MAY 1987

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

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MAY 1987

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

Secretary of Labor, MSHA v. Texasgulf, Inc., Docket Nos. WEST 85-148-M, WEST 86-83-M. (Judge Lasher, April 14, 1987)

Local Union 2333, District 29, UMWA v. Ranger Fuel Corporation, Docket No. WEVA 86-439-C. (Interlocutory Review of Judge Melick's oral decision)

Review was denied in the following cases during the month of May:

Secretary of Labor, MSHA v. Brown Brothers Sand Company, Docket No. SE 86-23-M. (Judge Koutras, March 25, 1987)

Alvin Ritchie v. Kodak Mining Company, Docket No. KENT 86-138-D. (Judge Melick, April 14, 1987)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 28, 1987

JIMMY R. MULLINS	:	
	:	
v.	:	
	:	
BETH-ELKHORN COAL CORPORATION,	:	Docket No. KENT 83-268-D
	:	
	:	
LOCAL 1468, DISTRICT 30, UNITED MINE WORKERS OF AMERICA	:	
	:	
and	:	
	:	
INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint filed by Jimmy R. Mullins pursuant to the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 801 et seq. (1982)("Mine Act"). The complaint alleges that Mullins' removal from a dispatcher's job pursuant to an arbitration award resolving a seniority grievance violated section 105(c)(1) of the Mine Act by contravening his rights under 30 C.F.R. Part 90 ("Part 90"). 1/ Former Commission Administrative Law Judge Richard C. Steffey

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1/ In relevant part, section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this

found that the removal of Mullins from the dispatcher's job constituted unlawful discrimination, ordered that Mullins be reinstated to that position, and awarded back pay, expenses, and attorney's fees. 7 FMSHRC 1819 (November 1985)(ALJ). The Commission granted petitions for discretionary review filed by Beth-Elkhorn Corporation ("Beth-Elkhorn"), Local 1468, District 30, United Mine Workers of America ("UMWA"), and the International Union, UMWA. 2/ The Secretary of Labor ("Secretary") filed an amicus curiae brief in support of petitioners. Because we conclude that miners' Part 90 rights do not entitle miners to particular transfer positions, we reverse.

I.

The parties stipulated to the relevant facts. 7 FMSHRC at 1821-25. Mullins began working for Beth-Elkhorn at its No. 26 underground coal mine in 1970. At all times relevant to this proceeding, the UMWA represented miners at this mine for collective bargaining purposes. Until February 1981, Mullins worked as a repairman on a non-production maintenance shift. In May 1980, Mullins had a chest x-ray that evidenced pneumoconiosis, and the Department of Labor's Mine Safety and Health Administration ("MSHA") informed Mullins and Beth-Elkhorn of Mullins' option under Part 90 to work in an area of the mine in which the average concentration of respirable dust in the atmosphere was continuously maintained at or below 1.0 mg/m^3. See 30 C.F.R. §§ 90.1 & 90.3. Because the average concentration of respirable dust in the mine atmosphere in which Mullins was working was maintained at or below 1.0 mg/m^3, Mullins continued to work in his repairman's position.

On February 3, 1981, through exercise of his seniority rights under the National Bituminous Coal Wage Agreement of 1981 ("the Agreement"), the collective bargaining agreement to which Beth-Elkhorn and the UMWA were parties, Mullins secured a job as an electrician on

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> [Act] ... or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1).

Under 30 C.F.R. Part 90, as relevant here, a miner determined by the Secretary of Health and Human Services to have evidence of the development of Black Lung disease (pneumoconiosis) is given the opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m^3"). 30 C.F.R. § 90.3.

2/ For the sake of brevity, Local 1468, District 30, and the International Union of the UMWA are referred to herein as the "UMWA" or "the Union" unless the context requires a more specific reference.

the second shift, also a non-production shift. 3/ In September 1981 a sampling of the atmosphere in the area in which Mullins was working revealed that the average concentration of respirable dust exceeded 1.0 mg/m^3. MSHA issued Beth-Elkhorn a citation alleging a violation of 30 C.F.R. § 90.100 for failing to maintain the required low dust mine atmosphere where Mullins was working. Mullins became eligible again under Part 90 for transfer to a job in a less dusty area of the mine. Although Beth-Elkhorn offered to transfer Mullins to a less dusty area, he elected to waive his transfer option, pursuant to 30 C.F.R. § 90.104(a), and to retain the electrician's job. 4/ By letter dated October 15, 1981, Beth-Elkhorn informed MSHA that it did not believe that the dust in Mullins' work area could be maintained at the appropriate level but that Mullins had elected to waive his Part 90 transfer rights and remain in the electrician's position. Based on Mullins' waiver, MSHA terminated the previously issued citation.

Approximately one year later, in September 1982, the dispatcher's job on the second shift became permanently vacant and was advertised for bidding in the mine. By letter dated September 17, 1982, Mullins informed MSHA that he now wished to re-exercise his Part 90 rights to obtain that particular job. In his letter, Mullins stated, "If I cannot obtain this job as a dispatcher, then I do not wish to re-exercise my rights as a Part 90 miner." Exh. 9. In response, MSHA notified Beth-Elkhorn in November 1982 that Mullins had exercised his option "to work in a low dust area," and that "by the 21st calendar day after receipt of the notification ... [Mullins] must be working in an environment which meets the [1.0 mg/m^3] respirable dust standard." Exh. 11.

Mullins also bid on the dispatcher's job under the seniority provisions of the Agreement. Another bidder for the job, Norman Caudill, had greater mine seniority but was not a Part 90 miner. Beth-Elkhorn awarded the job to Mullins based on the "superseniority provision" of Article XVII(i)(10) of the Agreement, which gives a one-time job preference to Part 90 "production crew" members. 5/

3/ Article XVII(i) of the Agreement specifies that the filling of all permanently vacant jobs and new jobs created during the term of the contract shall be made on the basis of seniority. Article XVII(a) defines "seniority" as "Length of service and the ability to step into and perform the work of the job at the time it is awarded." Exh. 27, pp. 64-76.

4/ 30 C.F.R. § 90.104(a) provides that miners, through notification or other actions, may waive their Part 90 rights. This section also permits miners to re-exercise their Part 90 rights following a waiver. 30 C.F.R. § 90.104(c).

5/ Article XVII(i)(10) states:

> If the job which is posted involves work in a "less dusty area" of the mine (dust concentrations of less than one milligram per cubic meter), the provisions of the Article shall not apply if one of

Under the Agreement's procedures, Caudill filed a grievance with respect to Beth-Elkhorn's decision to award Mullins the job. The UMWA's Local 1468, District 30 represented Caudill, and the grievance proceeded to arbitration. In an opinion issued on April 15, 1983, the arbitrator sustained Caudill's grievance. The arbitrator held that the super-seniority provision of Article XVII(i)(10) applies only to Part 90 miners who are members of a "production crew," and that Mullins, as an electrician on a non-production maintenance shift, was not entitled to the one-time preference. Consequently, the arbitrator awarded the job to Caudill. Exh. 18.

Subsequent to the award, Beth-Elkhorn representatives met with Mullins and informed him that they would comply with the arbitrator's ruling by giving the dispatcher's job to Caudill. They also advised him that he could return to his former electrician's position or begin a new job as a repairman on the same non-production shift. The repairman's job carried the same hourly rate of pay and, in Beth-Elkhorn's opinion, was in a mine atmosphere that (unlike the electrician's position) complied with the 1.0 mg/m^3 dust standard. After this meeting, Mullins chose to return to his job as an electrician.

In a letter dated May 2, 1983, Beth-Elkhorn informed MSHA of these developments and stated that, in its opinion, Mullins' choice constituted a waiver, pursuant to 30 C.F.R. § 90.104, of his Part 90 transfer rights. At about the same time, Mullins filed a complaint with MSHA alleging, in essence, that his removal from the dispatcher's position discriminatorily denied him his Part 90 rights in violation of section 105(c)(1) of the Mine Act. Following an investigation of the complaint, MSHA determined that Mullins had not been subjected to illegal discrimination under the Act and declined to prosecute a complaint on Mullins' behalf. Mullins then instituted the present proceeding before this independent Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3).

In an eighty-page decision favoring Mullins, the judge found that Mullins had engaged in protected activity under section 105(c)(1) of the Mine Act when he re-exercised his Part 90 transfer rights and bid on the job of dispatcher. 7 FMSHRC at 1850-54. The judge concluded that

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> the bidders is an Employee who is not working in a "less dusty area" and who has received a letter from the U.S. Department of Health and Human Services informing him that he has contracted black lung disease and that he has the option to transfer to a less dusty area of the mine. In such event, the job in the less dusty area must be awarded to the letterholder on any production crew who has the greatest mine seniority. Having once exercised his option, the letterholder shall thereafter be subject to all provisions of this Article pertaining to seniority and job bidding. This section is not intended to limit in any way or infringe upon the transfer rights which letterholders may otherwise be entitled to under the Act.

Article XVII(i)(10) of the Agreement itself discriminated against and interfered with the rights of Part 90 miners by restricting them to a one-time only exercise of superseniority in bidding on vacant jobs and by giving preference in job placement only to Part 90 production crew members. 7 FMSHRC at 1844-45, 1854-61. The judge held that the UMWA discriminated against Mullins "when [it] brought a grievance to arbitration and succeeded in obtaining an interpretation of Article XVII(i)(10) of the [Agreement] which resulted in an award of a job performed in [a low dust area] to a miner who did not have any Part 90 rights at all." 7 FMSHRC at 1850. The judge further held that Beth-Elkhorn discriminated against Mullins by removing him from the dispatcher's job in compliance with the arbitrator's award. 7 FMSHRC at 1868-73. In reaching this conclusion, the judge opined that Beth-Elkhorn should have "re-examine[d] the [Agreement] ... to determine why it should not be revised in order to permit all Part 90 miners to bid on vacancies in positions performed in less than 1.0 milligrams of respirable dust." 7 FMSHRC at 1872. Finally, the judge concluded that the UMWA was an "operator" as defined in section 3(d) of the Mine Act, and consequently could be assessed a civil penalty for the violation of section 105(c)(1). 7 FMSHRC at 1841-44.

II.

The principal question presented is whether the judge erred in concluding that Mullins enjoyed the right to obtain a particular Part 90 transfer position -- here, the dispatcher's job on the second shift -- and that Beth-Elkhorn's award of that job to another miner pursuant to the arbitration decision violated section 105(c)(1) of the Mine Act. There is no dispute that a Part 90 miner, upon exercising his transfer option, has the right to be transferred to a position satisfying the requisite Part 90 criteria. We hold, however, that a Part 90 miner is not entitled to dictate to the operator or otherwise specify the particular position to which the transfer must be made. We find no statutory or regulatory basis for the judge's contrary views.

The general principles governing analysis of discrimination cases under the Mine Act are 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 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 803, 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).

The first question is that of protected activity: Did Mullins enjoy the right under the Mine Act and Part 90 to transfer to a specific position? The Commission has established some broad guidelines relevant to that question. We have held that section 105(c) of the Act bars discrimination against or interference with miners who are "the subject of medical evaluations and potential transfer" under the Part 90 standards. Goff v. Youghiogheny & Ohio Coal Co., 7 FMSHRC 1776, 1780-81 (November 1985)("Goff I"). We have emphasized the importance of the rights and protections conferred by Part 90 and the related provisions of the Act, but have recognized that their extent is not unlimited. For example, neither the Act nor Part 90 entitles a qualifying miner to work in a mine environment totally free of respirable dust. Goff v. Youghiogheny & Ohio Coal Co., 8 FMSHRC 1860, 1865 (December 1986)("Goff II"). Claims of protected activity and discrimination in this context must be resolved upon the basis of a careful review of the structure of miners' rights and operators' obligations contained in the pertinent statutory and regulatory texts.

In general, key provisions of the Mine Act and related mandatory health standards require that the average concentrations of respirable dust and of respirable dust containing quartz in the atmospheres of active workings in coal mines be maintained at or below specified low levels. 30 U.S.C. §§ 842 & 845; 30 C.F.R. §§ 70.100 et seq. & 71.100 et seq. Section 101(a)(7) of the Act further authorizes the Secretary to develop improved mandatory health or safety standards providing that miners whose health has been impaired by exposure to a designated hazard "shall be removed from such exposure and reassigned." 6/ As we stated in Goff I, "Part 90 implements this statutory mandate by providing for the transfer of miners who, as a result of exposure to the health hazard

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6/ In relevant part, section 101(a)(7) states:

> Where appropriate, [any mandatory health or safety standard promulgated under this subsection] shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to ... [a] hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miners shall be based on the new work classification.

30 U.S.C. § 811(a)(7)(emphasis added).

of respirable dust, have developed pneumoconiosis." 7 FMSHRC at 1778 n. 3. The improved Part 90 standards supercede the interim mandatory health standards contained in section 203(b) of the Mine Act, 30 U.S.C. § 843(b), which provided specifically for the transfer of miners with evidence of development of pneumoconiosis "to another position in any area of the mine." (Emphasis added.)

The Part 90 transfer option encompasses three basic rights: (1) to be assigned work in "an area of a mine" where the required Part 90 dust concentration levels are continuously maintained (30 C.F.R. §§ 90.3(a), 90.100 & 90.101); (2) in "an existing position" at the same mine on the same shift or shift rotation or, if the miner agrees in writing, in "a different coal mine, a newly-created position or a position on a different shift or shift rotation" (30 C.F.R. § 90.102(a)); and (3) at no less than the regular rate of pay earned by the miner immediately before exercise of the transfer option (30 C.F.R. § 90.103)(emphases added). It is the duty of operators to effectuate these rights as applicable with respect to their Part 90 miners.

Nothing in the quoted texts -- from superseded section 203(b) of the Mine Act (supra) to the present Part 90 standards -- requires that eligible miners be transferred to particular positions. On the contrary, placement in a position meeting the relevant dust concentration criteria is all that is required. As the Secretary points out in his amicus curiae brief, "Part 90 allows an operator to respond with flexibility to a miner's request to work in a less dusty area." S. Br. 8. Not only may the operator offer the Part 90 miner transfer to a range of qualifying positions within less dusty areas (30 C.F.R. § 90.102), but also may elect to maintain or bring the miner's existing work area into compliance with the applicable Part 90 dust standards (30 C.F.R. §§ 90.100 & 90.101). 45 Fed. Reg. 80,760-761 (December 5, 1980)(Secretary's official commentary on final Part 90 regulations).

The pertinent legislative and regulatory histories make clear that the fundamental purpose of these transfer provisions is the protection of miners' health -- not the distribution of specific jobs. Thus, in originally enacting as part of the 1969 Coal Act the provision that became section 203(b) of the Mine Act, a key House report states: "The committee considers this section ... equal in importance to the dust control section for decreasing the incidence and development of pneumoconiosis." H. Rep. No. 563, 91st Cong., 1st Sess. 20 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1050 (1975); see also Id. at 1071-72, 1199 & 1551. The legislative history of the Mine Act again reveals that the congressional emphasis is on decreasing the incidence of pneumoconiosis. S. Rep. No. 181, 95th Cong., 1st Sess. 22-23 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 610-11 (1978); see also Id. at 1320.

