MAY 1995

COMMISSION DECISIONS AND ORDERS

There were no Commission decisions in May.

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MAY 1995

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

Secretary of Labor, MSHA v. Enlow Fork Mining Company, Docket No. PENN 94-400. (Judge Weisberger, April 6, 1995)

Secretary of Labor, MSHA v. Enlow Fork Mining Company, Docket No. PENN 94-259. (Judge Weisberger, April 6, 1995)

Secretary of Labor, MSHA v. Walker Stone Company, Docket No. CENT 94-97-M. (Judge Maurer, April 12, 1995)

Review was not granted in the following cases during the month of May:

Secretary of Labor, MSHA v. Wyoming Fuel Company and Earl White employed by Basin Resources, Inc., Docket Nos. WEST 92-340, etc. (Judge Manning, April 6, 1995)

United Steelworkers of America on behalf of Local 5024 v. Copper Range Company, Docket No. LAKE 94-614-CM. (Judge Maurer, April 4, 1995)

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 2 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-89
Petitioner	:	A.C. No. 15-16928-03525
v.	:	
	:	No. 1 Mine
B & A COAL COMPANY,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, and Gerald W. McMasters, Mine Safety and Health Administration, Pikeville, Kentucky, for the Petitioner.
Abram Adkins, pro se, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging a violation by B & A Coal Company of 30 C.F.R. § 75.523-3. A hearing on this matter was held in Paintsville, Kentucky, on March 22, 1995.

Findings of Fact and Discussion

On August 3, 1992, Douglas Looney an MSHA Inspector, inspected a drift opening mine, operated by B & A Coal Company ("Operator"). He inspected three rubber-tired self-propelled battery operated Mescher tractors. The tractors were used to transport coal from the working section to the surface dump point, a distance of 1,500 feet. The terrain was relatively level with "some dips" (Tr. 50). These vehicles were equipped

with parking brakes that engaged when a panic bar was applied. Also they were capable of being operated manually. Looney disconnected the batteries on these vehicles and observed that "the brake pads didn't come out against the brake disk" (sic) (Tr. 67).

Looney issued a section 104(a) citation for each of these vehicles alleging, in each case, a violation of 30 C.F.R. § 75.523-3. Section 75.523-3, supra provides that, pertaining to rubber-tire self-propelled electric haulage equipment used in the active workings of underground mines that " . . . . (b) automatic emergency-parking brakes shall . . . (2) engage automatically within 5.0 seconds when the equipment is deenergized . . . ".

The Operator did not rebut, contradict, or impeach the testimony of Looney regarding his observations and actions. Abram Adkins, an agent of the Operator, agreed that when the vehicles are deenergized the parking brakes "wouldn't set up" (Tr. 77). As a defense, the Operator argues, in essence, that nothing was available from the manufacturer to allow the brake to engage upon being deenergized. Adkins testified that he put "everything" on the tractors that was "available", and the Pikeville MSHA office "approve it" (sic) (Tr. 78. 79), Adkins stated as follows: "I've run a tractor for 30 year (sic) and I've never had a man hurt" (Tr. 87).

The terms of Section 75.523-3, supra, are clear, unequivocal, and unconditional. Based upon the testimony of Looney, I conclude that the equipment at issue did not engage automatically within 5.0 seconds when the equipment was deengerized. I thus conclude that the Operator did violate Section 75.523-3, supra.

Adkins conceded that he was aware that the brakes on the vehicles in questions would not engage when the equipment was deenergized. It was his testimony, however, that in essence, he put everything available on the tractors, and that the Pikeville MSHA Office approved it. Petitioner did not impeach or contradict this testimony. I find on the basis of this testimony that the Operator's negligence has been mitigated to some degree. I find that a penalty of $50 is appropriate for each of the cited conditions.

ORDER

It is ORDERED that, within 30 days of this decision, the Operator shall pay a civil penalty of $150.

Avram Weisberger
Administrative Law Judge

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Mr. Abram Adkins, 1252 Greasy Creek Road, Shelbiana, KY (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 4 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-184
Petitioner	:	A. C. No. 15-11620-03533
v.	:	
	:	No. 2 Hall
PYRAMID MINING INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Susan E. Foster, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Carl B. Boyd, Jr., Esq., Meyer, Hutchinson, Haynes & Boyd, Henderson, Kentucky, for the Respondent.

Before: Judge Weisberger

On October 31, 1994, the Commission issued a decision that vacated my determination that Pyramid Mining Incorporated ("Pyramid") did not violate 30 C.F.R. § 77.1505 by failing to block auger holes, because the holes had not been "abandoned" within the meaning of the standard (16 FMSHRC 2037 (October 1994)). In its decision, the Commission remanded the matter to me to consider whether Pyramid violated Section 77.1505, supra, by failing to block the cited holes at the earliest reasonable time, taking into account the following factors: the existence of any active mining in the area in question, the period of time that had passed since holes were created in the initial coal extraction, whether the operator has taken action to resume drilling, and the hazards presented by the holes" (16 FMSHRC supra, at 2040).

On November 2, 1994, I initiated a telephone conference call with counsel for both parties, to determine if counsel would seek an evidentiary hearing on the issues raised by the Commission's remand. Counsel were granted additional time to determine their positions. On November 15, 1994, in a subsequent telephone conference call, counsel advised that they each requested an evidentiary hearing, and it was mutually agreed that the matter be heard on February 1, 1995. In a subsequent telephone conference on December 15, 1994, Respondent requested an adjournment due to the scheduling of another trial on February 1, and Petitioner did not oppose the request. The matter was rescheduled, and heard in Evansville, Indiana on February 16, 1995.

At the hearing, MSHA inspector Darold Gamblin testified for Petitioner, and James Michael Hollis, Respondent's Safety and Reclamation Supervisor, testified for Respondent. Both Gamblin and Hollis had testified at the initial hearing on July 8, 1993.

I. Findings of Fact

Based on evidence adduced at the initial hearing, and at the supplemental hearing held on February 16, 1995, I make the following findings of fact, in addition to those made in my initial decision of September 23, 1993 (15 FMSHRC 1950 (1993):

> 1. On March 20, 1992, when Gamblin inspected the subject site, active mining was taking place in an area approximately 2000 feet from the area where the unblocked hose was located. There is no clear convincing evidence to establish the precise period of time that had passed since holes were created in the initial coal extraction. Gamlin indicated that he had seen the same holes in January 19, 1992, during a previous examination. Joe Clark, Respondent's Ground Manager, when asked at the initial hearing, when the holes were initially drilled answered as follows: "[t]hey would have been drilled between November and March" (Tr. 58, September 23, 1993) (Emphasis added). James Hollis, Respondent's Safety and Reclamation Supervisor, testified that he did not recall when the holes were created.

2. In discussions Hollis had with the contractor responsible for drilling the holes over the period November, December 1991 and January 1992, the contractor was informed that, regarding the holes that had not been fully penetrated, " . . . we were going to attempt at that time to re-enter (sic) them" (Tr. 133). However, there is no evidence that Pyramid had taken action to resume drilling.

3. There was no fence or other device physically blocking the entrance to any of the unblocked holes. Nor were there any signs specifically warning persons of the hazards involved in entering these holes and warning persons to stay out of them. Children from a nearby residential area might enter these holes. A person entering an unblocked auger hole could encounter the hazards attendant upon exposure to methane, unsupported roof, or accumulations of water.

II. Discussion

A. Violation

According to Hollis, Pyramid considers the area where holes had been augered and the area where mining was taking place on the date cited, to be "all one pit" (Tr. 130). However, the record is clear that at the date Pyramid was cited, active mining was taking place in a section approximately 2000 feet away from the cited auger holes. Although a finding cannot be made as to the precise amount of time that had elapsed from the time the holes were created until they were cited in March 1992, it appears that the cited holes were augered during the months of November 1991, December 1991 and January 1992 (See Exhibit R-2). Both Hollis and Clark testified at the initial hearing that, in essence, it was Pyramid's intent to have the holes redrilled to their full length. Hollis testified at the February 16 hearing that the contractor responsible for drilling the holes was informed in November and December 1991 and in January 1992, that Pyramid had decided to attempt to redrill the holes. However, there is no evidence that Pyramid has taken any action to resume drilling of these holes. Respondent has not impeached or contradicted Gamblin's testimony that the holes were

not ventilated to their full depth, and that methane accumulates in the holes. Nor did Respondent contradict or impeach Gamblin's testimony that cave-ins could occur in the holes due to unsupported roof. Also, Gamblin's uncontroverted testimony establishes that the holes could become filled with water, which also would pose a hazard.

Following the dictates of the Commission in its decision in this matter, 16 FMSHRC supra, and considering the factors set forth in the Commission's decision, as discussed above, I conclude that Pyramid did violate Section 77.1505 supra, by failing to block the cited holes at the earliest possible time.

B. Significant and Substantial

According to Gamblin there had been three previous methane ignitions in auger holes on the cited property. He also referred to an accident that had occurred at another mine when methane was ignited in a drilling operation which lead to an explosion and injuries. There was no fence surrounding the pit area, and there were no signs warning persons not to go there or warning of dangers of the unblocked holes.

In order for a violation to be significant and substantial, it must be established that there was a reasonable likelihood of an injury producing event (U.S. Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (1985)). Hence, it must be established that there was a reasonable likelihood of a person being exposed to the hazards of the abandoned holes. It is clear that persons could have entered the unblocked holes. However, there is insufficient evidence to predicate a conclusion that such an event was reasonably likely to have occurred. Indeed, on cross-examination, Gamblin was asked whether there was a reasonable likelihood of persons entering the holes. He indicated only that such an event was possible. For these reasons, I find that it has not been established that the violation was significant and substantial.

C. Penalty

In assessing a penalty, I find that the penalty to be imposed should be mitigated in that Respondent did not consider the holes to be abandoned and intended to have them redrilled.

Hence, there was only a low level of negligence on its part in connection with the violation of Section 77.1505, supra, which requires the blocking of such holes before they are abandoned. I find that a penalty of $100 is appropriate for this violation.

ORDER

IT IS ORDERED that the citation at issue be amended to a violation that is not significant and substantial. It is further ordered that Respondent shall, within 30 days of this decision, pay a civil penalty of $100.

Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 4 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1210
Petitioner	:	A.C. No. 15-08216-03627
v.	:	
	:	No. 2 Mine
DIXIE FUEL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
H. Kent Hendrickson, Esq., Rice & Hendrickson, Harlan, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging two violations by Dixie Fuel Company (Respondent) of 30 C.F.R. Section 75.202(a). Subsequent to notice, the case was scheduled for hearing in Johnson City, Tennessee, on March 7, 1995. At the hearing, Petitioner made a motion to approve a settlement agreement regarding Citation No. 4249321. Respondent has agreed to pay the full assessed penalty of $189. I have considered the representations and documentations submitted relating to this citation, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the motion to approve settlement is granted.

The remaining matter in this case, Citation No. 4249322, was heard on March 7, 1995. Andron Wilson testified for Petitioner. Michael McMillan, Lewis Eugene Blevins, and Eddie Sargent testified for Respondent. Counsel for both parties elected not to file a post hearing brief.

Findings of Fact and Discussion

I. Violation of Section 75.202(a), supra

On March 22, 1994, Andron Wilson, an MSHA Inspector, inspected Respondent's No. 2 mine, an underground coal mine. In essence, he testified that the roof was loose and broken in an approximately 300 foot area of entry Nos. 4 and 5. He said that a lot of loose rock had already fallen, and that "a lot of them that were left were cracked and hanging down" (Tr. 36). He estimated that the largest chunks of rock were 24 inches by approximately 30 inches. According to Wilson, the rocks "averaged" (Tr. 37) up to 8 inches thick. He stated that he could hear chunks of rocks falling when he made his inspection.

The roof was supported according to Respondent's roof control plan. Sixty inch bolts had been inserted into the roof on 4 foot centers. Also, steel straps, 20 inches wide and 16 feet long, were held to the roof by bolts. The distance between the bolts was 40 inches. Wilson indicated that "normally" there is an "average" of 32 inches of "open roof" between straps (Tr. 35).

Although no mining was taking place at the time, two men were working in the No. 4 entry. According to Wilson, there were "many areas" of unsupported roof, and loose dry rock containing cracks and gaps throughout the section at issue where Michael McMillian, the section foreman, had directed the workforce to "set up this section" (Tr. 36).

Wilson issued a Section 104 (d)(1) citation alleging a violation of 30 C.F.R. § 75.202(a) which provides, as pertinent, as follows: "[t]he roof, . . . of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof ... ."

Michael McMillian, who was a bolter and foreman on March 22, 1994, and who accompanied Wilson, stated that he did not see any hazardous conditions in the roof of entry No. 4. He said that nothing was falling from the roof. He testified that he looked at the entries along with Wilson and that the condition of the roof was "not as bad as he (Wilson) was saying it was because we had straps in it" (Tr. 83). He stated that, regarding the safety of the roof, "I did not see anything wrong with it at the time" (Tr. 89).

Lewis Eugene Blevins, Respondent's Superintendent, who also was present with Wilson, indicated that before the inspection on March 22, there was no likelihood of an accident or injury occurring in the area due to rock falls. However, on cross-examination, he was asked whether at the start of the shift on March 22, the area in question needed scaling, and he answered as follows: ". . . you might have found one or two little pieces you might needed to scale" (sic) (Tr. 108). He further elaborated as follows: "[w]ell, that would be hard to say if it needed scaling. You would have to -- when you make your examination, then you would determine if it needed scaled or not, which I didn't see nothing that needed scaled down" (sic) (Tr. 109).

I find the testimony of Respondent's witnesses insufficient to impeach or significantly contradict the testimony of Wilson regarding his observations. Further, I find that there is insufficient evidence in the record to impugn any improper motive on the part of Wilson regarding his opinion that the conditions he observed were hazardous to miners working in the area. I thus find that although the roof had been supported by bolts and straps, the conditions were such that the roof was not adequately controlled to have protected the miners working in the area from the hazardous conditions associated with loose and broken roof. For these reasons, I conclude that Respondent did violate Section 75.202(a), supra.[1]

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[1]In essence, according to Blevins, the roof had formed an arch between the straps of the roof. He opined that if loose rock is pulled around the straps, which provide the bases for the arches, the roof bolts would become dislodged. Compliance with Section 75.202(a) does not require the pulling of loose rock around

According to Wilson, had the conditions in the roof not been abated the loose and broken rocks would have eventually fallen, time causing serious injuries.

II. Significant and Substantial

According to McMullian, after the inspection Wilson told him to pry down loose rock and that "a lot of it wasn't as loose as what he (Wilson) thought it was", and that "we was having to force it down", as "there wasn't nothing that was loose" (sic) (Tr. 86). McMillian indicated that in his 9 years of experience working at the mine, he does not recall any injuries resulting from draw rock "between these straps" (Tr. 85). In the same fashion, Blevins testified that, in his 10 years at the mine, he could not recall any problems or injuries from rock falls in the area in question. He opined that there was no likelihood of an accident from a rock fall. He indicated that he would feel comfortable working in the area "as it was" on March 22 (Tr. 100).

I have considered the above testimony of Respondent's witnesses concerning the likelihood on an injury resulting from the cited conditions. However, due to the extent and size of loose material as set forth in Wilson's testimony, I conclude that the violation was significant and substantial (See, Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984)).

III. Unwarranable Failure

The area in question was preshifted prior to its being cited by Wilson. According to Wilson, Blevins and McMillian did not deny that there were any problems with the roof. Both McMillian and Blevins, in essence, opined that the cited conditions were

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footnote No. 1 cont'd.

straps. Hence, even if arches were present in the roof, Respondent is not relieved from complying with the terms of Section 75.202(a), supra requiring the support or control of the roof to protect miners from the hazards related to roof falls.

not hazardous. According to Wilson, when he discussed the cited conditions with McMillian and the need to remove the loose rock, McMillian told him that " ... if I pull it today, its just going to need pulled again tomorrow" (sic) (Tr. 39). McMillian explained that if rock is pulled off the straps, the roof loosens and has room to move.

Given the extent of the roof area that had loose and broken roof, the fact that the roof had been inspected that morning on a preshift examination, and the fact that men were working in the area, I conclude that the violation herein resulted from more than ordinary negligence, and reached the level of unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1997, 2203-2204 (1987).)

I find that a penalty of $3,500 is appropriate for this violation.

ORDER

IT IS ORDERED that, within 30 days of this decision, Respondent pay a total penalty of $3,689.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAY 5 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-206
Petitioner	:	A.C. No. 03-01736-03505
v.	:	
	:	Docket No. CENT 94-213
GEMINI MINING COMPANY,	:	A.C. No. 03-01736-03507
Respondent	:	
	:	Docket No. CENT 94-235
	:	A.C. No. 03-01736-03508
	:	
	:	Wilkem No. 1 Mine

DECISION

Appearances: Robert A. Goldberg, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c), seeking civil penalty assessments for nine (9) alleged violations of certain mandatory safety standards found in Parts 48 and 75, Title 30, Code of Federal Regulations. A hearing was conducted in Fort Smith, Arkansas, and the petitioner appeared, but the respondent did not.

Issues

The issues presented in these proceedings include the fact of violation, whether some of the violations were "significant and substantial," and the appropriate civil penalty assessments to be made for the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 39 U.S.C. § 301, et seq.

2. Sections 110(a) and 110(i) of the Act.

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

Stipulations

The petitioner's counsel produced the following stipulations for the record, and he stated that he had not reviewed them with the respondent, but had no reason to believe that the respondent would object to them (Tr. 6-8):

1. The respondent is engaged in mining and selling minerals, and its mining operations affect commerce.

2. The respondent is the owner and operator of the Wilkem #1 Mine, Mine Identification Number 03-01736.

3. The respondent is an operator within the meaning of the Mine Act.

4. The respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, et seq. (Mine Act).

5. The Administrative Law Judge has jurisdiction over this matter.

6. The subject orders were properly served by a duly authorized representative of the Secretary of Labor, the Mine Safety and Health Administration, upon an agent of the respondent on the dates and places stated therein. Accordingly, the orders may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

7. The proposed penalties as amended by the parties in the course of their settlement negotiations will not affect the respondent's ability to continue in business.

Discussion

As previously noted, the petitioner entered an appearance at the hearing, but the respondent did not. The parties informed me of their proposed settlements, for the first time, shortly after my arrival in Fort Smith the day before the hearing. The respondent's representative advised me in the course of a telephone conference that he was unable to appear at the hearing, and that since he reached a settlement with the petitioner, he believed that his appearance was not necessary. I accepted the respondent's excuse for not appearing pursuant to notice and advised him that I would not hold him in default pursuant to Commission Rule 2700.66, 29 C.F.R. § 2700.66, particularly since he was acting pro se and agreed to a settlement with the petitioner in good faith, and did not dispute the violations except for the proposed penalty assessments.

The citations, initial assessments, and the proposed settlement dispositions for the violations in these cases are as follows:

CENT 94-206

Order No.	Date	30 C.F.R. Section	Assessment	Settlement
3589714	12/13/93	75.370(a)	$3,800	$1,000
3589716	12/13/93	48.6(a)	$ 600	$ 600

CENT 94-213

Order No.	Date	30 C.F.R. Section	Assessment	Settlement
3589703	12/07/93	75.370(a)(1)	$1,800	$1,000
3589707	12/08/93	75.1714(b)	$2,300	$1,000
3589712	12/08/93	75.306(b)	$2,500	$1,000
3591472	12/13/93	75.503	$2,400	$1,000
3589723	1/03/94	75.360(a)	$4,500	$1,400
3589724	1/03/94	75.220(a)(1)	$2,800	$1,000

CENT 94-235

Order No.	Date	Statutory Section	Assessment	Settlement
3589728	1/12/94	104(d)(2) of the Act	$4,800	Vacated

The petitioner's counsel presented arguments in support of the proposed settlement. Counsel stated that the respondent acquired the mine and began developing it on September 30, 1993, and that the inspection which resulted in the violations was the first MSHA AAA inspection for the respondent. MSHA Inspector Lester Coleman, who was present in the courtroom, confirmed that this was the case.

Petitioner's counsel confirmed that in the course of the settlement negotiations, the respondent did not dispute the fact of violations, and took issue only with the amount of the proposed penalty assessments which it believe were unreasonable and excessive. Counsel stated that the mine is no longer in operation and that it has been closed down by MSHA by virtue of an outstanding section 104(d)(2) order issued in June, 1994. Inspector Coleman confirmed that this was the case (Tr. 22-24).

Inspector Coleman stated that when the mine was in operation, it employed six miners and an on-site engineer, and produced 3,496 tons of coal annually. I conclude and find that the respondent is a small mine operator, and that it is no longer actively mining the subject mine where these violations occurred (Tr. 27-28).

