

Montgomery issued a citation alleging a violation of 30 C.F.R. § 75.316. His testimony indicates that it is his position that the Ventilation Plan ("the Plan") was not being complied with in the following particulars: (1) the plan requires the use of mortar in the joints of the cement blocks, but the blocks in question were "dry stacked" (Tr. 33) without mortar; and (2) the plan requires two parallel rows of cement blocks separated by 8 inches with the gap filled with mandoseal, whereas Respondent was constructing three parallel rows of blocks 8 inches wide; and (3) the use of 8 inch blocks is required by the plan whereas Respondent used blocks that were 6 inches in height. Further, Montgomery testified that when he returned to the mine on January 11, 1991, subsequent to the date set for abatement, substantially no work had been performed to correct the cited condition, and he therefore issued a section 104(b) order.

David Stritzel, Respondent's Director of Health and Safety, indicated that it was his decision to construct the seals at issue, in order to seal a gob area of approximately 15,000 to 16,000 feet by 10,000 feet, to prevent the gob gases or water in the gob area from entering the rest of the mine. He indicated that, in his experience, mortar is defined as an adhesive. Essentially the same definition was provided by Robert Macatee, Respondent's manager of safety, who indicated that the common understanding of the term mortar is a substance that bonds surfaces of block together. Stritzel, in essence, indicated that it was his decision to use B-bond (Block Bond) as it was safer than other materials with regard to chemical burns, and he had previously used it in constructing block stoppings.

Joe Rizor, who was in charge of the construction of the seals in issue, testified that hitches were cut out of the ribs, top, and bottom of the entries in which the seals were constructed, in order to tie in the seal to the strata. He testified that he had instructed the mine superintendent, and notified all the miners working on the seals, that the cement blocks were to be immersed in a B-Bond (Block Bond) mixture and then stacked. He stated that the bag that contained the B-Bond indicated that it consisted of portland cement, fiberglass, and an aggregate. According to Rizor, on the date of the initial inspection he observed an area of B-Bond material, approximately 4 to 5 inches high, in a corner of the outby side of seal number 34 A. He further opined that inasmuch as the concrete blocks have smooth surfaces, if they were dry stacked without any bonding material it would not have been possible to insert a gauge between the blocks. Hence, he concluded that the fact that it was possible to insert a gauge indicates that there was material in the joints. He also stated that gaps in the joints between the blocks do not establish a lack of mortar, as such gaps are common.

B. Mortar in the Joints

Based on the testimony of Rizor, whom I found to be a credible witness, I find that the miners who constructed the seals were instructed to dip or immerse the cement blocks in the block bond mixture, and then stack them. Also, due to the fact that Rizor was present in the area of the construction of the seals eight hours a day throughout the period of their construction, I accord considerable weight to his testimony that the blocks were dipped in the mixture. Donald Williams, a mining engineer, testified that if a cement block is dipped in Block Bond mixture, an eighth to a quarter of an inch of the mixture, would remain, and partially cover the bottom of the surface of the block. He also indicated that although it is desirable, it is not critical to have coating of the entire surface of the block. This testimony was neither impeached nor rebutted. I thus accord it considerable weight, especially considering Mitchell's impressive work experience, publications and expertise.

Petitioner did not impeach or rebut Rizor's testimony with regard to the presence on the date of the inspection of a mass of B-Bond material on the floor, which indicated that this material had been used to bond the blocks. In addition, I note Rizor's testimony that had B-Bond material not been used, it would not had been possible to have inserted a .025 gauge to a depth of 2 1/2 inches, I find this testimony credible inasmuch as it has not been impeached or rebutted. Indeed it was essentially corroborated by the testimony of Mitchell. Due to the latter's expertise, I accord considerable weight to his testimony. I thus conclude that the cement blocks had been dipped into the Block Bond mixture, and then stacked.

Diagram No. MB-631(B) of the plan requires that "...all joints between blocks will be mortared." In evaluating the evidence before me with regard to the common meaning of the term "mortar" in the mining industry, I accord most weight to the testimony of Mitchell, due to the extent and breadth of his experience, and the fact that it is based upon the definition found in the American Society of Testing Materials (ASTM). He testified to that definition as follows: "The primary purpose of mortar in masonry is to bond masonry units into an assemblage which acts as an integral element, having desired functional performance characteristics. Mortar consists of a mixture of cementious material, aggregate, and water" (Tr. 224-225). According to the testimony of Mitchell, which was not rebutted or contradicted, Block Bond consists of portland cement, pulverized limestone, and alpha glass fibers and is used in surface bonding Mitchell testified that B-Bond (Block Bond) is a surface bonding mortar mix that, when mixed with water, becomes a mortar. According to Mitchell, the fact that there was a gap between the concrete blocks and that it was possible to insert a gauge about

2 inches, indicates the presence of mortar between the joints, as the only way that the gap could have occurred, was if rough material or mortar had been placed between the blocks. This opinion has not been rebutted or contradicted by Petitioner.

Based on the above, I conclude that there was B-Bond material in the joints between the concrete blocks, and that this material was mortar.

C. The Middle row of Cement blocks as the equivalent of Mandoseal.

It is Petitioner's position that the plan was not complied with inasmuch as Respondent did not fill the gap between the two eight inch thick walls of the seal with mandoseal, but instead constructed an 8 inch thick concrete block wall in that gap. The plan provides that the eight inch space between the walls is to be "...filled with mandoseal or eqiv... ."

Mitchell testified that mandoseal is a cementious material as it is comprised of portland cement, pulverized limestone, and vermiculite. He indicated that its compressive strength i.e., ability to withstand stresses, loads, and pressures, is between 100 and 350 pounds per square inch (psi). In contrast, a cement block has a compressive strength between 2,500 and 3,500 psi, and the compressive strength of Block Bond is between 3,000 and 3,500 psi. Accordingly, the middle wall in issue, comprised of cement blocks and mortared with Block Bond, had a compressive strength approximately 10 times as much as the compressive strength that would have been in effect had that area been filled with mandoseal. Also, Mitchell testified that block bond has an impulse load, i.e. the ability to withstand the sudden load of an explosion 10 to 30 times more than that of mandoseal. I accept the testimony of Mitchell with regard to the comparison of the concrete wall constructed by Respondent, and mandoseal, as it has not been either rebutted, contradicted, or impeached. I therefore conclude that the gap between the two outer block walls of the seals in question were filled with material more than the equivalent of mandoseal. Hence, the plan was not violated in this regard.

D. Dimensions of the Cement Blocks

Montgomery also asserted that the plan was violated inasmuch as Respondent used cement blocks that were 6 inches high 8 inches wide and 16 inches long. MB-631(B), relied on by Petitioner, does not stipulate the size of blocks to be used in constructing the seals. Specifically, the height of the blocks is not depicted. A side view of the seal wall in question depicts blocks 8 inches wide, which is the size utilized by Respondent herein. Similarly, the first line on MB-631(B) calls for "2, 8" solid concrete block walls" which would appear to indicate the

depth of the wall, or width of the block, inasmuch as the accompanying sketch is of the top view of the walls of the seal.

Mitchell indicated that in 1979, the year in which MB-631(B) was revised, the term "8 inch solid block walls" "might" have meant blocks of a dimension of 8 inches high, 8 inches wide, and 16 inches long (Tr. 254), but that he did not know what the practice was in the Mid-West. However, it was also his testimony that, utilizing a block 6 inches in height, 8 inches in width 16 inches long results in a "marked effect" on reducing back and finger injuries, because these blocks weigh 20 pounds less then those that are 8 inches high, 8 inches wide, and 16 inches long (Tr. 252). He also said that utilizing blocks 6 inches high instead of those 8 inches high does not reduce the strength of the structure "in any manner" (Tr. 252). Petitioner did not contradict, rebut or impeach this testimony. I thus conclude that the 8 inch wide, 16 inches long, 6 inches high blocks utilized by Respondent were not in violation of the plan.

E. Conclusions of Law

Therefore for all of the above reasons, I conclude that the construction of the seals in question did not violate the terms of the plan, and as a consequence Respondent did not violate 30 C.F.R. § 75.316 as charged.[4] Accordingly, Citation No. 3536483 should be dismissed, and the Section 104(b) Order No. 3536850 should also be dismissed.

ORDER

It is ORDERED that Docket Nos. LAKE 91-416 and LAKE 91-720 be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

Distribution:

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[4]I have considered to the arguments of counsel as set forth in their briefs. To the extent that these arguments are not consistent with my decision, they are rejected.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 23, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-372-M A. C. No. 45-03085-05504
v.	:	
WALLACE BROTHERS, Respondent	:	Portable Crusher

ORDER OF DISMISSAL

Before: Judge Merlin

On March 23, 1992, the Commission received a communication dated March 17, 1992, from the operator's counsel which was styled as a petition for review of a proposed assessment.

The petition sets forth the following:

1. On May 29, 1991, Wallace Brothers' portable crusher received Citation Nos. 3640554, 3640551 and 3640552.

2. On June 7, 1991, counsel wrote the MSHA District Manager requesting a safety and health conference and asking that all communications regarding these citations be sent to this office. [A copy of the June 7 letter was enclosed with the petition.]

3. MSHA did not provide the requested conference and counsel was never notified or sent copies of any communications regarding the citations.

4. In January, 1992, counsel was given copies of the Proposed Assessments by a representative of Wallace Brothers.

5. On February 3, 1992, counsel wrote the Civil Penalty Compliance Office requesting information and clarification about the citations and complaining that the requested conference had not been provided. [A copy of the February 3 letter was attached.]

6. On February 13, 1992, the Director of Assessments advised counsel that the assessment was final because it was not contested within 30 days and that if he wanted to know why the request for a conference was not granted, he should write the District Manager. [A copy of the February 13 letter was attached.]

For purposes of considering the petition at this stage the representations contained therein are accepted.

Section 105(a) of the Mine Act, 30 U.S.C. § 815(a), provides that an operator has 30 days after receipt of the proposed assessment to notify the Secretary that it wishes to contest the assessment. If a penalty is not contested within the allotted time, the proposed assessment is deemed to be a final order of the Commission not subject to review by any court or agency. This provision is repeated in section 2700.25 of the Commission's regulations, 29 C.F.R. § 2700.25 and section 100.7(b) and (c) of the Secretary of Labor's regulations, 30 C.F.R. § 100.7(b) and (c). Pursuant to section 105(d) of the Mine Act, 30 U.S.C. § 815(d), the Commission provides a hearing if the operator has notified the Secretary within the 30 days that it wishes to contest the proposed assessment.

According to the February 13 letter of the Director of Assessments, the proposed assessments in this case were received by the operator on October 29, 1991.[1] The operator took no action during the following 30 days. Indeed, it does not appear that the operator or its attorney has ever requested a hearing by sending back the return mailing card (commonly called the "blue card") which is provided by MSHA to operators along with the proposed assessment. Not until after the operator gave counsel the notice of delinquent civil penalty did counsel inquire about these citations in his letter of February 3, 1992.

The Act mandates that a penalty not contested within the allotted period the proposed assessment shall be deemed a final order of the Commission not subject to review by any court or agency. Energy Fuels Mining Company, 12 FMSHRC 1484 (July 1990). Northern Aggregates Inc., 2 FMSHRC 1062 (May 1980). Cf. J. P. Burroughs and Sons, Inc., 3 FMSHRC 854 (April 1981); Old Ben Coal Company, 7 FMSHRC 205 (February 1985); Local Union 2333, District 29, UMWA v. Ranger Fuel Corporation, 10 FMSHRC 612, 618 (May 1988); Peabody Coal Company, 11 FMSHRC 2068, 2092, 2093 (October 1989).

In this connection it must also be noted that a long line of cases going back to the Interior Board of Mine Operation Appeals has held that cases contesting the issuance of a citation must be brought within the statutory prescribed 30 days or be dismissed. Freeman Coal Mining Corporation, 1 MSHC 1001 (1970); Consolidation Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 2143 (1979), aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Rivco Dredging Corp., 10 FMSHRC 889 (July 1988); See Also, Peabody Coal Co., supra; and Big Horn Calcium, 12 FMSHRC 463 (March 1990). Accordingly, the time requirements for contesting the issuance of a citation and for contesting the penalty assessment which appear together in section 105(a), must be viewed as

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[1] The letter also shows that Citation No. 3640554 was not included in that assessment package. Therefore, this citation is not a part of this case.

jurisdictional. It is well settled that jurisdiction cannot be waived and can be raised by the court sua sponte at any stage of the proceedings. Insurance Corporation of Ireland, LTD, et al. v. Compagnie des Bauxites, 456 U.S. 694, 701-702 (1982); Athens Community Hospital, Inc. v. Schweiker, 686 F.2d 989 (D.C. Cir. 1982).

Counsel did not contact MSHA until almost eight months after he had requested a conference. Under 30 C.F.R. § 100.6(c) of the Secretary's regulations the decision whether or not to grant a conference is within the sole discretion of MSHA. The jurisdiction of the Commission is defined and limited by the Act. An administrative agency cannot exceed the jurisdictional authority granted to it by Congress. As the Commission has pointed out, several provisions of the Act grant subject matter jurisdiction by establishing specific enforcement and contest proceedings and other forms of actions over which the Commission presides. Kaiser Coal Company, 10 FMSHRC 1165, 1169 (September 1988). The Commission has been given no jurisdiction over MSHA's internal practices and procedures. Cf. Mid-Continent Resources, 11 FMSHRC 1015 (June 1989). Under circumstances far more compelling than those presented here, I have held that the Act and regulations afford no basis to excuse tardiness because the operator mistakenly believed it could pursue avenues of relief with MSHA before coming to this separate and independent Commission to challenge a citation. Prestige Coal Company, 13 FMSHRC 93 (January 1991).

Finally, operator's counsel alleges a denial of due process because communications regarding the subject citations were not sent to him as his June 7, 1991 letter to the District Manager requested. Counsel contends that his request complied with 30 C.F.R. § 41.30 which provides that operators may request service to another appropriate address. See also 30 C.F.R. § 41.20. Counsel, however, overlooks 30 C.F.R. § 100.8(b) which requires that if an operator chooses to have proposed assessments mailed to a different address the Office of Assessments must be notified in writing of the new address. Counsel failed to comply with 100.8(b) because he only wrote the District Manager rather than the Office of Assessments. Section 100.8 was designed to prevent just such a situation as this. Counsel is chargeable with knowledge of all applicable regulations.[2] Under the circumstances, service was proper and there is no basis for any extension.

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[2] It is noted that in his argument regarding the denial of a conference, counsel demonstrates his awareness of other sections of Part 100.

In light of the foregoing, I conclude that this case must be dismissed due to the operator's failure to timely request a hearing.

In light of the foregoing, it is **ORDERED** that this case be **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 23, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 91-301
	:	A. C. No. 46-01455-03823
v.	:	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Charles Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington Virginia, for Petitioner;
Walter J. Scheller, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: **Judge Merlin**

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Consolidation Coal Company under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820.[1]

Order No. 3314237 was issued under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), for an alleged violation of 30 C.F.R. § 75.303. A hearing was held on March 9, 1992 and the parties have filed post hearing briefs.

30 C.F.R. § 75.303, which restates section 303(d)(1) of the Act, 30 U.S.C. § 863(d)(1), provides in pertinent part:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground

[1] The penalty petition originally contained four proposed assessments three of which involved excessive history of violations and one which did not. By order dated November 25, 1991, the three assessments involving excessive history were removed from this docket and placed in a newly created Docket No. WEVA 91-301-A which was stayed pending a decision by the Commission. The instant case involves Order No. 3314237 which was not assessed pursuant to the excessive history criteria.

area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall * * * *

* * * *

examine and test the roof, face, and rib conditions in such working section * * * *

* * * *

and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require.