Moreover, the Secretary's official comments concerning the final Part 90 standards adopted by him expressly indicate that while a Part 90 miner is entitled to an opportunity to remove himself from potentially

harmful concentrations of respirable dust, a mine operator retains "a margin of latitude" and "some flexibility" in the placement of a Part 90 miner, particularly in view of "unforeseen situations and unexpected mine and market conditions." 45 Fed. Reg. at 80,765-66. Thus, while an operator is required to provide a miner exercising his Part 90 option with a job that meets the applicable dust concentration limit, the operator retains an important measure of discretion to choose the specific job that is offered, provided the job meets the criteria specified in Part 90 regarding the mine involved, the shift or shift rotation, and the rate of pay. To the extent that the judge interpreted the Secretary's official comments as supporting a conclusion to the contrary (7 FMSHRC at 1838-39), the judge erred. 7/

We also note the explanatory construction of the Part 90 regulations provided us by the Secretary on review:

> The intent of Part 90 is that the specific job assignment of a Part 90 miner remains essentially a management decision made by the operator. ... In promulgating Part 90, the Secretary did not intend that an operator be required to give an eligible miner a specific job, but instead that the operator be obliged only to give him the opportunity to work in low dust concentrations. Any other interpretation of Part 90 destroys the flexibility the regulation is intended to provide. For example, it would be pointless for the standard to give an operator the option of bringing the dust level on the miner's present job into compliance with the standard if the miner nevertheless could require the operator to transfer him to a different specific job of his own choosing.

S. Br. 8-9.

In sum, we find nothing in the language, purpose or history of the Mine Act or of Part 90 that grants Part 90 miners the right to secure specific jobs that they desire. Here, Mullins attempted to exercise his Part 90 transfer option by seeking only the specific job of dispatcher. (As noted, Mullins' transfer request to Beth-Elkhorn stated: "If I cannot obtain this job as a dispatcher, then I do not wish to re-exercise my rights as a Part 90 miner.") Mullins, of course, had the

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7/ In his Federal Register comments the Secretary rejected a recommendation that Part 90 miners be assigned only to vacant existing job to avoid "bumping" non-Part 90 miners from their jobs. 45 Fed. Reg. at 80,766. We read the Secretary's statement that "there will be occasions where an operator will assign a Part 90 miner to a position currently held by a non-Part 90 miner" not as an indication that a Part 90 miner is entitled to a particular job over a miner with more seniority, but rather as recognition that in the exercise of the operator's perogative of offering Part 90 miners qualifying jobs, such "bumps" may be inevitable.

general right to re-exercise his Part 90 transfer option. To the extent that he sought Part 90 transfer to a particular position, however, his goal was outside the rights afforded by the Mine Act.

From the standpoint of Beth-Elkhorn's Part 90 obligations, it follows that the operator did not violate the Mine Act by failing to retain Mullins in the dispatcher's job. Beth-Elkhorn's only duty was to offer Mullins a position that satisfied the Part 90 criteria. The operator fulfilled its responsibilities by offering him the repairman's job -- a position at the same mine, on the same shift, at no loss in pay, and in a low dust area of the mine. 30 C.F.R. §§ 90.100 & 90.102.

Nor is there any evidence in the record that Beth-Elkhorn's actions otherwise were tainted in any part by an intent to discriminate against Mullins or interfere with his exercise of any legitimate protected activity. Prior to the dispute over the dispatcher's job, Beth-Elkhorn and Mullins had reached a mutually acceptable accommodation concerning Mullins' work as an electrician. Beth-Elkhorn initially awarded the dispatcher's job to Mullins pursuant to the superseniority provision of Article XVII(i)(10) of the Agreement. The UMWA sought Mullins' removal from that position pursuant to the grievance and arbitration procedures of the Agreement. We cannot conclude that either the UMWA, in pursuing a grievance over Mullins' initial placement in the dispatcher's position, or Beth-Elkhorn, in removing Mullins from the job pursuant to the arbitration award, violated the Mine Act.

As independent grounds for declaring Mullins' removal unlawful, however, the judge determined that Article XVII(i)(10) of the Agreement and the grievance arbitration proceedings taken in this matter amounted to invalid restrictions upon Mullins' Part 90 and Mine Act rights. We hold that the judge erred and exceeded the limits of his authority in so ruling.

The Mine Act is not an employment statute; the Commission does not sit as a super grievance or arbitration board. When required to do so for purposes of resolving issues arising under the Mine Act, we must interpret the meaning and application of parties' bargaining agreements with appropriate restraint. As the Commission has stated: "It is true that we do not decide cases in a manner which permits parties' private agreements to overcome mandatory safety requirements or miners' protected rights; nor do we unnecessarily thrust ourselves into resolution of labor or collective bargaining disputes." Loc. U. No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp., 3 FMSHRC 1175, 1179 (May 1981). See also United Mine Workers of America on behalf of James Rowe, et al. v. Peabody Coal Co., 7 FMSHRC 1357, 1364 (September 1985), pet. for review filed, No. 85-1717 (D.C. Cir. October 30, 1985).

The wisdom or fairness of Article XVII(i)(10) is not the Commission's concern. Nor does the Commission's role include assessing whether the arbitrator's construction of that provision represents sound or unsound collective bargaining law. Also, there being no Part 90 right to secure particular positions, the superseniority effect of the Article in question may, in fact, operate to grant some Part 90 miners

more rights than conferred by Part 90 and the Mine Act. The Mine Act does not bar operators and unions from agreeing to give Part 90 miners placement rights more generous than those provided by statute and regulation. See, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 778-79 (1976); Moteles v. Univ. of Penn., 730 F.2d 913, 921 (3d Cir.), cert. denied, 469 U.S. 855 (1984); Tangren v. Wackenhut Services, Inc., 658 F.2d 705, 707 (9th Cir. 1981), cert. denied, 456 U.S. 916 (1982). Further, the complained-of distinction in Article XVII(i)(10) between production and non-production Part 90 miners is a seniority matter negotiated between the contracting parties and was drawn in a context of providing an elevated level of rights to Part 90 miners. Such contractual distinctions, above the statutory/regulatory "floor," do not violate the Mine Act or Part 90. In short, Mullins had no Part 90 claim to the dispatcher's job; his initial award of the job, pursuant to the superseniority provisions of the Agreement, went beyond any entitlement under Part 90; and his removal from that job pursuant to the same Agreement and proposed transfer to another Part 90-qualifying position did not violate any of his Part 90 rights.

Accordingly, we conclude that Mullins did not engage in protected activity in seeking the dispatcher's job, and neither the Union nor Beth-Elkhorn violated section 105(c) of the Mine Act in connection with his removal from that position. 8/

III.

Finally, we briefly address the judge's holding that for purposes of this proceeding the UMWA is an "operator" under the Mine Act subject to a civil penalty for the violation of section 105(c)(1). 9/ Section 3(d) of the Act, 30 U.S.C. § 802(d), defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." The judge noted that Article 1A of the Agreement provides that Beth-Elkhorn may not contract out certain types of mine construction or extraction jobs "unless all [UMWA] employees with necessary skills to perform the work are working no less than 5 days per week." 7 FMSHRC at 1843. The judge concluded that "by restricting [Beth-Elkhorn's] right to contract out construction and other work at the mine, [the UMWA] makes itself an 'independent contractor performing services at the mine' and makes [itself] an 'operator' within the meaning of section 3(d) of the Act." 7 FMSHRC at 1843. We disagree.

8/ During the course of this proceeding, the Union sought and the judge denied his disqualification or recusal. 7 FMSHRC at 1897. The UMWA sought review of the judge's ruling but at oral argument advised the Commission that it had abandoned the recusal issue. Tr. Oral Arg. 13-14. We therefore do not address that issue.

9/ Section 110(a) of the Act states that "[t]he operator of a ... mine" in which a violation of the Act occurs shall be subject to a civil penalty. 30 U.S.C. § 820(a).

Without deciding whether a union may ever be an "operator" under the Mine Act, we conclude that on the facts presented here the UMWA is not an "independent contractor performing services or construction." The Union did not itself "contract to perform services or construction at [the] mine." See 30 C.F.R. § 45.2(c). Of equal importance, under the Agreement the power of the UMWA to restrict Beth-Elkhorn's right to contract out construction and other work at the mine is far removed from the kind of participation in the running of the contracted activity or service that could support a finding under the Mine Act of independent contractor status. See, e.g., Old Dominion Power Company v. Donovan, 772 F.2d 91, 96 (4th Cir. 1985); National Industrial Sand Ass'n. v. Marshall, 601 F.2d 689, 701 (3d. Cir. 1979). We vacate the judge's finding that the UMWA is an "operator" under the Mine Act.

IV.

For the foregoing reasons, the judge's decision is reversed and Mullins' complaint of discrimination is dismissed. 10/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

10/ Chairman Ford did not participate in the consideration or disposition of this case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 29, 1987

JIM WALTER RESOURCES, INC.	:	
	:	
v.	:	Docket No. SE 85-36-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
SECRETARY OF LABOR,	:	Docket No. SE 85-62
MINE SAFETY AND HEALTH	:	Docket No. SE 85-109
ADMINISTRATION (MSHA)	:	Docket No. SE 85-123
	:	Docket No. SE 85-124
v.	:	
	:	
JIM WALTER RESOURCES, INC.	:	
	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. SE 86-83
	:	
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY THE COMMISSION:

In these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"), the issue is whether Jim Walter Resources, Inc. ("Jim Walter") violated 30 C.F.R. § 75.316 by failing to comply with its approved methane and dust control plan by not maintaining line brattice to within 10 feet of "all faces." 1/ Commission

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1/ 30 C.F.R. § 75.316, a mandatory safety standard for underground coal mines, repeats § 303(o) of the Mine Act, 30 U.S.C. § 863(o).

Administrative Law Judge George Koutras held in Docket No. SE 85-36-R, etc. that the Secretary of Labor ("Secretary") did not establish a violation. 8 FMSHRC 568 (April 1986)(ALJ). 2/ In Docket No. SE 86-83 Commission Administrative Law Judge James Broderick concluded that a violation was established and assessed a civil penalty of $750. 3/ 9 FMSHRC 109 (January 1987)(ALJ). We granted petitions for discretionary review of both decisions. We consolidated the cases on review and heard oral argument. For the reasons that follow, we affirm Judge Koutras' decision and reverse Judge Broderick's.

I.

The antecedents of these controversies arose in 1972 when a methane ignition occurred at Jim Walter's No. 3 mine. The mine is located in Tuscaloosa County, Alabama, and has a history of high methane liberation. At the time of the methane ignition, the No. 3 mine's approved ventilation plan required that line brattice be maintained to within 10 feet of all working faces while coal was being cut and loaded. After mining of the face ceased, the line brattice was taken down and cleanup operations in the face area were conducted. A continuous mining machine being used during the cleanup caused a methane ignition. Following the ignition, Jim Walter was cited by the Secretary of Interior's Mining Enforcement and Safety Administration ("MESA") for a

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Section 75.316 provides in part:

> 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.... 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.

2/ Docket No. SE 85-36-R is a contest proceeding filed by Jim Walter challenging a withdrawal order. Docket Nos. SE 85-62, SE 85-109, SE 85-123, and SE 85-124 are penalty proceedings initiated by the Secretary. Docket No. SE 85-124 was inadvertently omitted from Jim Walter's petition for discretionary review. The parties agree that it should have been included, and consequently, we deem it before us on review. In Docket No. SE 85-124, Judge Koutras also found a violation of the permissibility standard, 30 C.F.R. § 75.503. This violation is not before us on review.

3/ In addition, Judge Broderick found a second violation of section 75.316 in that Jim Walter allowed methane on a longwall section to exceed the maximum permissible limit. This violation is not before us on review.

violation of section 75.316, but the proceeding was dismissed after it was determined that coal was not being mined at a "working face" when the ignition occurred, and that the cited provision in the ventilation plan therefore was inapplicable. MESA thereafter concluded that the ventilation plans at certain of Jim Walter's mines should be revised to require that line brattice be maintained to within 10 feet of "the area of deepest penetration of all faces in all working places inby the last open crosscut" (the "all faces provision"), rather than just working faces. 4/

Accordingly, in 1973 Jim Walter submitted to the appropriate MESA district manager for his review and approval a ventilation plan for the No. 7 mine, which also is located in Tuscaloosa County and also has a history of high methane liberation. As submitted by Jim Walter, the plan applicable to the No. 7 mine contained a provision that line brattice be maintained to within 10 feet of all working faces. The MESA district manager sent Jim Walter a letter that approved the plan with the proviso that line brattice be maintained to within 10 feet of "all faces," as stated above. Between 1973 and 1984, each time the ventilation plan for the No. 7 mine was reviewed at six-month intervals, as required by statute and the Secretary's regulation, Jim Walter submitted a plan that required line brattice to be maintained to within 10 feet of all working faces and the MESA (and MSHA) district manager responded with a letter stating that the plan was approved provided that line brattice "be maintained to within 10 feet ... of all faces."

Apparently, between 1973 and November 13, 1984, no citations were issued either by MESA or MSHA alleging a violation of the all faces provision at Jim Walter's mines. On November 13, 1984, however, an MSHA inspector issued the first citation alleging such a violation at Jim Walter's No. 4 mine, also in Tuscaloosa County. Jim Walter asserted that there was no violation because mining had ceased at the face and would not be resumed for several days, and it was not required by the plan to maintain line brattice within 10 feet of idle faces. Following an evidentiary hearing, Judge Broderick ruled against Jim Walter and found that the area at issue was a face within the meaning of the all faces provision. Jim Walter Resources, Inc., 7 FMSHRC 1471 (September 1985)(ALJ). 5/

4/ MESA administered the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977), the predecessor of the Mine Act. When the Mine Act became effective in 1977, enforcement jurisdiction transferred from the Secretary of the Interior to the Secretary of Labor and MESA was replaced by the Mine Safety and Health Administration ("MSHA").

5/ Jim Walter did not seek Commission review of this decision. The parties stipulated that the issue in Docket Nos. SE 85-36-R, etc. is identical to the issue in the case involving the November 13, 1984 citation. The Secretary argues that Judge Koutras erred in not finding Jim Walter collaterally estopped from relitigating the issue. We reject this contention. The Secretary did not argue collateral estoppel below, nor has he shown any cause for failure to do so. The Mine Act and

II. Docket No. SE 85-36-R, etc. 6/

On April 8, 1985, MSHA Inspector Judy McCormick inspected the No. 7 mine. In the No. 13 section of the mine, Inspector McCormick found that a crosscut had been driven to the left for 24 feet off the No. 2 entry toward the No. 1 entry. Prior to driving the crosscut, the continuous mining machine had advanced the No. 2 entry a distance of 8 feet inby, creating an 8 foot extension of the No. 2 entry inby the crosscut (location Y on Exh. G-3). Line brattice was not maintained to within 10 feet of location Y. However, line brattice was maintained to within 10 feet of the end of the crosscut (location X on Exh. G-3). Inspector McCormick believed that under the all faces provision both location X and location Y were faces within 10 feet of which line brattice had to be maintained. Therefore, Inspector McCormick issued a withdrawal order alleging a violation of section 75.316. Jim Walter abated the alleged violation by installing line brattice to within 10 feet of location Y.

Jim Walter contested the validity of the withdrawal order asserting that under its approved ventilation plan line brattice was not required at location Y. For a variety of reasons, Judge Koutras agreed. In his decision, Judge Koutras noted that section 75.316 requires that the plan approved by the Secretary and adopted by the operator be suitable to the mine. The judge found the all faces provision not suitable to the No. 7 mine in that its implementation would result in added hazards. 8 FMSHRC at 593. The judge also found that the Secretary did not present credible evidence to establish reasons why the provision was required, that it was inconsistent with other mandatory safety standards, and that it was discriminatory. Id. at 588, 593-594. Finally, the judge criticized the manner in which MSHA attempted to impose the requirement through the use of a "proviso" inserted in successive letters approving Jim Walter's plans. Id. at 592-593. The judge vacated the withdrawal order and dismissed the civil penalty proceedings. Id. at 594.