The record reflects that all of the violations that are the subject of these proceedings were terminated after the respondent corrected and abated the cited conditions. Petitioner's counsel and Inspector Coleman confirmed that the respondent took corrective action after it was served with the violations.

With respect to section 104(a) non-"S&S" Citation No. 3589728, January 12, 1994 (Docket No. CENT 94-235), the petitioner's counsel moved to withdraw the proposed civil penalty assessment and to vacate the citation on the ground that it is duplicative of a violation cited in section 104(d)(2) Order No. 3589724, issued on January 3, 1994, in Docket No. CENT 94-213. The motion was granted from the bench, and my ruling in this regard is re-affirmed (Tr. 9-10, 20).

Conclusion

After careful review and consideration of the pleadings, and the arguments in support of the proposed settlement of these cases, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest. I take note of the fact that all of the violations were abated, and there is no evidence of any accidents or injuries resulting from the cited conditions or practices. I have also considered the fact that the respondent is a small mine operator and that the subject mine is closed and not presently producing coal. Under all of these circumstances, and pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, the settlements agreed to by the parties **ARE APPROVED**.

ORDER

In view of the foregoing, **IT IS ORDERED** as follows:

1. Section 104(a) non-"S&S" Citation No. 3589728, issued on January 12, 1994, and alleging a failure by the respondent to comply with a previously issued section 104(d)(2) order **IS VACATED**, and the petitioner's civil penalty proposed **IS DISMISSED**.

2. The respondent **IS ORDERED** to pay civil penalty assessments in the settlement amounts shown above in

satisfaction of the enumerated citations for each of the cases. The petitioner has confirmed that the respondent has paid $2,000 in partial payment of the total settlement amount in these cases. The remaining payments are to be made to MSHA in accordance with the following schedule:

Date Due	Payment Due
May 20, 1995	$1,000
June 20, 1995	$1,000
July 20, 1995	$1,000
August 20, 1995	$1,000
September 20, 1995	$1,000
October 20, 1995	$1,000

Payments shall be made by certified or cashier's check made payable to "The U.S. Department of Labor, MSHA," and mailed to Mine Safety and Health Administration, P.O. Box 360250M, Pittsburgh, PA 15251-6250. Each payment instrument shall include the relevant docket numbers and assessment control numbers, **CENT 94-206, A.C. No. 03-01736; CENT 94-213, A.C. No. 03-01736-03507; and CENT 94-235, A.C. No. 03-01736-03508.** Compliance with this payment schedule requires the respondent to have his monthly payments deposited in the U.S. Mail by the dates listed above.

These decisions will not become final until such time as full payment of the $6,000 balance due is made by the respondent to MSHA, and I retain jurisdiction in these proceedings until payment of all installments are remitted and received by MSHA. In the event the respondent fails to comply with the terms of the settlement, the petitioner may file a motion seeking appropriate sanctions or further action against the respondent, including a reopening of the cases. In the event the respondent fails to timely remit its monthly payments, the remaining balances will become due and immediately payable to MSHA. Upon receipt of all payments, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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303-844-3577/FAX 303-844-5268

MAY 5 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 94-259-M A.C. No. 04-05146-05503
v.	:	
	:	AT&E Mine
AT&E ENTERPRISES, INC., Respondent	:	

DECISION

Appearances: Alan M. Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner; Gregory J. Roberts, Esq., Christensen & Barrus, Fresno, California, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against AT&E Enterprises, Inc. ("AT&E"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petition alleges five violations of the Secretary's safety standards. For the reasons set forth below, I vacate one citation, modify one citation, and assess civil penalties in the amount of $200.00.

A hearing was held in this case on December 13, 1994, in Fresno, California. The parties presented testimony and filed post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

The AT&E Mine is a small, underground gold mine in Mariposa County, California. The mine had been operated in the past and AT&E was in the process of rehabilitating it. (Tr. 24). At the time of the inspection, December 1, 1993, no ore had been extracted. The mine is located at the top of a mountain and its portal opens into a drift that is supported by timber. AT&E was replacing old timber sets with new timber sets and mucking out loose rock. Miners had been working underground for less than two

months. Id. At the time of the inspection, miners had replaced timbers about 50 feet into the drift from the portal. Mike Garoogian is president and sole owner of AT&E. (Tr. 110). The inspection was conducted by MSHA Inspector David Kerber.

Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. I find that AT&E was issued two citations in the 24 months preceding the inspection in this case. (Tr. 6). I also find that AT&E was a small operator, employing about 18 people, with three miners working underground. (Tr. 17, 112). AT&E reported about 19,350 man-hours over the previous year. (Tr. 6). I also find that the civil penalties assessed in this decision would not affect AT&E's ability to continue in business. The conditions cited by the inspector were all timely abated. I find that AT&E is concerned about the safety of its miners and made good faith efforts to comply with MSHA's safety standards.

B. Citation No. 3932726

This citation alleges that the "timber located at the mine entrance in the portal was not provided with a fire suppression system, covered with a material equivalent for fire protection, or fire-retardant paint to prevent a fire." The citation states that the timber was exposed for about 55 feet. The safety standard cited, 30 C.F.R. § 57.4560, provides, in pertinent part:

> For at least 200 feet inside the mine portal ... timber used for ground support in intake openings and in exhaust openings that are designated escapeways shall be --
>
> (a) Provided with a fire suppression system, ... capable of controlling a fire in its early stages; or
>
> (b) Covered with shotcrete, gunite, or other material with equivalent fire protection characteristics; or
>
> (c) Coated with fire-retardant paint or other material....

There is no dispute that the timbers were not protected with a fire suppression system, covered with shotcrete or other material, or coated with fire-retardant paint. Matthew Swanson, operations officer for the mine, testified that AT&E had considered how to protect the timbers and had purchased fire-retardant paint for that purpose. (Tr. 85-89). He stated that AT&E planned to spray on the paint, but that they had not done so because the timber was still wet. Id. He stated that due to the remote location of the mine, AT&E operates a sawmill at the mine site and cuts its own timber out of sugar pine trees on mine property. He stated that the timber is soaking wet, heavy and dense when it is used and must dry out before it can be painted. Id. He believed

that the timber was too wet to be painted at the time of the inspection. He further stated that the timber at the portal was almost dry enough to be painted. I credit the testimony of Mr. Swanson.

Inspector Kerber testified that the purpose of the standard is to prevent carbon monoxide from entering the mine. (Tr. 47). He stated that an operator is required to paint or otherwise protect the timber as each set is installed in the mine. (Tr. 47-48, 59, 72). I find, however, that the safety standard does not expressly contain such a requirement. The language of the safety standard does not address when fire-retardant material must be applied if a mine operator is developing a new mine or is rehabilitating an old mine by installing new timber sets. Under the standard, an operator is permitted to cover the timber with shotcrete or gunite. Those materials are generally made of cement and are sprayed on pneumatically.[1] It would not be feasible to spray the timber with gunite or shotcrete as it is placed in the mine because that material must be prepared in batches. (Tr. 87). I reject the inspector's interpretation of the standard as requiring each timber set to be protected as it is installed.

The Commission has held that a safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess as its meaning and differ as to its application." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982)(citation omitted). The Commission has determined that adequate notice of the requirements of a broadly worded standard is provided if a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990); Lanham Coal Co., 13 FMSHRC 1341, 1343 (September 1991). Although the subject standard is not broadly worded, it does not address the issue raised here. I do not believe that a reasonably prudent person would have recognized that it was prohibited by the safety standard from installing timber sets without applying gunite, shotcrete, fire-retardant paint, or other material at the time it was installed.

Based on the particular facts in this case, I conclude that the citation should be vacated. I find, based on the testimony of Mr. Swanson, that the timber sets were raw, very wet, and could not have been painted at the time of the inspection. Fire retardant paint does not prevent wood from burning, but rather retards the burning process. (Tr. 13, 56). In vacating the

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[1] See definitions of "gunite," "guniting," and "shotcrete" in Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral and Related Terms, at 518-19, 1004 (1968).

citation, I have taken into consideration the fact the AT&E had only advanced about 50 feet into the mine, air naturally flowed out of the mine through the entry being timbered, and there was no evidence of any sources for a fire. As a consequence, the lack of fire-retardant paint did not present a danger of carbon monoxide poisoning.

C. Citation No. 3932727

This citation alleges that AT&E did not have any means of testing for gases or fumes before entering into the part of the mine that was not ventilated with a fan. The citation states that miners had gone about 100 feet into the mine to work on an air door. The cited safety standard, 30 C.F.R. § 57.5002, states: "Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures."

There is no dispute that AT&E did not have any devices to test the mine atmosphere. AT&E maintains that during previous MSHA inspections and when consultants had visited the mine, the mine atmosphere had been tested and that such tests did not indicate that there any bad air in the mine. (Tr. 91, 132-34) It further argues that the miners had never gone more than about 50 feet into the mine except on two days when two miners worked on the air door that was about 120 feet into the mine. (Tr. 16, 30, 93). AT&E states that it was going to install a new ventilation system and it was looking into various types of testing equipment to monitor and control the air quality. It believes that it met the standard's "as frequently as necessary" requirement because all of the previous tests indicated that the air was good and the natural air flow from the upper workings kept the air circulating.

On at least one occasion miners complained about the quality of the air in the mine and some said that they had become sick from the air. (Tr. 14, 29, 50, 60-61). In addition, AT&E was rehabilitating an old mine and air circulated through old stopes before exiting the mine through the portal. (Tr. 29, 36). AT&E did not have any means to test the quality of the air. I find that, given the circumstances of this case, AT&E was required to have testing equipment at its disposal to check the air in the mine, especially because miners were required, on occasion, to enter the deeper areas of the mine where contaminated or oxygen deficient air is more likely to accumulate. (Tr. 14). I find that AT&E violated the standard because it did not, and could not, test the air as frequently as necessary to determine the adequacy of its air control measures.

Inspector Kerber determined in the citation that the gravity of the violation was low and that the violation was the result of AT&E's low negligence. The violation was not designated as sig-

nificant and substantial ("S&S"). I agree with the inspector's determinations and reject the Secretary's argument in his brief that the negligence of AT&E was greater than originally determined by the inspector. After considering the evidence presented at the hearing, I conclude that MSHA's proposed penalty of $50.00 is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i).

D. Citation No. 3932730

This citation alleges that AT&E did not have a check-in and check-out system at the mine to provide an accurate record of persons who are underground. In addition, the citation alleges that persons underground did not carry a positive means of being identified. The cited safety standard, 30 C.F.R. § 57.11058, requires each operator of an underground mine to "establish a check-in and check-out system which shall provide an accurate record of persons in the mine." The standard also states that every person underground "shall carry a positive means of being identified."

AT&E contends that it had a check-in and check-out system. It argues that because only three miners worked underground and they could generally be seen from the mine entrance, it could rely on verbal communication and a visual check to determine who was underground. Miners were not permitted to go underground without notifying Bill Gergen, AT&E's mine engineer. (Tr. 30-31, 38, 94). In addition, AT&E contends that each miner had a positive means of identification in the form of a training certificate which each carried.

I find that AT&E's check-in and check-out system did not meet the requirements of the standard. Although under normal circumstances AT&E would know who was underground, confusion could arise during an emergency and rescue efforts could be hindered. (Tr. 52). Under AT&E's system, an accurate "record" of persons in the mine was not kept. In addition, I find that training certificates do not constitute a positive means of identification because they can be easily destroyed. Although the standard does not expressly require that metal tags be used, I find that metal tags are standard in the industry and, consequently, a reasonably prudent person familiar with the mining industry would know that metal identification tags are required. (Tr. 72-73). Mr. Gergen testified that he carried a brass tag and Mr. Swanson stated that he has worked at many mines and not one used paper certificates as a positive means of indentification. (Tr. 17, 107-08).

Inspector Kerber determined that the gravity of the violation was low and that the violation was the result of AT&E's high negligence. The violation was not designated as significant and

substantial ("S&S"). I agree with the inspector's determinations. After considering the evidence presented at the hearing, I conclude that MSHA's proposed penalty of $50.00 is appropriate under the criteria set forth in Section 110(i) of the Act.

E. Citation No. 3932731

This citation alleges that AT&E did not have a neutral return spring on the control handle for the 12-B mucker. The citation states that the lack of a return spring created a hazard to employees using the mucker. The cited safety standard, 30 C.F.R. § 57.14100(b), provides: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

There is no dispute that the return spring was missing from AT&E's track-mounted mucker. This mucker was used to pick up waste rock from the mine and dump the material into an ore car for removal. The function of the return spring was to return the gear shift to neutral if the mucker operator took his hand off the control handle. Without the return spring, it was possible for the mucker to remain running and in motion if the operator's hand was removed from the control handle.

AT&E admits that the return spring was missing, but contends that it ordered the replacement part immediately after it discovered that the spring was missing. Thus, it argues that it was doing all that it could to correct the defect in a timely manner. AT&E also contends that the defect did not create a hazard to persons because the mucker was used only for about an hour a day and it had other safety devices that would stop the mucker in the event the operator was knocked off.

I find that the evidence demonstrates that AT&E violated the safety standard. First, I find that the missing return spring did affect the safety of the mucker. Unanticipated events could cause the mucker operator to let go of the control handle. For example, he could slip or be knocked off the mucker, faint, suffer a heart attack, or become distracted. The return spring is designed to reduce the movement of the mucker in the event the operator is no longer in control of it. Second, although AT&E immediately ordered a new part, it did not take steps necessary to assure that the defect was corrected in a timely manner. The condition had existed for at least three days prior to the inspection. (Tr. 33). The spring did not arrive for about three months after it was ordered. (Tr. 20). AT&E could have shut down the mucker or fashioned a temporary make-shift spring for use until the replacement part arrived. Indeed, AT&E's mine engineer, Bill Gergen, made a make-shift spring to abate the citation. (Tr. 20, 33). Thus, I conclude that the safety defect was not corrected in a timely manner, as required by the safety standard.

Inspector Kerber determined that it was reasonably likely that a serious injury would occur as a result of the violation and designated the violation as S&S. He also the determined that the violation was caused by AT&E's moderate negligence. I conclude that the Secretary has not established that the violation was S&S. The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. The Commission has established a four-part S&S test, as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial ..., the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). An evaluation of the reasonable likelihood of an injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

The Secretary established the first two steps of the S&S test. I find, however, that the evidence does not establish a reasonable likelihood that the hazard contributed to by the violation will result in an injury. The mucker was used about one hour every day to remove waste materials as new timber sets were installed in the drift. (Tr. 32). During that hour, it was being moved approximately half of that time. (Tr. 32, 96). Only three people worked underground and the same two miners operated the mucker whenever it was used. The mucker operator stands to one side as he operates the controls and another miner stands on the same side and slightly behind it to protect the air line.[2] (Tr. 32). The drift was about six feet wide and the mucker was about two and one half feet wide. The operator's side has more clearance that the other side. (Tr. 18-19, 95-96). When functioning, the return spring on the mucker will return the gear to neutral but it will not engage a brake, so the mucker will keep moving at least a few feet if it is on a grade. (Tr. 41-43). Given these facts, and the fact that the mucker operator's hand

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[2] The mucker is powered by compressed air.

would have to be unexpectedly removed from the control handle before a hazard is created, I find that it is unlikely that the hazard contributed to by the violation would result in an injury, assuming continued normal mining operations. In addition, I find that, even if one assumes an event occurs that causes the operator to take his hand off the control handle, it was not likely that the mucker would injure anyone. While I recognize that the return spring is an important piece of safety equipment, I believe that, given the particular facts in this case, the likelihood of an injury was remote.[3]

I find that the violation was caused by AT&E's moderate negligence. After considering the evidence presented at the hearing, I conclude that a penalty of $50.00 is appropriate under the criteria set forth in Section 110(i) of the Act.

F. Citation No. 3932732

The citation alleges that there was not a whip check or safety chain on the one-inch air hose on the oiler. The safety standard, 30 C.F.R. § 57.13021, provides, in part, that "safety chains or other suitable locking devices shall be used on connections to machines of high pressure hose lines ... where a connection failure would create a hazard."

AT&E argues that the particular air hose in question was not in use at the time of the inspection and that the Secretary did not show that it had ever been used. AT&E also states that whip checks were available at the mine and that one would have been attached to the air hose when it was used.

A whip check is designed to protect miners from injury in the event an air hose connection fails. An air hose can whip around and strike people if it becomes disconnected from the equipment to which it is attached. There is no dispute that the type of air hose cited was required to be equipped with a whip check. AT&E's engineer testified that while he was not certain that the cited air hose had been used without a whip check, he stated that it could have been used. (Tr. 22, 34). There was no evidence that the air hose was not available for use or that it had been disconnected from the air compressor.

I find that the Secretary has established a violation of the safety standard. Inspector Kerber determined that the gravity of the violation was low and that the violation was the result of AT&E's moderate negligence. The violation was not designated as S&S. I agree with the inspector's determinations. After consid-

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[3] The fourth element of the Mathies S&S test has been met because it is reasonably likely that if an injury occurred, it would be of a serious nature.

ering the evidence presented at the hearing, I conclude that MSHA's proposed penalty of $50.00 is appropriate under the criteria set forth in Section 110(i) of the Act.

II. Civil Penalty Assessments

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties, as discussed above:

Citation Nos.	30 C.F.R. §	Assessed Penalty
3932726	57.4560	VACATED
3932727	57.5002	$50.00
3932730	57.11058	50.00
3932731	57.14100(b)	50.00
3932732	57.13021	50.00
	Total Penalty	$200.00

III. ORDER

Accordingly, Citation No. 3932726 is **VACATED**, the remaining citations are **AFFIRMED** with Citation No. 3932731 **MODIFIED** to delete the significant and substantial designation, and AT&E Enterprises, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $200.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

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Gregory J. Roberts, Esq., CHRISTENSEN & BARRUS, 7112 North Fresno Street, Fresno, CA 93720

RWM

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 1995

TERRY McGILL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. SE 95-132-D
	:	BARB CD 94-32
U.S. STEEL MINING COMPANY,	:	
Respondent	:	Oak Grove Mine
	:	Mine ID 01-00851
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor	:	

ORDER OF DISMISSAL

Before: Judge Hodgdon

This case is before me on a complaint of discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Complainant has requested leave to withdraw his complaint because the parties have resolved their differences. Commission Rule 11, 29 C.F.R. § 2700.11, provides that "[a] party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission."

Accordingly, the motion for leave to withdraw is **GRANTED** and it is **ORDERED** that this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Mr. Terry McGill, Route 13, Box 311, Jasper, AL 35501

Robert M. Weaver, Esq., United Mine Worker's of America, Longshore, Nakamura & Quinn, Suite 300, 2100 First Avenue North, Birmingham, AL 35203

Billy Tennant, Esq., U.S. Steel, 600 Grant Street, USX Tower, Pittsburgh, PA 15219

/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 10 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-198-M
Petitioner	:	A.C. No. 41-03766-05503
v.	:	
	:	Tarrant Aggregate #2
F W CONTRACTORS INCORPORATED,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve settlement agreement and to dismiss the case. A reduction in penalty from $2700 to $2025 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $2025 within 30 days of this order.

Avram Weisberger
Administrative Law Judge

Distribution:

Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin St., Suite 501, Dallas, TX 75202

Paul G. Johnston, Safety Director, F W Contractors Incorporated, P.O. Box 185219, Fort Worth, TX 76181

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 10 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 95-111-D
ON BEHALF OF	:	MSHA Case No. PITT CD 94-05
LARRY P. SMITH,	:	
Complainant	:	Clutch Run Mine
v.	:	
	:	
DOVERSPIKE BROTHERS COAL CO.,	:	
Respondent	:	

DECISION

Appearances: James Brooks Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant; R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a discrimination complaint filed by the Secretary of Labor on behalf of Larry P. Smith, against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The complaint alleged that Mr. Smith was laid off, and, in effect discharged, on or about March 13, 1994, because it was thought by the respondent, through its agents, Mine Foreman Charles Ishman and Superintendent Randall Rearick that Mr. Smith had initially alerted the state and federal mine safety enforcement authorities of a mine fan stoppage occurrence on February 24, 1994, at the Clutch Run Mine in which the underground miners were not withdrawn from the mine when the fan was inoperative

for a time period greater than 15 minutes. Mr. Smith further alleged that the miners were instructed by Mr. Ishman to tell the federal and state inspectors that the fan was inoperative for only five minutes when, according to Mr. Smith, the fan had been off for at least 45 minutes.

The respondent denied that it had taken any adverse discriminatory action against Mr. Smith or that they discharged him for any protected activity pursuant to the Act. The respondent asserted that Mr. Smith and another employee were laid off for economic reasons. The respondent further stated that after Mr. Smith was laid off, management discovered that he had engaged in certain conduct as superintendent of one of its mines that would have resulted in his termination if it had been discovered while he was employed with the respondent.