* * * *

Such mine examiner shall place his initials and the date and time at all places he examines.

* * * *

Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

(b) No person (other than certified persons designated under this § 75.303) shall enter any underground area, except during any shift, unless an examination of such area as prescribed in this § 75.303 has been made within 8 hours immediately preceding this entrance into such area.

30 C.F.R. § 75.2(g)(4) which restates section 318(g)(4) of the Act, 30 U.S.C. § 878(g)(4), defines "active workings" as follows:

Active workings means any place in a coal mine where miners are normally required to work or travel.

The subject Order No. 3314237, dated September 7, 1990, which is challenged herein, charged a violation for the following alleged condition or practice:

> Preshift examinations are not being conducted along the travelway of 5 Butt tailgate entry. Citation 3314222, dated 8-27-90, was issued due to a water build up in this travelway, and according to mine management and miners persons have been traveling into this entry to install waterlines and hoses since this date. Preshift examinations books do not indicate that there have been examinations. No dates or initials can be found throughout the area to prove that examinations have been made. Citation 3314230 dated 9-5-90 was issued along this travelway citing the hazards of slip, trip, fall hazards. Citation 3314236 dated 9-07-90 was issued for hazards related to the fall of roof at spad 8770 along this travelway.
>
> Three workers and a foreman were observed working along this travelway at approximately 1815 hours on 09-07-90. When questioned the foreman stated that he had not made a preshift examination of the area. While questioning other miners it was determined that at least 7 workers have been exposed to the above mentioned hazards without benefit of a preshift examination.

The inspector found that the violation was significant and substantial and that it resulted from an unwarrantable failure on the part of the operator.

As appears above, the challenged order is premised upon previously issued Citations Nos. 3314222, 3314230, and 3314236. Citation No. 3314222 dated August 27, 1990, charged an S&S violation of 30 C.F.R. § 75.305 for the following condition:

> The weekly examination for hazardous conditions for the longwall tailgate, 5 Butt section dated 8-21-90 is inadequate. All along this entry, approximately 5,000 feet long, there are slip, trip and fall hazards. Coal has sloughed into the walkway at several locations. Stopping No. 43, water has accumulated one to two feet deep for a distance approximately 100 feet inby and for a distance of approximately 300 feet outby. The water is one to one and half feet deep across the entry. At spad 868 the water is one to two feet deep for a distance of one to two feet deep and at spad 8626 one to two feet deep for approximately 200 feet. In the event of an emergency, rapid escape along this entry would be difficult. The inspection party took over 60 minutes to walk this entry.

Citation No. 3314230 dated September 5, 1990, charged an S&S violation of 30 C.F.R. § 75.305 for the following condition:

> Hazards exist in the 5 Butt longwall section tailgate entry that have not been corrected immediately. At marker number 42 + 80 there is a water hole rib to rib approximately 80 feet long and from 1 to 2 feet deep. The bottom is irregular with some mud and some coal sloughage. The bottom cannot be seen through the water and slip, trip, fall hazards exist. Weekly mine examiners travel this entry weekly.

Finally, Citation No. 3314236 dated September 7, 1990, charged an S&S violation of 30 C.F.R. § 75.202(a) for the following condition:

> The roof at spad 8770 and the 5 Butt section tailgate entry is not controlled to protect persons from the hazards related to falls of the roof. Loose drummy top has fallen out on both sides of the crib provided exposing loose drummy roof. The boards provided with roof bolts have been bent from the weight of the roof. Persons are working out by this area and indications are that they travel under this roof enroute to work.

Prior to going on the record, the parties agreed to the following stipulations (Tr. 3-4):

(1) The operator is the owner and operator of the subject mine;

(2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

(3) I have jurisdiction in this case;

(4) the inspector who issued the subject order was a duly authorized representative of the Secretary;

(5) a true and correct copy of the subject order was properly served upon the operator;

(6) a copy of the subject order is authentic and may be admitted into evidence for the purpose of establishing issuance but not for the purpose of establishing the truthfulness or relevancy of any of the statements asserted therein;

(7) payment of any penalty will not affect the operator's ability to continue in business;

(8) the operator demonstrated good faith abatement;

(9) the operator has an average history of prior violations for a mine operator of its size;

(10) a section 104(d) chain has been established and is not in issue;

(11) Citation Nos. 3314222, 3314236 and 3314230 were not contested by the operator. They have been paid and are final with respect to all matters contained therein.

The size of the operator was inadvertently overlooked at the hearing. In a post-hearing telephone conference call on April 13, 1992, counsel for both parties agreed the operator's size is large.

At the hearing the inspector described the conditions which caused him to issue the three citations prior to the 104(d)(2) order which is the subject of this action. He testified that on August 27 he found several water holes in the tailgate entry as described in the citation of that date (Tr. 31-33). Although the tailgate entry was not a designated primary or alternate escapeway, the inspector said it was an escape route off the longwall face in the event of a fire somewhere along the face which made it impossible for miners to exit through the headgate (Tr. 34-36). The water condition continued after August 27 (Tr. 36). On September 5, as set forth in the second citation, the inspector again found a violation due to a water hole, irregular bottom and coal sloughage in the entry (Tr. 36-37). The water condition changed at the various times and the area of water was smaller on the 5th than it had been on the 27th (Tr. 61-62). Finally, on September 7 the inspector issued a third citation which was for bad roof and inadequate roof support (Tr. 58-59). As appears in Stipulation No. 11, supra, these three citations were not contested and therefore, the conditions cited therein and the fact that they were significant and substantial are accepted as true for purposes of this case.

The inspector testified that he issued the subject citation because he concluded that pre-shift examinations were not being made in the tailgate entry where persons had been working installing waterlines and pumping (Tr. 38). He cited the operator for the times persons were sent into the tailgate entry to pump water without the benefit of a pre-shift examination (Tr. 65). The water conditions on the 7th when he issued the subject order were similar to what they had been on the 5th (Tr. 62). He believed the miners were subject to danger from both the bad roof and from slipping and falling because the pre-shift examination pursuant to which these hazards would have been observed and reported, was not performed (Tr. 60-61).

Section 75.303, quoted supra, requires that there be a pre-shift examination in "active workings" of a mine. Section 75.2(g)(4) also quoted above, defines "active workings" as any place in a coal mine where men are normally required to work or travel. The inspector took the position that the entire tailgate entry was "active workings" because extensive water in that entry which had existed for several days, created a substantial job for workers who went in there to install pumps and waterlines, pump water and move the compressor (Tr. 82-83). According to the inspector this work, which mine management knew needed to be done, had to be performed not just on an intermittent basis (Tr. 83). On the day the inspector issued the order people were in the area working, pumping water or moving waterlines and pumps (Tr. 66).

In the same vein is the testimony of a miner whose regular job at the time was pumper (Tr. 120-131). He stated he had been working in the area since the original violation for water was issued on August 27 (Tr. 124). He was on the afternoon shift and every day that he was present, he worked in that area and had numerous conversations, almost on a daily basis, with the mine foreman about the water condition (Tr. 124-125, 127). He said there was an average of two to five people pumping water and moving pumps and lines (Tr. 125). He had never seen evidence of a pre-shift examination (Tr. 130).

The mine foreman testified that he recalled putting men to work in the area to abate the water condition but did not remember specific shifts or assignments (Tr. 182). He stated men were not working on that problem every shift every day, but that men were there off and on at different times (Tr. 193). The only shift he could guess when they worked there regularly was the midnight shift (Tr. 193). He could not say men were not down there on occasion during other shifts (Tr. 194).

Based upon the foregoing, I find that the tailgate entry in this case constituted "active workings" of the mine. As the testimony of the inspector and the pumper makes clear, correction of a long-standing water problem required miners to normally work and travel in the area. In addition, although the operator's mine foreman did not think men were in the area on every shift and although he differed with the pumper with respect to which shift was involved, his testimony, like that of the others, demonstrates that miners were in the tailgate entry on a regular basis to eliminate the water. In order for miners to normally work or travel in an area they need not be there all the time. I agree with the inspector that a pre-shift examination was necessary to warn the miners before they entered the mine and went to the area where there were slipping, falling and tripping hazards created by the water (Tr. 65). In sum therefore, I decide that where there is an ongoing condition of several days duration which is known to the operator and which poses dangers to miners

who are normally working and travelling in the area in order to abate the condition, the area is "active workings" which must be pre-shifted pursuant to 30 C.F.R. § 75.303.

This determination is consistent with the Commission's decision in Southern Ohio Coal Company, 12 FMSHRC 1498 (August 1990). In that case it was held that an accumulation of loose coal existed in "active workings" when it was located at the intersection of the longwall face and the tailgate entry and extended 18 feet down the tailgate. The Commission noted that the tailgate entry was required to be examined weekly and that because the entry was a designated escapeway it was in fact, checked more often. Accepting evidence that miners did not normally work in the area, the Commission pointed out that the definition of "active workings" also applies to areas where miners were required to travel. In this connection the presence of a ventilation curtain maintained at the outby end of the accumulation was deemed relevant because men were normally required to travel in the area to move the curtain as the face advanced. The evidence in the instant case is even stronger than in Southern Ohio in support of a finding that the tailgate entry was an "active workings". Here miners were not only required to engage in normal travel in the entry, but in addition it was necessary for them to work there on a continuous basis to abate the water condition.

A different conclusion, however, obtains with respect to the roof condition concerning which the inspector also decided a pre-shift examination was required. Although this violation also occurred in the tailgate "active workings", the time frame applicable to it does not support the conclusion that a pre-shift examination should have been done. The roof condition was cited for the first time just 30 minutes before the subject 104(d)(2) order was issued. The inspector testified that the roof condition he saw usually develops over a day or two, but he did not see it when he was in the area two days previously on September 5 (Tr. 102, 118). The inspector admitted he did not know when the roof became bad or how long it existed before he saw it (Tr. 103-104). It could have occurred in an hour or two and it was even possible it occurred between the time the pre-shift would have been done and the time the inspector saw it (Tr. 117-118). Citing the operator for not performing a pre-shift with respect to the roof condition was therefore, not warranted and that part of the order concerning failure to pre-shift for the roof condition must be vacated.

Turning again to the water condition, it next must be determined whether the required pre-shift was performed in the tailgate entry with respect to that condition. The mine foreman testified that he walked the tailgate toward the end of the shift during the time a pre-shift would be performed (Tr. 184). However, the purpose of his walk was not to pre-shift, but to see

what was needed to abate the water condition in a specific location (Tr. 185, 187-188). As set forth, supra, one of the requirements of § 75.303 is that upon completing his examination, the pre-shift examiner report out the results of his examination to a person on the surface designated to receive such a report before the oncoming shift enters the mine. The foreman admitted he did not call out the results of his examination (Tr. 188). His entry in the pre-shift book was made about 5 or 5:30 p.m., after the next shift had begun and after the inspector had looked in the book and gone underground (Tr. 188-190). Therefore, the mine foreman's actions cannot be accepted as a pre-shift within the purview of § 75.303.

Another requirement of § 75.303 is that the pre-shift examiner place his initials and the date and time at all places he examines. The foreman testified that he placed dates, times and initials at different locations along the tailgate entry, but he could not remember where (Tr. 195-196). I reject the foreman's account, because I find far more persuasive the statements of both the inspector and the miner representative that they looked for dates, times and initials, throughout the entry but found none (Tr. 64, 139). The inspector described how he looked on crib blocks, headers and other evident places (Tr. 55-56). He said that although he was accompanied by an operator escort and met the longwall foreman, no one showed him any dates, times or initials to prove the entry had been examined (Tr. 107). Most telling was the detailed account of the miner representative. He accompanied the inspector and related that he and the operator escort checked around one side of the crib while the inspector checked the other side. They also looked in between the cribs without finding any dates, times and initials for the day they were looking (Tr. 140, 145-146). I also accept the miner representative's statement that it was standard practice for everyone to look for dates, times and initials and that the operator escort also was looking (Tr. 141). The operator escort's allegation that he did not remember whether or not he looked is far less direct and convincing than the recollections of the miner representative (Tr. 154). The operator escort knew the inspector was looking for dates, times and initials and he must have realized that in order to avoid a violation they would have to be found. Consequently, it makes sense that, as the miner representative said, the operator escort looked for the dates, times and initials along with the others. In accordance with the great weight of the evidence, therefore, I find that there were no dates, times and initials for the pre-shift on September 7 and that for this reason also the mine foreman's walk through the entry also failed to satisfy § 75.303.

The onshift records indicated that the inby portion of the tailgate extending approximately 200 feet from the end of the

longwall face to the check curtain was regularly examined during the period when a pre-shift would have been performed (Op. Exh. No. 1, "B" to "H"; Op. Exh. No. 2; Tr. 159-160). Cf. Southern Ohio Coal Company, supra. The inspector acknowledged that examinations in this limited portion of the tailgate were made during the time a pre-shift would have been conducted (Tr. 210-211). But here again, the requirements of § 75.303 were not met because, as set forth above, there were no dates, times and initials entered anywhere in the entry. Also there was no calling out of the report to the surface in accordance with § 75.303.

Nor did the onshift activities of the section foreman satisfy the requirements of § 75.303. He described how he walked down the tailgate to the waterhole, made a couple of methane checks, and checked the top (Tr. 174). He then went back up the tailgate and the men started bringing the necessary supplies across the longwall face down the tailgate to the waterhole (Tr. 175). The foreman himself admitted his activities did not constitute a pre-shift because in order to do a pre-shift he would have had to have been on the preceding day shift (Tr. 176-177). Also, it is evident that the principal purpose of the section foreman's onshift was to determine what equipment and supplies were necessary to work on the water at the specific location rather than to warn and protect the men in advance from hazards present along the tailgate.

In light of the foregoing, I conclude that the operator violated 30 C.F.R. § 75.303 by failing to conduct a pre-shift in accordance with the requirements of that mandatory standard with respect to the water conditions in the tailgate entry. Quinland Coals Inc., 9 FMSHRC 1614, 1619 (1987).

The next issue is whether the violation was "significant and substantial" as that term has been defined by the Commission. Mathies Coal Company, 6 FMSHRC 1 (January 1984). As already noted, the findings in the prior citations that the water conditions presented a significant and substantial risk of slipping, falling and tripping, are final and conclusive. I conclude that the failure to find, record and report these conditions pursuant to a valid pre-shift examination also presented a reasonable likelihood of serious injury. I again find relevant the inspector's testimony that because there had been no pre-shift the miners were not warned of the slipping, falling and tripping hazards presented by the water (Tr. 65). The continual presence of miners in the area to repair the situation and the changing nature of the water conditions from hour to hour created a reasonable likelihood of serious injury if the miners were not informed before they went underground of the perils that awaited them there. I further conclude that the activities of the mine foreman and the section foreman in the entry cannot serve to reduce gravity below the level of significant and substantial.

As described above, the intent and scope of those activities were limited and in no way provided the level of protection afforded by a pre-shift under § 75.303. The inspector's finding of significant and substantial must be affirmed and the violation is found to be very serious.