Because we conclude that the Secretary did not prove a violation of section 75.316, we agree with the result reached by the judge. Our conclusion, however, is premised upon a different and more limited basis. We find that the disputed language of the plan provision is ambiguous. We further find that the Secretary's evidence does not dispel the ambiguity and does not establish that the cited condition violated the provision at issue.

Ventilation plans are approved by the Secretary and adopted by

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Commission Procedural Rule 70(d) bar, except for good cause shown, an assignment of legal error upon which the judge had no opportunity to pass. 30 U.S.C. § 823(d)(2)(iii); 29 C.F.R. § 2700.70(d). Wilmot Mining Co., Docket No. LAKE 85-47, 9 FMSHRC ___ (April 30, 1987), slip op. at 3.

6/ The parties stipulated that this part of the consolidated proceeding would be determined on the basis of the facts in Docket No. SE 85-109.

mine operators pursuant to section 75.316 and section 303(o) of the Mine Act. The approval and adoption process is bilateral and results in the Secretary and the operator, through consultation, discussion, and negotiation, mutually agreeing to ventilation plans suitable to the specific conditions at particular mines. Zeigler v. Kleppe, 536 F.2d 398, 406-407 (D.C. Cir. 1976); Carbon County Coal Co., 6 FMSHRC 1123 (May 1984). The process is flexible, contemplates negotiation toward complete agreement, and is aimed at compliance with mine safety and health requirements. Under the approval and adoption process, the operator submits a plan to the Secretary who may approve it or suggest changes. The operator is not bound to acquiesce in the Secretary's suggested changes. The operator and the Secretary are bound, however, to negotiate in good faith over disputes as to the plan's provisions and if they remain at odds they may seek resolution of their disputes in enforcement proceedings before the Commission. Carbon County Coal Company, 7 FMSHRC 1367, 1370-71 (September 1985); Penn Allegh Coal Co., 3 FMSHRC 2767, 2771 (December 1981). The ultimate goal of the approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord. Once the plan is approved and adopted, these provisions are enforceable at the mine as mandatory safety standards. Zeigler, supra at 409; Carbon County, 7 FMSHRC at 1370; Penn Allegh.

In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. In plan violation cases the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition or practice violates the provision. Here, Jim Walter argues in part that the all faces provision was not a part of the approved and adopted plan at the No. 7 mine. We do not reach this question, however, because, even assuming the provision is considered a part of the approved and adopted plan, in the instant case the Secretary did not prove that the failure to provide line brattice to within 10 feet of the cited location (location Y) violated the all faces provision.

In Penn Allegh, the Commission held:

> The statute and the standard require the parties to agree on a dust control plan in the interest of miner safety. Therefore, after a plan has been implemented (having gone through the adoption/ approval process) it should not be presumed lightly that terms in the plan do not have an agreed upon meaning.

3 FMSHRC at 2770. The provision in that case was ambiguous on its face but the Secretary established the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision and evidence of consistent enforcement. The Secretary's evidence in the instant case falls far short in these respects.

First, the record contains no detailed and consistent testimony from the Secretary's witnesses illuminating the meaning of the all faces provision. Indeed, the testimony of two of the Secretary's witnesses is

at odds regarding the meaning of the term "all faces." Inspector McCormick conceded that there is no definition of the term "face" in the Mine Act or in the Secretary's regulations and could only "guess" that the term "face" would be "the area from which coal is to be extracted or is being extracted." Tr. 102. MSHA's supervisory mining engineer, William H. Meadows, disagreed with the inspector's view and stated that the term "face" "has not been interpreted" to include areas where future mining is planned and that he "would not enforce it that way." Tr. 182. This conflicting testimony in general evidences the difficulty in ascertaining from the record an agreed definition of the term. Tr. 156-160. Since the Secretary's own witnesses were uncertain and in disagreement as to the meaning of the all faces provision, it cannot be presumed that Jim Walter was aware that the provision meant what the Secretary now urges it means. Compare U.S. Steel Mining Co., 8 FMSHRC 314, 320 (March 1986)(detailed and consistent testimony of MSHA inspector supports Secretary's interpretation of plan).

Second, the Secretary presented no evidence of any prior consistent enforcement of the "all faces" provision that might have established that Jim Walter was on notice regarding the Secretary's interpretation of the meaning of the provision. Compare Penn Allegh, supra, 3 FMSHRC at 2769-70 (consistent enforcement is strong evidence of interpretation of plan).

Third, the Secretary asserts that on April 8, 1985, there were two faces, location X and location Y, in the No. 13 section. Yet the Secretary admitted that the 1972 ignition incident that led to the Secretary's inclusion of the disputed provision involved only one face. Tr. Oral Arg. 16-17. The 1972 ignition involved a failure to maintain line brattice to within 10 feet of the most recently mined face. On April 8, 1985, location X was the face most recently mined and all parties agree that Jim Walter maintained line brattice within 10 feet of location X.

For these reasons, we conclude that the Secretary did not prove a violation of section 75.316. We therefore affirm the judge's decision insofar as it it is consistent with our discussion.

III. Docket No. 86-83

On March 13, 1986, MSHA Inspector Gerald N. Tuggle issued a withdrawal order to Jim Walter alleging a violation of section 75.316 at Jim Walter's No. 7 mine: 7/

> [T]he continuous mining machine had mined the crosscut in [the No. 2 entry of the No. 8 section] to the left on the curtain (brattice line) side and the end of the curtain terminated in excess of 10 feet from the deepest point of penetration of the face to the straight of the entry.

7/ Originally the order charged a violation of 30 C.F.R. § 75.200 but was modified subsequently to allege a violation of section 75.316.

The parties agree that the conditions described in the order occurred. The Secretary alleged that in failing to maintain the line brattice to within 10 feet "of the face to the straight of the entry," Jim Walter violated the all faces provision.

In the subsequent civil penalty proceeding Jim Walter asserted that it did not violate section 75.316. The essence of Jim Walter's argument was that the end point to the straight of the No. 2 entry had not been recently mined and that under the approved ventilation plan, it was not required to maintain line brattice to within 10 feet of that point. The parties stipulated that the issue of whether Jim Walter violated the standard was identical to the issue pending before the Commission in Docket Nos. SE 85-36-R, etc., and that the Commission's decision in those cases would be controlling. Stipulation 1 and 4. See also Tr. 4-5. Accordingly, because the judge's decision in this docket was based on a rationale at odds with our disposition set forth above, we reverse his decision and vacate the withdrawal order.

IV.

In deciding these cases, we decline to attempt on the present records to determine an all-encompassing definition of the term "face." We also do not address whether the ventilation plans at the subject mines should include the additional measure urged by the Secretary. The Act and the mandatory standard require the Secretary and the operator to agree upon a ventilation plan. It is of paramount importance under the statute that both the Secretary and the operator proceed diligently and in good faith to develop a conclusive and suitable plan containing provisions clearly understood by both. Thus, if MSHA continues to believe that the all faces provision is necessary to miner safety and suitable to Jim Walter's mines, it should seek to reach agreement with Jim Walter on the provision through proper implementation of the ventilation plan approval and adoption process. In this regard, we note the parties strongly disagree as to whether the all faces provision was ever conclusively incorporated into the ventilation plan. The record indicates that for thirteen years Jim Walter submitted plans for approval without the all faces provision and that MESA, and then MSHA, approved the plans by letters that included the all faces provision. It serves neither the safety of the miners nor the policy of the Mine Act when the Secretary and an operator are unable to reach firm agreement on the meaning of a mine plan provision even after several years of dealing with that provision. Given the importance Congress attached to mine specific plans, we emphasize that it is incumbent upon the parties to adopt a more effective mechanism to ensure that mine plans are expeditiously, unambiguously and conclusively approved and adopted.

Accordingly, the judge's decision in Docket Nos. SE 85-36-R, etc., vacating the Secretary's citations, dismissing MSHA's civil penalty

proposals, and granting Jim Walter's contest is affirmed. The decision in Docket No. SE 86-83, finding a violation of the all faces provision, is reversed, and the subject order of withdrawal and civil penalty are vacated.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 1, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 86-68 A. C. No. 33-00942-03515
v.	:	Lafferty Strip & Tipples
OHIO RIVER COLLIERIES, Respondent	:	

AMENDED DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The Decision Approving Settlement previously issued for the above-captioned case is hereby reopened due to a clerical error pursuant to Commission rule 65(c). 29 C.F.R. § 2700.65(c).

The originally assessed amounts were $1,000 and the proposed settlements are for $690. The Solicitor's motion discusses each violation in detail and justifies the proposed settlements in accordance with the six statutory criteria set forth in section 110(i) of the Act.

Accordingly, the recommended settlements are Approved and the operator is ORDERED TO PAY $690 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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MAY 5 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 87-52
	:	A.C. No. 15-09926-03507
v.	:	
	:	Docket No. KENT 87-53
GRATESIDE COALS, INC., Respondent	:	A.C. No. 15-09926-03508
	:	
	:	Grateside No. 3 Surface

ORDER OF DEFAULT

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Docket No. KENT 87-52, concerns the petitioner's proposals for assessment of civil penalties in the amount of $1,972, for 20 section 104(a) citations alleging violations of various mandatory safety standards found in Parts 48 and 77, Title 30, Code of Federal Regulations. Docket No. KENT 87-53, concerns proposals of assessment of civil penalties in the amount of $472, for five section 104(a) citations alleging violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations.

The petitioner has certified that its civil penalty proposals were mailed to respondent's counsel of record on February 27, 1987, and a copy of a letter to counsel from the petitioner's Nashville, Tennessee Solicitor's Office reflects that counsel was advised that she had 30 days to file answers pursuant to Commission Rule 28, 29 C.F.R. § 2700.28. Counsel was also advised that the failure to file answers within the 30-day period could result in the proposed assessments being entered as the final orders of the Commission as provided by procedural Rule 63, 29 C.F.R. § 2700.63. As of this date, no answers have been filed.

In view of the respondent's failure to file answers to the petitioner's civil penalty proposals, I issued an Order to Show Cause on April 10, 1987, ordering the respondent to state within 10 days why it should not be held in default for its failure to file answers in these proceedings. The certified mail postal receipt received from the Post Office Department reflects that counsel for the respondent received my Order on April 16, 1987. However, counsel has not responded.

Discussion

29 C.F.R. § 2700.39, provides as follows:

> A party against whom a penalty is sought shall file and serve an answer within 30 days after service of a copy of the proposal on the party. An answer shall include a short and plain statement of the reasons why each of the violations cited in the proposal is contested, including a statement as to whether a violation occurred and whether a hearing is requested.

29 C.F.R. § 2700.63, provides as follows:

> (a) Generally. When a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.
>
> (b) Penalty proceedings. When the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

The respondent in these proceedings has failed to file answers to the petitioner's civil penalty proposals, and it has also failed to respond to my Order to Show Cause. Under the circumstances, I conclude and find that the respondent is in default and has waived its right to a hearing. I see no reason why the petitioner's proposed civil penalty assessments should not be made the final order of the Commission.

ORDER

Judgement by default is herewith entered in favor of the petitioner, and the respondent IS ORDERED TO IMMEDIATELY PAY to the petitioner the sum of $2,444, as the final civil penalty assessments for the citations in question.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 5 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 86-38-M
	:	A.C. No. 33-03990-05507
v.	:	
	:	Jonathan Limestone Mine
COLUMBIA PORTLAND CEMENT COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $2,000 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.12-16, as stated in a section 104(a) Citation No. 2518303, issued at the mine on July 29, 1985.

The respondent filed a timely answer and contest, and the case was scheduled for hearing in Zanesville, Ohio, on May 6, 1987. However, the petitioner has filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a settlement of the case. The proposed settlement agreement requires the respondent to pay a civil penalty assessment in the amount of $1,000 for the violation in question.

Discussion

In support of the proposed settlement disposition of this case, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. In addition, the petitioner has submitted a full discussion and disclosure as to the facts and circumstances surrounding the issuance of the citation in question, and a reasonable justification for the reduction of the original proposed civil penalty assessment.

The citation in this case was issued after an MSHA investigation into an accident which occurred on July 27, 1985, which resulted in serious disabling injuries to an electrician when he entered a kiln precipitator hopper with the feed-out screw conveyor running and was caught in the screw. The electrician's right leg was severed below the knee. The electrical power switch for the screw conveyor had not been deenergized or locked out. The cited standard, 30 C.F.R. § 56.12-16, requires that electricially powered equipment be deenergized before mechanical work is done on such equipment.

Petitioner states that the original civil penalty assessment amount was based on a "special assessment" made in accordance with 30 C.F.R. § 100.5, due to the occurrence of the serious nonfatal accident. However, petitioner asserts that there are mitigating circumstances which justify a reduction in the original penalty amount. In this regard, petitioner states that the electrician had not started the mechanical work when the accident occurred and that he was accidently knocked into the hopper and into the moving screw conveyor. The electrician did not intend to enter the precipitator at the time of the accident as his belt, tools and radio had been left outside and he had only intended to check the dust level to the hopper at the time of the accident.

Petitioner asserts that the employee in question was an experienced electrician who had received training from the respondent on lock out procedures, and that the respondent had a history of training employees on such procedures. Petitioner also points out that the electrician's foreman had given him instructions and warned him to lock out the screw conveyor before entering the precipitator. Further, petitioner states that the mine is a small operation, and that during the 24-months preceding the issuance of the citation, the respondent had received two assessed violations.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $1,000 in satisfaction of the citation in question within

thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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May 6, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 87-2-M A. C. No. 29-00159-05516
v.	:	Tyrone Mine & Mill
PHELPS DODGE CORPORATION-TYRONE BRANCH, Respondent	:	

DISAPPROVAL OF SETTLEMENT
NOTICE OF HEARING

Before: Judge Merlin

The parties have filed a motion to approve a settlement for the one violation in this case. The proposed settlement is for the original assessed amount of $192. One man was killed and another seriously injured as a result of the accident which was the subject of the citation. Based upon the present record, the proposed settlement cannot be approved.

The Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act which provides:

> (k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. * * *

See S. Rep. No. 95-181, 95th Cong., 1st Sess. 41-5 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978).

Penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's proposed penalties. Rather, they must determine the appropriate amount of penalty, if any, in accordance with the six

criteria set forth in section 110(i) of the Act. Sellersburg Stone v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

The Commission has recently reaffirmed the authority of its Judges to review and, where necessary, disapprove settlements, stating:

> * * *. Settlement of contested issues and Commission oversight of that process are integral parts of dispute resolution under the Mine Act. 30 U.S.C. § 820(k); see Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986). The Commission has held repeatedly that if a judge disagrees with a penalty proposed in a settlement he is free to reject the settlement and direct the matter for hearing. See, e.g., Knox County Stone Co., 3 FMSHRC 2478, 2480-81 (November 1981). A judge's oversight of the settlement process "is an adjudicative function that necessarily involves wide discretion." Knox County, 3 FMSHRC at 2479.
>
> * * * * *

Secretary of Labor v. Wilmot Mining Company, Docket Number LAKE 85-47, slip op. at 3, 8 FMSHRC_____ at _____ (April 30, 1987).

The Commission further explained:

> * * *, we believe that [the] better practice requires that if a judge rejects a written settlement proposal he issue an order to that effect. Specifying the reasons for the rejection might sharpen the issues for trial and even possibly encourage an acceptable settlement proposal.