A hearing was convened in Indiana, Pennsylvania, on April 13-14, 1995, and the parties appeared and participated fully therein. However, as discussed hereafter, the parties agreed to settle their dispute, and they filed a posthearing settlement motion for my consideration and approval.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), and (2) and (3).

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

Stipulations

The parties stipulated in relevant part that the respondent is a small to medium size coal mining company and that it is a mine operator subject to the jurisdiction of the Mine Act. They further stipulated that the Commission's presiding judge has jurisdiction to hear and decide this matter.

Discussion

In support of the complaint, the Secretary, on the first day of the hearing, presented the testimony of Mr. Smith, seven current and former employees of the respondent, the MSHA special investigator who investigated Mr. Smith, and a supervisory special investigator. The respondent presented the testimony of two witnesses. On the second day of the hearing, and after the record was opened for the continuation of the respondent's case, counsel for the parties informed me that the parties reached a tentative agreement to settle their dispute and they requested a continuance of the matter in order to pursue it further with their clients and to finalize the agreement. The request was granted, and the hearing was continued.

The parties have now filed their proposed settlement agreement, the terms of which include an agreement by the respondent to pay Mr. Smith a monetary settlement within five days of the Order approving the settlement, with the understanding that such payment shall be in full and complete settlement of the complaint. Additional terms of the settlement are set forth in the settlement agreement executed and signed by the parties, including Mr. Smith. I take note of a letter dated May 2, 1995, from the respondent's counsel to the Secretary's counsel forwarding a cashier's check for Mr. Smith pursuant to the settlement agreement.

Conclusion

After careful review and consideration of the settlement terms and conditions, I find that they reflect a reasonable resolution of the complaint and that the proposed settlement is in the public interest. Since it is apparent that all parties are in accord with the agreement for the settlement disposition of the complaint, I see no reason why it should not be approved.

ORDER

The proposed settlement **IS APPROVED**. The parties **ARE ORDERED** to forthwith comply with all the terms of the agreement. Upon compliance, this matter is dismissed with prejudice.

George A. Koutras
Administrative Law Judge

Distribution:

James Brooks Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, P.C., USX Tower, 57th Floor, 600 Grant Street, Pittsburgh, PA 15219 (Certified Mail)

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

MAY 10 1995

ROBBIE A. SMITH, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 95-10-D
v.	:	
CENTRALIA MINING CO., INC., Respondent	:	Centralia Coal Mine Mine I.D. 45-00416

DECISION APPROVING SETTLEMENT

Before: Judge Manning

This proceeding was brought by the Secretary of Labor on behalf of Robbie A. Smith under section 105(c)(2) of Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On April 5, 1995, the Secretary filed an unopposed motion to discontinue his representation of Mr. Smith. By order dated April 6, 1995, the motion was granted and Mr. Smith has represented himself in this proceeding since that date. On May 8, 1995, Mr. Smith and Centralia Mining Company filed a joint Settlement Agreement and General Release. The settlement agreement resolves all existing and potential disputes between the parties in this case arising out of the termination of Mr. Smith's employment by Centralia. I have reviewed the terms of the proposed settlement and find the settlement to be reasonable and in the public interest.

Accordingly, the terms of the settlement set forth in the Settlement Agreement and General Release are **APPROVED** and this discrimination proceeding is **DISMISSED.**

Richard W. Manning
Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., CROWELL & MORING, 1001 Pennsylvania Ave., NW Washington, DC 20004-2595

Mr. Robbie A. Smith, 943 E. Greenbrae Dr., Sparks, NV 89434

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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MAY 15 1995

WESTERN FUELS-UTAH, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 94-391-R
v.	:	Citation 4059968; 4/21/94
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Deserado Mine
	:	Mine I.D. 05-03505

DECISION

Appearances: Karl F. Anuta, Esq., Boulder, Colorado, for Contestant;
Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a notice of contest filed by Western Fuels-Utah, Inc. ("Western Fuels") against the Secretary of Labor and his Mine Safety and Health Administration ("MSHA"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. Western Fuels contests the issuance of Citation No. 4059968 to it at its Deserado Mine on April 21, 1994. For the reasons set forth below, I affirm the citation.

A hearing was held in this case on January 5, 1995, in Grand Junction, Colorado. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I. FINDINGS OF FACT

The Deserado Mine is an underground coal mine in Rio Blanco County, Colorado. It mines coal using the longwall method and transports coal out of the longwall section on a conveyor belt. On April 21, 1994, MSHA Inspector Phillip Gibson issued a section 104(a) citation to Western Fuels because "additional insulation was not provided for the communication circuit in the belt conveyor entry of the 9th East longwall section at the point where the circuit passed over the 995 V AC power conductor." (Ex. M-1). He alleged a violation of 30 C.F.R. § 75.516-2(c). In the citation, Inspector Gibson stated that an injury was unlikely, that if an injury did occur it would not result in any lost work days, and that the violation was not of a significant and substantial nature. He determined that the mine operator's negli-

gence was moderate. The citation was abated by moving the communication cable and a nearby telephone.

Section 75.516-2 provides, in pertinent part:

> **Communication wires and cables; installation; insulation; support.**
>
> (a) All communication wires shall be supported on insulated hangers or insulated J-hooks.
>
> (b) All communication cables shall be insulated ..., and shall either be supported on insulated or uninsulated hangers or J-hooks, ... or buried, or otherwise protected against mechanical damage....
>
> (c) All communication wires and cables installed in track entries shall, except when a communication cable is buried in accordance with paragraph (b) of this section, be installed on the side of the entry opposite to trolley wires and trolley feeder wires. Additional insulation shall be provided for communication circuits at points where they pass over or under any power conductor.
>
> (d) For purposes of this section, communication cable means two or more insulated conductors covered by an additional abrasion-resistant covering.

Western Fuels does not deny that the phone cable passed over the power cable and that additional insulation was not provided at that location. It contends, however, that this condition did not violate the safety standard.

Tracks and trolley wires are not used in the Deserado Mine. Between 70 and 80 permissible telephones are present underground, which are used as the primary means of communication in the mine. (Tr. 112-13; Ex. W-2). These phones are connected through and powered by 24-volt DC audio communication cables, which contain four shielded conductors and are protected by an outer jacket. (Tr. 109-10; Ex. W-7). The phone cables are installed on J hooks attached to the roof in the belt entry of the longwall section. Western Fuels does not dispute that its phone cables are a "communication circuit," as that term is used in the standard. Electricity for the longwall section is supplied through power cables, which carry about 995 volts AC. (Tr. 106-09; Ex. W-6).[1]

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[1] Exhibit W-6 is portable mining cable. The cable installed to supply power to the longwall is similar, but is a larger 350 MCM cable. (Tr. 107).

The power cables contain three power conductors, two ground conductors and a conductor for the ground fault monitor. (Tr. 108). The cable has a dielectric rating of 2,000 volts and is protected by an outer jacket. (Tr. 106-08; Ex. W-6). The power cables are installed in the belt entry on a monorail. The monorail consists of a long I-shaped bar suspended from the mine roof. (Ex. W-4). The power cables are suspended from cable carriers that are located along this bar. (Ex. W-5). The cable carriers are on wheels so that they may be moved along the monorail, as necessary. Two power cables and several compressed air lines are supported by the cable carriers.

Inspector Gibson testified that the communication cable touched the power cable where they crossed. (Tr. 18). Robert Daniels, a safety inspector and trainer with Western Fuels, testified that the cables were about three inches apart. (Tr. 100). Neither party, however, contends that this conflict is significant in the resolution of this case. Both cables were well insulated and were protected against mechanical damage by outer jackets. Neither cable was damaged or worn at the cited location. The fuses and circuit breakers protecting the communication and power circuits were adequate. Mobile equipment was not used in the entry where the citation was written. Finally, MSHA would have permitted Western Fuels to abate the citation by covering either cable with a single wrap of electrical tape at the crossover point.

It is not uncommon for cables to become cracked or broken in underground coal mines. (Tr. 126-27). MSHA believes that additional insulation is necessary where communication circuits pass over or under power cables because communication circuits lead directly to telephones used by miners on a regular basis. These telephones are an important safety tool for miners. If the communication circuit becomes energized by a power cable, anyone using the phone could be injured, a methane explosion could occur, and the phone system could be knocked out.[2] The Secretary's witnesses acknowledged that, given the condition of the cables at the cited location, the chance of the communication circuit becoming energized by the power cable was remote. (Tr. 31-32, 34, 62-64; Ex. W-1 p.7). They stated that the requirement for additional insulation is to provide an extra measure of safety for an abnormal situation, in case "something out of the ordinary were to occur." (Tr. 62-64).

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[2] Western Fuels has a backup wireless communications system for use in the event the communication circuit is not functioning.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Western Fuels

Western Fuels makes several arguments in support of its contention that it did not violate the safety standard. First, it argues that the provisions of section 75.516.2(c) are only applicable to track entries. Western Fuels contends that the two sentences in 75.516-2(c) must be read together and that the phrase "communication wires and cables installed in track entries" in the first sentence of subsection 2(c) is also applicable to the second sentence. It reasons that the language of the first sentence of the subsection limits the application of the entire subsection to track entries, because such entries contain bare trolley wires. Western Fuels further contends that the language of the subsection is clear, not ambiguous, and is not subject to a contrary interpretation by MSHA. Since the communication cable observed by the inspector was not in a track entry, the safety standard was inapplicable and, consequently, there was no violation.

Second, Western Fuels argues that Commission precedent requires that the MSHA inspector make an objective evaluation of the conditions observed to determine whether a hazard was present. In this case, it argues that the inspector failed to take into consideration the condition of the power and communication cables, the degree of insulation and physical protection provided by the cables themselves, the method the mine used to support the cables, the fact that no vehicles travel through the area, and other environmental factors. Western Fuels contends that the citation should be vacated because the inspector failed to make the requisite objective evaluation of these conditions.

Finally, Western Fuels contends that MSHA's interpretation of the standard is nonsensical and defeats its purpose. It maintains that the purpose of the safety standard is to protect miners from the potential hazards of electrical shock or fire in the event communication wires or cables contact bare trolley wires. It makes sense to require additional insulation where communication cables cross bare trolley wires because a trolley wire is not insulated. Applying the standard to communication cables that are not in track entries is illogical because power cables and communication cables are adequately protected by the insulation and outer jackets provided by the manufacturer.

B. Secretary

The Secretary contends that the second sentence of section 75.516-2(c) was promulgated to deal with communication wires, wherever they may be located. He maintains that the second sentence is concerned with communication circuits crossing "any power conductor," not just trolley wires. The Secretary points

to the fact that the safety standard deals with the hazards of communication circuits, not with the hazards of trolley wires or track entries. Thus, the standard is titled "Communication wires and cables; installation; insulation; support." The Secretary maintains that the second sentence of subsection 2(c) is applicable to the conditions cited by the inspector.

The Secretary also contends that the word "additional" in the standard means what it says: additional insulation must be provided by the mine operator at the applicable locations. He argues that the degree of protection provided by the cable manufacturer and the environmental conditions at the mine are irrelevant in determining whether there is a violation of the standard. Thus, the inspector is not required to make an objective evaluation of the these conditions.

Finally, the Secretary contends that, to the extent the standard is deemed to be ambiguous or silent as to the issues raised by Western Fuels, the Commission should give the Secretary's interpretation deference. The Secretary maintains that his interpretation is entitled to deference because it is clearly consistent with the purposes of the Mine Act.

III. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

I find that the language of the safety standard is clear on its face and that the second sentence is applicable to the condition cited by Inspector Gibson. Accordingly, I have not reached the Secretary's deference argument. The safety standard, 30 C.F.R. § 75.516-2, is directed to hazards associated with communication wires and cables. One sentence in the standard specifically directs that communication wires and cables be installed on the side of the entry opposite trolley wires. No other sentence in the standard speaks of track entries or trolley wires. The sentence in dispute specifically states that its requirements are applicable where communication circuits "pass over or under any power conductor." Thus, by its own terms, the requirements of that sentence are not limited to areas where communication circuits cross over bare trolley wires.

Although the placement of the disputed sentence immediately after the sentence concerning trolley wires is unfortunate, such placement does not alter the meaning of specific language of the sentence. I believe that such placement should not cause undue confusion because of the clarity of the language. It is not logical to assume that, because the first sentence in subsection 2(c) addresses the hazards of communication wires in track entries, the second sentence is also applicable only to track entries. The title of the standard is broadly worded and the language in the sentence in question specifically addresses all

power cables, not just trolley wires. Because the sentence is applicable to all power cables, it is not logical to limit its scope to track entries. If a communication circuit passing over an insulated power cable poses a hazard in a track entry, then it would also pose a hazard in other entries. Thus, I find that the second sentence of section 75.516-2(c) is not limited to communication circuits in track entries.

Western Fuels maintains that Inspector Gibson was required to consider the conditions present in the mine and determine objectively whether additional insulation was required where the communication cable passed over the power cable. In making this argument, Western Fuels relies on the Commission's decisions in Homestake Mining Co., 4 FMSHRC 146 (February 1982) and Climax Molybdenum Co., 4 FMSHRC 159 (February 1982). For the reasons discussed below, I believe that those cases are distinguishable.

In Homestake and Climax, insulated power cables were in contact with waterlines, telephone lines, and air lines. The safety standard at issue provided that "powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines."[3] MSHA inspectors issued citations without determining whether the powerlines were "well separated or insulated" from the waterlines, telephone lines, and air lines. The inspectors believed that the standard required operators to provide additional insulation around the power cables, above that supplied by the manufacturer, at such contact points. In vacating the citations involved, the Commission emphasized that the standard at issue "does not state that 'additional insulation' must be placed between 'powerlines' and pipelines; it merely requires separation or insulation." 4 FMSHRC at 149. Thus, the Commission held that the Secretary was required to show, through objective evidence, that the insulation provided in the power cable was insufficient at the specified contact points, given the specific conditions found in the mine.

The safety standard at issue in this proceeding specifically states that "additional insulation" must be provided at specified points. Thus, even if the cables are "well separated or insulated," additional insulation is required.

Western Fuels also cites the decision of Judge George A. Koutras in Cyprus Emerald Resources Corp., 11 FMSHRC 2329 (November 1989). In that case, a citation was issued because a "light switch power cable was not adequately protected where [it] passed over [an] energized trolley wire." 11 FMSHRC at 2337. The safety standard cited, 30 C.F.R. § 75.517, provides that "power wires and cables, except trolley wires, trolley feeder

---

[3] This safety standard is currently at 30 C.F.R. § 57.12082.

wires, and bare signal wires, shall be insulated adequately and fully protected." Judge Koutras used the Homestake approach and determined that, in order to establish that a power cable is not fully protected, the inspector "must, on a case-by-case basis, make an objective evaluation of all the circumstances presented ... [to] support a reasonable conclusion that the cable is located and utilized in such a manner as to expose it to physical damage." 11 FMSHRC at 2345. While I am in agreement with the judge's approach in that case, it is not applicable here. Section 75.516-2(c) does not provide that cables be adequately protected and insulated, it requires that "additional insulation" be provided at specified locations.

Finally, Western Fuels points to the decision of Judge John J. Morris in Western Fuels-Utah, Inc., 16 FMSHRC 295 (February 1994). In that case, a communication cable crossed over a power cable and an MSHA inspector issued a citation for a violation of section 75.516-2(c). Judge Morris affirmed the citation. Western Fuels argues that Judge Morris held that an objective evaluation of the particular conditions observed by the MSHA inspector was required. Although Judge Morris cited Homestake and Cyprus Emerald in his decision, it is not clear to me that he applied them in his analysis. 16 FMSHRC at 305-06. In any event, he did not hold that the Secretary must show that the existing insulation is inadequate in order to sustain a violation of subsection 2(c).

I conclude that the Secretary was not required to show that the insulation and outer jacket on the communication and power cables was insufficient in order to sustain a violation of 30 C.F.R. § 75.516-2(c) in this case. The fact that the cables were in good condition, were well insulated and protected by outer jackets, and were unlikely to be struck by mobile equipment does not invalidate the citation. These facts and other environmental factors relate to the gravity of the violation, not to the fact of violation.

In large measure, Western Fuels is arguing that the hazard is so remote in this case that enforcement of the standard in the manner advocated by MSHA does not advance the safety of its miners. It maintains that an objective evaluation of the surrounding conditions is necessary to determine if there is a sufficient hazard to create a violation. There is no dispute that there was only a remote possibility that the communication circuit could become energized by the power cable as a result of this violation. The safety resources of MSHA and mine operators are finite. To the extent that MSHA is enforcing this standard in the manner described above, and mine operators are employing its resources to comply with the standard, those resources cannot be applied to other more serious hazards. Thus, Western Fuels is questioning the opportunity cost of enforcing this safety standard without regard to the hazard created. This issue, however,

is beyond my authority and is more properly addressed to the Assistant Secretary for Mine Safety and Health.

IV. ORDER

Accordingly, Citation No. 4059968 is **AFFIRMED** and this proceeding is **DISMISSED.**

Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 17 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE AND SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1244
Petitioner	:	A.C. No. 15-17077-03531
	:	
v.	:	RB #5 Mine
	:	
R B COAL COMPANY, INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Richard D. Cohelia, Safety Director, R B Coal Company, Inc., Pathfork, Kentucky, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent corporation pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petition sought to impose a total civil penalty of $17,000 for four alleged violations of the mandatory safety standards in Part 75 of the regulations, 30 C.F.R. Part 75, which were all purportedly attributable to the respondent's unwarrantable failure.

This matter was called for hearing on March 29, 1995, in London, Kentucky, at which time the respondent stipulated that it is a mine operator subject to the jurisdiction of the Act. After the Secretary had presented his direct case with respect to the first 104(d)(1) citation in issue, the parties elected to confer

for the purpose of settlement. The parties reached a comprehensive settlement agreement that was presented on the record for my approval by counsel for the Secretary.

In support of the proposed settlement, the parties agree that the evidence reflects that the respondent's degree of negligence does not rise to the requisite level of aggravated or unjustifiable conduct necessary to support the inspector's unwarrantable failure findings. Consequently, the parties settlement motion as it pertains to each of the cited violations is as follows:

1. 104(d)(1) Citation No. 4248202 is modified to a significant and substantial 104(a) citation attributable to the respondent's moderate rather than high degree of negligence. As a consequence, the special assessment is removed and the parties agree to a reduction in the proposed civil penalty from $5,000 to $450.

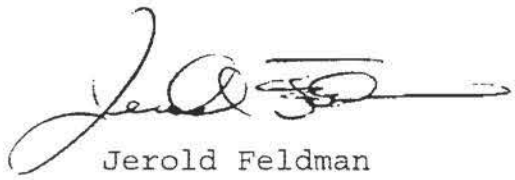
2. 104(d)(1) Order No. 4248203 is modified to a significant and substantial 104(a) citation attributable to the respondent's moderate degree of negligence thus removing the Secretary's proposed special assessment of a $5,000 civil penalty. The respondent has agreed to pay a reduced civil penalty of $450 in satisfaction of this modified citation.

3. 104(d)(1) Order No. 4248204 is modified to a significant and substantial 104(a) citation as a result of a reduction in the respondent's degree of negligence from high to moderate. The proposed special assessment of $2,000 is reduced to a civil penalty of $300.

4. 104(d)(1) Order No. 4248205 is modified to a nonsignificant and substantial 104(a) citation attributable to the respondent's moderate degree of negligence. As a result of the reduction in the degree of negligence and gravity associated with the cited violation, the parties agree that the $5,000 special proposed assessment should be reduced to a $50 civil penalty.

ORDER

This decision formalizes the approval of the parties' settlement motion that was granted on the record after consideration of the Secretary's presentation in support of the agreement and the applicable civil penalty criteria contained in section 110(i) of the Act, 30 U.S.C. § 820(i). Accordingly, **IT IS ORDERED** that the respondent pay a total civil penalty of $1,250 in satisfaction of the four citations in issue. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of payment, Docket No. KENT 94-1244 **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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MAY 1 8 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-212-M
Petitioner	:	A. C. No. 23-01557-05512
v.	:	
	:	Pierce Sand Company
PIERCE SAND COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
Bob Pierce, Stanberry, Missouri, pro se.

