MAY 1989

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDER

MAY 1989

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

Secretary of Labor, MSHA v. A.H. Smith Stone Company, Docket No. VA 88-44-M. (Judge Merlin, Default Decision, February 22, 1989)

Secretary of Labor, MSHA v. Green River Coal Company, Docket No. KENT 88-152. (Judge Koutras, April 24, 1989)

Donald Denu v. Amax Coal Company, Docket No. LAKE 88-123-D. (Judge Melick, April 7, 1989)

Secretary of Labor, MSHA v. L & L Gravel, Docket No. CENT 89-2-M. (Judge Merlin, Default Decision, April 20, 1989)

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

Secretary of Labor, MSHA v. Sanger Rock & Sand, Docket No. WEST 88-44-M, etc. (Judge Cetti, March 22, 1989)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 9, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket Nos. PENN 86-297-R PENN 87-16
FLORENCE MINING COMPANY	:	

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

DECISION

BY THE COMMISSION:

At issue in this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"), is whether the Florence Mining Company ("Florence") violated 30 C.F.R. § 75.1704 by removing from service an approved emergency escape facility while miners were underground. 1/ Also at issue is whether the violation was significant and substantial in nature and caused by Florence's unwarrantable failure to comply with the mandatory safety standard. Commission Administrative Law Judge William Fauver answered these questions in the affirmative. 9 FMSHRC 1180 (June 1987)(ALJ). For the reasons that follow, we affirm the judge's finding of a violation but reverse his unwarrantable failure and significant and substantial findings and remand the proceeding.

1/ Section 75.1704 essentially restates 317(f)(1) of the Mine Act, 30 U.S.C. § 877(f)(1), and provides in part:

> ... Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

The material facts are not in controversy. Florence operates the Florence No. 2 Mine, an underground coal mine located at Huff, Pennsylvania. The workings of the mine are reached by means of a "dual compartment" slope, approximately 620 feet in length, which has a belt entry in the top compartment and a track entry in the lower compartment. Supplies and equipment are lowered into the mine by a materials hoist located in the track entry. A concrete walkway, approximately 5 feet wide, with a handrail and lighting, is located on the left side of the slope beside the materials hoist track. Miners enter and leave the mine by means of the walkway.

Prior to November 1985, Florence removed injured or disabled persons from the mine, either by handcarrying a stretcher up the walkway ("stretchering out") or by transporting them on a weight car attached to the materials hoist ("hoisting out"). In late 1985, Florence's practice of hoisting out injured miners was challenged by representatives of the miners as being unapproved. Thereafter, Florence requested the Secretary of Labor's ("Secretary") Mine Safety and Health Administration ("MSHA") to approve its use of the hoist as an escape facility. On March 4, 1986, MSHA approved the hoist as a means of transporting sick or injured miners to the surface. The resulting "Emergency Escape Hoist Facilities Plan" ("the plan") in part required that when miners were underground a person trained in the operation of the hoist be available within 30 minutes after notification to transport injured or disabled persons to the surface. 2/ MSHA's approval of the hoist as an emergency escape facility did not address Florence's pre-existing policy, acceptable under the standard, of stretchering out injured or disabled miners.

In preparation for lowering a large piece of mining equipment into the mine on the weekend of August 16, 1987, Florence's management decided to replace the cable on the materials hoist. (Although the cable had several broken strands, it did not meet the regulatory criteria for mandatory retirement. 3/) On August 13, 1986, after the morning shift had entered the mine by means of the walkway, the hoist was removed from service for approximately five and one-half hours while the cable was replaced. Although Florence had notified the local union president that the cable would be replaced, the miners working underground on the August 13 morning shift apparently were not informed by Florence that the cable would be replaced during their shift.

On August 14, the Johnstown, Pennsylvania, MSHA Subdistrict Field Office received a telephone call from a representative of the miners

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2/ Section 75.1704 does not specifically require an "Emergency Escape Hoist Facilities Plan," it merely requires Secretarial approval of "escape facilities" installed by the operator. By contrast, other standards, e.g., 30 C.F.R. §§ 75.220 and 75.316, specify that plans are to be adopted by the operator and approved by the Secretary. We nevertheless adopt the characterization of the approval document as a "plan" to which the parties agreed.

3/ See, 30 C.F.R. § 75.1434.

requesting an inspection pursuant to section 103(g)(1) of the Mine Act. 4/ The request was based on the miners' belief that the new cable on the hoist had been damaged during its installation.

When MSHA Inspector Ronald Gossard arrived at the mine on August 14, he was presented with a written request for a section 103(g)(1) inspection of the cable. Pursuant to the request, the inspector conducted an inspection but determined that the cable was not in violation of any mandatory safety standards. The inspector was then given another written request for an additional section 103(g)(1) inspection concerning the fact that the cable had been replaced while miners were underground. Upon inquiry to Mine Superintendent Thomas Moran and others, the inspector ascertained that the hoist had been out of operation from 9:30 a.m. to 3:00 p.m. the previous day, while a production crew was underground. The inspector found this to be a violation of section 75.1704. He also found that the violation was significant and substantial in nature and the result of Florence's unwarrantable failure to comply with the standard. Therefore, the inspector issued to Florence Order No. 2697882 pursuant to section 104(d)(2) of the Mine Act. 5/

4/ Section 103(g)(1) states in part:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this [Act] or a mandatory health or safety standard exists ... such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.... Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such a violation or danger exists in accordance with the provisions of this [Title]. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

30 U.S.C. § 813(g)(1).

5/ Section 104(d)(2) states:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violation similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar

The order states in relevant part:

> The slope hoist facility approved by MSHA to transport injured miners from the mine was removed from operation to replace the hoist cable while miners were underground. The hoist was not available for use from 9:30 a.m. to 3:00 p.m. on August 13, 1986. The operator's approved plan requires a person trained to operate the hoist shall be available when miners are underground to transport injured persons to the surface. This requirement implies that the hoist will also be available for use when miners are underground.

The inspector subsequently modified the order to reflect his finding that management was aware that under the plan the hoist was required to be available to transport injured or disabled persons to the surface and that management nonetheless scheduled the hoist to be replaced while miners were underground. The modification further noted that the replacement of the hoist cable caused the approved escape facility to be inoperative for approximately five and one-half hours while miners were underground.

Florence contested the validity of the order of withdrawal and the civil penalty of $400 proposed by the Secretary for the violation of section 75.1704 on the grounds that, under section 104(d), an inspector may only cite violations that the inspector observes in progress. Florence argued that even if there had been a violation, it had ceased before the inspector's arrival and, consequently, could not be cited in a withdrawal order issued pursuant to section 104(d). Florence also contended that, in fact, it had not violated section 75.1704, or, in the alternative, that the violation had not resulted from its unwarrantable failure to comply, nor was it significant and substantial in nature.

The administrative law judge rejected Florence's contentions. The judge found that enforcement actions under section 104(d) "may be issued for violations that are reasonably recent, consistent with the prompt disposition intended by section 104(d), even though the violation ceased before the inspector's arrival on the scene." 9 FMSHRC at 1186. The judge also held that the inspector reasonably concluded that the provision in the plan requiring that a person trained to operate the hoist be available when miners are underground meant that Florence was required to keep the hoist in service while miners were underground. 9 FMSHRC at 1187. The judge noted that section 75.1704 contains "no provision or exception allowing the operator to close or remove approved escape facilities while miners are underground." He therefore concluded that it was a violation of section 75.1704 for Florence to shut down the

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> violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

hoist while its miners were underground. Id. In addition, the judge held that the violation was both caused by an unwarrantable failure to comply and significant and substantial in nature, and he assessed a civil penalty of $400. 9 FMSHRC at 1187-92.

On review, Florence argues that the judge erred in four respects: (1) in concluding that a section 104(d)(2) order of withdrawal could be based upon a violation occurring prior to its detection by the inspector; (2) in finding a violation of section 75.1704; (3) in determining that the alleged violation was due to Florence's unwarrantable failure to comply with the standard; and (4) in finding that the violation was of a significant and substantial nature. We consider each of these challenges in turn.

I.

Subsequent to the judge's decision, the Commission issued a series of decisions addressing the first issue raised by Florence. Nacco Mining Co., 9 FMSHRC 1541 (September 1987), pet. for review filed, No. 88-1053 (D.C. Cir. January 27, 1988); Emerald Mines Corp., 9 FMSHRC 1590 (September 1987), affd., 863 F.2d 51 (D.C. Cir. 1988); White County Coal Corp., 9 FMSHRC 1578 (September 1987), pet. for review filed, No. 88-1174 (D.C. Cir. March 1, 1988); and Greenwich Collieries, 9 FMSHRC 1601 (September 1987). In these decisions the Commission concluded that a section 104(d) enforcement action may be based upon violations detected by an inspector even after the violations had ceased to exist. In particular, Nacco and Emerald involved the issuance of section 104(d)(1) citations for violations detected by inspectors during section 103(g)(1) inspections. The Commission found "nothing in the language of section 103(g) that requires the violation to be ongoing when the inspector arrives at the mine site." 9 FMSHRC at 1548; 9 FMSHRC at 1594. Further, in White County Coal Corp., the Commission concluded that "section 104(d) orders may be based upon violations detected by the inspector during an inspection occurring after the violation has ceased to exist." The Commission noted that "the focus of section 104(d) is upon unwarrantable failure by the operator, not upon whether its detection occurred concurrently with its commission." 9 FMSHRC at 1581.

In affirming Emerald, supra, the United States Court of Appeals for the District of Columbia Circuit stated:

> The gravity of the mine operator's conduct does not turn on whether the operator was caught in or after the act. We are satisfied that the Commission's interpretation properly preserves "the unwarrantable failure closure order as an effective and viable enforcement sanction".... [W]e hold that the Secretary may make "unwarrantable failure" findings under section 104(d) of the Mine Act for violations that have abated before the inspector arrives at the site.

Emerald, supra, 863 F.2d at 59 (citations omitted). Therefore, we hold that the judge correctly rejected Florence's argument that a withdrawal

order cannot properly be issued pursuant to section 104(d)(2) for violations detected after they have ceased to exist.

II.

We further conclude that substantial evidence supports the judge's conclusion that Florence violated section 75.1704. There is no dispute that, at Florence's request, use of the materials hoist was approved by the Secretary as an emergency escape facility to transport injured or disabled miners from the mine. Exhibit GX-D. This approval required in part that "a person trained in the operation of the hoist shall be available when miner(s) are underground to transport injured persons to the surface," and that the hoist "be operative within 30 minutes after being alerted." Id. at Attachment 2, 4. We agree with the judge that the inspector's interpretation of the provisions of the plan to require that the hoist be kept in service while miners are underground is reasonable. 9 FMSHRC at 1186-87. We therefore agree that Florence was required to keep the hoist in service while miners were underground. Here it is uncontroverted that, in order to replace the cable, Florence removed the facility from service for five and one-half hours on August 13, 1986, while a production shift was underground.

Florence argues that because the plan contained no express language specifying when the hoist cable could be changed and because Florence could stretcher out injured or disabled miners, it did not violate section 75.1704. These arguments miss the mark. Although Florence correctly notes that it was not foreclosed from stretchering out injured miners even after obtaining approval to use the hoist, once it had committed to utilize the hoist as an approved escape facility, Florence was obligated by the terms of the plan to maintain its availability within 30 minutes while miners were underground. We therefore affirm the judge's finding of a violation of section 75.1704.

III.

In decisions issued subsequent to the judge's decision, we held that "unwarrantable failure" means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). In concluding that Florence unwarrantably failed to comply with section 75.1704, the judge stated that "the phrase 'unwarrantable failure' means the failure of an operator to abate a condition or practice constituting a violation of a mandatory standard it knew or should have known existed, or the failure to abate such a condition or practice because of indifference or lack of reasonable care." 9 FMSHRC at 1187-90. The judge determined that under either the "knew or should have known" or the "indifference or lack of reasonable care" construction, Florence "demonstrated an unwarrantable failure to comply with the cited safety standard when it deliberately shut down the hoist for 5½ hours on a production day." 9 FMSHRC at 1191. Florence argues that the judge applied an incorrect legal standard in determining whether the violation was the result of its unwarrantable failure to comply, and that, in any event, the violation was not the result of its

unwarrantable failure.

The Commission has previously reviewed the same construction of "unwarrantable failure" as was set forth by the judge in the present case, and has concluded that "[e]ven though the judge did not literally anticipate and apply the aggravated conduct standard of unwarrantable failure enunciated in Emery, his treatment of the question of unwarrantable failure ... is in accord substantively with that decision." Quinland Coals, Inc., 10 FMSHRC 705, 708 (June 1988); see also The Helen Mining Company, 10 FMSHRC 1672, 1676 (December 1988). Therefore, the relevant inquiry is whether the evidence supports the judge's finding of unwarrantable failure.

Florence argues that an unwarrantable failure finding is inappropriate due to the existence of a good faith dispute over the requirements of the approved emergency escape facilities plan. In support of this argument, Florence points to the lack of express language in the plan addressing when the hoist must be operable, the witnesses' differing interpretations of the plan provision mandating that a hoist operator be available when miners are underground, the fact that this was the first occasion since the hoist had become an approved escape facility that the cable was replaced, the lack of prior interpretative disputes with MSHA over the requirements of the plan and the availability of an alternative method of compliance with the standard (stretchering out). Florence also stresses that in issuing the withdrawal order the inspector found only "moderate" negligence in respect to the violation and that this finding conflicts with his further finding of an unwarrantable failure.

In determining whether the judge's unwarrantable failure finding is supported by substantial evidence, we must consider the record as a whole including the evidence that "fairly detracts" from the finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Measured against this standard, we conclude that the judge's finding of unwarrantable failure cannot be sustained.

As discussed, the inquiry is whether Florence's conduct in removing the hoist from service constituted aggravated conduct exceeding ordinary negligence. The great weight of the evidence establishes that Florence's on-shift repair of the hoist was not attributable to such aggravated conduct. Rather, as set forth below, it is clear that Florence's decision to remove the hoist from service was based on its own good faith belief that it was not prohibited from doing so by the terms of the approved escape plan and by virtue of the continued presence and availability of the slope walkway as a permissible escape route.

First, the inspector and the mine superintendent agreed that the plan did not expressly address when the hoist cable could be replaced or serviced and did not expressly specify whether or when the hoist could be taken out of service when miners were underground. Tr. 21, 133. Also, this was the first occasion that the hoist cable had been replaced since the hoist had been approved as an emergency escape facility. Prior to this approval, no standard or plan proscribed replacement of

the hoist cable during production shifts, and it is undisputed that the issue of whether, or when, the approved escape facility could be removed from service had not previously arisen as an issue between Florence and MSHA.

Second, it must be stressed that the stretchering out of injured miners along the illuminated, cement slope walkway was an acceptable means of compliance with the standard which does not require the presence of a mechanical escape facility in the type of slope in question. As the MSHA inspector indicated in his testimony, the approval of the hoist as an escape facility did not affect Florence's ability to remove injured miners by transporting them out of the mine on stretchers handcarried up the walkway. Tr. 86. Rather, this route remained as an "alternative or additional means of removing injured people." Id. The record makes it abundantly clear that the continued availability of this escape facility during the time that the materials hoist was out of service formed the basis for Florence's belief that removal of the hoist was not violative of the cited standard.

Third, the MSHA inspector found that the level of Florence's negligence in connection with the violation was "moderate," a finding left unchanged during the two subsequent modifications of the order. In this regard, we note that MSHA Policy Memorandum Nos. 88-2C and 88-1M, issued April 6, 1988, provide that "evidence of moderate negligence will generally not support unwarrantable failure findings." As counsel for the Secretary admitted at the oral argument before the Commission in this case, the Secretary continues to adhere to the statement of position in the policy memorandum and the inspector's findings therefore "somewhat ... conflict." Oral Arg. Tr. at 29-31. Although the validity of the interpretation set forth in the policy memorandum is not at issue in this case, we agree with Florence that the inspector's conflicting findings detract from the Secretary's arguments in support of the unwarrantable failure finding.

In sum, in light of our review of the record as a whole, we conclude that Florence's action was a result of its mistaken, but good faith, belief in the correctness of its interpretation of the plan and of the requirements of section 75.1704. Therefore, we conclude that Florence's conduct in connection with the violation did not constitute aggravated conduct exceeding ordinary negligence and the judge's contrary finding of an unwarrantable failure must be reversed.

IV.

Florence also challenges the judge's finding that the violation of section 75.1704 was of a significant and substantial nature. After affirming the violation, the judge determined that the purpose of the approved emergency escape facility was "to provide safe and relatively fast transportation of injured persons from the mine." 9 FMSHRC at 1192. Stating that transportation by hoist was faster and superior to transportation by stretcher up the slope, the judge determined that "[b]y shutting down the hoist for 5½ hours while the day shift miners were underground, mine management consciously removed an important emergency protection of the miners" and that this reduction of

protection could "significantly and substantially contribute to the cause and effect of aggravated injury, or even death, e.g., in case of severe shock, internal bleeding or burns." Id.

Florence argues that the judge's finding of a significant and substantial violation is not supported by substantial evidence. It asserts that there is no medical evidence in the record supporting a finding that the unavailability of the hoist would result in an injury of a reasonably serious nature. Instead, it asserts that the testimony in this regard is comprised of only unfounded speculation. Florence further argues that the judge erred because he based his significant and substantial finding on a comparison of two methods for the evacuation of injured or disabled miners, a comparison in which stretchering out injured miners came up short, when, in fact, both methods of evacuation are acceptable to MSHA. We agree.

A violation is properly designated as being of a significant and substantial nature if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In arriving at the definition of significant and substantial in National Gypsum, the Commission explicitly rejected the Secretary's position that significant and substantial violations include all but "purely technical violations" or those "which pose risks having only a remote or speculative chance of happening." Id. at 826, n.5. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury," and that the likelihood of injury must be evaluated in terms of continued normal mining operations. Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986).

Our affirmance of the judge's finding that Florence violated section 75.1704 establishes the first element of the Mathies test. The second element requires the Secretary to prove that the violation of section 75.1704 presented a discrete safety hazard. The judge based his finding that the violation could "contribute to the cause and effect of

aggravated injury, or even death" upon the testimony of the inspector. 9 FMSHRC at 1192. The inspector stated that stretchering out injured or disabled miners could result in aggravation of injuries or disabilities due to delay in reaching the surface, jostling of the stretcher, or reduced ability to effectively administer first aid. Tr. 26-28, 30-31, 46-49, 87-88. We conclude that substantial evidence does not support a finding that the time difference between the two methods of evacuation presented a discrete safety hazard. Estimates of the time required to evacuate an average-sized miner up the slope via a stretcher varied from 5-7 minutes to 10-12 minutes. Tr. 73, 101, 173. Estimates of the time required to evacuate a miner up the slope on the weight car ranged from 2 to 3 minutes. Tr. 74-75, 171. Although all witnesses agreed that the actual hoisting out would be faster than stretchering out, Superintendent Moran emphasized that procedures involved in readying the hoist could lessen and even eliminate the time difference between the two evacuation methods. Tr. 74-78, 100, 111, 146, 173-74, 185-87. Even assuming that the hoist operator had been alerted and the hoist was at the bottom of the slope, the stretcher would have to be secured to the weight car, safety drags would have to be set, and the hoist operator would have to be notified to begin raising the hoist. See, e.g., Tr. 50-53, 136-38. In addition, the inspector testified that the plan allowed for a delay of up to 30 minutes for the hoist operator to be located and alerted to lower the hoist. Tr. 74-80. In view of these facts, the evidence cannot be viewed as supporting the conclusion that stretchering out would result in a meaningful delay in reaching the surface and that utilization of the stretcher method would ipso facto constitute a discrete safety hazard.

As to whether stretchering out miners could result in aggravation of their injuries or disabilities due to jostling of the stretcher or reduced ability to administer first aid, the inspector stated that he believed more severe injuries were likely if an injured miner were stretchered out of the mine. However, the inspector admitted that he was unfamiliar with the injury record at the No. 2 mine and did not know what injuries had occurred there. Tr. 47-48. The Secretary presented no evidence showing that the stretchering out of miners had resulted in exacerbated injuries or disabilities at the No. 2 mine, or, for that matter, at any other mine.

Most importantly, the witnesses agreed that the use of stretchers was an acceptable method of evacuating injured or disabled miners to the surface prior to MSHA's approval of the hoist as an emergency escape facility and that even after the approval MSHA continued to regard the use of stretchers as an acceptable means of transporting miners to the surface. Tr. 85-86. Put simply, if no hoist were in place at this slope mine, there would not even have been a violation since the walkway alone would have constituted full compliance with the standard in issue. Tr. 56, 68-69, 85-86. It would be anomalous, indeed, to conclude that a method of evacuation that would be acceptable in and of itself is somehow transformed into an evacuation method involving significant and substantial hazards simply because an approved alternative became temporarily unavailable.

For these reasons, we conclude that substantial evidence does not

support the judge's finding that the violation of section 75.1704 was significant and substantial in nature.

V.

In sum, we affirm the judge's finding that Florence violated section 75.1704 by removing an approved emergency escape facility from operation while miners were underground, but we reverse the judge's findings that the violation was the result of Florence's unwarrantable failure and that it was significant and substantial in nature. Accordingly, we remand the proceeding for reconsideration of the civil penalty assessed in light of our reversal of the unwarrantable failure and significant and substantial findings.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 10, 1989

RUSHTON MINING COMPANY	:	
	:	
v.	:	Docket Nos. PENN 85-253-R
	:	PENN 86-1
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

The question presented is whether the Commission may award Rushton Mining Company ("Rushton") reimbursement from the Secretary of Labor for its attorney's fees and litigation expenses as a sanction against the Secretary under Rule 11 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P. 11") in a proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act" or "Act"). 1/ In a prior order, we remanded this matter to Commission

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1/ Fed. R. Civ. P. 11 provides:

> Signing of Pleadings, Motions, and Other Papers; Sanctions
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> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness

Administrative Law Judge James A. Broderick for a determination of this issue. 9 FMSHRC 392 (March 1987). Judge Broderick concluded that monetary sanctions under Fed. R. Civ. P. 11 are not available in Commission proceedings and that, even if they were, the facts of this case would not support such an award. 9 FMSHRC 1270 (July 1987)(ALJ). We agree in result and affirm.

On June 11, 1985, Donald Klemick, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection at Rushton's underground coal mine located in Centre County, Pennsylvania. Klemick issued to Rushton withdrawal order No. 2403926 pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a violation of 30 C.F.R. § 75.326. 2/ The withdrawal order

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> sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended April 28, 1983, effective August 1, 1983.) (Emphasis added.)

2/ Section 75.326, taken from mandatory safety standards contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977) and the Mine Act (see 30 U.S.C. § 863(y)(1) (1976)(amended 1977) and 30 U.S.C. § 863(y)(1) (1982)), provides in relevant part:

> Aircourses and belt haulage entries.
>
> In any coal mine opened after March 30, 1970, the entries used as intake and return air courses shall be separated from belt haulage entries, and each

states:

> The West mains intake trolley haulage secondary escapeway entry was not separated from the parallel West mains belt haulage entry near the slope bottom. The permanent type stopping had been removed and was replaced by a brattice cloth check curtain on the belt side and by a runthrough type brattice cloth check on the trolley haulage side. Both curtains (checks) were installed in a poor workmanlike manner with excessive leakage from the belt into the track as was indicated by the use of smoke clouds. ... This order requires a permanent type stopping to be installed or the minimum of a substantial equipment door and a substantial check to serve as an adequate airlock.

Because Rushton's mine was opened prior to March 30, 1970, and had more than two entries, the second sentence of 30 C.F.R. § 75.326 (n. 2 infra) was applicable to the mine. Although the trolley haulage entry was not a primary intake entry, it functioned at times as a component of the mine's air intake system. Due to the removal of the stopping between the trolley entry and the parallel belt entry and the installation of ineffective curtain barriers, air from the belt entry was entering the trolley entry. Under these circumstances, a violation of the second sentence of section 75.326 arguably would have occurred if air from the belt entry was used to ventilate active working places in the absence of an MSHA determination that such ventilation was "necessary." (In contrast, the first sentence of section 75.326, which applies to coal mines opened after March 30, 1970, provides that intake and return aircourse entries must be kept separate from belt haulage entries.)

Rushton filed a notice of contest of the withdrawal order contesting the validity of the order, denying that there was any violation in this case, and contending that the order failed even to

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> operator of such mine shall limit the velocity of the air coursed through belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane, and such air shall not be used to ventilate active working places. Whenever an authorized representative of the Secretary finds, in the case of any coal mine opened on or prior to March 30, 1970, which has been developed with more than two entries, that the conditions in the entries, other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries, ... the belt haulage entries shall not be used to ventilate, unless such entries are necessary to ventilate, active working places....

state a violation on its face. In response the Secretary filed an answer asserting that the order was properly issued. The Secretary also filed a petition for civil penalty proposing a penalty of $1,100 for the alleged violation. This matter was assigned to Judge Broderick, who subsequently consolidated it with additional penalty and contest proceedings arising from other citations and orders issued at the Rushton Mine by Inspector Klemick. See Rushton Mining Co., 9 FMSHRC 325 (February 1987)(ALJ).

An evidentiary hearing in the consolidated cases was held before Judge Broderick on November 6, 1986. The testimony pertinent to this matter focused on the question of whether air in the trolley haulage entry had been used to ventilate active working places of the mine on the day that the withdrawal order was issued. Rushton's mine manager, Raymond Roeder, testified in essence that on that day air in the trolley entry was not being used to ventilate active working places but instead was being dumped in the return entry. Inspector Klemick's testimony concerning the alleged violation was, in our opinion, unclear and may have reflected some confusion as to the distinct requirements imposed by the first and second sentences of section 75.326.

On February 3, 1987, after completion of the hearing and before any briefs were filed with respect to the withdrawal order in question, the Secretary filed a motion seeking leave to vacate the order and to withdraw the associated civil penalty petition. The motion states:

> Subsequent to a hearing on the merits in the above-captioned matter and upon additional review of the alleged violation, it has been determined that the petition should be withdrawn insofar as it concerns Citation No. 2403926, which should be vacated. The respondent has no objection to the Secretary's Motion.

In his decision of February 20, 1987, ruling in the consolidated cases, Judge Broderick granted the motion without substantive comment, vacated the order, and dismissed the contest proceeding and associated civil penalty petition. 9 FMSHRC at 326.

On March 20, 1987, Rushton filed with the Commission a Petition for Discretionary Review pursuant to section 113(d)(2)(A)(ii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(ii), contending that in proceedings before the Commission a mine operator is eligible for reimbursement of its litigation expenses from the Secretary under Fed. R. Civ. P. 11 if the Secretary has engaged in the kind of litigation abuse covered by the rule, and that the facts of this case justified such an award. Rushton asserted that Fed. R. Civ. P. 11 should be applied to Commission proceedings pursuant to Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), which provides that "[o]n any procedural question not regulated by the Act, [the Commission's] Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission or any Judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate." Rushton argued that the Secretary's answer to Rushton's

notice of contest, which alleged that the withdrawal order had been properly issued, "was not well-grounded in fact as evidenced by the subsequent Motion to Withdraw and vacation of the Order." PDR at 5.

In an order issued on March 30, 1987, we stated that given the termination of the judge's jurisdiction upon issuance of his February 20, 1987 decision (see 29 C.F.R. § 2700.65(c)), Rushton "did not have the opportunity to present the issue of reimbursement before the trier of fact." 9 FMSHRC at 392. We accordingly remanded the proceeding to Judge Broderick "for the purpose of developing a record and ruling on the issues" presented in Rushton's petition.

In response to an order issued by Judge Broderick in the remand proceeding, the parties indicated that they did not wish to submit any evidence on the issues presented. In his decision, the judge denied Rushton's application for attorney's fees and other litigation expenses, concluding that Fed. R. Civ. P. 11 does not apply to Commission proceedings. The judge held that the procedural question of possible reimbursement of litigation expenses is "regulated" by Commission Procedural Rules 6 and 80, 29 C.F.R. §§ 2700.6 & .80, and that those rules do not authorize reimbursement of a party's expenses as a sanction. 9 FMSHRC at 1273. Therefore, he found it "unnecessary to look to the Federal Rules of Civil Procedure for guidance." Id. The judge stated that Commission Procedural Rule 6 was "obviously modeled after Rule 11 of the FRCP except that it does not provide for a sanction when the rule is disregarded." Id. Although he found that certain sanctions could be assessed under Commission Procedural Rule 80, he concluded that they "do not include an order assessing costs or attorney's fees." 9 FMSHRC at 1272-73. The judge also determined that, even assuming the applicability of Fed. R. Civ. P. 11 as a guide, the record in this case would not support a conclusion that the Secretary's answer to Rushton's contest and the Secretary's civil penalty petition were not well grounded in fact or warranted by law. 9 FMSHRC at 1274.

Rushton filed a Petition for Discretionary Review of this ruling, which we granted. We also heard oral argument. The essential question presented is whether the monetary sanctions provision of Fed. R. Civ. P. 11 applies to Commission proceedings. In accord with the judge, we conclude that it does not.

The fundamental flaw in Rushton's position is that the Commission lacks authority to grant the relief requested. The barriers to the relief sought include the silence of the Mine Act on the subject, the nature of the Federal Rules of Civil Procedure, the bar of sovereign immunity, and the Equal Access to Justice Act (Pub. L. No. 96-481, 94 Stat. 2325, reauthorized, Pub. L. 99-80, 99 Stat. 183) ("EAJA").

We begin with the Mine Act. No provision of the Act expressly empowers the Commission to award to a mine operator attorney's fees and costs from the Secretary in an administrative proceeding arising under the Act. Granting that Rushton is seeking attorney's fees and costs not as a prevailing party but, rather, as an alleged victim of litigation abuse, we nevertheless note that we have strictly interpreted the Act when determining whether such awards are due prevailing parties. For

instance, section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), specifically authorizes assessment of attorney's fees and costs in favor of a prevailing complainant in certain discrimination proceedings arising under section 105(c) of the Act. 30 U.S.C. § 815(c). In construing this provision, we have concluded, however, that attorney's fees are not awardable to a complainant who retains private counsel in a discrimination complaint proceeding brought by the Secretary of Labor on the complainant's behalf pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Odell Maggard v. Chaney Creek Coal Corp., etc., 9 FMSHRC 1314, 1322-23 (August 1987), aff'd in part, rev'd in part on other grounds, 866 F.2d 1424 (D.C. Cir. 1989). We based this position on Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 643-44 (4th Cir. 1987), in which the Fourth Circuit, applying the "American Rule" limiting availability of attorney's fees in the absence of statutory authorization (see Alyeska Pipeline Service Co. v. The Wilderness Soc., 421 U.S. 240, 247-71 (1975)), discerned no statutory warrant for private counsel fees in a discrimination complaint proceeding brought by the Secretary under 30 U.S.C. § 815(c)(2). Comparably, the absence of such an authorization in section 111 of the Act, 30 U.S.C. § 821, precludes the award of attorney's fees and costs in a compensation proceeding. Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493, 1498-99 (November 1988), pet. for review filed on other grounds, No. 88-1873 (D.C. Cir. December 16, 1988). We stated in Clinchfield: "[U]nder the 'American Rule' applied to the Mine Act as set forth in the Fourth Circuit's [Eastern] decision, attorney's fees are not available to prevailing litigants under the Mine Act, except where the Act specifically authorizes such fees." 10 FMSHRC at 1499. Thus, as we have observed in a number of analogous contexts, the absence of specific statutory authorization for an asserted form of relief under the Mine Act "dictates cautious review...." Council of So. Mtns. v. Martin County Coal Corp., 6 FMSHRC 206, 209 (February 1984), aff'd, 751 F.2d 1418 (D.C. Cir. 1985). See also Kaiser Coal Corp., 10 FMSHRC 1165, 1169-70 (September 1988).

Similarly, as Judge Broderick correctly observed, none of our procedural rules, which establish procedures governing administrative litigation before the Commission arising under the Act, purports to grant the Commission such authority. Rule 11, upon which Rushton relies, is one of the Federal Rules of Civil Procedure, which "govern the procedure in the United States district courts in all suits of a civil nature...." Fed. R. Civ. P. 1. The Commission, of course, is not a federal court. The Commission is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers. 30 U.S.C. § 823; see generally, e.g., Kaiser Coal, supra, 10 FMSHRC at 1169-70; Old Ben Coal Co., 1 FMSHRC 1480, 1484 (October 1979). Rushton has not enlightened us with any federal court decisions supporting its novel proposition that a federal agency such as the Commission may employ Fed. R. Civ. P. 11 in administrative proceedings to support an award of attorney's fees against the federal government. (Rushton acknowledged this lack of judicial authority at oral argument. Tr. Arg. 14.) Our own review of the case law under Fed. R. Civ. P. 11 persuades us that an administrative agency's grant of attorney's fees against the federal government under Fed. R. Civ. P. 11 in administrative proceedings would be unprecedented.

Rushton misconstrues our Procedural Rule 1(b). Rule 1(b) does not dictate that any particular Federal Rule of Civil Procedure be reflexively applied in Commission proceedings on procedural questions not regulated by the Mine Act, Administrative Procedure Act, or our own procedural rules. Rather, Procedural Rule 1(b) merely states that in such circumstances, the Commission and Commission judges are to be "guided so far as practicable" by the Federal Rules of Civil Procedure "as appropriate." Plainly, Procedural Rule 1(b) reserves to the Commission considerable discretion in deciding whether and to what extent it is to be "guided" by a particular Federal Rule of Civil Procedure. In assessing the "practicability" and "appropriateness" of awarding attorney's fees and costs against the Secretary under Fed. R. Civ. P. 11, we are met with formidable obstacles, the doctrine of sovereign immunity and the clear applicability of the EAJA.

It is a settled principle of federal law that the United States, as the "sovereign," is immune from suit except as it consents to be sued, and that the terms of such consent strictly limit a court's jurisdiction to entertain the suit. Block v. North Dakota, 461 U.S. 273, 280 (1983); United States v. Mitchell, 445 U.S. 535, 583 (1980). A claim is against the sovereign if the judgment sought, as here, would draw on the public treasury. Dugan v. Rank, 372 U.S. 609, 620 (1963). Waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969); United States v. Testan, 424 U.S. 392, 394 (1976). Only Congress may waive the sovereign immunity of the United States. Block, supra, 461 U.S. at 280. The doctrine of sovereign immunity bars the award of attorney's fees and costs to be taxed against an agency of the United States unless there is Congressional authorization. United States v. Chemical Foundation, Inc., 272 U.S. 1, 20 (1926); NAACP v. Civiletti, 609 F.2d 514, 520 (D.C. Cir. 1979); Van Hoomissen v. Xerox Corp., 503 F.2d 1131, 1132 (9th Cir. 1974); Pyramid Lake Paiute Tribe of Indians v. Morton, 499 F.2d 1095, 1096 (D.C. Cir. 1974), cert. denied, 420 U.S. 962 (1975).

In enacting the EAJA, Congress has occupied the relevant field in a manner, as we explain below, fatal to Rushton's claims here. The EAJA expressly permits attorney's fees and costs against the United States in administrative proceedings (5 U.S.C. § 504 (West Supp. 1988)) and in civil court proceedings (28 U.S.C. § 2412 (West Supp. 1988)). 3/ Under 5 U.S.C. § 504, a prevailing party in administrative litigation against an agency of the United States may be awarded fees and expenses "unless ... the position of the agency was substantially justified or that special circumstances make an award unjust." In turn, we have promulgated rules implementing the EAJA in Commission adjudicatory proceedings. 29 C.F.R. Part 2704. We conclude that the EAJA is presently the exclusive remedy provided by Congress to prevailing litigants who seek reimbursement of their litigation expenses from the Secretary in Commission contest and civil penalty proceedings.

3/ The EAJA as originally enacted was effective for a three-year period, October 1, 1981, through October 1, 1984. The EAJA expired and Pub. L. 99-80 reauthorizing EAJA was enacted on August 5, 1985.

The EAJA, which was originally enacted in 1980 (P.L. 96-481), amended the Administrative Procedure Act by adding new section 5 U.S.C. § 504 and also modified 28 U.S.C. § 2412. As originally enacted and as reauthorized, EAJA is intended to expand the liability of the United States for attorney's fees and other expenses in administrative proceedings and civil actions. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5, reprinted in 1980 U.S. Code Cong. & Ad. News 4984; H.R. Rep. No. 99, 99th Cong. 1st Sess. 4, reprinted in 1985 U.S. Code Cong. & Ad. News 132. The primary purpose of EAJA is to ensure that certain eligible individuals, partnerships, corporations, business associations, and other organizations will not be deterred from seeking review of or defending against unjustified governmental action because of the expense involved in securing the vindication of their rights. H.R. Rep. No. 1418, supra, at 5, 12 reprinted in 1980 U.S. Code Cong. & Ad. News 4984, 4991; H.R. Conf. Rep. No. 1434, 96th Cong., 1st Sess. 21, reprinted in 1985 U.S. Code Cong. & Ad. News 5010; H.R. Rep. No. 99, supra, at 4, reprinted in 1985 U.S. Code Cong. & Ad. News 132-33. The EAJA serves as a clear expression of Congress' waiver of sovereign immunity for the purpose of compensating eligible parties for the cost of litigation incurred as a result of unreasonable action by the United States. However, by its explicit terms, the EAJA sets economic limits for such relief and this restriction mandates our denial of Rushton's claim.

The EAJA restricts eligible applicants to those individuals with a net worth of not more than $2 million and those small businesses and other entities with a net worth of not more than $7 million and not more than 500 employees. 5 U.S.C. § 504(b)(1)(B) (West Supp. 1988); 28 U.S.C. § 2412(d)(2)(B) (West Supp. 1988). The Commission's EAJA rules, as amended, mirror these eligibility criteria. 29 C.F.R. § 2704.104(b) (54 Fed. Reg. 6284, 6285 (February 1989)). Rushton, a large mine operator, concedes that it does not meet these criteria and would have us use Fed. R. Civ. P. 11 to bypass the EAJA's eligibility standards and its failure to qualify under those standards. The EAJA and the doctrine of sovereign immunity cannot be so easily circumvented.

Congressional waivers of sovereign immunity are strictly and narrowly construed, and a statute permitting claims against the United States must be confined to its explicit terms. See, e.g., In re Oliver North, 842 F.2d 340, 342 (D.C. Cir. 1988); Unification Church v. INS, 762 F.2d 1077, 1089 (D.C. Cir. 1985); Nichols v. Pierce, 740 F.2d 1249, 1255-56 (D.C. Cir. 1984). These principles apply fully to the EAJA. Action on Smoking & Health v. CAB, 724 F.2d 211, 225 (D.C. Cir. 1984). In setting the size and dollar eligibility limitations in the EAJA, Congress determined that sovereign immunity was not waived as to entities of a size or with net worth above those limits. We are bound to respect that congressional choice. Cf. Kaiser Coal, supra, 10 FMSHRC at 1170. Under these circumstances, Rushton's proper appeal lies, not with the Commission, but with Congress -- to relax EAJA's eligibility requirements. 4/

4/ In Adamson v. Bowen, 855 F.2d 668 (10th Cir. 1988), decided just prior to oral argument in this case, the Tenth Circuit approved a grant of Fed. R. Civ. P. 11 attorney's fees against the federal government in

Finally, we conclude, as did the judge, that even if Fed. R. Civ. P. 11 did apply to Commission proceedings, the standards for an award have not been met. In general, under Rule 11, monetary sanctions may be imposed if a reasonable inquiry discloses that a litigant's pleading or other paper is not well grounded in fact, is not warranted in law, or has been interposed for any improper purpose. See, e.g., Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-80 (D.C. Cir. 1985). The rule is directed against unreasonable or abusive litigation. Westmoreland, supra, 770 F.2d at 1180.