Id. at Footnote 1.

The subject Citation, No. 2662005, dated January 6, 1985 describes the condition as follows:

> Two employees of an independent contractor were seriously injured on November 25, 1985, and one died on December 19, 1985, when a bundle of three, 12 inch by 45 feet long pipe that were banded together slid from a stack and pinned the victims between pipe on the ground they were attempting to put a choker

on, and the falling bundle. The pipe had been stacked about one week prior to the accident by an employee of the production-operator in a manner that contributed to a fall of material hazard in that the south stack of five bundles of pipe had three pipe in the bottom bundle, three pipe in the next bundle and four pipe in the top three bundles, resulting in a total height of approximately 5-1/2 feet. The top bundle of four pipe in the south stack apparently slid to the north and pushed the three pipe off the north pile onto the victims.

The mandatory standard is 30 C.F.R. § 56.16001 which requires that:

> Supplies shall not be stacked or stored in a manner which creates tripping or fall-of-material hazards.

The file also contains the MSHA Accident Investigation Report which sets forth, inter alia, these facts: Phelps Dodge Corporation contracted with Hamilton Western Construction Company, Inc., to install a 6,000-foot-long 12-inch dewatering pipeline. This arrangement required that Hamilton Western lay the pipeline in accordance with a provided design while Phelps Dodge was to provide, among other items, the plastic pipe specified. Phelps Dodge purchased the required pipe which was delivered to the mine-site by common carrier. As in previous deliveries, the pipe was received by Phelps Dodge warehousing personnel who unloaded the pipe with a Phelps Dodge forklift. The pipe was unloaded and stacked at a pre-determined location ahead of the approaching pipeline construction. The pipe in question was delivered and unloaded on November 12, 1985, thirteen days before the accident. A total of 49 pipes was delivered packaged in seven 3-pipe and seven 4-pipe bundles. The pile nearest the pipeline contained three 4-pipe bundles overlain by two 3-pipe bundles (north stack). Abutting this pile on the south was a 22-pipe pile consisting of two 3-pipe bundles on top of which were stacked four 4-pipe bundles (south stack). This pile was inherently unstable since the base bundles were 12 3/4 inches narrower than the width of 16 pipe lengths it supported. During preceding pipe-laying activity, pipe bundles were reportedly stacked only 2 or 3 units high (approximately 43.5 inches). On this occasion, however, the bundles were stacked 6-high (87 inches). The crew therefore, was faced with a significantly different set of physical conditions. The pipeline construction crew consisted of a crane operator and two laborers. They had previously received their work assignment and proceeded to the jobsite without their supervisor's presence. The crane operator moved a cherry picker into hoisting position as the first laborer readied the fusion equipment. The crane operator began cutting

the steel-securing bands of the top 3-pipe bundle of the south stack nearest the crane. He cut 5 of the 6 bands and, positioning himself in the clear, cut the last band. This allowed the 3-pipes to fall to the ground on the south side of the steel service pipeline. He then obtained hoisting slings while the second laborer positioned a dozer to drag fused lengths of pipe away from the fusion machine. As the crane operator was attaching the hoisting sling to the first pipe on the ground, the remaining 3-pipe bundle of the north stack slid to the ground landing on top of him and pinning the second laborer's right leg against the steel service pipeline. Apparently at the same time the top 4-pipe bundle of the south stack also slid off to the north and across the pipe bundle lying atop the crane operator. Twenty-four days later the crane operator died of his injuries. The second laborer suffered a broken leg.

The Accident Investigation Report describes the cause of the accident in this manner:

> The direct cause of this accident was the failure to recognize the instability of the irregularly stacked pipe bundles.
>
> Possibly contributing to this accident was the fact that the crew members were not accustomed to working with pipe piled higher than 2 or 3 bundles. In this accident the bundles were stacked 6-high. The light rainfall of the past night may have created even greater pile instability; wet plastic pipe presents a very slippery surface.

The settlement motion submitted by the parties states that the pipes were stacked by the operator's warehousing personnel and states that two employees of the independent contractor working for the operator were removing pipe when the accident occurred. The settlement motion recognizes that according to the citation the stacking of the pipes contributed to the hazard of falling material. It then sets forth that the operator does not agree with all the facts set forth in the citation, including an attached drawing showing how the pipes were stacked and fell. Nor does it agree with the finding of a violation. Nevertheless, the parties propose that the inspector's finding of low negligence be amended to no negligence for the following reasons:

> (i) The supplies had been stacked for approximately two weeks without any indication or incident of instability;

(ii) The employees had received adequate training, instruction and supervision in the conduct of their work involving the handling of pipe bundles and had completed approximately one-half of such work required of them at Respondent's workplace without incident;

(iii) The evidence does not indicate to what extent the weight of the 4-pipe bundle on the south stack caused the remaining 3-pipe bundle to fall, as compared to the extent the 3-pipe bundle fell perhaps because of the movement generated by the removal of the initially removed 3-pipe bundle; and

(iv) The employees had experience in handling stacks of pipes of approximately the same height and weight.

I cannot accept the proffered settlement. Both the citation and the investigation report identify as a cause of the accident, the manner in which the pipes were stacked. The fact that the pipes gave no indication of instability until they were touched, does not as the settlement motion suggests, warrant a finding of no negligence, or even low negligence. The motion further asserts the employees were adequately, trained, instructed and supervised and were experienced, but does not indicate whether it is referring to the operator's employees who stacked the pipes or the independent contractor's employees who removed them. In any event, the investigation report states that these particular bundles were stacked differently than preceding ones had been and the victims were not accustomed to working with pipes stacked so high. The motion's assertion that the evidence does not show to what extent the stacking caused the fall as opposed to the manner in which the pipes were removed, does not justify this settlement. The accident could have had one cause or multiple causes and if the latter, it is not necessary to fix the degree of causation with mathematical certainty. Finally, no information has been furnished regarding the liability of the independent contractor.

In summary, therefore, the settlement motion, far from presenting matters in a posture which would support a reasoned settlement, raises many questions which must be answered at a hearing on the record. Only in this way can it properly be determined whether a civil penalty should be assessed and, if so, the proper amount.

Accordingly, it is ORDERED that this matter be set for hearing at 9 a.m., July 1, 1987 at the United States Tax Court,

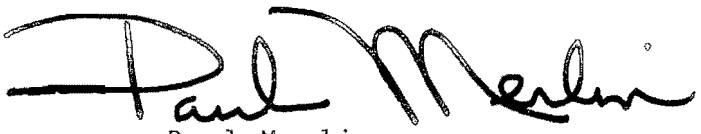
Federal Building, Room 235, 555 N. Central Avenue, Phoenix, Arizona 85004. 1/

It is further ORDERED that the Solicitor insure attendance at the hearing by the inspector who issued the subject citation and the authors of the Accident Investigation Report. The Solicitor should be prepared to elicit the circumstances of the accident from these individuals.

The operator may call whatever witnesses it wishes.

Documentary evidence may be offered.

It is further ORDERED that on or before June 12, 1987, the parties submit a list of the witnesses they intend to call and copies of the documentary exhibits they propose to submit.



Paul Merlin
Chief Administrative Law Judge

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/gl

1/ Any request for continuance will be viewed with extreme disfavor. The case has been pending for several months. The prehearing and hearing order was issued in January. After the Solicitor finally advised the case was settled, four phone calls were made to her during April in repeated attempts to elicit the motion. When she was told the case would be dismissed for want of prosecution, the motion finally was submitted.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 6, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 87-42-M A. C. No. 42-00149-05502 P9N
v.	:	Kennecott Mine
EMKO CORPORATION, Respondent	:	

DISAPPROVAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

The parties have submitted a joint motion to withdraw their pleadings in the above-captioned case which involves four violations.

The Solicitor has moved to vacate one of the citations and the operator has agreed to pay the original assessments of $300 each for two others. These matters appear to be in order.

The difficulty is with the fourth order. Order No. 2644520A cites a violation of 30 C.F.R. § 56.9040(a) because two miners had been riding in the front bucket of a Case 580D loader and back-hoe. This penalty was originally assessed at $300 and the proposed settlement is for $150. The parties represent that the 50% reduction in the originally assessed amount is justified because "negligence is less than was originally assessed." No reasons are given to support this representation. I have therefore, no basis upon which to determine whether the settlement recommendation is justified.

The parties are reminded that the Commission and its Judges bear a heavy responsibility in sett'ement cases pursuant to section 110(k) of the Act. One of the principal reasons for the enactment of section 110(k) was the unwarranted lowering of penalties during the settlement process under the 1969 Act. S. Rep. No. 95-181, 95th Cong., 1st Sess. 41-5 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978).

Penalty proceedings before the Commission are de novo. The appropriate amount of penalty must be determined in accordance with the six criteria set forth in section 110(i) of the Act. Sellersburg Stone v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

The Commission most recently has reaffirmed the authority of the Judges to review and, where necessary, disapprove settlements, stating:

> * * *. Settlement of contested issues and Commission oversight of that process are integral parts of dispute resolution under the Mine Act. 30 U. S. C. § 820(k); see Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986. The Commission has held repeatedly that if a judge disagrees with a penalty proposed in a settlement he is free to reject the settlement and direct the matter for hearing. See, e.g., Knox County Stone Co., 3 FMSHRC 2478, 2480-81 (November 1981). A judge's oversight of the settlement process "is an adjudicative function that necessarily involves wide discretion." Knox County, 3 FMSHRC at 2479.
>
> * * * * *

Secretary of Labor v. Wilmot Mining Company, Docket Number LAKE 85-47, slip op. at 3, 8 FMSHRC_____ at_____ (April 30, 1987).

Most Solicitors routinely submit satisfactory settlement motions, while a few do not.

In light of the foregoing, it is ORDERED that within 15 days from the date of this order the parties submit additional information to support their settlement recommendation. Otherwise the case will be set for hearing forthwith.

Paul Merlin
Chief Administrative Law Judge

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Lynn B. Larsen, Esq., Larsen & Wilkins, 500 Kennecott Building, 10 East South Temple, Salt Lake City, UT 84133 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 12 1987

RONALD TOLBERT, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 86-123-D
v.	:	
	:	Dollar Branch Mine AKA
CHANEY CREEK COAL CORP., Respondent	:	White Oak Mine

DECISION

Appearances: Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Hazard, Kentucky, for Complainant; Thomas W. Miller, Esq., Miller, Griffin and Marx, Lexington, Kentucky, for Respondent.

Before: Judge Melick

By decision dated March 16, 1987, Chaney Creek Coal Corporation was found to have discriminated against Ronald Tolbert, in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), the "Act". Based upon that decision, the parties subsequently stipulated damages, costs (except attorney's fees), and interest, through April 8, 1987. It is accordingly established that through that date Ronald Tolbert is entitled to $13,888 net back pay plus interest of $564.85. Subsequent to the submission of those stipulations, further delays ensued because of disputes concerning reinstatement and attorney's fees. Accordingly, Mr. Tolbert is also entitled to additional back pay corresponding to any work days missed for failure of Respondent to reinstatement him, plus interest computed in accordance with the formula set forth in Secretary v. Arkansas-Carbona Company and Walter, 5 FMSHRC 2042 (1983).

The Complainant also seeks an award of attorneys fees and expenses totalling $16,900.20 for work through April 8, 1987. Section 105(c)(3) of the Act provides that "[w]henever an order is issued sustaining the Complainants charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorneys fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment, or representative of miners for, or in connection with, the institution and prosecution of such

proceedings shall be assessed against the person committing such violation."

Respondent specifically objects to attorney's fees for certain services which it alleges could have been performed by a nonattorney, paralegal, or paraprofessional, at a lower hourly rate and, in particular, cites time spent interviewing witnesses as an inappropriate function of an attorney. It is well settled, however, that the time an attorney spends on investigating facts is clearly compensable. 1 Court Awarded Attorney's Fees, § 16.02(b). There is no evidence, moreover, concerning the availability of paralegals and/or investigators. Respondent's objection in this regard is accordingly rejected.

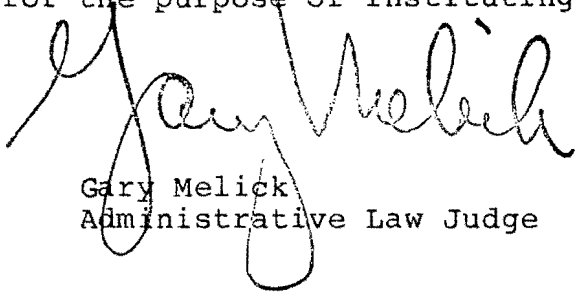
Respondent also argues that the time spent in trial preparation and in preparing posthearing briefs was excessive. Complainant's counsel in this case did an exceptionally thorough and competent job in preparing and presenting the Complainant's case at trial and preparing his posthearing brief. While this case did not involve novel legal issues, I find that the time devoted by counsel in trial preparation and in the preparation of the brief was not unreasonable or excessive in light of the complex factual nature of the case. Accordingly, I also reject Respondent's contention that excessive time was devoted to these tasks.

Finally, Respondent argues that a telephone call with an employee of the Respondent and with the Solicitor's Office of the Department of Labor were not appropriately charged to this case. In the absence of a specific showing, however, that those telephone calls were not, in fact, related to the case herein, I presume the truthfulness of the application. Under the circumstances, I find the requested attorney's fees and expenses to be appropriate.

FINAL ORDER

Chaney Creek Coal Corporation is hereby ORDERED to immediately offer employment to Ronald Tolbert at its former White Oak Mine or at its Chaney No. 3 (Harlan County) Mine at no less than the current rate of pay in effect for the position of serviceman (I do not find reinstatement to the Oneida Mine to be appropriate in light of the unreasonable commutation time of 4 hours). Chaney Creek Coal Corporation is further ORDERED to pay the Complainant within 30 days of the date of this decision, back pay and interest through April 8, 1987, in the amount of $14,452.85, as well as additional back pay and interest to the date of reinstatement and in accordance with the Commission's decision in Secretary v. Arkansas-Carbona Company and Walter, 5 FMSHRC 2042 (1983). Chaney Creek coal Corporation is further

ORDERED to pay Complainant attorney's fees and expenses of $16,900.20. It is further ORDERED that the Decision and Final Order in this case be posted at all mines now being operated by Chaney Creek Coal Corporation. This case is also being referred to the Secretary of Labor for the purpose of instituting civil penalty proceedings.



Gary Melick
Administrative Law Judge

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAY 12 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 85-175-M A.C. No. 04-04118-05501
v.	:	Docket No. WEST 86-39-M A.C. No. 04-04118-05502
BRIAN LACKEY CONCRETE, Respondent	:	Lackey Concrete Mine

DECISION

Appearances: Leroy Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner;
Mr. Brian Lackey, Brian Lackey Concrete, Needles, California,
pro se.

Before: Judge Lasher

These proceedings were initiated by the filing of proposals for assessment of civil penalties by the Secretary of Labor pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a)(1977) (herein the "Act"). A hearing on the merits was held in Needles, California, on April 13, 1987.

Respondent concedes that the 17 violations (issued on June 26, 1985, by MSHA Inspector Ronald Barri) charged in the two dockets (16 in Docket 85-175-M and 1 in Docket 86-39-M) occurred. The sole issue was the amount of appropriate penalties. The parties waived filing of post-hearing briefs.

The amount of a penalty should relate to the degree of a mine operator's culpability in terms of willfulness or negligence, the seriousness of a violation, the business size of the operator, and the number and nature of violations previously discovered at the mine involved. Mitigating factors include the operator's good faith in abating violative conditions and the fact that a significantly adverse effect on the operator's ability to continue in business would result by assessment of penalties at a particular monetary level. Factors other than the above-mentioned six criteria which are expressly provided in the Act are not precluded from consideration either to increase or reduce the amount of penalty otherwise warranted.