The final question is whether the violation resulted from unwarrantable failure on the part of the operator. The Commission has defined unwarrantable failure as conduct not justifiable and inexcusable and the result of more than inadvertence, thoughtlessness, or inattention. The term is construed to mean aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2001 (December 1987). As set forth above, the water condition had existed for several days and was known to the operator during the entire period. Nevertheless, the operator persistently sent miners to work in the affected area without affording them the protection and security of pre-shift examinations. Because of the long duration of time involved and the repeated instances where the operator's failure to pre-shift knowingly exposed its men to danger, I find that the operator's cited delinquency on September 7 was aggravated within the meaning of Commission precedent and that, therefore, the operator was guilty of unwarrantable failure.

The remaining criteria with respect to the amount of the civil penalty to be assessed have been stipulated to by the parties. I find that a penalty of $1,250 is appropriate.

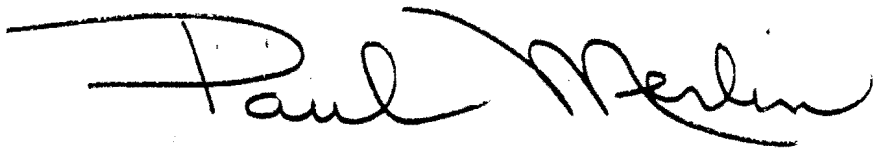
The post-hearing briefs filed by the parties have been reviewed. To the extent the briefs are inconsistent with this decision, they are rejected.

ORDERS

It is **ORDERED** that Order No. 3314237 be **MODIFIED** in that the finding of a violation be **VACATED** with respect to the failure to pre-shift for the roof condition and **AFFIRMED** for all the remaining aspects of the conditions cited.

It is further **ORDERED** that the findings of significant and substantial and unwarrantable failure be **AFFIRMED**.

It is further **ORDERED** that a penalty of $1,250 be **ASSESSED** and that the operator **PAY** $1,250 within 30 days of the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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THE FEDERAL BUILDING
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DENVER, CO 80204

APR 24 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 91-176-M A.C. No. 29-01433-05523
v.	:	Grefco Plant and Quarry
GREFCO, INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Morris

This is a civil penalty proceeding initiated by Petitioner against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil penalty sought here is for the violation of a mandatory regulation promulgated pursuant to the Act.

Prior to a hearing, the parties filed a motion and agreed that the "significant and substantial" allegations be stricken. The parties further submitted information relating to the statutory criteris for assessing civil penalties as contained in 30 U.S.C. § 820(i).

In addition, the parties agreed to settle Citation No. 3448926, originally assessed for $192, for the sum of $20.

I have reviewed the settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement is **APPROVED.**

2. Citation No. 3448926 and the amended penalty are **AFFIRMED.**

3. Respondent is **ORDERED TO PAY** to the Secretary of Labor the sum of $20 within 40 days of the date of this decision.

4. The hearing scheduled in Denver, Colorado, for May 22, 1992, is **CANCELED**.

John J. Morris
Administrative Law Judge

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APR 27 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 91-130-M A. C. No. 14-00164-05511
v.	:	
WALKER STONE COMPANY, INC., Respondent	:	Kansas Falls Quarry & Mill

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. David S. Walker, President, Walker Stone Company, Inc., Chapman, Kansas, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

In this docket, the Secretary seeks a civil penalty of $112 for a single alleged violation of the mandatory safety standards. Pursuant to notice, a hearing was held on the alleged violation in Topeka, Kansas, on November 26, 1991. No provision was made on the record for posthearing briefs and none were submitted. I have considered the entire record of proceedings in this case and the contentions of the parties, and I make the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. Walker Stone Company, Inc., is engaged in the mining and selling of limestone in the United States, and its mining operations affect interstate commerce.

2. Walker Stone Company, Inc. is the owner and operator of Kansas Falls Quarry and Mill, MSHA I.D. No. 14-00164.

3. Walker Stone Company, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Walker Stone Company, Inc. on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Walker Stone Company, Inc. and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect Walker Stone Company, Inc.'s ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

9. Walker Stone Company, Inc. is a small size mine operator with 67,187 hours worked in 1990.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the 2 years prior to the date of the citation.

DISCUSSION

Section 104(a) Citation No. 3629335 was issued to the operator on March 14, 1991, cites a violation of 30 C.F.R § 56.11001 and the condition or practice states as follows:

> A safe means of access had not been provided for the crusher operator to access the head pulley drive assembly located at the top end of the inclined stacking conveyor that extended southwest from the primary crusher location. Access to this location is necessary to lubricate the head pulley assembly.

Inspector Quartaro, who issued the subject citation, was the Secretary's sole witness at the hearing. He testified that upon his arrival at the operator's quarry on the morning of March 14, 1991, he observed the primary crusher operator coming down the conveyor belt, walking on the belt line itself. This belt was approximately 24-30 inches wide and 100 feet long from the head pulley assembly to the place where the man would be able to get off it. It is inclined at 18 degrees.

MSHA's policy is that it is permissible to use the conveyor belt as an access to the head pulley assembly if there is a handrail along the side for the worker to hang on to while he is walking up and down it. In this particular instance, there were no handrails installed on either side of the belt line. The inspector opined that there was no protection whatsoever offered to the person walking on the belt that would prevent him from falling off the belt and sustaining a serious injury.

The operator, by and through its President, Mr. Walker, admits the fact of the violation, and has since installed such a handrail to abate the violation. However, the operator contests the inspector's special finding of "significant and substantial" (S&S).

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the

language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The inspector testified that if a person in the vicinity of the head pulley assembly were to fall from the belt line at that point, it would be approximately a 25 foot fall to the ground. The distance above the ground decreases from there sloping downward at 18 degrees until the point where a person could exit off the belt. Also, the inspector focused on the fact that wind conditions could adversely affect an individual walking up or down an inclined belt line. A gust could blow him off or at least cause him to lose his balance and fall off. Such an accident occurred at this quarry in 1990, when an employee standing on a stacker screen 8-10 feet high off the ground was blown off by a gust of wind. He was knocked unconscious for a short time, broke his collar bone and dislocated his shoulder.

The same result is easily foreseeable in the facts of this case. The mere fact that it hasn't happened yet, does not mean that it would not have occurred had the violative condition remained unabated. I visited the mine site with the parties and observed the cited inclined stacking conveyor. I concur with the inspector that without a handrail installed, just as he saw it on March 14, 1991, it was reasonably likely that a worker could have lost his balance and fallen. This could obviously have resulted in serious injuries. Witness what happened previously at this quarry in an 8-10 foot fall to the ground. I therefore conclude that the violation was significant and substantial.

In light of the criteria in section 110(i) of the Mine Act, I conclude that $112, as originally proposed by the Secretary, is an appropriate penalty for the violation and will be assessed herein.

ORDER

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

1. Citation No. 3629335 **IS AFFIRMED**, including the special finding that the violation was significant and substantial.

2. The Walker Stone Company, Inc. pay a civil penalty of $112 within 30 days of the date of this decision for the violation found in Citation No. 3629335.

Roy J. Maurer
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

APR 27 1992

METTIKI COAL CORPORATION, Contestant	:	CONTEST PROCEEDING
	:	Docket No. YORK 89-10-R
v.	:	Citation No. 3110188; 11/1/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mettiki Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 89-26 A. C. No. 18-00621-03659
v.	:	Mettiki Mine
METTIKI COAL CORPORATION, Respondent	:	

ORDER OF DISMISSAL

The Secretary's motion to dismiss, being unopposed by Mettiki, is GRANTED, and these proceedings are DISMISSED.

William Fauver
Administrative Law Judge

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APR 28 1992

CHARLES T. SMITH, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 90-30-D
v.	:	BARB CD 89-27
KEM COAL COMPANY, Respondent	:	

DECISION ON REMAND

Before: Judge Fauver

The Commission has remanded this case "for further credibility findings and for analysis and explanation of the bases for [the judge's] ultimate conclusions regarding the nexus between Smith's protected activity and his discharge by Kem Coal."

The Commission directs the judge "to resolve the factual issues we have raised and to determine anew, by applying the Pasula/Robinette test, whether Smith has established a prima facie case of discrimination" and if so, to "determine whether Kem Coal has rebutted that case, or has affirmatively defended against it by demonstrating that it would have discharged Smith, in any event, for his unprotected activity alone."

In particular, the Commission directs the judge to "set forth the evidentiary bases for the first three elements of Halcomb's distorted account," as found by the judge. [1]

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[1] The Commission describes the four elements of my finding that Halcomb gave a distorted account of the facts to Cox as follows:

> "(1) that, knowing Cox to be a practicing pastor, Halcomb told him that Smith had used a religious epithet;
>
> "(2) that Halcomb failed to tell him that Smith immediately apologized;
>
> "(3) that Halcomb told Cox that Smith swore at him in front of the crew; and
>
> "(4) that Halcomb failed to inform Cox that Smith had

The Commission states that there are "several possible explanations" for Cox's mistaken belief that others were present when Smith swore at Halcomb and, although it does "not second-guess the judge as to the most plausible explanation ... , it is necessary for purposes of 'meaningful review' to know the reasons or bases for the judge's conclusion on this critical issue." The Commission also states that the there are "critical differences in the testimony of Smith and Cox" that should be resolved.

The parties have filed proposed findings of fact, conclusions, and supporting briefs based on their understanding of the remand issues raised by Commission.

It appears from the parties' submissions that they may be assuming that the Commission exercises de novo review of the factual findings of an administrative law judge. It is therefore important to clarify, at the outset, the standard for agency review under this statute.

As stated by the Court of Appeals in Simpson v. FMSHRC, 842 F.2d 453, 461 (D.C. Cir. 1988):

> The Mine Act denies the Commission (and on judicial review, this court) authority to overturn an ALJ's fact determinations ... when those determinations are supported by substantial evidence.

Thus, agency review of an administrative law judge's decision under the Federal Mine Safety and Health Act is not de novo. Hicks v. Cobra Mining, Inc., 13 FMSHRC 523, 533 (1991); Simpson v. FMSHRC, 842 F.2d 453, 461 (D.C. Cir. 1988); Donovan v. Phelps Dodge Corp., 709 F.2d 86, 90-92 (D.C. Cir. 1983). A Commission judge's factual findings are binding if supported by substantial evidence, and the Commission may not substitute a competing version of the facts, "even if the Commission's own view [also finds] support in the evidence."709 F.2d at 92. Findings covered by this rule include not only past actions, but "predictions about operator conduct" (842 F.2d at 461).

Demeanor Evidence

There are, of course, many things that a trial judge observes that do not appear on the printed record. The appearance of witnesses and their manner of testifying greatly aid the judge in determining the credibility of witnesses and the weight to be given to competing versions of the facts.

Beyond the printed words of a transcript, the value of

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threatened to take his complaint to MSHA."

physical and behavioral clues should not be minimized. Printed words, unaccompanied by observation of the witnesses, can be very misleading. The truthfulness or deception of a witness may be indicated by well recognized physical and behavioral clues, as well as by changes in meaning due to phonetic emphasis, sarcasm, or other nuances.

Such clues include changes and contradictory signs in facial expressions, the eyes, the voice, and body language which may be perceived by an observer at the subconscious as well as the conscious level. They also include "microexpressions":

> Some of the most reliable clues to emotion thus come from the so-called "microexpression." This is a complete facial expression that correctly conveys the underlying emotion, but only for a fleeting instant. As soon as it appears it vanishes, replaced by some other expression more nearly in accord with the emotion the subject wishes to portray. Microexpressions, or fragments thereof, do not always occur when someone is trying to mask an emotion. But when they do, they are extremely reliable. [2]

As a general matter, it does not seem practical or desirable for trial judges to try to specify the observations and impressions of a witness' appearance or demeanor, or other physical and behavioral clues to truth or deception that influenced their factual findings. Such findings are based on observations at the subconscious (intuitive) as well as the conscious level, and involve many impressions that could never be fully articulated. However, since the Commission has pointed to my finding of Cox's sensitivity to the words "God damn" as requiring more explanation, I discuss some of my observations of Cox under the first issue below.

My findings and conclusions are included in the discussion of each issue.

Cox's Mistaken Belief that Smith Used a Religious Epithet

My impressions and observations of Cox as a witness, including his words, the inflection of his voice, changes in the speed of his speaking, his facial expressions, posture, and his general body language - - in short, the totality of his impressions on me during his examination as a witness - - persuade me that this plant superintendent who was also an active ordained minister found particularly objectionable the words "God damn." I observed him carefully as he testified, and I

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[2] Passions Within Reason, Robert H. Frank (W. W. Norton and Company, Inc. NY 1988), 125-126.

particularly noted his voice tone, facial expressions and body language as he used the initials "G.D." instead of repeating Halcomb's actual words and explained his use of initials by saying, "I hope you'll respect me for that" (Tr. 71). I do not find in any sense that Cox viewed these words as just "garden variety" miners' talk. Many aspects of his verbal and non-verbal behavior convinced me that Cox viewed those words as blasphemous, and thus particularly insulting and offensive. I find that the two and a half years' association between Cox and Halcomb was ample time for Halcomb to have come to know this aspect of Cox, and to believe, or reasonably expect, that Cox would consider a miner's use of the words "God damn" highly objectionable, especially in a public insult or rebuke of his foreman.

I give full weight to Smith's testimony, as opposed to that of Halcomb and Cox, as to what was said between Smith and Halcomb and between Smith and Cox. There are no conflicts between the testimony of Cox and that of Smith that I resolve in favor of Cox. [3] Indeed, when Cox testified that he thought Collins had said he heard Smith swear at Halcomb (Tr. 64), I find that Cox was mistaken. The reliable evidence shows that Smith and Halcomb were alone when Smith swore at Halcomb, and that no one else heard them.

I do not find that Smith "admitted" to Cox that he had used the words "God damn." If Cox thought that, I find this was a miscommunication or one-sided interpretation by Cox and was not so understood by Smith. I credit Smith's testimony that he had not used those words (Tr. 182) and that the first time he learned that the words "God damn" had been attributed to him was when he saw the company report of his discharge after he was fired. Tr. 27-28. Cox's misunderstanding of Smith on this point does not detract from the significance of Halcomb's false account. Halcomb added the words "God damn" to the remarks he attributed to Smith. This false addition was detrimental to Smith. Its effect on the discharge is discussed under "Nexus," below.

Cox's Mistaken Belief that Others were Present When Smith Swore at Halcomb

Cox believed, based solely on Halcomb's account, that Smith had sworn at Halcomb, invoking God, in front of members of Halcomb's crew. Cox did not derive this belief from anything said by Smith, because Cox had already decided, after talking to Halcomb and to Cox's supervisor before he saw Smith, that if Halcomb's account of the incident were true, Cox "had no choice

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[3] I reconcile the difference in their testimony as to whether Cox was told by Smith that Smith had apologized to Halcomb, under the "Apology" issue, below.

but to let him go" (Tr. 44) and the reason for that decision was that Smith had "called Henry [Halcomb] these names in front of Henry's people that he had to manage and ... it placed him in a very bad position." Tr. 63. Cox testified that the only thing left to do -- after he talked to Halcomb and Cox's supervisor -- was to see if Smith denied Halcomb's account: "if he denied it, then we would have brought in the other guys and discussed the situation" (Tr. 45). This plainly shows that Cox believed, solely from Halcomb's account, that there were "other guys" present when Smith swore at Halcomb. Also, Cox told Smith that Smith's brother (who actually was nowhere in the area) heard Smith swear at Halcomb. Tr. 28. Since Halcomb was the only witness Cox spoke to before he saw Smith, Cox had to have gotten this false account from Halcomb. Finally, Cox was asked these simple and direct questions:

> Q. 36 You went under the opinion that this argument that transpired between Tom and Henry, when the words were spoken, there were other people present at that time?
>
> A. Yes
>
> Q. 37 Is that what Henry told you?
>
> A. Later on, other people came to me and rehearsed to me the seriousness of the situation, yes. [Tr. 63-64.]