Here, Rushton asserts that the Secretary's answer to Rushton's contest and the Secretary's civil penalty petition were not well grounded in fact as evidenced by the Secretary's dismissal motion. However, we emphasize that, as the judge noted, Rushton failed to put forth any evidence, either in the original proceeding or in the remanded proceeding before Judge Broderick, to prove that allegation. As the judge properly observed:

> Rushton's brief assumes that it is self-evident, or at least evident from the record made in this case, that the Secretary's Answer in the contest case and his Petition in the penalty case did not meet the requirements of Rule 11.... [T]he record before me is limited to the testimony and exhibits addressed to the order and its propriety, and the fact that after hearing, the Secretary moved to withdraw the penalty petition as related to the order and to vacate the order. Rushton did not object to the motion and it was granted. It would be presumptuous in the extreme on the basis of such a record to conclude that the documents in question were filed by officers of the court without the belief that they were well grounded in fact and warranted by law. I don't know and the record does not show what inquiry was made prior to the filing of the documents.... Therefore, even if Rule 11 applied to Commission proceedings, I would conclude that this record does not show that it was violated.

9 FMSHRC at 1274.

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civil litigation involving a social security disability applicant on the grounds that the civil branch of the EAJA, 28 U.S.C. § 2412, waived the government's sovereign immunity from fee awards made pursuant to the Federal Rules of Civil Procedure. 855 F.2d at 671-72. The court acknowledged that waivers of sovereign immunity must be construed strictly (855 F.2d at 671), and we read this decision to mean that a party in federal civil litigation who otherwise would qualify as an EAJA applicant may be entitled to Rule 11 attorney's fees under appropriate circumstances. As emphasized in the text, there is no dispute here that Rushton does not qualify under the EAJA. Furthermore, Adamson does not address the more difficult question presented in this matter of whether federal agencies may apply Fed. R. Civ. P. 11 in their administrative proceedings.

On the basis of the present record, we will not disturb the judge's conclusion that, if Fed. R. Civ. P. 11 were applicable, this case would not support the imposition of monetary sanctions against the Secretary. As the prosecutor under the Act, the Secretary has a duty to withdraw litigation that, upon further examination, she finds to be insufficiently founded. Cf. Robert K. Roland v. Secretary, 7 FMSHRC 630, 635-36 (May 1985). From all that can be gleaned from the existing record, the Secretary did just that. 5/

On the foregoing bases, we conclude that the monetary sanctions provision of Fed. R. Civ. P. 11 does not apply to Commission proceedings and that, even if it did apply, the record would not support the imposition of such sanctions. We therefore affirm the judge's decision denying Rushton's application.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ In view of our determinations, we find it unnecessary to comment on the judge's construction of the meaning and effect of Commission Procedural Rules 6 and 80, 29 C.F.R. §§ 2700.6 & .80.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 11, 1989

ROBERT SIMPSON	:	
	:	
v.	:	Docket No. KENT 83-155-D
	:	
KENTA ENERGY, INC.	:	
	:	
and	:	
	:	
ROY DAN JACKSON	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act" or "Act"), is on remand to us from an opinion of the United States Court of Appeals for the District of Columbia Circuit reversing our prior decision in this matter. Robert Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988), rev'g, Robert Simpson v. Kenta Energy, Inc. & Roy Dan Jackson, 8 FMSHRC 1034 (July 1986). This case involves a discrimination complaint filed by Robert Simpson alleging that he engaged in a protected work refusal and that Kenta Energy, Inc. ("Kenta") and Roy Dan Jackson constructively discharged him and refused to reinstate him in violation of section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1). In a decision on the merits and a supplemental decision as to Jackson's personal liability, Commission Administrative Law Judge James A. Broderick upheld Simpson's complaint against Kenta and Jackson, and ordered Simpson reinstated with back pay, interest, attorney's fees, and litigation expenses. 6 FMSHRC 1454 (June 1984)(ALJ); 7 FMSHRC 272 (February 1985)(ALJ).

Jackson petitioned the Commission for review, and we reversed the judge's decisions, concluding that Simpson did not engage in a protected work refusal because of a failure to communicate his safety concerns and that, in any event, he was not constructively discharged in violation of the Act. 8 FMSHRC 1034 (July 1986). Simpson appealed to the Court, which reversed and remanded with instructions to the Commission to consider certain issues. In light of the Court's decision, we now resolve the remanded issues, decide remaining questions not reached in

our prior decision given our original disposition, and, on the following grounds, affirm the judge's decisions.

I.

The facts relating to Simpson's work refusal and the adverse actions are set forth in our earlier decision and need not be repeated in detail here. See 8 FMSHRC at 1035-37. Briefly, Simpson, a scoop operator at Kenta's No. 1 Mine, quit his job in September 1982 because of safety concerns based on conditions at the mine. Prior to leaving work, Simpson failed to communicate those concerns to any supervisory representative of Kenta. In December 1982, approximately three months after he quit, Simpson met Roy Dan Jackson, Kenta's President, by chance, explained the safety concerns that had prompted his action, and asked for his job back. Jackson refused to rehire him. Shortly before his encounter with Jackson, Simpson had filed a discrimination complaint with the Secretary of Labor alleging that his severance of employment had amounted to a violation of section 105(c)(1) of the Mine Act. Following investigation of this complaint, the Secretary determined that no violation of the Act had occurred and Simpson then filed with this independent Commission his individual discrimination complaint against both Kenta and Jackson. See 30 U.S.C. §§ 815(c)(2) & (3).

In his decision on the merits upholding Simpson's complaint, Judge Broderick found that Simpson's decision to leave his job represented a protected work refusal based on Simpson's reasonable, good faith concerns for his safety. The judge found that there was no qualified supervisor to perform required preshift and onshift examinations and that Simpson believed that they were cutting in the direction of abandoned works with no test holes being drilled. 6 FMSHRC at 1455-57, 1460. Concerning the requirement in work refusal situations that a miner communicate his safety concerns to the mine operator prior to or reasonably soon after his work refusal (see, e.g., Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982)), the judge found that Simpson had not communicated his safety concerns to Jackson. The judge excused the failure, however, on the grounds that Jackson had actual knowledge of the absence of a foreman and the failure to perform the preshift and onshift examinations and that communication would have been futile. 6 FMSHRC at 1462. The judge concluded that Simpson suffered an adverse action, a constructive discharge, because Simpson was subjected to working conditions so intolerable that he was forced to quit. 6 FMSHRC at 1460-61. The judge found that although Kenta and Jackson were not motivated to maintain the intolerable working conditions because of Simpson's protected activity, their motivation was not determinative as to whether discrimination had occurred. 6 FMSHRC at 1461. The judge further determined that Jackson's failure to rehire Simpson also violated section 105(c) of the Act. 6 FMSHRC at 1457, 1462-63, 1464. With regard to the latter finding, the judge rejected the operator's defense that Simpson would have been laid off in any event for economic reasons in January or February of 1983. 6 FMSHRC at 1462, 1463.

At the conclusion of his decision on the merits, the judge directed further proceedings to resolve the question of whether

respondent Jackson was personally liable for the discriminatory acts in issue. 6 FMSHRC at 1464. The judge ordered Simpson to "file a statement explaining with particularity the legal basis of his claim against Respondent Jackson, and the evidence it expects to produce to establish that claim." Id. On June 27, 1984, Simpson submitted a Statement of Claim, essentially basing his assertion of Jackson's personal liability on doctrines of piercing the corporate veil and alter ego. On July 30, 1984, the judge issued an Order Permitting Further Discovery and Notice of Hearing. In part, the order dealt with Simpson's contention that Jackson should be held personally liable for the discrimination in question:

> Jackson's liability in this case depends upon whether he was the "person" who discharged Complainant in violation of section 105(c)(1) of the Act. This question may be related to the further question whether Jackson was the "operator" (defined in section 3(d) of the Act) of the subject mine. The questions whether Jackson was the alter ego of Kenta and whether Kenta's corporate veil may be pierced are important insofar as they may bear on the first question set out above.

Order 2. In his February 1985 remedial decision, the judge concluded that Jackson was, in reality, the "operator" of the mine at all relevant times and found Jackson personally liable for the unlawful discrimination at issue. 7 FMSHRC at 273-78. The judge directed Simpson's reinstatement, the award of some $36,000 in back pay and interest, and payment of some $57,000 in attorney's fees and expenses. 7 FMSHRC at 286.

Jackson filed a Petition for Discretionary Review; Kenta did not. In his petition, Jackson challenged the judge's central conclusions with respect to Simpson's work refusal, the communication issue, and the two instances of discrimination. Jackson also assigned as error the judge's finding that Simpson would not have been laid off for economic reasons and further claimed that the judge committed a prejudicial error of procedure "by first establishing a procedure for trying the issue of Jackson's personal liability wherein Simpson framed the specific legal basis for his claims against Jackson and then issuing his [remedial] order on matters not specified by Simpson." PDR 15-17. Jackson raised no issues concerning the back pay or attorney's fees determinations.

In our decision reversing the judge, we held that the judge erred in concluding that Simpson had engaged in a protected work refusal and that Simpson had been subjected to a discriminatory constructive discharge and failure to rehire. 8 FMSHRC at 1038-41 & n.4. With respect to the work refusal issue, we agreed with the judge that Simpson had a good faith, reasonable belief in hazardous conditions. 8 FMSHRC at 1038. However, focusing on the requirement that a miner communicate to the operator his health or safety concerns, we concluded that Simpson, without any showing of good reason, had failed to communicate such concerns "to anyone in authority prior to quitting his job on September 20, or even reasonably soon thereafter." 8 FMSHRC at 1039.

We rejected the judge's finding (6 FMSHRC at 1462) that any such communication by Simpson would have been futile: "Even assuming, as the judge did, that Jackson was aware of the absence of a foreman and the failure to conduct the required pre-shift and on-shift examinations, we cannot presume that Jackson would have taken no action had Simpson communicated his concerns to Jackson." 8 FMSHRC at 1039-40.

In addressing the constructive discharge issue, and assuming arguendo that Simpson had engaged in protected activity, we stated that "in order to establish a successful claim of constructive discharge, the miner must show that in retaliation for protected activity by the miner the operator created or maintained intolerable working conditions in order to force the miner to quit." 8 FMSHRC at 1040, citing Rosalie Edwards v. Aaron Mining, Inc., 5 FMSHRC 2035, 2037 (December 1983). We found "no evidence in this record that Kenta or Jackson were motivated to create or to maintain the conditions about which Simpson was concerned because of the exercise by Simpson of any rights protected by the Mine Act." 8 FMSHRC at 1040-41. Accordingly, we concluded that Simpson had not been constructively discharged in violation of the Act.

In addition, we found insufficient record support for, and therefore reversed, the judge's additional conclusion that the failure to rehire Simpson constituted a further violation of section 105(c) of the Act. 8 FMSHRC at 1041 n.4. We also denied a motion filed on review by Simpson to reopen the proceedings to determine whether the Black Joe Coal Company was a legal successor to Kenta and, hence, liable for Kenta's alleged discrimination. 8 FMSHRC at 1041. Simpson had asserted that the judge's finding as to Kenta's liability was final and not subject to review insofar as Kenta was concerned because Kenta had not petitioned the Commission for review of the judge's decision. We stated:

> In his petition for review Jackson raised the central issue of whether Simpson was discriminated against in violation of the Act. We have concluded that no discrimination occurred in conjunction with Simpson's leaving the job. Because there is no violation of the Act, there is no liability on behalf of any respondent. In these circumstances, Simpson's argument that he had a binding judgment against Kenta because Kenta did not separately seek review is rejected. See, e.g., Arnold Hofbrau, Inc. v. George Hyman Construction Co., Inc., 480 F.2d 1145, 1150 (D.C. Cir. 1973).

Id.

Given our disposition of the case, we did not address the issues of whether Simpson would have been laid off in any event and whether the judge committed a prejudicial procedural error in the supplemental remedial proceedings.

In its opinion reversing our decision, the Court approved in general terms the Commission's Pasula/Robinette work refusal doctrine

(2 FMSHRC 2786 (October 1980); 3 FMSHRC 803 (April 1981), respectively). 842 F.2d at 458. The Court also specifically endorsed the Commission's Dunmire & Estle communication requirement in work refusal situations (4 FMSHRC 126 (February 1982)). 842 F.2d at 459.

With regard to the subject of communication in a work refusal context, the Court noted that Simpson argued that the futility of communication issue was one of fact and that the Commission had impermissibly substituted its own view of the facts for that of the judge, while Jackson argued that the futility issue was one of law. 842 F.2d at 459-60. The Court opined that the "Commission's decision sheds little light on this [factual v. legal] aspect of the dispute." 842 F.2d at 460. The Court quoted the Commission's discussion of futility (8 FMSHRC at 1039-40), and stated that it could not determine "whether the Commission meant to reject the legal standard applied by the ALJ, or, alternatively, whether the Commission simply regarded the ALJ's finding of futility as a fact determination that lacked adequate record support." Id. The Court suggested that the Commission's decision "could be read to maintain that there was substantial evidence only for a finding of 'possible operator awareness of a hazard,' [8 FMSHRC at 1040], and not for the conclusion that notice would have been futile." Id.

The Court then engaged in its own evidentiary analysis, in which it concluded that substantial evidence supported the judge's findings "not only that Jackson was aware of conditions at the mine but also that he would have been unresponsive to any worker complaints about them." 842 F.2d at 460-61. However, the Court stopped short of totally disposing of this issue because it felt that the Commission's decision may have been based on "an unarticulated conclusion that, as a matter of law, futility in this context requires some showing beyond what the term means in common parlance, a showing Simpson may not have made." 842 F.2d at 461 (emphasis added). The Court accordingly remanded the issue to us in the following terms: "We therefore remand the communication issue to the Commission for reconsideration, and for a clear explanation of why the futility exception should or should not apply to the facts of this case." 842 F.2d at 461.

The Court next examined the constructive discharge issue, noting that "[a]ll parties apparently agree that if the work refusal was protected, a constructive discharge would have amounted to unlawful discrimination...." 842 F.2d at 461. Relying on Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981), a Title VII discrimination case, the Court distinguished between its own, preferred "objective" standard governing constructive discharges, and what it described as the Commission's "subjective," motivation-based standard. 842 F.2d at 461-63. The Court approved the "objective" constructive discharge standard for Mine Act purposes. Id. The Court viewed the objective standard as requiring a showing that "an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." 842 F.2d at 461. The Court attached weight to the fact that the Commission had recognized that respondents' "blatant violations of the Mine Act" had led to Simpson's leaving his job. 842 F.2d at 463. The Court concluded its examination by asserting in effect that there

was no question that conditions were intolerable at the Kenta No. 1 Mine and justified Simpson's work refusal. The Court then stated that resolution of the case therefore turned on whether Simpson's work refusal was protected -- the primary subject of remand. 842 F.2d at 463.

Finally, the Court addressed the operator's failure to rehire and the motion to reopen. Regarding failure to rehire, the Court observed that if "Simpson's September work refusal was unprotected, the Commission's ruling [on rehire] would be sound, because the discrimination prohibited by the Mine Act requires some nexus to protected activity." 842 F.2d at 464. On the other hand, if "Simpson's work refusal was protected by the Mine Act, the evidence ... would have supported the ALJ's finding that the refusal to rehire was based on protected activity, in violation of section 105(c)(1)." Id.

The Court's treatment of the Commission's disposition of Simpson's motion to reopen turned on the fact that Kenta had not separately sought review of the judge's decision. The Court regarded the Commission's disposition of that issue as amounting to a "vacation" of the judgment against Kenta, apparently not subscribing to the Commission's view, based on the Court's decision in Arnold Hofbrau, supra, that a finding of no liability at all in this matter would operate to relieve Kenta (and its successors) of liability under the judge's decision. The Court stated:

> The Commission's return to the merits of Simpson's case obviously may compel a return to this last holding, so we note at this point only the questionable consistency of the Commission's action vacating the judgment against Kenta Energy with its review authority. See ... 30 U.S.C. § 823(d) (limiting the grounds for discretionary review by the Commission, and denying authority to "raise or consider additional issues" not presented by the petition for review).

842 F.2d at 464.

II.

We first address the specific issues that the Court remanded to the Commission, and then resolve the two questions remaining from the original proceeding on review.

A. Issues on remand

1. Futility of communication

The Court stated that our determination regarding futility of communication may have been based on our "conclusion that, as a matter of law, futility in this context requires some showing beyond what the term means in common parlance." 842 F.2d at 461. Such is not the case.

The Court specifically approved our statement of the communication requirement associated with the right to refuse work as set forth in Dunmire and Estle, supra. In that decision, we held:

> Where reasonably possible, a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. "Reasonable possibility" may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the word, "ordinarily" in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances -- such as futility -- may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal.

4 FMSHRC at 133 (emphasis added).

As the Court recognized (842 F.2d at 460), Dunmire and Estle stands for the general proposition that communication issues should be resolved "in a common sense, not legalistic manner." 4 FMSHRC at 134. Accordingly, we do not view the futility exception to the communication requirement as a technical or restrictive concept. Rather, futility in this context is based on the common meaning of the term and covers situations in which a miner's communication of a health or safety concern would be ineffective or useless. See generally Webster's Third New Int'l Dictionary (Unabridged) 925 (1986 ed.)(definitions of "futile" and "futility"). If genuine futility is present, a miner's failure to communicate may be excused. Such a situation may occur, for example, where a mine operator has made clear that it will not address complained of hazards or where the operator has manifested "evident disdain for worker complaints" (842 F.2d at 460).

Our earlier resolution of the futility issue was based on factual, not legal, grounds and meant only that we discerned a lack of substantial evidentiary support for what we viewed as the judge's "presumption" that communication with Jackson would have been futile. See 8 FMSHRC at 1039-40. The court, however, has concluded that there is adequate record support for the judge's findings that Jackson was aware of the conditions at the mine and would have been unresponsive to worker safety complaints about those conditions. 842 F.2d at 460-61. Within the proper meaning of the Dunmire and Estle futility exception as explained above, the Court has effectively held that Simpson's failure to communicate is excused. In light of the Court's factual determinations, we so hold as well. Given our prior finding that Simpson's work refusal was based on a reasonable, good faith belief in a hazard (8 FMSHRC at 1038), we conclude that Simpson engaged in a protected work refusal under the Mine Act.

2. Constructive discharge

The Court, agreeing with the judge, held that to establish a successful claim of constructive discharge under the Mine Act, a miner must show that the operator maintained conditions so intolerable that a reasonable miner would have felt compelled to quit. 842 F.2d at 461-63. Noting our statement that "blatant violations of the Mine Act" existed at the mine prior to Simpson's work refusal (8 FMSHRC at 1038), the Court observed that such conditions "see[m] to preclude [the Commission's] rejection of the ALJ's finding [that the operator maintained conditions so intolerable that a reasonable miner would have felt compelled to quit]." 842 F.2d at 463. Given the Court's disposition of this issue, we are constrained to conclude in this case that Simpson established that he was subjected to constructive discharge in violation of section 105(c)(1) of the Act.

3. Refusal to rehire

Given our disposition of the work refusal and constructive discharge issues, we additionally conclude that the refusal to rehire Simpson after he quit also constituted an act of unlawful discrimination. We had reversed the judge on this issue, finding insufficient record support for his conclusion to the contrary. The Court stated, however, that "[i]f Simpson's work refusal was protected by the Mine Act, the evidence ... would have supported the ALJ's finding that the refusal to rehire was based on protected activity in violation of section 105(c)(1)." 842 F.2d at 464. In view of the Court's analysis of the relevant evidence, we accordingly adopt the Court's view and conclude that the refusal to rehire also violated the Act.

4. Simpson's motion to reopen

On review before the Commission, Simpson had moved to reopen the proceedings to determine whether Black Joe Coal Company was the legal successor to Kenta and should assume Kenta's liability to Simpson. We originally denied this motion in view of our conclusion that no violation of the Act had occurred. As noted, Kenta did not seek Commission review of the judge's decision. In the Court's apparent view, Kenta's failure to petition for review meant that, pursuant to operation of the statute, the judge's decision with regard to Kenta became a final decision of the Commission on April 7, 1985, 40 days after its issuance. 30 U.S.C. § 823(d)(1). No party sought review of that "portion" of the judge's decision in a United States Court of Appeals. 30 U.S.C. § 816(a). Under these circumstances, the Court appears to have treated the judge's decision as to Kenta as a final judgment that we lacked authority to review or "vacate." See 842 F.2d at 464. We adopt in this case the Court's view in that regard. Therefore, Simpson must be regarded as having received a final judgment holding Kenta liable to Simpson for the discriminatory acts at issue and for the relief ordered by the judge.

Simpson's motion to reopen alleges generally that Kenta went out

of business and did not reinstate Simpson or pay him back pay, and that Black Joe Coal Company is Kenta's successor for purposes of Mine Act liability and should be held liable to remedy the respondents' discrimination. In Ronald Tolbert v. Chaney Creek Coal Corp., 9 FMSHRC 1847 (November 1987), we denied a similar motion to reopen a "final judgment" on the grounds that the relief sought was in the nature of enforcement of judgment and collection of a judgment debt and that such an enforcement request is properly directed to the Secretary of Labor, who is authorized pursuant to sections 106(b) and 108 of the Mine Act, 30 U.S.C. §§ 816(b) & 818, to seek compliance with Commission orders in the federal courts. 9 FMSHRC at 1848. We subsequently made clear that if the Secretary declines to act in enforcement, all other remedies (including any remedies available in state courts) may be pursued. Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506, 508-09 (April 1988).

Accordingly, we deny Simpson's motion to reopen. Simpson may pursue his appropriate enforcement remedies elsewhere. We have today confirmed that his judgment against Kenta is final. There is no serious legal question that a Commission judgment may be enforced against a genuine successor. See generally Secretary on behalf of Corbin v. Sugartree Corp., 9 FMSHRC 394 (March 1987), aff'd sub nom. Terco v. FMSHRC, 839 F.2d 236 (6th Cir. 1987), pet. for cert. den., ____ U.S. ____, 102 L.Ed 2d 36 (1988). We note that questions of successorship frequently arise in the context of enforcing judgments. See, e.g., Christiansen v. Mechanical Contractors Bid Depository, 404 F.2d 324, 325 (10th Cir. 1968) (proceedings for execution upon a judgment pursuant to Fed. R. Civ. P. 69). Thus, the Secretary on Simpson's behalf or Simpson, as the case may be, may seek enforcement of his claims in any proper enforcement forum.

B. Additional Issues

As noted, two issues were not decided in our original opinion given the other results that we reached. We now resolve those questions, both of which were previously briefed to us on review by the parties.

1. The layoff issue

Before the judge, Kenta had argued as a defense to the allegations of discriminatory discharge and refusal to rehire that "because of a recession in the coal business, [Simpson] would have been laid off in any event and that he was not rehired in December [1982] because there was no job for him." 6 FMSHRC at 1462. The judge rejected this defense, stating that "[t]he evidence does not show that [Simpson] would have been laid off for economic reasons." 6 FMSHRC at 1463. On review, Jackson argues that the judge erred in finding that Simpson would not have been laid off for economic reasons. The evidence in the record establishes that certain layoffs did occur at the mine in January or February 1983, after the December 1982 refusal to rehire Simpson. Therefore, given our conclusion above that the refusal to rehire was in violation of the Act, we view Jackson's and Kenta's assertions that Simpson would have been laid off in any event as a defense to the judge's order of reinstatement and award of back pay and interest.

In general, once discrimination has been found and a gross amount of back pay alleged, "the burden is on the employer to establish facts which would negative the existence of [backpay] liability to a given employee or which would mitigate that liability." NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1318 (D.C. Cir. 1972), quoting NLRB v. Brown & Root, Inc., 311 F.2d 447, 454 (8th Cir. 1963). Specifically, the burden of showing that work was not available for a discriminatee, whether through layoff, business contractions, or similar conditions, lies with the employer as an affirmative defense to reinstatement and backpay. See, e.g., NLRB v. Mastro Plastics Corp., 354 F.2d 170, 175-77 (2d Cir. 1965), cert. den., 384 U.S. 170 (1966). Cf. Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 232-33 (February 1984), aff'd, 776 F.2d 469 (11th Cir. 1985) (operator bears burden of proof with respect to willful loss of earnings by back pay claimant). Thus, at trial the burden was on respondents to establish by a preponderance of the evidence Simpson's probable layoff as an affirmative defense to his claims for reinstatement and back pay.

Judge Broderick concluded that respondents had not carried their burden of proof. The evidence on the subject was provided by the testimony of Jackson himself. Initially, Jackson testified that he had laid off two miners after Simpson left; that the mine was not "running much coal" and that he had been required to "cut the crew down real small;" that other miners in his crew were more experienced than Simpson; and that he would "lay the youngest men off first." Tr. 609, 611-12, 614-16. In response to subsequent questioning by Judge Broderick, Jackson further stated that he "guess[ed]" that the two miners he had laid off were let go in January or February 1983; that they were "the youngest people [he] had"; that he "guess[ed]" that they had more seniority than Simpson; that he "guess[ed]" that "most" of the miners had more seniority than Simpson; that layoffs were also based on "job qualification"; and that one of the two laid off miners "might have" qualified for Simpson's scoop operator's job while the other would not have. Tr. 654-55. Significantly, Jackson testified that he did not always base layoff decisions on seniority, at times basing such decisions on the size of a miner's family and upon job qualifications. Tr. 315-16, 655.

The judge weighed the respondents' evidence and found it lacking. Jackson's testimony lacks specificity as to how seniority was calculated. It also lacks certainty as to the seniority of the two laid-off miners or the retained miners in relation to Simpson, and as to how "job qualification" and family considerations figured into Jackson's decisions regarding layoffs. Further, the respondents did not introduce seniority lists or business records explaining the layoff decisions or the effects of the alleged recession on the mine's operation.

The record evidence also shows that another miner, Roy Gentry, a former bolting machine operator, replaced Simpson as scoop operator after Simpson left. Gentry Dep. 3. This fact lessens the weight to be accorded Jackson's assertion that he had not hired any scoop operators to replace Simpson; apparently, he did not have to. There is no evidence of record as to how Simpson's incumbency in the scoop position would have been affected had he not left work. The respondents bore the

burden of proving that Simpson would have been laid off and we conclude that they failed to carry that burden.

2. The procedural objection

At the outset, it is important to clarify that Jackson is not claiming that there was a lack of notice or a procedural error in trying the question of his personal liability nor is he attacking on the merits any of the judge's substantive findings with regard to his personal liability. Jackson contends only that in concluding Jackson was an "operator" and personally responsible for the discrimination in question, the judge went beyond Simpson's supplemental statement of claim, which framed the issue of Jackson's liability in terms of piercing the corporate veil and alter ego. We find this objection semantic and without merit.

The discrimination complaint and trial (see Tr. 344-45) made clear that Simpson was pursuing Jackson as a co-respondent on theories of personal liability. Simpson's argument that the corporate veil should be pierced to show that Jackson was the alter ego of Kenta was simply another way of stating that Jackson was the real "operator," the real "person" in control of the personnel actions at the mine. The point of this approach was to show that Jackson should not be permitted to "hide" behind the corporate veil. We find Simpson's statement of claim reasonably clear in this regard. For example, at pp. 9-10 of the claim, Simpson asserts that "[f]rom this evidence it is clear that Jackson was the operator of the [mine] ... [and] that corporate formalities were not observed. ... Jackson was the alter ego of Kenta." In other words, any evidence as to corporate control was relevant only to the extent that it clarified Jackson's status as an "operator" and his personal responsibility for the events at issue.

The judge's order of July 30, 1984, also made the nature of this issue reasonably clear. If the respondents were aggrieved by the judge's characterization of the question, they should have objected in a timely fashion to the judge himself -- a course they did not follow. In view of this, Jackson cannot be heard on appeal to complain that he was deprived of notice or prejudicially misled by Simpson's pleadings. Accordingly, we reject this procedural objection.

III.

In sum, on the bases articulated above, we affirm the judge's conclusions that Simpson engaged in a protected work refusal and that Kenta and Jackson violated the Act when Simpson was discharged and refused rehire. We confirm the viability of Simpson's final judgment against Kenta. We deny Simpson's motion to reopen. Simpson may pursue all appropriate remedies for enforcement of the final judgment against Kenta. We affirm the judge's finding that respondents failed to prove that Simpson would have been laid off, and we reject the procedural challenge to the judge's actions below. Accordingly, Judge Broderick's decisions are affirmed. 1/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Chairman Ford did not participate in the consideration or disposition of this matter.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 30, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	)	
v.	)	Docket No. SE 85-63-M
TENNESSEE CHEMICAL, INC.	)	

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

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), Commission Administrative Law Judge William Fauver concluded that Tennessee Chemical Company ("Tennessee Chemical" or "operator") violated 30 C.F.R. § 57.3-20 (1984), a standard addressing the use of ground support in underground metal and nonmetal mines. We granted Tennessee Chemical's petition for discretionary review. On the bases that follow, we affirm.

Tennessee Chemical operates an underground copper mine near Copperhill, Tennessee (the "Cherokee Mine") employing approximately 200 miners, working three eight-hour shifts per day, seven days a week. Copper and iron sulfide ore are mined using the sublevel stoping method. This case arose as a result of a fall of ground in a development tunnel. Development work (i.e., excavating tunnels for haulageways and travelways) was performed by crews who drilled blast holes into the tunnel face and back, 1/ set charges, blasted the rock, scaled the back, and removed the rock from

1/ "Back", defined as "[t]he roof or upper part in any underground mining cavity" is generally considered the metal/nonmetal counterpart to the term "roof" in coal mines. "Fall of ground" or "rockfall" refer to "[r]ock falling from the roof into a mine opening." Dictionary of Mining, Mineral, and Related Terms 70, 410, 934 (1968).

the blast area. This development cycle would then be repeated. The crews were paid an incentive rate based on the number of feet they advanced the tunnel. The drilling was performed with the use of a three-boom pneumatic drill described as a "Jumbo." The holes were drilled and blasted on close centers in the back to provide a "smooth wall" that extended about 20 feet from the face. A "smooth wall" is a lip or brow intentionally left in the back after an explosion. Rock bolts were installed in the back on an "as needed" basis. Each development crew, working under the supervision of a development foreman, was to examine and scale the back in its own work places and to bolt, unless a large area needed bolting in which case a separate bolting crew would perform that work.

Shortly before September 14, 1984, the development drift involved in this case (referred to as the 14 N 33) had been down for eight shifts because of adverse ground conditions. Rock bolts were installed up to the edge of the smooth wall and this work was completed on September 13. The bolter who performed this work, Mark Richards, installed an extra row of bolts at one place because he heard popping noises in the back and saw small bits of rock falling from it. Richards also bolted an area around a small bore hole in the drift, after Gary Williams, general mine foreman, ordered that it be bolted due to dangerous ground conditions in the area.

On September 14, 1984, Steve Dillard and Joshua Waters, development drillers, began working a shift that started at 3:00 p.m. They were working with Frank Wright, development loader operator, in the 14 N 33 drift, where they were tunneling a 16 by 18 foot opening to be used as a truck haulage road. The development foreman for their shift was Cleaston Morrow.

When Dillard, Waters, and Wright arrived at the 14 N 33 drift with Hayden Stiles, equipment operator, they found that the heading had to be "mucked out," that is previously blasted rock left by the day shift development crew had to be removed. After blasting, it was the development crew's job to examine and scale the back, following which the loader operator would then commence mucking. Once that was completed, the cycle would be repeated. Dillard, Waters, and Stiles began scaling loose rock from the back while Wright went to get a loader to muck out the rock. Wright returned with the loader and Dillard told him the area was ready to be mucked. Wright and Stiles proceeded to muck out the area, and Dillard and Waters left the area. Most of the area had been mucked when a rock measuring about two feet wide by four feet long fell from the back, inby the last row of bolts, landing in front of Wright's loader. Wright was frightened by the event as his loader had passed under the area where the rock fell. He also was angered because Dillard had told him the area had been scaled.

After the fall of ground, Wright backed his loader into the N-28 crosscut and told Stiles what had happened. Wright then got into the dipper of Stiles' loader so he could reach the back and scale it with a scaling bar. Wright and Stiles scaled "quite a bit" of loose material, and then finished mucking the area. When that was completed Wright went to the office/lunchroom where he saw Dillard, Waters, and their foreman, Morrow.

Wright confronted Dillard because of the rock fall and the loose ground that had not been scaled. Wright also warned Dillard that some back had "blowed up." (This term refers to a bad ground condition signaling the potential danger of a fall; "blowing", as it is called, may include popping noises, cracking or the falling of fine pieces of material called fines or scales.) When Dillard and Waters returned to the drift they did no further scaling of the back, although they did scale the floor of the tunnel. They then began drilling holes in the tunnel face with the Jumbo when a rock six feet eight inches long, four feet ten inches wide and four to five inches thick fell from the back striking both of them while they were at the controls of the Jumbo. The rock killed Dillard and permanently injured Waters. At the time of the fall the men were approximately seven and one-half feet beyond the last bolted area.

On the following morning, MSHA inspectors Frank Holiway and Eugene Mouser began an investigation. They inspected the 14 N 33 drift and interviewed mine officials and employees. As a result they issued a citation on September 15, 1984, charging a violation of 30 C.F.R. § 57.3-22. 2/ Almost two years later, on August 18, 1986, the citation was modified to instead allege a violation of section 57.3-20, which provided:

> Mandatory.
>
> Ground support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required. If it is required, support, including timbering, rock bolting, or other methods shall be consistent with the nature of the ground and the mining method used. 3/

2/ 30 C.F.R. § 57.3-22 (1978) provided:

> Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

3/ Although we are construing § 57.3-20 as it appeared in 1984 we note that the standard has since been revised and renumbered and now provides:

> Scaling and Support - Underground Only
>
> § 57.3360 Ground support use.
>
> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in

(Footnote continued)

A hearing was held before Judge William Fauver on April 14 and 15, 1987. In his decision the judge affirmed the citation and assessed a $7,500 civil penalty.

In finding that Tennessee Chemical violated section 57.3-20 the judge first construed the standard, focusing upon the term "operating experience." The judge held "that 'operating experience' sufficient to indicate the need for roof support does not have to be at the point of an immediate danger of a roof falling, but includes [the] danger of a potential roof fall." 10 FMSHRC at 377. The judge also considered a prior fall of ground fatality at the Cherokee Mine as part of the mine's operating experience. 10 FMSHRC at 387.

Crediting and relying upon the testimony of MSHA supervisor M. Turner and inspectors Holiway and Mouser, the judge found that the areas of loose rock viewed by those individuals after the Dillard fatality existed prior to that event and were not caused by the fall of ground. The judge further concluded that the 14 N 33 drift had poor ground conditions, was dangerous, and needed support where Dillard and Waters had been working. 10 FMSHRC at 378. The judge rejected Tennessee Chemical's position that the fall of ground was a surprise and that it had an effective "layered" ground control system under which miners, front-line supervisors, and upper management all played a role in monitoring and controlling ground conditions. On this point the judge found that there was a breakdown in communication on each of these levels. 10 FMSHRC at 382, 387.

The first issue raised by Tennessee Chemical on review is whether it was reversible error for the judge to consider a prior fatality as part of the mine's "operating experience," as that term is used in § 57.3-20.

The prior fatality considered by the judge occurred on January 27, 1984, when Ted Ledford, a development driller like Dillard and Waters, was killed while operating a Jumbo drill at the Cherokee Mine. Although the Ledford fatality occurred in a different drift, like the instant case, the miner was killed while drilling blasting holes into the face and a large rock fell from the back. MSHA investigated the Ledford fatality but did not issue any citations or orders for violation of safety standards. The MSHA investigation concluded in a report issued February 22, 1984, that the cause of the accident was the failure of management and employees to

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Fn. 3/ continued

> the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use (sic) for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

30 C.F.R. § 57.3360 (1988).

detect loose ground. Exhibit P-6. 10 FMSHRC at 372, 373. MSHA also believed that a contributing cause may have been that vibrations from the Jumbo drill may have loosened unstable ground. The report contained recommendations that supervisors review proper ground control procedures with the miners and that overhead protection be provided on all mobile equipment where feasible. MSHA further advised in the report that to prevent future rock fall accidents there must be continued surveillance of day-to-day ground conditions and continual scaling of the back and ribs. Id.

The judge observed that in its investigative report of the Dillard/Waters accident MSHA made the same findings as to the cause of the accident and repeated its earlier recommendations. 10 FMSHRC at 372-374. The Dillard report also recommended that, where necessary for ground support, rock bolting should be as near to the face as possible. Id.

Tennessee Chemical contends that it was reversible error for the judge to consider the Ledford fatality as part of its operating experience and asserts that operating experience should not encompass prior incidents that are free of operator culpability. Since MSHA did not issue any citation in connection with the Ledford fatality, Tennessee Chemical contends that it had been exonerated of any culpability. Therefore, according to Tennessee Chemical, consideration of this incident in the present proceeding subjects it to double jeopardy.

The Secretary contends that the Ledford fatality is relevant to Tennessee Chemical's operating experience within the meaning of 57.3-20 and that it is also relevant to the issue of Tennessee Chemical's negligence. The Secretary notes that the judge also evaluated the conditions in existence in the 14 N 33 drift prior to and at the time of the Dillard/Waters incident as part of the mine's operating experience apart from the Ledford fatality.

We hold that it was proper for the judge to consider the Ledford fatality, as well as the events occurring in the 14 N 33 drift in the days preceeding the Dillard/Waters incident, as part of Tennessee Chemical's operating experience within the meaning of section 57.3-20.

As noted by the judge, the Commission has previously interpreted the standard in issue. In White Pine Copper Range Company, 5 FMSHRC 825 (1983), ("White Pine") we observed that the dictionary definition of the key word "experience" included "practical wisdom resulting from what one has encountered, undergone, or lived through" and that "a mine's 'operating experience' broadly encompasses all relevant facts tending to show the condition of the mine roof in question and whether, in light of the roof condition, roof support is necessary." White Pine, 5 FMSHRC at 836. We further observed that operating experience is determined by looking at the mine's prior operating history and present day experience and that "this determination takes into account the operating history of the mine (i.e., its past mining practice) geological conditions, scientific test or monitoring data and any other relevant facts tending to show the condition of the mine roof in question and whether in light of those factors roof support is required in order to protect the miners from a potential roof fall." Id. at 838.