Based on stipulations reached by the parties at the outset of the hearing, it is found that this is a small mine operator with no history of violations during the 24-month period prior to the issuance of those involved in these two dockets. The Secretary agreed that Respondent proceeded in good faith to promptly abate the 17 violations upon notification thereof. The parties agreed that all violations were committed as a result of but a moderate degree of negligence on Respondent's part. As to the gravity of the violations, three (Citations numbered 2344842, 2344843, and 2344876) were stipulated as being "non-serious" in nature; the remaining 14 violations were agreed to be serious which agreement includes the violation charged in Citation No. 2344874 which is the only citation involved in Docket No. WEST 86-39-M.

With respect to the remaining mandatory penalty assessment criterion provided in the Act, the Respondent established the ultimate economic consideration, that is, Respondent, a sole proprietorship owned and operated by Brian Lackey, showed that he had gone out of business for economic reasons. Mr. Lackey, age 46, had operated this very small (two employees) placer (sand and gravel) mine located near Needles, California, for approximately 20 years. Approximately two months prior to the hearing Mr. Lackey assigned his interest in the business to one Quinto Polidori in payment of his indebtedness (approximately $28,000.00) for such items as powder and cement. Mr. Lackey also testified that he owns no other businesses and has no other source of income at the present time. Respondent testified under oath that all his remaining assets have a total value of approximately $5,000.00 while his debts somewhat exceed that sum. In early March 1987, Mr. Lackey underwent surgery for removal of a lung and has been advised not to work for one year for medical reasons. Part of his indebtedness is for medical expenses. Mr. Lackey stated his intention to leave California to return to Illinois to live with family for the immediate future. In view of this information revealed in sworn, unrebutted testimony, it is determined that only very modest penalties ($5.00 for each violation) are warranted.

ORDER

The 17 citations hereinabove discussed in the above two dockets are affirmed in all respects.

Respondent shall pay the Secretary of Labor within 30 days from the date hereof the 17 penalties hereinabove assessed in the total sum of $85.00.

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

Distribution:

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Ms. Wilma Baldwin, Office Manager, Needles Ready-Mix, Inc., P.O. Box 983, Needles, CA 92363 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 12 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 86-272
	:	A.C. No. 46-04266-03529
v.	:	
	:	Meredith Mine
BULL RUN MINING COMPANY, INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $500 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.1101-8(b), as stated in a section 104(d)(1) Citation No. 2710986, issued at the mine on February 12, 1986.

The respondent filed a timely answer and contest, and the case was scheduled for hearing in Morgantown, West Virginia, on May 4, 1987. However, the hearing was cancelled after petitioner's counsel advised me that the case was settled. The petitioner has now filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a settlement of the case. The proposed settlement agreement requires the respondent to pay a civil penalty assessment in the amount of $200 for the violation in question.

Discussion

The record in this case reflects that the petitioner's proposed civil penalty assessment was "specially assessed" at $500 in accordance with the six statutory criteria found in section 110(i) of the Act as set forth in MSHA's regulations

at 30 C.F.R. § 100.3(a). In support of the proposed settlement disposition, the petitioner has submitted a full discussion and disclosure as to the facts and circumstances surrounding the issuance of the citation in question, and a reasonable justification for the reduction of the original proposed civil penalty assessment.

Petitioner states that the citation was issued because of the failure of the respondent to provide two branch lines to supply water to several belt head drives in the event of a fire. The cited safety standard requires two branch lines for a uniform discharge of water to the surface of the belt. While the respondent concedes the existence of a violation and the validity of the section 104(d)(1) "S&S" citation, petitioner states that the respondent represents that the gravity of the violation is mitigated due to the fact that in 1975 it installed a multi-directional sprinkler head on each system to ensure a uniform discharge of water to the belt, and that it did so in response to a concern over the adequacy of fire protection for the subject belt. In view of the adequacy of this sprinkler system, petitioner believes that the respondent is more properly charged with a "moderate" degree of negligence and a reduced level of gravity. Petitioner also states that the respondent timely abated the violation by installing a second branch line for each of the belt head drives.

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $200 in satisfaction of the citation in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is dismissed.

George A. Koutras
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

May 13, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 87-41 A. C. No. 01-01247-03741
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The parties have submitted a joint motion to approve settlements of the three violations involved in this case. The total amount of the originally assessed penalties was $815 and the total of the proposed settlements is $723.

The motion discusses the violations in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. The operator has agreed to pay the original assessment of $294 for Citation No. 2811209 and $329 for Citation No. 2811213.

The parties propose that the originally assessed amount of $192 for Citation No. 2810537 be reduced to $100, because negligence is less than was originally assessed. This citation cites a violation of 30 C.F.R. § 75.1714-2(a) because a ram car operator was observed inside the mine without a self rescuer device on his person or within twenty-five feet of his person. The parties represent that a reduction from the original assessment is warranted because once this condition was discovered, the employee was issued a written reprimand by the operator pursuant to the progressive disciplinary program employed at the mine. I accept these representations and approved recommended settlements.

In light of the foregoing, the settlement motion is Approved and the operator is ORDERED TO PAY $723 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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H. Gerald Reynolds, Esq., Jim Walter Corporation, P. O. Box 22601, Tampa, FL 33622 (Certified Mail)

Ms. Joyce Hanula, Legal Assistant, UMWA, 900 15th Street, N. W., Washington, DC 20005 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 13 1987

WILFRED BRYANT, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 85-43-D
v.	:	
	:	Dingess Mine No. 2
DINGESS MINE SERVICE, WINCHESTER COALS, INC., MULLINS COAL COMPANY, JOE DINGESS AND JOHNNY DINGESS, Respondents	:	

SUPPLEMENTAL DECISION

Before: Judge Broderick

On February 24, 1987, I issued a decision on the merits of this case. I concluded that Complainant was laid off on April 27, 1984, for activity protected under the Act. I concluded that Dingess Mine Service and Joe and Johnny Dingess were liable for the discriminatory lay off and that Winchester Coals, Inc. and Mullins Coal Company were not liable. I further concluded that the adverse action terminated when Complainant refused the offer to be called back to work, and that he formally resigned on May 9, 1984. I ordered Dingess Mine Service to pay Complainant back pay from April 27, 1984 to May 9, 1984, with interest in accordance with the Arkansas-Carbona formula, and to reimburse him for reasonable attorney's fees and costs of litigation.

On April 28, 1987, counsel for Complainant filed a statement of back pay with interest and a statement of attorney's fees and expenses. Respondents have not replied to the statement. 1/

1/ The copies of the Decision issued on February 24, 1987, and the order extending time issued March 24, 1987, sent by certified mail to Dingess Mine Service, Joe Dingess and Johnny Dingess were all returned to the Commission by the Postal Service as "unclaimed."

BACK PAY AND INTEREST

The back pay claim is for nine regular work days at a daily wage of $111.00 or a total of $999.00. Interest calculated under the Arkansas Carbona formula from April 27, 1984 to April 24, 1987, totals $298.48. Interest shall accumulate thereafter in the amount of .25 per day. The back pay and interest claim conform to my prior decision, and will be approved.

COSTS OF LITIGATION

Complainant's statement shows litigation costs, including travel for counsel and Complainant, in the total amount of $665.18. I accept this statement of expenses as reasonable and will approve it.

ATTORNEY'S FEES

Section 105(c)(3) of the Act provides:

> Whenever an order is issued sustaining the Complainant's charges . . ., a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

A reasonable attorney's fee for the institution and prosecution of a case such as this is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit. See Lindy Bros. v. American Radiator, 487 F.2d 161 (3rd Cir. 1973); Johnson Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) ["Copeland III"[.

HOURLY RATE

The reasonable hourly rate is the rate prevailing for similar work in the community where the attorneys practice law. Johnson, supra. It may vary depending upon such factors as the kind of work involved, the experience and skill of the attorneys, the complexity of the case, the results obtained, the undesirability of the case, and whether the fee is contingent or fixed. The attorneys who represented Complainant here are seeking approval of hourly rates of $75 (Ms. Fleischauer) and $65 (Mr. Sheridan). There is no information in the record as to the prevailing rate in the communities where they practiced. There is no information in the record as to the experience of either

attorney. The case was of average complexity, the fee was contingent, the results obtained were very limited (9 days back pay; no reinstatement). I recognize that it is important that a fee award should reflect the policy of encouraging competent representation for miners claiming discrimination. Based on all the information before me, I conclude that $65 is a reasonable hourly rate for the hours reasonably expended by each of Complainant's attorneys.

HOURS REASONABLY EXPENDED

Attorney Fleischauer claims compensation for 196 hours; attorney Sheridan claims compensation for 121.3 hours. A substantial number of hours are claimed by each attorney for conversations and discussions with each other. Both claim full compensation for the time spent taking depositions and participating in the trial of the case. Nothing was submitted to show that the participation of both attorneys was required at the depositions or the entire hearing, and I am not aware that it was necessary. I conclude that 100 of the 196 hours claimed by Ms. Fleischauer are properly billable at the hourly rate of $65; the remaining 96 hours are properly billable at 50 percent of this rate or $32.50. This totals $9620. Because of the extremely limited recovery, I believe it proper to reduce this amount by 33-1/3 percent. This reflects my conclusion that a substantial part of the time for which fees are claimed was "spent litigating issues upon which plaintiff did not ultimately prevail", Copeland, supra, at page 902. In fact, much of the time was spent attempting to establish liability in Winchester and Mullins. Therefore, I will approve a total fee for Ms. Fleischauer in the amount of $6415. Mr. Sheridan's statement shows 75 hours properly billable at $65 per hour and 46 hours which are duplicative or involve discussions with co-counsel and are properly billable at $32.50 per hour. This totals $6370. Reducing it by 33-1/3 percent, I will approve a total fee for Mr. Sheridan in the amount of $4247.

ORDER

Based on the record in this case and the above conclusions, IT IS ORDERED:

1. The decision issued February 24, 1987 is confirmed.

2. Respondents Dingess Mine Service, Joe Dingess and Johnny Dingess shall within 30 days of the date of this decision pay to claimant the sum of $1297.48 representing back pay from April 27, 1984 to May 9, 1984, and interest to April 24, 1987. Said Respondents shall pay further interest at the rate of 9 percent per annum from April 24, 1987, until the total amount is paid.

3. Respondents Dingess Mine Service, Joe Dingess and Johnny Dingess shall, within 30 days of the date of this decision reimburse Complainant Wilfred Bryant for his litigation expenses in the amount of $99.

4. Respondents Dingess Mine Service, Joe Dingess and Johnny Dingess shall, within 30 days of the date of this decision, pay to Barbara Fleischauer, Esq., the sum of $6415 as attorney's fees and $566.18 as litigation expenses.

5. Respondents Dingess Mine Service, Joe Dingess and Johnny Dingess shall, within 30 days of the date of this decision, pay to Paul R. Sheridan, Esq., the sum of $4247 as attorney's fees.

6. This decision is final.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 19 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF RONALD G. NELSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 87-79-D
	:	HOPE CD 86-23
	:	VC No. 15-A Mine
v.	:	
VALLEY CAMP COAL COMPANY, (DONALDSON MINING COMPANY), Respondent	:	

ORDER OF DISMISSAL

Before: Judge Maurer

The Complainant, Secretary of Labor, with the consent of the individual Complainant, Ronald G. Nelson, requests in effect to withdraw his complaint of discrimination in the captioned case on the grounds that the parties have reached a mutually agreeable settlement. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The case is therefore 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

MAY 20 1987

PEABODY COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. KENT 86-94-R
v.	:	Citation No. 2214342; 3/3/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 86-95-R Citation No. 2214343; 3/5/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 87-154 A.C. No. 15-08357
v.	:	Camp No. 11 Underground Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Michael O. McKown, Esq., Henderson, Kentucky, for Peabody Coal Company;
Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, for the Secretary of Labor.

Before: Judge Fauver

Peabody Coal Company seeks to have two citations vacated, and the Secretary seeks to have them affirmed and civil penalties assessed for violations charged in them, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

The basic issue is whether the equipment cited is required to have a cab or canopy under 30 C.F.R. § 75.1710-1.

Based on the hearing evidence and the record as a whole, I find that a preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. Peabody is a large operator of coal mines producing coal for use or sale in interstate commerce.

2. Peabody's Camp No. 11 Mine is a large underground coal mine near Morganfield, Kentucky.

3. From about 1978 to the present, two coal production sections at Camp No. 11 Mine have used what is called a "continuous haulage system," which is designed so that coal mined by a continuous miner is put directly onto a mobile haulage system that conveys it to the panel belt line. The continuous haulage system consists of three piggyback conveyors, two mobile bridge carriers (MBCs) and a special low structure or dolly that is connected to the tailpiece of the panel belt. The inby part of the system is connected to a Joy continuous miner. All these components are joined by slot devices hooked together by pins. The components may be disconnected, and this is done between mining cycles. The MBCs provide mobility to the system so that it can adjust to movement of the continuous miner without disrupting the constant movement of mined coal. The system is substantially more efficient than using shuttle cars to move coal from the continuous miner.

4. The components described above are connected in the following order: the continuous miner, a piggyback conveyor, a mobile bridge conveyor (MBC), another piggyback conveyor, a second MBC, and a third piggyback conveyor that is connected to a special dolly that "rides" up and down the panel belt onto which coal is dumped.

5. Peabody uses a five entry system in its continuous haulage sections. At times, it reduces the entries to three where gas or oil wells or other obstructions are encountered.

6. The mining cycle using the continuous haulage system results in offset crosscuts at angles of approximately 60 degrees. The last open crosscut resulting from such a configuration, and as defined by the flow of air across the section, includes not only the openings between the entries but across the intersections and that part of an entry inby an intersection to the point of the next intersection inby. That is, the last open crosscut follows the air flow across the entries of the working section.

7. The distance from the first (the inby) MBC operator's compartment to the cutting drums of the continuous miner is 105 feet plus or minus two feet.

8. From their earliest use at this mine, the MBCs have not been equipped with a cab or canopy over the operator's compartment where the operator sits while operating the MBC.

9. On March 3, 1986, and March 5, 1986, Peabody was issued Citations 2214342 and 2214343 for operating the MBCs without cabs or canopies.

DISCUSSION WITH FURTHER FINDINGS

The controlling issue is whether the first (the inby) MBC is subject to 30 C.F.R. § 75.1710-1, which provides in pertinent part:

> (a) *** [A]ll self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine ... shall ... be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls.

The MBC is self-propelled and is electrically operated, but is it "electric face equipment"? That term is not defined by the cab/canopy regulation, but 30 C.F.R. § 75.2(i) provides a practical line of demarcation (emphasis added):

> (i) "Permissible" as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment. ***

The issue thus leads to the meaning of the "last open crosscut" as used in § 75.2(i). This term is not defined in the Act or regulations.

Peabody's witness, Mr. Charles Jernigan, testified and illustrated his testimony by marking Exhibits G-10 and G-11 in yellow pencil to show that the last open crosscut is only the area between, but not including, the mine entries. However, he testified in response to questions from counsel for the Secretary that the definition of "last open crosscut" is "where your air travels across your face," meaning where the "air travels through on the intake and exhaust system" (Tr. p. 163).

The Bureau of Mines Dictionary of Mining, Minerals and Related Terms (1968) does not define last open crosscut but does define "crosscut" in part as follows:

> In room and pillar mining the piercing of the pillars at more or less regular intervals for the purpose of haulage and ventilation.