Considering the way in which this last answer was delivered, as well as the total impressions made by Cox as a witness, and the record as a whole, I find that the "yes" in his answer refers to Halcomb -- that is, Cox's answer meant "Yes, Halcomb told me Smith had cursed him in front of others." Cox never contended otherwise. Halcomb's false account to Cox that others were present when Smith swore at Halcomb was detrimental to Smith.

Halcomb's Failure to Tell Cox that Smith Stated He Would Report Halcomb's Unsafe Practices to MSHA

In the safety dispute with Halcomb, Smith told him he would take his complaint to MSHA: "I told Henry that this putting me in a[n] unsafe condition was going to stop, and he said it wasn't unsafe. That's when I told him that I was going to have to let the Mine Safety and Health Administration find out what he was doing." Tr. 35. Halcomb angrily told Smith not to threaten him.

In Halcomb's account to Cox, he omitted the fact that Smith said he would report Halcomb's unsafe practices to MSHA.

Respondent contends that since Halcomb told Cox that Smith had raised a safety complaint, there was no discriminatory motive

in this omission. However, a foreman's personal liability for safety violations cannot be dismissed. Such penalties can be substantial, and MSHA has prosecuted many cases against foremen under § 110(c) of the Act. Halcomb's anger over Smith's statement that he would report him to MSHA was an animus factor that Cox did not know about in accepting Halcomb's account of the facts. Concealing this factor had the effect of concealing from Cox an illegitimate motive for Halcomb's adverse actions, and of trying to minimize the weight of Smith's safety complaint, which was another illegitimate motivating factor. This omission contributed to Halcomb's overall "laundering" of his account to Cox in order to achieve Smith's dismissal.

Halcomb's Failure to Tell Cox that Smith Apologized

Smith immediately apologized to Halcomb after swearing at him, but Halcomb responded, "It's already been said now" (Tr. 29), and suspended Smith without pay with referral to Cox for further discipline. Halcomb's report to Cox omitted the important fact that Smith had immediately apologized for his outburst. Smith testified that he told Cox that he had apologized to Halcomb (Tr. 36), but Cox did not recall hearing this (Tr. 63). The testimony of both Smith and Cox on this point is reconciled by the fact, which I find, that Smith made the statement to Cox that he had apologized but his statement did not register in Cox's attention or memory. Halcomb's omission of the apology was detrimental to Smith.

The Nexus Between Smith's Protected Activities and His Suspension Without Pay and Discharge

Under the Commission's Pasula/Robinette [4] test, a miner has the burden to prove that he was engaged in protected activity and that the adverse action complained of was "motivated in any part" by that activity.

Smith's safety complaints to Halcomb before July 15, 1989, and on that date, including his statement that he would report Halcomb's unsafe practices to MSHA, were all protected activities.

I find that Halcomb was angered at Smith's safety complaints, and Smith's statement on July 15, 1989, that he would report Halcomb's unsafe practices (endangering Smith's life) to MSHA. Halcomb angrily told Smith not to threaten him, before

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[4] Secretary o.b.o. Pasula v. Consolidation Coal Co., FMSHRC 2786, 2797-2800 (1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary o.b.o. Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (1981).

Smith swore at him. Halcomb first tried to dodge the truth of the complaint with a "hearsay" device. When that failed, he flatly contradicted Smith's truthfulness. In effect, Halcomb was calling Smith a liar; and Smith, knowing the truth of his complaint, took great offense and swore at Halcomb, although he immediately apologized. Halcomb refused to accept his apology. This series of events was immediately and intimately connected with Smith's safety complaint. [5]

Halcomb had a disposition to bully, taunt and abuse Smith. [6] This showed a readiness to retaliate against Smith should Smith anger him or challenge his orders or actions on any basis. I find that Halcomb was angered by Smith's safety complaints and his statement that he would take his safety complaint about Halcomb to MSHA, as well as by Smith's swearing at him. Because of his anger, Halcomb retaliated by suspending Smith without pay and referring the matter to Cox for further discipline. Halcomb's retaliation was motivated by Smith's protected activities as well as by Smith's swearing at Halcomb.

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[5] Smith swore at Halcomb because Halcomb upset him by first confounding Smith with a "hearsay" device to evade his safety complaint and then flatly contradicting the truthfulness of the complaint. The heart of Smith's safety complaint was that Smith had told Halcomb, through the radio operator, of his dangerous situation (working under falling coal) but Halcomb ordered him, through the radio operator, to "go ahead and run it" (Tr. 187). On July 15, 1989, Halcomb answered Smith's safety complaint by raising a "hearsay" technicality to evade the complaint - - contending that Halcomb's words conveyed through a radio operator were only "hearsay" and could not prove a safety complaint against him. Smith countered with the point that it was not "hearsay" because the radio operator had the job duty of transmitting orders from Halcomb to Smith. Halcomb seemed to be troubled by Smith's removal of the "hearsay" claim, and decided to end the complaint by contradicting Smith's truthfulness altogether, saying, "No, it didn't happen that way" (Tr. 24). This was the final straw for Smith, who blurted out, "You're a lying son of a bitch", and then immediately apologized (Tr. 24). But for Smith's protected activity of raising the safety complaint, and Halcomb's conduct in dodging the complaint and then flatly contradicting Smith's truthfulness, it cannot be reasonably inferred that the safety dispute would have reached the point of Smith swearing at Halcomb.

[6] Halcomb had a practice of bullying Smith and an abusive, retaliatory attitude toward Him. He taunted and belittled Smith on a frequent basis -- ordering him to make coffee, accusing him, a married man with children, of flirting with a married cashier at a grocery store and taking a young girl in his truck implying improper motives, depriving him of lunch breaks, ignoring his safety complaints, and subjecting him to danger.

I find, from the totality of Halcomb's distortions of the incident he reported to Cox, that he discriminated against Smith, and this discrimination resulted in Smith's discharge. These distortions were: (1) that Smith used the words "God damn," (2) not telling Cox that Smith had immediately apologized, (3) that Smith swore at Halcomb in the presence of members of Halcomb's crew, and (4) not telling Cox that Smith stated he would report Halcomb's unsafe practices to MSHA.

Wholly apart from Halcomb's giving a discriminatory, distorted account to Cox, I find that Halcomb discriminated [7] against Smith by suspending him without pay and referring the matter to Cox for further discipline. These acts in themselves were retaliatory, motivated in part by Smith's protected activities, and they led to his discharge. By refusing to accept Smith's apology and suspending him without pay with referral to Cox for further discipline, Halcomb acted from an animus toward Smith motivated both by Smith's protected activities and by Smith's swearing at him. I do not accept Halcomb's testimony that he was not motivated in any part by Smith's protected activities.

I find that a preponderance of the substantial, reliable, and probative evidence established a prima facie case of discrimination by Respondent against Smith, in violation of § 105(c) of the Act, based on the following elements: (1) Motivated in part by Smith's protected activities, Halcomb discriminated against Smith (A) by suspending him without pay and referring the matter to Cox for further discipline and (B) by giving a distorted account to Cox of what had occurred between Smith and Halcomb; (2) Halcomb's discriminatory acts led to Smith's discharge; (3) since Halcomb was a supervisor, his discrimination is imputed to Respondent; (4) wholly apart from element (1)(B), above, Halcomb (and therefore Respondent) discriminated against Smith by suspending him without pay and referring the matter to Cox for further discipline, because these acts were motivated by Smith's protected activities as well as by Smith's swearing at Halcomb, and they led to Smith's discharge.

Respondent did not rebut Smith's prima facie case by any reliable evidence that there was no protected activity or that Halcomb's retaliatory actions were not motivated in any part by Smith's protected activities.

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[7] "Discrimination" includes adverse action and any other conduct detrimental to the miner's employment relationship, if motivated in any part by protected activity. Hecla-Day Mine Corp., 6 FMSHRC 1842 (1984).

Affirmative Defense

Under the Pasula/Robinette test, if the operator fails to rebut a prima facie case, it may still affirmatively defend against the prima facie case by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone.

The Commission's test of an affirmative defense is adopted from an NLRB construction that the Supreme Court has found to be a permissible agency rule. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983); NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). To establish the affirmative defense, the employer has the burden of proving "by a preponderance of the evidence" that "absent the improper motivation he would have acted in the same manner for wholly legitimate reasons." NLRB v. Transportation Management Corp., Inc., supra, 462 U.S. at 401.

In approving assigning the burden of proof to the employer, the Supreme Court stated:

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing. [462 U.S. at 403.]

The affirmative defense adopted by the Commission, like the NLRB test, is not required by the anti-discrimination provision of the statute, but is a permissible agency rule. As the Supreme Court stated concerning the NLRB rule:

> We also assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy . . . . The Board has instead chosen to recognize . . . what it designates as an affirmative defense that the employer has the burden of sustaining. We are unprepared to hold that this is an impermissible construction of the Act. '[T]he Board's construction here, while it may not be required by the Act, is at least permissible under it . . . .' and in these circumstances its position is entitled to deference. [462 U.S. 402-403; citations omitted.]

The affirmative defense in Mine Act cases must be applied with care, to ensure that it operates in harmony with the intent of the Congress. Application of the defense must not undermine either the miner's right to raise safety complaints freely,

without fear of reprisal, or the operator's right to discipline for legitimate reasons.

In the case at hand, the swearing incident was immediately and intimately connected with Smith's safety complaint and the foreman's hostile reaction to it. Halcomb first tried to dodge the safety complaint with a "hearsay" device. When that failed, he flatly contradicted the truthfulness of Smith's complaint. In effect, he was calling Smith a liar. Smith became upset and swore at Halcomb, and then immediately apologized. Halcomb refused to accept the apology and retaliated because of mixed motives - - discrimination against Smith for his safety complaints and anger for Smith's act of swearing at him. [8] To establish an affirmative defense, Respondent had the burden of proving by a preponderance of the evidence that, "absent the improper motivation [it] would have acted in the same manner for wholly legitimate reasons." NLRB v. Transportation Management Corp., Inc., supra, 462 U.S. at 401. However, Cox's testimony shows that if Halcomb had told him the truth about what had occurred between Smith and Halcomb, Smith would not have been discharged. [9] This is the opposite of an affirmative defense. Also, based on the evidence it cannot be reasonably assumed that but for the safety complaint and Halcomb's improper response to it, Smith would have sworn at Halcomb. That is, Smith's act of swearing cannot be reasonably isolated as an independent, legitimate motive for the adverse action. [10] Respondent's difficulty in trying to prove it would have fired Smith for a "wholly legitimate" reason is due to Halcomb's (and thus Respondent's) own wrongdoing - - his discrimination and improper response to the safety complaint. As the Supreme Court stated, "it is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." 462 U.S. at 403. On balance, I find that Respondent did not meet its burden of proving an affirmative defense.

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[8] The incident is discussed in more detail in Fn. 5, above.

[9] Cox testified that if he had known that Complainant swore at Mr. Halcomb when they were alone -- "just between him and Henry, it could have probably been resolved," that is, without discharging Complainant (Tr. 65).

[10] This is not to say that misconduct by a miner in a safety dispute could not meet the test of an affirmative defense, e.g., if a miner strikes a foreman out of anger because of the foreman's improper response to his safety complaint. However, the affirmative defense places the burden on the employer to separate the legal from the illegal motive in a convincing way, by a preponderance of the evidence.

ORDER

1. To avoid duplication, my Decisions and Orders of October 31, 1990, and January 31, 1991, in all parts not inconsistent with this Decision on Remand, are hereby incorporated by reference as if they were written in this Remand Decision.

2. Respondent is ORDERED to comply with this Order which incorporates by reference the language of my prior Order to reinstate Complainant (October 31, 1990) and my Order for monetary relief (January 31, 1991).

3. IT IS FURTHER ORDERED that the parties shall confer within 15 days of the date of this Decision, in an effort to stipulate the back pay, interest, attorney fee and other litigation costs that have accrued since the computation period in my Order of January 31, 1991. If they are unable to do so, Complainant shall submit, within 20 days of the date of this Decision, his statement of the amounts due. Respondent may respond within 10 days thereafter.

4. This Decision will not become final until a subsequent order is issued awarding monetary relief and declaring this Decision to be final.

William Fauver
Administrative Law Judge

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OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
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APR 28 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-112-M A.C. No. 04-03008-05501-E24
v.	:	Docket No. WEST 91-200-M A.C. No. 04-03008-05502-E24
AUSTIN POWDER COMPANY, Respondent	:	Oro Grande Mine

DECISION

Appearances: Catherine R. Lazuran, Esq., Office of the Solicitor U.S. Department of Labor, San Francisco, California, for Petitioner;
Walter J. Davis, Director, Safety, Compliance and Transportation, Cleveland, Ohio, for Respondent.

Before: Judge Morris

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

A hearing on the merits was held in Ontario, California, on January 22, 1992.

Petitioner filed a post-trial brief. Respondent's representative Mr. Davis addressed the issues in his closing argument.

THRESHOLD ISSUE

The threshold issue is whether MSHA has jurisdication over Austin.

SUMMARY OF THE EVIDENCE PERTAINING TO JURISDICTION

It is appropriate to consider the various actors involved in these cases:

VINNELL MINING COMPANY ("Vinnell") owns the mining rights at the Oro Grande Mine. Vinnell is subject to MSHA's jurisdiction but was not cited for the powder magazine violations.

AUSTIN POWDER COMPANY ("Austin") was cited for the magazine violations.

SOUTHWESTERN EXPLOSIVES ("SWE") is a subsidiary of Austin.

SPIRIT CONSTRUCTION AND BLASTING ("Spirit") by contract performs the blasting for Vinnell.

EDMUNDO ARCHULETA, an MSHA inspector for over 17 years, inspected Austin between May 31, 1990, and June 6, 1991. Austin and SWE owned the magazines that were cited and located on Vinnell's Property. (Tr. 30, 31).

Vinnell produces silica and aggregate. Its production enters interstate commerce. (Tr. 13, 14, 29; Ex. P-15).

Mr. Bean, a salesman for Austin, opened the magazines for the inspector. (Tr. 20, 21). During the inspection, Mr. Archuleta observed two Austin employees moving detonators out of a railroad car. (Tr. 30).

Davis Lucas was the general manager for either Austin or SWE. Chuck Bean and Avis Lucas were also Austin representatives. (Tr. 39).

Mr. Archuleta was informed by Mr. Lucas that Austin was moving magazines to various locations outside of Vinnell's property. They were later returned to Vinnell's property. (Tr. 32).

Inspector Archuleta agrees he did not see Austin or SWE involved in the production of minerals at the mine; nor did he see any written contracts for Austin or SWE to do any service work for Vinnell. (Tr. 32).

Mr. Lucas told Mr. Archuleta to issue any citations for any violations by Spirit to Austin. (Tr. 38). The inspector was able to enter Spirit magazines because Mr. Lucas had the keys. (Tr. 39). Citations were issued to SWE who, together with Spirit, had storage magazines on Vinnell mine property. (Tr. 44, 45).

RONALD AINGE, a person experienced in mining, has been an MSHA inspector for 14 years. (Tr. 49).