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). An evidentiary hearing in this matter was held on March 2, 1995, in St. Joseph, Missouri. At the conclusion of that hearing, the parties filed a motion to approve a settlement agreement and to dismiss this case. A reduction in penalty from $862 to $556 is proposed. The citations, initial assessments, and the proposed settlement amounts are as follows:

CITATION NO.	INITIAL ASSESSMENT	PROPOSED SETTLEMENT
4321896	$ 204	$ 102
4321897	50	50
4321898	50	50
4321899	204	102
4321900	50	50
4322041	50	50
4322042	50	50
4322043	204	102
TOTAL	$ 862	$ 556

I have considered the representations and documentation submitted in this case, as well as the testimony contained in the record of proceedings and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that respondent pay a penalty of $556 within 30 days of this decision, and upon receipt of that payment by MSHA, these proceedings are **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

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Bob Pierce, Owner, Pierce Sand Company, 111 East Main, Stanberry, MO 64489 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 1 8 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-217-M
Petitioner	:	A. C. No. 23-02071-05505
v.	:	
	:	Amazonia Quarry
IDEKER, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
Ken Ideker, St. Joseph, Missouri, pro se.

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). An evidentiary hearing in this matter was held on March 2, 1995, in St. Joseph, Missouri. At the conclusion of that hearing, the parties filed a motion to approve a settlement agreement and to dismiss this case. A reduction in penalty from $1000 to $500 is proposed. I have considered the representations and documentation submitted in this case, as well as the testimony contained in the record of proceedings and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that respondent pay a penalty of $500 within 30 days of the date of this decision, and upon receipt of that payment by MSHA, these proceedings are **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

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MAY 19 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-391
Petitioner	:	A.C. No. 46-08242-03501 PSY
v.	:	
	:	C S I #5
MINERAL TRANSPORT, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $800 to $400 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $400 within 30 days of this order. The hearing scheduled for June 8, 1995, is accordingly cancelled.

Gary Melick
Administrative Law Judge

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/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 23, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket NO. KENT 94-1194 A.C. No. 15-15592-03594 S
v.	:	No. 1 Mine
ALPHA MINING COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 94-1223 A.C. No. 15-15592-03592 M
v.	:	No. 1 Mine
DEWEY HUBBARD, Employed by ALPHA MINING COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 94-1224 A.C. No. 15-15592-03593 M
v.	:	No. 1 Mine
ROBERT HARDIN, Employed by ALPHA MINING COMPANY, Respondent	:	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia on behalf of Petitioner;
Bill Hayes, Esq., 2309 Cumberland Avenue, Middlesboro, Kentucky on behalf of Respondents.

Before: Judge Melick

These consolidated civil penalty proceedings are before me pursuant to sections 105(d) and 110(g) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act" charging Alpha Mining Company (Alpha) and two of its employees, Dewey Hubbard and Robert Hardin, with violating section 317(c) of the Act and the mandatory standard at 30 C.F.R. § 75.1702 (prohibiting smoking and the carrying of smoking materials underground). The general issue is whether Alpha and/or the named individuals committed the violations as charged, and, if so, what is the appropriate civil penalty for such violations. Additional specific issues are addressed as noted.

Secretary v. Robert Hardin - Docket No. KENT 94-1224

Citation No. 4039258, as amended, charges a willful violation of section 317(c) of the Act and alleges that "Robert Hardin, mechanic, was observed with one empty pack of Basic cigarettes and one Basic cigarette butt in his coat pocket on the 003-0 section approximately 750 feet underground." [1] On May 27, 1994, the citation was amended to charge that "each item of smoking material is a separate violation and will recive [sic] a separate civil penalty will be assessed [sic]". The Secretary has accordingly proposed an assessment of two $250 penalties for the alleged violations. Section 317(c), incorporated in the standard at 30 C.F.R. § 75.1702, provides, in relevant part, that "no person shall smoke [or] carry smoking materials, matches, or lighters underground ... ." Section 110(g) of the Act provides that "[a]ny miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than $250 for each occurrence of such violation."

Neither the original citation nor the amendment thereto charge Hardin with actually smoking underground. I find that the Secretary in this case therefore elected to proceed only under that part of Section 317(c) which proscribes the carrying of smoking materials. No consideration will therefore be given as

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[1] While this citation, as well as the citation against Dewey Hubbard (No. 4039257) alleges a "significant and substantial" violation, it is readily apparent from the language of sections 104(d) and (e) of the Act that such findings are relevant only to violations against mine operators . Consistent with this view, it is noted that the Secretary has not argued in his brief that such findings should be made in these citations against the individual miners.

to whether an empty cigarette pack and cigarette butt may constitute circumstantial evidence that unlawful smoking had occurred.[2]

According to Inspector Stanley Sampsel of the Mine Safety and Health Administration (MSHA), on May 19, 1994, he and two other MSHA inspectors, Joseph Grubb and Ted Phillips, were assigned to conduct a special inspection for smoking materials at the Alpha No. 1 mine. Upon arrival at the mine office, Inspector Grubb secured the telephone to prevent notice of the inspection to the underground miners and Sampsel and Mine Superintendent Michael Rourk proceeded underground.

Upon arrival at the underground working section, the individual miners were directed to a central location and a search of their pockets, boots, and socks was conducted, along with a "pat-down". No smoking materials were found at this time. Each miner was then separately escorted to his work area to complete the search. Sampsel escorted maintenance man Robert Hardin to a mantrip located several crosscuts outby the face area. According to Sampsel, Hardin identified a tool box and a jacket lying on the mantrip as belonging to him. Sampsel found what he described as a "Basic" brand cigarette butt in a pocket of the jacket and a "Basic" brand empty cigarette pack in the mantrip operator's compartment. Hardin denied that the cigarette butt belonged to him and maintained that the jacket had been worn by other miners.

At hearing, Hardin testified that, indeed, Sampsel found his jacket lying behind the seat of the "buggy" (mantrip) and there was a "Basic" cigarette butt in his jacket pocket. He maintained, however, that he had not worn the jacket for two or three days, that he did not place the butt in its pocket, and that others regularly used this jacket, which remained hung outside the mine most of the time. Hardin further maintained that although he does, in fact, smoke cigarettes, he smokes "Winston" brand and not the "Basic" brand. Hardin also acknowledged that Sampsel found a wadded empty pack of "Basic" brand cigarettes in the mantrip. Hardin did not specifically deny that he had placed this empty cigarette pack in the mantrip but only observed that others also used the mantrip.

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[2] While the Secretary could no doubt have added these charges by a timely amended complaint pursuant to Fed R.Civ.P 15 no such amendment has been filed. In this regard compare the Secretary's amendment to Citation No. 4038467 against Alpha in which the charge "smoked or carried smoking materials" is specifically set forth and accordingly describes "with particularity the nature of the violation."

As noted, the Secretary charges in the instant citation that Hardin committed two violations by carrying two smoking materials, i.e. a cigarette butt and an empty cigarette package. The first question to be decided is whether the empty package of "Basic" brand cigarettes found in the mantrip and the alleged cigarette butt (containing only traces of tobacco product and which admittedly could not be smoked) found in the coat pocket were "smoking materials" within the meaning of section 317(c) of the Act. The term is not defined in the Act or regulations but the term "smoking material" clearly connotes a material that is capable of being smoked. The Secretary argues that, as a container that may be used to hold cigarettes and thereby facilitate smoking, an empty cigarette package constitutes a "smoking material". There is no evidence in this record, however, of any common practice of re-using empty cigarette packs to store cigarettes, especially where, as in this case, it has been crushed, wadded, possibly gnawed by vermin and discarded. Moreover, under the Secretary's theory, anything that could be used to hold or convey cigarettes, including a dinner bucket or jacket pocket, would also constitute a "smoking material". It is, of course, a basic rule of construction that a statute should not be interpreted in a manner that would lead to absurd consequences. *Sutherland Stat Const.* § 45.12 (5th Ed.). Under the circumstances, I do not find that the empty cigarette pack at issue constituted a "smoking material" within the meaning of the cited statute and regulation.

I reach the same result with respect to the so-called cigarette butt found in Hardin's jacket pocket. Examination of the butt reveals only minute traces of what appears to be tobacco product remaining. Moreover, Inspector Sampsel acknowledged that there was insufficient tobacco remaining to enable the substance to be smoked. Accordingly, I do not find the alleged cigarette butt here cited -- one that has insufficient tobacco product to actually smoke -- to constitute a "smoking material" within the meaning of the cited law and, accordingly, the citation must be vacated. Again, it should be stated that whether possession of an empty cigarette pack and cigarette butt may provide circumstantial evidence that smoking has occurred is not an issue before me in this case since no such charges are set forth in Citation No. 4039258 or its amendment.

Secretary v. Dewey Hubbard (Docket No. KENT 94-1223)

Citation No. 4039257, issued May 19, 1994, charges Dewey Hubbard also with a violation of Section 317(c) of the Act and alleges that: "Dewey Hubbard, Section Foreman on the 003-0 section was observed with a full pack of Marlboro cigarettes and an empty pack of Marlboro cigarettes in his dinner pail approximately 750 feet underground." This citation was also modified on May 27, 1995, to add that "[e]ach item of smoking

material is a separate violation and will recive [sic] a separate civil penalty will be assessed [sic]." Accordingly, as with the charges against Hardin, the Secretary has likewise here elected not to charge Hubbard with smoking but only with carrying smoking materials.

According to Inspector Sampsel, during the search of individual miners underground, Hubbard was directed to open his dinner bucket. One full and one empty pack of "Marlboro" brand cigarettes were found inside.[4] Hubbard who was then the section foreman, admits that the empty and full packages of cigarettes were in his dinner bucket. For the reasons previously stated, however, I do not find that an empty package of cigarettes is in itself a "smoking material" as alleged. Accordingly, that part of the citation charging Hubbard with carrying an empty "Marlboro" brand cigarette package is vacated.

However, with respect to the charges against Hubbard for willfully carrying a full package of cigarettes in his "dinner pail" the citation is affirmed. Hubbard also acknowledges that he knew he had possession of the full pack of cigarettes when earlier that shift he opened his dinner bucket to eat. Hubbard admits that he also knew that the smoking plan required him, upon such discovery, to transport the cigarettes out of the mine by the next reliable person but maintains that there was no vehicle available to do that. In this regard, however, Hubbard's testimony that he was trying to report his possession of cigarettes to maintenance foreman Michael Roark outside the mine when the inspectors took the telephone away from Roark is directly contradicted by Roark himself. For this reason I can give Hubbard's testimony but little weight.

While Hubbard also maintains that his wife had placed the full pack of cigarettes in his dinner bucket without his knowledge, I am not persuaded by this self-serving testimony. His failure to have called a most critical witness on this issue -- his wife -- is also noteworthy. She could have explained why she placed a full pack of cigarettes in the dinner bucket that, by reasonable inference, Mr. Hubbard regularly takes underground with him.

The fact that Hubbard also carried in his dinner bucket an empty pack of the same brand of cigarettes further suggests that he willfully carried these cigarettes and, as an aggravating penalty factor, indeed, had smoked cigarettes and intended to smoke additional cigarettes underground that day. In reaching this conclusion, I have not disregarded Hubbard's purported

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[4] It was stipulated at supplemental hearings that this still-sealed package contained cigarettes.

explanation for the empty pack, i.e. that he found the empty pack lying on the mantrip earlier that day, placed it in his pocket and then placed it in his lunch box. However, under the totality of the circumstances, this explanation is also not credible.

Under the circumstances and considering the relevant criteria under section 110(i) of the Act, a willful violation of section 317(c) is affirmed with a maximum $250 penalty.

Secretary of Labor v. Alpha Mining Co. (Docket No. KENT 94-1194)

In this case the Secretary charges Alpha Mining Company (Alpha) in one "Section 104(d)(1)" citation and amendment thereto with a number of violations of the standard at 30 C.F.R. § 75.1702 but seeks a single civil penalty of $10,000, apparently considering these charges to constitute one violation under Section 110(a) of the Act. The citation, No. 4038467, as first issued on May 19, 1994, charges as follows:

> The operator was not complying with the approved search program for smoker's articles, a full pack of Marlboros and an empty Marlboro pack, one bic lighter, 2 cigarette butts were found on the active section, smoker's articles were found in foreman's lunch box, a cigarette butt was found in mechanic's coat pocket and an empty pack in his mechanic's car. The lighter was found on the mine floor and one cigarette butt found on the mine floor.

On September 1, 1994, the citation was amended to include the following additional charges:[4]

> Section I, Item B should include the language, "The mine foreman, Dewey Hubbard, smoked or carried smoking materials, including one (1) full pack of cigarettes and one (1) empty pack of cigarettes (both Marlboro brand), underground. Also, the mechanic, Robert Hardin, smoked or carried smoking materials, including one (1) cigarette (butt found) (Basic brand), and one (1) empty pack of cigarettes (Basic brand), underground. Finally, a further search of the mine revealed that persons unknown smoked or carried smoking materials including one (1) cigarette (butt found) and one (1) 'Bic' cigarette lighter underground."

In essence, the charges in the original citation were that Alpha failed to comply with its approved search program for

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[4] In spite of these additional charges the Secretary did not concomitantly amend his pleadings to increase the amount originally proposed for a civil penalty.

smoking articles based on the discovery during the May 19, 1994, inspection of various alleged smoking materials, including purported cigarette butts, several empty and a full package of cigarettes and a 'Bic' cigarette lighter. In relevant part, the cited standard provides that "the operator shall institute a program approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters." The relevant approved smoking plan provides as follows:

1. Each individual miner shall be informed that smoking or carrying smoking articles into the mine is a violation of these provisions and is subject to a penalty.

2. A systematic search for smokers' articles of all persons entering the mine (including, but not limited to lunch boxes, lunch bags, tool boxes, etc.) shall be conducted at least weekly at irregular intervals.

3. In addition, spot-check searches shall be conducted when necessary to ensure that such program is being followed.

4. Responsible persons shall be designated by the operator to conduct such searches and record of the searches will be kept.

5. "No Smoking" signs shall be prominently displayed at all mine entrances.

Since there is no dispute that at least one full package of cigarettes and a functioning cigarette lighter were found in the mine, it is clear that the violation is proven. The violation was also the result of high negligence since clearly inadequate searches were conducted for smoking articles on persons entering the mine. In this regard, mechanic Robert Hardin testified that the last time he had been searched for smoking materials upon entering the underground portion of the mine neither the jacket he was wearing nor his lunch box nor shoes nor socks was searched. It was only a "pat down" and the miners were not even asked to turn out their pockets. Moreover, Foreman Hubbard admitted that when searching for smoking materials he did not actually check miner's lunch pails but merely accepted their word that no smoking materials were within. Upon this evidence alone, it is clear that a violation is proven.

Since there is some question whether the above theory of a violation was charged in the citation at bar, I note the following theory which is implicitly incorporated in the citation is also supported by a preponderance of the evidence. In this regard the cited standard requires that the program instituted by the operator must "insure" that any person entering the

underground area of the mine does not carry lighters or smoking materials. Accordingly, there is liability without fault if a person in the underground area of the mine is found carrying smoking materials. For this additional reason the citation must be affirmed. Foreman Hubbard had admittedly been carrying a full package of Marlboro cigarettes underground in his dinner bucket and it may reasonably be inferred that the operable "Bic" cigarette lighter had been carried underground.

Additional violations are alleged in the amended citation in that each of the six materials was alleged to constitute evidence of either smoking and/or of carrying smoking materials. Clearly the discovery of a full package of cigarettes and a functioning "Bic" cigarette lighter is evidence that smoking materials had been carried underground.[5] In addition, when those articles are considered in conjunction with the two empty packs of cigarettes found underground, one in the same lunch bucket containing the same brand of a full pack of cigarettes and the other in close proximity to a cigarette butt of the same brand, there is clearly sufficient evidence to support a finding that smoking had also occurred underground. Accordingly, the allegation that smoking had occurred underground is also proven as charged.

The violations were also clearly "significant and substantial" and of high gravity. A "significant and substantial" violation is described in section 104(d)(1) of the 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." 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

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[5] Based on findings in the related cases I do not find that empty cigarette packs or cigarette butts incapable of being smoked, constitute "smoking materials".

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, 1936 (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).

The evidence herein demonstrates that "smoking materials" and a lighter had, in fact, been carried underground at the Alpha No. 1 Mine. It is also reasonable to infer from the evidence that it was a common, if not accepted, practice to do so in this mine. Indeed, the section foreman himself was found to be carrying both an empty and a full pack of cigarettes in his lunch bucket without credible justification.

The testimony of Inspector Sampsel that the violations were "significant and substantial" is also essentially undisputed. He testified that there was a danger of methane ignition aggravated by a dust explosion from smoking underground. Sampsel noted that this mine had extensive old workings and was adjacent to mines which had been sealed off. He further noted that such seals have a tendency to leak explosive methane gas and can be disturbed by roof falls. He also testified that the old works cannot properly be examined and it would not be unusual to have methane leaking from such areas. Indeed, he concluded that there was a "high probability" of methane in the sealed areas and contamination from leakage from broken seals. The record also shows that Alpha had, in fact, on occasion cut into these abandoned areas.

Sampsel further noted that mining had occurred both above and below the level of the mine at issue and roof falls and heaves can cause leakage from these other seams. He observed that nine people working in the area could suffer death from

burns, explosions, and/or carbon monoxide suffocation. In this regard the record also shows that at least one mine disaster, at the Grundy mine, resulted in the death of nine miners from an explosion when an individual smoked underground at the same time an abandoned working was cut into.

The violation was also the result of high operator negligence and "unwarrantable failure". Indeed, it was the agent of the operator himself, section foreman Hubbard, who I have found personally and willfully violated the law. His negligence is further apparent from his failure to properly conduct smoking searches. He admitted that when "searching" for smoking materials he did not actually check the miners' lunch pails but merely accepted their word that none were present. The negligence of its foreman is imputed to the operator. *Southern Ohio Coal Co.*, 4 FMSHRC 1459 (1982); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189 (1991). Moreover, the aggravated negligence herein meets the criteria for unwarrantability. See *Youghiogheny and Ohio Coal co.*, 9 FMSHRC 2007 (1987), *Emery Mining Corp.*, 9 FMSHRC 1997 (1987).

Within this framework of evidence and considering the criteria under section 110(i) of the Act, it is further apparent that the proposed civil penalty of $10,000 is appropriate for the violations charged in Citation No. 4038467.

ORDER

Docket No. KENT 94-1224 - Citation No. 4039258 is hereby vacated.

Docket No. KENT 94-1223 - The charges in Citation No. 4039257 alleging that Dewey Hubbard carried smoking materials are affirmed in part and vacated in part as set forth in this decision. Dewey Hubbard is hereby directed to pay a civil penalty of $250 within 30 days of the date of this decision.

Docket No. KENT 94-1194 - Citation No. 4038467 is affirmed. Alpha Mining Company is hereby directed to pay a civil penalty of $10,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 24 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 95-1-D
On behalf of	:	MSHA Case No. WILK CD 94-01
WILLIAM KACZMARCZYK,	:	
Complainant	:	Ellangowan Refuse Bank
v.	:	No. 45
	:	
READING ANTHRACITE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, P.C., Pottsville, Pennsylvania, for Respondent.

Before: Judge Amchan

Procedural Background

On September 12, 1994, I ordered Respondent, Reading Anthracite Company, to temporarily reinstate Complainant, William Kaczmarczyk, to his light duty position following an evidentiary hearing on the Secretary's application for such relief (Docket No. PENN 94-417-D, 16 FMSHRC 1941). On September 30, 1994, the Secretary then filed a discrimination complaint on Mr. Kaczmarczyk's behalf. A hearing on the merits of this complaint was held on March 14, 1995, in Pottsville, Pennsylvania. The record of the temporary

reinstatement hearing has been incorporated into the record of the discrimination proceeding (Tr. II: 6-7[1]).

Factual Background

William Kaczmarczyk began working for Respondent in December 1976 (Tr. I: 21-22). He became an electrician with the company in 1985, working at the St. Nicholas Breaker and the Ellangowan Refuse Bank (Tr. I: 23-25). In October 1989, Kaczmarczyk injured his back while moving a 300-pound motor with a bar (Tr. I: 43). He was on workers compensation from October 1989 to January 1992, except for 4-1/2 weeks in February 1991, when he unsuccessfully tried to return to work (Tr. I: 46-49). On January 8, 1992, after undergoing a cervical spinal fusion four months earlier, Kaczmarczyk returned to work on light duty (Tr. I: 49).

Complainant worked on light duty from January 8, 1992 until October 15, 1993, when he was placed back on workers compensation status (Tr. I: 52-53). Prior to October 1993, Kaczmarczyk was the treasurer of Local 7226 of the United Mine Workers of America (UMWA). He was also a mine committeeman and safetyman for his local, which represented Respondent's employees at the St. Nicholas Breaker (Tr. I: 33-35). Another UMWA local, No. 807, represented employees at the Ellangowan Refuse Bank (Tr. I: 34). [2]

Protected Activity

Complainant served as employee walkaround representative for an MSHA inspection conducted between September 15 and 17, 1993 (Tr. I: 90-93, Sec. Exh. 1). He was also the walkaround

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[1]I will refer to the transcript of the September 1, 1994 temporary reinstatement proceeding as Tr. I and the transcript of the March 14, 1995 hearing as Tr. II.