The Secretary's witness, Mr. David Whitcomb, defined "last open crosscut" as "the last continuous line the air passes through across the [run] 1/ from one side of the entry to the other side" (Tr. p. 258). I find that this definition is consistent with the pattern of ventilation and electrical standards under the Act. The operative concept of the last open crosscut is used in many of the regulations found in Title 30, Part 75 of C.F.R. For example, § 75.500(a) requires all multiple power connections "inby the last open crosscut" to be permissible. See also: §§ 75.507-1, 75.522-1, 75.1002-1, and 75.1107-5. If Peabody's characterization of last open crosscut as only the areas between the entries were applied literally this would make inby the last open crosscut the middle of a solid block of coal.

1/ Although the court reporter transcribed the word "drum" at this point, I find that Mr. Whitcomb actually said "run" and the reporter made an error in transcription. "Run" as used by Mr. Whitcomb refers to the distance from the Number 1 to the Number 5 entries, that is, the full expanse of the coal faces being developed. See Bureau of Mines Dictionary of Mining, Mineral and Related Terms (1968) giving a definition of "run" as "The horizontal distance to which a mine drift is or may be carried."

I credit Mr. Whitcomb's definition of last open crosscut as being reliable and accurate. Peabody's narrow definition would lead to arbitrary results, inconsistent with the broad, remedial purposes of the statute.

I also credit Mr. Whitcomb's testimony analyzing the mining cycle and movements of the first (inby) MBC based upon the other hearing evidence. The evidence shows that, applying the definition of last open crosscut used by Mr. Whitcomb, the first MBC operator's compartment enters the last open crosscut in the mining cycle. Mr. Whitcomb's careful analysis of the mining cycle and distances involved also shows that, even if Peabody's narrow definition of last open crosscut were applied, the operator's compartment of the first MBC still enters the last open crosscut.

Since the first MBC operator's compartment enters the last open crosscut, it is required to have a cab or canopy under § 75.1710-1. Since the MBCs are mobile and interchangeable, all of the MBCs that are subject to being used in the first MBC position are required to have a cab or canopy under § 75.1710-1.

The Secretary also contends that the continuous haulage system is a "unitary or integrated system" that must be viewed as a single unit for purposes of applying the cab/canopy regulation. The Secretary argues that, since the Joy miner and at least part of the first MBC move into or inby the last open crosscut, every part of the system should be held to be subject to § 75.170-1.

I do not find this argument persuasive. The MBCs and bridges function both as a belt conveyor and a substitute for shuttle cars. The components are interchangeable and separable. The test of applying the cab/canopy regulation is whether the equipment operator's compartment is subject to being used in or inby the last open crosscut. It would stretch the standard too far to hold that the second MBC, which is far removed from the last open crosscut, should be considered "face equipment" solely because the front part of the continuous haulage system is in or inby the last open crosscut.

These cases involve a novel haulage system that raises a question of first impression. The operator used this system for a number of years without being cited by the Secretary until March of 1986. The operator has held a sincere, good faith belief that the cab/canopy standard does not apply to its continuous haulage system. The violations are serious because of the gravity of injuries that could occur if an MBC operator were struck in a fall of roof or rib. However, the company is making a good faith test of its interpretative position, which differs from the Secretary's. I therefore assess a penalty of $1.00 for each violation.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citations 2214342 and 2214343 are AFFIRMED.

2. Peabody Coal Company shall pay the above-assessed civil penalties of $2.00 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 20 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DAVID WARD, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 86-376-D
	:	HOPE CD 86-6
	:	Montcoal No. 7 Mine
v.	:	
PEABODY COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL
DECISION APPROVING SETTLEMENT

Before: Judge Maurer

The Secretary has filed a motion explaining that pursuant to agreement between the parties, the complainant now has received or will receive all the relief sought in this case. Furthermore, the assessed penalty of $1,000 has been paid.

Based upon my review of the Secretary's motion, I am satisfied that the proposed settlement is consistent with the purposes and spirit of the statute.

In light of the foregoing, the proposed settlement is APPROVED and this matter is hereby DISMISSED.

Roy J. Maurer
Administrative Law Judge

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MAY 20 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 87-15 A.C. No. 46-07103-03501
v.	:	Williams Mountain No. 1
KELSO COAL COMPANY, INC., Respondent	:	

DECISION

Before: Judge Fauver

On April 29, 1987, because of Respondent's failure to comply with a prehearing order, a show cause order was issued allowing Respondent until May 11, 1987, to show cause in writing why it should not be held in default and ordered to pay the civil penalties proposed by the Secretary of Labor.

Respondent has failed to file a response to the show cause order, and is hereby deemed to be in default and to have waived its right to a hearing. The proposed civil penalties shall therefore be made the final order of the Commission.

WHEREFORE IT IS ORDERED that Respondent shall pay the secretary's proposed civil penalties in the amount of $340.00 within 30 days of this Decision.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 20 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 87-67
	:	A.C. No. 46-01452-03621
	:	
v.	:	Arkwright Mine
	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 87-42(A)
	:	A.C. No. 46-01453-03735
	:	
	:	Docket No. WEVA 87-419
	:	A.C. No. 46-01453-03711
	:	
	:	Docket No. WEVA 87-68
	:	A.C. No. 46-01453-03737
	:	
	:	Humphrey No. 7 Mine
	:	
	:	Docket No. WEVA 87-70
	:	A.C. No. 46-01455-03650
	:	
	:	Osage No. 3 Mine
	:	
	:	Docket No. WEVA 86-384
	:	A.C. No. 46-01454-03667
	:	
	:	Pursglove No. 15 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On May 15, 1987, the parties filed a joint motion for approval of a settlement reached between them. The above dockets contain a total of 10 alleged violations of 30 C.F.R. Part 50 and were originally assessed in the total amount of $400. The motion proposes a settlement for the payment of a total of $5000, or $500 for each alleged violation.

On the alleged violations, five were originally assessed at $20 each, four were assessed at $50 each, and one was

assessed at $100. The motion states that the parties disagreed as to the proper interpretation of the requirements of Part 50, but that Consol agrees to comply with the broad intent of Part 50 and MSHA's interpretation thereof in the informational bulletin issued in December 1986. The settlement does not constitute an admission by Consol to any violation of the Act or the regulations or standards promulgated thereunder, but for the purposes of the settlement, Consol consents to a finding of the existence of the alleged violations. Consol is a large operator; the violations were serious and the result of negligence. They were abated in good faith. Consol has an average history of violations for an operator of its size.

I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $5000 within 30 days of the date of this order.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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May 20, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 87-90 A. C. No. 46-01453-03745
v.	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary against Consolidation Coal Company. Involved are five violations of 30 C.F.R. § 50.20(a) for failure to report occupational injuries as required by the regulations. Each violation was originally assessed at $150 and the proposed settlements are for $500 apiece.

I have previously set forth my views regarding Part 50. Consolidation Coal Company, ___FMSHRC ___ (April 9, 1987).

In the subject action the settlement motion recites in pertinent part:

> The Secretary submits that Consol is a large operator. The Secretary further submits that each of the violations involved an appreciable degree of negligence and seriousness. The files include information related to the fact that the violations were abated after issuance in good faith and that payment of the agreed-to penalties will not adversely affect Consol's ability to remain in business. Consol has an average history of prior violations for a mine operator of its size.

I accept the foregoing representations and further note that so many violations of the same type demonstrate a disturbing pattern. The increases in the original assessments are warranted and appropriate.

In light of these circumstances, the settlements are Approved and the operator is ORDERED TO PAY $2,500 within 30 days from the date of this order.

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

May 22, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 87-38 A. C. No. 01-00328-03613
v.	:	Bessie Mine
JIM WALTER RESOURCES, INC., Respondent	:	Docket No. SE 87-39 A. C. No. 01-00758-03684
	:	No. 3 Mine
	:	Docket No. SE 87-53 A. C. No. 01-01322-03654
	:	Docket No. SE 87-59 A. C. No. 01-01322-03657
	:	No. 5 Mine
	:	Docket No. SE 87-60 A. C. No. 01-01401-03657
	:	No. 7 Mine
	:	Docket No. SE 87-62 A. C. No. 01-00758-03685
	:	No. 3 Mine
	:	Docket No. SE 87-63 A. C. No. 01-00328-03616
	:	Bessie Mine
	:	Docket No. SE 87-66 A. C. No. 01-01247-03756
	:	No. 4 Mine
	:	Docket No. SE 87-70 A. C. No. 01-01322-03664
	:	No. 5 Mine
	:	Docket No. SE 87-71 A. C. No. 01-00328-03618
	:	Bessie Mine

SUMMARY DECISION
ORDER TO PAY

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Secretary against Jim Walter Resources, Inc. Each case involves a violation for excessive respirable dust.

Docket No. SE 87-38, Citation No. 9984247, cites a violation of 30 C.F.R. § 70.100(a) because the average concentration of respirable dust in the working environment of the mechanized mining unit was 3.3 mg/m^3 of air. The permissible limit is 2.0 mg/m^3.

Docket No. SE 87-39, Citation No. 2806429, cites a violation of 30 C.F.R. § 70.100(a) because the average concentration of respirable dust in the working environment of a designated occupation tailgate shearer operator on a longwall mechanized mining unit was 3.6 mg/m^3. The permissible limit is 2.0 mg/m^3.

Docket No. SE 87-53, Citation No. 9984269, cites a violation of 30 C.F.R. § 70.101 because the average concentration of respirable dust in the working environment of the mechanized mining unit was 1.8 mg/m^3 of air. The permissible limit is 1.7 mg/m^3.

Docket No. SE 87-59, Citation No. 9984270, cites a violation of 30 C.F.R. § 70.100(a) because the average concentration of respirable dust in a designated area was 2.5 mg/m^3 of air. The permissible limit is 2.0 mg/m^3.

All violations were designated as significant and substantial on the citations.

On May 4, 1987 the parties submitted the foregoing four cases for summary decision based upon a Joint Stipulation of Facts which reads as follows:

1. Jim Walter Resources, Inc., is the owner and operator of the subject mines;

2. The operator and the mines are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

3. The Administrative Law Judge has jurisdiction of these cases;

4. The inspectors who issued the subject citations were duly authorized representatives of the Secretary of Labor;

5. Copies of the subject citations were properly served upon the operator;

6. With respect to Citation Nos. 9984247, 9984269, 9984270, and 2806429, the facts and conditions described on the face of the respective citations are true and accurate and constitute violations of the cited sections of the Code of Federal Regulations;

7. Citation No. 9984247 was terminated on December 12, 1986; Citation No. 9984269 was terminated on December 30, 1986; Citation No. 9984270 was terminated on January 26, 1987; and Citation No. 2806429 was terminated on December 8, 1986;

8. The operator makes respirators available to its employees;

9. The operator submits that by providing respirators to its employees, the operator satisfies its burden of proof in rebutting the presumption that the cited violations are significant and substantial. The operator, therefore, offers no evidence as to whether respirators are actually worn;

10. The size of the operator is medium;

11. Imposition of penalties will not affect the operator's ability to continue in business;

12. The violations were abated in good faith;

13. The operator's history of prior violations is average for its size;

14. The negligence of the operator is moderate;

15. The gravity of the violations is serious.

Subsequently, the parties requested that six additional cases, Docket Numbers SE 87-60, SE 87-62, SE 87-63, SE 87-66, SE 87-70, and SE 87-71, all of which involved respirable dust violations, also be decided in this proceeding on the same basis as the first four. In a motion dated May 13, 1987, the parties stipulated as follows:

> Additional cases have since arisen which present this identical issue. Accordingly, the parties now move to consolidate the following cases with those previously submitted to the Court [sic] on May 1.
>
> * * * * *
>
> The operator stipulates that these seven additional citations also constitute violations of the cited regulatory provisions. The parties further adopt and incorporate herein the Joint Stipulation of Facts submitted in Docket Nos. SE 87-38, 87-39, 87-53, and 87-59, and the respective briefs filed therein.

Docket No. SE 87-60, Citation No. 2806388, cites a violation of 30 C.F.R. § 70.100(a) because the average concentration of respirable dust in the working environment on the longwall section was 3.3 mg/m^3 of air. The permissible limit is 2.0 mg/m^3.

Docket No. SE 87-62, Citation No. 9984275, cites a violation of 30 C.F.R. § 70.100(a) because the average concentration of dust in the working environment of the mechanized mining unit was 2.2 mg/m^3 of air. The permissible limit is 2.0 mg/m^3.

Docket No. SE 87-63, Citation No. 2811811, cites a violation of 30 C.F.R. § 70.100(a) because the average concentration of respirable dust in the working environment of the mechanized mining unit was 2.3 mg/m^3. The permissible limit is 2.0 mg/m^3.

Docket No. SE 87-66, Citation No. 2811809, cites a violation of 30 C.F.R. § 70.100(a) because the average concentration of respirable dust in the working environment on the longwall section was 3.5 mg/m^3 of air. The permissible limit is 2.0 mg/m^3.

Docket No. SE 87-70, Citation No. 9984296, cites a violation of 30 C.F.R. § 70.100(a) because the average concentration of respirable dust in the working environment of a mechanized mining unit was 2.6 mg/m^3 of air. The permissible limit is 2.0 mg/m^3.

Docket No. SE 87-71, involves two violations. 1/ Citation No. 9984297 cites a violation of 30 C.F.R. § 70.100(a) because the average concentration of respirable dust in the working environment of a mechanized unit was 2.7 mg/m^3 of air. Citation No. 9984298 cites a violation of 30 C.F.R. § 70.100(a) because the average concentration of respirable dust in the working environment of a mechanized mining unit was 2.2 mg/m^3 of air. The permissible limit is 2.0 mg/m^3.

In these additional six cases the violations also were designated as significant and substantial on the citations.

The existence of the violations and other matters set forth in the stipulations having been admitted, the sole issue presented is whether the violations are significant and substantial in accordance with governing Commission precedent.

In Consolidation Coal Company, 8 FMSHRC 890 (1986), appeal docketed, No. 86-1403 (D. C. Cir. 1986) the Commission established a rebuttable presumption that all respirable dust violations are significant and substantial, stating in pertinent part:

> * * * we hold that when the Secretary proves that a violation of 30 C.F.R. § 70.100(a), based upon excessive designated occupation samples, has occurred, a presumption that the violation is a significant and substantial violation is appropriate. We further hold this presumption that the violation is significant and substantial may be rebutted by the operator by establishing that miners in the designated occupation in fact were not exposed to the hazard posed by the excessive concentration of respirable dust, e.g., through the use of personal protective equipment. * * *

8 FMSHRC at 899.

As noted above, Docket Number SE 87-53 involves respirable dust with quartz. 30 C.F.R. § 70.101. In U. S. Steel Mining Co., Inc., 8 FMSHRC 1274 (1986) the Commission applied the principles adopted in Consolidation Coal Company to respirable dust with quartz, explaining:

> In Consol the Commission further held that, because analysis of the four elements of the

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1/ In Docket Nos. SE 87-66, SE 87-70, and SE 87-71, I accept the Joint Motion dated May 13, 1987, as the operator's answers to the penalty petitions pursuant to 29 C.F.R. § 2700.28.