While the Ledford fatality occurred in January 1984 in a different drift, it shared the following commonalities with the September 1984 Dillard fatality: development work was being performed; the victims were drilling blasting holes into the face with a Jumbo drill; loose ground had been neither adequately scaled nor bolted; the victims were working under an unbolted area; and a large rock fell from the unbolted area causing the fatal injury. 10 FMSHRC at 372.

We view these common factors as sufficient to bring the Ledford fatality within the scope of the term "operating experience." Indeed the operator does not attempt to distinguish the circumstances surrounding the two fatalities. Instead, Tennessee Chemical raises only a "fairness" objection to consideration of the Ledford fatality.

To ignore the operator's previous experience simply because no violations had been alleged would place a severe limitation upon what would otherwise be considered a part of operating experience. Since the White Pine test for "operating experience" takes an inclusive approach allowing consideration of all relevant facts, Tennessee Chemical's argument that operating experience should be tied to culpability is inconsistent with that precedent.

While the operator asserts that this amounts to "double jeopardy", we reject that argument for several reasons, chief among them being that the concept is limited to situations where a defendant has been punished in a prior criminal proceeding and the Government is now seeking a second punishment for the same offense. United States v. Halper, 57 U.S.L.W. 4526 (U.S. May 16, 1989)(No. 87-1383); 21 Am. Jur. 2d Criminal Law § 244, 249. Here, there was no prior criminal proceeding. The Secretary is not seeking a civil penalty in connection with the Ledford fatality, nor is she seeking to litigate the facts surrounding that event. The Ledford fatality accident report was introduced only to show that the event was part of the mine's operating experience.

We also find no basis for Tennessee Chemical's assertion that the judge based his finding of a violation upon the Ledford incident. The judge clearly relied upon a great deal of other information about the conditions in the 14 N 33 drift in concluding that Tennessee Chemical's operating experience was such that it should have known that ground support was needed. The judge recounted the following as part of Tennessee Chemical's ground support operating experience:

Shortly before the Dillard fatality the 14 N 33 drift had been down for eight shifts due to adverse ground conditions. Extra rock bolts were installed up to the edge of the smooth wall and this was completed on September 13, 1984. 10 FMSHRC at 371; Tr. 308, 309, 312, 315, 319, 324, 344, 482, 483. Rock bolter M. Richards testified that he installed these bolts and that he put in an extra row of bolts due to popping noises in the back and fines falling from the back. 10 FMSHRC at 378; Tr. 315, 318, 319. On or about September 13, 1984, Richards also bolted around a small bore hole which was located 15 feet from the place where Dillard was killed. This bolting was ordered by the general mine foreman, G. Williams, because of the dangerous ground conditions. 10 FMSHRC at 371;

Tr. 310-312. Prior to the Dillard fatality Richards told his supervisor, L. Hicks, of the dangerous ground conditions he encountered. 10 FMSHRC at 371; Tr. 324, 325, 326.

Tennessee Chemical's manager of mining, A. Edey and Dr. Ross Hammet, a mining engineer consultant, testified that noise in the back and falling of small and large rocks as well as the necessity of installing rock bolts in a particular area are all part of a mine's operating experience. 10 FMSHRC at 372; Tr. 521, 522, 618. Miners F. Wright and T. Mason (part of the 14 N 33 development crew) testified about the bad ground conditions they experienced in that drift prior to the Dillard fatality. 10 FMSHRC at 372, 385; Tr. 179, 182, 183, 204, 230, 264, 270, 281.

In July, 1984, Dr. Ross Hammet advised Tennessee Chemical that while systematic rock bolting was not then indicated, the requirement for ground support should be determined by continuing to observe local geological conditions that might ultimately dictate the need for systematic bolting. 10 FMSHRC at 372, 386; Exhibit P-27 at 10; Tr. 602-611.

Most importantly, immediately before the Dillard fatality, a 2 foot wide by 3 to 4 foot long rock fell in front of Wright's loader while he was mucking out the 14 N 33 drift. Wright informed Dillard of the fall and warned him that the back had "blowed up." C. Morrow, the development foreman, overheard Wright tell Dillard of these conditions. 10 FMSHRC at 370; Tr. 164, 167, 171.

Turner, and MSHA inspector E. Mouser testified that the loose rock they observed upon visiting the scene of the Dillard fatality on September 15th and 17th existed prior to the fatality and was not caused by the rock fall. 10 FMSHRC at 381; Tr. 95, 96, 142.

The judge recounted all of the above in the context of reviewing Tennessee Chemical's "abundant operating experience" indicating the need for ground support before the fatality. Reading the judge's decision as a whole it is evident that, while the judge considered the Ledford fatality as part of Tennessee Chemical's operating experience, he did not predicate his decision upon that event and, in fact, relied in large measure upon this other experience, which Tennessee Chemical does not contend was improperly considered as part of its operating experience.

We next address Tennessee Chemical's challenge to the judge's finding of gross negligence. After finding that Tennessee Chemical violated section 57.3-20 by failing to provide support at the place where the rock fell on Dillard and Waters, the judge determined that:

> In light of the abundant operating experience showing the need for roof support in this area before the fatality, I find that Respondent's failure to provide roof support to protect Dillard and Waters from a potential roof fall constituted gross negligence.

10 FMSHRC at 387-88.

Thus, the judge's legal determination of gross negligence was tied to his factual findings of abundant operating experience showing the need for ground support in the 14 N 33 drift. In terms of whether there is substantial evidence for the judge's determination of gross negligence, we find support for this finding in the record beginning with the mine operator's experience in connection with the Ledford incident, and including the events and history of the conditions in the 14 N 33 tunnel in the days immediately preceding the Dillard fatality.

The judge also found that Tennessee Chemical's "layered system" involving three levels of responsibility (miners, front line supervisors, and upper management) for monitoring and controlling the ground failed at each level. 10 FMSHRC 382. These failures played an important part in the judge's determination that gross negligence was involved. In this regard the judge pointed to several failures of communication between Wright, Dillard and Waters regarding the areas that were scaled and those that needed to be scaled. 10 FMSHRC 383. The judge also related the failures at the front line supervisor level, focusing upon the failure of Morrow, the development foreman, to carry out his duties under 30 C.F.R. § 57.3-22, which requires supervisors to examine the ground conditions during daily visits. The judge found that Morrow had not visited the area on that shift before or after the warning and that he failed to take any action even after overhearing Wright warn Dillard of the hazardous ground conditions. The judge also found that Morrow knew that Dillard and Waters would be returning to the area that Wright had warned about and that they would be drilling into the face while working in an unbolted area. 10 FMSHRC at 384. Additionally, the judge accepted the general mine foreman's statement that the development crew had reported the adverse conditions to Morrow. Tennessee Chemical does not take issue with these findings.

The judge further determined that there was a second failure on the part of front line supervisors. Based on the testimony of rock bolter, M. Richards, the judge found that L. Hicks, supervisor of stoping and rock bolting, was informed by Richards on September 13th of the adverse ground conditions yet, like Morrow, he took no action to inspect or provide support for the area where Dillard and Waters would be drilling. In fact, Hicks criticized Richard for installing extra bolts. 10 FMSHRC at 385.

At the upper management level the judge noted general mine foreman G. Williams' awareness of the adverse conditions in the part of the drift where Dillard would be working and his ordering of bolting around the bore hole, but his failure to order bolting for the area where Dillard would be working. 10 FMSHRC at 386. Finally, the judge noted that, while Dr. Hammet had stated in his July 1984 report that systematic bolting was not yet needed, he warned that such bolting might ultimately be necessary and that decisions on the areas to be supported would depend primarily on local geological conditions.

We view the above as constituting substantial evidence in support of the judge's finding as to the degree of negligence involved. 4/

4/ Geological differences between underground coal mines and underground metal/nonmetal mines generally result in requiring systematic roof bolting

(Footnote continued)

There is, however, Tennessee Chemical's argument that the judge did not consider the opinions of the MSHA inspectors who considered the negligence to be moderate. MSHA supervisor Turner explained that he retreated from his initial opinion that high negligence was involved to his subsequent view that the negligence was moderate because he believed that there were mitigating circumstances. 5/ Tr. 18, 97. Turner felt the negligence was moderate because of Tennessee Chemical's efforts following the Ledford fatality, including their hiring of consultants and the training and retraining of their employees in ground control. Tr. 38, 39, 41, 42, 89, 100.

While the judge did not specifically discuss MSHA's change in opinion as to the level of negligence involved, after a citation is contested before the Commission, it is the judge's responsibility to determine the extent of negligence de novo based on the evidence in the record before him. Sellersburg Stone Co., 5 FMSHRC 934, 36 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). "When a judge's penalty assessment is put in issue on review, we must determine whether it is supported by substantial evidence and whether it is consistent with the statutory penalty criteria." Missouri Rock, Inc., 11 FMSHRC 136, 141 (February 1989). As we have set forth, we find substantial evidence of record supporting the judge's finding.

Tennessee Chemical also asserts that there is no factual support for the judge's finding that there was a failure to supply needed ground support, unless it is held to a standard of being an insurer of events in the mine. It is Tennessee Chemical's position that it had done all it could under the smooth wall method by bolting as far forward in the drift as possible. It notes that smooth walling is an accepted way to mine and that MSHA knew that it was utilizing that method.

We need not consider the merits or demerits of smooth walling generally or as practiced by Tennessee Chemical. The fact that the smooth wall method may be a recognized method of ground support is not at issue. The issue is simply whether, while utilizing the smooth wall method, Tennessee Chemical maintained ground support that their operating experience indicated was needed at the cited location. Although Tennessee Chemical may have bolted as far forward as normally called for under the smooth wall method, it is clear that, in the circumstances presented, further bolting was called for and could have been achieved. See Tr. 44, 45.

Fn. 4/ continued:

in the former and rock bolting as necessary in the latter. Applying that tenet here, the issue is not whether systematic bolting to the face should have been instituted prior to the Dillard fatality, but whether bolting should have been provided in the area where Dillard and Waters were working. As to that issue, substantial evidence in the record establishes that the area should have been bolted and that failure to do so was grossly negligent.

5/ Turner's original basis for determining that high negligence was involved stemmed from directions by his superiors within MSHA who were influenced by the fact that there had been seven fatalities in mines inspected by Turner's MSHA field office. Tr. 88.

In sum, there is substantial evidentiary support in the record for the judge's finding that Tennessee Chemical should have recognized that there were serious ground support problems in the 14 N 33 drift, preceding the Dillard fatality. Accordingly, there is substantial support for the judge's rejection of Tennessee Chemical's argument that the fall of ground that killed Dillard was a surprise. Further, there is substantial support for the judge's finding regarding the penalty criteria in his assessment of a $7,500 penalty.

For the foregoing reasons, the judge's decision is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 8, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 88-227
PENNSYLVANIA ELECTRIC COMPANY	:	

ORDER

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), the Secretary of Labor has issued two citations to Pennsylvania Electric Company ("Penelec") alleging violations of 30 C.F.R. § 77.400(c) for failure to guard adequately the head drives of two conveyors at Penelec's Homer City Steam Electric Generating Station. Before Commission Administrative Law Judge Gary Melick, Penelec challenged whether the head drive equipment came within the jurisdiction of the Mine Act. The judge concluded that the Department of Labor's Mine Safety and Health Administration ("MSHA") had jurisdiction to inspect the head drives, found that the violations had occurred, and assessed Penelec civil penalties of $54 for each violation. 10 FMSHRC 1780 (December 1988)(ALJ). The Commission granted Penelec's Petition for Discretionary Review. Penelec has subsequently filed an Application for Temporary Relief requesting, in effect, that the Commission enjoin MSHA from enforcement activities at the electrical generating station pending a decision in this case. Penelec has also filed a Motion for Expedited Hearing and Oral Argument. The Secretary has filed responses to Penelec's motions. On the following bases, the Application for Temporary Relief is denied and the Motion for Expedited Hearing and Oral Argument is granted.

Section 105(b)(2) of the Mine Act, 30 U.S.C. § 815(b)(2), defines the conditions under which temporary relief may be granted under the Mine Act. Commission Procedural Rules 45 and 46, 29 C.F.R. §§ 2700.45 & .46, merely implement this statutory provision. Section 105(b)(2) of the Act provides for temporary relief from "any modification or termination of any order or from any order issued under section [104]" of the Act, and specifically states that "[n]o temporary relief shall be granted in the case of a citation issued under subsection (a) ... of section [104]" of the Act. There are no orders of withdrawal involved in the present proceeding. Rather, the two citations in question were

issued under section 104(a) of the Act. Thus, by the express terms of the Act, temporary relief may not be granted in this case.

Penelec also asserts that MSHA had agreed that, during the pendency of this civil penalty proceeding, it would restrict inspections of the generating station to previously inspected areas. Penelec further asserts that on March 27-30, 1989, MSHA violated that agreement by issuing 23 additional citations involving training requirements and equipment specifications at the station. Issuance of these additional citations has no bearing upon whether temporary relief may be granted in this case. Section 105(b)(2) of the Act and Commission Procedural Rules 45 and 46 contemplate that, prior to any grant of temporary relief, a proceeding be instituted before the Commission and a hearing held. The 23 additional citations are not the subject of the present proceeding and there is no indication in the record that Penelec has challenged them under the Act or that a hearing concerning these other citations has been held. Moreover, as already noted, temporary relief is not available for citations issued pursuant to section 104 of the Mine Act. Accordingly, Penelec's application for temporary relief is denied.

Upon consideration of Penelec's Motion for Expedited Hearing and Oral Argument and the Secretary's responses thereto, the motion is granted. An order setting the date and terms of oral argument will be issued at an appropriate time.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 8, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket No. VA 88-44-M
A. H. SMITH STONE COMPANY	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). On February 22, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent A. H. Smith Stone Company ("Smith Stone") in default for failure to answer the Secretary of Labor's civil penalty complaint and the judge's two subsequent orders to show cause. The judge assessed a civil penalty of $362 proposed by the Secretary for four violations of mandatory safety standards. By letter dated April 10, 1989, addressed to Judge Merlin, A. H. Smith Associates Limited Partnership ("Smith Associates"), on behalf of Smith Stone, requested that the order of default be removed from the proceeding and that the operator be allowed to contest the alleged violations. On May 1, 1989, the Secretary filed an opposition to the request. We deem the April 10 letter to constitute a request for relief from a final Commission order incorporating a late-filed petition for discretionary review, and, for the reasons set forth below, we grant review, vacate the judge's default order and remand for further proceedings.

On January 5 and 6, 1988, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Smith

Stone four citations pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a). On March 29, 1988, MSHA's Office of Assessments notified Smith Stone that it proposed a total civil penalty of $362 for the alleged violations. On May 4, 1988, Smith Stone filed its "Blue Card" request for a hearing before this independent Commission. On June 9, 1988, the Secretary filed a complaint proposing the assessment of civil penalties for the violations. The record reflects that Smith Stone did not file an answer to the complaint, which was served by first class mail on it at its Mitchell, Virginia, address.

On August 15, 1988, Judge Merlin issued a show cause order directing Smith Stone to answer the complaint within 30 days or be found in default. The order was sent via certified mail, return receipt requested, to Joseph McElfish, A. H. Smith Stone Company at the Mitchell, Virginia, address. The record reflects that the certified mail return receipt for the order was signed on August 22, 1988, by one Clyde Wayland as agent for Smith Stone. No response to the order appears in the official file.

On November 8, 1988, the judge's law clerk noted, via a memorandum to the file, that Mr. McElfish was no longer employed by Smith Stone and that service should be directed to a Ms. Pridgen at Smith Associates' corporate headquarters in Branchville, Maryland. On December 8, 1988, Judge Merlin issued a second order to show cause, directing Smith Stone to answer the complaint within 30 days, indicating that since "it has subsequently been learned that Mr. McElfish is no longer employed by the operator and ... the proper company officials may not have received the order.... the second show cause order is being issued [to Ms. Pridgen at the corporate headquarters of A. H. Smith Associates in Branchville, Maryland]." The certified mail return receipt for the second order was signed by one R. Bailey.

On February 22, 1989, Judge Merlin issued an Order of Default stating, inter alia, that the respondent had "failed to comply ... [with the second order to show cause]." The judge accordingly assessed the total civil penalty amount of $362.

By letter dated April 10, 1989, which encloses an answer to the complaint, Smith Associates' Director of Safety/Government Affairs essentially requested that the order of default be vacated and its right to contest the citations reinstated. The submission asserts that the delay in responding is attributable to the fact that the Secretary's complaint, the orders to show cause and the order of default were directed to persons no longer employed by Smith Associates.

On May 1, 1989, the Secretary opposed the request on the grounds that the respondent's proffered excuses for its nonresponse to Commission orders are not persuasive.

The judge's jurisdiction in this matter terminated when his default order was issued on February 22, 1989. 29 C.F.R. § 2700.65(c). Because the judge's decision has become final by operation of law, we can consider the merits of A. H. Smith Associates' request only if we construe it as a request for relief from a final Commission decision

incorporating a late-filed petition for discretionary review. See, e.g., Amber Coal Company, 11 FMSHRC 131, 132 (February 1989); Kelley Trucking Co., 8 FMSHRC 1867 (December 1986); M.M. Sundt Construction Co., 8 FMSHRC 1269 (September 1986).

Smith Associates, proceeding without benefit of counsel, has raised what may be a colorable excuse for its nonresponse to the judge's orders. See, e.g., Columbia Portland Cement Co., 8 FMSHRC 1644 (November 1986)(nonresponse attributable to mistake or neglect of a former employee); Mohave Concrete and Materials, Inc., 8 FMSHRC 1646 (November 1986)(failure to respond attributable to mistake or neglect of a former bookkeeper); see also, Ten-A Coal Co., 10 FMSHRC 1332 (September 1988); Perry Drilling Co., 9 FMSHRC 370 (March 1987). The Commission has previously afforded such a party relief from final orders of the Commission where it appears that the party's failure to respond to a judge's order and the party's subsequent default are due to inadvertence, mistake, or excusable neglect. Amber, supra; Kelley, supra; Sundt, supra. Under these circumstances, we will accept Smith Associates' letter as a request for relief from a final Commission order incorporating by implication a petition for discretionary review. We accordingly grant the petition.

We have observed repeatedly that default is a harsh remedy and that if the defaulting party can make a showing of adequate or good cause for the failure to respond, the failure may be excused and appropriate proceedings on the merits permitted. Sundt, 8 FMSHRC at 1271; Kelley, 8 FMSHRC at 1869. The Commission has recently noted that "under appropriate circumstances a genuine problem in communication or with the mail may justify relief from default." Ten-A Coal Company, 10 FMSHRC 1132, 1133 (September 1988), quoting Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988); Con-Ag, Inc., 9 FMSHRC 989, 990 (June 1987)(emphasis supplied). Since we are unable, on the basis of the present record, to evaluate the merits of the respondent's assertions, we will permit the parties to present their positions to the judge, who will determine whether sufficient grounds exist for excusing the failure to timely respond. Perry Drilling Co., 9 FMSHRC 377, 380 (March 1987), citing Kelley, supra, 8 FMSHRC at 1869.

Accordingly, the judge's default order is vacated and this matter is remanded for proceedings consistent with this order. Respondent is reminded to serve the Secretary of Labor with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 10, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. KENT 88-152
v.	:	
GREEN RIVER COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

By a petition for discretionary review filed May 1, 1989, and supplemented on May 5, 1989, the Secretary seeks review of a decision issued by Commission Administrative Law Judge George A. Koutras on April 24, 1989. The basis for the Secretary's petition is that a prejudicial error of procedure was committed when the judge issued his decision prior to May 3, 1989, the date set by the judge for the filing of post-hearing briefs, and before any such briefs had been received. The petition requests that the case be summarily remanded to the judge for reconsideration of his decision in light of any timely-filed post-hearing briefs of the parties. Concurrently with the filing of her petition for review, the Secretary also filed with the judge a motion for reconsideration of his decision pursuant to Commission Procedural Rule 65(c), 29 C.F.R. § 2700.65(c) providing in part for the correction of "clerical mistakes and errors arising from oversight or omission in decisions, orders or other parts of the record" after a judge's decision has been issued.

On May 8, 1989, Green River Coal Company filed a response to the Secretary's petition requesting that it be denied on three grounds: that no prejudice to the Secretary occurred since the judge issued his decision without considering the brief of either party; that the petition was premature insofar as the judge had not yet ruled on the Secretary's motion for reconsideration; and that a petition for review based on a technical

error should also indicate that the petitioner can also prevail on the merits. Meanwhile, by an order issued May 4, 1989, the judge denied the Secretary's motion for reconsideration citing among other authority the Commission's decision in Capitol Aggregates, Inc., 2 FMSHRC 1040 (May 1980). */

Having considered the arguments of the parties and the judge's order denying the Secretary's motion for reconsideration, we find that Capitol Aggregates, Inc., is dispositive of this matter. We therefore grant the Secretary's petition for review, vacate the judge's decision of April 24, 1989, and remand the case to the judge for further consideration of his decision in light of the post-hearing briefs filed by the parties.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

*/ In Capitol Aggregates, the Commission held that a judge has no authority to stay the effective date of his already issued decision pending the filing of post-hearing briefs by the parties, and remanded that case to the judge for reconsideration of his decision in light of the post-hearing briefs. 2 FMSHRC at 1041-42.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 30, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 89-2-M
L & L GRAVEL	:	

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). On April 20, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent L & L Gravel ("L&L") in default for failing to answer the Secretary of Labor's Proposal for Penalty and the judge's Order to Show Cause. On May 22, 1989, the Secretary filed with the Commission a Motion to Correct Order of Default seeking reduction of the penalty amount by $20, on the basis that one of the underlying citations for which penalties had been proposed had been vacated. For the reasons set forth below, we deem this motion to constitute a Petition for Discretionary Review, which we grant, and we vacate the judge's default order and remand for further proceeding.

The Secretary asserts that one of the underlying citations, based on an alleged violation of 30 C.F.R. § 56.14010 (safety devices on hand-held power tools), was vacated on October 14, 1988, and that the penalty of $20 assessed in connection with that citation should also be vacated.

The judge's jurisdiction in this matter terminated when his default order was issued on April 20, 1989. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70. Here the Secretary's motion is a request for revision of, and a form of relief

from, the judge' decision and we will treat it as a petition for discretionary review. See, e.g., Secretary on behalf of DeLisio v. Mathies Coal Co., 9 FMSHRC 193, 194 (February 1987).

The Secretary's motion, in effect, questions the factual basis upon which the judge's decision penalty assessment rests. Under the circumstances, we deem it appropriate to remand this matter to the judge, who shall take appropriate action with respect to the Secretary's request for correction of his original decision. Cf. Camp Fork Fuel Co., 11 FMSHRC 496, 497-98 (April 1989).

Accordingly, the judge's default order is vacated and this matter is remanded for proceedings consistent with this order.

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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, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. YORK 88-43-M A. C. No. 19-00798-05503
v.	:	Richardson Pit Mine
WARREN E. MANTER COMPANY, INC., Respondent	:	

DECISION

Appearances: David L. Baskin, Esq., Office of the Solicitor U. S. Department of Labor, Boston, Massachusetts, for Petitioner.
Warren E. Manter, Pro Se, for the Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties for four alleged violations filed by the Secretary of Labor against Warren E. Manter Company, Inc., under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 820. An evidentiary hearing was held on March 24, 1989, and the parties have waived the filing of post-hearing briefs.

When a violation is established, section 110(i) of the Act, 30 U. S. C. § 820(i), directs that in assessing the amount of civil penalty, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation.

Gravity and negligence will be considered individually with respect to each citation. Based upon the record, I make the following findings for the remaining criteria as applicable to all the citations. The alleged violations were rapidly abated in good faith. In absence of any evidence to the contrary, I conclude that the imposition of civil penalties herein will not affect the operator's ability to continue in business. Also in the absence of any evidence to the contrary from the Solicitor, the operator prior history is held noncontributory. The operator's size is small (Tr. 87).

Citation No. 2853589 sets forth the subject condition as follows:

> "The fire extinguisher in the generator trailer had been discharged and not replaced with a fully charged and sealed extinguisher. There is oil and other flammable material in the trailer."

The citation charges a violation of 30 C.F.R. § 56.4203 which provides:

> "Fire extinguishers shall be recharged or replaced with a fully charged extinguisher promptly after any discharge."

A conflict exists in the testimony regarding this citation. The inspector testified that the seal on the extinguisher had been broken (Tr. 15). He said an employee of the operator told him the extinguisher had been used previously in a fire (Tr. 16). The inspector admitted he did not look at the extinguisher's gauge (Tr. 26). The operator testified that although the seal was broken, the gauge showed the extinguisher was full and that the extinguisher had in fact not been used and was charged (Tr. 29, 99). I find that the operator was a credible witness and that his first-hand testimony is persuasive. As appears hereinafter, where a violation did exist, the operator freely admitted it. The employee upon whom the inspector relied with respect to the supposed prior use of the extinguisher, was described by the operator as disgruntled and that description is uncontradicted. The hearsay statements attributed to this employee are not as convincing as the operator's live testimony. Accordingly, I find the extinguisher was not discharged and I conclude that no violation existed. Therefore, this citation is vacated and no penalty is assessed.

Citation No. 2853590 sets forth the subject condition as follows:

> "The walkway and floor in the trailer for the generator is covered with oil [sic] it is a slipping and fire hazard. This area is used as a walkway to gain access to some areas of the plant.

The citation charges a violation of 30 C.F.R. § 56.20003(a) which provides that at all mining operations:

> "(a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly."

The inspector testified that the walkways were covered with dust and oil (Tr. 31). The operator admitted the trailer was messy (Tr. 101). On this basis I conclude a violation existed. I also find the operator was negligent, relying upon the inspector's estimate that the condition occurred over a period of time (Tr. 33). The violation was however, of only modest gravity. The inspector testified that the oil was a mixture of diesel and motor oil and that most of it was motor oil which is not as flammable as diesel (Tr. 36). In addition, the inspector stated that except for oil under the generator, stone dust covered the oil and made it less flammable (Tr. 36-37). The operator asserted that stone dust covered the oil everywhere, rendering all of it less flammable (Tr. 101). To the extent that there is a conflict in the descriptions, I find that of the operator more persuasive. I also accept the operator's testimony that the cited area was not the main access to the plant (Tr. 101, 102). Finally, although the generator was on, the plant was not operating. The foregoing circumstances indicate only moderate gravity and show as well that there was no reasonable likelihood of injury. Therefore, the significant and substantial designation on the citation was improper. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981), Mathies Coal Co, 6 FMSHRC 1, 3-4 (1984). The penalty was originally assessed at $276, but in view of the circumstances set forth herein regarding gravity and the other statutory criteria, I determine a penalty of $75 is appropriate.

Citation No. 2853591 sets forth the subject condition as follows:

> "The electrical junction box on the scalping screen is broken loose and hanging on live wires. Everyone on the plant is exposed to potential electrical shock."

The citation charges a violation of 30 C.F.R. § 56.12032 which provides:

> "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

The inspector's testimony that the junction box was disengaged from the plant structure and was hanging supported by wires that supply electricity to the plant is uncontradicted (Tr. 50). On this basis I find a violation existed. The inspector did not know exactly how long the condition had existed, but he estimated it would have been more than a day, something in the nature of days (Tr. 64, 72). The condition was visibly obvious (Tr. 64). The operator could not state when the condition occurred, but I accept his testimony that the rust the inspector saw was not on the screws which had been holding the box before they broke off and that therefore, the rust is not an indication

of the duration of the violation (Tr. 77). Clearly, the operator should have found and corrected this condition and accordingly must be found negligent. With respect to gravity, I accept the operator's statement that the voltage was 220 and that if fuses failed to work, the plant structure could become energized, creating a shock hazard (Tr. 79). However, gravity is greatly mitigated, because the plant was not operating. The inspector also mentioned the possibility of a shock hazard if wires were chafed through, but he did not see any evidence of insulation wearing away because he did not look. Based upon the foregoing, I conclude the violation was of only moderate gravity. Because the plant was not operating, there was no reasonable likelihood of injury and therefore, the significant and substantial designation on the citation was improper. The penalty was originally assessed at $413, but in view of the circumstances set forth herein regarding gravity and the other statutory criteria, I determine that a penalty of $100 is appropriate.

Citation No. 2853592 sets forth the subject condition as follows:

> "The guards had been removed from the self-cleaning tail pulley of the small conveyor and not replaced after repairs."

The citation charges a violation of 30 C.F.R. § 56.14006 which provides:

> "Except when testing the machinery, guards shall be securely in place while machinery is being operated."

The inspector testified that the location of the missing guard was at the tail pulley of the stacking conveyor (Tr. 88-89). The operator admitted the guard was broken off because he had seen it himself the day before (Tr. 96). On this basis I find a violation existed. The operator was negligent because the missing guard should have been replaced. With respect to gravity, I accept the operator's testimony that the tail pulley did not extend beyond the belt (Tr. 96-97). Nevertheless, as the operator admitted and as the inspector testified, there was a danger that an individual's arm or clothing could become caught (Tr. 88-89, 97). However, the inspector testified that only the individual performing maintenance tasks would be subject to such a danger. Finally, any risk of harm was greatly reduced because the plant was not operating. The foregoing circumstances indicate only moderate gravity. Because the plant was not operating, there was no reasonable likelihood of injury and therefore, the significant and substantial designation on the citation was improper. The penalty was originally assessed at $168, but in view of the circumstances set forth herein regarding gravity and the other statutory criteria, I determine that a penalty of $75 is appropriate.

ORDER

Accordingly, it is ORDERED that Citation No. 2853589 be VACATED, and that Citation Nos. 2853590, 2853591 and 2853592 be AFFIRMED.

It is further ORDERED that the designation of significant and substantial in Citation Nos. 2853590, 2853591, and 2853592 be DELETED.

It is further ORDERED that the following civil penalties are assessed.

Citation No.	Penalty
2853590	$75
2853591	$100
2853592	$75

It is ORDERED that the operator pay $250 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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/gl

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 3 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 88-204
	:	A.C. No. 46-06846-03517
v.	:	
	:	Oneida Mine No. 12
ONEIDA COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: James H. Swain, Susan M. Jordan, Esqs., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; W. T. Weber, Jr., Esq., Weston, West Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for two alleged violations of the mandatory accident reporting requirements found in Part 50, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the proposed civil penalties, and a hearing was held in Charleston, West Virginia. The parties filed posthearing arguments, which I have considered in the course of my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory standards, and (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act.

The crucial issue in this case is whether or not a purported "accident" which prompted the issuance of the violations, was in fact a reportable accident within the definition of the term "accident" found in 30 C.F.R. § 50.2(h)(2).

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Mandatory accident reporting standards 30 C.F.R. § 50.10 and 50.12.

4. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the admission of certain documents, and also stipulated to the following (Tr. 5-6).

> 1. The respondent and its controlling company are subject to the Act, and the presiding judge has jurisdiction to hear and decide this matter.
>
> 2. The inspector who issued the contested citations was acting in his capacity as a duly authorized representative of the Secretary of Labor.
>
> 3. A true and correct copy of each of the citations was properly served on the respondent's representative.
>
> 4. Imposition of civil penalties for the alleged violations will not adversely affect the respondent's ability to continue in business.
>
> 5. The respondent's history of prior violations is reflected in an MSHA computer print-out, exhibit P-7, and it is correct.
>
> 6. The respondent is a medium-size coal mine operator who produced 1.4 million tons of

coal in 1987, and its Mine No. 12 produced 477,466 tons of coal for that same year.

7. The injured miner in question, James Mullens, was a miner employed by the respondent on December 7, 1987.

Discussion

The undisputed facts in this case establish that on Monday, December 7, 1987, continuous-mining machine operator James Mullens, who was working on the afternoon shift on the L-2 Section of the underground mine in question sustained injuries at approximately 8:30 p.m. to 9:00 p.m., when he was pinned against a coal rib by the machine cable restraining clamp. Mr. Mullens was the operator of the remote controlled machine, and after receiving first-aid underground, he was removed from the mine and taken to the Braxton County, West Virginia Hospital by ambulance where he was treated in the emergency room. He was then transported to the West Virginia University Medical Center in Morgantown, West Virginia, by helicopter. Following an accident investigation by MSHA, Inspector Richard Herndon served the respondent with two citations, and they are as follows:

Section 104(a) Non-"S&S" Citation No. 2944551, issued on December 9, 1987, cites an alleged violation of mandatory accident reporting standard 30 C.F.R. § 50.10, and it states as follows:

> The operator failed to notify MSHA immediately at the occurrence of a serious accident to James Mullens at approximately 9:00 p.m. 12-7-87. MSHA was not made aware of the accident until 4:30 p.m. 12-8-87.

Section 104(a) Non-"S&S" Citation No. 2944552, issued on December 9, 1987, cites an alleged violation of 30 C.F.R. § 50.12, and it states as follows:

> The operator was not granted permission by MSHA to continue operation or alter the accident site or related area on the L-2 section where a serious accident occurred 12-7-87. Due to the continuing of the mining cycle the scene of the accident and subsequent maintenance of the Joy 14CH the scene of the accident was altered.

Testimony and Evidence Adduced by the Petitioner

Dr. Jose Bordonada, testified as to his education and experience, and he confirmed that he practices medicine at the Braxton County Memorial Hospital in Gassaway, Braxton County, West Virginia. He also confirmed that his experience includes 18 years of practice in general surgery, a fellowship in abdominal surgery, and that he has extensive experience in treating traumatic injury patients in emergency situations, including emergency room treatment for vehicular chest and abdominal injuries. Dr. Bordonada was qualified and admitted as an expert medical witness (Tr. 18-22).

Dr. Bordonada confirmed that he was the hospital emergency room attending physician on December 7, 1987, and he treated the respondent's employee James Mullens on that day. Referring to a copy of the hospital emergency department outpatient record, (exhibit P-1), Dr. Bordonado explained the information appearing therein, as well as several notations which he made in the course of his examination and treatment of Mr. Mullens.

Dr. Bordonada stated that according to his notations, Mr. Mullens was pinned against a rock and miner across his upper abdomen and lower chest, and that he was complaining of severe abdominal pain, tenderness, back pain, and numbness and weakness of his lower leg. He further explained that his examination of Mr. Mullens' head, eyes, ear, nose, and throat were all negative, but that his abdomen was rigid and tender which was a sign "of something going on, especially over the left upper quadrant" (Tr. 24). He also confirmed that Mr. Mullens' lumbar dorsal spine, or abdomen, chest, and pelvis were x-rayed, and that certain blood tests were taken. Mr. Mullens was given demoral for his pain, and phenergan and peritoneal lavage medications were also administered as part of his diagnostic procedures. His diagnosis indicated "intra-abdominal bleeding, ruptured spleen compression fracture L5, with left hemiparesis, and a renal contusion" (Tr. 27).

With regard to page two of the hospital report, Dr. Bordonada confirmed that his notation reflects that he discussed Mr. Mullens' case with a Dr. Monger, West Virginia University Hospital, and that Dr. Monger agreed to accept a transfer of Mr. Mullens to that facility by helicopter (Tr. 28). Dr. Bordonada also explained the further treatment he administered to Mr. Mullens after he arrived at the emergency room, and he believed that Mr. Mullens had suffered intra-abdominal injuries, with possible nerve injuries to his lower leg. He also explained the notations he made on page

four of the hospital report, and confirmed that from the results of the blood tests administered to Mr. Mullens, he concluded that Mr. Mullens showed signs of intra-abdominal bleeding, which is a serious condition, and usually indicative of a ruptured spleen. He indicated further that a ruptured spleen is not to be taken lightly, and that a patient could "go into shock in a matter of a few minutes." If a patient were to go into shock, his blood supply to the brain and heart could be jeopardized, and the patient could develop a heart attack and die (Tr. 29-33).

Dr. Bordonada stated that a urinalysis conducted on Mr. Mullens reflected 20 to 30 red blood cells in his urine, and this would indicate a contusion of the kidney (Tr. 33). He also confirmed that the last page of the report is the x-ray report and the interpretations made by the radiologist who made the report. Although the reports were essentially negative, Dr. Bordonada stated that he still suspected an L5 fracture because such an injury is consistent with the patient's complaint of weakness and decreased sensation of the lower left extremity (Tr. 34). Dr. Bordonada confirmed that he immediately requested the assistance of a MediVac helicopter because of his "suspicion of the kind of injury that needs more work-up and treatment," and that this would be available to Mr. Mullens at another facility (Tr. 35).

In response to a question with respect to the severity of Mr. Mullens' injuries, Dr. Bordonada responded as follows (Tr. 355-36):

> Q. Doctor, do you have any opinion with respect to whether or not the injuries sustained by James Mullens on December 7, 1987, presented a reasonable potential to cause death?
>
> A. Yes, sir.
>
> Q. What is that opinion?
>
> A. I believe we are dealing here with a serious case of a case, and that is really threatening his life.
>
> JUDGE KOUTRAS. Would you repeat that again? The last part.
>
> THE WITNESS: I believe this case, that his life is threatened.

BY MR. SWAIN:

Q. Why did you think that his life was threatened?

A. Because of the nature of the injury that he received.

Q. In what respect were those injuries life threatening?

A. On the record, it was even mentioned. This gentlemen was pinned with this miner in the lower chest, one would also suspect a contusion of the heart, and there's a big thing that they also observed in Morgantown but at that time, the real prominent situation is in the abdomen, and which like I mentioned, there are signs of intra-abdominal bleeding. This is the one I worried -- I've seen a lot of patients who go into shock just right there, and the patient exterminated right before your eyes. That happened to me many times.

In response to a question as to whether or not the respondent or its safety director Edward Bauer asked him whether or not the injuries sustained by Mr. Mullens had a reasonable potential to cause his death, Dr. Bordonada replied "I don't think so" (Tr. 36). Dr. Bordonada also denied that Mr. Bauer ever mentioned that such an inquiry was related to any legal reporting requirement (Tr. 37). In the event he were asked for an opinion whether or not the injuries were life threatening, Dr. Bordonada stated that "my answer would be positive" (Tr. 37).

On cross-examination, Dr. Bordonada confirmed that he first saw Mr. Mullens at the hospital at 9:30 p.m., on the evening of December 7, 1987. He confirmed that Mr. Mullens was conscious, and that his blood pressure was within normal limits, his pulse rate was "abnormally high," and that his respiratory rate was "too high" (Tr. 40). Dr. Bordonada was of the opinion that the pulse rate is significant and indicative of the possibility of intra-abdominal bleeding, and although Mr. Mullens was bleeding from a lacerated finger, he did not believe that this was related to the high pulse rate. Dr. Bordonada stated that he confirmed that Mr. Mullens had internal abdominal bleeding when he inserted a needle and

found bloody fluid. This "tap" was done at 10:45 p.m., according to the hospital report (Tr. 42).

Dr. Bordonada confirmed that Mr. Mullens arrived at the hospital by ambulance, and that there "were some people" with him. He also confirmed that he knew Mr. Bauer and had "seen him around whenever there's a mine injury." He also knew that Mr. Bauer was "involved" with the respondent company, and that he was at the hospital asking questions (Tr. 44). When asked whether he made a statement to Mr. Bauer after 9:30 and before 10:45 p.m., that he did not believe that Mr. Mullens' injuries were life threatening, Dr. Bordonada replied "I don't believe so." He also stated that "I don't recall any conversation of such nature," but "It's most possible, because I talk to so many people when you go out of the room" (Tr. 45). When asked whether he had a second conversation with Mr. Bauer at approximately 10:00 p.m., during which Mr. Bauer asked him whether or not the injuries sustained by Mr. Mullens had a reasonable potential for death, Dr. Bordonada replied "I would say no, but it's possible that I talked to him," and that it was possible that he had that conversation (Tr. 45).