[2]Complainant performed electrical work at Ellangowan (Tr. I: 27-28). Prior to October 1993, Local No. 807 did not represent any electricians (Tr. I: 173). Since that time Local 807 has assumed jurisdiction over all Respondent's miners at the Ellangowan Refuse Bank and the St. Nicholas Breaker (Tr. II: 46).

representative for an MSHA electrical inspection that was conducted on October 4, 12, and 14, 1993, at the Ellangowan Refuse Bank (Tr. I: 105-08). On the last day of the October inspection, Respondent's safety director, David Wolfe, questioned the need for Mr. Kaczmarczyk's presence during the inspection since Michael Ploxa, President of Local 807, was also serving as a walkaround representative (Tr. I: 107-13, 268-69).

The next day, October 15, 1993, Complainant was informed that he was being put back on workers compensation (Tr. I: 52-53, 122-23). He alleges that this was done in retaliation for his activities as walkaround representative during the October 1993 inspection, which resulted in nine citations being issued to Respondent (Exhibit B to the Secretary of Labor's Application for Temporary Reinstatement, Sec. Exh. 3).

Respondent's Position

Respondent contends that Complainant's return to workers compensation status was non-retaliatory. On October 14, 1993, Safety Director David Wolfe received a telephone call from Andrea Antolick, a nurse and field service representative for Comprehensive Rehabilitation Associates. Ms. Antolick oversees Mr. Kaczmarczyk's rehabilitation program for Respondent's workers compensation insurer (Joint Exh. 1-DP, pp. 6-8, 21). She informed Wolfe that the results of a September 30, 1993 functional capacity evaluation (FCE) of Kaczmarczyk were invalid because Complainant did not put forth his maximum effort to complete the test (Joint Exh. 1-DP, pp. 23-24).

On the morning of October 15, Antolick met with Wolfe for about an hour (Joint Exh. 1-DP, pp. 27-32). Mr. Kaczmarczyk's case was discussed for about 15 minutes (Ibid. p. 29). Antolick again discussed with Wolfe the invalidity of the functional capacity test (Ibid. p. 27) and her opinion that Comprehensive Rehabilitation did not have a current assessment of Mr. Kaczmarczyk's physical capabilities[3].

[3]"Invalidity" appears to be a term of art and indicates a lack of good faith effort on the part of the individual being tested (Joint Exh 1-DP, p. 19).

Wolfe contends that his October 14 conversation with Antolick precipitated the decision to return Kaczmarczyk to compensation status that was totally independent of Kaczmarczyk's activities as a walkaround representative (Tr. I: 254-55, 311-16). General Manager Frank Derrick, however, testified that the report that Complainant failed to complete the functional capacity test was "coincidental" to his return to workers compensation status (Tr. I: 349-50). Derrick contends that recurring reports from supervisors that Mr. Kaczmarczyk was not performing assigned duties led to this decision (Tr. I: 350).

Evaluation of the Evidence

Did Respondent Violate Section 105(c) of the Act?

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any ... miner because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission

held that a complainant establishes a prima facie case of discrimination by showing (1) that he engaged in protected activity and (2) that an adverse action was motivated in part by the protected activity.

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 the protected activity. If the operator cannot thus rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

The timing of Complainant's return to workers compensation and evidence of safety-related animus

The timing of Mr. Kaczmarczyk's return to workers compensation status, one day after his protected activities as an employee walkaround representative, establishes a prima facie case. Donovan v. Stafford Construction Co., 732 F.2d 954, 960 (D.C. Cir. 1984); Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2511 (November 1981). Additionally, I conclude that Safety Director Wolfe did harbor some degree of animus towards Kaczmarczyk due to his participation in the October MSHA inspection.

Mr. Wolfe was not happy to see Kaczmarczyk participating in the inspection on October 14, 1993, and challenged the necessity of his presence. In view of the fact that Michael Ploxa, President of UMWA Local 807, was also acting as employee walkaround representative, and the fact that other electricians were available, Wolfe considered Kaczmarczyk's participation unnecessary (Tr. I: 175-76, 308).

The nexus between the October inspection and Complainant's return to workers compensation is not overwhelming. Although the October 1993 MSHA electrical inspection was initiated by an employee complaint, Kaczmarczyk did not file the complaint (Tr. I: 97-98, 178).[4]

Additionally, there is nothing in this record to suggest that anything that Mr. Kaczmarczyk did as walkaround representative on October 4, 12, and 14, 1993, aroused Respondent's ire. Although Respondent received nine citations as a result of this inspection, there is no indication that Complainant's conduct as a walkaround representative was responsible for any of these citations (Tr. I: 277, 301). In summary, there is virtually nothing in the record to indicate that Respondent would have any reason to retaliate against Complainant solely for his role in the October 1993 inspection.

Nevertheless, I conclude that Complainant would not have been returned to workers compensation status but for the cumulative effect of his activities as a walkaround representative during MSHA inspections. I regard the statements and conduct of Safety Director Wolfe at Kaczmarczyk's October 18, 1993, grievance hearing to be determinative on this issue.

The statements and conduct of Safety Director David Wolfe at the October 18, 1993 grievance meeting

Kaczmarczyk filed a grievance over his return to workers compensation status. It is uncontroverted that at a meeting on the grievance on October 18, 1993, Wolfe and Kaczmarczyk got into a heated argument over the reasons for this personnel action. It is also undisputed that during this argument Wolfe

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[4]Although Foreman Vince Devine asked Kaczmarczyk who made the complaint that led to the October inspection, Kaczmarczyk told Devine it was not him (Tr. I: 100-105). There is no reason to believe Devine suspected it was Kaczmarczyk who complained about the presence of water near electrical components in the steam genny house, which was the subject of the complaint (Tr. I: 16-17, 178-79). Devine was present during the inspection in which this concern was raised and Kaczmarczyk was not (Tr. I: 97, Secretary's Exhibit 2).

went into another room, obtained a stack of MSHA citations issued to Respondent and threw, or placed them, on the table (Tr. I: 128-29, 191-93, 274-75, 283-93).

According to Kaczmarczyk and Jay Berger, the UMWA district representative present, whose testimony I credit, Wolfe said something to the effect that these citations were another reason why Kaczmarczyk was being placed on compensation (Tr. I: 128-29, 191-93)[5]. I regard Wolfe's statement as an admission that Complainant's protected activities were a significant factor in Respondent's decision to return him to workers compensation.

The alternative explanations offered by Respondent for Wolfe's actions and statement are unpersuasive. Wolfe testified that the citations he placed on the table were not those issued in September or October, 1993, but were citations issued in August 1992 which were largely the fault of Mr. Kaczmarczyk (Tr. I: 274-278)[6]. At the temporary reinstatement hearing, Wolfe

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[5]Wolfe testified that he never told Kaczmarczyk that he was being placed back on workers compensation because he participated in a walkaround inspection (Tr I: 275), which is not a direct contradiction of the testimony of Kaczmarczyk and Berger. He also testified that when he put the citations down he said to Kaczmarczyk, "[t]his is why you can't perform your job duties" (Tr. I: 287). However, Wolfe's continued explanation provides sufficient reason for the undersigned not to credit his testimony on this issue.

Q. ... What's the connection between putting those [citations] down on the table and telling Mr. Kaczmarczyk he couldn't do his job?...

A. I really don't know.

(Tr. I: 287-88).

[6]The credibility of Wolfe's testimony is undermined by its inconsistency in several regards. For example, he testified at the temporary reinstatement proceeding that he did not hold Kaczmarczyk responsible for the October 1993 citations (Tr. I: 276-78). At the discrimination hearing, however, he testified

testified that he put the citations on the table "out of frustration" (Tr. I: 275), and to emphasize that Respondent would not get as many citations as it was receiving if all its employees were capable of doing their jobs (Tr. I: 274-75).

I cannot credit Wolfe's testimony that he was agitated about August 1992 citations in October, 1993, but not about the 14 citations Respondent had received in the preceding month (Sec. Exhibits 1, 2, and 3). This is particularly hard to believe in view of the fact that the October 1993 inspection was the first time that Respondent had received as many as nine citations from an MSHA electrical inspection (Tr. I: 186). Further, the credibility of this testimony is greatly undermined by the fact that at a grievance proceeding on November 22, 1993, Wolfe could not remember which citations he placed on the table on October 18, 1993 (Tr. I: 291-93).

Similarly unconvincing is Wolfe's testimony at the temporary reinstatement hearing that his actions and statements at the October 18, 1993 grievance meeting were an indication of his frustration with Complainant's failure to perform work assignments which caused the August 1992 citations (Tr. I: 274-278). At the temporary reinstatement proceeding Wolfe testified that some of the conditions leading to the August 1992 citations would not have existed if Kaczmarczyk had been able to fully perform his job (Tr. I: 276-77, but also see Tr. I: 287). However, at the discrimination hearing he testified that Complainant was not disciplined because he accepted Kaczmarczyk's assertion that he had reported the violative conditions to his foreman, who failed to take corrective action (Tr. II: 175).

Complainant's failure to complete a functional capacity evaluation

Safety Director Wolfe explains the timing of Complainant's return to compensation status as due to the receipt of information on October 14, 1993, that Kaczmarczyk refused to make a good faith effort to complete a functional capacity evaluation (FCE)

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fn. 6 (continued)
that some of the citations were due to Complainant's failure to do electrical inspections properly (Tr. II: 196-198).

on September 30, 1993 (Tr. I: 253-55, Exh. R-10). However, General Manager Frank Derrick indicated that Kaczmarczyk's alleged refusal to take the FCE had little to do with Respondent's decision to put him back on workers compensation (Tr. I: 349-50).

Derrick characterized that information as "coincidental" to his decision (Tr. I: 350). The inconsistency in the testimony of the two witnesses who decided to transfer Complainant to workers compensation itself suggests discriminatory motives, N.L.R.B. v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984); Hall v. N.L.R.B., 941 F.2d 684 688 (8th Cir. 1991).

Even if I disregard this inconsistency, the extremely rapid response of Mr. Wolfe to this information, considered in the context of Kaczmarczyk's recent protected activity, and Wolfe's statements at grievance proceeding, leads me to conclude that his receipt of information regarding the functional capacity evaluation is not an intervening event that rebuts Complainant's prima facie case, or establishes a legitimate affirmative defense.

The record shows that Mr. Wolfe received a call from Andrea Antolick, a nurse employed as a field service representative, on October 14, 1993. Antolick reported that Kaczmarczyk had not put forth maximum effort when failing to complete the functional capacity evaluation (Tr. I: 311, Joint Exh.-1-DP, p. 21-23, 35, Sec. Exh. 3-DP, 4-DP, & 5-DP)[7].

On the morning of October 15, 1993, Ms. Antolick had a meeting with Mr. Wolfe, at his office, which lasted about an hour (Joint Exh-1-DP, p. 26-32). Approximately 15 minutes was spent discussing Complainant (Ibid., p. 29-30). Antolick and Wolfe discussed her understanding that Kaczmarczyk's test results were invalid and she indicated that she was going to attempt to obtain an opinion regarding his physical capabilities from his physician, Dr. Keith Kuhlengal, a neurosurgeon (Id., p. 27).

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[7]I credit Antolick's testimony that the first report to Respondent regarding the functional capacity report was made on October 14, 1993, rather than October 12.

Although Wolfe knew Antolick had no first-hand knowledge regarding the FCE, he decided to return Kaczmarczyk to workers compensation without making any sort of inquiry of Complainant or the individuals who conducted the test (Tr. I: 312-16)[8]. Absent other factors, it is not implausible that an employer would react immediately to information indicating malingering on the part of one of it employees. However, in the instant case, given the fact that Kaczmarczyk had been on light duty for 21 months, I conclude that the rapid response to Antolick's report, if it in fact was a factor in Wolfe's decision, was not made independently of his animus towards Complainant's safety-related activities.

Was Complainant returned to workers compensation status as the result of a non-discriminatory application of Respondent's light-duty program?

Respondent also argues that Mr. Kaczmarczyk's return to compensation status was the result of a non-discriminatory application of its light-duty program. The decision to return Complainant to compensation was made by General Manager Frank Derrick, in consultation with Safety Manager David Wolfe (Tr. I: 338, 344, 349-50).

While both Wolfe and Derrick point to a number of instances in which Kaczmarczyk was unable to do work assigned to him while on light duty, they are able to conclusively establish only one which occurred in the two and a half months prior to the decision to return him to compensation (Tr. I: 66-67, 75-76, 203, 238, 322, Tr. II: 125-130, 134, 138-139, 148-150, 153-154). The record indicates that Complainant had been unable to do job assignments throughout his 21 months on light duty and does not conclusively establish non-retaliatory reasons for which the company made an issue of Kaczmarczyk's restricted abilities in October 1993. Indeed, Complainant was unable to do much more work in 1992 and during the previous winter than in the fall of 1993 (Tr. I: 222-23).

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[8]I do not infer from Wolfe's testimony at Tr. I: 315-16 that he sought input from Kaczmarczyk before Respondent decided to return Complainant to workers compensation status (See Tr. I: 123).

Respondent asks, at page 3 of its post-trial brief, that this decision carefully account for the nature and purpose of its light-duty program, and not disrupt the company's legitimate purposes in providing such a program and administering it in a flexible manner. Of course, nothing in the Federal Mine Safety and Health Act prohibits Respondent from administering its light duty program in a non-discriminatory way, including non-retaliatory transfers from light-duty back to workers compensation.

On the other hand, a transfer from light-duty to workers compensation that would not have occurred but for activity protected by the Act is prohibited by section 105(c). Given Complainant's prima facie case, Respondent falls far short of showing that his return to workers compensation was the result of a non-discriminatory application of its light-duty program.

Respondent has satisfied me that there are many other miners that have been on light duty who also were put back on workers compensation (Tr. I: 246, 264-66, 336-37, 354-57). However, it has not established that prior to the instant case there was any company policy that light-duty assignments are temporary, or intended to be in the nature of a work-hardening program, as it now contends. The only written evidence of the policy, Exhibit R-8, says nothing of the sort. Further, Secretary's Exhibit 2-DP strongly suggests that prior to Complainant's transfer there was no such hard and fast rule. Nurse Antolick, in a report dated July 14, 1993, stated:

> Vocational Implications: I spoke with Dave Wolfe of Reading Anthracite. Mr. Wolfe stated that Mr. Kaczmarczyk has been working well in his light-duty position and requested I not contact him. I explained my attempting to obtain a consent through Mr. Kaczmarczyk's attorney and that I will be only contacting his physician. **Mr. Wolfe did state that client could remain in present job indefinitely.** I did obtain a job analysis on client's pre-injury job (emphasis added).

Moreover, even if the program was intended to be temporary, the issue in this case is the **timing** of the decision to put Complainant back on workers compensation. The question is

not whether Respondent at some time could have returned Mr. Kaczmarczyk to workers compensation because of lack of work or lack of improvement in his physical condition. The issue before me is whether it changed his status on October 15, 1993, for non-discriminatory reasons, or whether that transfer would not have been made but for his protected activity.

The list of miners who also were returned to workers compensation from light-duty does not help Respondent's case at all. For starters, although its brief repeats the assertion made by Mr. Wolfe (Tr. II: 192) that no employee spent more time on light duty than Mr. Kaczmarczyk, Exhibit R-1-DP indicates that is not so. On October 15, 1993, Complainant had been on light duty for approximately 21 months. Respondent's exhibit indicates that David Eckert was on light duty from December 31, 1991 to March 3, 1994 (26 months). It lists Joseph Holland as having been on light duty from February 25, 1992 to February 24, 1994 (24 months). Keith Mielke was on light duty from June 10, 1991 to June 14, 1993 (24 months). Russel Sadusky was on light duty from January 13, 1992 to June 3, 1994 (28 months).

Evidence of Malingering

General Manager Derrick testified that Complainant was doing less work than he was capable of doing (Tr. I: 346-47). There is substantial testimony to the contrary (Tr. II: 124-130, 134, 148-150, 152, Sec, Exh. 1-DP and 2-DP). While other evidence also suggests that Mr. Kaczmarczyk's physical capacity was not as limited as he contends (Joint Exh-1-DP, pp. 35-39, Exhs. R-6, R-10, R-11), I need not decide whether Complainant exaggerated his limitations because the record does not support a finding that Respondent returned him to workers compensation for this reason.

Respondent has established only one instance in the two and a half months prior to October 15, 1993, when Kaczmarczyk's supervisors reported to Wolfe or Derrick that Complainant had declined to perform a task (Tr. I: 238, II: 124-130, 134, 138, 148-150). This occurred on September 24, 1993, when Kaczmarczyk told his foreman that he could not continue cutting weeds (Tr. II: 124-30).

There is also little concrete evidence regarding such refusals in 1993. Complainant's principal foreman, Vince Devine, maintained a daily log in 1993. After checking this log for the period January 1, 1993 through October 15, 1993, Devine could find no recorded instance in which Kaczmarczyk declined to complete a task due to his physical condition other than the weed cutting incident (Tr. II: 125-138)[9].

Claire Yarnell, the electrical foreman who occasionally supervised Kaczmarczyk, is only aware of two or three instances in 1993 in which Complainant declined to complete tasks due to his back. One is the aforementioned weed cutting incident and another was an occasion in the summer of 1993 in which Kaczmarczyk said he could not continue to help other employees roll up wire (Tr. I: 200-204, II: 150, 153-54).

Thus, there is no basis for finding that Complainant's job performance was a bona-fide nondiscriminatory reason for his return to workers compensation. In so concluding, I weigh the evidence adverse to Complainant in the context of his protected activity, the indications of Mr. Wolfe's safety-related animus, and the paucity of information available to Wolfe and Derrick that Kaczmarczyk was declining to perform tasks, or that his work was deteriorating.

I also consider that Respondent's supervisors presented something less than a united front on the issue of Kaczmarczyk's work performance. Claire Yarnell described Complainant as an excellent worker, who did whatever was asked of him (Tr. II: 148-9, 152). Even Safety Director Wolfe described Kaczmarczyk's work as sometimes "excellent" (Tr. II: 166-67; also see Wolfe's characterizations of Complainant's work in Sec. Exh. 1-DP and 2-DP).

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[9]Devine's log for September 24, 1993, states, "Billy K told by Dave to cut weeds, he said his back is hurting him" (Tr. II: 134).

Was Complainant put back on workers compensation in a non-discriminatory manner due to lack of work?

At the temporary reinstatement hearing, General Manager Derrick testified, to the surprise of Respondent's counsel, that there was not sufficient light-duty work to keep Complainant busy both at the time of the hearing and on October 15, 1993 (Tr. I: 339-344). As the Secretary notes in his brief, this contention was not mentioned in Mr. Derrick's Affidavit that was attached to Respondent's Response to the Application for Temporary Reinstatement.

Moreover, I conclude that there is no credible evidence that Complainant was put back on workers compensation due to lack of work. Mr. Wolfe told Ms. Antolick in July, 1993, that Mr. Kaczmarczyk could stay on his light duty job indefinitely (Sec. Exh. 2-DP). There is no evidence of any relevant change of circumstances prior to October 15, 1993. Although Respondent introduced evidence regarding changes at its worksite since October 15, 1993, there is nothing in the record that would indicate that these changes had anything to do with its decision to put Complainant back on workers compensation on October 15.

Conclusion

The record as a whole establishes a prima facie case of discrimination in violation of section 105(c) of the Act, which is not adequately rebutted by Respondent. I find that but for Mr. Kaczmarczyk's participation in the MSHA inspections of September and October 1993, he would not have been placed back on workers compensation status on October 15, 1993. In so deciding, there are three considerations that stand out from the others. First is the timing of personnel action. Second is Safety Director Wolfe's irritation at seeing Complainant on the MSHA walkaround on October 14. Last are the statements made by Wolfe on October 18, which I construe as an admission by Respondent that Kaczmarczyk's protected activity and his return to workers compensation status were related.

ORDER

Respondent is ordered to reinstate Complainant to the position he held prior to October 15, 1993. The parties are to confer and advise the undersigned within 30 days of this decision as to whether they are able to stipulate to the damages sustained by Complainant due to Respondent's violation of section 105(c) of the Act, and an appropriate civil penalty. If the parties are unable to so stipulate, they may either submit written arguments on these issues or request a supplemental hearing.

As agreed to by the parties, I retain jurisdiction over this matter to issue a decision on the Secretary's Motion to Enforce the Order of Temporary Reinstatement. A hearing on this motion was held on May 19, 1995, after which the parties have been provided an opportunity to file written closing arguments.