> significant and substantial test would be essentially the same in each instance in which the Secretary proves a violation of 30 C.F.R. § 70.100(a), proof of a violation gives rise to a presumption that the violation is significant and substantial. 8 FMSHRC at 899. We conclude that a similar presumption is appropriate when the Secretary proves a violation of 30 C.F.R. § 70.101. We further hold that, as with a violation of section 70.100(a), the presumption can be rebutted by the operator by establishing that miners in the designated occupation in fact were not exposed to the excessive concentration of respirable dust, e.g., through the use of personal protective equipment. See 8 FMSHRC at 899. In the instant proceeding, there is no evidence that the miners placed at risk by the subject violations were not exposed to excessive levels of silica-bearing respirable dust.

8 FMSHRC at 1281.

The operator asserts that it rebuts the presumption of significant and substantial by making respirators available to the miners. "Available" means "suitable or ready for use; usable; at hand * * * readily, obtainable; accessible * * *" The Random House College Dictionary, Revised Edition (1980). The foregoing Commission precedent is not couched in terms of availability. Rather, the Commission holds that the presumption may be rebutted only when the operator establishes that the miners in fact were not exposed to excessive concentrations of respirable dust through the use of personal protective equipment. The distinction is clear. The Commission requires a showing that miners were not exposed because they used respirators. Merely making respirators available without any concern or interest in their actual use falls short of the evidentiary requirement established in Consolidation Coal. The standard of proof required to rebut the presumption of significant and substantial must be viewed in light of the dire consequences resulting from over-exposure to respirable dust. As the Commission noted:

> * * * Indeed, prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act. * * * (emphasis in original).

Consolidation Coal Company, supra at 895.

The operator's reference to section 202(h) of the Act, 30 U.S.C. § 842(h), which directs that approved respiratory

equipment shall be made available to miners exposed to excessive respirable dust concentrations, is misplaced. That requirement is separate and distinct from the issue of what evidence is sufficient to rebut the presumption that a respirable dust violation is significant and substantial. As the Solicitor's brief points out, if this argument were accepted, the presumption would always be rebutted by an operator's mere compliance with section 202(h).

In light of the foregoing, I conclude that the subject violations were significant and substantial.

As set forth above, the parties have stipulated to the six elements required to be considered by section 110(i) of the Act for assessment of a civil penalty. I accept the stipulations. In addition, the penalty amounts levied herein reflect the degree of gravity as evidenced in each instance by the amount of deviation from the required standard.

In accordance with the stipulations, the following civil penalties are assessed.

Docket No.	Citation No.	Penalty
SE 87-38	9984247	$200.00
SE 87-39	2806429	$250.00
SE 87-53	9984269	$100.00
SE 87-59	9984270	$150.00
SE 87-60	2806388	$200.00
SE 87-62	9984275	$100.00
SE 87-63	2811811	$100.00
SE 87-66	2811809	$250.00
SE 87-70	9984296	$150.00
SE 87-71	9984297	$150.00
SE 87-71	9984298	$100.00

It is ORDERED that operator pay $1,750.00 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAY 22 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 86-61-M
	:	A.C. No. 04-01937-05501
v.	:	Sanger Pit & Mill
SANGER ROCK & SAND, Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California for Petitioner;
Mr. W. A. Baun, President, Sanger Rock & Sand, Clovis, California,
pro se.

Before: Judge Cetti

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., ("Mine Act"). The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges the operator of an open pit mine with violating a safety regulation, 30 C.F.R. § 56.14001, which requires the guarding of moving machine parts.

This proceeding was initiated by the Secretary with the filing of a proposal for assessment of a civil penalty. The operator filed a timely appeal contesting the existence of the alleged violation. The Secretary then moved to amend the citation to change the safety standard allegedly violated from 30 C.F.R. § 56.14006 to 30 C.F.R. § 56.14001.

A hearing on the merits was held before me at Fresno, California. Oral and documentary evidence was introduced by the parties and case was held open 15 days for the filing of proposed findings of fact and conclusion of law which were timely filed by the Secretary. Both parties waived their right to file post-trial briefs.

Issues

The issue as stated by the Secretary in his response to a Prehearing Order is whether or not the V-belt drive was "guarded by location". Stated more broadly the issues are the existence of the alleged violation of 30 C.F.R. § 56.14001 and the appropriate penalty.

Stipulations

The parties stipulated as follows:

1. Respondent is the operator of an open pit mine with screening and processing equipment to process rock & sand.

2. Respondent is a small operator.

3. Respondent has a good history.

4. Respondent demonstrated good faith.

5. The penalty would not affect the ability of the respondent to continue in business.

THE REGULATION

30 C.F.R. § 56.14001 provides as follows:

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

Summary of the Evidence

The inspector admittedly made his inspection at a time when the rock and sand processing plant was not in operation. By bending or stooping under some water hoses which were located 39 inches above the floor of a dead end catwalk the inspector was able to gain access to the area where he observed an unguarded V-belt drive on the No. 1 screen. The inspector testified that the V-belt drive had in the past been isolated and guarded by location. He explained that it had been guarded by location by virtue of a metal bar or railing (he also referred to it as a guard) which had been welded in such a way as to protrude across the dead end catwalk that was located along the side of the V-belt drive. The short bar had been welded across the catwalk in the area where the large belt-high water hoses partially blocked the catwalk. The inspector saw the metal bar lying on the deck below the area where it "had broken loose." The inspector stated that the alleged violation was abated when the metal bar or railing was welded back in the same place where it had broken loose.

Mr. Baun, president of the Sanger Rock & Sand testified that he is a graduate engineer. He received a BS degree in Engineering from University of Pacific in 1954 and for the past 20 years he has been the safety engineer for the company. He has read the manuals and attended MSHA and OSHA's seminars for different types of safety training.

Mr. Baun testified that even without the railing welded across the dead end catwalk the V-belt drive was guarded by location. It is located out of the way behind some equipment. The dead end catwalk is not a working area and not a travelway. There are three large water hoses that come down and block the access to the V-belt drive. These water hoses are located in such a way that you have to "make an effort" and "almost get down on your hands and knees" to get under them. When the plant is in operation no one would go to the area where the V-belt drive is located because they would be drenched by a high pressure spray of water that is used to wash the sand off the bottom of a conveyor belt that is located just above the area in question. If the plant had been operating the inspector would not have been in the area of the V-belt drive because of the noise and high pressure water spray coming down in that area. In addition, the inspector had to stoop down under the water hoses to gain access to the dead end catwalk.

On cross examination Mr. Baun stated that if there was a need to make a repair in the area of the V-belt drive, he would put a man in the area but only after the equipment was de-energized and locked out. The men are provided locks which they use to lock out equipment. The man making the repairs "holds" the key to the lock he is using so no other person can unlock the lock and start the equipment.

Findings and Reasons for Decision

The Federal Mine Safety and Health Review Commission in Secretary of Labor, v. Thompson Brothers Coal Company, Inc., 3 MSHC 1571 construed the guarding requirements of § 77.400(a), a surface mining standard containing language identical to § 56.14001. The Review Commission stated that in order to establish a prima facie case of a violation under this identically worded standard, "the Secretary of Labor must prove: (1) that the cited machine part is one specifically listed in the standard or is "similar" to those listed; (2) that the part was not guarded; and (3) that the unguarded part "may be contacted by persons" and "may cause injury to persons."

With respect to this later (third) requirement the Review Commission stated:

> The standard requires the guarding of machine parts only when they "may be contacted" and "may cause in-

> jury." Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness... Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

In the present case, I accept and credit the testimony of Mr. Baun with regard to the inaccessibility of the V-belt drive while the plant is in operation. I find the Secretary failed to carry its burden of establishing a reasonable possibility of contact with the moving machinery in question. Although the Secretary produced some speculation on this point no persuasive evidence was produced to establish that anyone would ever be near the V-belt drive while it was in operation.

My finding that a violation of the safety standard was not established is also supported by the fact that no evidence was produced to establish that the metal bar or railing was not in place at the time the equipment was last in operation. Without such evidence no violation can be established in view of the inspector's testimony that as long as this guard or railing was in place the V-belt drive was protected by location. The inspector also found the violation abated when this piece of metal rail was again welded back in the same place where it had broken loose.

On questioning the mine inspector in an attempt to determine when the metal bar may have broken loose it became obvious that the inspector made no attempt during his inspection to determine the answer to this issue. Thus a finding that the railing was not in place at the time the plant was last operated would be based on mere speculation rather than evidence.

Mr. Baun offered into evidence the facilities last periodic inspection report covering the area where the V-belt drive was located. This report did not note anything unusual about the guard railing in question.

Further Findings and Conclusions of Law

1. Respondent is subject to provisions of the Federal Mine Safety and Health Act in the operation of its Sanger Pit and Mill facility.

2. The undersigned Administrative Law Judge has jurisdiction over the parties and the subject matter of this proceeding.

3. On September 10, 1985 a federal mine inspector conducted an inspection of respondent's rock and sand processing facilities located at Sanger, Fresno County, California.

4. Respondent is a small operator.

5. Respondent has a good history.

6. Respondent demonstrated good faith.

7. The Secretary failed to establish a reasonable possibility of contact with the moving machine part.

8. The violation of 30 C.F.R. § 56.14001 was not established.

Accordingly, based on the findings of fact and conclusions of law herein I enter the following:

ORDER

Citation 2361739 and all penalties therefor are vacated.

August F. Cetti
Administrative Law Judge

Distribution:

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Sanger Rock & Sand, Mr. W. A. Baun, President, P.O. Box 626, Clovis, CA 93612 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

MAY 26 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 85-109 A.C. No. 34-01087-03501 J3E
v.	:	C F & I
KELLEY TRUCKING COMPANY, Respondent	:	

DECISION AFTER REMAND APPROVING SETTLEMENT

Before: Judge Morris

This is a civil penalty proceeding initiated by the petitioner against respondent in accordance with 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 standard promulgated pursuant to the Act.

Prior to a hearing the parties filed a motion seeking approval of proposed settlement.

Citation 2218839 alleges a violation of 30 C.F.R. § 48.25(a). An original assessment of $400 was proposed.

The parties now seek a decision affirming the citation and assessing a penalty of $100.

In support of their motion to approve the settlement the parties have submitted information relating to the statutory criteria required for assessing civil penalties as contained in 30 U.S.C. § 820(i).

I find the proposed settlement is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement is approved.

2. Citation 2218839 is affirmed.

3. A civil penalty of $100 is assessed.

John J. Morris
Administrative Law Judge

Distribution:

Allen Reid Tilson, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Kelley Trucking Company, Mr. Curtis Kelley, Owner, H C 63, Box 10, Hodgen, OK 74939 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 27, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 87-104 A. C. No. 36-00926-03671
v.	:	
	:	Homer City Mine
HELEN MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the violation involved in this case. The originally assessed amount was $1,000 and the proposed settlement is for $500.

The subject order was issued for a violation of 30 C.F.R. § 75.400 because combustible materials, float coal dust and loose coal, were permitted to accumulate along the Number 4 belt conveyor. The loose coal had accumulated under the belt and belt roller for a distance of approximately 600 feet and was 4 to 18 inches deep. Float coal dust in the belt entry extended a distance of approximately 1,700 feet. The Solicitor represents that a reduction from the original assessment is warranted for the following reasons:

> The special assessment of this violation indicated that this violation could have contributed to the propagation of a fire or an explosion. Float coal dust in the belt entry extended a distance of approximately 1,700 feet. The bottom belt rollers could have become overheated and provided an ignition source for the accumulations. Further investigation into the matter revealed that the Assessment Office did not take into account the modification MSHA Inspector William McClure made with reference to the description of the condition. Further conversations with this inspector have revealed that the condition was not as grave as it has been assessed. The modification and the inspector have revealed that approximately 600 feet of

> the 1,750 feet of the loose coal accumulations between Number 20 to Number 22 marker and from the Number 1 marker to Number 18 marker was [sic] damp to wet. Additionally, 70 feet of the 150 feet of float coal dust outby the Number 18 marker was [sic] damp to wet. Inspector McClure has stated that the remainder of the accumulations was not completely dry but in a damp to dry condition. He also checked for hot rollers and found not [sic] hot rollers. He checked for electrical violations and found no electrical violations in the area. He believed that the conditions in the belt entry were generally of a damp nature. Accordingly, the propagation of a fire or an explosion was not probable.

The Solicitor is to be commended for her comprehensive explanation.

In light of the foregoing, I accept the Solicitor's representations and approve recommended settlement. I further note that the settlement amount remains substantial.

Accordingly, the motion to approve settlement is GRANTED and the operator is ORDERED TO PAY $500 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

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 28 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 87-44
	:	A.C. No. 15-13508-03515
v.	:	
	:	Docket No. KENT 87-45
TRIPLE ELKHORN MINING COMPANY,	:	A.C. No. 15-13508-03516
	:	
Respondent	:	No. 2 Surface Mine

DECISION APPROVING SETTLEMENT

Appearances: Carl W. Gerig, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Mr. Travis E. Miller, President, Triple Elkhorn Mining Company, Harold, Kentucky, for the Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing, Petitioner filed motions to approve settlement agreements and to dismiss these cases. A reduction in penalties from $1,866 to $1,500 was proposed. I have considered the representations and documentation submitted, and I conclude that the proffered settlements are 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 penalties of $1,500 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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Mr. Travis E. Miller, President, Triple Elkhorn Mining Company, P.O. Box 520, Harold, KY 41635 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 28 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 87-58 A. C. No. 15-07295-03502
v.	:	Martiki Surface
WILMON MOORE d/b/a BIG BLUE TRUCKING, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Wilmon Moore, Lovely, Kentucky, pro se.

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 Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $450 to $150 was proposed. I have considered the representations and documentation submitted in this case, 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 $150 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 29 1987

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 86-83-D
ON BEHALF OF	:	MSHA Case No. CD 85-9
JOSEPH G. DELISIO, JR.,	:	
Complainant	:	Mathies Mine
v.	:	
	:	
MATHIES COAL COMPANY,	:	
Respondent	:	

SUPPLEMENTAL DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

On November 21, 1986, I rendered a decision in which I concluded that the respondent violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1) by unlawfully interferring with the complainant's right as a representative of miners to accompany federal inspectors during inspections of the mine. To remedy the violation, I ordered the respondent to permit the contestant to drive his private automobile to the mine portal where inspections normally begin or, in the alternative, provide him with company transportation underground to that location, 8 FMSHRC 1772, 1837 (November 1986).

Subsequent to the issuance of my decision, MSHA filed a "Request for Clarification" of my remedial order. Since my jurisdiction terminated upon the release of my decision, I declined to rule on the request, and referred it to the Commission. In an order issued on December 30, 1986, the Commission stayed the running of the 40-day period within which my decision would have become final, and directed the respondent to respond to MSHA's request for clarification.

On January 2, 1987, MSHA filed a supplement to its request for clarification, and on January 7, 1987, the respondent filed its response. Thereafter, on February 3, 1987, the Commission issued another order remanding this matter to me for the purpose of ruling on MSHA's request, 9 FMSHRC 193 (February 1987). In its remand, the Commission stated as follows at 9 FMSHRC 195:

> This matter is remanded to the judge to rule upon the request for clarification. The judge may conduct such expedited proceedings as may be necessary for purposes of his ruling. Any party dissatisfied with the judge's further ruling may timely petition the Commission for review of the decision as clarified or amended.

In compliance with the Commission's remand, I scheduled a hearing in Pittsburgh, Pennsylvania, on March 12, 1987, to afford the parties an opportunity to be heard on MSHA's clarification request. However, on March 9, 1987, MSHA's counsel advised me that the parties reached a settlement on the remedial dispute in question, and the hearing was cancelled to afford the parties an opportunity to file their settlement proposal with me for my review and appropriate disposition.