Dr. Bordonada confirmed that his great concern with respect to the life threatening aspects of the injuries sustained by Mr. Mullens was with respect to his belief that Mr. Mullens may have ruptured his spleen, and that this would have been some time after 10:45 p.m., after he had done the abdominal tap (Tr. 48). He agreed that his call for a helicopter evacuation was received by the hospital in Morgantown at 10:57 p.m., and that the helicopter arrived at the Braxton Hospital at approximately 11:55 p.m., and left for Morgantown with Mr. Mullens at 12:30 a.m., December 8 (Tr. 49-50).

Dr. Bordonada confirmed that Mr. Mullens did not in fact have a ruptured spleen or any fractured vertebrae, but that he did have a sprained leg, a cut finger, and a lumbar plexus contusion or bruise to the loose nerves that supply the leg. In his opinion, these injuries did not present a reasonable potential to cause death (Tr. 52-53).

Robert Stump, section foreman, stated that he was the section foreman on December 7, 1987, when the incident concerning Mr. Mullens occurred. He confirmed that he was summoned to the area by one of his buggy operators, and when he arrived he observed Mr. Mullens between the cable stand-off of the miner and the rib (Tr. 60). He described the "cable stand-off" as the metal compartment that holds the miner cable to the machine. Mr. Stump stated that when he first observed Mr. Mullens, he could not tell whether he was conscious. He

explained that Mr. Mullens was in a sitting position with the cable stand-off "pressing up against him," and Mr. Mullens' back was "to the coal rib." Mr. Stump confirmed that the miner pump motor was still running, and that he shut it off. He described the mining machine as approximately 30 feet long and that it weighed approximately 12 tons (Tr. 59-62).

Mr. Stump stated that he sent the buggy operator to get help, and that he (Stump) supervised the placing of Mr. Mullens on a back board and taking him out of the mine. Mr. Stump confirmed that he supplied the information which appears on the respondent's accident report form, as well as the information from which the sketch attached thereto was made, and that he also discussed the incident with Mr. Harold Hayhurst, the individual who completed the report, but that Mr. Hayhurst was not present when Mr. Mullens was extricated from the miner and taken out of the mine (Tr. 62-63; exhibit P-3).

MSHA Inspector Richard Herndon stated that he is a special investigator, and he testified as to his experience and background, and confirmed that he and three other inspectors conducted an investigation at the mine on December 7, 1987, with respect to the incident concerning Mr. Mullens. He identified a copy of MSHA's accident report, and confirmed that he issued the two contested citations in this case (Tr. 64-67; exhibit P-6).

Referring to the accident report, Mr. Herndon stated that at approximately 4:30 p.m., on Tuesday, December 8, 1987, the respondent's safety director Edward Bauer, notified MSHA's Clarksburg, West Virginia, field office, that a serious accident had occurred at the mine on the previous day on the afternoon shift sometime between 8:30 and 9:00 p.m., and that "a man was pinned between a continuous miner and the coal rib," and had been transported to the West Virginia University Medical Center. The MSHA supervisor to whom the accident was reported (James Satterfield) issued a verbal section 103(k) order over the telephone to Mr. Bauer, and the effect of that order was to "freeze the accident site" so that an investigation could be conducted (Tr. 67-68). Mr. Herndon confirmed that he was aware of the regulatory definition of an "accident" as found in section 50.2(h), and that as a result of the investigation, he determined that mine management had knowledge of the fact that there was an injury to a miner that had a reasonable potential to cause death prior to the time it was reported at 4:30 p.m., on December 8, 1987 (Tr. 72). Mr. Herndon further confirmed that he came to this conclusion in light of the fact that the miner was transferred from Braxton County to the University Medical Center, and that his

interviews with people at the mine suggested that Mr. Mullens had suffered internal injuries (Tr. 73).

Mr. Herndon identified a copy of the respondent's accident report (exhibit P-3), and he confirmed that he did not see it or review it during his investigation. However, he confirmed that during the course of the investigation he spoke with Mr. Hayhurst, the individual who prepared the report, and Mr. Hayhurst showed him a drawing of the accident scene which is similar to the one attached to the report (Tr. 74).

Mr. Herndon stated that during the investigation, he determined and "understood" that Mr. Mullens had "sprains, injury to, I believe, the L5 vertebra, possible internal injuries, plus abrasions and various contusions." On the basis of this information, he concluded that an accident had occurred, and that it was required to be reported immediately (Tr. 75). With regard to Mr. Mullens' condition at the time of the accident, Mr. Herndon stated that according to the witnesses who were interviewed, Mr. Mullens was found with the miner restraining clamp block against his chest, and that he was against the rib in an unconscious state. After the machine was moved away, Mr. Mullens was semi-conscious, and after first-aid was administered, he was taken by ambulance to the Braxton Hospital, and then transported by helicopter to the University Medical Center later that evening (Tr. 76).

Mr. Herndon was of the opinion that the respondent should have reported the accident immediately at the time Mr. Mullens was transported to the Braxton Hospital because he had internal injuries and the scope of those injuries were not known (Tr. 77). In this regard, he stated as follows at (Tr. 76):

> Q. Based on what information did you conclude that these injuries that Mr. Mullens had received had a reasonable potential to cause death?
>
> A. Based on, really, past experience, and the fact that I have done accident investigations in the past of this type, as well as reviewing reports from across the country, this type of an accident has, in many cases, become fatalities. As a matter of fact, I believe it was in 1983, the first fatality of the year was this type of an injury, where a person was crushed between a miner and the rib.

And, at (Tr. 112):

> JUDGE KOUTRAS: In other words, the fact that Mr. Mullens didn't die, didn't in effect, reaffirm your past experience with incidents of this kind.
>
> THE WITNESS: The fact that Mr. Mullens didn't die does not make the determination of whether or not it was an accident. When Mr. Mullens was injured, there was the potential for a fatality. * * * *

Mr. Herndon believed that Mr. Bauer accompanied Mr. Mullens to the hospital, and confirmed that no MSHA representatives were at the hospital because MSHA was not aware of the fact the accident had occurred (Tr. 77).

With regard to his gravity findings concerning the section 50.10 violation, Mr. Herndon confirmed that while the violation was not "significant and substantial" he believed the failure to immediately report the accident was a serious violation because MSHA needs to immediately investigate such incidents while the accident scene is undisturbed in order to obtain knowledge of the facts so that appropriate action is taken to prevent repeat accidents. Mr. Herndon confirmed that he based his "high negligence" finding on the fact that the respondent was aware of the seriousness of the accident on the evening of December 7, and was aware of the fact that MSHA should have been notified (Tr. 79-80). The violation was abated by explaining to the respondent the Part 50 requirement for immediately reporting accidents (Tr. 80).

Mr. Herndon confirmed that he cited a violation of section 50.12, because the respondent continued mining after the accident, and made some changes to the mining machine, and that this hampered MSHA's investigation of the accident. When the accident was reported some 20 hours later, the operator did not have permission to continue mining since a section 103(k) order was issued at that time. Mr. Herndon stated that during the 20-hour period prior to the report to MSHA, the entry where the accident had occurred had been mined to completion and the continuous-mining machine right-hand traction motor had been replaced. The machine was also moved to a different entry (Tr. 82-84). Mr. Herndon confirmed that the machine was operated by remote control, and that Mr. Mullens was the operator at the time of the accident (Tr. 85). Petitioner's counsel agreed that by the time the accident was reported by Mr. Bauer the changes to the accident scene and

the mining machine had already taken place (Tr. 86). Inspector Herndon confirmed that the old traction motor was removed from the property, and MSHA was unable to determine whether any motor malfunction caused the accident (Tr. 95).

Mr. Herndon believed the violation was serious because by changing the scene, MSHA could make no determination as to the actual cause of the accident. He based his "high negligence" finding on the fact that the respondent was aware of the seriousness of the injury sustained by Mr. Mullens, but did not report it. Abatement was achieved by explaining the requirements of section 50.12 to the respondent (Tr. 95-96).

On cross-examination, Mr. Herndon confirmed that he relied on the definition of "accident" as found in section 50.2(h), to support the violations which he issued. He conceded that the definitional language does not use the word "serious," and if an accident had not occurred, the respondent was not required to report it or to preserve the scene (Tr. 97).

Mr. Herndon explained his investigative procedure, and he confirmed that neither Dr. Bordonada or anyone else at the Braxton Hospital were interviewed, and that the hospital records at Braxton and the University of West Virginia were not reviewed (Tr. 98). Mr. Herndon described the mining machine cable restraining clamp which had pinned Mr. Mullens to the rib (Tr. 102-105). He also identified the witnesses who were interviewed during the investigation, and confirmed that the cause of the accident was never factually determined and there were no eye witnesses (Tr. 105-110).

In response to further bench questions, Mr. Herndon confirmed that at the time of the investigation, the miner motor which had been removed from the machine was disassembled and in the repair shop, but that no MSHA electrical inspector looked at it, notwithstanding the fact that there was some indication that it was "shorting out inside." In response to a question as to why the hospital records were not reviewed during the investigation, Mr. Herndon stated that "we have had problems getting these reports," and he conceded that no attempts were made to obtain the records during the investigation (Tr. 116-117). In reply to a question as to the source of the information which appears at page 2 of MSHA's accident investigative report (exhibit P-6), concerning the Braxton Hospital diagnosis of the injuries sustained by Mr. Mullens, Mr. Herndon stated that the information was supplied by Mr. Bauer (Tr. 118).

Respondent's Testimony and Evidence

Robert B. Stump, section foreman, stated that he was the section foreman on December 7, 1987, when Mr. Mullens was injured, and he confirmed that he has received specialized medical or health training, and that he is a certified Emergency Medical Technician (EMT), licensed by the State of West Virginia, and certified through the National Registry. He also confirmed that he serves on the local Hacker Valley Medical Service Ambulance and Emergency Squad, and that on a dozen or more occasions has rendered services at accident scenes involving traumatic injuries and fatalities. He explained the procedures he follows during his examination of such patients (Tr. 120-126).

Mr. Stump stated that he became aware of the incident involving Mr. Mullens when he was summoned to the scene by Mr. Sheldon Simmons, the buggy operator. Mr. Stump stated that when he arrived at the scene, he saw Mr. Mullens between the rib and the continuous miner cable stand-off, and he passed by him and shut off the machine. Mr. Mullens was in a sitting position, with his left knee into his chest, between his chest and the cable stand-off. After turning off the machine, Mr. Stump looked at Mr. Mullens, and 15 seconds later, Mr. Mullens stated "Get me out of here, I'm hurt." Mr. Stump then re-started the machine and trammed the miner away from Mr. Mullens. He then examined Mr. Mullens and determined that he was able to breathe and speak to him, and that "he did have an airway." Mr. Mullens was then placed in a reclining position, and Mr. Stump continued his examination and explained what he did. He confirmed that he found discoloration of the chest, apparent discomfort of the upper abdomen, and a bruised upper left leg. After administering further aid, Mr. Mullens was placed on a back board and transported out of the mine (Tr. 126-131).

Mr. Stump stated that on the basis of his examination of Mr. Mullens he did not believe that the injuries he had received had a reasonable potential to cause his death (Tr. 132). He confirmed that he reported the incident to his shift foreman Harold Hayhurst by telephone approximately 15 minutes after it occurred, and that Mr. Hayhurst called for an ambulance. Mr. Stump then assembled his crew at the power center to "settle them down, because everyone was excited," and he waited for Mr. Hayhurst to call him back. Mr. Hayhurst called him back and advised him that he would come to the area as quickly as possible. After Mr. Hayhurst arrived at the scene, they measured the accident area and made a sketch of

the scene which is included as part of the respondent's accident report, exhibit P-3. Mr. Hayhurst then left the area, and at approximately 10:30 to 10:45, he authorized Mr. Stump to "start running coal or go back to work" (Tr. 134).

On cross-examination, Mr. Stump stated that Mr. Hayhurst did not accompany Mr. Mullens to the hospital, and that during his conversations with Mr. Hayhurst, he expressed concern about Mr. Mullens, and asked "what shape that I thought James was in," and whether "I thought he was hurt bad." Mr. Stump confirmed that Mr. Hayhurst based his accident report on the information that he (Stump) supplied him, but that he did not observe Mr. Hayhurst filling out the report. Mr. Stump also confirmed that the information on the report form that Mr. Mullens had suffered "possible internal injuries," was based on his examination which indicated that Mr. Mullens was experiencing palpitation of the upper abdomen, some discomfort in his legs, and had trouble moving them. Mr. Stump was of the opinion that Mr. Mullens could not have been alone for more than 90 seconds before he was discovered, and that his examination of Mr. Mullens reflected a very full pulse rate which was somewhat rapid because of "fear and anxiety," but "not enough to be overly concerned about" (Tr. 139).

Mr. Stump stated that Mr. Mullens was pinned against the rib by the restraining clamp of the machine, and while he could have pulled Mr. Mullens out without moving the machine, he decided to move the machine away so that he could have access to him and not cause any further injury (Tr. 142). Mr. Stump stated that his experience with past traumatic injury cases involved cases in which two-thirds of the victims were already dead at the scene, and one-third had injuries that would have a reasonable probability to cause death and the victims were not conscious. He confirmed that he had no prior experience at the mine where he made any assessment as to whether or not any injury had a reasonable probability of death. He also confirmed that he was aware of MSHA's injury reporting requirements, but had never previously made any recommendations or a report which had to be immediately reported to MSHA (Tr. 143).

Mr. Stump confirmed that he was interviewed by Inspector Herndon during the course of the investigation, but he could not recall informing the inspector about his medical training, or whether the inspector asked him about it. He also confirmed that the inspector never inquired as to the diagnosis that he made of Mr. Mullens' injuries, and he could not recall discussing the reporting requirements with the inspector (Tr. 149).

Edward Bauer, respondent's Director of Safety and Training, stated that he provides emergency medical training for the respondent's employees, including first-aid training for supervisors as required by MSHA's regulations, and mine rescue training. He confirmed that in accordance with company procedures, anytime an employee is injured and taken to a hospital both he and the company president, Robert McGregor are notified. Mr. Bauer confirmed that at approximately 8:40 p.m., on December 7, Mr. Hayhurst called him and advised him that Mr. Mullens was involved in an accident with a miner, and that he was caught between the rib and the miner, and that an ambulance had been called (Tr. 153). Mr. Bauer stated that he directed Mr. Hayhurst to speak with Mr. Stump in order to determine Mr. Mullens' vital signs and his injuries. Mr. Bauer stated that he learned from Mr. Hayhurst that Mr. Mullens was complaining of pain in his leg, but that Mr. Stump had indicated that he was stable and that his vital signs were good. Mr. Bauer then proceeded to the hospital and advised Mr. Hayhurst to inform Mr. McGregor about the accident. Mr. Bauer arrived at the hospital emergency room approximately 35 minutes ahead of Mr. Mullens, and he helped unload him from the ambulance when he arrived. At that time, Mr. Mullens stated that his leg hurt and he was trying to explain to the ambulance attendants the circumstances under which he was injured, but they had some difficulty in understanding the mining terminology used by Mr. Mullens. Mr. Bauer spoke with Mr. Mullens and explained further to the attendants (Tr. 156).

Mr. Bauer stated that Mr. Mullens arrived at the hospital at 9:35 p.m., and that shortly after his arrival Dr. Bordonada examined him in the emergency room. Mr. Bauer stated that at approximately 10:05 p.m., he asked Dr. Bordonada about the nature of the injuries sustained by Mr. Mullens, and the doctor explained that he was concerned about the pain in the abdomen, but was not sure about the back, and mentioned that Mr. Mullens had some abrasions on his hand and leg. Mr. Bauer stated that he asked the doctor whether or not there was any chance at all that the injuries sustained by Mr. Mullens would cause him to die, and that the doctor responded "no" (Tr. 158).

Mr. Bauer confirmed that after speaking with the doctor, he received a call at the hospital from Mr. McGregor inquiring about the condition of Mr. Mullens. Mr. Bauer stated that he told Mr. McGregor about his conversation with Dr. Bordonada, and Mr. McGregor inquired as to whether or not the accident needed to be reported under Part 50, and Mr. Bauer informed him about the reporting requirement in cases where an injury

has a reasonable potential to cause death. Mr. McGregor then instructed Mr. Bauer to insure that he asked the doctor that specific question, and at approximately 10:25 Mr. Bauer spoke to the doctor again and asked him whether the injuries sustained by Mr. Mullens had a reasonable potential to cause death. Mr. Bauer stated that the doctor again answered "no," and that he called Mr. McGregor back to inform him of this conversation with the doctor (Tr. 160).

Mr. Bauer stated that on the day after the accident, he was at the mine in the company of MSHA Inspector Roy Bennett, and Mr. Bennett asked him whether or not the mine had experienced any "lost time and accidents." Mr. Bauer stated that he explained the circumstances surrounding Mr. Mullens' accident, including his conversations with the doctor and the EMT treatment received by Mr. Mullens, and advised Mr. Bennett of his opinion that the accident was not reportable. Mr. Bennett informed Mr. Bauer that the accident should be called in to MSHA, and following his instructions, Mr. Bauer reported the accident by telephone at approximately 12:30 noon on December 8, to the MSHA Clarksburg Field Office. He later spoke with Mr. Satterfield of that office at 4:30 p.m. that same day, and after explaining the circumstances to him, Mr. Satterfield issued a section 103(k) order (Tr. 171). Later, on December 10, Inspector Herndon came to Mr. Bauer's office to examine the accident report and the training records of Mr. Mullens and Mr. Stump. Mr. Stump stated that at no time on December 7, or thereafter, did he have reasonable cause to believe that the injuries sustained by Mr. Mullens could have caused his death (Tr. 172).

On cross-examination, Mr. Bauer confirmed that he made no notes concerning his discussions with Dr. Bordonada, but did write down the reported injuries sustained by Mr. Mullens in order to report them to Mr. McGregor. Mr. Bauer could not recall the doctor telling him that he suspected a possible ruptured spleen or internal abdominal injuries, but did recall the doctor telling him that he was concerned about the pain in the abdominal region and the leg (Tr. 173). He denied that the doctor said anything about taking x-rays or fluid from the abdomen before he could determine whether the injuries were serious, and he re-confirmed that the doctor responded "no" to his question concerning any reasonable potential for death (Tr. 174). Mr. Bauer confirmed that he did not inquire as to why Mr. Mullens was being taken to another hospital by helicopter because it was not uncommon to transfer patients out of Braxton County by helicopter (Tr. 175). Mr. Bauer stated that the exact words he used in posing his question to Dr. Bordonada were whether there was "any chance at all that he would die

from those injuries" (Tr. 176). Mr. Bauer confirmed that he asked the doctor no further questions after the lab reports were in, and he denied any knowledge that Mr. Mullens had blood in the fluid, or that the doctor suspected a renal contusion or bruise of the kidney, or a possible spleen injury (Tr. 179).

In response to further questions, Mr. Bauer confirmed that he is a certified Emergency Medical Technician, and if the doctor had told him that Mr. Mullens had a ruptured spleen or blood in his abdomen, he would have had some doubt about the doctor's negative answer that there was no reasonable potential for death and would have immediately reported the accident. However, he relied on the doctor's negative answers to his questions in forming his opinion that there was no reasonable potential for death (Tr. 179-180).

Mr. Bauer confirmed that he participated in MSHA's accident investigation, and that he informed Inspector Herndon of his view that the accident was not reportable. However, Mr. Satterfield took the position that because of the fact that the accident involved a mining machine, the accident was immediately reportable (Tr. 182). Mr. Bauer also confirmed that when he spoke to Mr. Satterfield at 4:30 p.m., on December 8, when the 103(k) order was issued, he informed Mr. Satterfield that the section had been mined out and the machine removed, and that Mr. Satterfield stated that he did not want the scene "disturbed any more" (Tr. 182).

Mr. Bauer agreed that the accident was a "lost time accident" which needed to be reported, and that as of December 9, he had not completed the necessary paperwork. He confirmed that he was not cited for failure to file a lost time accident, and MSHA's counsel confirmed that such accidents need not be reported immediately (Tr. 185).

Robert McGregor, respondent's President and Chief Executive Operations Officer, stated that he was thoroughly familiar with MSHA's Part 50 reporting requirements, and that during his past experience in the mining industry has had occasion to make such reports. He confirmed that he first learned of the incident concerning Mr. Mullens when he received a telephone call from Mr. Hayhurst on December 7, at approximately 9:00 p.m. Mr. McGregor informed Mr. Hayhurst to "stop everything on the section" and to contact Mr. Stump for a full investigation and "a drawing of the circumstances." Mr. McGregor stated that the thought of immediately reporting the accident crossed his mind after Mr. Hayhurst told him of the circumstances concerning Mr. Mullens being pinned against the rib by a miner, but he waited until Mr. Mullens was at the

hospital so that he would have a preliminary diagnosis of the problem. Mr. McGregor then called the hospital and spoke with Mr. Bauer who informed him that the doctor was concerned about Mr. Mullens' back but said that his life was not in danger. Mr. McGregor discussed the reporting requirements of Part 50 with Mr. Bauer and instructed him to ask the doctor about the potential for death, using the exact language of the standard, because he did not want any misunderstanding. Mr. Bauer called him back and stated that the doctor had informed him that Mr. Mullens' injuries had no reasonable potential to cause death (Tr. 194-197).

Mr. McGregor stated that after speaking with Mr. Bauer, he called Mr. Hayhurst and instructed him to "go ahead and release the section," and that they would confer the next day to investigate the accident. When he later spoke with Mr. Bauer, he was informed that Inspector Bennett was of the opinion that the accident should have been immediately reported, and Mr. Bauer advised him that Mr. Satterfield had placed a "K order" on the section and was going to come to the mine to investigate the accident (Tr. 199). Mr. McGregor stated that he personally called Mr. Satterfield and tried to explain why the accident was not immediately reported, but that Mr. Satterfield took the position that it should have, and gave him the following reasons for his position (Tr. 199):

> A. * * * [I] tried to explain to him why we hadn't called in at the time. Basically, that the doctor had told us at that time, and our people said they didn't feel his life was threatened as a result of his injuries. At that time, we got into a lengthy discussion. He basically told me that didn't matter. He said the nature of the injury could have been fatal. The event itself could have been fatal, and that's what he was basing his decision. I said, "Jim, that's not the way I read the law." He said, "Well, that's the way I see it." I said, "Are you telling me that if somebody gets a brush burn, but if they had been six inches over, that it could have killed them, that's still a" -- he said, "That's exactly what I'm telling you."
>
> As a result of that, as a matter of that, Ed Bauer and I got together and drew up a new set of guidelines, and quite frankly, the reason we're here today is because, for our

purpose, we want to comply with the law and we wanted the position clarified.

On cross-examination, Mr. McGregor confirmed that he first learned of the accident from Mr. Hayhurst, and that Mr. Hayhurst informed him that Mr. Mullens had a leg injury and a pain in his stomach, but that his vital signs were good. Mr. McGregor stated that he informed Mr. Hayhurst that he wanted nothing further done on the section until he could investigate to learn exactly how serious Mr. Mullens was injured. Mr. McGregor stated that he then called Mr. Bauer at the hospital approximately an hour after he spoke with Mr. Hayhurst, but that he (McGregor) never spoke to the doctor (Tr. 200-204).

Mr. McGregor confirmed that he was concerned about the accident, and in order to make a record, he wanted to investigate the incident and take measurements and detail all of the particulars. He confirmed that Mr. Hayhurst said nothing to him about any possible internal injuries suffered by Mr. Mullens, other than that "his stomach was hurting" (Tr. 205). Mr. McGregor also confirmed that he received a report concerning the prevailing conditions on the section after the accident from Mr. Hayhurst before releasing the section to continue working, and he explained why he did not initially report to MSHA after receiving this information (Tr. 206-209). When asked about the factors he relied on when he made his decision to release the section after the accident, Mr. McGregor stated as follows (Tr. 217-218):

> THE WITNESS: Of course, the one factor, was the information I got from the hospital, and the other factor was that we had -- I was told that the miner was in good operating condition, that it worked fine, that we had made a drawing of the area, and that I felt there was no reason not to proceed. That there would be nothing to gain one way or the other, once we had the dimensions, a picture of the scene and the fact that the machinery, at least, was reported to me that it was operating properly with the exception that the remote control box was damaged, where as it turned out later, was the cause of the accident.
>
> Where the cable had caught his hand, it set his control box on the ground. He had two tram leaders that worked the cats. When he was tramming them back, he wasn't watching the

cable and the clamp caught his -- came over his hand and forced his hand down on the control levers. Brought the machine back to him. Therefore, he got his abrasion on the hand. When he got his hand free, it bent the little guard down that we had on the side of the control box.

So at that point, I felt that there was no reason not to put the section back in service, and we would continue the investigation the next day.

Inspector Herndon was recalled by the court, and he denied any knowledge of any MSHA requirement for the immediate reporting of accidents involving miners being pinned against the rib. However, he confirmed that in most cases he has been involved in when a miner is pinned against a rib there is a reasonable potential for death (Tr. 220-221). He confirmed that he issued the citation because of the information related to him during the investigation from mine personnel who were with Mr. Mullens at the time of the accident, namely, that Mr. Mullens was conscious or semi-conscious, and suffered a compression fracture of the fifth lumbar vertebra, contusions to the lung, abrasions on the left hand, and a possible strained knee. He concluded from all of this that the injuries presented a reasonable potential for death and should have been immediately reported (Tr. 222-223).

Findings and Conclusions

Fact of Violation - 30 C.F.R. § 50.10

The respondent is charged with an alleged violation of mandatory reporting standard 30 C.F.R. § 50.10, for failing to immediately notify MSHA of the occurrence of the accident involving Mr. Mullens. The statutory requirement for reporting mine accidents is found in section 103(j) of the 1977 Mine Act, which states in pertinent part as follows: "[I]n the event of an accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof." While it is clear that an accident must be reported, the requirement that it be done immediately is not found in the statute. The requirement for an immediate report is found in the regulation at 30 C.F.R. § 50.10, which provides as follows:

§ 50.10 Immediate notification.

> If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582.

The definition of the type of "accident" which must be immediately reported to MSHA pursuant to section 50.10, is found at 30 C.F.R. § 50.2(h)(2), which defines such an accident as "An injury to an individual at a mine which has a reasonable potential to cause death."

The evidence in this case establishes that the respondent reported the accident to MSHA by telephone at 12:30 p.m. and 4:30 p.m., on December 8, 1987. Petitioner takes the position that the injuries sustained by Mr. Mullens in the accident presented a reasonable potential for causing his death, and that the respondent should have immediately reported the accident when it occurred on December 7, 1987. The respondent takes the position that the injuries sustained by Mr. Mullens did not present a reasonable potential for causing his death, and that the incident of December 7, 1987, was therefore not an "accident" within the definition found in section 50.2(h)(2), or an "accident" which was required to be reported immediately to MSHA.

In MSHA v. Climax Molybdenum, 2 FMSHRC 1967, a miner suffered fractures to the left femur, the pelvis, and the right hip, when a 7,000 pound tire fell on him. An initial examination which took place at the mine infirmary by an attending doctor and nurse showed that the victim's vital signs were stable and he was cooperative, and the attending medical personnel advised the mine safety director that while the injuries suffered by the miner were serious, they were not life threatening. The victim was transferred from the infirmary to a local hospital for treatment, and was subsequently transferred again to another hospital in Denver where he developed a fat embolism associated with a bone fracture, but this condition was not considered to be life-threatening.

in the Climax case, Judge Morris found no merit in MSHA's contention that immediate notification is required whenever there exists any question as to whether an injury is life

threatening. He also rejected MSHA's contentions that immediate reporting was required due to a combination of circumstances, namely, the injuries were serious, a fat embolism developed, intensive case was required, and the miner was moved to three different treatment facilities. In short, Judge Morris found that the injuries sustained by the miner were not required to be immediately reported pursuant to section 50.10, because MSHA offered no credible evidence to support a conclusion that the injuries had a reasonable potential to cause the death of the miner. I reached the same conclusion in Hecla Mining Company, 1 FMSHRC 1872 (November 1979).

In MSHA v. Allied Chemical Corp., 7 FMSHRC 2053 (December 1985), Judge Morris affirmed a violation of section 50.10, after concluding that the injuries sustained by a miner who received an electrical shock posed a reasonable potential to cause death. The shock victim was hospitalized and his heart beat was monitored for 12 to 18 hours. The attending hospital physician advised the inspector that the injured miner was being monitored because there was still a potential for death, and Judge Morris was not persuaded by the testimony of another doctor who was experienced in the hazards of electrical shock, and who testified for the operator that in his opinion, the injuries would not have caused the miner's death.

MSHA's position in this case is that any determination of whether there are injuries with a reasonable potential to cause death and, thus, an immediately reportable accident, is subject to a "reasonable person test." MSHA asserts that a reasonable determination must be made at the scene of the accident or the earliest point or as near in time to the accident as possible based on the particular facts of the case. MSHA concludes that as soon as a reasonable person would conclude that there is a reasonable probability of death from the injuries involved, the accident should be reported. MSHA further concludes that the determination does not necessarily require a medical opinion because such a requirement would defeat the purpose of the regulation since valuable time would be lost. Of course, once there is a medical opinion to the effect that the injury poses a reasonable potential for death, MSHA believes that it must be immediately reported.

MSHA maintains that in view of Mr. Mullens' condition at the time of the accident, mine management should have made a determination that his injuries had a reasonable potential to cause death and, therefore, should have immediately reported the accident. In support of this conclusion, MSHA relies on

the fact that Mr. Mullens was knocked unconscious, mine management suspected internal injuries, Mr. Mullens was rushed to the hospital by ambulance, and the "general knowledge" that the type of accident (a miner being pinned against a rib by a continuous-mining machine) is very serious and sometimes fatal.

MSHA's conclusions that the respondent should have made a reasonable determination at the time of the accident that Mr. Mullens' injuries posed a reasonable potential for causing his death are based on the testimony of MSHA Inspector Herndon, the individual who participated in the accident investigation and wrote the accident report of December 18, 1987 (Exhibit P-6). Mr. Herndon testified that his interviews with mine personnel "suggested" that Mr. Mullens had suffered internal injuries, and that it was his "understanding" that Mr. Mullens had sustained "possible" internal injuries.

Mr. Herndon conceded that at the time of MSHA's accident investigation, no interviews were conducted with the attending emergency room doctor, and no hospital records concerning Mr. Mullens' condition were reviewed. He also conceded that he did not review the accident report prepared by Mr. Hayhurst which contains a notation that Mr. Mullens had sustained "possible internal injuries" (exhibit P-3). Mr. Herndon's accident investigation report reflects that he issued the citation because of the respondent's failure to immediately notify MSHA "of this serious accident" (exhibit P-6, pg. 3).

Mr. Herndon testified on direct examination that it was his understanding that in addition to possible internal injuries, Mr. Mullens had sustained sprains, an injury to the L5 vertebra, abrasions and various contusions, and that he was in an "unconscious state" when first observed, but was semi-conscious when the machine was moved away from him. When recalled to testify later in the hearing, Mr. Herndon stated that Mr. Mullens had suffered a compression fracture of the fifth lumbar vertebra, contusions to the lung, abrasions to the left hand, and a possible strained knee. This information also appears at page 2 of his accident report, and Mr. Herndon asserted that he received the information from Mr. Bauer after Mr. Mullens was taken to the Braxton Hospital emergency room.

Mr. Herndon testified that he believed the respondent should have immediately reported the accident at the time Mr. Mullens was transported to the hospital by ambulance because he had suffered internal injuries, the scope of which were unknown. When asked the basis for his conclusion that Mr. Mullens' injuries had a reasonable potential to cause

death, Mr. Herndon responded "past experience, and the fact that I have done accident investigations in the past of this type, as well as reviewing reports from across the country, this type of an accident has, in many cases, become fatalities" (Tr. 76). Mr. Herndon later confirmed that in most cases he has investigated, when a miner is pinned against the rib, there is a reasonable potential for death (Tr. 220-221).

In my view, Inspector Herndon's belief that the respondent should have immediately reported the accident at the time that Mr. Mullens was taken out of the mine and transported to the hospital emergency room was based on several factors. Mr. Herndon was of the opinion that since the accident was serious, it was required to be immediately reported. I find no such requirement in the cited regulation. The definition of a reportable accident relied on by MSHA does not include any language with respect to the degree of injury, and Mr. Herndon's characterization of the accident as "serious" cannot support a violation for failure to immediately report the matter.

Inspector Herndon's reliance on his past experience concerning miners being pinned against a rib by a mining machine cannot ipso facto support any reasonable conclusion that the injuries sustained by Mr. Mullens posed a reasonable potential for death. The fact that MSHA generally believes that accidents of this type generally have been known to result in the demise of past accident victims is irrelevant. MSHA is bound by its own regulatory definition of an accident which is required to be immediately reported, and given that definition, any such determination must necessarily be made on the facts of each incident on a case-by-case basis. Further, if MSHA believes that such incidents in general need to be reported immediately, regardless of the extent of any injury, it is free to amend its regulations.

In my view, the question of whether the respondent met its duty to immediately report the accident in question depends on when it possessed reasonably reliable information which would have reasonably led it to conclude that the accident was immediately reportable. On the facts of this case, it seems clear to me that Inspector Herndon had no personal first-hand knowledge of the injuries sustained by Mr. Mullens at the time of the accident. He issued the citation on the basis of certain information given to him during the course of his investigation. The issue is not whether Mr. Herndon, after the fact believed that Mr. Mullens' injuries were such as to pose a reasonable potential for death, but whether or not those management representatives who had first-hand knowledge of the

injuries sustained by Mr. Mullens acted reasonably or unreasonably in concluding that there was no reasonable potential for death, and whether they acted reasonably or unreasonably in concluding that they were not required to immediately report the accident to MSHA during the critical time period beginning with the occurrence of the accident and the removal and transportation of Mr. Mullens from the mine to the hospital.

After careful examination of all of the testimony and evidence presented in this case, I find no credible or probative evidence to support MSHA's assertions that when Mr. Mullens was removed from the mine and transported to the hospital, his condition presented a reasonable potential for death, and that the respondent knew, or should have known that this was the case, and should have immediately reported it to MSHA. MSHA's reliance on the fact that Mr. Mullens was knocked unconscious, that management suspected internal injuries, that he was transported to the hospital, and that incidents of this type have generally be known to result in serious, and sometimes fatal injuries, to support its conclusions that the accident was reportable at the time of its occurrence is rejected.

The credible testimony of Robert Stump, a trained and experienced certified Emergency Medical Technician who first observed and examined and administered first aid to Mr. Mullens, and who assisted in removing him from the scene and placing him in the ambulance, reflects that when he first observed Mr. Mullens he could not tell whether or not he was conscious, and that Mr. Mullens was looking at him while bent over in a sitting position (Tr. 60, 128). Mr. Stump testified that within 15 seconds after reaching Mr. Mullens and turning off the machine, Mr. Mullens spoke to him. After tramming the machine away from Mr. Mullens, Mr. Stump placed him in a reclining position and examined him further and found that he had a very full pulse rate which was somewhat rapid because of "fear and anxiety," but not rapid enough to cause Mr. Stump to be concerned. Mr. Stump explained the details of his examination of Mr. Mullens, and confirmed that he followed his standard EMT examination procedures, and established spontaneous eye and verbal contact with Mr. Mullens, and Mr. Mullens confirmed and showed him that he could move his hands. Shortly before placing Mr. Mullens on a "back board," Mr. Stump stated that Mr. Mullens "was responding to us, talking with us. We could ask him what was hurting and everything, and he would respond whatever his problems were, what he was thinking or anything else" (Tr. 130-131).

Mr. Stump confirmed that Mr. Mullens was pinned against the rib by the machine cable restraining clamp, and that while it was not necessary to remove the machine in order to extricate Mr. Mullens, he moved the machine so that he could have better access to Mr. Mullens and to preclude any possible further injury if he had simply "jerked him out" (Tr. 141-142).

Although Mr. Stump confirmed that he suspected that Mr. Mullens may have sustained possible internal injuries because of discoloration and palpitation of his upper abdomen, had trouble moving his legs, and was experiencing discomfort in his legs, and had an abnormal respiratory rate which was "not too bad" (Tr. 136-137), he concluded that on the basis of his examination of Mr. Mullens at the scene of the accident the injuries sustained by Mr. Mullens did not have a reasonable potential for causing his death (Tr. 132). Mr. Stump confirmed that upon Mr. Hayhurst's arrival at the scene, Mr. Hayhurst asked him about Mr. Mullens' condition (Tr. 138). Mr. Bauer testified that Mr. Hayhurst informed him that Mr. Stump advised him that Mr. Mullens was complaining of pain in his leg, but that he was stable and that his vital signs were good (Tr. 154). Mr. Bauer testified further that he assisted in removing Mr. Mullens from the ambulance upon his arrival at the hospital, and that while he was complaining about his leg hurting, he was speaking distinctly, and was talking to all of the hospital and ambulance personnel about what had happened (Tr. 155-156).

In view of the foregoing, I cannot conclude that Mr. Stump, a trained medical technician who had prior experience with traumatic injuries, and who after examining and treating Mr. Mullens at the scene of the accident, concluded that his injuries were not life threatening and did not present any reasonable potential for death, acted unreasonably in reaching that conclusion at that point in time. Nor can I conclude that Mr. Hayhurst or Mr. Bauer acted unreasonably in not immediately reporting the accident to MSHA at the time of its occurrence. Although Mr. Hayhurst did not testify in this case, based on the testimony of Mr. Stump and Mr. Bauer, there is a strong inference that Mr. Hayhurst relied on the information given to him by Mr. Stump. The fact that Mr. Stump may have told Mr. Hayhurst that Mr. Mullens may have sustained "possible internal injuries," does not in my view support any reasonable conclusion that such undiagnosed injuries, the extent of which were not known, presented a reasonable potential for death. Insofar as Mr. Bauer is concerned, he first learned of Mr. Mullens' injuries through Mr. Hayhurst who informed him of Mr. Stump's assessment that Mr. Mullens was stable and that his life signs were good. Mr. Bauer also

personally observed Mr. Mullens when he helped remove from the ambulance, and Mr. Mullens was conscious and speaking freely with him and the medical personnel who were present while explaining what had occurred to him. Under the circumstances, I cannot conclude that Mr. Bauer had any reasonable basis for concluding that Mr. Mullens' injuries had a reasonable potential for causing death, nor can I conclude that Mr. Bauer acted unreasonably in not immediately reporting the accident to MSHA at that point in time.