Arthur J. Amchan
Administrative Law Judge

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MAY 2 4 1995

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES HYLES, DOUGLAS MEARS, DERRICK SOTO, GREGORY DENNIS, Complainants v. ALL AMERICAN ASPHALT, Respondent	:	DISCRIMINATION PROCEEDINGS Docket Nos. WEST 93-336-DM WEST 93-436-DM WEST 93-337-DM WEST 93-437-DM WEST 93-338-DM WEST 93-438-DM WEST 93-339-DM WEST 93-439-DM WEST 94-021-DM All American Aggregates

DECISION

Appearances: J. Mark Ogden, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Complainants;
Lawrence Gartner, Esq., Naomi Young, Esq., Gartner & Young, P.C., Los Angeles, California, for Respondents.

Before: Judge Cetti

These consolidated discrimination proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). The proceedings were initiated by the Secretary under Section 105(c)(2) of the Mine Act on behalf of the Complainants James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis.

At the close of the December, 1993 hearings at Riverside, California, the undersigned Judge issued an Order of Temporary Reinstatement from the bench, followed by a written decision a few days later ordering temporary reinstatement of the Claimants. See Docket Nos. WEST 93-124, WEST 93-125, WEST 93-126 and WEST 93-127. Published in 16 FMSHRC 31 (1994).

On November 2, 1994, a decision on permanent reinstatement was issued and published at 16 FMSHRC 2232. By agreement and request of the parties the issue of back-pay and benefits was severed from the hearing and decision on liability.

The November 2, 1994, decision ordered the operator All American Asphalt to reinstate each of the Claimants to his former position with full back-pay, benefits and interest, at the same rate of pay, and the same status and classification that he would now hold had he not been unlawfully discharged. The decision also directed counsel for the parties to confer with each other with respect to the remedies due each of the Claimants and encouraged the parties to reach a mutually agreeable resolution or settlement of these matters.

The undersigned Judge also retained jurisdiction until the remedial aspects of this case were resolved and finalized.

The November, 1994 decision directed the parties to state their respective positions on those compensation issues where they were unable to agree and to submit their respective proposals, with supporting arguments and specific proposed dollar amounts for each category of relief.

At the request of the parties, an extension of time was granted for submission of the position statements. The position statements were filed by the parties on December 31, 1994. The parties could not reach an agreement and requested a hearing on the dollar amount of back-wages and penalties. A hearing was set and then without objection was continued at the request of the Secretary to May 8-10, 1995, in Riverside, California.

Just prior to the scheduled May 1995 hearing, the parties after conference calls on May 5th and May 8th 1995 notified the Judge that they had reached an agreement on the dollar amounts due. They requested cancellation of the May hearing on the grounds that it would no longer be necessary or productive in view of a stipulation reached by the parties. The scheduled hearing was canceled and the parties were directed to promptly file their stipulation. The stipulation was filed on May 22, 1995.

The stipulation is attached to this decision as Exhibit A. While the stipulation will of course speak for itself it is clear from the stipulation the parties agree to certain dollar amounts of back-pay due each Claimant during a specified time period for the purpose of settling the record. The stipulation, however, is not an agreement as to entitlement thereto. Respondent disputes liability and reserves its right for review and appeal.

The parties now want and are entitled to a prompt final decision. I accept the stipulation filed by the parties (Ex. A)

and subject to the terms of that stipulation make the following findings and awards for the agreed period prior to December 17, 1993.

I find that each of the Claimants for the period prior to December 17, 1993, are entitled to back-pay plus interest accrued from March 15, 1993, until the date of payment in the following amounts:

Name	Amounts
James Hyles	$20,837.24 plus interest
Derrick Soto	$34,347.10 plus interest
Douglas Mears	$38,656.34 plus interest
Gregory Dennis	$36,159.32 plus interest

I find civil penalties totaling $28,000.00 appropriate for Respondent's violations of section 105(g) of the Act as alleged in the above captioned proceedings. I therefore assess a civil penalty of $28,000.00 for said violations payable to the Secretary of Labor.

Based on the record and the stipulation filed May 22, 1995, I enter the following:

ORDER

Respondent is ordered to pay the Complainants for lost wage and interest prior to December 17, 1993, in the following amounts:

Name	Amounts
James Hyles	$20,837.24 plus interest [1]
Derrick Soto	$34,347.10 plus interest
Douglas Mears	$38,656.34 plus interest
Gregory Dennis	$36,159.32 plus interest

It is further ordered that **RESPONDENTS PAY** a civil penalty of $28,000.00 to the Secretary of Labor for Respondent's violations of section 105(c) of the Mine Act as charged in the above-captioned proceedings. All amounts payable by Respondent pursuant to this order shall be paid within 40 days of the date of this decision.

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[1] Interest shall be computed in accordance with the Commission's decision in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (December 1983), at the adjusted prime rate announced semi-annually by the Internal Revenue Service for the underpayment and overpayment to taxes. Interest shall be computed from March 15, 1993, until the date of payment of back-pay awarded.

This is my final decision in the above-captioned dockets and upon full compliance with the decision, the above-captioned dockets are dismissed.

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

IN THE

OFFICE OF ADMINISTRATIVE LAW JUDGES

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATIVE (MSHA), on behalf of JAMES HYLES, DOUGLAS MEARS, DERRICK SOTO, and GREGORY DENNIS, Complainants, vs. ALL AMERICAN ASPHALT, Respondent.	DISCRIMINATION PROCEEDINGS DOCKET NOS. WEST 93-336-DM WEST 93-436-DM WEST 93-337-DM WEST 93-437-DM WEST 93-338-DM WEST 93-438-DM WEST 93-339-DM WEST 93-439-DM WEST 94-021-DM **STIPULATION**

EXHIBIT A

It is hereby stipulated and agreed by and between the Secretary of Labor, and Respondent All American Asphalt, and Complainants James Hyles, Derrick Soto, Douglas Mears, and Gregory Dennis (collectively Complainants), through their respective counsel of record that, assuming liability as found in the Decision of Administrative Law Judge August F. Cetti dated November 2, 1994 in Docket Nos. West 93-336, 93-436, 93-337, 93-437, 93-338, 93-438, 93-339 and 93-439 (hereinafter the "Decision"), any back pay due each of the Complainants and any statutory penalty shall be as follows:

1. Each Complainant shall be awarded the gross dollar amount, plus interest, for claimed loss of earnings as set forth opposite his name below, assuming liability (and subject to the further provisions of Paragraph 6 hereof in the event of Commission review and/or appeal to the Courts). The Secretary of Labor and the Complainants seek no benefits as part of these proceedings. Respondent disputes liability and reserves its right to petition the Federal Mine Safety and Health Review Commission ("Commission") for review and to thereafter appeal to the courts from the Commission's final order. Respondent shall make all legally required payroll deductions and withholdings from said gross amounts. Respondent shall not make any deductions from said gross amounts for any alleged off-set or re-payment of unemployment benefits received by Complainants. Interest shall be calculated in accordance with the Notice of Intention by Administrative Law Judge August F. Cetti dated January 13, 1995 at footnote 1 thereof, with interest beginning to accrue on March 15, 1993 on the entire back pay award. These

amounts constitute the full award for each Complainant to be made herein arising from the claims raised in the cases bearing Docket Nos. West 93-336, 93-436, 93-337, 93-437, 93-338, 93-438, 93-339, 93-439 and 94-021 (also referred to as 93-021) (hereinafter "Docket Numbers"), prior to December 17, 1993.

NAME	AMOUNTS
James Hyles	$20,837.24
Derrick Soto	$34,347.10
Douglas Mears	$38,656.34
Gregory Dennis	$36,159.32

2. The Secretary represents that each Complainant has, after receiving advice of counsel, concurred in the amounts set forth in paragraph 1 above.

3. This stipulation is entered into for the purpose specified in Paragraph 8 only, and the stipulation, and any agreements made herein, shall have no force or effect in any other forum or proceeding other than in the MSHA Docket Nos. specified in Paragraph 1 herein. Nothing stated herein shall prohibit or interfere with Respondent All American Asphalt from asserting the right to claim an offset of any back pay awarded in connection with the MSHA Docket Nos. specified in Paragraph 1 against any other claim made by Complainants in any other forum or proceeding, and nothing herein shall prohibit any other administrative agency, court, trier of fact or tribunal from making such an offset.

4. The civil money penalty to be awarded herein, assuming liability on the part of Respondent (and subject to the further provisions of Paragraph 6 hereof in the event of

Commission review and/or appeal to the Courts), shall be Three Thousand Five Hundred Dollars ($3500.00) per violation for each of the eight alleged violations (i.e., two alleged layoffs for each Complainant) for a total of Twenty Eight Thousand Dollars ($28,000.00). Three Thousand Five Hundred Dollars ($3500.00) is the maximum penalty to be awarded per alleged violation in the cases bearing the Docket Numbers set forth in paragraph 1 above (except there shall be no penalty in the case bearing Docket No. 94-021).

5. Nothing herein shall interfere with or prohibit Respondent from pursuing all avenues and rights of review and/or appeal of liability found in the above captioned matters.

6. The amounts specified in paragraphs 1 and 4 above shall be reduced, or eliminated in their entirety, in accordance with any determination by the Commission or by the Courts to that effect on appeal (or on a remand ordered by the Commission or the Courts, subject to further petition for review and/or appeal by any party) in the event the finding of liability is not upheld in its entirety upon review and/or appeal. In no event shall the monetary award to each Complainant and penalty in the cases bearing the Docket Numbers set forth in paragraph 1 above exceed the amounts set forth in paragraphs 1 and 4 above, for the period prior to December 17, 1993.

7. No provision is made herein with respect to the payment of any amount that may or may not be due to any benefit trust fund.

8. The parties acknowledge that neither the execution nor performance of any provision of this Stipulation

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shall constitute or be construed as an admission of any liability whatsoever by Respondent or that any monetary award or penalty is due or appropriate and this Stipulation in entered into solely to agree upon a monetary award and penalty in the event of liability (and subject to the further provisions of Paragraph 6 hereof in the event of Commission review and/or appeal to the Courts) in order to avoid the expense of the hearing on remedies scheduled for May 8-10, 1995.

9. The monetary recovery amounts and penalties herein referred to are for the period prior to December 17, 1993; and this stipulation is without prejudice to the right of the Secretary to seek any back pay or civil monetary penalties for a period subsequent to December 17, 1993, in any separate proceeding, including any action to enforce the temporary reinstatement order of December 17, 1993 and/or a permanent reinstatement based on the Decision of the Administrative Law Judge dated November 4, 1994. Respondent waives no right to challenge and to raise every defense to any such separate proceedings.

10. Approval of this Stipulation by the Administrative Law Judge will have the effect of eliminating the need for the hearing presently scheduled to commence on May 8, 1995 regarding the monetary awards and penalty to be awarded in the above captioned matter. Accordingly, the parties request that said hearing be immediately taken off calendar pending the Administrative Law Judge's approval of this Stipulation. If the

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stipulation is not approved in its entirety, it will be void, and either party may request that the hearing be rescheduled.

DATED: May 19, 1995

NAOMI YOUNG
LAWRENCE J. GARTNER
GARTNER & YOUNG
A Professional Corporation

By: _____
LAWRENCE J. GARTNER
Attorneys for Respondent
All American Asphalt

DATED: May 17, 1995

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Solicitor of Labor

DANIEL W. TEEHAN
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JOHN C. NANGLE
Associate Regional Solicitor

By: _____
J. MARK OGDEN, Trial Attorney
Attorneys for the Government

DATED: May 15, 1995

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 25 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-401
Petitioner	:	A. C. No. 46-08242-03502GPF
v.	:	
	:	CSI #5 Mine
BSC CONSTRUCTION, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed a motion to approve a settlement agreement.

The citation in this case alleged two separate violations of the Regulations, Sections 48.28(a) and 48.31(a), 30 U.S.C. §§ 48.28(a) and 48.31(a), and penalties were assessed for each violation. The Secretary has modified the citation to vacate all references to Section 48.31(a). A reduction in penalty from $400.00 to $300.00 is proposed for the remaining violation. Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i).

Accordingly, the motion for approval of settlement is **GRANTED** and it is **ORDERED** that Respondent pay a penalty of $300.00 within 30 days of the date of this order. On receipt of payment, this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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Mr. Roger L. Glover, Operations Manager, BSC Construction, Inc., P.O. Box 945, Uniontown, PA 15401

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 25 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-369
Petitioner	:	A.C. No. 15-14074-03634
v.	:	
	:	Martwick UG Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION AFTER REMAND

Before: Judge Amchan

Procedural History

On April 26, 1995, the Commission vacated my decision, which held that two citations issued to Respondent were significant and substantial ("S&S"). It remanded this case for application of Commission precedent, as set forth in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984)[1].

Citation No. 3417313: the external grounding device on the cathead

On December 14, 1992, MSHA representative Darold Gamblin inspected Respondent's underground coal mine. Upon reaching the 3 South Panel entries he encountered an electrical transformer supplying power to the equipment in the entries (Joint Exh-1). Plugged into the transformer was a power cable coupler, or cathead, that was connected to a cable running to a belt feeder transfer point (Tr. 11-14).

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[1]The parties have advised the undersigned that they will rely on the record and briefs filed prior to the issuance of the Commission's decision.

The cathead consists of two large metal parts, one of which is plugged into the other. There is a female receptacle mounted on the transformer and a male part to which the cable is attached. The external grounding device of the cathead consists of two wires, one attached to each metal part. This grounding device on the cathead observed by Gamblin was not functional because these wires were not connected (Tr. 25, Exh. 4). Gamblin therefore issued Respondent Citation No. 3417313 alleging an "S&S" violation of 30 C.F.R. § 75.701. This standard provides that:

> Metallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary.

The cathead also has an internal grounding device which normally prevents an employee from being shocked or electrocuted if the cable insulation were to break (Tr. 14-15). There is no evidence that the internal grounding device was defective when Gamblin issued the instant citation. Both Gamblin and Alan Perks, Respondent's chief maintenance engineer, characterized the external ground as a "back-up" device (Tr. 72-74, 83).

As Respondent concedes that the standard was violated, the only issues before me are whether the violation was S&S and the assessment of an appropriate civil penalty. The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is 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.

The only evidence introduced by the Secretary with regard to the third step of the Mathies test is the purely conclusory opinion of Inspector Gamblin that it is reasonably likely that the cited condition would lead to injury if the mining process continued (Tr. 17-18, 26). I find this insufficient to establish that the cited violation was "S&S."

Moreover, I conclude from the testimony of Alan Perks, Respondent's chief maintenance engineer, that it is not reasonably likely that failure to connect the two wires of the external ground will result in injury. This is so for two reasons. First, the normal practice is to turn off the circuit breaker on the transformer before disconnecting the cathead (Tr. 88). Secondly, even if a miner disconnects the cathead first, the internal grounding mechanism is likely to shut off the power if the cathead becomes energized (Tr. 83).

While it is possible for a miner to be electrocuted due to failure to connect the external ground wires, several things would have to go wrong for this to happen. First, a miner would have to disconnect the cathead before shutting off the circuit breaker. Secondly, there would have to be a short in the electrical cable, and third, the internal grounding mechanism would have to be defective. None of these conditions were shown to have existed at the time of the instant citation. Therefore, I am not persuaded that it is reasonably likely that they would have all occurred at Respondent's mine in the continued course of normal mining operations. Therefore I affirm the citation as a non-S&S violation and assess a $50 civil penalty.

Citation No. 3417315: The Unmarked Cathead

During his inspection of December 14, 1992, Gamblin noticed two catheads affixing cables from continuous mining machines to a transformer. One cathead was marked to indicate the machine to which its cable was attached, the other was not so marked (Tr. 36, 42). Inspector Gamblin issued Respondent a citation alleging an "S&S" violation of 30 C.F.R. § 75.601. This standard provides:

> ... Disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and such devices shall be equipped or designed in such a manner that it can be determined by visual observation that the power is disconnected.

Gamblin believes it is reasonably likely that a miner would work on a continuous mining machine which he or she mistakenly thought was de-energized due to the lack of identification markings on the one cathead (Tr. 40, 50, 56, 60-63). Respondent contends that injury was unlikely for several reasons.

First of all, a miner could determine which cathead went to which continuous mining machine by process of elimination--since one cathead was properly marked (Tr. 52). Secondly, one of the catheads observed by Gamblin was significantly cleaner than the other. Respondent had two continuous miners in the section because it was in the process of replacing one with the other, which had been recently rebuilt (Tr. 89). The cathead belonging to the rebuilt machine was much cleaner than the other cathead (Tr. 106-07). Respondent argues that it would be obvious that the cleaner cathead belonged to the rebuilt miner.

Further, Respondent argues, the normal practice for an employee when disconnecting a cathead is to follow the continuous miner's cable back to the transformer to insure that he or she disconnects the right one (Tr. 90). Moreover, Peabody's company policy is that an employee performing work on a continuous mining machine must disconnect and lock out the power to the machine himself or herself (Tr. 109).

As with the prior citation, the only issue before me is whether the violation was S&S. The Commission, in the instant case, indicated that United States Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984) stands for the proposition that while S&S determinations are not limited to conditions existing at the time of the citation, they should not take into consideration conditions at other mines or over extended periods of time.

In the instant case, the older continuous miner would only be in the section with the rebuilt miner for two or three days until Peabody was satisfied that the rebuilt machine was working properly (Tr. 92, 103). Given this fact, and the other factors

mentioned by Respondent, I conclude that an injury was not reasonably likely to occur due to the lack of markings on the one cathead. I therefore affirm the citation as a non-S&S violation and assess a $50 civil penalty.

ORDER

Citation Nos. 3417313 and 3417315 are affirmed as non-S&S violations. Considering the statutory factors enumerated in section 110(i) of the Act, I assess a $50 civil penalty for each of the violations. These penalties shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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MAY 2 6 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 93-376-M A.C. No. 04-02710-05509
v.	:	Docket No. WEST 93-380-M A.C. No. 04-02710-05510
ARCATA READIMIX, Respondent	:	Arcata Pit & Mill

DECISION

Appearances: Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
William J. O'Neill, President, Arcata Readimix, Arcata, California, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Arcata Readimix ("Arcata"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege six violations of the Secretary's safety standards. For the reasons set forth below, I affirm the citations and assess civil penalties in the amount of $170.00.

A hearing was held in these cases before Administrative Law Judge John J. Morris, in Eureka, California. The parties presented testimony and documentary evidence, but waived post-hearing briefs. These cases were reassigned to me on April 25, 1995, for an appropriate resolution.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Preliminary Matters

The Arcata Pit & Mill is a small, sand and gravel pit in Humboldt County, California. The citations that are the subject of these proceedings were issued at Arcata's crushing and screening plant (the "plant") by MSHA Inspector Dennis Harsh on February 2 and 3, 1993.

Arcata maintains that its plant was shut down for the winter at the time of the inspection. Lawrence Frank, a former super-

visor at the plant, testified that the main power center for the plant was at a "remote shack" that was locked, and that only three people had a key to this shack: William O'Neill, the president, Jim O'Neill, the president's brother, and Mr. Frank. (Tr. 38-39; 47-48; Ex. R-2). He further stated that a lock or a lock-out sign was on the electrical switch box inside the shack. Id. He further testified that the plant was "in a state of semi-disassembly." (Tr. 40). Mr. Frank stated that during the shut-down, equipment at the plant was being taken apart and serviced with the guards removed, "so when things pick up in the spring, we don't have to deal with that." (Tr. 41). He stated that the plant had not been in production since about December 1992. (Tr. 42-43). This testimony was supported by the testimony of William O'Neill. (Tr. 53). Mr. O'Neill stated that the plant was shut down and that he thought everyone knew that it was shut down, including Inspector Harsh. (Tr. 53-55). He testified that all of the conditions observed by the inspector would have been corrected before the plant was put into operation in the spring. (Tr. 53-55; 70-71). On that basis, Arcata argues that the citations should be vacated.

Inspector Harsh testified that, although the plant was not operating at the time of the inspection, he believed that the shutdown was only temporary. He testified that he was told by Arcata employees that the "plant was down for repairs, clean-up, and [a shaker] screen change." (Tr. 23). Inspector Harsh testified that these types of repairs are frequently made at crushing and screening plants. (Tr. 65-66). He believed that "it was just a temporary shutdown for these things which are necessary from time to time." Id. In addition, he stated that no Arcata employee advised him, at the time of the inspection or during the close-out conference, that the plant was shut down for the winter. (Tr. 28, 65-66). It was his understanding that the "plant would be restarted or stopped as product was needed at any time." (Tr. 66). Inspector Harsh also did not see any evidence that Arcata was performing a major renovation of the plant or that any equipment was being dismantled or torn apart for service. (Tr. 63-64). Finally, he testified that the power had not been disconnected from the plant and that all that was required to start the plant was to "throw" a few switches. (Tr. 64).