On October 30, 1990, he was accompanied by the office administrator for SWE. (Tr. 50). Mr. Ainge discussed the map (Ex. P-14) and estimated the location of the various magazines in relation to the roadway. (Tr. 46). The inspector could not gain access to two magazines owned by Spirit. (Tr. 55).

According to information received from Chuck Bean, manager for SWE, Austin owned all of the magazines. Austin and SWE are the same company. (Tr. 57, 58).

Austin and Vinnell had entered into a lease agreement whereby Austin could store its products on the mine site. (Tr. 62). Mr. Ainge understood that Spirit does the drilling and blasting. Austin sells its explosives to Spirit. (Tr. 64).

During the inspection, Mr. Ainge saw Austin employees taking products out of the magazines for sale and the employees were off-loading the products for storage. (Tr. 58). The Austin employees were either at the railroad detonator magazine or at the railroad detonator bunker. (Tr. 58, 59; Ex. P-14). Mr. Ainge did not obtain the names of the Austin employees. (Tr. 59).

WILLIAM W. WILSON, and MSHA supervisor, inspected the Oro Grande Mine once as an inspector and once again in response to Mr. Davis's concerns in 1990. (Tr. 65, 66). In June 1990, SWE told MSHA that Austin, not SWE, was to be identified as Independent Contractor No. E24. (Tr. 67).

Chuck Dean, Davis Lucas, and Mr. McCray (manager for Vinnell) told Mr. Wilson that Austin sold powder to Spirit as well as to Vinnell. (Tr. 68). On June 15, 1990, Chuck Bean told Mr. Wilson that Austin sold eight loads of explosives during the first six months of 1990. (Tr. 69, 72). Austin had also assisted in the transportation from the explosives to the blasting site. (Tr. 72).

On June 11, Mr. Davis, Austin's corporate safety director, raised the issue of MSHA's jurisdiction (Tr. 70). Mr. Davis produced a lease between Austin and Vinnell. (Tr. 71). He further confirmed that Austin had supplied eight loads of explosives to Vinnell.

On June 15, 1990, after leaving Austin's office, Mr. Wilson went to the site and counted 11 magazines. (Tr. 73). In his opinion, since Austin owned the magazines, it could readily abate the violations and prevent their recurrence. (Tr. 81).

The Austin magazines were intermingled with the Vinnell mining activities. The son of the local manager for Austin was doing Vinnell's blasting with the company known as "Spirit." (Tr. 82).

To reach the detonator magazines, it was necessary to use the only road to the mine. After trucks are loaded, they leave the quarry, go past the magazines, and go to the plant. Any number of things could affect workers loading or unloading the explosives. (Tr. 83). If the magazines had been located where miners were not directly exposed, Mr. Wilson would have sided with Austin's position. (Tr. 83, 84). Mr. Wilson believes Austin is a large national corporation with assets in Texas, Ohio, and California. (Tr. 85).

Austin was moderately negligent and it should have known MSHA's rules. The violations were not reasonably likely to cause a serious accident. Austin abated the violations and their cooperation was excellent. (Tr. 86).

A memorandum of understanding exists between MSHA and the Bureau of Alcohol, Tobacco, and Firearms (BATF). (Tr. 86; Ex. P-12).

If MSHA and BATF regulations conflict, then MSHA inspectors are to enforce the regulations that provide for the greater safety of the miners. (Tr. 88). The differences between MSHA and BATF regulations were discussed. (Tr. 88-96). Exhibit R-4 is an MSHA/OSHA Interagency agreement. (Tr. 105, 106).

On June 11, 1990, Mr. Wilson asked Mr. Davis if Austin sold or assisted Vinnell with explosives in the last six months. Mr. Davis replied that an average of eight sales loads were sold to Vinnell to assist in its drilling. (Tr. 78). Chuck Bean also said Austin assisted Spirit in transporting explosives from the magazines to the blast site at the quarry. (Tr. 99).

Exhibit P-16, an MSHA form, contains Mr. Wilson's notes that Austin sold eight loads of explosives to Vinnell to assist their drilling. (Tr. 111).

AUSTIN EVIDENCE

WALTER DAVIS, Director of Safety and Compliance for Austin, tesfified that the company entered the Southern California explosives market several years ago. At that time, Austin leased five acres of land from Vinnell Mining Company and took over some of Vinnell's existing powder magazines.

The written lease, for an annual consideration of $7000, was entered into on June 1, 1988, between Austin and Vinnell. The lease describes the five acres of land. Also leased by the agreement are a storage bunker, rail car, and portable magazines. In addition, office space on the Vinnell property and fixtures were leased by Austin. (Ex. R-2).

On June 1, 1989, the lease agreement was amended. The amendment provided for rent of the leased premises in the amount of $5000 per year. The lease described the term at four years, until May 30, 1993. (Ex. R-3). Austin also applied for a license from the Bureau of Alcohol, Tobacco, and Firearms. The license approved the manufacture, distribution, and use of explosives. The magazines were inspected by BATF. (Tr. 114).

Austin believes its powder magazines were not subject to MSHA enforcement. However, MSHA inspectors could enter Austin's leased property to enforce BATF regulations as contained in C.F.R. Part 27. (Tr. 115). Austin and its subsidiary SWE were were not involved in any operations such as drilling, blasting, loading, etc., at the Oro Grande Mine. Austin simply put powder in the magazines and removed it in the normal course of its business. (Tr. 117, 118).

Mr. Davis reviewed his notes of the conference with Mr. Wilson and there was no conversation regarding billing of any product to Vinnell. If he made such a statement, it was in error. (Tr. 118). Mr Davis, through his office computer and sales records, could not find the record of any billing from Austin to Vinnell from 1991 to the end of 1989. Austin performed no services for Vinnell and had no contracts with the mining company. (Tr. 118).

Austin agrees it supplies materials to Spirit and that is their only relationship. Austin is legal with ATF regulations. (Tr. 119, 121).

Austin also consulted with the Tread Corporation, a manufacturer of magazines. In its letter to Austin, Tread Corporation concluded that their magazines complied with MSHA rules. (Tr. 121, 122, Ex. R-5). Austin, on a nationwide basis, has 800 employees. (Tr. 124,125).

Austin's home office is located in Cleveland, Ohio, and its 65 distribution facilities, such as at Rio Grande, are located throughout the United States. (Tr. 125).

There are mine storage magazines at the Oro Grande Mine. Any additional magazines there would be moved from customer to customer. (Tr. 126, 127).

If someone would buy explosives at the Oro Grande Mine, then Oro Grande would generate a delivery document called a "J-ticket. The J-ticket lists the customer's name and the products sold.

DISCUSSION AND FURTHER FINDINGS

The evidence involves three critical credibility conflicts. First, did Austin sell explosives and furnish services to Vinnell? If that occurred, Austin was a subcontractor subject to the Mine Act as in Otis Elevator Company, 11 FMSHRC 1896 (October 1989).

I credit the evidence of Inspector Wilson that Austin sold explosives directly to Vinnell. Mr. Wilson's testimony and his conference worksheet (Ex. P-16) reflects the June 1990 telephone conferences. Among the questions noted on his worksheet were: "Has Austin Powder sold/assisted Vinnell in the last six months with powder, et al.? The answer was, "Yes - average eight sales (loads) to Vinnell to assist in their drilling." While hearsay has its limits, Mr. Wilson's testimony is also supported by the hearsay statement of Chuck Bean that Austin sold eight loads during the first six months of 1990. (Tr. 69, 72). Austin also assisted in the transportation of the explosives to the blasting site. (Tr. 72).

A further credibility issue concerns the authority of Davis Lucas to speak for Austin. The evidence shows Mr. Lucas instructed Mr. Archuleta to issue citations to Austin for any Spirit violations. (Tr. 38). The inspector was able to enter Spirit magazines because Mr. Lucas had the keys. (Tr. 39).

Chuck Dean, Davis Lucas, and Mr. McRay also told Mr. Wilson that Austin sold powder to Spirit as well as to Vinnell. (Tr. 68).

Chuck Dean and Inspector Archuleta told Mr. Wilson that Mr. Lucas was the general manager of SWE. (Tr. 149, 150).

In addition, Danny Wallace wrote MSHA on September 26, 1989, changing Austin/SWE's address. This letter was prompted by a telephone call from Mr. Lucas. (Tr. 150; Ex. P-15). Mr. Lucas wanted certain reports to go to Cleveland, Ohio. MSHA could not comply with this request without a formal letter. (Tr. 151).

Austin asserts Mr. Lucas was only a consultant for the company and did not have any authority to speak for it. Contrary to Austin's views, I find the above cited testimony to be very persuasive. In addition, Danny Wallace's letter of September 26, 1989,

was also fowarded to W.J. Davis (Director of Safety), as well as to Mr. Lucas, and Mr. Day. It was clearly Austin company business. Finally, Davis Lucas's letter to Austin's home office, dated January 18, 1988 (seeking to change the address on the ATF license) was Austin/SWE business. (Ex. P-17). The evidence indicates that Mr. Lucas had authority to act for Austin.

The final credibility issue arises from the maps of the mine area. MSHA's testimony is that MSHA's map is superior to Austin's map. The company takes a contrary view. The evidence indicates MSHA's map was drawn the night before the hearing; Austin's map was submitted to BATF. Neither map is to scale. The maps generally show storage magazines in close proximity to the single road in the area as well as to the mining in the quarry. However, neither map delineates the Austin leasehold. Basically, the area maps do not assist the judge in making a determination of the issues.

The record, as a whole, establishes that Austin was an independent contractor on the property. Austin's activities in selling explosives and transporting such explosives for Vinnell at its mine renders Austin subject to the Act.

EVIDENCE ON THE MERITS

The citations were amply supported by the uncontradicted testimony of Inspectors Archuleta and Ainge. Austin offered no contrary evidence on the merits. The initial seven Citations allege Austin violated 30 C.F.R. § 56.6020(e). [1]

Citation No. 3648344 provides:

> The trailer constructed of metal and used to store powder, License Plate No. KY T-22-147, and located South West of the Vinnell Oro Grande Plant was not electrically bonded or grounded. Explosives are stored in the Trailer. (Ex. P-1).

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[1] Section 56.6020 Magazine Requirements.

Magazines shall be--

(e) Electronically bonded and grounded if constructed of metal;

Citation No. 3648346 provides:

> The explosive storage magazine constructed of metal No. 200 located S.W. of the Vinnell Oro Grande Plant was not electrically bonded or grounded. The Magazine had 2400 pounds of Emuline explosives. (Ex. P-2).

Citation No. 3648347 provides:

> The Trailer Serial No. 3 INCAK used to store explosives and constructed of metal and located S.W. of the Vinnell Oro Grande Plant was not electrically bonded or grounded. Explosives are stored in the trailer. (Ex. P-3).

Citation No. 3648348 provides:

> The explosive storage magazine No. 190 SWE, constructed of metal and located S.W. of the Vinnell Oro Grande Plant, was not electrically bonded or grounded. Explosives are stored in magazine. (Ex. P-4).

Citation No. 3648347 provides:

> The detonator magazine No. 100 which is constructed out of metal was not electrically bonded or grounded. Detonators were stored in the magazine. (Ex. P-7).

Citation No. 3648438 provides:

> The rail car detonator storage magazine constructed of metal was not electrically bond and grounded. Detonators were stored in the Rail Car. (Ex. P-8).

Citation No. 3648440 provides:

> The door on the Bunker Detonator storage magazine constructed of metal was not electrically bonded and grounded. Detonators were stored in the magazine. (Ex. P-9).

Citation No. 3647277 alleges a violation of 30 C.F.R. § 56.6020 [2] and provides:

> The Cap Magazine Company number 9129 was not vented near the ceiling area. The magazine did have vents near the floor. The only people who enter this area is [sic] Austin Powder Co. employs [sic] who are knowledgeable in storage and handling of explosives. (Ex. P-10).

Citation No. 3648440 provides:

> The explosive Magazine No. 190 SWE was not properly ventilated. A new wood exterior had been installed of wood but vent holes had not been drilled. Explosives are stored in the magazine. (Ex. P-5).

Citation No. 3647278 alleges Austin violated 30 C.F.R. § 56.6020(i). [3]

> There was [sic] two signs visible on the approach roadway to the storage magazine on the south side of the property, if someone was to shoot through either of these signs they could strike one of several magazines in this area. There is a full-time guard at the property and the chance of this happening is unlikely. (Ex. P-11).

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[2] Section 56.6020 Magazine requirements.

Magazines shall be--

(g) Provided with adequate and effectively screened openings near the floor and ceiling;

[3] Section 56.6020(i). Magazine requirements.

Magazines shall be--

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

Citation No. 3648350 alleges a violation of 30 C.F.R. § 56.6005 [4] and provides:

> The bunker detonator storage magazine was not cleared of dry vegetation for a distance of 25 feet in all directions. Vegetation was observed on top of the magazine and in front of it. Detonators are being stored in this magazine. (Ex. P-6).

On the uncontradicted evidence, the citations herein should be affirmed.

MSHA VERSUS BATF REGULATIONS

Austin argues that MSHA can enforce BATF regulations but not MSHA regulations on its leasehold property. I disagree. The interagency agreement provides that MSHA will enforce the stricter requirements whether it be MSHA or BATF regulations.

On this issue I credit Mr. Wilson's testimony that the MSHA regulations are stricter that BATF. Facially, a comparison between the regulations supports Mr. Wilson's testimony.

As noted in assessing civil penalties MSHA no longer requires the grounding of metal magazines. However, the writer is required to deal with the terms of the regulation in effect at the time of the violation.

Grounding is obviously a more stringent requirement.

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[4] **Section 56.6005. Areas around storage facilities.**

> Areas surrounding magazines and facilities for 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.

Austin also asserts that OSHA's regulations should prevail here. I disagree. This site is obviously a mine generally under MSHA's enforcement jurisdiction.

I further reject the opinion of the Triad Corporation (Ex. R-5). It is ultimately an issue for the Commission whether an operator is in violation of a regulation.

CIVIL PENALTIES

Section 110(i) of the Act mandates consideration of six criteria in assessing appropriate civil penalties.

Austin is a large national company consisting of approximately 700 employees. (Tr. 85). The penalties set forth in the order of this decision are appropriate and should not affect Austin's ability to continue in business.

While Austin has been previously cited, there was no specific detailed evidence of such prior history. Austin was negligent as the violative conditions were open and obvious.

As noted, it is true that MSHA no longer requires that metal magazines be grounded. This would indicate the gravity as to the ungrounded magazines was not as high as MSHA originally believed.

Austin immediately abated the violative conditions and fully cooperated with MSHA. It is accordingly entitled to statutory good faith.