MSHA asserts that following Mr. Mullens' transport to the hospital and examination by Dr. Bordonada, the respondent's duty to immediately report the accident became even clearer, because the doctor diagnosed some very serious and possibly life threatening injuries to Mr. Mullens and ordered him transferred by helicopter to another hospital. In addition to Dr. Bordonada's diagnosis and treatment of Mr. Mullens upon his arrival at the hospital, the evidentiary underpinning for MSHA's conclusion that Mr. Mullens' injuries posed a reasonable potential for death, and thus were required to be immediately be reported to MSHA at the time Mr. Mullens was admitted to the hospital, is the doctor's opinion that the injuries sustained by Mr. Mullens presented a reasonable potential for death, the doctor's denials that Mr. Bauer or any other management representative ever asked him whether the injuries were life threatening or posed a reasonable potential for death, and the doctor's assertion that if he had been asked whether or not Mr. Mullens' injuries had a reasonable potential for death he would have answered in the affirmative.

Dr. Bordonada confirmed that he was initially informed by radio by the paramedics who brought Mr. Mullens to the emergency room that he had been "crushed" by a continuous-mining machine and was unconscious, and that the paramedics may have called for a helicopter. In light of this initial call, the doctor further confirmed that he had "great concern" because "when you have injury like this, you thing right away of helicopter" (Tr. 55). He believed that he asked for the assistance of a helicopter because of "my suspicion of the kind of injury that needs more work-up and treatment and he should be taken to another facility where they can provide these kind of diagnostic instruments" (Tr. 35). The doctor also confirmed that he called for the helicopter to transfer Mr. Mullens to the West Virginia University Hospital and spoke with a doctor at that hospital who agreed to the transfer (Tr. 28, 35, 49). He also confirmed that the call for the helicopter was placed at approximately 11:00 p.m., and it arrived at the Braxton Hospital at approximately 12:00 midnight, and left with Mr. Mullens at 12:30 a.m. (Tr. 49-50).

Dr. Bordonada confirmed that when he first observed Mr. Mullens, he was conscious, his blood pressure was within normal limits, and his pulse and respiratory rates were high. He also indicated that Mr. Mullens was scared, and he agreed that it was possible that this would cause elevated pulse and respiratory rates (Tr. 40). The doctor also confirmed that his concern with respect to the life threatening aspects of Mr. Mullens' injuries focused on his belief that Mr. Mullens may have sustained a ruptured spleen, and that his conclusion in this regard was reached sometime after he had done an abdominal tap sometime after 10:45 p.m. (Tr. 48). He also confirmed that a ruptured spleen presents a problem in that a patient may go into shock (Tr. 32, 49). He agreed that the records from the West Virginia University Hospital ultimately confirmed that Mr. Mullens did not have a ruptured spleen or a fractured vertebrae, but that he did sustain a sprained leg, a cut on his finger, and a bruise or contusion to the lumbar plexus, or nerves supplying the leg (Tr. 52-53). When asked whether these injuries posed a reasonably potential to cause death, he responded "One Hundred percent no" (Tr. 53). The doctor confirmed that none of the hospital records contain any "form questions" as to whether or not a patient's condition may be "life threatening," and no such conclusions are included in any of the reports (Tr. 38).

Although Dr. Bordonada denied that Mr. Bauer ever asked him whether or not he believed that Mr. Mullens' injuries were life threatening or had a reasonable potential for causing death (Tr. 35, 44), I conclude and find that his negative answers were equivocal. For example, when he was first asked the question, Dr. Bordonada responded "I don't believe so" and "I do not think so" (Tr. 36). When asked the same question on cross-examination, he responded "I don't believe so" and "I don't recall any conversation of such nature" (Tr. 44). When asked whether he could have had such a conversation, Dr. Bordonada replied "it's most possible, because I talk to so many people when you get out of the room" (Tr. 45). When asked about a second conversation with Mr. Bauer with regard to the same question, the doctor conceded that it was possible that he had such a conversation with Mr. Bauer (Tr. 45).

Dr. Bordonada stated that since establishing his medical practice in West Virginia in 1981, his hospital practice since his residency has been confined to diagnosis and treatment in the hospital emergency room, and that at the time of the accident on December 7, 1987, he was the attending emergency room doctor (Tr. 21-22). He also stated that he had seen Mr. Bauer at the emergency room, knew who he was, and knew that he

worked for the respondent, and that whenever there was an injury involving a miner, Mr. Bauer would be there. The doctor also confirmed that he knew that Mr. Bauer was at the emergency room asking questions (Tr. 44). He also confirmed that he was the only doctor in the emergency room and that he spoke to many people after he left the roof (Tr. 45, 56).

The testimony by Doctor Bordonada in this case was based on his recollection of the accident which had occurred a year prior to the hearing. His testimony was based on his review of the Braxton Hospital emergency room outpatient records, which included his notations concerning his diagnosis, observations, and certain test results incident to Mr. Mullens' treatment. Given the fact that Dr. Bordonada was obviously preoccupied with attending to Mr. Mullens, the fact that he was the only doctor on duty at the time, and had spoken to many people in and around the emergency room, I find it difficult to believe or expect that he would specifically and unequivocally remember that he did not have the conversations in question with Mr. Bauer. Contrary to MSHA's assertion at page 15 of its posthearing brief that the doctor specifically denied the conversation, Dr. Bordonada, on several occasions during his testimony, conceded that while he had no recollection of the conversation, it was possible that such conversations took place. The doctor also conceded that he knew Mr. Bauer as an individual who appeared at the emergency room whenever a miner was injured, and knew that he was at the emergency room asking questions.

Respondent's safety director Edward Bauer confirmed that he went to the hospital pursuant to company policy that required both he and Mr. McGregor to be notified anytime a miner is injured and taken to the hospital. Mr. Bauer unequivocally testified that on two occasions during the course of the evening of December 7, 1987, while at the emergency room, he asked Dr. Bordonada whether or not Mr. Mullens' injuries were life threatening. Mr. Bauer stated that he first asked the doctor whether or not the injuries would cause Mr. Mullens to die, and later, upon the instructions of the company president, Robert McGregor, he asked the doctor whether Mr. Mullens' injuries had a reasonable potential for causing death. Mr. Bauer confirmed that the doctor gave negative answers to both questions. Mr. Bauer recalled the specific form of the first question, and stated that he asked the doctor whether there was "any chance at all that he (Mullens) would die from those injuries" (Tr. 176).

Mr. Bauer, who is also a trained Emergency Medical Technician (EMT), and who had knowledge of MSHA's accident

reporting requirements, confirmed that the doctor advised him that he was concerned about the pain in Mr. Mullens' abdomen, was not sure about his back, and that Mr. Mullens had some abrasions on his hand and leg. Mr. Bauer stated that he made notes concerning these reported injuries so that he could report them to Mr. McGregor, but he could not recall the doctor telling him that he suspected a possible ruptured spleen or internal abdominal injuries. In view of his EMT training, Mr. Bauer asserted that if the doctor had told him that Mr. Mullens had a ruptured spleen or blood in his abdomen, he would have doubted the doctor's negative responses to his inquiries as to whether Mr. Mullens' injuries were life threatening, and immediately reported the matter to MSHA. Mr. Bauer maintained that he relied on the doctor's negative responses in forming his opinion that Mr. Mullens' injuries did not pose a reasonable potential for death.

Respondent's President, Robert McGregor, confirmed that he was thoroughly familiar with MSHA's Part 50 reporting requirements, including the requirement for reporting accidents involving injuries which present a reasonable potential for causing death, and that he has often prepared and made such reports during the years he has been in the mining business. Mr. McGregor corroborated Mr. Bauer's testimony concerning his telephone communications with Mr. Bauer on the evening of the accident, including Mr. Bauer's assertions that he communicated to him the doctor's negative responses with respect to whether or not Mr. Mullens' injuries were potentially life threatening. Mr. McGregor confirmed that he first learned of the accident from Mr. Hayhurst who informed him that Mr. Mullens had a leg injury and pain in his stomach, but that his vital signs were good. Mr. Hayhurst did not mention any internal injuries, and Mr. McGregor confirmed that he pursued the matter further by calling the hospital to speak to Mr. Bauer about Mr. Mullens' condition.

MSHA's assertion that the evacuation of Mr. Mullens to another hospital by helicopter should have alerted mine management that his injuries posed a reasonable potential for death is rejected. I find that Dr. Bordonada's call for a helicopter was prompted by the initial information he received before his examination of Mr. Mullens which indicated that Mr. Mullens had been "crushed" by a heavy piece of equipment and was unconscious. I believe the doctor acted out of an abundance of caution, and he agreed that helicopter assistance was necessary to expedite Mr. Mullens' transfer to a hospital which had the capability for further treatment and diagnosis of Mr. Mullens' injuries. Mr. Bauer testified that he made no inquiry as to

why Mr. Mullens was being taken to another hospital by helicopter because it was not uncommon to transfer patients out of Braxton County by helicopter, and I find his testimony in this regard to be credible and plausible. Further, I find no credible evidence to establish that Mr. Bauer was aware of the doctor's concern that Mr. Mullens may have sustained internal injuries or a ruptured spleen, nor do I find any credible evidence to support any conclusion that Mr. Bauer was aware of the details concerning the doctor's diagnosis of Mr. Mullens' suspected injuries. MSHA's assertions and transcript references at page 11 of its brief that the respondent's witnesses "recognized that the existence of internal injuries is life threatening" are taken out of context. Although Mr. Bauer admitted as much at (Tr. 180), he specifically qualified his answer by stating that he had no factual knowledge that Mr. Mullens had sustained internal injuries at the time he was at the hospital.

On the facts of this case, and notwithstanding Inspector Herndon's denials to the contrary, I believe that he formed an initial opinion that the accident posed a reasonable potential for death, and was thus required to be reported immediately, because he considered the accident to be "serious" in that it involved an incident where a miner was pinned against the rib by a continuous-mining machine. I also believe that Mr. Herndon relied on his past experience in which incidents of this kind have resulted in the deaths of the accident victims.

Although Mr. Herndon asserted that he issued the citation on the basis of certain medical information given to him by the witnesses who were interviewed during the investigation, the report is devoid of any statements or conclusions that Mr. Mullens' injuries were life threatening, or posed a reasonable potential for death, and at page 3 of the report, (exhibit P-6), Mr. Herndon states "Because the operator failed to notify MSHA immediately of this serious accident, a citation was issued for a violation of 30 C.F.R. § 50.10." Mr. Herndon conceded that no attempts were made to interview the hospital doctors, or to review the hospital records with respect to Mr. Mullens' injuries, and in my view the report is not particularly reliable. For example, at page 2, the report states that Mr. Mullens was transferred to the West Virginia University Hospital by ambulance, when in fact he was transported there by helicopter.

Having viewed Mr. Bauer and Mr. McCormack during their testimony, they impressed me as credible and straightforward

witnesses, and I give credence to Mr. Bauer's consistent testimony, as corroborated by Mr. McCormack, that Dr. Bordonada informed him that Mr. Mullens' injuries were not life threatening. I find Mr. Bauer's testimony regarding his two conversations with Dr. Bordonada to be believable and plausible, and while I have no reason to believe that the doctor was not telling the truth, I simply find his testimony to be too equivocal to support any conclusion that the conversations did not take place. Although Dr. Bordonada's medical opinion, expressed at the hearing after his review of his prior notations and the hospital records, that Mr. Mullens' injuries had a reasonable potential to cause death at the time the doctor treated him, is unrebutted, I find no credible or probative evidence to support any finding that this opinion was communicated to Mr. Bauer, Mr. McCormack, or anyone else in mine management, after Mr. Mullens was taken to the hospital. Nor do I find any credible or probative evidence to establish that anyone in mine management had any reasonable basis for believing that Mr. Mullens' injuries posed a reasonable potential for death. Lacking any such knowledge, I further find no basis for concluding that the respondent had a duty to immediately report the accident while Mr. Mullens was at the Braxton Hospital emergency room awaiting transportation to another hospital, or that its failure to do so was imprudent or unreasonable in the circumstances. Accordingly, I conclude and find that a violation has not been established, and the citation IS VACATED.

Fact of Violation - 30 C.F.R. § 50.12

Citation No. 2944552, charges the respondent with altering the accident scene by continuing mining operations after Mr. Mullens' was removed from the mine and taken to the hospital. The cited mandatory standard section 50.12 provides as follows:

> Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

In view of my findings and conclusions that the respondent had no duty to immediately report the accident in question, I find no basis for concluding that it had a duty to maintain the

status quo at the accident scene. Accordingly, I find no basis for concluding that the respondent violated the cited standard, and the citation IS VACATED.

ORDER

In view of the aforesaid findings and conclusions, the contested section 104(a) Citation Nos. 2944551 and 2944552, ARE VACATED, and the petitioner's proposals for assessment of civil penalties for the alleged violations in question are DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

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MAY 5 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 88-63 A.C. No. 32-00491-03506
v.	:	Falkirk Mine
FALKIRK MINING COMPANY, Respondent	:	

DECISION

Before: Judge Cetti

This case is before me upon petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", charging the Falkirk Mining Company (Falkirk) with 1 violation of the regulatory standard at 30 C.F.R. § 50.20(a) for the failure to report an alleged occupation injury to the Federal Mine Safety and Health Administration (MSHA).

On April 16, 1987, MSHA inspector Iszler issued Citation No. 2831514 to Falkirk at its mine in Underwood, North Dakota. The citation charges that Falkirk failed to report an occupational injury of one its employees, Ronald S. Weisenberger, in violation of 30 C.F.R. § 50.20(a).

The citation charges as follows:

> Records indicate this mine did not report to MSHA an occupational injury on form 7000-1. Mr. Ronald Weisenberger received a job related back injury on 6/16/86, saw a chiropractor on the 17th but did not return to work on the 18th. He took vacation time on 6/ 18, 19, 20, 23, 24 and returned to work on the 25th. Mr. Doug Herper with MSHA Education and Training performing the audit has indicated a violation of Section 50.20(a) exists. It is suggested form 7000-1 for this incident be completed and mailed to MSHA as required.

The violation was terminated by Falkirk reporting the alleged occupational injury on Form 7000-1 which it mailed to MSHA "under protest".

Pursuant to agreement of the parties the case was submitted on a stipulation of facts and briefs. The parties filed the following stipulation of facts:

The parties, by and through their undersigned counsel, do hereby stipulate to the following as relevant facts that may be accepted as being true and verified:

STIPULATION OF FACTS

1. Ronald S. Weisenberger ("Weisenberger") is employed by the Falkirk Mining Company at its Falkirk Mine in Underwood, North Dakota as a Utility Person and has held this position since January 2, 1980.

2. On June 16, 1986, at approximately 7:22 a.m., Weisenberger strained his lower back while helping to install a one-ton overhead crane on the ceiling of a building at the Falkirk Mine.

3. Weisenberger completed his shift, which ended at 8:00 a.m.

4. After completing his shift, Weisenberger went home and slept until about 6:00 p.m. When he got up, his back was stiff; so, he went to see a chiropractor, Dr. Lester, who is located in Bismarck.

5. The procedure performed by Dr. Lester did not help Weisenberger's back. In fact, the procedure made his back sorer than it was before. As a consequence, Weisenberger went to see a medical doctor, Dr. Johnson, at the Quain and Ramstad Clinic in Underwood, North Dakota. Dr. Johnson said Weisenberger had pulled a muscle in his lower back and prescribed a pain reliever and muscle relaxants but did not place any restrictions on Weisenberger's ability to work.

6. Before Weisenberger saw Dr. Lester, he could have worked on June 17 and 18, 1986 and performed his normal job duties. After Weisenberger saw Dr. Lester, he might not have been able to perform all of his normal job duties on those days.

7. Prior to June 16, 1986, Weisenberger scheduled vacation on June 19 through 24, 1986.

8. On June 16, 1986, Weisenberger asked and was given permission to take June 17 and 18, 1986, as vacation days, because his sister, who lives in Portland, Oregon, was coming to town, and because he wanted to attend the jubilee festival in Tuttle, North Dakota.

9. Attached hereto as Exhibit 1 and made a part hereof is a true and correct copy of the instructions for the Mine Accident, Injury and Illness Report -- MSHA Form 7000-1 which are still in use.

10. Prior to December, 1986 neither the Federal Mine Safety and Health Administration nor the Federal Mine Enforcement and Safety Administration published any document which interpreted "medical treatment" as used 30 CFR Part 50 to include chiropractic.

11. Attached hereto as Exhibit 2 and made a part hereof is a copy of Citation No. 2831514 which was issued by MSHA to the Falkirk Mining Company on April 16, 1987.

12. Attached hereto as Exhibit 3 and made a part hereof is a true and correct copy of the Conference Worksheet prepared by J.W. Ferguson of MSHA in connection with the incident in controversy.

DISCUSSION

30 C.F.R § 50.20(a) requires that an operator report an occupational injury to MSHA within (10) working days after the occupational injury occurs. The regulations specifies that the operator is to use MSHA's Form 7000-1 in making such reports.

"Occupational Injuries" is defined in 30 C.F.R. § 50.20(a) as follows:

> ... any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other job duties, or transferred to another job.

In this this case it is undisputed that Falkirk's employee on June 16, 1986 strained his lower back while helping to install a one-ton over head crane on the ceiling of a mine building approximately 30 minutes before he completed his midnight shift. He went home slept all day until he awoke with a stiff back. His stiff back was sore and painful so he went to see a chiropractor for treatment that would give him relief. When the chiropractor's treatment did not give him the relief he needed

(actually made his back sorer) he went to see a medical doctor, Dr. Johnson, at the Quain and Ramstad Clinic in Underwood, North Dakota. Dr. Johnson diagnosed his back condition as a pulled muscle in his lower back and administered medical treatment consisting of a prescribed pain reliever and muscle relaxants.

The most reasonable inference to be drawn from the stipulated facts is that the injured employee sustained injuries of his lower back consisting of a pulled muscle. After sleeping all day his injured back was so stiff and sore he went to see a chiropractor to obtain relief and when the chiropractor's treatment did not produce the desired relief he was still in need of treatment that would give his back relief. He obtained treatment from the medical doctor because his need for treatment of the condition that resulted from the original injury as well as any relief that may have been desirable from the increased pain caused by the chiropractor's treatment.

I am therefore satisfied from the evidence presented and the reasonable inferences to be drawn from the established facts that we have in this case a miner who sustained an on the job injury at a mine for which medical treatment was administered. The injury was not reported within the required time. Consequently I find there was a violation of 30 C.F.R § 50.20(a) as alleged in Citation No. 2831514.

When the parties file their stipulated facts they attached as part of the record three exhibits. Exhibit 1 which is discussed in stipulation No. 9, is a copy of the form and instructions for the Mine Accident, Injury and Illness Report --MSHA Form 7000-1. This form was in use at the time of Mr. Weisenberger's June 16, 1986 back strain. Exhibit 2 is a copy of Citation No. 2831514 which is the citation in question and Exhibit 3 which is a copy of the conference worksheet prepared by J.W. Ferguson of MSHA in connection with the incident and citation in controversy.

With respect to Exhibit 3 the Solicitor in his brief points out that the belief or opinions of investigators and supervisors held, at various points in time, on the subject of whether the violation did or did not exist, are not relevant nor are they reasonably calculated to lead to admissible evidence under Rule 2060 of the Federal Rules of Civil Procedure.

This principal has been enunciated by the Courts in a number of decisions. For example, in United States v. AT&T, 524 F.Supp. 1381 (D.C. 1981), the defendants wished to buttress the proposition that they acted reasonably, in light of FCC decisions and policies, by eliciting the testimony of the Commissioners. The Court denied them the opportunity, stating:

"Extrinsic evidence as to how and why the FCC reached its decisions and what it intended thereby - either by Commissioner's speaking in their individual capacities or by employees of the FCC - are irrelevant to the question whether defendants' compliance was reasonable."
ID. at 1387 (emphasis added).

The Court noted that "[i]t is likewise clear that inquiry into such matters would not yield relevant evidence," and that "it makes no difference - it is not relevant - what a particular Commissioner or staff member might say today about what he understood a particular decision to mean".

Similarly, in SEC v. National Student Marketing Corp., 68 F.R.D. 157, 160 (D.D.C. 1975), aff'd 538 F.2d 404 (D.C. Cir. 1976). cert. denied 429 U.S. 1073 (1977), defendants sought various internal documents in order to explore the "intent, reason, and motive" behind any agency memorandum. The Court found that "[n]one of the requested documents is relevant", stating:

"The intent [or purpose] of a governmental agency ... is a rather limited concept which cannot be determined from a random search of documents authored by agency staff or individual [officials]... while [officials] may in fact respect the staff's recommendations, they are not bound by them nor do such recommendations reflect the position of the agency as a whole. The great bulk of the documents requested by defendants... consist, with a few exceptions of memoranda among individual [agency officials], their legal assistants, and the [agency] staff. Therefore they are of little, if any, value and cannot be considered an official expression of the will and the intent of the [agency]."

In yet another action the plaintiff requested Federal Power Commission staff memoranda in various matters as to which plaintiff claimed that the Commission favored its legal position. The Court of Appeals for the Second Circuit denied disclosure, "because the views of individual members of the Commission's staff are not legally germane, either individually or collectively to the actual making final orders. They could be grossly misleading, when applied to the ultimate findings and conclusions reached by the FCC as a whole, because at best theyare only advisory in character. International Paper Co. v. Federal Power Commission, 438 F.2d 1349, 1358 (2d Cir.) cert denied, 404 U.S. 827 (1971)(emphasis added).

Here, as in the cited cases, an internal document reflecting a staff person's proposals, analyses, recommendations, and

conclusions have no value on the issue before me. The fact is that MSHA issued Citation No. 2831514 alleging a violation and has not retreated from its contention.

I have considered the statutory criteria set forth in Section 110(i) of the Act for determining the appropriate penalty for this violation. Under the facts and circumstances stipulated by the parties I find that the $20 penalty proposed by the Secretary is the appropriate penalty for the violation.

This decision was decided, written and issued on the stipulated facts submitted for decision by the parties. Before issuing the Decision I served a copy of my proposed decision on the parties on April 19, 1989, with a notice of intention to issue the decision unless the parties within ten days showed good cause in writing why the Decision should not be issued. The only response has been a motion filed April 26, 1989 to approve a settlement in the amount of $20.00. Neither the proposed settlement nor any other writing filed by the parties shows any good reason or cause why the decision should not be issued. Therefore the decision is issued and the proposed settlement disapproved.

ORDER

Citation No. 2831514 is affirmed. Falkirk Mining Company is directed to pay a civil penalty of $20.00 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge

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MAY 8 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 89-13-M A.C. No. 44-02965-05517
v.	:	Louisa Plant
A. H. SMITH STONE COMPANY, Respondent	:	

DECISION

Appearances: Jack E. Strausman, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Ms. Lisa Wolff, Director of Safety/Governmental Affairs, A. H. Smith Stone Co., for Respondent.

Before: Judge Fauver

This case was brought by the Secretary of Labor for a civil penalty for an alleged violation of a safety standard, under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

At the conclusion of the hearing, oral arguments were heard and a bench decision was issued. This decision confirms the bench decision and assesses a civil penalty for the violation found.

A preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion that follows.

FINDINGS OF FACT

1. The parties have stipulated that Respondent's Louisa Plant is subject to the jurisdiction of the Act, and that the judge has jurisdiction over this proceeding.

2. On July 19, 1988, Respondent operated a Terex front-end loader without an operable backup alarm. This equipment is a large, heavy duty vehicle that has an obstructed view to the rear.

3. The vehicle was equipped with a backup alarm which had been defective for about two weeks before July 19, 1988.

4. Federal Mine Inspector Charles E. Rines observed the defective equipment on July 19, 1988, and, at 10:15 a.m., issued a citation charging a violation of 30 C.F.R. § 56.9087. The inspector delivered the citation to Respondent's supervisor, Clifford Ketts. The citation gave Respondent until 7:00 a.m. the next day to abate the cited condition.

5. The following morning, after 7:00 a.m., the inspector inspected the loader and found that the backup alarm was not repaired. He waited for Clifford Ketts to arrive, and about 9:00 a.m., he told Mr. Ketts that the backup alarm had not been repaired, and that it must be repaired by 7:00 a.m. the next day. Mr. Ketts said he would take care of it.

6. The next morning, July 21, the inspector observed that the backup alarm had still not been repaired. At 9:30 a.m., he issued a § 104(b) order forbidding use of the loader until the violation was abated. The inspector remained at the Louisa Plant the rest of the day.

7. He returned to the plant the next morning, Friday, July 22, 1988, to check on another matter involving a plant-wide withdrawal order that had been issued forbidding all production operations until abatement of other cited conditions. While the inspector was at the plant, Mr. Ketts told him a mechanic was on the way from Richmond, Virginia, to repair the backup alarm. By the time the inspector left the plant, several hours later, the mechanic had still not arrived although the Louisa Plant is only about 50 miles from Richmond.

8. The following Monday, July 25, 1988, the inspector inspected the backup alarm and found that it had been repaired. He therefore issued a termination of the citation and its related order.

DISCUSSION WITH FURTHER FINDINGS

The Terex loader was operated without an operable backup alarm for two weeks before Citation 3045446 was issued. The violation was easy to detect and should have been corrected long before the inspector inspected the equipment on July 19, 1988. I find that the facts support the inspector's finding of high negligence.

The loader was operated at the loading area where customers were on foot. Operating the loader without an operable backup alarm presented a high risk of serious injury, including a fatality. The facts thus support the inspector's finding of a significant and substantial violation.

Respondent did not make a reasonable effort to abate the violation in the time allowed by the citation. The inspector was therefore justified in issuing a § 104(b) order.

Government Exhibits 4 and 5 are compliance printouts for two of Respondent's mining operations for 24 months before the citation. These show that, of a total of $3,732 in assessed civil penalties, Respondent is in arrears for $489 for eight penalties 1/ that are not in litigation. Failure to pay final assessments (uncontested or no longer in litigation) is part of an operator's compliance history, one of the criteria to be considered is assessing a civil penalty under § 110(i) of the Act. Respondent has submitted a letter stating that it is "missing paperwork" regarding these assessments, and has requested duplicate copies from MSHA's Civil Penalty Compliance Office. If further states it will work to close these matters "as soon as possible." I will credit this representation of prompt future disposition of the outstanding assessments.

In addition to the above final civil penalties, the Solicitor's letter of April 26, 1989, states that other civil penalties in the printouts are also final and overdue. These additional penalties are about $435.

1/ The delinquent penalties, identified in the exhibits as "DLTR" (for Demand Letter), are as follows:

Citation	Civil Penalty
2852078	$ 20.00
2852601	50.00
2852602	50.00
2852605	105.00
2852606	105.00
2852607	119.00
2852608	20.00
2852609	20.00
	$489.00

The record thus indicates that, of $3,732 in civil penalties shown on the printouts, penalties of about $925 are overdue and unpaid.

At the hearing Respondent introduced a letter, "To Whom It May Concern," from two partners, stating that A. H. Smith Associates, Louisa, Virginia, has been "in net profit (loss) position" for fiscal years 1987 and 1988 and that payment of a $395 penalty will "adversely affect the company." I find that this statement, without the opportunity for the Secretary to cross examine the authors, and without a fuller showing of Respondent's financial condition, e.g., net worth, unincumbered assets, revenues, equity, and tax returns, fails to establish a financial hardship defense. Section 110(i) is concerned with the impact of a civil penalty "on the operator's ability to continue in business." Respondent's letter is insufficient to address this issue.

Respondent, as a mining enterprise, is a large operator.

Considering all of the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of $395 is appropriate for the violation found herein.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Respondent violated 30 C.F.R. § 56.9087 as charged in Citation 3045446.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation 3045446 is AFFIRMED.

2. Order 3045450 is AFFIRMED.

3. Respondent shall pay the above assessed civil penalty of $395 within 30 days of this Decision.

William Fauver
Administrative Law Judge

Distribution:

Jack E. Strausman, Esq.,Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Ms. Lisa Wolff, Director of Safety/Governmental Affairs, A. H. Smith Stone Co., 9101 Railroad Avenue, Branchville, MD 20740 (Certified Mail)

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

MAY 8 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-337-M A.C. No. 05-03295-05514
v.	:	Wolf Pit No. 1 and Plant
COLORADO SILICA SAND, INC., Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor U.S. Department of Labor, Denver, Colorado for the Petitioner;
Mr. Lennart T. Erickson II, Vice-President, Colorado Silica Sand, Inc., Colorado Springs, Colorado, pro se.

Before: Judge Morris

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

After notice to the parties a hearing on the merits was held in Denver, Colorado on April 25, 1989.

The parties waived their right to file post-trial briefs, submitted their cases on oral arguments, and further waived receipt of the transcript and requested an expedited decision.

Summary of the Case

Citation No. 3065071 charges respondent with violating 30 C.F.R. § 56.14006, which provides as follows:

> § 56.14006 Placement of guards during during machinery operation.
>
> Except when testing the machinery, guards shall be securely in place while machinery is being operated.

Stipulation

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

1. The operator has 13 miners working two shifts; the company is a medium-sized operator.

2. The imposition of a civil penalty will not impair the company's ability to continue in business.

3. Abatement was rapidly accomplished in this case.

Secretary's Evidence

ARNOLD B. KERBER, an MSHA inspector, is a person experienced in mining and mine safety. He has been an inspector for approximately 15 years.

The witness is familiar with the Wolf Pit No. 1 mine located in El Paso County, Colorado. Both the plant and pit are under MSHA's jurisdiction.

The company uses front-end loaders to remove silica sand from a hillside deposit. From there it is trucked to the plant site where it is eventually fed into hoppers.

On June 21, 1988, the inspector met Jack Wright, the superintendent of maintenance, at the work site. They toured the plant looking for any unsafe conditions.

At the plant the silica sand is conveyed by a brown cross-over belt conveyor. The conveyor transfers the sand between storage bins; it is transported from the north side to the south side of the plant. The belt conveyor is 36 feet long; the belt itself is 24 inches wide.

The conveyor runs continually except when it is shut down.

On June 21, 1988, the inspector observed the guard at the head pulley of the conveyor lying on the ground. The conveyor is usually completely covered. However, on this occasion there was no guard at the head pulley where the belt meets the top roller. The exposed area was 18 inches by 12 inches.

The opening itself was 48 inches above the ground and if a person fell he could become entangled with the head pulley. If this occurred it would be possible to suffer the loss of an arm. In addition, there was quite a bit of silica sand spillage in the area; sand of this type can be slippery and walking in it can be difficult.

On the day of the inspection the belt was not being tested; further, company representative Wright did not claim it was being tested.

There was a regular track where workers travel near this area and the missing guard was in plain view.

On the day the citation was issued the conveyor had been operating and there was material on the belt.

The inspector learned that three employees had come in at 5:00 a.m. and the balance of the employees had come in at about 8:00 a.m. when the regular shift begins. The citation was written at approximately 11:00 a.m. It was terminated the next day when the inspector returned to the site. At that time the guard was back in place.

During the balance of the day the inspector reviewed the records that MSHA requires the company to keep. On June 22, 1988, the following day, he tested employees for silica as well as noise exposure. On June 23 he was there for a short time for a close-out conference.

When conducting the inspection it was windy. Dust and sand reduced visibility in the area.

The guards of the conveyor themselves were corrugated metal and usually connected to the conveyor. (See Exhibits R-1, R-2, R-3, R-5). The inspector did not learn who had removed the guard.

In cross-examination the inspector indicated he has received good cooperation from the company. He had also inspected the company in March 1987. He had previously asked the company to move a guard about 6 inches forward; he had also issued a citation for that condition. However, there had been no conversation about the particular head pulley that resulted in the instant citation.

The company was operating the plant because the inspector would not have written the citation as S & S unless the plant was operating. A good portion of the inspector's activities concentrate on pointing out exposed pinch points to the company representatives.

Operator's Evidence

LENNART T. ERICKSON, II is a Vice-President of the company in charge of finance and administration.

The particular silica mined by the company is harder and rounder than a river run. The company's silica, a dune deposit, runs about 95 percent silica sand; a river run is approximately 65 percent.

Mr. Erickson was not present when Inspector Kerber issued his citation. However, his duties require that he investigate all MSHA citations. In connection with this citation he talked to Dale Correll (plant superintendent), Jim Wright (maintenance supervisor), and Bill Hoss (mechanic).

These three men are no longer with the company and they told him that they were to fasten the guard covers. This could only be accomplished by a tack weld. Mr. Erickson also learned from investigation that the previous night the conveyor guard had blown off. The morning of the investigation it was to be replaced and welded.

In addition, the conveyor was not in operation.

The company tries to follow MSHA's rules and regulations.

On cross-examination, the witness agreed that it had been some months before, at a prior inspection, when they had been told by the inspector to move a guard forward.

Company employee Correll told Mr. Erickson the plant was not operating at the time of the inspection nor had the conveyor been running that day. The plant can be in operation without the conveyor operating. The conveyor runs about 50 percent of the time.

The normal shift of the company starts about 8:00 a.m.

The company's position that the conveyor was not in operation is set forth in the company's letter dated December 15, 1988, which is in its answer filed in the case.

Discussion

A credibility issue arises here as to whether the plant was operating at the time of the inspection. On this issue I credit the inspector's testimony: the citation was issued about 11:00 a.m. when the full work force of thirteen workers was on the site. I reject the operator's contrary evidence which is admittedly hearsay with only minimal foundation.

The regulation involved here requires that a guard shall be securely in place "while machinery is being operated." The credible evidence establishes that the conveyor at the head pulley was not in place. In fact, it was lying on the ground. The inspector indicated that the conveyor was not being tested and the company representative accompanying him did not claim that any such test was taking place.

The credible evidence in the case establishes that the conveyor was neither conveying material nor moving at the time the citation was issued. However, I infer the conveyor was nevertheless "being operated" as that term is used in § 56.14006. It is apparent that the conveyor supplies silica to the plant about 50 percent of the time. Since the plant itself was operating I infer the conveyor was also being operated. To like effect, see Freeport Koolin Company, 2 FMSHRC 233, 250, 251 (1980) (Cook, J), and The Hanna Mining Company, 2 FMSHRC 1446, 1453 (1980) (Broderick, J).

On the uncontroverted credible evidence it appears that a violation of § 56.14006 existed.

At best, the company's defense is that the wind had blown the guard off of the conveyor and that the company had three hours to find and remedy this condition. The company's defense cannot prevail. The fact that it had only three hours to find and remedy the defective condition relates to the company's negligence and not as to whether a violation occurred. Negligence is a factor to be considered in the imposition of a civil penalty.

Since the uncontroverted evidence shows the guard was not in place and the conveyor was in operation, a violation occurred and Citation No. 3065071 should be affirmed.

Civil Penalty

The statutory criteria to assess civil penalties is contained in section 110(i) of the Act.

The evidence shows that for the two years ending June 20, 1988, the operator was assessed for 29 violations of safety regulations. (Exhibit P-1).

The stipulation of the parties indicates the company is a medium-sized operator. The company's negligence must be considered low in that it had a relatively short period of time to discover and correct this violative condition. The stipulation indicates that payment of a penalty will not cause the operator to discontinue its business. The gravity of the violation is high since a miner could be severely injured if he became entangled with the exposed pinch point. The operator is entitled to its statutory credit for good faith since it rapidly abated the violative condition.

On balance, I deem that a civil penalty of $40 is appropriate.

ORDER

Based on the foregoing finding of fact and conclusions of law I hereby enter the following order:

Citation No. 3065071 is affirmed and a penalty of $40 is assessed.

John J. Morris
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Mr. Lennart T. Erickson II, Vice-President, Finance & Administration, Colorado Silica Sand, Inc., 3250 Drennan Industrial Loop, P.O. Box 15615, Colorado Springs, CO 80935 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 9 1989

OZARK-MAHONING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 88-128-RM
	:	Citation No. 3260151; 3/4/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Annabel Lee Mine
	:	Mine ID 11-02780
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 88-108-M
	:	A.C. No. 11-02780-05507
v.	:	
	:	Annabel Lee Mine
OZARK-MAHONING COMPANY, Respondent	:	

DECISION
AND
ORDER OF DISMISSAL

Appearances: Victor Evans, General Manager, Ozark-Mahoning Company, Rosiclare, Indiana, for the Contestant/Respondent;
Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a proposal for assessment of civil penalty initiated by the petitioner (MSHA) against the Ozark-Mahoning Company (hereinafter 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 $74 for an alleged violation of mandatory safety standard 30 C.F.R. § 57.12015, (Docket No. LAKE 88-108-M). Docket No. LAKE 88-128-RM, concerns a separate

contest filed by the Ozark-Mahoning Company challenging the validity of the citation.

A hearing was convened in Evansville, Indiana, and the parties appeared and participated fully therein. The parties waived the filing of written posthearing arguments. However, they were afforded an opportunity to present oral arguments at the conclusion of all testimony, and I have considered the arguments in the course of my adjudication of this matter.

Issues

The issues presented in these proceedings are (1) whether the conditions or practices cited by the inspector constituted a violation of the cited mandatory safety standard, (2) the appropriate civil penalty assessment to be made for the violation taking into account the civil penalty assessment criteria found in section 110(i) of the Act, and (3) whether the violation was "significant and substantial." Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

Stipulations

The parties stipulated to the following (Joint exhibit 1):

1. The mine involved in this case is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. The administrative law judge assigned to this case has jurisdiction in this matter.

3. The MSHA inspector who issued the citation involved in this case was a duly authorized representative of the Secretary of Labor at all times relevant to this matter.

4. From March 4, 1986 through March 4, 1988, respondent committed three (3) MSHA violations at its Annabel Lee Mine.

5. During the calendar year preceding the issuance of the citation involved in this case the operator accumulated a total of 55,837 hours of work at its Annabel Lee Mine.

6. During the calendar year preceding the issuance of the Citation involved in this case the Ozark-Mahoning Company accumulated a total of 232,648 hours of work at all the mines under its control.

7. The Ozark-Mahoning Company demonstrated its good faith by abating the condition involved in the Citation in this case within the time granted by the MSHA inspector.

8. Payment of the penalty assessed for the citation involved in this case will not affect the mine operator's ability to remain in business.

Discussion

The section 104(a) "S&S" Citation No. 3260151, in issue in these proceedings was issued on March 4, 1988, and it cites an alleged violation of mandatory safety standard 30 C.F.R. § 57.12016, and the cited condition or practice states as follows:

> An employee was observed working in the skip under the man cage in the main hoist shaft without de-energizing the power for the hoist and locking the switch out. The hoist operator was sitting at the hoist controls.

Petitioner's Testimony and Evidence

MSHA Inspector Gene Upton, testified as to his experience and training, and he confirmed that he inspected the mine on March 4, 1988, and issued the citation in question (exhibit P-1). Mr. Upton confirmed that he issued the citation after observing work being performed inside the skip bucket located beneath the man cage used to carry men up and down the mine shaft. The bucket is used to transport ore from the mine. Since the hoisting electrical system was energized and not locked out as required by section 57.12016, he issued the violation.

Mr. Upton agreed that the skip bucket was approximately 4 feet high and that it moved up and down the shaft with the man cage. He stated that the individual inside the bucket was performing some metal patch work at the bottom of the skip using welding and acetylene torch equipment, as well as other tools. He considered the work being performed as "mechanical work" within the meaning of the standard. The individual performing the work was being assisted by another individual who was outside the cage, and he was being used to bring supplies to the area where the work was being performed.