I credit the testimony of Inspector Harsh. I believe that if the plant was totally shut down for the entire winter, someone from Arcata would have advised Inspector Harsh of that fact during his inspection or the close-out conference. Mr. O'Neill testified that he saw Inspector Harsh "writing for two hours" immediately following the inspection, but that he did not "anticipate any type of problem [because] we were shut down." (Tr. 56-57). Arcata's witnesses did not offer any explanation as to why the inspector was not notified of the shutdown except that "everybody" knew about it and the plant was "pretty quiet." Id.

Upon receiving the citations, one would expect a mine operator to say to the issuing inspector, "Wait a minute, you shouldn't issue us any citations because we are shut down for the winter and are servicing our equipment." Apparently, this issue was not raised by Arcata until it filed its answer in these proceedings. As stated above, Inspector Harsh testified that he did not see any evidence that the plant was on a long term shutdown or that equipment was being torn apart and repaired. He stated that he would not issue citations on equipment that was torn apart. (Tr. 63).

Inspector Harsh testified that the plant could have been started by throwing a few electrical switches. Mr. O'Neill did not seriously dispute that testimony. (Tr. 57-58). Thus, even if one assumes that the plant had not been operating for some time, it could have been restarted very quickly if more product was needed. In addition, equipment could have been operated for testing purposes during the repair process and Arcata's employees could have been exposed to the conditions cited by the inspector. Thus, I conclude that the citations issued by Inspector Harsh should not be vacated on the basis that the plant was shut down or that the conditions cited would have been corrected before the plant was placed in production.

B. Docket No. WEST 93-376-M

1. Citation No. 3913936 alleges that a bare electrical conductor was within two inches of a metal start/stop switch in the shaker power room. The citation states that the power cable had been pulled from the fitting in the bottom of the switch, exposing the electrical conductors. Bare wire was exposed in one 220 volt conductor. The safety standard cited, 30 C.F.R. § 56.12030, provides that "when a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

There is no dispute that the conditions observed by the inspector existed. Inspector Harsh estimated that someone enters the shaker power room to turn on or off the switch about twice a day. (Tr. 19-20). He said that the condition created a shock and electrocution hazard because the bare wire was about two inches from the switch. (Tr. 20-21) He determined that it was reasonably likely that someone would contact the exposed wire and suffer a severe shock or burns. Id. He further stated that the Arcata employee who accompanied him on the inspection, Earl Norris, indicated that the bare wire could seriously hurt someone.[1] (Tr. 18-19, 22).

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[1] Arcata contends that Mr. Norris, a loader operator, was not authorized to be its walk around representative during the inspection. William O'Neill, Mr. Frank and Jim O'Neill were not

Mr. Frank testified that he pulled on electrical cables periodically to determine if they are firmly attached. (Tr. 39). He believes that he exposed the wire when performing this test at the cited location. (Tr. 39-40). He further testified that he made a notation to have it repaired before the plant resumed operation. Id.

Based on the record as a whole, I find that the Secretary established a violation of the safety standard. I also find that the violation was of a significant and substantial nature ("S&S") because there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1994). I find that the violation was serious.

2. Citation No. 3913937 alleges that the cover for the splice box on top of the cone crusher feed belt was loose and dislodged, exposing the electrical conductors to weather conditions and mechanical damage. The conductors were not damaged. The safety standard cited, 30 C.F.R. § 56.12032, provides that "inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

There is no dispute that the conditions observed by the inspector existed. The inspector testified that "the cover had worked its way loose and was hanging there by one screw with the box wide open, exposing the inner conductors ... to any kind of adverse weather condition." (Tr. 14-15). Mr. Frank testified that, more than likely, the cover had been removed intentionally during the shutdown when equipment was being repaired, and that the cover is always in place during operation. (Tr. 39-40).

Based on this evidence, I find that the Secretary established a violation of the safety standard. There was no evidence that the cover was off because the subject equipment was being repaired or tested. I agree with the inspector that the violation was not S&S. The conductors and the splice were not damaged. In addition, there was no evidence that miners were likely to be in the immediate area or that the metal splice box would become energized as a result of the violation. Accordingly, I find that the violation was not serious.

3. Citation No. 3913939 alleges that there was no guard covering the pinch point on the smooth tail pulley of the cone

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available at the time of the inspection. Apparently, Mr. Norris accompanied the inspector because nobody else was available. This issue is not relevant and I have based my decision on the testimony of the witnesses, not statements made by Mr. Norris to Inspector Harsh.

crusher feed belt. It alleges that the exposed pinch point was adjacent to the screen portion of the walkway, about 16 inches above the walkway and about two feet from the inside edge of the walkway. The citation states that the pulley was in a remote area of the plant, but was still readily accessible. The safety standard cited, 30 C.F.R. § 56.14107, provides, in pertinent part, that "moving machine parts shall be guarded to protect persons from contacting ... drive, head, and takeup pulleys ... and similar moving parts that can cause injury."

There is no dispute that the conditions observed by the inspector existed. Mr. O'Neill stated that the guards were off so that the area could be cleaned out and the bearings underneath the pulley could be checked. (Tr. 30-31). Mr. Frank testified that shaker screens were being repaired and that welders from a contractor were coming to repair supports for the shaker screens underneath the shaker plant. (Tr. 40). He further stated that aggregate had accumulated under the plant and the guards were removed to clear the area out. (Tr. 40-41). He testified that during the shutdown, all of the bearings were inspected and pulleys were pulled apart as part of Arcata's preventive maintenance program. Id. He testified that everything would have been replaced, including the guards, when "things pick[ed] up in the spring." (Tr. 41).

Based on the record as a whole, I find that the Secretary established a violation of the safety standard. As stated above, Inspector Harsh did not see any evidence that the equipment he inspected was in the process of being repaired or "pulled apart." There is no dispute that the pinch point was not guarded. It could have been operated during the repair process without the guard. I agree with the inspector that the violation was not S&S. The parties concede that the pinch point was in a remote area of the plant. I find that the violation was not serious.

B. Docket No. WEST 93-376-M

1. Citation No. 3913935 alleges that the fire extinguisher for the crushing plant had not had the required yearly maintenance check since December 1991. The citation also states that the extinguisher appeared to be operational and fully charged. The safety standard cited, 30 C.F.R. § 56.4201(a)(2), provides, in pertinent part, that "at least once every twelve months, maintenance checks shall be made of [each fire extinguisher] to determine that the fire extinguisher will operate effectively."

There is no dispute that the maintenance check had not been made. Inspector Harsh testified that the inspection tag on the extinguisher had not been initialed during the previous 12 months. (Tr. 16-17). He further stated that the extinguisher appeared to be operational and fully charged. Id. Mr. Frank testified that Arcata had a contract with a fire extinguisher

service company to conduct the annual inspection but that it had not been inspected because the son of the contractor had recently died. (Tr. 37-38). He further stated that the inspection was only two months overdue and that Arcata has entered into a new service contract with another company. Id.

Based on this evidence, I find that the Secretary established a violation of the safety standard. The Mine Act is a strict liability statute and a mine operator is legally responsible for any violation that occurs at its mine. I agree with the inspector that the violation was not S&S. Since it appears that the extinguisher was in working condition, the violation was technical in nature and was not serious.

2. Citation No. 3913938 alleges that there was no guard covering the spoke-type pulley and drive belt of the No. 4 conveyor belt. It alleges that the exposed pinch point was about 64 inches above and adjacent to the wooden walkway on the west side of the shaker screen. The citation states that the amount of exposure could not be established, but that the pulley was accessible. The safety standard cited, 30 C.F.R. § 56.14107, provides, in pertinent part, that "moving machine parts shall be guarded to protect persons from contacting ... drive, head, and takeup pulleys ... and similar moving parts that can cause injury."

There is no dispute that the conditions observed by the inspector existed. Inspector Harsh testified that he observed an unguarded V-belt pulley within reach of and no more than seven feet above a walkway. (Tr. 11). He stated that an injury was unlikely because the pinch point was about 64 inches above the walkway. Id. Mr. Frank testified that during the shutdown, all of the bearings were inspected and pulleys were pulled apart as part of Arcata's preventive maintenance program. (Tr. 40). He testified that everything would have been replaced, including the guards, when "things pick[ed] up in the spring." (Tr. 41).

Based on the record as a whole, I find that the Secretary established a violation of the safety standard. As stated above, Inspector Harsh did not see any evidence that the equipment he inspected was in the process of being repaired or "pulled apart." There is no dispute that the pinch point was not guarded. It could have been operated during the repair process without the guard. I agree with the inspector that the violation was not S&S. Given the height of the pinch point and the fact the inspector could not establish the amount of the exposure, I find that the violation was not serious.

3. Citation No. 3913940 alleges that continuity and resistance testing of the electrical grounding system had not been conducted since September 1991. The citation also stated that the weather in the area is highly corrosive to metal and that

corrosion is one of the factors that can render the electrical grounding system ineffective. The safety standard cited, 30 C.F.R. § 56.12028, provides, in pertinent part, that "continuity and resistance of grounding systems shall be tested immediately after installation ... and annually thereafter." A record of the tests is required to be kept.

There is no dispute that the required test had not been made. Inspector Harsh testified that when he uncovered a portion of the grounding electrode, it showed signs of heavy corrosion. (Tr. 25). Although the inspector marked the citation as S&S, he stated at the hearing that it should not be considered S&S because he did not perform a test to see if the integrity of the grounding system had been compromised by the corrosion. (Tr. 26, see also 7). Mr. Frank testified that Arcata must depend upon its contractor to conduct the inspections on an annual basis. (Tr. 41). Because the contractor was four months late in conducting the inspection, Arcata changed contractors. Id.

Based on this evidence, I find that the Secretary established a violation of the safety standard. The Mine Act is a strict liability statute and a mine operator is legally responsible for any violation that occurs at its mine. I agree that the violation was not S&S. The violation was serious because, without conducting the test, Arcata did not know if its grounding system would protect its employees.

II. Civil Penalty Assessments

Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. I find that Arcata was issued four citations in the 24 months preceding the inspection in this case. (Tr. 6). I also find that Arcata is a small operator, employing about 23 people, with about 19,350 man-hours worked over the previous year. (Tr. 6, 44). I also find that the civil penalties assessed in this decision would not affect Arcata's ability to continue in business. The conditions cited by the inspector were all timely abated. I find that Arcata is concerned about the safety of its miners and made good faith efforts to comply with MSHA's safety standards.

I also find that Arcata's negligence was very low with respect to each violation. As stated above, the Mine Act is a strict liability statute. Asarco, Inc. v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989). A citation issued by MSHA for a violation of a safety standard must be affirmed if the facts show that the standard was violated, even if the mine operator was not negligent. The degree of the mine operator's negligence, however, is an important factor in determining the civil penalty. I find that Arcata was only slightly negligent with respect to the violations discussed above because its managers believed, in good faith,

that these conditions did not need to be corrected until it resumed production and there is no evidence that these conditions existed while the plant was operating, even for testing purposes.

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties, as discussed above:

Citation Nos.	30 C.F.R. §	Assessed Penalty
3913936	56.12030	$60.00
3913937	56.12032	20.00
3913939	56.14107	20.00
3913935	56.4201(a)(2)	10.00
3913938	56.14107	20.00
3913940	56.12028	40.00
	Total Penalty	$170.00

III. ORDER

Accordingly, the citations listed above are **AFFIRMED**, and Arcata Readimix is **ORDERED TO PAY** the Secretary of Labor the sum of $170.00 within 30 days of the date of this decision.

Richard W. Manning
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 31 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-221-D
ON BEHALF OF MARK BEYER,	:	A.C. No. DENV CD 94-27
Complainant	:	
v.	:	Jacobs Ranch Mine
	:	Mine ID 48-00997
KERR-McGEE COAL CORPORATION,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Weisberger

The Secretary's Motion to Dismiss is granted based on the assertions set forth in the Motion.

It is ORDERED that the hearing in this case scheduled for August 8, 1995, is cancelled. It is further ORDERED that this case be DISMISSED.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 2, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-64-M
Petitioner	:	A. C. No. 45-02518-05517
	:	
v.	:	Harbor Rock Portable
HARBOR ROCK, INCORPORATED,	:	
Respondent	:	

ORDER ACCEPTING RESPONSE
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977.

The parties have filed a joint motion to approve settlements for the two violations in this case. A reduction in the penalties from $3,000 to $959 is proposed. On March 16, 1995, an order was issued disapproving the settlement and directing the parties to file additional information to support their motion. On April 14, 1995, the parties filed a second motion to approve settlement.

Citation No. 4341585 was issued for a violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a), because the operator's representative ordered the inspector off the mine property. The originally assessed penalty was $1,000 and the proposed settlement is $320. The motion filed by the parties fully sets forth the circumstances under which the operator's representative acted. Clearly, the representative violated the law. However, as set forth in the motion there now have been amicable and productive discussions between the parties and no recurrence. I am told that the parties recognize the statutory right of MSHA to conduct inspections without delay or interference. Based on these representations I will approve the motion. It goes without saying, I do not expect repetition of such behavior from any representative of the operator.

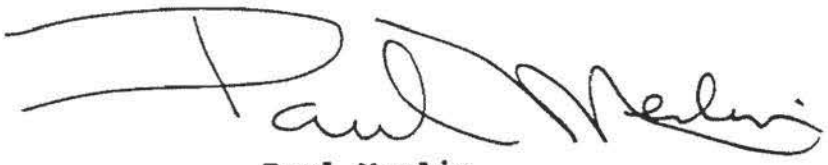
Citation No. 4341658 was issued as a 104(d)(1) citation for a violation of 30 C.F.R. § 56.11012 because a railing, barrier or cover was not in place at the jaw crusher which was near the access into the crusher control booth. The originally assessed penalty was $2,000 and the proposed settlement is $639. The parties advise that the penalty has been amended on the basis of

the operator's present financial condition. I accept the parties' representations and conclude that the settlement is appropriate. I further note that the operator is small in size and promptly abated the violation.

In light of the foregoing, it is ORDERED that the settlement motion filed on April 14 is ACCEPTED as a response to the March 16 order.

It is further ORDERED that the recommended settlements be APPROVED.

It is further ORDERED that the operator PAY $959 within 30 days of the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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Mr. Tim Bond, Secretary, Harbor Rock Inc., Box 246, South Bend, WA 98586

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

MAY 9 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-360
Petitioner	:	A. C. No. 46-06750-03551
v.	:	
	:	Peats Branch No. 3
OLD HICKORY COAL COMPANY,	:	
Respondent	:	

ORDER DISAPPROVING SETTLEMENT AGREEMENT

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed a motion to approve a settlement agreement. A reduction in penalty from $10,000.00 to $5,500.00 is proposed. In addition, both orders in the case are to be modified from 104(d)2) orders, 30 U.S.C. § 814(d)(2), to 104(a) citations, 30 U.S.C. § 814(a), by deleting the "unwarrantable failure" designations and reducing the degree of negligence from "high" to "moderate."

Order No. 4184405 alleges a violation of Section 77.404(a) of the Regulations, 30 C.F.R. § 77.404(a), because five safety defects were found on the cut rock truck. Two of these conditions had been reported on previous pre-shift inspection records. The agreement states that evidence would not support a finding of "unwarrantable failure" because:

> Although the brake lights and handrails had been reported on the pre-shift examination records within a week of the issuance of the order, none of the safety defects were reported on either the day the order was issued or the preceding day. Consequently, the Respondent may have reasonably concluded that the brake

> lights and handrails had been repaired before the order was issued. Although the operator has a duty to ensure that reported hazards are corrected, there is no indication that the failure to correct the reported hazards, or the failure to detect the additional, unreported hazards, was due to more than ordinary negligence.

Order No. 4184413 is for a violation of Section 77.1001, 30 C.F.R. § 77.1001, because loose, unconfined material, consisting of large rocks which were shot and broken up, was observed in the highwall area where equipment was working. The agreement avers that the Secretary could not establish that this violation was due to the Respondent's "unwarrantable failure" because "[a]lthough rocks were present in the highwall area, they were imbedded in the mud seam. Consequently, the operator's failure to take action in light of this condition did not constitute aggravated conduct."

Commission Rule 31(b)(3), 29 C.F.R. § 2700.31(b)(3), requires that a motion to approve a settlement include "[f]acts in support of the penalty agreed to by the parties." With respect to the first order, rather than leading to the conclusion that the violation did not result from the Respondent's "unwarrantable failure," the facts set out create a strong inference that the respondent was indifferent or exhibited a serious lack of reasonable care. The facts set out concerning the second order are simply insufficient to reach a conclusion one way or the other concerning "unwarrantable failure."

The Mine Act was passed with the intention that the Commission "assure that the public interest is adequately protected before approval of any reduction in penalties." S. Rep. No. 95-181, 95th Cong., 1st Sess. 45 (1977), *reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). In this connection, it is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in Section

110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984).

Based on the statements provided, I have no way of making such a determination in this case. Consequently, having considered the representations and documentation submitted, I am unable to approve the proffered settlement.

ORDER

Accordingly, it is **ORDERED** that the motion for approval of settlement is **DENIED**. The parties have **15 days** from the date of this order to submit additional information to support the motion for settlement. Failure to submit additional information, or to resubmit a new agreement, within the time provided will result in the case being rescheduled for hearing.

T. Todd Hodgdon
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 9, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-637-M
Petitioner	:	A. C. No. 35-03123-05514
v.	:	
	:	Cedar Creek Quarries
CEDAR CREEK QUARRIES, INC.,	:	
Respondent	:	

ORDER DISAPPROVING SETTLEMENT AGREEMENT

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The parties have filed a motion to approve a settlement agreement.[1] The agreement provides that the proposed penalty of $2,000.00 will be "withdrawn."

Citation No. 3923238 alleges a violation of Section 103(a) of the Act, 30 U.S.C. § 813(a), because, according to the motion, the Respondent's president:

> refused to be interviewed by an MSHA special investigator concerning a § 110(c) violation, [30 U.S.C. § 820(c)], refused to allow his foreman to be interviewed, and refused to provide the names of employees who were present at the quarry on the day that an earlier citation - which was the subject of the investigation - was issued.

[1] This case was scheduled for hearing on April 27, 1995, but the hearing was canceled when the parties advised that the case had been settled.

Apparently as mitigation, the motion relates that after contacting his attorney, arrangements were made for the investigator to return to the mine 13 days later, at which time the president and his employees were interviewed. The motion further recounts that the company has cooperated during subsequent inspections, that the president understands that MSHA is required to inspect all surface mines twice a year and that MSHA inspectors and investigators have a right to enter the mine and mine offices without a warrant for the purpose of conducting inspections and investigations.

This motion must be disapproved for two reasons. First, Commission Rule 31(b)(3), 29 C.F.R. § 2700.31(b)(3), requires that a motion to approve a settlement include "[f]acts in support of the penalty agreed to by the parties." While the facts provided in this motion might provide support for reducing the proposed penalty, they certainly are insufficient to support doing away with it entirely.

Secondly, and more importantly, Section 110(a) of the Act, 30 U.S.C. § 820(a), provides that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary . . . ." Consequently, if there is a violation, there must be a civil penalty. *Island Creek Coal Co.*, 2 FMSHRC 279, 280 (February 1980). It certainly appears that there was a violation in this case. *See U.S. Steel Corp.*, *6* FMSHRC 1423, 1433 (June 1984). Therefore, there has to be some civil penalty, it cannot be "withdrawn."

The Mine Act was passed with the intention that the Commission "assure that the public interest is adequately protected before approval of any reduction in penalties." S. Rep. No. 95-181, 95th Cong., 1st Sess. 45 (1977), *reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). In this connection, it is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in Section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984).

Based on the statements provided, I have no way of making such a determination in this case. Consequently, having considered the representations and documentation submitted, I am unable to approve the proffered settlement.

ORDER

Accordingly, it is **ORDERED** that the motion for approval of settlement is **DENIED**. The parties have **15 days** from the date of this order to submit an agreement that conforms to the Act and the Regulations, either by providing for a suitable civil penalty or, if the Secretary deems it appropriate, vacating the citation. Failure to resubmit a new agreement within the time provided will result in the case being rescheduled for hearing.

T. Todd Hodgdon
Administrative Law Judge
(703) 756-4570

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 16, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-957
Petitioner	:	A. C. No. 15-07986-03665
	:	
v.	:	Darby Mine
JERICOL MINING INCORPORATED,	:	
Respondent	:	

ORDER DISAPPROVING SETTLEMENT
SECOND ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977.

On January 9, 1995, the parties filed a joint motion to approve settlements for the two violations in this case. A reduction in the penalties from $5,700 to $2,298 was proposed. On February 7, 1995, an order was issued disapproving the settlement recommendations and directing the parties to submit additional information to support their motion. On April 18, 1995, the parties filed a second settlement motion.

In the order of disapproval the parties were told that it is the judge's responsibility to approve a penalty amount which accords with the six criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i) and that any proposed penalty reduction must satisfy those standards. The first settlement motion was disapproved because the parties merely gave their respective positions and set forth unresolved evidentiary conflicts.