On March 16, 1987, the parties confirmed their proposed settlement, and they filed a Memorandum of Understanding executed on February 25, 1987, by Mr. Edmund Baker, General Manager of the Mathies Mine, Mr. DeLisio, and Mr. Ronald Stipanovich, President, UMWA Local 2244. The pertinent terms of the settlement are as follows:

> Mr. DeLisio's daylight shift starting and ending times at the Thomas Portal will be changed to 7:30 a.m. and 3:30 p.m. The change in the daylight shift times will apply only to Mr. DeLisio in his capacity as the designated miner for walk-around inspections. The change would not be applicable should the mine examiner's job at the Thomas Portal be filled by some other miner who is not the designated miner.
>
> Mr. DeLisio will make a good faith effort to promptly begin and proceed with his underground travel. The Company will make a good faith effort to minimize traffic on the haulage line during the 7:30 to 8:00 a.m. period. It is anticipated that such efforts by both parties will enable Mr. DeLisio, under normal conditions, to reach the Linden Portal in time to begin the walkaround with the federal inspector.

The shift adjustment for Mr. DeLisio will be subject to a 90 calendar day trial period. At any time during the trial period either party may terminate the shift adjustment and this understanding. Following the trial period if both parties are in agreement with this agreement then it will become binding. The trial period will begin with Mr. DeLisio's first daylight shift after confirmation of this understanding.

In view of the fact that the settlement agreement was conditioned on the completion of a 90-day trial period, during which time either party could terminate Mr. Delisio's adjusted work schedule and request a further hearing in the matter, I issued a Stay Order on March 27, 1987, staying further disposition of this case in order to allow the 90-day trial period to run its course.

Discussion

The 90-day trial period has now been completed, and I have heard nothing further from the parties. After careful consideration of the terms of the settlement between the parties with respect to the remedial aspects of my original decision and order of November 21, 1986, I conclude and find that it reflects a reasonable resolution of the dispute, and I see no reason why it should not be approved. In view of the settlement disposition, MSHA's previously filed Motion for Clarification is moot.

CONCLUSION AND ORDER

The settlement agreement entered into by the parties in this matter IS APPROVED. The parties are JOINTLY ORDERED to fully comply with the terms of the settlement agreement. In view of the approval of the settlement, the March 12, 1987, request by the parties to close the record in this case IS GRANTED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 29 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-226 A.C. No. 36-00845-03503
v.	:	
	:	Cambria Slope No. 33
CHARLES J. MERLO, INCORPORATED, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of $30 for an alleged violation of mandatory safety standard 30 C.F.R. § 77.1605(d), as stated in section 104(a) Citation No. 2688979, served on the respondent on May 16, 1986.

The respondent filed a timely answer and notice of contest, and the case was scheduled for a hearing on the merits in Indiana, Pennsylvania, on May 28, 1987. However, by motion filed with me on May 15, 1987, pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the petitioner seeks approval of a settlement of the case. The petitioner also seeks my approval of a proposed modification of the citation to substitute and name Beth Energy Mines, Inc., as the responsible party and respondent for the alleged violation in question.

Discussion

The petitioner proposes to settle this matter with no civil penalty assessment payment by the respondent Charles J. Merlo, Inc. In support of the motion, petitioner's counsel states that during the inspection the inspector observed that

respondent's Caterpillar Dozer Model D-9H, Serial Number 9014013, did not emit an audible warning and that the directional lights in the front and rear did not function. However, counsel submits that the responsibility for the alleged violation lies with the Beth Energy Mines, Inc. Counsel states that the Cambria Slope Preparation Plant, the site inspected, was owned and operated by Beth Energy Mines, Inc., and while it leased the dozer from Charles J. Merlo, Inc., on a month-to-month basis, it had exclusive control of the dozer for over 4 years. Further, the lessor and lessee had an arrangement whereby Charles J. Merlo, Inc. would repair the dozer when a problem was reported by Beth Energy. Beth Energy had not advised Charles J. Merlo, Inc. of the defective warning device and lights nor had it requested repairs be performed. Charles J. Merlo, Inc., therefore, had no duty to correct the defects. Moreover, at the time of the inspection, the equipment was being operated by Tom Cochran, an employee of Beth Energy. No Charles J. Merlo, Inc. employees were exposed to the hazard.

Conclusion

On the facts of this case, it seems clear to me that the respondent is not the party responsible for the alleged violation. Under the circumstances, I find no basis for approving the proposed settlement which provides for no civil penalty assessment payment by the respondent. To the contrary, I conclude and find that the respondent should be dismissed as the responsible party in this proceeding, and I will treat the petitioner's motion as a motion to withdraw its civil penalty proposal against Charles J. Merlo, Inc. The respondent is free to institute a new civil penalty proceeding against Beth Energy Mines, Inc., for the alleged violation in question.

ORDER

The petitioner's proposed civil penalty assessment filed against the respondent Charles J. Merlo, Inc., is deemed to be withdrawn, and this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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MAY 29 1987

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. SE 86-105-R
	:	Order No. 2811664; 7/1/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. SE 86-106-R
	:	Order No. 2811667; 7/8/86
	:	No. 5 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 87-8
	:	A. C. No. 01-01322-03648
v.	:	No. 5 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: R. Stanley Morrow, Esq. and Harold D. Rice, Esq., Birmingham, Alabama, for Jim Walter Resources, Inc.; William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama for Secretary of Labor.

Before: Judge Weisberger

STATEMENT OF THE CASE

The Secretary's Petition for Civil Penalties for alleged violations, by the Mine Operator (hereinafter called Respondent) of 30 C.F.R. § 75.500(d), has been consolidated with the companion Notices of Contest filed by the Respondent. Pursuant to notice, the case was heard on March 3, 1987, in Birmingham, Alabama. Carl Early, William Vann, and William Meadows testified for the Secretary (hereinafter called the Petitioner). Charles Stewart testified for Respondent. At the hearing, Petitioner made a motion that the Notice of Contest, SE 86-106, be dismissed on the ground that the Order contested, Number 2811667, was vacated by the Mine Safety and Health Administration. This motion was not objected to by the Respondent.

Petitioner filed its Post Hearing Brief on April 23, 1987, and Respondent filed its Brief on May 4, 1987. Respondent filed its Reply Brief on May 11, 1987. Petitioner did not file any Reply Brief.

ISSUES

1. Whether Respondent violated 30 C.F.R § 75.500(d).

2. Whether the crosscuts, in which nonpermissible electrical equipment were located, were "the last crosscut" as that term is used in section 75.500(d), supra.

3. If Respondent violated 30 C.F.R. § 75.500(d), was the violation caused by its "unwarrantable failure."

REGULATORY PROVISIONS

30 C.F.R. § 75.500(d) as pertinent, provides as follows: "All other electric face equipment which is taken into or used inby the last crosscut of any coal mine...., shall be permissible."

STIPULATIONS

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 (Act).

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

4. The MSHA Inspector, who issued the subject citation, was a duly authorized representative of the Secretary.

5. A true and correct copy of the subject citation was properly served upon the operator.

6. Imposition of a penalty, in this case, will not affect the operator's ability to do business.

7. The operator's size is medium.

8. If it be found that a violation of 30 C.F.R § 75.500(d) occurred as alleged, Order 2811664, then the violation is to be considered to be "significant and substantial."

9. The equipment identified in Order Citation Number 2811664 were nonpermissible.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 1, 1986, a nonpermissible distribution box, at Respondent's Number 5 Mine, was located in the last crosscut connecting number 2 and number 3 entries in the number 8 section. (See F, Exhibit G-2.) Although there were two open crosscuts further inby, they were between entries 1 and 2, and 3 and 4, respectively. (See A and H, Exhibit G-2.) There was no crosscut connecting entries 2 and 3 which was further inby the crosscut in which the distribution box was located.

Respondent cites 30 C.F.R. § 75.200-7(iii), 30 C.F.R. § 75.31-3(a), and 30 C.F.R. § 75.302(a), as the only regulations, aside from the one at issue, that contain the term "last open crosscut." Respondent, in essence, argues that these sections delineate the parameters of that term. In this connection, it is noted that pursuant to 30 C.F.R. § 75.301 and 302, air is tested in number 1 and number 4 entries respectively, outby crosscuts A and H, (labeled on Exhibit G-2), as these crosscuts are considered to be last open crosscuts within the meaning of section 75.301, supra, and section 75.302, supra, as they separate intake and return air entries.

It appears to be Respondent's position, based upon these sections, that the last crosscuts inby the face, which separate intake and outtake entries, labeled A and H, on Exhibit G-2, are the only crosscuts to be considered to be "the last crosscut" for purposes of section 75.500(d), supra.

I have considered Respondent's argument, but find it lacking in merit. I find that the regulatory sections cited by Respondent do not define the phrase "last crosscut." These sections merely indicate a reference to "the last open crosscut" where certain actions are to be performed, or certain devices are to be used. It is unduly restrictive to hold that the identification of "the last open crosscut" for the purposes set forth in the sections cited by Respondent, mandates identification of the same crosscut for the purposes enumerated in section 75.500(d), supra.

Instead, I have been guided by the Congressional intent in promulgating section 318(i), of the 1977 Mine Act, 30 U.S.C. § 801 et seq., whose language is repeated in section 75.500(d), supra. Congressional intent is expressly stated in section 318(i), supra, which provides, in essence, that only permissible electrical equipment are to be used in the last open crosscut "to assure that such equipment will not cause a mine explosion or mine fire. . . . " Respondent, in essence, argues that because the intent of section 75.500(d), is to minimize the hazard of a methane ignition, nonpermissible equipment is precluded only in

crosscuts A and H, connecting fresh air intake to the return, (see Exhibit G-2) as only these crosscuts are exposed to methane laden air. In support of its position, Respondent cites testimony to the effect that most methane is liberated at the face in the cutting operation, and then travels through crosscuts A and H and down return entries 1 and 4 outby the face (see Exhibit G-2). Thus Respondent argues that methane laden air does not enter crosscut F in which the nonpermissible equipment was located (see Exhibit G-2).

However, according to the uncontradicted testimony of William Vann, a Federal Mine Safety Health Administration Ventilation Specialist, methane gas is common in the crosscut in which the distribution box was located. It was also the uncontradicted testimony of the Federal Mine Inspector, Carl Early, that 30 percent of the time, that he has tested for methane in that crosscut, there has been more than 1 percent of methane which is in excess of the allowed amount. (Tr. 31, 74.) The testimony of Vann and Early tends to establish that interruption of a mine curtain placed in the number 3 entry outby the crosscut in which the nonpermissible equipment was located, would result in neutral air in that crosscut allowing methane to accumulate. Accordingly, to hold that the crosscut in which the distribution box was located, is other than the last crosscut, would clearly lessen the assurance against a mine explosion or fire, and would accordingly be violative, of the expressed purpose of section 318(i), supra. Furthermore, Early, Vann, and William Meadows, Supervisory Mine Engineer, employed by Mine Safety and Health Administration, all testified, in essence, that to their knowledge the only way that the crosscut in which the distribution box is located is referred to, is as the last crosscut. I therefore find that section 75.500(d), was violated by having a nonpermissible distribution box in the crosscut labeled F, in Exhibit G-2, which is the last crosscut between entries 2 and 3 and which is the last crosscut referred to in section 75.500(d), supra.

The parties have stipulated that, on July 1, 1986, there was a nonpermissible scoop charger being used. Its location is depicted on Exhibit G-2 as being in a crosscut between entries 3 and 4. Vann testified that the scoop charger was in the "last crosscut" as that crosscut extends from the brattice in crosscut C, between entries 1 and 2, up to the brattice in the crosscut J, between entries 3 and 4, (see the yellow areas in Exhibit G-2). However, Early has indicated that the charger was in the the "affected area" of the last crosscut, but that the crosscut in which it was located was not the last open crosscut. (Tr. 53.) Meadows, in essence, indicated that a crosscut is a connection between two entries. (Tr. 129.) Essentially the same definition is found in A Dictionary of Mining, Mineral, and Related Terms (U. S. Department of the Interior, Bureau of Mines (1968)), which defines crosscut as "a small passageway driven at right angles to

the main entry to connect it with a parallel entry or air course." Accordingly, I conclude that the scoop charger was not in the same crosscut where the distribution box was located, which has been found to be the last crosscut. Rather, the scoop charger, as depicted in Exhibit G-2, was in a crosscut between entries 3 and 4. Inasmuch as there were two other crosscuts between entries 3 and 4 inby the face, I conclude that scoop charger was not in the "last crosscut."

Having found that section 75.500(d) was violated, I conclude, on the basis of the Parties' stipulation, that such violation was "significant and substantial." Petitioner maintains that the violation of section 75.500(d), resulted from a "unwarrantable failure" on the part of the Respondent. Respondent has stipulated that the equipment in question was nonpermissible, and there does not appear to be any dispute that the Respondent knew of the actual location of the equipment in question. The only question is whether or not the Respondent knew, or should reasonably have known, that the nonpermissible equipment was located in the "last crosscut." Charles C. Stewart, the Deputy Mine Manager at the No. 5 Mine, Respondent's only witness, testified that crosscuts A and H, depicted on Exhibit G-2, which are the most inby crosscuts between entries 2 and 3, and 3 and 4 respectively, each have air from the face going through them. In contrast, the crosscut, in which the distribution box was located, has only intake air. Stewart further testified that until July 1, 1986, the date the instant citation was issued, the Respondent had never received any other citation for nonpermissible equipment in crosscut F (Exhibit G-2). Stewart testified that he did not know the last crosscut for permissible equipment. However, he stated specifically that the last crosscut between entries 2 and 3 was labeled F (Exhibit G-2), which is the crosscut in which the distribution box was located. In addition, I find most persuasive the uncontradicted testimony of Early, Vann, and Meadows that to their knowledge "last crosscut," is the only term to be applied to the crosscut in which the distribution box was located, i.e., the last crosscut between entries 2 and 3 inby the face. I conclude that Respondent should have known that the location of the nonpermissible distribution box was in the "last crosscut." Accordingly, I find that the violation herein was caused by Respondent's "unwarrantable failure."

I conclude, based on the record and the Parties stipulation, that the violation herein was "significant and substantial."

I have considered all the criteria set forth in section 110 of the Act. Specifically, I have taken into the account of the high gravity of the violation, as indicated by the stipulation as

to its being "significant and substantial," and I have also taken into account the high degree of negligence as discussed above in my analysis of the issue of "unwarrantable failure." Petitioner had, in its petition for assessment of civil penalty, requested a penalty of $1000. However, inasmuch as I have found that the use of a scoop battery charger, in the crosscut between the 3rd and 4th entry, did not constitute a violation of section 75.500(d), I find that a penalty of $500 is appropriate.

At the hearing, Petitioner indicated that Citation Number 2811667 was vacated by the Mine Safety and Health Administration effective February 27, 1986. Petitioner made a motion that the Notice of Contest, contesting this order, SE 86-106-R be dismissed. Respondent indicated that it did not have any objection. Therefore, the Notice of Contest, SE 86-106-R is DISMISSED.

At the hearing, at the conclusion of the Petitioner's case, Respondent made motion to dismiss. In light of my decision this motion is DENIED.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay the sum of $500 within 30 days of the date of this decision as a civil penalty for the violation found wherein.

It is further ORDERED that Respondent's motion to dismiss is DENIED.

It is further ORDERED that the Notice of Contest, SE 86-106-R, be DISMISSED. It is further ORDERED that the Notice of Contest, SE 86-105-R be DISMISSED.

Avram Weisberger
Administrative Law Judge

Distribution:

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