Mr. Upton stated that the control booth which contained the controls for operating the hoist and skip was located approximately 200 feet away from the skip and that the hoist operator was at the controls while the work was being performed. Mr. Upton also stated that the main disconnect switch which should have been used to deenergize the hoist was located outside of the control booth approximately 15 to 20 feet away. He found that the operator's hoist control switch located inside the control booth and the main disconnect switch were not deenergized and locked out.

Mr. Upton stated that the failure to deenergize and lock out the hoist and skip presented a hazard in that in the event of any inadvertent movement move of the skip up or down the individual performing the work in the skip could have been "banged around" or suffered burns from the welding torch he was using, or he could have been entangled in the welding cables and hoses. He was also concerned that a mix-up in any signals between the hoist operator in the control room and the person doing the work in the skip may have caused the skip to move up or down since it was still energized, and if this occurred, the individual could fall out of the skip. If he did, it was reasonably likely that he would sustain injuries of a reasonably serious nature. He also believed that it was reasonably likely that in the event of any movement of the skip while the individual was inside performing work, the individual could be injured.

Mr. Upton stated that he based his "significant and substantial" finding on the fact that the individual working inside the skip had to rely on someone other than himself to signal the hoist operator who was in the booth, and in the event of any mixed signals, it was reasonably likely that the hoist would have moved at any time.

Mr. Upton confirmed that he made a negligence finding of "moderate" because the skip operator was at the controls holding the hoist brake, and the respondent knew or should have

known that it was required to use its lock out procedures while the work was being performed inside the skip. He also confirmed that the violation was timely abated within 10 minutes by shutting off and locking out the power switch and hoist controls.

On cross-examination, Mr. Upton confirmed that his mining experience does not include any shaft work or work as a skip operator or attendant. Upon review of the language found in section 57.12016, he stated that he was not familiar with the intent of the standard, and that other than deenergizing and locking out the hoist, he was not aware of any exceptions or "other measures" which would allow mechanical work to be performed without locking out the equipment. He confirmed that the hoist in question was not an "automatic" hoist, and that it required someone to manually and physically be present to operate and move it.

Mr. Upton stated that he has inspected similar hoists in the past, and that such an inspection would include an examination of the drums, wire cables and ropes, head shafts and cables, upper and lower lines, the "dead man" braking switch, and all hoist controls. He confirmed that during the course of testing the hoist cables, wire ropes, and drums, he uses a guage which requires him to touch the cables and ropes, and that the drums are turning. He confirmed that during these tests, the hoist is not deenergized or locked out because the hoist must be moved to facilitate the testing. However, someone is at the hoist controls while this is being done. Mr. Upton also confirmed that while inspecting the hoist shaft cables and guides, he needs to ride the skip and it is not deenergized or locked out.

Mr. Upton confirmed that the hoist in question was equipped with two sets of brakes, a "dead-man" braking switch and device which is activated by foot pressure inside the hoist. The hoist can be energized if foot pressure is applied to this device, but as soon as the pressure is taken off, the hoist will deenergize.

Mr. Upton also confirmed that the hoisting system included an emergency stop switch and a brake safety lever. He agreed that in the event all of the aforementioned safety features provided for the hoisting system were activated and in use, if someone were to throw the main switch to the "on" position, the hoist should not move. He conceded that it was unlikely and unreasonable to expect that the hoist would move given the use of these devices.

Mr. Upton agreed that the skip was raised above the level of the shaft while the work was being performed, and that the individual performing the work inside the skip was not required to wear a safety belt or line. He agreed that the skip landing was provided with hand rails and that the hoistman who was at the skip controls had a fairly clear visible view of the individual performing the work inside the skip. He also confirmed that pursuant to the hoisting procedures and MSHA's safety standards the individual at the hoist controls cannot move the hoist without an appropriate signal.

Mr. Upton stated that it was his opinion that the failure to deenergize and lock out the hoist was inadvertent, and he asserted that when he spoke to the hoistman in the control booth the hoistman advised him that he was not comfortable being at the hoist controls without the main power switch deenergized and locked out. Mr. Upton also confirmed that the hoistman was not supervising the work taking place in the skip, and that the decision not to deenergize and lock it out was apparently made by the individual supervising the work.

Respondent's Testimony and Evidence

Gary Austin respondent's maintenance supervisor, testified that he has worked for the respondent for 20 years, and that he is responsible for all of the mechanical maintenance work done on the hoist and skip. He confirmed that he has moved and re-installed the hoist on at least two occasions. He stated that the hoist is equipped with two brakes capable of holding the hoist under a full load and under full power. He also stated that the hoist is equipped with a dead man's switch which is activated by foot pressure on a button. This switch requires that the power be on in order to operate, and when the foot pressure is released, the brakes are automatically set. The hoist system also has a safety stop switch, and a regulator to control the air supplied braking systems.

Mr. Austin confirmed that he was in charge of the work being performed in the skip, and that the individual performing the work was installing a water seal on the bottom of the skip. He stated that this individual had full control of the work and the skip through the established signaling system, and that he was in the view of the hoist control operator.

Mr. Austin stated that the hoist was not locked out because the hoist and skip needs to be moved during the course of any mechanical work, particularly when welding equipment and acetylene hoses are used. This movement is necessary so as to prevent the acetylene hoses from being caught, and to

provide a safe distance between the acetylene tanks and the individual performing the work. Requiring the hoist power to be locked out under these circumstances would be impractical, particularly when the individual doing the work is within the view of the hoist operator and proper signalling measures are being used.

Mr. Austin stated that the brake handle purportedly being held by the hoistman was in fact a small lever approximately 5 to 6 inches long which was engaged and locked out by means of a notch on the lever. The lever was located on the hoist operator's control panel, and he was not required to physically hold any brake handle for the approximate 30 minutes it took to complete the work on the skip.

On cross-examination, Mr. Austin stated that the respondent does have equipment lock out procedures in effect but that it was his decision not to lock out the hoist in question because he did not believe it was necessary. He pointed out that mandatory safety standard section 57.14029, which requires the blocking of machinery to prevent movement and the turning off of the power before any work is performed, provides an exception where machinery motion is necessary to make adjustments.

Mr. Austin confirmed that the hoisting system in question was not an automatic system which can be turned on and off automatically and inadvertently by someone out of sight of the individual performing any work on the hoist.

Mr. Austin confirmed that he had the only hoist lock out key in his possession on the day in question, and in the event of any emergency underground, he would not want to be delayed by going to the main switch to turn the power back on. Although another hoist was available, it was diesel powered and slow, and the hoist in question would be the quickest way of travelling down the 1,000 foot shaft in the event of an emergency.

Mr. Austin confirmed that at the time the work was being performed on the skip, the hoistman was at the controls and had a clear view of the individual doing the work. The hoist had a voice box and bell signalling device for signalling the hoistman, and the law prohibits the hoistman from starting or moving the hoist unless he receives a signal to do so by the person doing the work.

The parties waived the filing of written posthearing briefs, but were afforded an opportunity to present the following oral arguments in support of their respective positions.

Petitioner's Argument

Petitioner's counsel asserted that there is sufficient evidence which establishes that the work being performed on the electrically powered hoist was in fact mechanical work. He argued that the evidence clearly establishes that the appropriate lock out procedures were not followed while this work was being done, and that the hoist was energized and that the power switch was not shut off and locked out.

Counsel asserted further that the inspector believed that the "other measures" provision referred to in the cited section 57.12016, did not apply in this case, and that the hazard presented concerned the possibility of a misunderstanding during the exchange of signals between the individual doing the work and the hoistman at the controls, and that in the event of such a misunderstanding, the individual doing the work would be exposed to the additional hazards testified to by the inspector.

Respondent's Argument

Respondent's representative argued that its evidence has established that the electrically powered hoisting system was provided with two braking systems consisting of a dead man's switch inside the hoist which automatically sets the brake when no one is in the hoist and is not applying any foot pressure to the activating switch, and an emergency stop switch and brake safety lever located in the control room which was locked out. He also pointed out that with all of these systems engaged and operational at the time the work was being performed on the hoist, and with the main power switch in the "off position," even if the hoistman were to leave the control booth for any reason, anyone deliberately or inadvertently turning the power on would not cause the hoist to move.

Respondent's representative argued further that the second sentence of section 57.12016, contains an alternative, and an exception, to the requirement that power switches be locked out, and that this alternative does not require any lock out of the hoist power switch as long as other measures are taken to prevent the hoist from being energized without the knowledge of the individuals working on it.

Respondent's representative asserted that the unrebutted evidence and testimony adduced in this case establishes that the individual performing the work on the hoist skip with the assistance of a helper was within visual sight of the hoist control operator and that appropriate signals were available and in use, and the hoist operator was prohibited by law from moving the hoist unless given an appropriate signal from the individual performing the work. Since the individual performing the work was in complete control of the situation, and given the existence of the aforementioned hoist braking and stopping devices which were clearly in place and operational, and which prevented any inadvertent movement of the hoist by someone engaging the hoist power switch without the knowledge of the individual performing the work in the skip, respondent's representative concluded that the other measures referred to in section 57.12016 were clearly present, and that under these circumstances, a violation has not been established.

Respondent's representative also pointed out that Inspector Upton conceded that when he was required to inspect the hoist, skip, and shaft, the hoist was not locked out. Respondent also pointed out that pursuant to mandatory standard section 57.14029, repairs or maintenance on machinery may be performed without turning the power off and blocking the machinery against movement as long as movement is necessary to make adjustments. In the instant case, respondent's representative maintained that some movement of the hoist was required in order to facilitate the work being performed.

Findings and Conclusions

Fact of Violation

Section 104(a) "S&S" Citation No. 3260151, 30 C.F.R. § 57.12016

The respondent is charged with a violation of section 57.12016, for failing to deenergize the power and locking out the power switch for the man cage skip in question while work was being performed on the equipment. The cited mandatory safety standard in question provides as follows:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the

power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

On the basis of the unrebutted credible testimony of the inspector, I conclude and find that the hoist in question was an electrically powered piece of equipment, that the skip bucket was an integral part of the hoist, and that the work being performed inside the bucket by the employee in question was mechanical work within the intent and meaning of the cited standard. I also conclude and find that the conditions cited by the inspector fall within the scope of the cited standard.

The failure by a mine operator to deenergize electrically powered equipment and to lock out power switches before any mechanical work is done on the equipment has been consistently held to constitute a violation of mandatory safety standard 30 C.F.R. § 57.12016, and the identical standard section 56.12016, applicable to surface metal and nonmetal mines. See: MSHA v. Adams Stone Corporation, 7 FMSHRC 692, 706-707, (May 1985); MSHA v. FMC Corporation, 4 FMSHRC 1818, 1821-22 (October 1982), petition for Commission review denied, November 16, 1982; MSHA v. Greenville Quarries, Incorporated, 9 FMSHRC 1390, 1428 (August 1987).

In the FMC Corporation case, supra, the operator argued that the power switch for the equipment being worked on was deenergized by the worker by using an "off" switch which was always in his view while he worked 4-1/2 feet away. Judge Morris rejected this defense, and found that simply turning the switch to the "off" position did not totally deenergize the unit being worked on and that the failure to deenergize the equipment established a violation.

In North American Sand and Gravel Company, 2 FMSHRC 2017 (July 1980), the judge affirmed a violation of section 56.12016, after finding that a mine operator simply removed fuses when electrical equipment was down for repairs, and had no lock-out procedure to insure that anyone working on the equipment would not be injured by someone inadvertently starting the equipment. Likewise, in Brown Brothers Sand Company, 3 FMSHRC 734 (March 1981), a violation was affirmed where it was found that an employee working on a pump deenergized the equipment by opening the power "knife" switch, but failed to lock out the switch to prevent it from being energized without his knowledge.

In Price Construction Company, 7 FMSHRC 661 (May 1985), a welder with 25 years experience lost a leg when he was injured by the rollers of a crusher he was working on. The accident occurred when the plant foreman misunderstood the welder's instructions and engaged a switch which had not been locked out and simply left in the "on" position. The plant superintendent admitted that he did not require padlocks to lock out roller switches, and the existing "lock-out" procedures were accomplished by merely turning off the generator and cutting the switches. The judge found a violation of section 56.12-16, and found that the company safety director admitted that he knew that a padlock had to be used on the roller switch to conform with the required lock-out procedures, and that it is a generally understood practice in the mining industry that a "lock-out" requires the use of a padlock.

In my view, the primary intent of section 57.12016 is to insure that all electrically powered equipment is deenergized before it is worked on. This is accomplished by deenergizing, or shutting down, any main power switch that supplies power to the equipment. A secondary intent of the standard is to insure that the equipment is not inadvertently energized while the work is being performed by someone turning the power switch back on, and this is accomplished by requiring the physical locking out of the switch by an appropriate lockout device. In the case at hand, the inspector alluded to two hoist power switches, one of which was the main power switch located outside of the hoist operator's control room approximately 15 to 20 feet away, and a second power switch located inside the room on the hoist control panel. Both switches were neither deenergized or locked out.

Although I find some merit in the respondent's argument that the language found in the second sentence of section 57.12016, provides for an alternative method of insuring against any inadvertent energizing of the equipment while it is being worked on, short of locking out the power switch, I believe that this language only comes into play once the requirements found in the first sentence for completely deenergizing the equipment is complied with, and that any alternative "other measures" for insuring against the inadvertent energizing of the equipment while it is being worked on may be considered in mitigation of any hazard, but may not serve as a defense to the requirement found in the first sentence that all such equipment be initially deenergized.

The respondent argues that it has not violated section 57.12016, because it complied with the second sentence of the standard which it views an exception to the requirement that

power switches be locked out. This defense is rejected. The clear and unambiguous requirements of the first sentence of section 57.12016, mandates that electrically powered equipment be deenergized before any mechanical work is done on the equipment. I find no exceptions in the first sentence, and the inspector's credible and unrebutted testimony establishes that the hoist main power disconnect switch, which was located outside of the control room, and some 15 to 20 feet away from where the hoistman was located inside the booth, as well as a second power switch inside the room, were not deenergized or locked out during the time work was being performed on the hoist skip bucket. Under these circumstances, I conclude and find that the failure to deenergize and lock out these switches constitutes a violation of section 56.12016, and the citation IS AFFIRMED.

The respondent's defense that mandatory safety standard 30 C.F.R. § 57.14029, permits maintenance work to be performed without turning of the power and blocking machinery against movement is rejected. The respondent is not charged with a violation of section 57.14029, and that standard makes no mentioned of electrically powered equipment, the language found in the cited section 57.12016.

The respondent's assertion that Inspector Upton conceded that he did not deenergize or lock out the power when he conducts inspections of hoist equipment, is rejected as a defense to the citation. While this may be true, I find a distinction between an inspection of a hoist that necessarily requires movement of the equipment in order to determine whether it is functioning properly, and the welding work being performed in this case. Notwithstanding the respondent's practicality arguments to the contrary, I am not convinced that the welding work being performed on the hoist, which took approximately 30 minutes to complete, required the movement of the hoist while the work was being performed. Further, insofar as the respondent's argument raises an inference of some form of estoppel, it is rejected. See: Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585 (10th Cir. 1984), affirming the Commission's decision in Secretary of Labor v. Emery Mining Corporation, 5 FMSHRC 1400 (August 1983).

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly

designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

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

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Maintenance Supervisor Gary Austin's credible and unrebutted testimony reflects that the hoist in question was equipped with several operational braking devices and safety mechanisms which precluded any inadvertent movement of the hoist, and that the hoist control operator was physically holding the brakes in place by hand. In fact, the brakes were locked out by a lever at the control panel where the hoist operator was stationed. Inspector Upton agreed that with all of these braking devices in use, it was unlikely and unreasonable to conclude that the hoist would move, even if the power switch were thrown to the "on" position. The hoist was not controlled "automatically," and someone would have to manual activate the controls to cause it to move (Tr. 23).

Although Mr. Upton believed that the hazard presented by the violation involved a possible misunderstanding in signals between the hoist operator and the individual doing the work inside the bucket, Mr. Austin's unrebutted testimony reflects that the hoist was equipped with a voice box and bell signalling devices for signalling the hoistman, and that the hoistman is prohibited from starting or moving the hoist without receiving an appropriate signal. Inspector Upton confirmed that this was the case.

Mr. Austin, an experienced maintenance supervisor with 20 years of experience working for the respondent, including hoist removal and replacement work, testified that the individual doing the work inside the hoist bucket had full control of the work he was performing through the established signaling system. Although Inspector Upton believed that the individual doing the work had to rely on a helper who was bringing him supplies to signal the hoistman, the evidence shows that the helper was within 5 feet of the work which was being performed, and Inspector Upton confirmed that the hoistman had a fairly clear visual view of the hoist bucket at the time the work was being performed (Tr. 27-28). Neither the individual doing the work or his helper, or the hoistman, testified in this case, and I find no evidence or testimony to support any conclusion that the helper was in fact giving any signals to the hoistman, or that any of these individuals were ignorant of the appropriate signals or use of the signaling devices. In short, I find no credible or probative evidence to support any conclusion that there was a potential for any misunderstanding in the signals or signaling procedures which may have been in effect or in use at the time of the inspection. Further, as confirmed by the inspector, it was unlikely and unreasonable to expect that the hoist would move even if the power switch which was not locked out were thrown to the "on" position. Under all of these circumstances, I cannot

conclude that the violation was significant and substantial, and the inspector's finding in this regard is rejected and vacated.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

Based on the stipulations by the parties, I conclude and find that the respondent is a medium-sized mine operator, and that the particular mine in question was a small-to-medium size operation. I also conclude and find that the payment of the civil penalty which has been assessed for the violation in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Based on the stipulations by the parties, which reflects that three violations were committed at the mine during the period March 4, 1986 through March 4, 1988, I conclude and find that the respondent has a good history of prior compliance at this mine and this is reflected in the civil penalty assessed for the violation in question.

Good Faith Compliance

The parties stipulated that the respondent demonstrated good faith by abating the cited condition within the time fixed by the inspector, and the record shows that abatement was achieved within 10 minutes by shutting off the power switch and locking it out. I conclude and find that the respondent demonstrated rapid compliance, and I have taken this into account in the civil penalty assessment for the violation in question.

Negligence

The inspector made a negligence finding of "moderate," and he confirmed that the failure to deenergize and lock out the hoist was inadvertent. I conclude and find that the violation resulted from the respondent's failure to take ordinary care, and the inspector's "moderate" negligence finding is affirmed.

Gravity

Notwithstanding my finding and conclusion that the violation was not significant and substantial, I find that the failure to deenergize and lock out the power switches in question was serious, particularly with respect to the main switch

which was located outside of, and approximately 15 to 20 feet from the hoist operator's control room. While it may be true that the movement of the hoist was unlikely, even if the switch were "on," since it was not within the immediate control of the hoist operator, anyone could have had access to this switch, and it posed a potential, albeit not likely hazard.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $25 is reasonable and appropriate for the violation in question.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $25 in satisfaction of the section 104(a) Citation No. 3260151, March 4, 1988, for a violation of mandatory safety standard 30 C.F.R. § 57.12016, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.

In view of the disposition of the civil penalty case, IT IS FURTHER ORDERED that the respondent's contest filed in Docket No. LAKE 88-128-RM, IS DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Victor Evans, General Manager, Ozark-Mahoning Company, P.O. Box 57, Rosiclare, IL 62982 (Certified Mail)

Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 9 1989

ROGER L. STILLION, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 88-91-D
	:	MORG CD 88-3
QUARTO MINING COMPANY, Respondent	:	Powhattan No. 4 Mine

SUPPLEMENTAL DECISION

Appearances: Thomas M. Myers, Esq., United Mine Workers of America, Shadyside, OH, for Complainant; Michael Peelish, Esq., Consolidation Coal Company, Pittsburgh, PA for the Respondent;

Before: Judge Fauver

A decision on liability was entered on April 6, 1989, holding that Respondent violated § 103 (f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., by refusing to pay Complainant for his time spent accompanying a federal mine inspector on October 6, 7, and 8, 1987. The decision provided that the parties should meet in an effort to stipulate the amount of back pay, interest and litigation expenses due the Complainant.

The parties have filed a stipulation of back pay and a reasonable attorney fee.

ORDER

Based upon the stipulation, it is ORDERED that, within 15 days of this Decision, Respondent shall pay Complainant a total of $2,375.71, representing back pay and interest of $258.21 and an attorney fee of $2,117.50.

This Supplemental Decision and the Decision dated April 6, 1989, constitute the final decision of the judge in this proceeding.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Thomas M. Myers, Esq., General Counsel, UMWA, District 6, 56000 Dilles Bottom, Shadyside, OH 43947 (Certified Mail)

Michael R. Peelish, Esq., Quarto Mining Company, 1800 Washington Road, Pittsburgh, PA 15241 (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 10 1989

LOCAL UNION 1570, DISTRICT 31, UNITED MINE WORKERS OF AMERICA (UMWA), Complainants	:	COMPENSATION PROCEEDING
	:	Docket No. WEVA 88-227-C
v.	:	Federal No. 2 Mine
EASTERN ASSOCIATED COAL CORPORATION, Respondent	:	

SUPPLEMENTAL DECISION AND ORDER

Appearances: Joyce A. Hanula, Legal Assistant, United Mine Workers of America, Washington, D.C., for the Complainants;
Eugene P. Schmittgens, Jr., Esq., Eastern Associated Coal Corporation, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

On April 6, 1989, I issued a partial decision granting in part, and denying in part, the compensation claims filed by the complainants in this case. The parties were requested to file a stipulation with respect to the amounts of compensation and interest due the idled miners in question, and they have now done so.

ORDER

The respondent IS ORDERED to pay the following miners the noted compensation and interest due in this matter, and payment is to be made within thirty (30) days of the date of this supplemental decision. The April 6, 1989, decision is hereby made final along with this supplemental decision.

14 Right Crew Wages Lost

February 9, 1988 (B Shift)

Employee	Employee No.	Wages Lost	Interest	Total Due
B. Tennant	43036	$64.46	$8.13	$72.59
B. Milush	43186	$60.19	$7.59	$67.78
M. Starkey	43503	$62.84	$7.93	$70.77
W. Hovatter	43618	$64.46	$8.13	$72.59
J. Starr	44408	$62.84	$7.93	$70.77
I. Ammons	44417	$62.84	$7.93	$70.77
J. Teets	44581	$62.84	$7.93	$70.77
B. Powell	45137	$64.46	$8.13	$72.59
D. Barker	45313	$64.46	$8.13	$72.59
R. Varner	45444	$64.46	$8.13	$72.59
J. Price	45449	$62.84	$7.93	$70.77

February 10, 1988 (A Shift)

Employee	Employee No.	Wages Lost	Interest	Total Due
D. Efaw	43077	$126.52	$15.96	$142.48
V. Alvarez	43094	$117.98	$14.88	$132.86
J. Moore	44390	$123.28	$15.55	$138.83
R. Yoney	44400	$123.28	$15.55	$138.83

February 10, 1988 (B Shift)

Employee	Employee No.	Wages Lost	Interest	Total Due
B. Milush	43186	$120.38	$15.19	$135.57
I. Ammons	44417	$125.68	$15.86	$141.54
R. Boyce	45089	$120.38	$15.19	$135.57
D. Barker	45313	$128.92	$16.26	$145.18

February 10, 1988 (C Shift)

Employee	Employee No.	Wages Lost	Interest	Total Due
J. Foley	43043	$129.72	$16.37	$146.09
R. Schrader	43177	$129.72	$16.37	$146.09
J. Kanosky	43207	$126.48	$15.96	$142.44
C. Hoover	43218	$126.48	$15.96	$142.44
R. Ribel	43536	$126.48	$15.96	$142.44
W. Smith	43586	$129.72	$16.37	$146.09
S. Hamilton	43808	$126.48	$15.96	$142.44
J. Melton	44115	$121.18	$15.29	$136.47
J. Hawkins	44151	$129.72	$16.37	$146.09

C. Stewart	44264	$126.48	$15.96	$142.44
E. Jackson	43035	$121.18	$15.29	$136.47
D. Barker	45090	$129.72	$16.37	$146.09
J. Wilson	45135	$121.18	$15.29	$136.47
R. Neff	45332	$121.18	$15.29	$136.47
S. Farrah	45518	$121.18	$15.29	$136.47
T. Turek	45538	$121.18	$15.29	$136.47
J. Mathews	44437	$129.72	$16.37	$146.09

George A. Koutras
Administrative Law Judge

Distribution:

Joyce A. Hanula, Legal Assistant, United Mine Workers of America (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
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FALLS CHURCH, VIRGINIA 22041

MAY 11 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. VA 89-11-M A.C. No. 44-03743-05514
v.	:	
KYANITE MINING CORPORATION, Respondent	:	Docket No. VA 89-10-M A.C. No. 44-03743-05513 East Ridge Plant

DECISION

Appearances: Jack S. Strausman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
B. R. Coleman, Vice President, Kyanite Mining Corporation, Dillwyn, Virginia, for the Respondent

Before: Judge Maurer

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, 30 U.S.C. §,801, et seq., (the Act).

Pursuant to notice, a hearing was commenced in Charlottesville, Virginia, on April 20, 1989. At that hearing, prior to the taking of any testimony, the parties proposed a settlement agreement. The petitioner proposed reducing the specially assessed penalty from $7200 to $5000 as a more reasonable penalty for the training violations cited. I note that the 24 violations cited could be thought of as a single training violation with 24 counts. MSHA cited the operator for failing to provide new miner safety training and each of the 24 Orders named an individual employee, and proposed a civil penalty of $300. In the aggregate, this amounted to a proposed civil penalty of $7200. I concur with the Secretary that $5000 is a more reasonable penalty which still satisfies the public interest. The respondent has agreed to pay that amount in full settlement of the cases. I have considered the matter in that light and under the criteria for civil penalties contained in § 110(i) of the Act and I conclude that the proffered settlement is appropriate.

Pursuant to the Rules of Practice before this Commission, this written decision confirms the bench decision I rendered at the hearing, approving the settlement.

WHEREFORE IT IS ORDERED that respondent shall pay the approved civil penalty of $5000 within 30 days of this decision and upon such payment, this proceeding IS DISMISSED.

Roy J. Maurer
Administrative Law Judge

Distribution:

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B. R. Coleman, Vice President-Operations, Kyanite Mining Corporation, P.O. Box 486, Dillwyn, VA 23936 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 12, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 88-178 A. C. No. 15-08333-03525
v.	:	No. 4 Mine
CAMP FORK FUEL COMPANY,	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On March 15, 1989, a Decision Approving Penalty and Order of Dismissal was entered in this case. On March 24, 1989, the Secretary filed a Motion for Reconsideration of the Order of Dismissal on the ground that the penalty had not been paid. In an Order dated April 7, 1989, the Commission vacated the dismissal and remanded this case for further appropriate proceedings.

On April 10, 1989, an order was issued in accordance with the Commission remand directing that within 21 days the parties confer and advise whether a hearing would be necessary. On April 24, 1989, the Solicitor advised as follows:

> The records of the Civil Penalty Processing Unit, Mine Safety and Health Administration, United States Department of Labor (MSHA), establish that the Respondent mailed check number 12087 dated October 9, 1988, to the Department of Labor. This check was in the amount of $927.00.
>
> Attached to this check was a Proposed Assessment form on which the Respondent had indicated that $441.00 of this amount was to be credited to this assessment number and that this $441.00 was for payment of the five uncontested violations in A. C. Number 15-08333-03525. The remaining $486.00 was credited to other civil money penalty assessments for which the Respondent owed payment, as was duly indicated by the Respondent in the transmittal of the check to MSHA.
>
> By letter of April 13, 1989, Linda Cantrell, Camp Fork Fuel Company, transmitted

to the Federal Mine Safety and Health Review Commission a check in the amount of $295.00 for the remaining assessed penalties. She stated that the omission of this amount from the first check was an innocent oversight.

Finally, the Solicitor stated that no hearing was required. The Solicitor's representations are accepted.

ORDER

In light of the foregoing, this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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

Ms. Linda Cantrell, Bookkeeper, Camp Fork Fuel Company, Box C, Elkhorn City, KY 41522 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 15 1989

BLAINE K. DEEL, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. VA 89-12-D
PAROKI ENTERPRISES, INC., Respondent	:	NORT CD 88-12
	:	No. 1 Truck Mine

ORDER OF DISMISSAL

Before: Judge Maurer

The parties have jointly moved to dismiss the captioned case on the grounds that they have reached a mutually agreeable settlement. Under the circumstances herein, permission to withdraw the complaint is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed, with prejudice, as requested by the parties; and the hearing set for May 18, 1989, in Big Stone Gap, Virginia is cancelled.

Roy J. Maurer
Administrative Law Judge

Distribution:

Blaine K. Deel, Route 2, Box 216, Vansant, VA 24656 (Certified Mail)

Ms. Arlene Deel, Paroki Enterprises, Inc., Route 2, Box 71, Haysi, VA 24256 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 16 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-136
Petitioner	:	A.C. No. 15-11155-03532
v.	:	
	:	Amber No. 7 Mine
AMBER COAL COMPANY, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty assessment proposal 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 $8,500 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.200, as noted in a section 104(a) Citation No. 2780320, issued on November 12, 1987. The respondent filed an answer and notice of contest, and a hearing was scheduled in Pikeville, Kentucky, on June 1, 1989. However, the parties have now filed a joint motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a proposed settlement of the case. The respondent has agreed to pay a civil penalty assessment in the amount of $6,000, for the violation in question.

Discussion

In support of the proposed settlement disposition of this case, the parties have submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. They have also 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.

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

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $6,000, in satisfaction of the violation 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:

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

Mr. Roger Kirk, President, Amber Coal Company, Inc., 29501 Mayo Trail, Catlettsburg, KY 41129 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 17 1989

STENSON BEGAY, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. CENT 88-126-D
	:	DENV CD 88-09
LIGGETT INDUSTRIES, INC., Respondent	:	

DECISION

Appearances: Earl Mettler, Esq., Mettler & LeCuyer, Albuquerque, New Mexico, for the Complainant; Charles L. Fine, Esq., O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, Phoenix, Arizona for the Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

Complainant filed a complaint with the Commission under §105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) [hereinafter referred to as the Act] on June 26, 1988, alleging essentially that because he believed that his health and safety were endangered by inadequate ventilation of welding fumes and noxious gases from his working spaces he was compelled to quit his employment. This is a constructive discharge case. Complainant seeks reinstatement, back pay, attorney fees and any other allowable compensation that the Commission may order.

Pursuant to notice, this case was heard in Gallup, New Mexico on January 26 and 27, 1989. Both parties have filed post-hearing proposed findings of fact and conclusions of law which I have considered along with the entire record in making this decision.

STIPULATIONS

Pursuant to my prehearing order, the parties stipulated to the following:

1. This case arises under § 105(c) of the Federal Mine Safety and Health Act of 1977.

2. Respondent, Liggett Industries, Inc., was a contractor performing work at the McKinley Mine, a coal mine, owned and

operated by Pittsburg & Midway Coal Company, Inc. (P & M Coal), which is located in northwest New Mexico.

3. Respondent's contract consisted (in major part) of the erecting and installing of two 1370W dragline bases. There were two contracts, one involving the bases on the north site, which lasted from May to October 1987; and the other contract involved the bases on the south site which commenced in October and concluded on January 29, 1988 for welders.

4. Complainant's hourly rate was $15.26 per hour and his fringe rate was $1.19, which totals $16.45 per hour. Complainant worked 40 hours per week. If he had not quit on December 10 and had worked each work day through January 29, 1988 (the date the last welder was laid off on the project), he would have worked 280 hours. Multiplied by $16.45, he would have earned gross wages in the amount of $4,606.00.

FINDINGS OF FACT

1. Complainant is a certified welder and has worked in the construction industry as such for approximately 13 years.

2. Respondent, at all times pertinent hereto, was a contractor engaged in equipment erection and maintenance for the mining industry.

3. During 1987, and early 1988, respondent was performing work, constructing two dragline bases or tubs, at the McKinley Mine, operated by the Pittsburg and Midway Coal Company (P & M) near Gallup, New Mexico.

4. Complainant started working for respondent as a welder on May 26, 1987 on the first of the two dragline bases that respondent assembled at the McKinley Mine. The second project, called the south site project, started sometime in October 1987 and the welders started actually welding inside the base during mid-November 1987. On December 10, 1987, after a meeting and confrontation with management, complainant walked off the job and for all intents and purposes quit his employment with respondent. It is this "quitting" that the complainant now alleges was a constructive discharge.

5. Each dragline base, or tub, was round and approximately 60 feet in diameter. It initially was assembled in pie-shaped sections, made-up of compartments. Each compartment is approximately four cubic feet in volume.

6. The compartments were fitted together and subsequently welded together and to the base itself.

7. There were fourteen manholes on the top of the tub, leading from the top of the base into the tub, from which smoke from inside the tub could escape.

8. There were also seams between the pie-shaped sections from which smoke could escape, at least until such time as those seams were welded up. This was one of the last procedures performed.

9. As of December 10, 1987, there were a maximum of eleven welders working on the base and in the tub at any one time. Typically, eight to ten welders were welding inside the base at the same time.

10. There were passages throughout the tub that the welders could move through from one compartment to the next by crawling through holes in the compartment walls.

11. The south site project was located on top of a hill in an area that was usually very windy. However, wind was not relied upon by the respondent to ventilate the base.

12. A canvas tent was positioned over the base. At times the sides of the tent were completely down around the circumference of the base and at other times the tent sides were rolled up or at least partially rolled up.

13. Welding on the south site project began in approximately mid-November of 1987.

14. At various times there were differing amounts and types of ventilation equipment available to clear the smoke and fumes from the working spaces inside the tub. There were at all times pertinent hereto, ten MSA air movers, sometimes referred to as "air horns" available. However, these were not actually used on the south site project ostensibly because they were compressor-powered and the compressor available did not have adequate capacity to operate them. There were also two SuperVac fans available and in use, as well as two or three household fans, by early December of 1987. Most significantly, there were five Dayton blowers available and in use from mid-November until December 9, 1987, when a sixth Dayton blower was acquired and put into service.

15. The two SuperVac fans were sometimes used by positioning one at one end of the base, on top, so that it would bring air into the canopy under the tent and the other at the opposite end of the base, also on top to exhaust air out from under the tent. The SuperVacs were capable of moving 9,200 cubic feet of air per minute. However, in this configuration they were not useful for exhausting smoke from inside the compartments where the welders were actually working, creating smoke and fumes. They were useful for maintaining airflow and removing some smoke from the

base area under the tent. The SuperVacs were also tried with fittings and hoses running down into the compartments in an attempt to pull air out of the compartments (and smoke along with it), but these attempts met with mixed results, at best.

16. The household fans on the top of the base did not contribute in any significant way to ventilation inside the tub.

17. The most significant ventilation of the compartments inside the base was accomplished by the Dayton blowers. They exhausted fumes and smoke from the compartments by suction. The Dayton blowers physically sat on top of the base. Flexible hose was used to bring the fumes and smoke from the compartments to the Dayton blowers, where it was then exhausted into the canopy under the tent on top of the base, and dispersed to some extent there by the SuperVacs and the wind, depending on the configuration of the tent sides.

18. Fresh air from outside the atmosphere that existed underneath the tent was never brought into the base where the welding was going on. Although the evidence is conflicting about the atmosphere inside the tent above the base, I find that it was generally smokey a majority of the time. Therefore, when one of the SuperVacs was put over a manhole to force air into the base, the air that went in was no better than that which was inside the tent.

19. Various kinds of welding was done inside the tub, including innershield or wire welding, stick welding and arc gouging. This welding created extremely smokey conditions inside the tub where the welders were working inside the compartments as well as noxious fumes.

20. Both the Occupational Safety and Health Administration (OSHA) and the American Welding Society have published standards for ventilation for welding in closed spaces. Ms. Cheryl Lucas, testifying as a certified industrial hygienist for the complainant established that when the Dayton blowers were used with a T-coupling by two welders, as they most often were, the flow volume for each welder is reduced by half and does not meet the OSHA standard, even if all the other conditions specified in the standard are met, which they were not. She also opined that the ventilation set-up did not meet the American Welding Society standard.

I am satisfied that the ventilation inside the tub met neither standard despite the failure of Ms. Lucas to consider the effect of some of the smoke escaping via other routes such as rising up though the manholes or seams in the compartments, the other fans in use or the wind. In my opinion, which is also hers, the only significantly effective mode of ventilation inside the tub was the Dayton blowers and that is what her testimony focused on.

I hasten to add here as an aside at this point, however, that whether the ventilation at respondent's project met either of these standards or not is not directly at issue in this case and therefore I am not going to go into great detail in analyzing it. The basic issue in this case remains whether the complainant's work refusal was based upon his reasonable and good faith belief that his working conditions were unsafe and/or unhealthful due to inadequate ventilation. There was no testimony that complainant knew of or was relying on any technical standards as a basis for forming his beliefs. Neither did the respondent compare their ventilation system with any published standards for airflow. The respondent also did not introduce any evidence to the effect that the ventilation in the tub did meet OSHA standards, or any published standards, for that matter. Respondent does insist that the ventilation was adequate based on experience in the industry. I find, however, that it was not.

21. The first complaint the complainant ever made to any supervisor or manager of respondent was made during a regular safety meeting on November 23, 1987. At that time they (the welders) were just about finished with the vertical welding and were going to be starting on the overhead and flat welding. Complainant told General Manager David Jones that the fume exhausters (the Dayton blowers) were not adequate for the overhead welding, and that more ventilation equipment was needed. He related that on these type of welds the distance between the welding and the end of the air hose could be as much as two feet. The point being that at this distance the blowers would not adequately capture the smoke and fumes from the innershield welding.

22. Mr. Jones told complainant he would pass on the complaint to Mike Eslinger, the welding foreman. He also ordered another blower and more fire-proof hose which were ultimately received and put directly into service before complainant left the job.

23. The next incident occurred on November 30, 1987. On that day, Dave Johnson, another welder, made a statement to Mike Eslinger that "it was real smokey" and if the ventilation did not improve he would quit. Eslinger told Johnson to "go ahead, he didn't care". Complainant overheard this exchange and responded to Eslinger's comment by stating that he (Johnson) wasn't going to be the only one leaving. At this juncture, Eslinger said he would take care of it (the ventilation problem).

24. Complainant testified there was one other occasion prior to November 30, 1987 that he had informed Eslinger that he felt it was very smokey inside the tub especially when two or three welders were working in close proximity to each other. Eslinger stated he would tell Jones.

25. Complainant allegedly experienced coughing, productive of mucus and blood and other respiratory symptoms while working on the project, and was seen by a doctor on December 7, 1987, for respiratory complaints. However, I find that there is no evidence to show that his respiratory difficulties, to whatever extent they existed, were caused by working for respondent. Complainant did not return to the doctor between December 7, 1987 and February 15, 1988. At that time, his symptoms had increased in severity even though he had not worked for respondent or anyone else since December 10, 1987. The doctor diagnosed pneumonitis probably secondary to industrial gases. There is no evidentiary basis in the record, however, for finding that "probability" to be grounded in fact. I am not holding that complainant's respiratory difficulties were not caused by the smoke and fumes he encountered on the job. I am stating that there is insufficient evidence to prove-up that proposition. However, I will take administrative notice that working in a smokey environment is not a positive factor for someone who has a respiratory ailment, whatever its etiology.