In the latest proposed settlement, each party acknowledges that for both violations the other would present substantial evidence at a hearing to support their differing positions with respect to the level of negligence. And they set forth conflicting positions with respect to gravity. The parties say that in light of these circumstances they have reached a "compromise" whereby the citations would remain as written, but the penalty amounts would be greatly reduced. On this basis they would have me approve a 70% reduction in the originally assessed penalty for Citation 4249131 from $4,200 to $1,298. The violation was an inoperative methane monitor due to bridging out and was rated as significant and substantial with high negligence. Similarly, a reduction of 33⅓% is sought for Citation 4249190 from $1,500 to $1,000. The violation was an inadequately supported roof due to

loose ribs and was rated as significant and substantial with high negligence.

The parties want it both ways. They would have the original assessment greatly reduced, but have the findings in the citation remain the way they are. What the parties apparently fail to appreciate is that the findings in the citation they want to leave unchanged, are the same as much of the criteria in section 110(i) that I am required to observe in approving a settlement. Under the circumstances the recommended settlements are too low for the level of the charges made and provide no basis to reduce the original assessment. For these reasons I cannot approve this proposal which plainly contravenes the Act.

In light of the foregoing, it is ORDERED that the amended settlement motion be DENIED.

It is further ORDERED that within 30 days of the date of this order the parties submit appropriate information that conforms to the statute to support their settlement motion. Otherwise, this case will be set for hearing.

Paul Merlin
Chief Administrative Law Judge

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 10 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 94-623-M
Petitioner	:	A.C. No. 45-03184-05528-A
v.	:	
	:	Docket No. WEST 94-624-M
EUGENE RUSSELL,	:	A.C. No. 45-03184-05529-A
ERVIN E. NICHOLS,	:	
JAMES M. DODD,	:	Docket No. WEST 94-625-M
REYNOLD E. CHANNER, and	:	A.C. No. 45-03184-05530-A
SCOTT FURMAN, employed by	:	
ECHO BAY MINERALS COMPANY,	:	Docket No. WEST 94-626-M
Respondents	:	A.C. No. 45-03184-05531-A
	:	
	:	Docket No. WEST 94-627-M
	:	A.C. No. 45-03184-05532-A
	:	
	:	Overlook Mine

ORDER DENYING RESPONDENTS' MOTION TO CONDUCT DISCOVERY WITH REGARD TO THE TIMELINESS OF THE ISSUANCE OF THE CIVIL PENALTY NOTICES; ORDER DENYING RESPONDENTS' MOTION FOR CERTIFICATION OF INTERLOCUTORY REVIEW

Respondents' have filed a motion requesting entry of an order allowing them to conduct discovery with regard to the reasons for the 24 to 27 month interval between the citation and order issued to their employer and their notification by MSHA that they were being assessed civil penalties pursuant to section 110(c) of the Act. In the alternative, Respondents have moved that I certify interlocutory review of my March 24, 1995, order denying Respondents' motion to dismiss/motion for summary decision on this issue. I deny both motions.

In my March 24, 1995, order I concluded that there is no basis for dismissing the instant penalties due to such a time lag without a showing by Respondents that they have been

materially prejudiced by the delay in proposing the civil penalties. If a Respondent in a civil penalty proceeding establishes such prejudice, then the Commission will balance the prejudice to the Respondent and the reasons for the delay, and may, in some cases, vacate the penalty, Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981).

In these cases, Respondents have not even alleged facts which would establish material prejudice. In my March 24, 1995, order, however, I offered Respondents an opportunity to establish material prejudice at the hearing on the merits of these proposed penalties. If the Respondents succeed in doing so, I am prepared to weigh this prejudice against the reasons for the delay set forth in the affidavits submitted by the Secretary in response to Respondents' motion to dismiss.

I will not, however, allow Respondents, either in discovery or at hearing, to inquire further as to the reasons for the delay. For example, I believe it would be entirely inappropriate to allow Respondents to depose attorneys in the Office of the Solicitor as to why the civil penalties in these cases were issued 14-1/2 months after receipt of the MSHA reports and files.

If Respondents could establish that the Solicitor had these files longer than Mr. White of that office states in his affidavit, it would not materially influence the outcome of this case. If Respondents could establish that the Solicitor's attorneys could have worked longer hours or devoted more time to this matter, rather than others, it would be similarly immaterial. Further, I view Commission review of such internal procedures of the Secretary to be inappropriate as a general matter.

Commission Rule 56(b) limits the scope of discovery to relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence. Respondents have not made a showing that its requested discovery of Labor Department personnel with regard to the delay in assessing the instant penalties meets this standard.

In so concluding, I note Rule 403 of the Federal Rules of Evidence allows exclusion of relevant evidence if its probative value is substantially outweighed by considerations of confusion of the issues, delay, or waste of time. Without a showing as to what Respondents hope to learn in the requested discovery, I suspect that the evidence they seek may well fit the description of excludable evidence in Rule 403.

RESPONDENT'S HAVE NOT SATISFIED THE CRITERIA FOR INTERLOCUTORY REVIEW

Commission Rule 76 states that interlocutory review cannot be granted unless the judge has certified that his ruling involves a controlling question of law and that immediate review will materially advance the final disposition of the proceeding. In this case, granting of interlocutory review will likely delay final disposition of these proceedings. These matters should be disposed of on the merits at the hearing now scheduled to begin on July 11, 1995. Consideration of evidence of internal procedures of the Secretary will likely delay resolution of the merits, and is, to my mind, totally irrelevant--particularly in view of the facts that Respondents have not even made a facial showing of material prejudice.

For the reasons stated herein, Respondents' motion to conduct discovery with regard to the timeliness issue is **DENIED.** Similarly, Respondents' motion to certify my March 24, 1995, order for interlocutory review is **DENIED.**

Arthur J. Amchan
Administrative Law Judge
703-756-6210

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 31, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 95-345
	:	A. C. No. 15-17234-03515
v.	:	Huff Creek No. 1
LONE MOUNTAIN PROCESSING, INCORPORATED, Respondent	:	

ORDER ACCEPTING APPEARANCE
ORDER ACCEPTING LATE FILING
ORDER DIRECTING OPERATOR TO ANSWER

It is ORDERED that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. Cyprus Emerald Resources Corporation, 16 FMSHRC 2359 (November 1994).

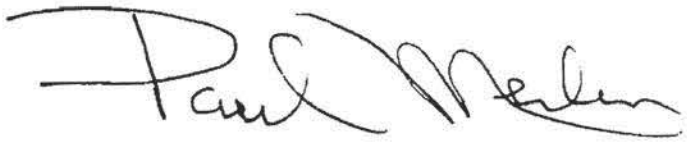
On April 24, 1994, the CLR filed a motion to accept late filing of the penalty petition along with an affidavit. As I have previously recognized, the CLR program is a new approach by the Secretary to have non-lawyer MSHA employees appear before the Commission in less complicated cases. I have approved the practice. Cyprus Emerald Resources Corporation, supra. As set forth in an affidavit of the CLR, there was some confusion over the computation of the 45 day period allowed for filing the penalty petition and therefore, the penalty petition was filed 16 days late. I take judicial notice of the fact that as a general matter pleadings and motions filed by CLRs with the Commission are most prompt.

The operator has not filed an objection to the CLR's motion. 29 C.F.R. § 2700.10. There is no allegation of prejudice

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of the penalty petitions upon a showing of adequate cause by the Secretary where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989). I find the circumstances as stated above constitute adequate cause for the short delay in the filing of the penalty petition.

In light of the foregoing, it is ORDERED that the CLR's motion to accept late filing of the penalty petition be GRANTED.

It is further ORDERED that the operator file an answer to the penalty petition within 30 days of the date of this order.



Paul Merlin
Chief Administrative Law Judge

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Mr. Mark A. White, President, Lone Mountain Processing Inc., P. O. Box 40, Pennington Gap, VA 24277

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 31, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 95-357 A. C. No. 15-16936-03502 E24
v.	:	Langley Branch
AUSTIN POWDER COMPANY, Respondent	:	

ORDER ACCEPTING APPEARANCE
ORDER ACCEPTING LATE FILING
ORDER DIRECTING OPERATOR TO ANSWER

It is ORDERED that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. Cyprus Emerald Resources Corporation, 16 FMSHRC 2359 (November 1994).

On April 24, 1994, the CLR filed a motion to accept late filing of the penalty petition along with an affidavit. As I have previously recognized, the CLR program is a new approach by the Secretary to have non-lawyer MSHA employees appear before the Commission in less complicated cases. I have approved the practice. Cyprus Emerald Resources Corporation, supra. As set forth in an affidavit of the CLR, there was some confusion over the computation of the 45 day period allowed for filing the penalty petition and therefore, the penalty petition was filed 51 days late. I take judicial notice of the fact that as a general matter pleadings and motions filed by CLRs with the Commission are most prompt.

The operator has not filed an objection to the CLR's motion. 29 C.F.R. § 2700.10. There is no allegation of prejudice

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of the penalty petitions upon a showing of adequate cause by the Secretary where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989). I find the circumstances as stated above constitute adequate cause for the short delay in the filing of the penalty petition.

In light of the foregoing, it is ORDERED that the CLR's motion to accept late filing of the penalty petition be GRANTED.

It is further ORDERED that the operator file an answer to the penalty petition within 30 days of the date of this order.

Paul Merlin
Chief Administrative Law Judge

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Mr. Larry J. King, Austin Powder Company, 25800 Science Park Drive, Cleveland, OH 44122

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 31, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-387
Petitioner	:	A. C. No. 15-16864-03516
	:	
v.	:	
	:	#1 Mine
IBOLD INCORPORATED,	:	
Respondent	:	

ORDER ACCEPTING APPEARANCE
ORDER ACCEPTING LATE FILING
ORDER DIRECTING OPERATOR TO ANSWER

It is ORDERED that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. Cyprus Emerald Resources Corporation, 16 FMSHRC 2359 (November 1994).

On April 24, 1994, the CLR filed a motion to accept late filing of the penalty petition along with an affidavit. As I have previously recognized, the CLR program is a new approach by the Secretary to have non-lawyer MSHA employees appear before the Commission in less complicated cases. I have approved the practice. Cyprus Emerald Resources Corporation, supra. As set forth in an affidavit of the CLR, there was some confusion over the computation of the 45 day period allowed for filing the penalty petition and therefore, the penalty petition was filed 16 days late. I take judicial notice of the fact that as a general matter pleadings and motions filed by CLRs with the Commission are most prompt.

The operator has not filed an objection to the CLR's motion. 29 C.F.R. § 2700.10. There is no allegation of prejudice

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of the penalty petitions upon a showing of adequate cause by the Secretary where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989). I find the circumstances as stated above constitute adequate cause for the short delay in the filing of the penalty petition.

In light of the foregoing, it is ORDERED that the CLR's motion to accept late filing of the penalty petition be GRANTED.

It is further ORDERED that the operator file an answer to the penalty petition within 30 days of the date of this order.

Paul Merlin

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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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 31, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket Nos. LAKE 94-72, etc.
v.	:	Buck Creek Mine
BUCK CREEK COAL INC., Respondent	:	

ORDER DENYING MOTION FOR STAY
ORDER GRANTING IN PART AND DENYING IN PART
OBJECTION TO NOTICE OF DEPOSITIONS
AND MOTION FOR PROTECTIVE ORDER
PREHEARING ORDER

On April 25, 1995, the Commission issued a decision vacating the February 15, 1995, order continuing the stay of all Buck Creek cases. *Buck Creek Coal Inc.*, 17 FMSHRC 500 (April 1995). As a consequence, the Secretary, by counsel, has filed a Motion for Stay of Civil Proceedings and an Objection to Notice of Depositions and Motion for Protective Order. Buck Creek opposes the Secretary's motions.

Motion for Stay

The Secretary requests the "entry of an order which stays for sixty days all citations which have been designated by the

United States Attorney as areas involving conduct under criminal investigation." Motion for Stay at 3.[1] For the reasons set forth below, the request is denied.

The motion states that the Secretary has referred numerous alleged violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, to the U.S. Attorney, who, in turn, has initiated a review of all violations issued at the Buck Creek Mine from April 1993 through April 1995. The Secretary asserts that: "Any criminal prosecution resulting from said referral would arise out of the same facts and circumstances present in the instant proceedings. The factual and legal issues arising in any criminal prosecution would be similar or identical to many of the citations involved in the above cases."

In its *Buck Creek* decision, the Commission set out five factors that should be considered in determining whether a stay should be granted: (1) the commonality of evidence in the civil and criminal matters; (2) the timing of the stay request; (3) prejudice to the litigants; (4) the efficient use of agency resources; and (5) the public interest. *Id.* at 503. The Commission stressed that "[w]e conclude that the first element listed above, commonality of evidence, is a key threshold factor" that must be established in the record. *Id.*

---

[1] Somewhat inconsistently, the first paragraph of the motion states that the Secretary:

> moves to stay proceedings involving citations issued on or before September 1, 1994 and which have been designated as involving areas of conduct under criminal investigation by the Federal Mine Safety and Health Administration and the United States Attorney for the Southern District of Indiana. The Secretary further requests that certain citations issued after September 1, 1994 be stayed for sixty days or until such time as the United States Attorney . . . makes a determination regarding prosecution of Buck Creek Coal Company and any of its officers for criminal violations of the Federal Mine and Health Act of 1977.

This clearly places the burden on the party seeking the stay to satisfy this threshold showing or have the stay denied before any of the other factors are considered. In spite of this guidance, the Secretary has not presented in his new request anything other than the same type of unsupported assertions which the Commission has already found insufficient for the granting of a stay.

In none of the pleadings does the Secretary state what the criminal investigation involves. The closest that the Secretary comes to providing this information is in his memorandum in support of the motion where it states: "Those areas of conduct involve roof control plan at the face; failure to follow the ventilation plan, failures to report accidents including face ignitions and failures and to properly record hazardous conditions required to be written in the record books." Memorandum at 2. However, it is not clear from the context of the paragraph whether this refers to the citations for which the Secretary is seeking a stay or those for which he is not.

Furthermore, even if the quoted language does refer to the citations which the Secretary seeks to have stayed, it advises only what conduct the citations concern, not what the investigation involves. Therefore, there is nothing to compare the citations or orders which the Secretary seeks to have stayed with in order to determine whether there is a commonality of evidence and issues.[2]

---

[2] The Secretary has attached to his motion a 27 page list of citations. This apparently shows which specific citations or orders he seeks to have stayed, although that is not entirely clear since there is no explanation as to what some of the notations on the list, specifically the "Y" and "N," mean. This list is not useful; the cases before me are in dockets, but the list makes no reference to dockets. In view of my decision, the unhelpfulness of the list makes no difference. However, in the future, the parties would be well advised to discuss citations or orders by docket as well as citation or order number, rather than expecting the judge to go through each of the over 500 dockets attempting to find the citation or order number mentioned.

The failure of the Secretary to establish a commonality of issues and evidence between the instant cases and the criminal matters, leaves no alternative but to deny the request for stay. Accordingly, it is **ORDERED** that the Motion for a Stay of Civil Proceedings is **DENIED**.

Objection to Depositions and Motion for Protective Order

With respect to the Buck Creek's notices of deposition[3] the Secretary requests: (1) that the Respondent be only permitted to depose the inspectors who issued the citations or orders and that questions be limited to matters contained in the citations or orders; (2) that inquiry concerning the criminal investigation on any stayed citation be prohibited; (3) that seeking the identity or testimony of any cooperating witnesses in the criminal proceeding be prohibited; and (4) that the taking of depositions of Rex Music, David Whitcomb, Mark Eslinger, Mike Conley, Woodrow Hale, Richard Oney, Mike Finnie, Edward Ritchie or April Bryan be prohibited because they are either managers without first hand knowledge of the facts underlying the case, are special investigators who did not conduct the inspections or issue the citations or orders, or are a secretary in the Madisonville, Kentucky, field office.

Commission Rule 56(b), 29 C.F.R. § 2700.56(b), states that "[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." Rule 56(c), 29 C.F.R. § 2700.56(c), provides that "[u]pon motion by a party or by the person from whom discovery is sought or upon his own motion, a Judge may, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense."

The Secretary's motion contains almost nothing in the way of good cause for its requests. With regard to its request that the depositions of specific individuals be prohibited, the motion simply states, in addition to the fact that the individuals are

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[3] Buck Creek's notices of depositions were filed with the Secretary in July 1994. The Secretary's objection to them was not ruled on at that time because of the granting of the stay. The Secretary now renews his objection.

managers, special investigators or a secretary, that "[t]he depositions of the above individuals are not relevant to the civil citations/orders and Buck Creek should not be allowed to conduct discovery in these proceedings relating to the criminal investigation of Buck Creek Coal Company and its officers." Secretary's Motion at 3. No argument or evidence of any type is presented for the remaining requests.

In its decision vacating the stay, the Commission pointed out that "[t]he judge has the power to impose limitations on the time and subject matter of discovery, which would permit the civil matter to proceed without harming the criminal case." *Id.* at 504. The Commission further stated that in doing this, "[t]he judge should also consider [the commonality of issues and evidence between the civil and criminal matters] when determining the limits of discovery in order to permit civil proceedings to advance without prejudice to criminal matters." *Id.* at 505. On the other hand, as the Commission also stated, "courts do not permit criminal defendants to employ liberal civil discovery procedures to obtain evidence that would ordinarily be unavailable to them in the parallel criminal case." *Id.* at 504.

The difficulty with this motion, as with the motion for stay, is that the Secretary has not provided any information concerning the parallel criminal case on which I can make a consideration of the commonality between the civil and criminal matters. The instant motion provides even less information than the stay motion concerning what the criminal investigation involves.

Accordingly, taking into consideration the wide scope of discovery set forth in Rule 56(b) and the Secretary's almost total failure to set forth good cause, let alone provide evidence to support it, the Secretary's motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

> (1) The Secretary's request that the depositions of Rex Music, David Whitcomb, Richard Oney, Mike Finnie and Mark Eslinger be prohibited is **DENIED**. The fact that these individuals are managers does not mean that they do not have knowledge of the facts underlying these cases or information that might lead to the discovery of admissible evidence.

(2) The Secretary's request that the depositions of Edward Ritchie, Mike Conley and Woodrow Hale be prohibited is **DENIED**. The fact that these individuals "did not conduct inspections which resulted in the issuing of the citations/orders or write the citations/orders" does not mean that they do not have knowledge of facts underlying the cases or information that might lead to the discovery of admissible evidence.

(3) The Secretary's request that the deposition of April Bryan be prohibited is **GRANTED**. It appears obvious from her position that she is not likely to have knowledge of the facts underlying these cases or information that might lead to the discovery of admissible evidence.

(4) The Secretary's request that the Respondent be prohibited from inquiring concerning the criminal investigation on any citation or order for which the Secretary has requested a stay is **GRANTED**. Although by this order no citations or orders have been stayed, inquiries concerning the criminal investigation would not have any relevance to the cases in this proceeding.

(5) The Secretary's request that the Respondent be prohibited from seeking the identity or the testimony of any cooperating witness in the criminal proceeding is premature. The informant's privilege is already available to the Secretary. If the Respondent attempts to elicit such information from a witness, the Secretary asserts the privilege and the Respondent seeks to compel a response, I will rule on the matter in accordance with Commission Rule 61, 29 C.F.R. § 2700.61. *Thunder Basin Coal Co.*, 15 FMSHRC 2228 (November 1993); *Bright Coal Co.*, 6 FMSHRC 2520 (November 1984).

(6) The Secretary's request that the Respondent be allowed to depose only those inspectors who issued the citations or orders is **DENIED**.

This order permits the taking of depositions 19 individuals, including managers, from district offices in and around Indiana. I expect the parties to cooperate in scheduling the depositions so that they are not unduly burdensome or oppressive either to the individual witnesses or their respective offices in carrying out their day-to-day activities.

Prehearing Order

In accordance with the provisions of Section 105(d) of the Act, 30 U.S.C. § 815(d), these cases will be set for hearings on the merits at times and places to be designated in subsequent orders. Prior to setting the cases for hearing, the parties are directed to confer for the purpose of discussing settlements and stipulating as to matters not in dispute. These discussions, as well as discovery, should be completed by **August 3, 1995.**

A **prehearing conference** will be held on **August 3, 1995**, in **Sullivan, Indiana**, beginning at 9:00 AM. The purpose of the conference will be to go through the cases docket by docket to take settlements and schedule hearings. Any discovery issues that have not been resolved, along with any unusual procedural or evidentiary issues will be taken up at that time. The parties should make sure that any witnesses necessary for completing the above matters are present at the hearing room.

T. Todd Hodgdon
Administrative Law Judge
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