For the foregoing reasons, I enter the following:

ORDER

1. Citation No. 3648344 is AFFIRMED and a civil penalty of $10 is ASSESSED.

2. Citation No. 3648346 is AFFIRMED and a civil penalty of $10 is ASSESSED.

3. Citation No. 3648347 is AFFIRMED and a civil penalty of $10 is ASSESSED.

4. Citation No. 3648348 is AFFIRMED and a civil penalty of $10 is ASSESSED.

5. **Citation No. 3648437 is AFFIRMED and a civil penalty of $10 is ASSESSED.**

6. **Citation No. 3648438 is AFFIRMED and a civil penalty of $10 is ASSESSED.**

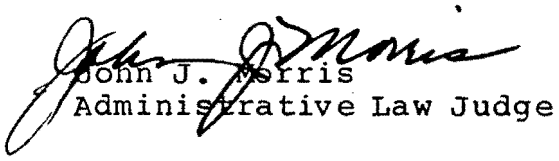
7. **Citation No. 3648440 is AFFIRMED and a civil penalty of $10 is ASSESSED.**

8. **Citation No. 3647277 is AFFIRMED and a civil penalty of $20 is ASSESSED.**

9. **Citation No. 3648349 is AFFIRMED and a civil penalty of $20 is ASSESSED.**

10. **Citation No. 3647278 is AFFIRMED and a civil penalty of $20 is ASSESSED.**

11. **Citation No. 3648350 is AFFIRMED and a civil penalty of $20 is ASSESSED.**



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 28, 1992

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 91-171-R Order No. 3116965; 2/2/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Loveridge No. 22 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-1996 A.C. No. 46-01433-03993
v.	:	Docket No. WEVA 92-232 A.C. No. 46-01433-04005
CONSOLIDATION COAL COMPANY, Respondent	:	Loveridge No. 22 Mine
	:	Docket No. WEVA 91-1834 A.C. No. 46-01452-03790
	:	Docket No. WEVA 91-1985 A.C. No. 46-01452-03793
	:	Arkwright No. 1 Mine
	:	Docket No. WEVA 91-1924 A.C. No. 46-01968-03928
	:	Docket No. WEVA 91-1967 A.C. No. 46-01968-03925
	:	Docket No. WEVA 91-1969 A.C. No. 46-01968-03927
	:	Docket No. WEVA 92-188 A.C. No. 46-01968-03944
	:	Blacksville No. 2 Mine
	:	Docket No. WEVA 91-1841 A.C. No. 46-01453-03966

: Docket No. WEVA 91-2038
: A.C. No. 46-01453-03973
:
: Humphrey No. 7 Mine
:
: Docket No. WEVA 91-1913
: A.C. No. 46-01318-04010
:
: Robinson Run No. 95 Mine

DECISION
AND
ORDER OF DISMISSAL

Appearances: Caryl Casden, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner;
Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Barbour

The captioned proceeding concerns one notice of contest and eleven civil penalty petitions filed by the parties pursuant to Sections 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(d), 820(a). The proceedings were noticed for hearing in Morgantown, West Virginia. Prior to the March 3, 1992 hearing, the parties stated that they had agreed to settle all matters, except contest proceeding, Docket No. WEVA 91-171-R, and its corresponding civil penalty proceeding, Docket No. WEVA 92-232. I advised the parties that I would hear their settlement motions on the record, at the close of the contested cases. I further advised them that rulings on the proposed settlements would be incorporated into a decision on the merits of the contested cases.

I.

Docket No. WEVA 91-171-R
Docket No. WEVA 92-232

The contested cases were heard as scheduled. Subsequent to the receipt by the parties of the transcript and to its review, counsel for the Secretary of Labor ("Secretary") informed me that she and counsel for Consolidation Coal Company ("Consol") had agreed to settle the contested matters, and, pursuant to Commission Procedural Rule 30, 29 C.F.R. § 2700.30, counsel for

the Secretary moved me to approve the settlement. At issue in the contested proceedings is an alleged violation of 30 C.F.R. § 75.1106-3(a)(3), a mandatory safety standard involving the storage of liquified and nonliquified compressed gas cylinders in underground coal mines. The standard states in relevant part:

> (a) Liquified and nonliquified compressed gas cylinders stored in an underground coal mine shall be:
>
> * * *
>
> (3) Protected against damage...from contact with...electrical equipment.

On February 2, 1991, Federal Mine Safety and Health Administration ("MSHA") Inspector Homer W. Delovich issued an order pursuant to Section 104(d)(2) of the Mine Act, 30 U.S.C. § 815(d)(2), alleging that two oxygen and two acetylene tanks were stored improperly at the corner of a track entry and a crosscut in active workings of Consol's Loveridge No. 22 Mine. According to the inspector, the crosscut was being used as a travelway by scoops bringing longwall shields from the longwall to the track loading point. The inspector believed the proximity of the tanks to the track and to the travelway subjected the tanks to damage from track equipment and, more importantly, from mobile equipment in the travelway.

The inspector further found that the violation was a significant and substantial contribution to a mine safety hazard (a "S&S" violation), that due to the failure to properly store the tanks an injury resulting in lost workdays or restricted duty was reasonably likely for up to seven miners and that the violation was the result of unwarrantable failure and "high" negligence on the part of mine management, whose foremen had regularly traversed the area in which the violative conditions existed. The inspector therefore issued to Consol Order of Withdrawal No. 3116965. Subsequently, Consol contested the validity of the withdrawal order, as well as the civil penalty of $1,100 proposed by the Secretary for the alleged violation of 30 C.F.R. § 75.1106-3(a)(3).

The Motion to Approve Settlement states that post-trial review of the testimony and documentary evidence convince the Secretary that while the fact of violation and the gravity of the violation have been established, the allegations of unwarrantable failure and "high" negligence alleged in the contested order and upon which the proposes civil penalty was, in part, based cannot be sustained. In essence, counsel for the Secretary asserts that, contrary to what the inspector believed, the evidence establishes that the intersection of the crosscut and the track entry had not been used repeatedly as a travelway because the particular mining process being undertaken--the moving of the longwall shields during recovery of the longwall--had only begun on the date the inspector issued the order, that the foremen in

charge of the work neither had used nor intended to use the subject intersection regularly, and that a scoop only once had passed close to the tanks.

Accordingly, counsel states that MSHA has agreed to modify the Section 104(d)(2) order to the Section 104(a) citation, 30 U.S.C. § 814(a), alleging an S&S violation due to moderate negligence on Consol's part and that Consol has agreed to pay a civil penalty of $700 for the violation.

I believe the settlement motion is well advised. The testimony of the inspector and of Consol's witnesses was in direct conflict regarding the use of the subject area by scoops removing shields from the longwall, as well as whether foreman had or would regularly traverse the area. Without implying any criticism of the inspector, who was acting in a forthright and conscientious manner to protect miners from the undoubted hazards presented by the improperly stored cylinders, the Secretary did not establish, in my opinion, that the intersection had been or would be subject to repeated use by the scoops as they shuttled between the longwall and the track loading point and thus was an area requiring repeated supervisory visits. Given this fact, I agree with the Secretary that mine management officials did not exhibit aggravated conduct in allowing the cylinders to be stored in the subject area.

II.

At the close of the testimony with regard to Docket Nos. WEVA 91-171-R and WEVA 92-232, counsel for the Secretary moved me to approve settlements or to stay, in part, the following civil penalty proceedings (Tr. 298-312):

Docket No. WEVA 91-1834

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3306395	3/7/91	75.601	$329	$329
3105723	3/11/91	75.1105	$305	0
3307585	3/11/91	75.520	$213	0

Counsel for the Secretary stated that Consol has agreed to pay in full the proposed civil penalty for Section 104(a) Citation No. 330695.

Regarding Section 104(a) Citation No. 33105723, counsel for the Secretary stated that the Secretary has agreed to vacate the citation because, on further investigation, the Secretary has found that there was no violation of the cited standard. Likewise, regarding Citation No. 3307585, counsel for the Secretary stated that upon further investigation it was determined that the equipment was in compliance with the standard and that there was no violation.

Docket No. WEVA 91-1985

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3315732	6/14/91	77.404(a)	$213	$20

Regarding Section 104(a) Citation No. 3315732, counsel for the Secretary stated that subsequent to being assessed by MSHA, the citation was modified by the inspector to delete the "S&S" finding. As modified, the proposed penalty would have been $20, and Consol has agreed to pay a $20 penalty.

Docket No. WEVA 91-1967

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3315473	3/11/91	75.515	$259	$259
3315474	3/11/91	75.1405	$259	stayed

Counsel for the Secretary stated that Consol has agreed to pay in full the proposed civil penalty for Section 104(a) Citation No. 3315473.

Regarding Section 104(a) Citation No. 315474, counsel for both parties requested this matter be stayed pending the decision of Commission Administrative Law Judge Avram Weisberger in Consolidation Coal Company, Docket No. WEVA 91-1833. Judge Weisberger has scheduled that case for hearing on May 18, 1992. The parties stated that the case contains several citations alleging violations of 75.1405 and arising under factual circumstances similar to the subject violation. They expect Judge Weisberger's decision to determine their resolution of the subject citation. I accept the parties' representations and, as ordered below, stay the proceeding.

Docket No. WEVA 91-1969

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3315486	3/20/91	77.512	$259	$155
3315487	3/20/91	77.505	$259	$155

Section 104(a) Citations Nos. 3315486 and 3315487, which respectively allege that the cover plate was missing from the electrical junction box of an overhead fan and that insulated wires were not in proper fittings in the metal junction box of an hot water heater, were both found by the inspector to be significant and substantial contributions to mine safety hazards. Counsel for the Secretary stated that MSHA has agreed to modify the citations to delete the S&S findings because the junction box to the overhead fan was 15 feet off the ground and unlikely to be

contacted by anyone and the junction box for the hot water heater was unlikely to be subject to any vibration causing wear or stress to the insulated wires. Consol has agreed to pay civil penalties of $155 for each violation.

Docket No. WEVA 91-1924

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3306261	10/15/90	75.512	$2,000	$210
3306262	10/15/90	75.511	$319	0
3306264	10/10/90	75.518	$2,000	$350

Regarding to Section 104(a) Citations Nos. 3306261 and 3306264, counsel for the Secretary stated that both violations had been specially assessed because of MSHA's belief that both violations contributed to an electrical short circuit accident that occurred on October 12, 1990 and that burned a miner. Counsel further stated the Secretary cannot prove the violations actually contributed to the accident.

Counsel for the Secretary stated that because the Secretary cannot establish the violation of Section 75.518 cited in Section 104(a) Citation No. 3306264 was reasonably likely to result in or contribute to a burn injury, MSHA has agreed to modify the citation to delete the "S&S" finding.

Finally, counsel for the Secretary noted that Section 104(a) Citation No. 3306262 was dismissed by Judge Weisberger on December 20, 1990, when he sustained a contest of the citation on the ground that the conditions cited did not constitute a violation of Section 75.511. Consolidation Coal Co., 12 FMSHRC 2643, 2650 (December 1990) (ALJ Weisberger).

Docket No. WEVA 91-1841

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3314463	3/11/91	75.302-4(a)	$192	$192
3307587	3/13/91	75.1704	$275	$155
3314473	3/13/91	75.520	$20	$20
3307588	3/14/91	77.401(b)	$20	0

Regarding Section 104(a) Citations Nos. 3314463 and 3314473 the Secretary's counsel stated that Consol has agreed to pay in full the proposed civil penalties.

Section 104(a) Citation No. 3307587 alleges that a violation of 75.1704 constituted a significant and substantial contribution to a mine safety hazard in that a gasoline leak in the vicinity of an emergency hoist (which served as an escapeway for active working sections) was reasonable likely to result in an accident

causing lost or restricted workdays dates. Counsel for the Secretary stated that MSHA has agreed to modify the citation to delete the S&S finding because it has been determined that the gasoline leak was minuet, and Consol has agreed to pay a resulting civil penalty of $192.

Section 104(a) Citation No. 3307588 alleges that a surface shop grinder was not labeled with its RPM value as required by Section 77.401(b). Counsel for the Secretary stated that MSHA has agreed to vacate the citation because the RPM values later were found on the machine.

Docket No. WEVA 91-2038

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3316601	7/1/91	75.203(a)	$227	$50

Section 104(a) Citation No. 3316601 alleges a significant and substantial violation of 75.203(a) in that miners were exposed to hazards caused by faculty pillar recovery methods on a longwall section. Counsel for the Secretary stated the Secretary has concluded that extra precautions required by the roof control plan (and, apparently, not considered by the inspector) made the pillar recovery methods being followed decidedly less hazardous than found by the inspector and that, as a consequence, MSHA has agreed to modify the citation to delete the S&S finding. In turn, Consol has agreed to pay a civil penalty of $50.

Docket No. WEVA 91-1913

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3105284	1/17/91	75.605	$241	$241

Regarding Section 104(a) Citation No. 3105284, Counsel for the Secretary stated that Consol has agreed to pay in full the proposed civil penalty.

Docket No. WEVA 91-188

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3105195	3/20/91	77.1605(d)	$20	$0
3105196	3/20/91	77.410	$259	$259
3315493	3/26/91	77.404(a)	$259	$155
3315236	5/31/91	75.1405	$192	stayed

Regarding Section 104(a) Citations Nos. 3105195 and 3105196, counsel for the Secretary stated that MSHA has vacated the first citation and Consol has agreed to pay in full the proposed assessment for the second.

Section 104(a) Citation No. 3315493 alleges that a broken left front windshield, with inside and outside rough edges, on a blade roller machine violated the cited standard and constituted a significant and substantial contribution to a mine safety hazard. Counsel for the Secretary stated that MSHA has agreed to modify the citation to delete the S&S finding because the breaks in the windshield were minor and did not obstruct or obscure the equipment operator's vision. Counsel also stated that Consol has agreed to pay a civil penalty of $155 or the violation.

Regarding Section 104(a) Citation No. 3315236, as with Citation No. 3315474 in Docket No. WEVA 91-1967, the parties have requested the matter be stayed pending the decision of Judge Weisberger in Consolidation Coal Co., WEVA 91-1833. As ordered below, I grant the parties' request.

Docket No. WEVA 91-1996

Citation No.	Date	30 C.F.R.	Proposed Assessment	Settlement
3116462	5/22/91	77.1605(a)	$178	$126

Regarding Section 104(a) Citation No. 3116462, counsel for the Secretary stated that the Secretary has concluded Consol's negligence in allowing the violation to exist was "low" rather than "moderate", as found by the inspector, and that Consol has agreed to pay a civil penalty of $126, the amount that would have been proposed had "low" negligence been used in calculating the assessment.

Conclusion

In view of the foregoing and after reviewing the pleadings and arguments in support of the proposed settlements and requests for stay, as well as the relevant civil penalty criteria, I conclude that the settlements for which approval is sought are in the public interest and, therefore, they are APPROVED. In addition, I conclude that stays should be granted for the cases containing the two alleged violations of Section 75.1405 until Judge Weisberger issues a decision in Consolidation Coal Co., WEVA 91-1833, or until that matter is otherwise resolved, and they are STAYED.

III.

ORDER

Docket No. WEVA 91-171-R
Docket No. WEVA 92-232

Consol is ordered to pay a civil penalty of $700, and the Secretary is ordered to modify Section 104(d)(2) Order No. 3116965 to a section 104(a) citation.

Docket No. WEVA 91-1834

Consol is ordered to pay a civil penalty of $329 for Citation No. 3306395, and the Secretary is ordered to vacate Section 104(a) Citation Nos. 3105723 and 3307585, if she has not already done so.

Docket No. WEVA 91-1985

Consol is ordered to pay a civil penalty of $20 for Citation No. 3315732, and the Secretary is ordered to modify the citation to delete the inspector's S&S finding, if she has not already done so.

Docket No. WEVA 91-1967

This matter is ordered stayed. Consol is ordered to pay a civil penalty of $259 for Citation No. 3315473. Consideration of Citation No. 3315474 in this case is held in abeyance pending Judge Weisberger's decision in Consolidation Coal Co., WEVA 91-1833, or until the case is otherwise resolved, and the parties are requested to advise me on or before July 1, 1992, and the first of each succeding month, of the status of this citation.