26. Other welders who worked on the project and testified at the hearing also experienced dizziness and coughing up of mucus and blood which they attributed to welding on the respondent's project. They also believed that the ventilation in the tub was inadequate.

27. On December 9, 1987, General Manager Jones advised Eslinger that he wanted to have a meeting of all personnel the following morning, December 10, 1987, because he had recently noticed that the employees were abusing their lunch break and were leaving work early.

28. At the meeting on the morning of December 10, 1987, ventilation was also discussed. Stenson Begay testified that the following exchange took place (TR. I, pp. 65-67):

> Q. Now, was ventilation discussed at a meeting on December 10th?
>
> A. Yes.
>
> Q. Can you tell me who spoke first at that meeting?
>
> A. Dave Jones.
>
> Q. And what did he say?
>
> A. He said the problem was brought to his attention by Mike Eslinger on the ventilation.
>
> Q. And what else did he say?

A. And he said that this should have been brought to his attention ahead of time, and I interrupted him.

Q. And what did you say?

A. I told him that, "Excuse me, Dave, but this was brought to your attention on November 30th by myself."

* * * * * * *

Q. You're referring to - November 30 or November 23rd?

A. November 23rd.

Q. And did you say anything more in addition to reminding him that you had brought it up before?

A. Yes. I told him that you were making it sound like we're to blame; that he's saying that we didn't bring it to his attention, but we did, I did.

Q. And did Mr. Jones continue to discuss?

A. Yeah. He said as far as he's concerned, he's not breaking any state or federal laws and that his decision was not to purchase additional ventilation equipment and if any of the welders still felt that it was still too smokey, that he would have to discharge welders.

* * * * * * *

Q. When Mr. Jones indicated that he would not buy more ventilation equipment, what kind of equipment did you take that to refer to?

A. The Daytona [sic] blowers which we needed in our work area.

Q. Did he offer to supply other kinds of equipment?

A. He said that he had ordered some six-inch tubing or exhaust duct.

Q. Hose from welder to the --

A. Yeah, the hose. He said he ordered the fireproof ones this time.

Q. And considering what he said about not buying any more machinery or blowers, did you take that to be a definite decision?

A. Yes, the way he said it.

29. Mr. Jones testified that during the discussion of the ventilation problem at the December 10 meeting, he had stated that in his opinion the ventilation in the tub was adequate and there was only approximately two weeks of welding left inside the tub in any event. He told the welders that he would purchase additional hose if requested, but he would not purchase additional blowers because the cost was not justified by the amount of welding left to do in the tub. Furthermore, Mr. Jones also told the welders at this meeting that if the ventilation was still a problem he would lay off employees by seniority under the theory that the fewer welders that there were welding inside the tub, the less smoke there would be. At the end of this presentation he asked if there were questions. There were none.

30. To the point that I have recited it here, supra, I credit the overall substance of both Jones' and Begay's recollection of the important December 10 meeting. It is obviously slanted in each case to their particular point of view, but I find the testimony of both men to be generally credible.

31. The meeting at this point moved on to another subject--the long lunches and leaving early. An employee named Leonard Mike became insubordinate during this later portion of the meeting and quit. He most likely would have been fired for insubordination in any event had he not quit. Respondent has attempted to connect up complainant to Leonard Mike, but I find nothing in common to the two situations except the fact that they both left the job at the same time. There is no indication in the record that complainant was concerned with overstaying his lunch time or leaving early. There is also no evidence that his leaving the job had anything to do with Leonard Mike's outburst and subsequent departure.

32. Complainant was the most vocal of the welders concerning ventilation matters, and management knew he was greatly concerned with the ventilation inside the tub at the south side project.

33. Prior to the December 10 meeting, complainant was planning to go to work that day. He had already checked out tools and equipment from the toolroom in preparation for work. However, at this meeting, management for the first time took the unshakable position that there would be no further ventilation equipment provided. This was communicated to the welders,

including complainant, at that meeting. I therefore find and believe that complainant returned his tools to the toolroom because in his mind he believed the situation to be hopeless at that point. He now knew that no more Dayton blowers would be provided and that if there were further complaints, welders would go. Apparently not necessarily himself, but welders with less seniority on the job.

34. After the meeting, when it became apparent that complainant and two others were leaving the job, Mr. Jones asked them all to first come to his office before they left the premises, which they did.

35. In the office, none of the welders, including complainant, made it expressly clear to Jones why they were leaving. However, in the case of the complainant, which is the only case we are concerned with here, I find that he left the job because of the ventilation situation inside the base and more significantly, I find that management in the persons of Jones and Eslinger understood that to be the case at the time.

36. Apropos the finding in No. 35, supra, at this post-meeting meeting in the office, Mr. Eslinger became agitated with complainant specifically about the ventilation complaints. He jumped off the table he was sitting on and came right up into the face of the complainant, and using profanity said that they were the worst bunch of "crybabies" that he had ever run across. He was bent on continuing this tirade when Jones grabbed him by the arm and took him outside. Mr. Jones testified that he took him outside and told him that "we handle everything in a business-like manner and we speak to the people as they are people".

37. It is my impression that at this point the die was cast. A business decision had been made. There would be no additional monies spent on ventilation equipment, no matter what. If a couple of welders thought it was too smokey inside the base and they quit, so be it. The job was almost complete and if replacement welders were needed, they could be found. In fact, the next week, respondent did hire two additional welders.

38. Immediately after leaving the job site, complainant, accompanied by Dave Johnson, went to the P & M Mining Company safety office to inform personnel of P & M's safety department that they had quit their jobs because of ventilation problems inside the base.

39. Subsequent inspections by P & M Coal Company and MSHA failed to establish any violations of safety or health regulations on the project.

Discussion, Further Findings, and Conclusions

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

As stated previously, this is a constructive discharge case, wherein the complainant refused to weld any further inside the base with the existing ventilation, allegedly because he believed it was unhealthy for him to do so. If I find that this work refusal equated to engaging in protected activity under the Act, then a finding of constructive discharge would be tantamount to a finding of adverse action motivated by that protected activity, and hence unlawful discrimination within the meaning of section 105(c) of the Mine Act.

The appropriate standard to apply in the context of the Mine Act is that a constructive discharge occurs whenever a miner engaged in protected activity can show that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. Whether conditions are so intolerable that a reasonable person would feel compelled to resign is a question for the trier of fact. Simpson v. FMSHRC 842 F.2d 453, 461-463 (D.C. Cir. 1988).

It is also well settled that a miner has the right under section 105(c) of the Act to refuse to work if he has a good faith, reasonable belief that the work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc.,

Additionally, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-135 (February 1982); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Miller v. Consolidation Coal Company, 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement).

In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1533-34 (September 1983): Haro v. Magna Copper Co., 4 FMSHRC 1935, 1944 (November 1982); Robinette, supra, 3 FMSHRC at 810. The Commission has also explained that "[g]ood faith belief simply means honest belief that a hazard exists." Robinette, supra at 810.

The initial question for decision then at this point is did Stenson Begay reasonably and in good faith believe that he would be required to work in hazardous and unhealthful conditions if he remained on the job on the morning of December 10, 1987.

Stenson Begay had thirteen years experience as a welder in the construction industry; he was well thought of as a welder by respondent's management and his complaints about the ventilation inside the base were taken seriously by General Manager Jones. Mr. Jones testified that Begay was the most vocal of the welders concerning the ventilation and was considered by him to be credible. Complainant's belief that the conditions inside the base were excessively smokey and therefore unhealthful and hazardous was shared by all the welders who testified at the hearing and was buttressed by the expert opinion of the industrial hygienist. For a period of some two weeks plus, Begay had been expressing his continuing concern about the smokey conditions inside the tub to management and some improvements were made, but they were insufficient. After the meeting on the morning of December 10, 1987, Begay had sufficient cause to believe that management intended to do nothing further to alleviate or improve the ventilation inside the dragline base. Respondent's position that their offer to discharge some of the welders to improve the ventilation inside the tub is not well taken. It lacks credibility given the fact that they replaced the complaining welders who quit with two more welders the following week. It was in this setting that Begay turned in his tools and equipment and left the job site, leaving behind a job that paid $16.45 an hour for unemployment.

I therefore find and conclude that complainant Begay refused to weld inside the base any longer because he reasonably and in good faith believed the inadequate ventilation inside the tub to be hazardous to his health because of the extremely smokey and noxious conditions extant there. He had every reason to believe that if he stayed on the job, he would be required to work in unhealthy conditions.

Next, respondent alleges that complainant failed to expressly communicate his reason for quitting and that such failure cannot be excused on account of futility.

While it is true that complainant did not expressly and unequivocably state his reason for quitting at the time he left the job site to a management representative of respondent, he did so state to a respresentative of the P & M Coal Company, for whom the construction work was being done. Furthermore, reading the record as a whole, I find that over the previous 2-3 weeks prior to December 10, 1987, Begay did make a good faith attempt to communicate his concerns to management, specifically to Jones and Eslinger. Approaching the communication requirement from a common sense standpoint, I believe that Begay did all that could be reasonably expected of him. Telling Mr. Jones one last time that the atmosphere inside the tub was unhealthy would not in my opinion have resulted in the procurement of the badly needed ventilation equipment or made complainant's job any safer.

I conclude that complainant was constructively discharged as a result of a protected work refusal. Accordingly, he was unlawfully discriminated against in violation of Section 105(c) of the Mine Act. The complaint of discrimination is therefore SUSTAINED.

REMEDIES

Turning now to complainant's remedies, I find that the stipulated amount of back pay, $4606, is appropriate to recompense the complainant for back pay from December 10, 1987, until welding was discontinued on this project on January 29, 1988. The payment of interest will also be ordered on this award until the date of payment.

Complainant also seeks reinstatement. However, due to the nature of the respondent's industry, which for welders involves only temporary stints of employment, generally only for the duration of a specific project, an effective reinstatement remedy is difficult to fashion.

I note from the evidence adduced at the hearing that several of the welders from the McKinley Mine dragline base projects have from time to time subsequently been rehired by respondent to work as welders on other projects. Therefore, respondent will be ordered to consider complainant's application, should he make

application, in good faith for any openings for welders on its projects without regard to his having made ventilation complaints in the past or the instant discrimination complaint. This shall include all work for which the complainant is qualified, considering his training and experience.

Finally, respondent will be ordered to reimburse complainant for his reasonable attorney fees and costs of litigation. Complainant's counsel submitted an itemized affidavit on March 27, 1989, accounting for 87.8 hours of attorney time expended for which he requests $125 per hour. This amounts to $10,975. He has also documented $3,012.92 in costs. No objection has been received from respondent.

My own review of the attorney fee petition and statement of costs satisfies me that they are reasonable considering the nature of the issues involved, the degree of skill with which complainant was represented and the amount of time and work involved. It shall be so ordered.

ORDER

Based on the stipulations and the foregoing findings of fact and conclusions of law, respondent IS ORDERED:

1. To pay Stenson Begay back pay through January 29, 1988 in the amount of $4606, within 30 days of the date of this order.

2. To pay Stenson Begay interest on that amount from the date he would have been entitled to those monies until the date of payment, at the short-term federal rate used by the Internal Revenue Service for the underpayment and overpayment of taxes, plus 3 percentage points, as announced by the Commission in Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 28, 1988), pet. for review filed, No. 88-1873 (D.C. Cir. Dec. 16, 1988).

3. To consider Stenson Begay's application for employment in the future, should he make such application, in good faith and without regard to his having made previous safety and health related complaints, or this discrimination complaint. This order encompasses all employment for which Stenson Begay is qualified, considering his training and experience.

4. To pay Stenson Begay $10,975 as reimbursement for attorney fees.

5. To pay Stenson Begay $3012.92 as reimbursement for costs.

Roy J. Maurer
Administrative Law Judge

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 17, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-290 A. C. No. 42-01697-03589
v.	:	Bear Canyon No. 1 Mine
C. W. MINING COMPANY,	:	

ORDER OF PARTIAL SETTLEMENT
ORDER OF PARTIAL DEFAULT
ORDER TO PAY

Before: Judge Merlin

The Solicitor has filed a partial motion to approve settlement for two of the three violations involved in this case.

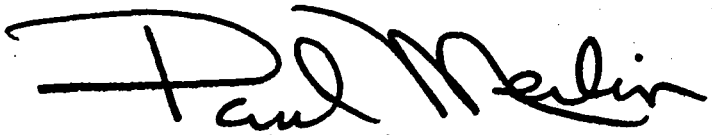
Citation No. 3075965 was issued for a violation of 30 C.F.R. § 75.1725(a) because a belt control switch was not being maintained to act as a positive stop control for the belt. The penalty was originally assessed at $192 and the proposed settlement is for $134. Citation No. 3224163 was issued for a violation of 30 C.F.R. § 75.220 because the approved roof control plan was not being complied with. The penalty was originally assessed at $294 and the proposed settlement is for $206. I have reviewed these violations in light of the six statutory criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and find that the proposed settlements may be approved as being in accordance with the provisions of the Act.

The remaining violation, Order No. 3227164, was issued for a violation of 30 C.F.R. § 75.303(a) because an adequate preshift examination was not made of an area in the lower seam section in that observable hazards which existed were not listed in the approved book. The penalty is assessed at $700. On January 9, 1989, the operator was ordered to file an Answer for this violation or show cause for not doing so. The file contains the return receipt showing that the operator received a copy of the show cause order on January 14, 1989. However, the operator failed to comply with it. As a result, judgment by default must be entered in favor of the Secretary.

It is therefore, ORDERED that the partial settlement motion for Citation Nos. 3075965 and 3224163 be APPROVED and the operator is ORDERED TO PAY $340.

It is further ORDERED that judgment by default shall be entered in favor of the Secretary for Order No. 3227164 and as a result the operator is ORDERED TO PAY $700.

Finally, it is ORDERED that the operator pay $1,040 within 30 days from 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
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

MAY 18 1989

JAMES H. COLQUITT, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 89-3-DM
v.	:	MD 88-32
	:	
IDEAL BASIC INDUSTRY/CEMENT COMPANY, Respondent	:	Ada Quarry

DECISION

Before: Judge Lasher

The parties, both represented by counsel, have executed a Stipulation of Voluntary Dismissal in this matter. Such stipulation, personally confirmed by Complainant's counsel with me, indicates that a settlement has been reached in this matter and that pursuant thereto this matter should be dismissed with prejudice.

Accordingly, this proceeding is dismissed with prejudice, each party to bear his own costs.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 22 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 88-129-M
	:	A. C. No. 33-00091-05504
v.	:	
	:	White Rock Quarry
EDWARD KRAEMER & SONS, INCORPORATED, Respondent	:	

DECISION

Appearances: Maureen M. Cafferkey, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, for the Secretary;
Willis P. Jones, Jr., Esq., Jones and Bahret, Toledo, Ohio, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a Proposal for Penalty filed by the Secretary (Petitioner) on August 18, 1988, for an alleged violation of 30 C.F.R. § 56.14001. The Operator (Respondent) filed its Answer on September 16, 1988.

On January 11, 1989, Petitioner filed Interrogatories and Request for Production of Documents. On January 19, 1989, Respondent filed a Motion for Protection Order arguing, in essence, that discovery shall not be allowed inasmuch as it was initiated beyond 20 days after the filing of the Proposal for Penalty filed on August 18, 1988 (See, 29 C.F.R. § 2700.55). Respondent's Motion was denied by Order dated January 30, 1989.

Pursuant to notice, this case was heard in Toledo, Ohio, on February 23, 1989. Robert G. Casey and Arthur J. Hoffman testified for Petitioner. Edward S. Kraemer and M. Honora Kraemer testified for Respondent.

Petitioner filed a Post-Trial Brief on April 27, 1989. On May 15, 1989, Respondent filed a Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law. On May 19, 1989, Respondent filed a Reply to Petitioner's Post-Trial Brief.

Stipulations

The Parties agreed on the following stipulations:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. Edward Kraemer & Sons owns White Rock Quarry in Clay Center, Ohio.

3. Edward Kraemer & Sons, Incorporation is an operator as defined by Section 3(d) of the Act.

4. White Rock Quarry is a mine as defined by Section 3(h) of the Act.

5. Edward Kraemer & Sons are subject to the jurisdiction of this Court and the 1977 Mine Act.

6. The size of proposed penalty, if assessed, will not affect the Operator's ability to continue in business.

Citation

Citation No. 3060361, issued on March 29, 1988, alleges as follows:

> In the quarry, at the running crusher, the front face of the approximately three and one half foot diameter fast spinning flywheel is unguarded. Although this flywheel is approximately eight feet off the ground, the steel access ladder to the crusher operator's control deck passes within eight inches of said flywheel. A person mounting or dismounting the crusher could contact this flywheel and be injured.

Regulation

30 C.F.R. § 56.14001 provides as follows: ". . . flywheels; . . . and similar exposed moving machine parts which may be contacted by persons, and which many cause injury to persons, shall be guarded."

Findings of Fact and Discussion

I.

The crusher in question has been used at Respondent's White Rock Quarry since January 1, 1988. The flywheel of the crusher, as depicted in Petitioner Exhibit 1, has a diameter of approximately 3 feet. The flywheel does not have any belts or chains. The exposed face of the flywheel is essentially smooth, but contains four nuts in its center. The flywheel operates at

approximately 1800 to 2100 revolutions per minute, and is located approximately 8 feet off the ground. Those persons who operate the crusher must climb a vertical steel ladder from the ground to enter the platform where the crusher is operated from. In entering the work platform from the ladder, two handrails must be grasped to hoist one's self onto the platform. These handrails are located at the top of the ladder and 8 1/4 inches laterally from the flywheel,1/ and approximately 10 inches in front of the flywheel. The flywheel has two separate guards along the upper portion of the outside circumference of the flywheel, covering approximately 180 degrees of the circumference. (Petitioner's Exhibit 1 and 2, and Respondent's Exhibit 3.)

Robert G. Casey, an MSHA Special Investigator Specialist, who was a supervisor of inspectors on March 29, 1988, accompanied an inspector on an inspection of the White Rock Quarry on that date. Casey indicated that he observed the crusher in operation, and the flywheel was "spinning very fast" (Tr. 34). He said that he observed an employee climbing the ladder to the work place, and noticed how close the latter's hand was to the flywheel when he grabbed the handrails. Casey concluded that the guards in place were inadequate to prevent the hazard, which he described as being immediately obvious, of a worker missing a guard rail, hitting the flywheel, and injuring his hand, or on a windy day having his clothing caught in the flywheel or its hub causing the worker to be entangled in the machinery.

Arthur J. Hoffman, who has been operating a crusher for Respondent since June 1986, indicated that in the winter he wears a jacket under coveralls. He said that in the spring when he wears a jacket he has never climbed to the top of the crusher with the jacket unzipped. He said that in the summer he wears short sleeve shirts. He indicated that it would be possible to miss a rail in climbing the steps of the ladder, but not by 6 inches, and that he has never come in contact with the flywheel while going up or down to the work site. He also indicated that although it would be possible to slip off the ladder, his hand would not come in contact with the flywheel since in climbing the ladder, his body presses backward, and thus in slipping he would not fall forward. He also indicated that if his jacket would be open while reaching for the handrail, and he would fall, the jacket would not get caught in the flywheel, as the revolutions of the flywheel create a wind which blows the jacket behind him.

1/ I have accepted the testimony of M. Honora Kraemer, Respondent's Safety and Loss Prevention Officer, with regard to the lateral distance of the flywheel from the handrail as she actually measured that distance. In contrast, there is no evidence that the testimony of Robert G. Casey, MSHA Inspector, Arthur J. Hoffman, the crusher operator, or Edward S. Kraemer, with regard to the distance between the flywheel and the handrail was based upon any measurement.

Edward S. Kraemer, who has a Bachelor of Science Degree in Civil Engineering, and has been "associated" with crushers for over 20 years (Tr. 171), indicated that because the flywheel spins in a clock-wise direction, any exposed pinch point would be too far away to be contacted by one falling from the ladder. He also indicated that the center of gravity of one climbing the vertical ladder would be on the outside. He explained that accordingly, if one would fall or slip from the ladder, one would fall backward. Thus, any contact with the flywheel would consequently cause one to fall backwards and not be drawn into the flywheel.

The two guards on the flywheel on the date in question, as depicted in Petitioner's Exhibits 1 and 2 and Respondent's Exhibit 3, would appear to guard against the hazard of a hand getting caught between the edge of the flywheel and the body of the crusher. A visual inspection of these photographs fails to indicate that these guards would prevent one from coming in contact with the surface of the face of the rotating flywheel. The testimony of Hoffman and Kraemer tends to establish that inadvertently coming in contact with the flywheel would not be likely. However, their testimony is not so persuasive as to establish that coming in contact with the flywheel is impossible. As such, it fails to contradict the opinion of Casey that it is possible for a worker to lose his balance, fail to grab the handrail, and come into contact with the flywheel. I thus conclude that the flywheel, "may be contacted" by a person using the vertical ladder in question. It is likely, as explained by Kraemer, that due to the position of one's center of gravity, as consequence of ascending and descending the vertical ladder, a hand coming into contact with the flywheel would be thrown away from it. This does not preclude the possibility, as indicated by Casey, that due to the high speed of the flywheel, a hand coming into contact with the flywheel might suffer debridement of the skin.

Accordingly, I conclude that inadvertent contact with the flywheel by one using the vertical ladder "may cause injury to persons." Thus, I conclude that it has been established that, because the exposed face of the flywheel has not been guarded, Respondent herein violated 30 C.F.R. § 56.14001.[2/]

[2/] In light of this conclusion, and for the reasons set forth in I, infra, I denied Respondent's Motion for a Directed Verdict which was made at the conclusion of the Petitioner's case and renewed again after both Parties had rested.

II.

According to Casey the violation herein was significant and substantial, because an injury was reasonably likely to occur due to the fact that the hands of the crusher operator using the ladder come within 6 inches of the flywheel. He noted essentially the high probability of the occurrence of such an accident, as Respondent runs 2 work shifts per day, 5 days per week, and each crusher operator makes 4 round trips per shift on the ladder. However, taking into account the following: (1) the handrail is over 8 inches removed from the flywheel in a lateral direction, and 10 inches in front of the flywheel; (2) Respondent has been using crusher since 1974, all similar to the one in question with a flywheel only particularly guarded, without any incidences of one coming in contact with the flywheel; (3) the testimony of the crusher operator, Hoffman, that he has never come in contact with the flywheel, and (4) considering the effect of the center of gravity upon one falling and losing ones' balance, as testified to by Hoffman and Kraemer; I conclude that it has not been established that the hazard of coming into contact with the flywheel would be reasonably likely to occur (cf. Mathies Coal Co., 6 FMSHRC 1, (Jan. 1984)).

According to Casey, coming in contact with the flywheel would cause debridement of the skin, and "the wheel actually throwing him off balance, and possibly flipping him and doing more severe damage, breaking bones or . . . (Tr. 128). I find this evidence not sufficient to support a conclusion that a debridement is a serious condition or that a severe injury such as a broken bone was reasonably likely to occur. Consequently, I conclude that any serious injury has not been established to be reasonably likely to occur. Therefore, I conclude that it has not been established that the violation herein is significant and substantial (See, cf. Mathies Coal Co., supra).

III.

Although it is possible that one using the ladder might slip and injure one's hand against the rotating unguarded surface of the flywheel, it has not been established that such an occurrence was likely to occur. Nor has it been established that any serious injury was reasonably likely to occur. Accordingly, I conclude that the gravity of the violation herein was low. It is clear that, as testified to by Casey, it was obvious that the surface of the flywheel was not completely guarded. However, in light of the fact, as testified to by Edward S. Kraemer and not contradicted, Respondent has never been cited for an unguarded flywheel in spite of having crushers since 1974 with similar not completely guarded flywheels, and considering the fact that no one in the past has been injured by coming in contact with such a flywheel, I conclude that Respondent's negligence herein was low. I also have taken

into account the remaining statutory factors set forth in section 110(i) of the Act as stipulated to by the Parties, as well as the history of violations set out in Petitioner's Ex. 4. Taking all these into account I conclude that a penalty herein of $20 is proper for the violation found herein.

ORDER

It is ORDERED that Citation No. 3060361 be amended to reflect the fact that the violation therein is not significant and substantial. It is further ORDERED that Respondent, within 30 days of this Decision, shall pay $20 as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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COLONNADE CENTER
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DENVER, CO 80204

MAY 22 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF MANUEL L. GOMEZ, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 89-184-D DENV CD 89-06
v.	:	Docket No. WEST 89-213-D (Consolidated)
MID-CONTINENT RESOURCES, INC., Respondent	:	Dutch Creek Mine

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Morris

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act").

Complainant has filed an application for reinstatment pursuant to Commission Rule 44, 29 C.F.R. § 2700.44 and he has further filed a discrimination complaint pursuant to section 105(c) of the Act.

After notice to the parties a hearing on the merits commenced in Glenwood Springs, Colorado on May 17, 1989.

At the commencement of the hearing the parties moved for the consolidation of the above cases. Pursuant to Commission Rule 12, 29 C.F.R. § 2700.12, the cases were consolidated.

The parties further advised the judge that they had reached an amicable settlement of the issues in contest.

The terms of the proposed settlement are that complainant will withdraw his application for temporary reinstatement and further waive any reinstatement and dismiss his claims herein. Further, in consideration thereof, respondent agrees to pay complainant the sum of $4,500.00.

Discussion

Complainant appeared with the Solicitor, his counsel, and stated that he understood the settlement and he further requested that the proposal be approved.

I find the settlement is proper particularly since all parties are in agreement.

Accordingly, I enter the following:

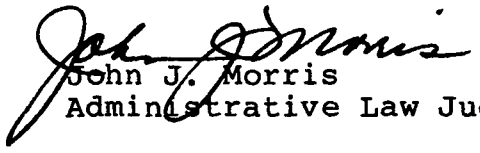
ORDER

1. The settlement agreement is approved.

2. The request for temporary reinstatement in WEST 89-184-D is dismissed.

3. The complaint of discrimination in WEST 89-213-D is dismissed.

4. Respondent is ordered to pay to complainant the sum of $4,500.00 within 7 days of the date of this decision.



John J. Morris
Administrative Law Judge

Distribution:

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 23, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 89-73
	:	A. C. No. 46-01867-03781
v.	:	
	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Jack E. Strausman, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Petitioner. Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Merlin

When this case came on for hearing, the parties advised that they had reached a proposed settlement. Other cases set for hearing at the same time were heard on the merits.

The subject citation was issued for a violation of 30 C.F.R. § 50.20(a) because the operator did not submit the required form notifying MSHA of an accident within 10 working days. The form was submitted on the eleventh day. The original assessed penalty was $150. Operator's counsel advised that the operator now had decided it would pay the assessed penalty rather than go to a hearing. However, counsel pointed out that the one-day delay occurred during a holiday weekend.

Based upon the foregoing I found that under the circumstances described, negligence was greatly mitigated. Accordingly, a penalty of $75 was assessed from the bench and is hereby AFFIRMED.

It is ORDERED that the operator pay $75 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

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FALLS CHURCH, VIRGINIA 22041

MAY 23 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 88-30
	:	A. C. No. 18-00621-03624
v.	:	
	:	Mettiki Mine
METTIKI COAL CORPORATION, Respondent	:	

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for the Secretary;
Susan E. Chetlin, Esq., Jane C. Baird, Esq., Crowell & Moring, Washington, DC, for Respondent.

Before: Judge Weisberger

Statement of the Case

In this case, the Secretary (Petitioner) seeks a Civil Penalty for an alleged violations of the Operator (Respondent) of 30 C.F.R. § 75.326. Pursuant to notice, this case was heard in Falls Church, Virginia, on February 14, 1989. At the hearing, Philip Martin Wilt, Barry Lane Ryan, and Dennis Deaver testified for Petitioner. John Pritt, Carl Randal Johnson, and Mark Carpenter testified for Respondent. Proposed Findings of Fact and Briefs were filed by Petitioner and Respondent on April 24, 1989. Respondent's filed a Reply Brief on May 12, 1989.

Respondent, on April 24, 1989, filed a Motion to Correct Hearing Transcript. Respondent, in its Motion, indicated the Petitioner did not object to the Motion, and it is hereby granted.

Stipulations

At the hearing, the following stipulations were entered into:

1. That Mettiki Coal Corporation is the owner and operator of the Mettiki Mine located in Deer Park, Garrett County, Maryland.

2. That Mettiki Coal Corporation and Mettiki Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. That the Mettiki Mine was opened after March 30, 1970.

4. The Administrative Law Judge has jurisdiction over this case pursuant to section 105 of the Act.

5. A copy of the Order was properly served by Philip M. Wilt, a duly authorized representative of the Secretary, upon an agent of the Respondent at the date, time and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not necessarily for the truthfulness or relevancy of any statements asserted therein.

6. That the assessment of a civil penalty in this proceeding will not affect Respondent's ability to continue in business.

7. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the fact that Respondent's annual production tonnage is 2,294,859.

8. That Mettiki Mine was assessed a total of 382 violations over 547 inspection days for a 24-month period immediately preceding the issuance of the order involved in this case.

9. That, in fact, air from the belt haulage entry was ventilating at the working face on February 22, 1988, at the time and place in which Philip Wilt indicated pursuant to Order No. 3115962.

Findings of Fact and Discussion

I.

On February 22, 1988, while inspecting the E2 Section of Respondent's Mettiki Mine, Philip Martin Wilt, a MSHA Inspector, noted that a check curtain at the feeder to the belt had an opening in the left bottom corner, which he measured as 5 square feet, and additionally had more than five openings. Wilt termed the curtain to be "very poorly" and "loosely" installed (Tr. 24), and said that he measured 1300 cubic feet of air going through the curtain's opening. He issued a 104(d)(2) Order, citing Respondent with allowing air from the conveyor belt entry to enter into and ventilate the active working section. Respondent concedes that air from the belt did enter the working section. Accordingly, it is found that Respondent herein did violate section 75.326, supra, which, in essence, provides that air from the belt entries shall not be used to ventilate active working places.

II.

According to Wilt, if an ignition would have occurred in the belt line, the resulting dark smoke and gases could have entered into the working areas causing "zero" (Tr. 39) visibility, and the possibility of miners working there being overcome by the gases. Barry Lane Ryan, a MSHA Supervisor, essentially agreed with Wilt's assessment, and in addition, indicated that in a belt entry there are ignition sources such as cables and belt rollers. Also, according to Ryan, a belt rolling over frozen rollers, or cutting into timbers that are too close to the belt line, creates friction which is a source of ignition. Ryan also indicated that coal dust is generated by the belt movement which would then, if air is flowing from the belt entry to the face, go to the face, exposing miners to coal dust.

At the time the Order in question was issued, there was no production on the section, although the belt was in operation. According to Mark Carpenter, Respondent's section foreman, who arrived on the section for the start of the shift along with Wilt and the other miners in the section, indicated that when he went to make his fire boss inspection, the miners on the shift were at the tool car, which was located one cross cut inby the face and between the intake entry and the number four return entry. As such, the weight of the evidence does not establish that at the time of the violation there were miners at the face exposed to air from the belt entry. Ryan's testimony with regard to the effect of the instant violation, was merely hypothetical, as he did not observe the conditions on the date in issue. Although, at best, the testimony of Petitioner's witnesses tends to establish that a health hazard to miners could have been contributed to by the violation herein, it fails to establish that there was any reasonable likelihood of a hazard occurring, nor a reasonable likelihood that it would result in injury of a reasonably serious nature. As such, I find it has not been established that the violation herein was significant and substantial (c.f. Mathies Coal Co., 6 FMSHRC 1 (January 1984)).

III.

Wilt indicated that when he observed the curtain in question on February 22, 1988, it was "loosely" installed (Tr. 24), had more than five openings, with one in the left hand corner being 5 feet square, and opined that it was an "old curtain", and in "poor" condition (Tr. 52). In this connection, Wilt indicated that he relied upon his review of a Daily Section and Time Report (Exhibit R-3), which indicated that on the previous shift a curtain was hung at the feeder in an "elapsed time" of 8 minutes. According to Wilt, he did not see any evidence of rocks or coal having fallen from the ridge of the roof in the area of the

feeder curtain. Essentially Wilt opined that the violation was due to Respondent's unwarrantable failure, based on ". . . the condition and in the way the curtain was installed" (Tr. 41). He also indicated, essentially, that he considered Respondent negligent based on the above factors, as well as the fact that in the preceding quarter he issued three citations for violations of the standard at issue.

Ryan indicated that he essentially agreed with Wilt's conclusions with regard to Respondent's negligence, and the fact that the violation resulted from its unwarrantable failure. Essentially, Ryan indicated that his opinion in this regard was based upon the same factors testified to by Wilt. He also considered that it was "unreasonable" for the "high" amount of air in the belt entry to be regulated through an 8 inch square regulator (Tr. 61).

According to the uncontradicted testimony of John Pritt, Respondent's section foreman for the day shift, the curtain in question was installed on February 22, 1988, at the commencement of the day shift at approximately 8:00 a.m., by being wired to roof bolts at the top of the roof, and was nailed to rib boards every 4 feet and to the coal in the rib. He indicated that there were no major tears in the curtain when it was installed. He indicated that he had installed the curtain because in the preceding shift the belt and its feeder was moved to a side dump position from an end dump position. According to Pritt, it took three persons to hang the curtain, and that the 8 minutes indicated on the Daily Section and Time Report was only an estimate which was arrived at after the shift was completed at 3:00 p.m. . Pritt indicated that when he left the section at about 2:30 p.m., on February 22, he did a preshift examination for the next shift and the curtain was tight without any major tears and "in good shape" (Tr. 114). He also indicated, essentially, that the air was checked at the feeder at that time and was going in the right direction. He described the curtain, when he left the section, as "hanging straight up and down" without any force of air in either direction (Tr. 128). He indicated that the belt was running when he left, and that power was subsequently shut off on the way out.

I have taken into account Wilt's testimony that he did not observe any evidence of rocks having fallen from the ribs or roof in the area of the feeder. I find this testimony insufficient to contradict the testimony of Pritt that when he left the section at the end of the day shift at approximately 2:30 p.m., the check curtain was "tight" and "in good shape" (Tr. 114). (In this connection I note that even Wilt agreed that a curtain could come

loose in seconds if there were rocks on the feeder or if people walk though the curtain. The evidence indicates that miners do indeed travel through the curtain feeder).

I also find no contradiction to Carpenter's testimony that upon arrival on the section in the afternoon shift along with Wilt, he went to perform his fire boss inspection, which usually includes the belt entry feeder area, and had not yet reached that area by the time Wilt issued the Order in question. Thus, it appears that the loosening of the curtain occurred between the time Pritt left the section at 2:30 p.m., and the time it was observed by Wilt at 3:45 p.m., and before Carpenter had a chance to discover it in the course of his fire bossing. Thus, Respondent had no opportunity to find and tighten the curtain before Wilt issued the Order in question.

Taking all the above into account, I conclude it has not been established that the condition, and specifically the air flow observed by Wilt at the beginning of the afternoon shift, was the result of any aggravated conduct on the part of Respondent. Accordingly, I find that it has not been established that the violation herein resulted from Respondent's unwarrantable failure. (Emery Mining Corp., 9 FMSHRC 1997 (1987).

IV.

Inasmuch as the evidence establishes that as a consequence of the violation herein, an ignition in the belt area could result in miners at the working faces being subjected to gases and dense smoke, I find that the violation herein to be of a moderately serious nature. Based upon the testimony of Pritt, as discussed above, III., infra, I find that the violative condition did not exist at the end of the day shift when Pritt made the last examination. The record does not establish the cause of the violative condition, but it is clear that it occurred sometime between Pritt's last inspection, and the time it was noted by Wilt. It is significant to note that Carpenter, who had the responsibility of inspecting the section prior to the commencement of the afternoon shift, was on his round, and had not yet had an opportunity to inspect the feeder area before it was cited by Wilt. Taking into account all the above, I conclude that Respondent herein was negligent to only a low degree. I also have considered the various other factors set forth in section 110(i) of the Act, as stipulated to by the Parties, and I adopt their stipulations. Based on all the above, I conclude that a penalty of $100 is appropriate for the violation herein of section 75.326, supra.

ORDER

It is hereby ORDERED that Order No. 3115962 be amended to a section 104(a) Citation to reflect the fact that the violation cited therein was neither significant and substantial, nor was it the result of Respondent's unwarrantable failure. It is further ORDERED that Respondent shall pay $100, within 30 days of this Decision, as civil penalty for the violation found herein.

It is further ORDERED that the Transcript of the hearing in this matter be amended to reflect the changes set forth in Respondent's Motion to Amend Transcript filed on April 24, 1989.

Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 24 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 88-138-M A.C. No. 11-02349-05505
v.	:	
JOLIET SAND AND GRAVEL COMPANY, Respondent	:	Rockdale Quarry

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

On May 18, 1989, the Secretary of Labor on behalf of the parties to this action, filed a motion to approve the settlement negotiated between them. At issue in this case are two violations, originally assessed at $4000 in the aggregate. Settlement is proposed at $2900.

The above-referenced violations were discovered as a result of an investigation into a fatal accident which occurred on May 17, 1988, killing a crushing machine operator at the mine. More particularly, the operator was cited for a violation of 30 C.F.R. § 56.11001 because safe access had not been provided to the controls of the Stanley rock breaker at the jaw crusher. The fatality occurred because the machine operator attempted to climb up to the controls, slipped and inadvertently grabbed one of the control levers. This swung the hammer around, struck another workman on the head and pinned the machine operator against a metal guard and killed him.

The operator was also cited for a violation of 30 C.F.R. § 56.14026 because the machine was not provided with a start and stop electricial control on the boom. This violation is significant and substantial because the fatality occurred when the machine operator could not stop the swing hammer.

I accept the parties' representations and approve the settlement.

ORDER

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that respondent pay a penalty of $2900 within 30 days of this order.

Roy J. Maurer
Administrative Law Judge

Distribution:

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Mr. George Comerford, Jr., President, Joliet Sand & Gravel Company, P.O. Box 254, Joliet, IL 60434 (Certified Mail)

/ml

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MAY 24 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 88-273-M
	:	A.C. No. 26-02050-05501
v.	:	Docket No. WEST 88-278-M
	:	A.C. No. 26-02050-05502
NEVADA MINERAL PROCESSING, Respondent	:	Docket No. WEST 88-306-M
	:	A.C. No. 26-02050-05503
	:	Nevada Mineral Mill

DECISION

Appearances: George B. O'Haver, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Annelie Hoyer, Secretary-Treasurer, Nevada Mineral Processing, Mina, Nevada, for Respondent.