Docket No. WEVA 91-1969

Consol is ordered to pay civil penalties of $155 each for Citations Nos. 3315486 and 3315487, and the Secretary is ordered to modify each citation to delete the inspector's finding S&S finding.

Docket No. WEVA 91-1924

Consol is ordered to pay civil penalties of $210 and $350 for Citations No. 3306261 and 3306264, and the Secretary is ordered to modify Citation No. 3306264 to delete the inspector's S&S finding.

Docket No. WEVA 91-1841

Consol is ordered to pay civil penalties in the amounts of $192 for Citation No. 3314463, $20 for Citation No. 3314473 and $155 for Citation No. 3307587, and the Secretary is ordered to modify Citation No. 3307587 to delete the inspector's S&S finding. Further, the Secretary is ordered to vacate Citation No. 3307588, if she has not already done so.

Docket No. WEVA 91-2038

Consol is ordered to pay $50 for Citation No. 3316601, and the Secretary is ordered to modify the citation to delete the inspector's S&S findings.

Docket No. WEVA 91-1913

Consol is order to pay $241 for Citation No. 3105284.

Docket No. WEVA 92-188

This matter is ordered stayed. Consol is ordered to pay $259 for Citation No. 3105196 and $155 for Citation No. 3315493. The Secretary is ordered to modify Citation No. 3315493 to delete the inspector's S&S finding and to vacate Citation No. 3105195, if she has not already done so. Consideration of Citation No. 3315236 is held in abeyance pending Judge Weisberger's decision in Consolidation Coal Co., WEVA 91-1833, or until that case is otherwise resolved, and the parties are requested to advise me on or before July 1, 1992, and the first of each succeeding month of the status of this citation.

Docket No. WEVA 91-1996

Consol is ordered to pay $126 for Citation No. 3116462.

IV.

As ordered above, payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment all captioned civil penalty proceedings are dismissed except Docket Nos. WEVA 91-1967 and WEVA 92-188, which are stayed. In addition, in view of the settlement disposition of the companion civil penalty case, Docket No. WEVA 92-232, contest proceeding Docket No. WEVA 91-171-R is dismissed.

David Barbour

David Barbour
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 29, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-2034 A. C. No. 46-01452-03795
v.	:	Arkwright No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Charles Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Petitioner;
Walter J. Scheller, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: **Judge Merlin**

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Consolidation Coal Company under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820.

Order No. 3308056 was issued pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), for an alleged violation of 30 C.F.R. § 75.316. A hearing was held on March 10, 1992, the transcript was received and by April 20, 1992, the parties filed their post hearing briefs.

30 C.F.R. § 75.316, which restates section 303(o) of the Act, 30 U.S.C. § 863(o), provides:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Order No. 3308056, dated October 18, 1990, and challenged

herein, charges a violation for the following alleged condition or practice:

> Measurements made with a magnehelic and pitot tube in the second tube outby the face of the left crosscut off No. 4 entry (2 Right Section) revealed that only 4930 CFM of air was present at that location and a slider tube is used to keep within 10 feet of the deepest point of penetration, which results in even less air at the end of the tube. The approved ventilation methane and dust control plan requires that a minimum of 6000 CFM of air be provided at a working face. 16 tubes and 4 fittings were in place with numerous leaks.

The inspector marked the citation significant and substantial and found that it was the result of unwarrantable failure on the part of the operator.

Prior to going on the record, the parties agreed to the following stipulations (Tr. 3-4):

(1) The operator is the owner and operator of the subject mine;

(2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

(3) I have jurisdiction in this case;

(4) the inspector who issued the subject order was a duly authorized representative of the Secretary;

(5) a true and correct copy of the subject order was properly served upon the operator;

(6) a copy of the subject order is authentic and can be admitted into evidence for the purpose of establishing its issuance but not for the purpose of establishing the truthfulness or relevancy of any of the statements asserted therein;

(7) payment of any penalty will not affect the operator's ability to continue in business;

(8) the operator demonstrated good faith abatement;

(9) the operator has an average history of prior violations for a mine operator of its size;

(10) the operator is large in size.

The inspector testified that when he inspected the mine on

the morning of October 18, 1990, he measured only 4,930 CFM of air at the face (Tr. 26). He cited a violation of 30 C.F.R. § 75.316 because the operator's ventilation plan required 6,000 CFM (Exh. R-2). The inspector also found the violation was significant and substantial, and that it resulted from high negligence on the part of the operator (Gov't. Exh. No. 2). Equating high negligence with unwarrantable failure, the inspector issued an order under section 104(d)(2) of the Act.

In a post-hearing letter dated April 7, 1992, the operator admitted the existence of the violation and that it was significant and substantial. The only issue remaining is whether the operator was guilty of unwarrantable failure.

According to the inspector, the continuous mining machine which was in the No. 4 entry was cutting left into the crosscut going from the No. 4 to the No. 3 entry (Tr. 12; Exh. R-1). The mining machine was approximately 20 feet into the crosscut and the inspector believed the turn into the crosscut had been made late on the preceding midnight shift (Tr. 70-71). Tubing ran along the right hand side of the miner, high against the mine roof and over against the coal rib (Tr. 27). This tubing extended from the face outby down the No. 4 entry to the next crosscut where it turned right into the auxiliary exhaust fan (Tr. 13). The inby end of the tubing was approximately 10 feet from the face (Tr. 18-19). The purpose of the tubing and the fan was to pull dusty or gassy polluted air away from the face (Tr. 14-15). By carrying contaminated air away from the face, fresh air coming up the No. 4 entry was allowed to come into the working place and go across the continuous mining machine replacing the exhausted air (Tr. 21-22).

On the morning in question, the inspector found that several tubes were damaged with smashed areas or holes in them (Tr. 19). There were a dozen holes which had up to a maximum diameter of 1 inch (Tr. 20, 61). Also the joints between the sections of tubing were not wrapped (Tr. 24). In the inspector's view, the damaged tubing decreased the air flow provided by the fan. The reduced air flow from the tubes was due half to the damaged areas (holes) and half to the joints (Tr. 61).

The inspector believed the operator was guilty of unwarrantable failure because the midnight shift foreman had not tested for air and the day shift foreman was going to begin mining without the requisite 6,000 CFM of air (Tr. 45-46). He stated that the condition of the tubing and the decreased air flow was obvious (Tr. 45). He thought the continuous mining machine had made its left turn late on the midnight shift and possibly could have bumped the tubing at that time (Tr. 57, 69-70, 71). However, since the damage was located all along the tubing he found it unlikely that it all happened at the end of the midnight shift (Tr. 71). He did not know when or how the conditions occurred

during the midnight shift, but felt that the midnight shift had been in compliance for at least a portion of the time (Tr. 73-74).

The section foreman for the day shift who was not the regular section foreman, admitted he had the power put on the machinery, but did not remember whether he attempted to check the air flow (Tr. 133-134). The mine foreman said inadequate air at the face could be felt when it hit the back of the neck and in this way the inspector could have determined that there was inadequate air when he came on the section (Tr. 118, 119). In the mine foreman's opinion the person in charge on the section should have sought out the cause of the inadequate air (Tr. 122, 123).

It is clear from the foregoing that the acting day shift section foreman committed a serious error in failing to realize that the volume of air at the face was inadequate and to take appropriate action. However, every error of judgment or omission of duty does not constitute unwarrantable failure. The Commission has established a significant threshold for a finding of unwarrantability. It has held that unwarrantable failure is conduct that is not justifiable, is inexcusable and is the result of more than inadvertence, thoughtlessness, or inattention. The term is construed to mean aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997 (Dec. 1987).

In this case the facts do not support an unwarrantable finding. The section foreman on the day in question was not the regular section foreman but a fill-in (Tr. 113, 130). Although this circumstance does not excuse his failure to apprehend the situation, it indicates an absence of reckless disregard or willful intent or other such factors which could be considered suggestive of aggravated conduct.

The length of time a violative condition exists before issuance of a citation or order is relevant in determining whether there is unwarrantable failure. Emergy Mining Corporation, supra; Quinland Coals Inc., 10 FMSHRC 705 (June 1988). Here, by the inspector's own estimate, the operator had fallen out of compliance with respect to the tubing sometime during the prior shift. This relatively short period does not support a finding of unwarrantability. We do not have here a situation where the operator conducted normal operations shift after shift despite inadequate air.

In addition, facts which existed before the order was issued, but came to light only after it was abated, further demonstrate there was no unwarrantable failure. Upon arriving at the scene after the order had been issued, the mine foreman immediately ordered the loading machine operator and his partner

to take apart the auxiliary exhaust fan to find out what was causing the lack of air (Tr. 80, 111, 127). Because the fan was new and powerful the mine foreman believed the inadequate air was caused by more than just the damaged tubing (Tr. 80, 127, 128). When the fan was examined, a rock dust bag was found up against its screen and blower (Tr. 81, 112). The loading machine operator and the mine foreman expressed the opinion that instead of properly disposing of the bag, a miner who was rock dusting at the inby end of the tubing could have thrown the bag into the tubing where it was sucked up against the fan (Tr. 82, 112). The bag greatly affected the operation of the fan and when it was removed the change in ventilation was significant and there was an enormous current of air at the face (Tr. 82, 88). Obviously, the rock dust bag was a contributing, if not the major, cause of the inadequate air which the inspector found. The force of the fan which was the most powerful one the loading machine operator had ever seen, was such that the operator had never had to wrap the holes in the tubing in order to establish sufficient air at the face (Tr. 80, 88).

The existence of the rock dust bag casts no adverse reflection upon the inspector's finding of a violation. He found inadequate air and properly cited it. However, the operator is entitled to have the charge of unwarrantability evaluated in light of the entire situation as it actually existed. For purposes of determining the existence of unwarrantability it is relevant to note that neither the loading machine operator nor the mine foreman, nor anyone else for that matter, could say for sure how the bag got into the fan (Tr. 81, 112). There is no evidence that the bag had been against the fan for any appreciable period of time. Indeed, the great force of the fan when it was operating properly, militates against such a conclusion.

In sum therefore, the evidence fails to establish that either the defective tubing or the misplaced rock dust bag had existed for a length of time sufficient to charge the operator with aggravated conduct. The operator committed only ordinary negligence. Accordingly, the finding of unwarrantability must be vacated and the 104(d)(2) order modified to a 104(a) citation.

One final note. Running through this case is an undercurrent of dissatisfaction by MSHA with how the operator checks for adequate air velocity at the face. If the operator is violating a mandatory standard by how and when it checks such air velocity, MSHA should so charge the operator and if necessary, have the matter adjudicated before this Commission. If, on the other hand, the mandatory standards are not clear or do not require what MSHA wants, the standards should be amended through rulemaking. Otherwise MSHA should desist. What cannot be countenanced is an attempt by MSHA to raise the issue in an oblique manner by citing the operator under a different standard and charging it with unwarrantable failure.

As stated previously, the operator admitted that the violation was significant and substantial. The remaining criteria with respect to the amount of the civil penalty to be assessed have been stipulated to by the parties. Accordingly, I find that a penalty of $750 is appropriate.

The post-hearing briefs filed by the parties have been reviewed. To the extent the briefs are inconsistent with this decision, they are rejected.

ORDER

It is **ORDERED** that the finding of unwarrantable failure for Order No. 3308056 be **VACATED.**

It is further **ORDERED** that Order No. 3308056 be **MODIFIED** to a 104(a) citation.

It is further **ORDERED** that a penalty of $750 be **ASSESSED** and that the **OPERATOR PAY** $750 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 7 1992

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS	Master Docket No. 91-1
SOUTHERN OHIO COAL COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDINGS Docket Nos. LAKE 91-454-R through LAKE 91-472-R Docket Nos. WEVA 91-1244-R through WEVA 91-1258-R
WINDSOR COAL COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Docket Nos. WEVA 91-1259-R through WEVA 91-1260-R
GREAT WESTERN COAL (Kentucky), INC., Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Docket Nos. KENT 91-867-R through KENT 91-871-R
GREAT WESTERN COAL, INC., Contestant v. SECRETARY OF LABOR,	Docket Nos. KENT 91-859-R through KENT 91-863-R

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	
HARLAN FUEL CO., Contestant	)	Docket Nos. KENT 91-864-R through KENT 91-866-R
v.	)	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	)	PENALTY PROCEEDING Docket Nos. WEST 91-475 and WEST 91-476
v.	)	
ENERGY FUELS COAL, INC., Respondent	)	

ORDER GRANTING LEAVE TO FILE OUT OF TIME

ORDER DENYING MOTION TO STRIKE AND DIRECTING SECRETARY TO RESPOND TO MOTION TO VACATE

On March 3, 1992, Contestants Southern Ohio Coal Company and Windsor Coal Company (Contestants) filed a motion for an order vacating the 36 citations issued by the Secretary of Labor (Secretary) on April 4, 1991, to Contestants. Each citation alleged a violation of 30 C.F.R 70.209(b) because the respirable dust sample submitted by Contestants had been altered by removing a portion of the dust from the sample. The motion was accompanied by a memorandum in support of the motion and 30 attached exhibits. On March 18, 1992, the Secretary filed a motion to strike Contestants' motion to vacate together with its supporting memorandum and the associated exhibits, on the ground that the motion to vacate "relies in significant part" on inappropriate documents and materials.

On March 30, 1992, Contestants filed an opposition to the Secretary's motion to strike. On March 30, 1992, the Secretary filed a motion for leave to file out of time her previously filed motion to strike Contestants' motion to vacate citations.

On March 25, 1992, Energy Fuels Coal, Inc. (Energy Fuels) filed a motion to vacate the nine citations issued to it on April

4, 1991. Energy Fuels incorporates by reference the memorandum in support of the motion to vacate citations filed by Contestants. On March 31, 1992, the Secretary filed a motion to strike energy Fuels' motion to vacate.

On April 1, 1992, Great Western Coal (Kentucky), Inc., Great Western Coal, Inc., and Harlan Fuel Co., filed a motion to join the Contestants' motion to vacate citations and memorandum in support of the motion.

I

The Secretary's motion to strike, considered as a response to the motion to vacate, was admittedly filed five days out of time. The reason advanced in her motion for leave to file out of time is that her counsel, because of the high volume of paper involved in this case, inadvertently failed to notice that the motion to vacate was served by hand delivery, and therefore she was not entitled to add five days to the time her response would be due under Commission Rules 8(b) and 10(b). The Secretary asserts that the issue raised in the motion to strike is of great importance, and that Contestants have not shown any prejudice because of the late filing. The reason advanced for the late filing is somewhat lame. I agree that the issue is very important, but so is the necessity for timeliness, as the Secretary has asserted more than once in these proceedings. Nevertheless, I will grant the Secretary's motion for leave to file out of time and I receive the motion to strike with its supporting memorandum for filing.

II

Contestants have moved to vacate the citations contested in these proceedings on the ground that they were not filed with reasonable promptness as required by § 104(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 814(a). If the citations are vacated they, of course, cannot support a penalty petition, and the contest proceedings become moot. Thus, the motion is one for summary decision and, as the Secretary notes, is potentially dispositive of the entire master docket, No. 91-1.

Commission Rule 64(b) (modelled on Fed. R. Civ. P. 56) provides that a motion for summary decision may be granted only if the entire record "including the pleadings, depositions, answers to interrogatories, admissions, and affidavits" shows that there is no genuine issue as to any material fact, and the movant is entitled to summary decision as a matter of law.

The motion to vacate refers to and relies upon the dates the cited dust samples were taken (contained in the citations); the dates the cited samples were received by Robert Thaxton

(contained in the custody sheets supplied by the Secretary); the deposition testimony of Thaxton that he alone was authorized to determine that a filter with an abnormal white center was a violation; the deposition testimony of Thaxton that he began classifying filters as tampered-with in March, 1989 (Peabody filters), and in August, 1989 (other mine operator filters); and the deposition testimony of Thaxton, Edward Hugler and Robert Nesbit that MSHA delayed voiding the AWC samples and withheld the issuance of citations to avoid alerting the industry to the pending investigation, and at the request of the U.S. Attorney's office. Contestants assert that the delay prejudiced them in that failure to notify them after the August 19, 1989 samples that MSHA deemed them violations prevented them from taking potentially corrective action to avoid future AWCs; and that important and potentially exculpatory physical evidence, e.g., non-cited samples taken at the same time as the cited samples and cassette parts of the cited samples, was not preserved. The motion does not refer to exhibits to support these assertions, but Contestants' opposition to the Secretary's motion to strike refers to the Secretary's response to Contestants' interrogatories, Set II, where she admits that she no longer has and cannot produce the plastic cases in which the cited filters were enclosed, the plugs inserted in the orifices of the plastic cases, the tape sealing the plastic cases, and the foil backing of the filters. The motion also refers to the "Lee Report," an expert opinion study and report prepared by Contestants' experts, and argues that it shows that the Secretary's premise that AWCs can result from tampering and from no other cause "was flat wrong" and that had the foil backings and cassette assemblies been preserved, the Lee group could have demonstrated that AWCs resulted from a cassette manufacturing anomaly rather than tampering. The motion further states that potential witnesses have become unavailable and recollections have grown dim with the passage of time. It relies on an affidavit of the Safety and Health Director of Contestants' parent company to show that three supervisors who oversaw the dust sample collection and eight sampled miners in the mines are no longer employed by Contestants, and that with respect to about half of the cited samples, Contestants are unable to identify the individual miner who was sampled.

III

The Secretary's response to the motion to vacate, treated as a motion for summary decision, is a motion, under Commission Rule 10 and presumably under Fed. R. Civ. P. 12(f), to strike Contestants' motion to vacate on the ground that it relies in part on references to materials that are not appropriate to consider for disposition of a motion for summary decision. Specifically, the Secretary states that Contestants' motion relies on the opinion testimony of Donald Tuchman of the U.S. Bureau of Mines and of Sharon Ainsworth of MSHA to show that the

citations were unreasonably delayed. It further asserts that the motion relies on the Lee Report, an expert opinion report, to show that Contestants were prejudiced by the delay.

A motion for summary decision is improper, or at least may not be granted, if there is a genuine issue as to any material fact. Rule 64(b). Factual issues, factual disputes, or differences of opinion may not be resolved on such a motion. Contestants argue that the Tuchman and Ainsworth testimony is relied upon to show that the Secretary had adopted the position that AWCs constituted violations long before the citations were issued. They assert that the opinions of Tuchman and Ainsworth are irrelevant and are not relied upon. Contestants argue that the Lee Report was referenced, not to establish the validity of its conclusion that AWCs are not necessarily the result of tampering, but to show prejudice resulting from Contestants' inability to examine the plastic cases, plugs, tapes, and foil backings of the cited filters.

Although the motion to vacate to some extent argues the merits of the citations, I do not find that it relies on opinion evidence for its contention that the entire record shows no genuine issue of material fact related to the question whether the citations were issued with reasonable promptness. Both parties have argued their positions on the merits of the motion for summary decision, that is, whether there is a genuine issue as to any material fact. The question before me at this time, however, is raised by the motion to strike: whether the motion for summary decision was properly framed and relies upon "the entire record, including depositions, answers to interrogatories, admissions, and affidavits," in an attempt to show that there is no genuine issue as to any material fact. Without indicating any conclusion as to the validity of the motion to vacate, I am persuaded that it is not defective as a motion. Therefore, it must be responded to. Any references in the motion or its supporting memorandum to other than factual matters supported by the record will be disregarded.

IV

The Secretary requests 30 days from the date of the issuance of an order on the motion, in which to file her statement in opposition "because of the complex nature of this matter, as well as its great importance to the Secretary in her enforcement of the Mine Act in this and other cases." Contestants object to giving her additional time, pointing out that the motion to vacate was filed and served almost a month hence, and giving the Secretary an additional 30 days means that she will have had 60 days to oppose the motion.

If the Secretary exaggerates the complex nature of this matter, it is without question a matter of great importance. For

that reason, in order that I may have full and fair argument, I will require the Secretary to respond to the motion to vacate within 20 days of the date of this order. Contestants shall have ten days thereafter to reply.

ORDER

Accordingly, IT IS ORDERED

1. The Secretary's motion for leave to file her motion to strike out of time is GRANTED;

2. The Secretary's motion to strike Contestants' motion to vacate is DENIED;

3. The Secretary shall within 20 days of the date of this order file with me and serve upon Contestants a response to the motion to vacate.

4. Contestants shall have 10 days from the date the Secretary's response is filed and served to reply to it.

James A. Broderick
Administrative Law Judge

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April 30, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JERRY LEE DOTSON, Complainant	:	DISCRIMINATING PROCEEDING Docket No. SE 92-181-D Mine No. 50
v.	:	
LAD MINING INC., LARRY FLYNN, AND RONALD CALHOUN, Respondent	:	

ORDER

On February 10, 1992 the Secretary of Labor ("Secretary") filed a complaint of discrimination on behalf of Jerry Lee Dotson ("Complainant") pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (The "Mine Act"), 30 U.S.C. § 815(c)(2), alleging that Lad Mining Inc., Larry Flynn and Ronald Calhoun ("Respondents") had discharged unlawfully and refused to rehire Dotson. Respondents filed a timely answer, and initiated discovery, serving the Complainant with interrogatories and requests for production of documents. The Secretary, acting on behalf of the Complainant, refused to divulge some of the information sought by the Respondents on the grounds of privilege The Respondent's now seek to compel its disclosure.

The pertinent interrogatories and responses involved in this dispute are as follows:

The Respondents have requested Complainant to identify all persons having knowledge of Complainant's claims and the substance of their knowledge [Interrogatory 2]. Complainant has answered, in part, by naming himself and Alfred Meeks, a former contractor/operator of the mine, as having knowledge of orders to discharge Complainant for allegedly protected activity and by naming Alfred Meeks as having knowledge of Respondent Calhoun's control over the daily operations of the mine and of Calhoun's attitude toward compliance with health and safety laws, but Complainant has declined to produce the names of potential miner

witnesses pursuant to Commission Procedural Rule 59.[1]

The Respondents have requested that Complainant identify each witness and summarize the testimony of each witness [Interrogatories 3 & 4]. Complainant has responded that Dotson and Meeks can be expected to testify and that two days prior to the hearing, and in accordance with Commission rules, Complainant will produce the names of miner witnesses. Further, Complainant has stated that he will testify to statements from other operators to the effect that Calhoun "blacklisted" him and statements that he will never work again as a coal miner in the area and that Meeks will testify regarding Calhoun's control of mine operations, his orders to fire Complainant and Complainant's work record, skills and reputation.

The Respondents have requested that Complainant identify persons with knowledge of the facts and circumstances regarding the allegedly common practice of "rehiring" every previously employed miner when the operations of the mine change hands [Interrogatory 13]. Complainant has responded that he will rely on statements from himself and other miner witnesses whose names he will not disclose "at this time."

The Respondents have requested that Complainant identify all persons with knowledge of the Respondents' alleged refusal to rehire Complainant because of his asserted protected safety activity [Interrogatory 14]. Complainant has responded that he will rely on circumstantial evidence, as well as statements from mine witnesses, and that the names of the witnesses will not be disclosed "at this time."

The Respondents have requested identification of all persons having knowledge of the facts and circumstances concerning Complainant's application for employment with Larry Flynn and/or Lad Mining, Inc. [Interrogatory 21]. Complainant has identified Dotson, Flynn and Calhoun, and miner witnesses whose names will not be disclosed "at this time."

Following Complainant's response to the interrogatories, the

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[1]Rule 59 states:

> A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness. A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.

29 C.F.R. § 2700.59

Respondents moved for an order compelling the Secretary to furnish the names of operators and/or miners who the Complainant will quote in his testimony but who the Secretary will not call as witnesses and to furnish a summary of the alleged statements of these operators and/or miners. Respondents state they recognize that the Secretary is not required to disclose the names and testimony summaries of miner witnesses expected to be called until two days prior to the hearing but argue they seek instead the names of operators and/or miners who will be quoted by the Complainant but who will not be called to testify.

The Secretary, on behalf of Complainant, has responded that although Complainant will testify regarding conversations with coal mine operators and miners concerning his alleged "blacklisting" by Calhoun and its effect on his ability to work in the mining industry, the Secretary opposes disclosure of the names of such individuals based on the informer's privilege (Commission Rule 59) and that counsel for the Secretary has assured Complainant that the names of individuals who have spoken with him regarding his blacklisting will not be disclosed pursuant to the privilege. The Secretary states that the informer's privilege clearly encompasses protection of the identities of individuals who provide information during the course of a governmental investigation regardless of whether or not the person is ultimately called to testify as a witness at trial, and that a ruling requiring the Secretary to disclosure the names of all individuals who provided information regarding Complainant's blacklisting will hinder MSHA's ability to conduct thorough investigations and obtain information regarding future Mine Act violations, as well as render meaningless MSHA's assurances of confidentiality. The Secretary also argues that Respondents have not made the showing necessary to overcome the informer's privilege.

Under Commission Procedural Rule 55(c), 29 C.F.R. § 2700.55 (c), and Rule 26(b)(1) of the Federal Rules of Civil Procedure, all relevant material not privileged is subject to discovery. The Commission and the Federal Courts have broadly construed the discovery rule to include relevant material, and conversely, have narrowly construed the claim of privilege. Hichman v. Taylor, 329 U.S. 495(1947); Secretary on behalf of Logan v. Bright Coal Co. Inc., 6 FMSHRC 2520 (1984). The burden is on the party claiming that relevant material is not subject to discovery because of privilege.

The Respondents, recognizing that privilege exists with regard to individuals who will appear as witnesses, have, in effect, narrowed their request for information to the identification of those who will not testify but who will be quoted or paraphrased by Complainant in his testimony and to summaries of what Complainant will say they said as it relates to his complaint of discrimination. As set forth below, I will

grant the Motion to Compel to the extent that it relates to such operators and/or miners who have spoken or otherwise communicated with Complainant but not with an MSHA investigator or other government official or agent.

The privilege to withhold from disclosure the identity and statements of persons who may have furnished information regarding violations or possible violations of the Mine Act is a qualified privilege that balances the public interest in protecting the free flow of information to MSHA's enforcement staff and the right of those who give information to be protected from possible retaliation against a respondent's need for the information to prepare his or her defense. Bright Coal Company, Inc., 6 FMSHRC at 2522-2523. See also: Wirtz v. Continental Finance & Loan Co. of West End, 326 F.2d 561 (5th Cir. 1964); Brennan v. Engineered Products, Inc., 506 F.2d 299 (8th Cir. 1974).

As noted by the Commission in Bright, 6 FMSHRC at 2524, the privilege, codified in Commission Rule 59, reflects Congressional concern, set forth in the Mine Act and its legislative history, about the possibility of retaliation against miners who participate in the enforcement of the Act and the desire to protect the identity of those who contact the Secretary regarding violations of the Act. Responding to this concern, the Commission, when interpreting the privilege, has sought to "maximize the lines of communication with the Secretary concerning violations of the Mine Act." 6 FMSHRC at 2524 (emphasis added). However, claims of privilege are to be narrowly construed, and the Commission has been careful to provide its judges with a framework for application of the privilege. It has defined the term "informer" and instructed that application of the informer's privilege should be based upon that definition. Bright, 6 FMSHRC at 2525.

An "informer" is "a person who has furnished information to a government official relating to or assisting in the government's investigation of a possible violation of the Mine Act," Bright, 6 FMSHRC at 2525 (emphasis added). Under the Commission's procedural framework, a judge must first determine if the information sought is relevant and discoverable. 6 FMSHRC at 2523. Next, the judge must determine whether, based upon the definition of "informer", the information is privilege. 6 FMSHRC at 2525.

Here, the Respondents seek to compel the Secretary to disclose the names of operators and/or miners who will be quoted or paraphrased by Complainant and to provide summaries of their statements regarding Complainant's claims, in particular, alleged blacklisting and alleged refusal of Respondents to rehire Complainant. This information bears directly on Complainant's

allegations of discrimination and is relevant and discoverable.[2]

The next step is to determine whether the information is privileged. Bright, 6 FMSHRC at 2525. This determination must first be based upon the definition of "informer". It is here that the Secretary's inclusive opposition to disclosure fails, because "informers," for the purpose of Rule 59, are those persons who have furnished information to a government official or agent relating to or assisting in the government's investigation of a possible violation of the Mine Act. Bright, 6 FMSHRC at 2525.

The Secretary, in her response to the Motion to Compel, is clear that she opposes production of the names and summaries of the testimony of operators and/or miners who have engaged in conversations with Complainant regarding his allegations of discrimination, but conversations with Complainant are not the same as furnishing information to an MSHA investigator or other government official so as to assist in the government's investigation of a possible Mine Act violation. Complainant, although the subject and potential beneficiary of a government investigation and although a party who may be represented by the government, is not an official or agent charged with enforcing the law. Nor is it conceivable to me that the informer's privilege was ever meant to extend to conversations with those other than such officials or agents. If such were the case, it would undercut the very nature of the privilege--furtherance and protection of the public interest in effective law enforcement through recognition that prescribing anonymity encourages citizens to communicate their knowledge the violations of the law to those charged with enforcing the law. Rovario v. United States, 353 U.S. 53 59 (1957).[3]

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[2]While the Commission in Bright suggested in camera inspection of information sought in order to determine its relevance, 6 FMSHRC at 2523, in this instance the relevant nature of the material sought is apparent on the face of the Secretary's pleadings.

[3]However, I agree with the Secretary that the fact that those who may be quoted by the Complainant will not be called to testify does not, in and of itself, render the informer's privilege inapplicable. Many who provide information to the government during the course of an investigation are not called to testify and for a variety of valid reasons. Nonetheless, the information they provide and their willingness to come forward is vital to the effectiveness of an investigation. Their participation should be encouraged. Restricting the protections from retaliation inherent in the informer's privilege only to those who ultimately testify would, in my opinion, hinder the efficacy of governmental enforcement.

Thus, I hold, as both parties seem to recognize, that Complainant need not produce to Respondents the names of potential miner witnesses until two days prior to trial. Nor need Complainant produce to Respondents the names and summaries of the testimony of operators and/or miners who communicated with MSHA investigators or other government officials or agents charged with enforcing the law regarding the substance of Complainant's allegations of discrimination. However, and with regard to such operators and/or miners who Complainant will quote or paraphrase in his testimony and who will not be themselves called to testify and who have spoken with Complainant but not communicated with MSHA investigators or other government law enforcement officials, Complainant must produce to Respondents their names and a summary of the words Complainant will attribute to them.

Accordingly, Complainant is ORDERED to produce the names and summaries in question as outlined above, and in further response to Interrogatories 3, 4, 13, 14, and 21, within ten days of this order.

David Barbour

David Barbour
Administrative Law Judge
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