Before: Judge Lasher

This matter arises upon the filing by the Secretary of Labor of three petitions for penalty assessment in the three subject dockets which collectively contain 7 Citations issued during the month of March 1988, at Respondent's operation located in the vicinity of Mina, Nevada. 1/

1/ With respect to docket No. WEST 88-306-M, which originally contained Petitioner's request for assessments for 2 Citations, Nos. 3070665 and 3070679, copies of these 2 Citations were attached to the Petition. However, other paperwork attached to the petition showed #3070679 involved a violation of 30 C.F.R. § 56.20026., whereas the Citation itself alleged a violation of "30 C.F.R. 56.20001e". At the hearing, after the 2 parties had reached meaningful stipulations and given testimony regarding the issues and the seven violations involved, it became apparent that Citation No. 3070679 was not one of the Citations they understood was involved in Docket WEST 88-306-M. Rather, it was Citation No. 3070678, which alleged a violation of 30 C.F.R. 56.13015(i). This also did not jibe with some of the paperwork (specifically, page 2 of the "Proposed Assessment") attached to the Petition. Counsel for the Solicitor indicated that Citation No. 3070678 was, in his files, the second Citation contained in Docket 88-306-M. Since the parties had prejudicially acted on this belief both before and during the hearing, the Petitioner's petition was amended at hearing to show Citation 3070678 instead of 3070679, and copies of 3070678 were substituted for 3070679 as attachments to the petition in the Commission's file.

Contentions of the Parties

At the outset of the hearing, the parties stipulated that the seven violations charged did occur (T. 6, 7). The Respondent's primary defense raised the question whether its milling operation (which allegedly was under construction but not in production at the time of the subject inspection in March, 1988) was within the jurisdiction of MSHA's enforcement authority and the coverage of the 1977 Mine Act (T. 11, 13). Respondent was also concerned that it was not allowed the courtesy of a CAV (Compliance Assistance Visit) for its new plant. Petitioner contended that 2 of the Citations (numbered 3070667 and 3070675 in Docket WEST 88-278-M) were so-called "significant and substantial" (S&S) violations and presented evidence on this issue. The remaining requirement is the penalty assessment for the seven violations involved.

Jurisdictional Matters

The first question is whether Respondent's custom mill is a "mine" covered by the Act. Respondent is a Nevada corporation with offices in 2 states, i.e., in Mina, Nevada, and Blaine, Washington. It does not engage in actual extraction of the gold and silver ore processed in its custom mill, but processes such for "small miners in the vicinity" (T. 48, 49).

During the period March 21 through 24, 1988, MSHA Mine Inspector John F. Myer, at the direction of his supervisor, conducted an inspection of Respondent's operation -- which he described as a "small mill" consisting of a "crusher, mill, conveyors, leach solution tank system, a lab, a small shop and an assay lab." (T. 18, 19, 27). At the time of inspection, 16 employees were working (T. 19, 72) and the operation was in the final stages construction. Inspector Myer observed the following kinds of work being carried on:

> "... there was some welding being done outside on some conveyors and an ore bin that feeds the crusher. There was some electrical work being done in the mill. There was assaying being done in the lab and there was shop work being done." (T. 19, 20).

Inspector Myer was advised by Respondent's Project Manager, Steven York, that some of the ore in the 15 to 20 ton stockpile was from a mine in California (T. 20, 21).

At the time of inspection the mill itself was not producing but its assay lab was operating. Thus the Inspector testified:

> "The mill itself wasn't operating. The assay lab was operating. They were prep sampling. They had a bucking

room with a small Bilco Chipmonk crusher, pulverizer, furnace for fire assay and that portion of the mill was operating, assaying samples, custom samples, for miners in the area. I don't really know where the ore came from but it was being assayed there." (T. 19) (emphasis added)

The work in the "bucking room" was described as follows:

"The bucking room is where they get the ore, the material, and they run it through a chipmonk crusher. That's a small crusher that they do just maybe a sack full of ore and it runs through the crusher, then it's taken out of there and put in a pulverizer. It's pulverized to almost powder and then it's put in crucibles and put in the furnace, along with lead and some flux to determine the content of the gold or silver in the ore." (T. 20).

Section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(I), defines a "mine" in the following language:

"Coal or other mine" means (A) an area of land from which minerals are extracted * * * (B) private ways and roads appurtenant to such area, and (C) lands * * * facilities, equipment * * * or other property * * * used in, or to be used in, or resulting from the work of extracting such materials from their natural deposits * * *, or used in, or to be used in the milling of such minerals, or the work of preparing coal or other minerals, ..."
[Emphasis added].

Under this definition, it is clear that a "mine" includes facilities and equipment "used" in the work of milling or preparing minerals, such as Respondent's custom mill.

A preparation facility or milling facility need not have a connection with the extractor of the mineral in order to be subject to the Act's coverage. Carolina Stalite Co., 6 FMSHRC 2518, 2519 (1984); Alexander Brothers, Inc., 4 FMSHRC 541, 544 (1982). Further, the construction of the mill itself is an activity covered under the Act. Bituminous Coal Oper. Ass'n v. Secretary of Interior, 547 F. 2d 240, 244, 245 (1977). In any event, on the inspection day, Respondent's "bucking room" was in operation. Thus, while the mill itself was not in full production, that part of the custom mill was in operation and ore was in fact being processed for the purpose of assaying. It is thus concluded for these independent reasons that Respondent's mill was a mine covered by the Act at all material times.

Commerce

With respect to the question whether Respondent's operation "affects commerce", Judge August F. Cetti, pointed out in his

decision in Secretary v. Cobblestone, Ltd., 10 FMSHRC 731, 733 (June, 1988) that the use of the phrase "affect commerce" in the Mine Act triggers a broad reach of regulatory coverage:

"Looking first to the Act itself, Section 4 of the Act states that:

> "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and every miner in such mine shall be subject to the provisions of this Act."
>
> "Commerce" is defined in section 3(b) of the Act as follows:
>
> "Trade, traffic, commerce, transportation or communication among the several states, or between a place in a state and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points within the same state but through a point outside thereof."

The use of the phrase "which affects commerce" in Section 4 of the Act, indicates the intent of Congress to exercise the full reach of its constitutional authority under the commerce clause. See Brennan v. OSHRC, 492 F.2d 1027 (2nd Cir. 1974); U.S. v. Dye Construction Co., 510 F.2d (10th Cir. 1975); Polish National Alliance v. NLRB, 332 U.S. 643 (1944); Godwin v. OSHRC, F.2d 1013 (9th Cir. 1976)."

Here, Respondent, which has offices in two states (Nevada and Washington), had ore in its stockpile which had been obtained from a mine in California. Even if all the ore Respondent were to process was obtained from the state of Nevada and was not shipped out of Nevada after processing such circumstance would not insulate it from affecting commerce since its mere presence in the intrastate market would have an effect on the supply and price of such mineral in the interstate market. See Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979); Fry v. U.S., 421 U.S. 542, 547 (1975).

It is concluded that Respondent is engaged in a mining activity affecting commerce and that such is covered by the Mine Act.

CAV Rights

Respondent contends that it should not be assessed penalties since it was not afforded the right to request a CAV (Compliance Assistance Visit) prior to the inspection. At the hearing, Inspector Myer explained the nature of CAVs:

Q. What is the policy of your agency, and can you explain for purposes of the record what a CAV inspection is?

A. A CAV inspection is a Compliance Assistant Visit. As an inspector, we go to the mine, when they're ready to go into production before they produce and we make a courtesy tour and we inspect the mines and any hazards or corrections that need to be made, we issue written notices which are non-penalty notices that are to be corrected and that they're not assessed. And we do this by written notice prior to their startup that they request.

Q. Your testimony is that in order to be a CAV inspection, it has to be requested in advance by the operator, is that your testimony?

A. Yes.

Q. And is that the policy of the agency as dictated by your head office in Washington, is that correct?

A. As far as I know, yes. (T. 24)

The Inspector also convincingly explained why Respondent was not given a CAV prior to the inspection:

"Q. Mr. Myer, talking about the internal memo, why couldn't respondent not qualify under your internal guidelines for a CAV inspection?

A. Well, number one, we never were notified, or a request sent to us in writing that they wanted one. Nor were we notified that they were a mill under construction.

Q. So your testimony is that you had no knowledge of their operations until you were told by your supervisor to go out and do this inspection, is that your testimony?

A. That's right." (T. 27)

With respect to this question, it is first noted that the "compliance assistance visit" process (Ex. P-2) is not a mine operator's absolute right and such is not provided for in the Act. Secondly, even under MSHA's internal CAV policies, since it was not notified by Respondent that the mill (mine) was under construction, there was no opportunity for MSHA, had it chosen to exercise its discretion and grant a CAV, to conduct such. Finally, Respondent was apparently unaware of such process at the time (T. 23-24, 54-56), and did not request a CAV. On the other hand, the mine in question is clearly subject to the Mine Act and

inspections thereof are mandated by the Act. Section 103(a), 30 U.S.C. § 815. In conjunction therewith, Sections 104(a) and 110(a) of the Act require that a Citation be issued and a penalty be assessed when a violation occurs. See Old Ben Coal Co., 7 MSHRC 205, 208 (1985). Accordingly, the contention of Respondent based on its failure to receive a prior CAV is found to lack merit and is rejected.

"Significant and Substantial" Allegations

The Inspector designated two of the Citations as involving "significant and substantial" (S & S) violations, i.e., Citations numbered 3070667 and 3070675 in Docket No. WEST 88-278-M.

Citation No. 3070667 charges a violation of 30 C.F.R. § 56.9087, to wit:

> "There was no audible reverse signal alarm on the Clark 275 B 2/ front end loader working in the mill yard area. Four employees were in the area on foot. The size of the loader caused an obstructed view to the rear. No spotter or signal man was being used to signal the operator when it was safe to back up."

30 C.F.R. § 56.9087, relating to "Audible warning devices and back-up alarms", provides:

> "Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up."

Inspector Myer testified that the subject front end loader is considered heavy duty mobile equipment, i.e. it weighs approximately 61,000 pounds with tire height of approximately 7 feet. He said that because of the height of the equipment the ground behind it is not visible to the rear for "quite aways," i.e., 25-30 feet (T. 36). While the loader was equipped with an audible signal alarm, it was not operable and there was no signal man being used. Four miners, in addition to the loader operator, were working in the area.

Inspector Myer described the hazard as follows:

2/ Respondent pointed out at the hearing (T. 66) that the correct number is 275A rather than 275B.

"A. Well, people on foot, no signalman, and they're engrossed in their work and the loader backs up they're very apt not to see it. The operator cannot see directly behind you and they can be run over, backed over.

Q. Would death or serious injury result.

A. Very definitely the size of this loader and the weight. It would be fatal. Fact of the matter our latest fatality in Nevada is with a front-end loader backing over an employee." (T. 35)

The Inspector also testified that two of the miners were working alongside the loader "because they were going with him to help him unload what he was carrying." Although the other two miners were working separately, the loader "probably passed" within six feet of them (T. 37).

Citation No. 3070675 charges an infraction of 30 C.F.R. § 56.14001:

"There was no guard covering the flywheels and V-Belts and pulleys on the Bilco Chipmunk Jaw Crusher in the bucking room. The wheels were 51 inches around with 4 spokes in the wheels. The center or hub of the wheel was 4-ft up from the floor level. The employee bucking samples was exposed to the moving wheel when feeding samples into the crusher."

30 C.F.R. § 56.14001 provides:

"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."

On the day of inspection, Inspector Myer observed an exposed flywheel on the Bilco crusher in the bucking room (T. 38). He described the crusher as "a small jaw that's used to sample small amounts of ore for assay purposes". It is driven by V-Belts and pulleys and a flywheel on each side. The Inspector said the flywheel travels at a "good speed" and that it is fed by "reaching over the flywheel to put ore into the crusher to feed the crusher" (T. 38-39). He actually observed an employee operating the crusher. The employee was required to stand at one side of the crusher which was in a small, approximately 6 foot by 8 foot, room. The Inspector indicated that "... you could only come up to the one side of it where ... the employee had to put the ore in" (T. 39). His testimony regarding the nature of the hazard and probabilities follows:

"A. Well, its an unguarded moving machine part. Its accessible to employees that were working right, right at the, right at it and having to reach over.

Q. They could get their arm caught in the flywheel?

A. Flywheel or the V-Belts and pulleys, either one.

Q. What type of any injury would occur from that type of an accident?

A. I would--- permanent disability you could lose an arm. You could lose fingers.

Q. Do these accidents occur frequently in this area?

A. Yes, probably one of the highest of accidents are due to injuries caused by moving machine parts in the mining industry." (emphasis added)

(T. 39-40)

A violation is properly designated S & S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission listed four elements of proof for S & S violations:

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

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

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co, 6 FMSHRC 1834, 1836 (Autust 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation

to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

It is concluded that the Petitioner carried its burden of proof under Mathies, supra, with respect to both Citations. Thus, the violations themselves were initially conceded, and both clearly contributed a measure of danger to the miners who were exposed to the hazards described and specified by the Inspector. Both violations, had the hazards actually come to fruition, would have resulted in serious bodily harm to the miners jeopardized. Indeed, the violation described in Citation No. 3070667 might well have resulted in a fatality. The record is clear that with respect to both violations the miners exposed worked at least at times in close proximity to the hazard. With respect to the "inoperable backup alarm" violation, vision was obstructed for some 25 feet behind the loader. With respect to the unguarded crusher violation, the operator thereof was required to work "right at" the hazard in a small confined space and "reach over" moving machine parts when feeding the crusher. I therefore find and infer from the unrebutted evidence of Petitioner cited above that both hazards which were significantly and substantially contributed to by the violations were reasonably likely to occur. Accordingly, both violations are found to be "significant and substantial."

Assessment of Penalties

Petitioner, at hearing, conceded that Respondent proceeded in good faith to abate all seven violations after notification thereof (T. 41). Respondent conceded that penalties assessed at the monetary levels proposed by the Secretary would not jeopardize its ability to continue in business (T. 69). Presumably, since this is a new operation evidence of previous violations was not proffered and it is inferred that Respondent has no prior violations. In terms of size, Respondent is small (T. 42) having 16 employees when the Citations were issued and 9 at the present time. Tonnage and/or sales figures were not available since Respondent had not commenced normal "production" as of the time of hearing. In connection with the remaining mandatory penalty assessment criteria, negligence and seriousness, the record with respect to the five non-S & S violations is not remarkable. In view of the strength of Respondent's belief that it was not a mine subject to the Act, and that if it had been it would have expected a CAV inspection, its negligence in committing all sevenviolations is found to be of a relatively low degree. Also, all seven citations were issued on its first inspection. The two S & S violations are found to be serious.

After consideration of the foregoing criteria, the penalties proposed by the Secretary for the seven violations involved (five

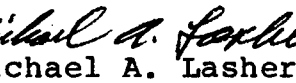
of which are $20 single penalty assessments) are found reasonable and appropriate, and are here assessed as follows:

Citation No.		Penalty
3070664		$ 20.00
3070665		20.00
3070676		20.00
3070677		20.00
3070678		20.00
3070667		85.00
3070675		68.00
	TOTAL	$253.00

ORDER

1. The Citations involved in this matter, including the "significant and substantial" designations on Citations numbered 3070667 and 3070675, are affirmed.

2. Respondent, if it has not previously done so, is ordered to pay the Secretary of Labor within 30 days from the date hereof the sum of $253.00 as and for the civil penalties above assessed.



Michael A. Lasher, Jr.
Administrative Law Judge

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 30, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 89-2-M A. C. No. 25-01093-05501
v.	:	Portable Dredge No. 1
L & L GRAVEL, Respondent	:	

AMENDED ORDER OF DEFAULT

Before: Judge Merlin

This case is before me pursuant to the Commission's Order dated May 30, 1989.

At the time the original default order, dated April 20, 1989, was issued, the Solicitor had failed to advise that one of the three citations involved in his petition had been vacated. The assessed penalties for the remaining two citations are $74.

Accordingly, judgment by default is entered in favor of the Secretary and the operator is ORDERED TO PAY the sum of $74 immediately.

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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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAY 30 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 88-72-M A.C. No. 38-00007-05505 M5K
v.	:	
	:	Giant Cement Company
WILLIAMS MECHANICAL AND WELDING, INC., Respondent	:	

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Secretary of Labor (Secretary); T.E. Peterson, Esq., Charleston, South Carolina, for Williams Mechanical & Welding, Inc. (Williams).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty in this proceeding for an alleged violation of the mandatory safety standard in 30 C.F.R. § 56.16002(2)(c). Pursuant to notice, the case was heard in Charleston, South Carolina, on April 18, 1989. Thel Hill testified on behalf of the Secretary. John Infinger, Burt Ardis, Ernest H. Williams and Franklin Neal testified on behalf of Williams. At the conclusion of the hearing, counsel for both parties orally argued their positions on the record, and each waived his right to file a post hearing brief. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Williams was a contractor doing maintenance and repair work for Giant Cement Company. Giant operated a limestone quarry and cement plant in Dorchester County, South Carolina. Williams stipulated that it operated as an independent contractor at a mine site. It had approximately 25 employees. The Secretary introduced a record of Williams' history of prior violations which shows a single violation of a mandatory safety standard. On February 25, 1988, Williams was engaged in cleaning out a

gypsum storage bin, removing the buildup of consolidated gypsum from the bin using a jackhammer. It had been engaged in this work for several weeks prior to February 25, 1988. The bin was constructed of concrete, and measured 24 feet in diameter and 46 feet in height. It had a capacity of approximately 675 tons.

On February 25, 1988, three men were working at the bin cleaning task, two inside the bin, Freddie Mack and Tyrone Gardner, and one on top of the bin, Franklin Neal, tending a lifeline which was attached to one of the men in the bin, namely, the one not operating the jackhammer. A lanyard, approximately six feet long, was hooked to his safety belt and to the jackhammer operator's belt. Gardner and Mack alternated using the jackhammer: the one not using the hammer was secured to the lifeline from the top of the bin; the one using the hammer was attached by a lanyard to the first employee.

At about 3:00 p.m., Gardner suggested that they start cutting the gypsum from the bottom of the bin rather than from the top. His foreman agreed and directed him to go up into the bin from below and "get everything down and start from the bottom." (Tr. 40) Gardner reentered the bin, took the jackhammer from Mack and began cutting the gypsum. Gardner did not attach a lifeline to his belt, nor did he attach the lanyard from Mack's belt to his own. Mack had the lifeline attached to his belt. At about 3:20 p.m., Gardner slipped and was pinned between a mass of gypsum and the side of the bin. His body was crushed and he was pronounced dead at approximately 4:00 p.m. when his body was removed from the bin.

Gardner had just turned twenty years of age, and had been employed by Williams for about two months. He had been working in the bin for about 30 days. Mack no longer works for Williams, and Williams was unable to subpoena him to testify at the hearing. Neal testified that he heard a noise when Gardner slipped and heard him say he was trapped. However, he could not see Gardner from the top of the bin.

REGULATION

30 C.F.R. § 56.16002 provides in part:

> (a) Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be --
>
> * * *
>
> (c) Where persons are required to enter any facility listed in this standard for maintenance or inspection purposes,

ladders, platforms, or staging shall be provided . . . Persons entering the facility shall wear a safety belt or harness equipped with a lifeline suitably fastened. A second person, similarly equipped, shall be stationed near where the lifeline is fastened and shall constantly adjust it or keep it tight as needed, with minimum slack.

ISSUES

1. Whether the evidence shows a violation of the cited standard?

2. If so, what is the appropriate penalty?

CONCLUSIONS OF LAW

I. JURISDICTION

Williams operated as an independent contractor at a mine site. As such it was a mine operator under the Mine Safety Act. I have jurisdiction over the parties and subject matter of this proceeding.

II. VIOLATION

Williams does not contest the fact that one of its employees, Tyrone Gardner, was working inside a bin or silo or tank where loose unconsolidated materials were handled, and that his safety belt was not fastened to a lifeline. This clearly constitutes a violation of 30 C.F.R. § 56.16002. Williams contends that Gardner after entering the bin began using the jackhammer against a direct order, but the evidence supporting this contention is ambiguous. I conclude that Gardner was not told not to use the jackhammer after he entered the bin from the bottom.

The practice normally followed by Williams under which one of the two people in the bin was tied to a lifeline, and a lanyard was attached from that employee's belt to the belt of the other employee who operated a jackhammer does not meet the requirments of the standard. The lanyard cannot be considered a lifeline: as the Investigator testified, it permits too much slack, and would permit the person on the end of the lanyard to fall an additional 6 feet (the length of the lanyard). However, the normal practice was not being followed at the time of the accident, contrary to the investigation report. At the time of the accident, the deceased employee entered the bin to perform work and was not protected by a lifeline or a lanyard. This constitutes a violation of the mandatory standard.

GRAVITY

The violation which I find to have occurred is a serious one. The failure to use a lifeline could result in a serious injury. The gravity is somewhat lessened by the fact that the employee was working near the bottom of the bin (5 to 7 feet from the bottom) and much of the gypsum had been removed. The fatal accident, moreoever, tragic though it was, did not result from the violation. Had Gardner been atached to the lifeline tended by Neal, this would not have prevented the accident, since Neal was unable to see Gardner when the accident occurred and could not have prevented it. Nor is it clear that the accident resulted from a slip or fall. These facts mitigate the gravity of the violation.

NEGLIGENCE

As I concluded above, Williams' practice of having a single lifeline for two employees working in the bin did not comply with the standard. This practice had been followed for approximately 30 days. Williams should have been aware of the violative nature of the practice. However, there is no evidence that Williams was aware that Gardner was operating the jackhammer in the bin without being attached either to the lifeline or the lanyard. I conclude, however, that Williams should have been aware of the fact the Gardner was using the jackhammer, and was not attached to the lifeline. Williams is guilty of ordinary negligence.

PENALTY

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $900.

ORDER

Based on the above findings of fact and conclusions of law, citation 2859169 issued February 27, 1988, is AFFIRMED. Respondent is ORDERED to pay within 30 days of the date of this order $900 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge

Distribution:

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 30 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 88-101-M
	:	A.C. No. 08-00006-05523
	:	
	:	Brooksville Rock Plant
v.	:	
	:	
FLORIDA MINING & MATERIALS, Respondent	:	

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia for Petitioner;
Archie Clark, Jr., Manager Human Resources and Safety, Tampa, Florida for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Florida Mining and Materials (the Company) with seven violations of the regulatory standard at 30 C.F.R. § 50.20. The general issue before me is whether the company violated the cited regulatory standard and if so what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The cited standard, 30 C.F.R. § 50.20, provides in part as follows:

> Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in sections 50.20-1 through 50.20-7... The operator shall mail completed forms to MSHA within 10 working days after an accident or occupational injury

> occurs or an occupational illness is diagnosed. When an accident specified in section 50.10 occurs, which does not involve an occupational injury, sections A, B and items 5 through 11 of section C of form 7000-1 shall be completed and mailed to MSHA in accordance with the instructions in section 50.20-1 and criteria contained in section 50.20-4 through 50.20-6.

The seven citation at bar all charge the failure of the mine operator to have submitted MSHA form 7000-1 to report an accident involving an employee. At hearing the Company admitted the violations but claimed that the Secretary's proposed penalty was unwarranted in light of the factors mitigating the negligence findings.

According to Archie Clark, Manager of Human Resources and Safety, the person in charge of filing the MSHA forms at issue died in May 1985, apparently just before the Company began failing to file the reports. According to Clark the office secretary who was familiar with the MSHA reporting requirements also suffered a longterm illness during 1986 and 1987 and had been replaced by a temporary secretary. Clark observed that neither the successor to the deceased manager nor the temporary secretary had experience in the MSHA reporting requirements. He also noted that the Company had not previously failed to report accidents or injuries and since a new employee had taken a course, apparently in MSHA reporting requirements, there have been no problems since the citations at bar.

The Secretary nevertheless argues that any violation of the cited standard demontrates negligence per se. In this regard counsel for the Secretary stated in closing argument as follows:

> Any violation of Part 50 is considered to be a result of a high degree of negligence simply because every MSHA -- every operator subject to MSHA jurisdiction knows and ought to take it as the highest responsibility to report injuries that occur in the workplace. As a matter of policy, that is what MSHA has determined to do.

The Secretary is clearly wrong however in her analysis. Negligence is defined in her own regulations as "committed or omitted conduct which falls below a standard of care established under the Act to protect persons against the risks of harm", 30 C.F.R. § 100.3(d). In particular then in determining the existence, vel non, of negligence the facts of each case must be examined. In this case the testimony of

Mr. Clark is undisputed that the two persons with knowledge of MSHA filing requirements had become unavailable during the time in which the cited accidents should have been reported. The evidence also is undisputed that both before and after the cited deficiencies the MSHA reports were properly filed. Under the circumstances I agree that there is indeed a mitigating basis for a reduction in the negligence findings.

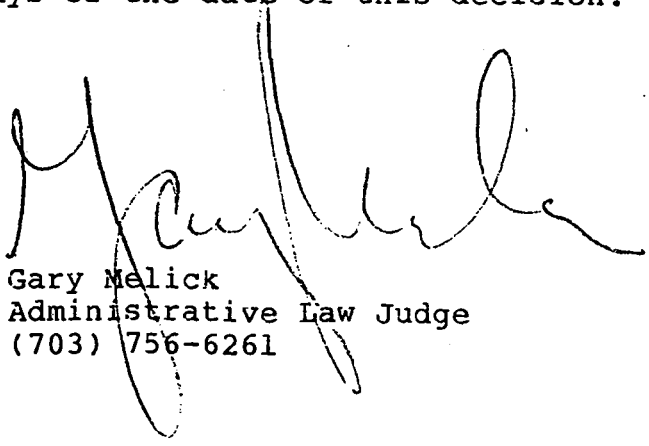
In assessing a civil penalty in this case I have also considered the Respondent's history of violations, that the violations were abated in good faith, and that the operator is large in size. In regard to gravity I concur with the observations made by Chief Judge Merlin in Secretary v. Consolidation Coal Co., 9 FMSHRC 727 at 733-734 (1987) concerning similar reporting violations:

> Gravity cannot be doubted in view of the fact that Part 50 is the cornerstone of enforcement under the Act. Since Part 50 statistics provide the basis for planning, training and inspection activities, accurate reporting is essential. Moreover, failure accurately to report could have extremely dangerous consequences by concealing problem areas in a mine which should be investigated by MSHA inspectors. In short, without proper compliance by the operator under Part 50, the Secretary could not know what is going on in the mines and, deprived of such information, he would be unable to decide how best to meet his enforcement responsibilities.

Under the circumstances I find that a civil penalty of $50 for each of the 7 violations is appropriate.

ORDER

Florida Mining and Materials is directed to pay civil penalties of $350 within 30 days of the date of this decision.



Gary Melick
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 30 1989

BETH ENERGY MINES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 88-268-R
	:	Citation No. 2897509; 5/23/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Mine No. 108
Respondent	:	Mine I.D. 46-03887
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 88-345
	:	A.C. No. 46-03887-03570
v.	:	Mine No. 108
BETH ENERGY MINES, INC., Respondent	:	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania for Beth Energy Mines, Inc.;
Nanci A. Hoover, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge one citation issued by the Secretary of Labor against Beth Energy Mines, Inc., (Beth Energy) and for review of civil penalties proposed by the Secretary for the violation alleged therein.

The evidence shows that on August 12, 1976, MSHA Inspector Frank J. Cervo issued Notice to Provide Safeguards 1FJC at Mine No. 108, then operated by the Bethlehem Mines Corp., Beth Energy's predecessor. That safeguard notice quoted the criteria set forth in 30 C.F.R. § 75.1403-10(e) providing that "positive-acting stopblocks or derails shall be provided near the end of all supply tracks."

It is undisputed that the same safeguard had been issued at all mines with haulage track in District 3, the MSHA district which includes Mine No. 108. It is also undisputed that Mine No. 108 utilizes track haulage only to move miners and supplies through the mine and that such a mine differs significantly from mines where the track is used to haul coal in regard to the volume of traffic, the size of trips and the size of the locomotives and cars.

Sometime before February 1988, all of these safeguards regarding the use of positive acting stopblocks or derails in District 3 were uniformly modified to include language prohibiting the use of certain types of stopblocks. Such a modification was issued at Mine 108 on February 17, 1988, by Inspector Scott Springer and read as follows:

Safeguard Notice 1FJC issued 8-12-76 is hereby modified to include the following statement:

> Positive acting stopblocks, derail or chain type car holds shall be used to secure or prevent runaways of track mounted haulage equipment. Other devices not specifically designed to secure track mounted haulage equipment to prevent runaways are not acceptable.

It is undisputed that this standardized modification was prepared from a sample form furnished by MSHA's District 3 office. It is further undisputed that this standardized language was applied to all track haulage mines in District 3, regardless of the conditions in any particular mine. It was intended to prohibit reliance on skids or chained timber stopblocks and to require chain type car holds. Beth Energy installed such car holds but continued to also use a timber arrangement.

On April 28, 1988, Inspector Roy Bennett issued an additional modification to Safeguard Notice 1FJC. The modification reads in relevant part as follows:

> Positive acting stopblocks, derails or chain type car holds shall be used to secure or prevent runaways of track mounted haulage equipment. Other devices not specifically designed for such purpose are not acceptable such as skid retarders, post or crib block crossed over rails of any design in

front or rear of haulage equipment, wooden chocks under wheels or jill pokes of any design.

It is undisputed that this modification was also issued on a district-wide basis in MSHA District 3, without regard to conditions in the particular mines and was also based upon a sample format prepared by the district office.

On May 23, 1988, Inspector Bennett traveled to the J-8 section of Mine 108 with Phil Burnside, a company Mine Inspector, and Mason Payne, a UMWA miners' representative. Upon arriving at the J-8 section they parked their vehicle outby several other vehicles including two supply cars near the end of the track. Beth Energy maintains that it had a timber stopblock in place at this location to provide protection from runaway haulage equipment. It concedes however that the chain-type car hold required by the latest modification was not attached to the supply cars and was in fact located approximately 30 feet outby the cars.

Inspector Bennett accordingly issued the citation at bar for failure to have the chain-type car hold attached to the supply cars. More specifically the citation alleges a "significant and substantial" violation of 30 C.F.R. § 75.1403 and Safeguard 1FJC and reads as follows:

> Two supply cars were on the J8 section supply track and were not chained to prevent runaway. The tie down chain was located 30 feet outby the cars.

Beth Energy raises two related arguments that may be dispositive of these cases: (1) whether the modification to Safeguard 1FJC upon which the citation at bar is based, was properly issued in that it was issued on a district-wide basis without consideration of the specific conditions at Mine 108; and (2) whether the issuance of the original underlying safeguard in 1976 was proper in that it was issued on a district-wide basis without consideration of the specific conditions at Mine 108. Inasmuch as I agree that neither the original safeguard nor the subsequent modifications were properly issued, the citation at bar, based upon such safeguard and modifications, must be vacated.

Section 314(b) of the Act provides as follows:

> Other safeguards, adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

The regulatory standard at 30 C.F.R. § 75.1403 contains the same provisions. The regulatory standards also set forth criteria, similar to those for the approval of individual mine plans for ventilation and roof control, to be applied when determining whether a safeguard is necessary. The operation of these criteria are described in 30 C.F.R. § 75.1403-1(a).

> Sections 75.1403-2 through 75.1403-11, set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under § 75.1403. Other safeguards may be required. (Emphasis added.)

As with the criteria for the approval of individual mine plans, these safeguard criteria are not in themselves mandatory safety standards but become enforceable only when an operator is given notice through the issuance of a safeguard notice. See Secretary v. Southern Ohio Coal Co., 10 FMSHRC 963 (1988).

In Southern Ohio Coal Co., supra, the Commission discussed the issue of the general application of safeguards but did not rule on the specific issue of whether a generally applicable safeguard would be invalid. It discussed the issue as follows:

> The Commission has observed that while other mandatory safety and health standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Act, section 314(b) extends to the Secretary an unusually broad grant of regulatory power--authority to issue standards on a mine-by-mine basis without regard to the normal statutory rulemaking procedures. Southern Ohio Coal Co., supra, 7 FMSHRC at 512. The Commission also has recognized that the exercise of this unique authority must be bounded by a rule of interpretation more restrained that that accorded promulgated standards. Therefore, the Commission has held that a narrow construction of the terms of a safeguard and its intended reach is required and that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the remedial conduct required by the operator to remedy such hazard.

> These underlying interpretive principles strike an appropriate balance between the Secretary's authority to require safeguards and the operator's right to notice of the conduct required of him. They do not, however, resolve the important issue raised here for the first time--whether a notice to provide safeguard can properly be issued to address a transportation hazard of a general rather than mine-specific nature. The United States Court of Appeals for the District of Columbia Circuit, in the context of the Mine Act's provision for mine-specific ventilation plans, has recognized that proof that ventilation requirements are generally applicable, rather than mine-specific, may provide the basis for a defense with respect to alleged violations of mandatory ventilation plans. In Zeigler Coal Co., supra, the court considered the relationship of a mine's ventilation plan required under section 303(o) of the Act, 30 U.S.C. § 863(o), to mandatory health and safety standards promulgated by the Secretary. The court explained that the provisions of such a plan cannot "be used to impose general requirements of a variety well-suited to all or nearly all coal mines" but that as long as the provisions "are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application." 536 F.2d at 407; See also Carbon County Coal Co., 6 FMSHRC 1123, 1127 (May 1984) (Carbon County I); Carbon County Coal Co., 7 FMSHRC 1367, 1370-72 (September 1985) (Carbon County II).
>
> Whether, as the judge believed, a similar type of challenge may be made to a safeguard notice is a question of significant import under the Mine Act. Given the manner in which this important question was raised and addressed in the present case, and the nature of the evidence in this record, it is a question that we do not resolve at this time. 10 FMSHRC at 966-7.

I find that indeed with respect to the proper interpretation of safeguard notices an analogy can properly be made to the law that has developed concerning the adoption of mine plans. In Carbon County Coal Corp., 7 FMSHRC 1367 (1985), the Commission addressed a similar issue. There an MSHA district office sought to require Carbon County to

include a provision in its ventilation plan concerning auxiliary fans. The provision was not one set forth in the criteria for ventilation plans in 30 C.F.R. § 75.316-2 but was a "guideline" issued by the district. The Commission did not address the merits of the inclusion of the disputed provision in the plan but rather held that the attempt to include a generally applicable provision was improper, stating as follows:

> Because we conclude that the uncontroverted material facts establish that MSHA's decision to impose the free discharge capacity provision was not based upon particular circumstances at the Carbon No. 1 Mine, but rather was imposed as a general rule applicable to all mines, we hold, for the reasons stated in Zeigler and enunciated here, that MSHA's insistence upon the free discharge capacity provision, MSHA's revocation of Carbon County's ventilation plan, and MSHA's revocation of Carbon County's ventilation plan, and MSHA's subsequent citation of Carbon County for a violation of section 75.316, were not in accord with applicable Mine Act procedure. Also, if MSHA believes the free discharge capacity provision to be of universal application, the Secretary may proceed to rulemaking under section 101 of the Mine Act and promulgate the free discharge capacity provision as a nationally applicable mandatory safety standard. 7 FMSHRC at 1375.

The Commission further discussed the issue of the application of general guidelines, quoting Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976):

> The approval-adoption process protects operators and miners by assuring that particular conditions at a mine are addressed by individualized safety requirements. The court in Zeigler, in a discussion we have found "persuasive and compelling" Carbon County Coal Co., 6 FMSHRC at 1127, described the limits the statute places upon the Secretary regarding the restricted subject matter of a ventilation and methane and dust control plan:
>
> > Section 303(o) specifically states that the plan is to be "suitable to the conditions and the mining system of the coal mine..." The context of the plan requirement, amidst the other provisions

> of § 303, which set forth fairly specific standards pertaining to mine ventilation, further suggests that the plan idea was conceived for a quite narrow and specific purpose. It is not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine.
>
> [I]nsofar as those plans are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application. 7 FMSHRC at 1371-2.

This legal analysis is analogous to the application of district-wide criteria for safeguards. Under the applicable regulations MSHA may impose requirements on an operator on a mine-by-mine basis subject to the specific conditions and requirements necessitated by the peculiar circumstances at a particular mine. Conversely and by similar analogy it is clear that safeguards issued under 30 C.F.R. § 75.1403 cannot be used to impose general requirements on all mines throughout a district without regard to the circumstances of the specific mines. Since it is undisputed that the original safeguard in this case, as well as the subsequent modifications, were issued on a district-wide basis without regard to the specific conditions at Mine 108 they were not properly issued. Citation No. 2897509, conditioned upon the validity of that safeguard and its modifications, must therefore be vacated. See U.S. Steel Mining Co., 4 FMSHRC 526 (Chief Judge Merlin 1982), Southern Ohio Coal Co., 9 FMSHRC 273 (Judge Maurer 1987), rev'd on other grounds, 10 FMSHRC 963 (1988), and Southern Ohio Coal Co., 10 FMSHRC 1564, (Judge Weisberger, 1988).

ORDER

Citation No. 2897509 is vacated.

Gary Mellick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 30, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 88-145 A. C. No. 41-01192-03525
v.	:	
TEXAS UTILITIES MINING, CO., Respondent	:	Big Brown Strip

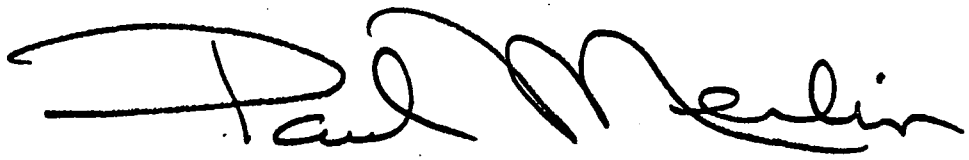
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The parties have filed a motion to approve settlement of the twenty violations involved in this case. The penalties were originally assessed at $5,000 and the proposed settlement is for $5,000.

The parties' 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. All twenty citations were issued for violations of 30 C.F.R. § 50.20(a) because reportable injuries which occurred during 1985, 1986 and 1987 and were not reported to MSHA. Each violation was originally assessed at $250 and the operator has agreed to the full amount for every violation. In the past I have expressed the opinion that reporting violations are serious. See, Secretary of Labor v. Consolidation Coal Company, 10 FMSHRC 1633 (1988). These settlements are consistent with my previously stated views.

Accordingly, the motion to approve settlement is GRANTED and the operator is ORDERED TO PAY $5,000 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDER

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 12, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 89-21 A. C. No. 15-10753-03533
v.	:	New Era Mine No. 1
NEW ERA COAL COMPANY, INCORPORATED, Respondent	:	

ORDER RESPONDENT TO SHOW CAUSE

The Solicitor has submitted a motion for default judgment in this case.

In his motion the Solicitor advises that although the operator has paid the originally assessed penalty in full, this payment should not be construed as a settlement since no agreement has been reached between the parties. Consequently, the Solicitor asks that an order to show cause be issued and that if there is no satisfactory response thereto, an order of default thereafter be entered against the operator.

The operator should understand that there can be no settlement unless both parties agree to it. The operator cannot dispose of a case through a settlement by paying the penalties without the Solicitor's concurrence. The Solicitor's present motion is well taken.

Accordingly, it is ORDERED that within 21 days from the date of this order the operator show good reason why it should not be held in default. Otherwise, a default judgment will be entered.

Paul Merlin
Chief Administrative Law Judge

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