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Commission Decisions

JUNE

The following case was Directed for Review during the month of June:

Secretary of Labor, MSHA v. United States Steel Mining Company, Docket No. PENN 82-328 (Judge Broderick, May 17, 1983)

No reviews were filed in which a Denial was issued.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

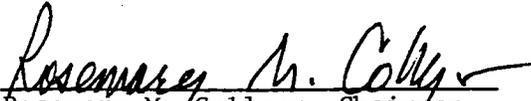
June 2, 1983

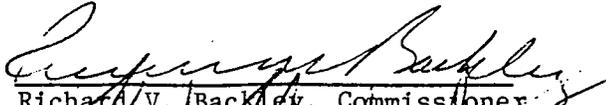
GLEN MUNSEY :
 :
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 v. :
 : Docket No. NORT 71-96
 :
 SMITTY BAKER COAL COMPANY, INC., :
 : P&P COAL COMPANY, AND : IBMA 72-21
 :
 RALPH BAKER :

ORDER

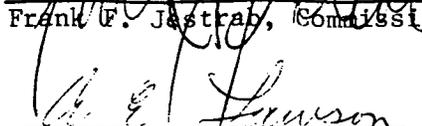
On March 11, 1983, the U.S. Court of Appeals for the D.C. Circuit issued its decision in Munsey v. FMSHRC et al., 701 F.2d 976 (D.C. Cir. 1983), reh'g and reh'g en banc denied May 6, 1983. The Court "with one exception" affirmed the decisions of the Commission and the administrative law judge. The exception referred to concerns the judge's conclusion that costs and attorney fees could not be awarded for the period during which Munsey's counsel was employed as an attorney on the staff of the United Mine Workers of America. As to this issue the Court reversed and remanded for a determination "of the amount to be awarded in accordance with the standard set forth in Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury," 656 F.2d 848 (D.C. Cir. 1981). 701 F.2d at 977. The certified copy of the Court's opinion and judgment was issued on May 16, 1983.

Accordingly, the case is remanded to the chief administrative law judge for appropriate assignment and further proceedings consistent with the Court's decision.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank F. Jastrab, Commissioner


A. E. Lawson, Commissioner


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On July 9, 1980, Gerald Speaker, the master mechanic and one of Bush's supervisors, demonstrated the new acid unloading procedure to Bush and other miners, and asked if they had any suggestions for changes. Bush and others complained about the safety of the new procedure because of possible acid leaks caused by acid build-up in the pipeline, and requested valves to bleed the line and prevent such build-up. (None of Bush's co-workers appears to have made safety complaints to management after July 9.) On July 22, when Speaker and Bill Snyder, the maintenance foreman who also supervised Bush, assigned him to "break in," or learn, the acid unloading procedure, Bush refused, stating that it was unsafe and it was not his job. 3/ Union Carbide permitted Bush merely to watch the procedure. Snyder testified that the acid leak and blow back problems were corrected that same day.

On the morning of July 23, another miner, Jim Hardin, received minor burns while unloading acid. Bush was not there when the accident occurred but subsequently learned of it. Also that morning, when Speaker asked Bush the exact nature of his safety complaints about the new acid unloading procedure, Bush merely repeated his earlier comment: "It never has been safe and it isn't safe now and it never will be safe, and besides it is not my job." Tr. II 112. That afternoon, Snyder and Bush met at Snyder's request, and discussed Bush's safety complaints and Union Carbide's corrective measures item-by-item. 4/ In particular, Snyder told Bush that the July 22 changes in the procedure had eliminated acid leaks and blow backs. Snyder described the conclusion of their meeting: "I asked Ken after all these things had already been taken care of, and we went through them all, I said now, would you please unload acid." Tr. II 76. Bush refused a third time, stating it was "unsafe now and down the road," and that it was not his job; he did not tell Snyder why he thought the procedure still was unsafe. Tr. I 94; Tr. II 76.

3/ At the hearing Bush testified that his major safety concerns on July 22 were acid leaks, and "blow backs" occurring when acid feeding into a truck mixed with compressed air and the air pressure caused acid to spray out of the manhole in a mist about 6-8 feet in area. Snyder and Speaker testified, however, that although Bush told them the procedures were unsafe, he did not specify his complaints that day.

4/ Although the judge at one point erroneously refers to this meeting as having occurred on July 24 (4 FMSHRC at 371), the record is clear that it occurred on July 23. The judge's error is probably typographical for he recognized in his Findings of Fact (Finding 12, 4 FMSHRC at 367) that the meeting occurred on July 23. The Secretary asserts that the judge's description of what took place at the meeting bears no relationship to what actually transpired. To the contrary, the judge's description of the meeting is fully supported by the record.

At about 7:00 a.m. on July 24 -- in response to Plant Manager Harold Piper's request the previous day that he interrupt his inspections elsewhere and come to Rifle as soon as possible -- Charles Myers, Union Carbide's Safety Coordinator, began an inspection of the acid unloading procedure. ^{5/} Myers carried out a 2-3 hour inspection and subsequently discussed with Snyder, Speaker and Piper the procedure, the complaints, and the corrective measures taken by management. Myers concluded there was nothing unsafe about the procedure, but rather that it was "very adequate," and a "very complete procedure." Tr. II 3-8, 30-31.

The events precipitating the discharge occurred on the afternoon of July 24 in the presence of numerous management personnel and miners. When Speaker instructed Bush to continue breaking in on the acid unloading procedure, Bush again refused. Speaker asked Bush if he was refusing to do his assigned work, to which Bush once more replied that he was refusing because the procedure would "always be unsafe" and it was not his job. Tr. I 98-99; Tr. II 10-11 34, 78. Piper repeated the question, and Bush replied, "[T]hey aren't my duties. They are unsafe besides." Tr. I 99, 147-149; Tr. II 11, 34, 78. Piper testified that when Bush "started to go through the reasons" why the procedure was unsafe, he cut Bush off, saying, "Ken, we have repeatedly tried to discuss this with you, with no rational discussion, we are not going to go through it now." Tr. I 150; Tr. II 34.

Piper then suspended Bush for refusing to do his assigned work. Bush, angry over the suspension, responded in part, "You mousey little b-----, I ought to break your f----- nose." Tr. I 99-100, 148-151; Tr. II 11, 34-35, 78-79. Bush was very agitated and advanced to within 6 to 8 inches of Piper, clenching and unclenching his fists, but no blows were exchanged. After a few more angry words, Bush walked away. The next day Piper sent Bush a certified letter, which stated that Bush was terminated effective immediately "for the totality of your conduct on Thursday, July 24, 1980, including insubordination, refusal to carry out work assignments, and for making threatening and derogatory remarks and gestures toward me."

^{5/} While the operator did not expressly inform Bush of Myers' inspection, Bush knew that Myers was at the plant, because he testified that he saw Myers in the unloading area that morning. Bush testified that he was in the unloading area at the time to "see what changes had been made." He stated that he also saw "a man on the valve right under the truck," and "observed valves in the position where the truck overflowed, if it overflowed like before, [the miner] was immediately under it...." However, Bush did not complain at that time, either to Myers or to other management personnel. Tr. I 142-145.

The Secretary of Labor filed a discrimination complaint on Bush's behalf alleging that Union Carbide "unlawfully discriminated against and discharged [Bush] for engaging in activity protected under section 105(c) of the Act." In its answer, Union Carbide denied that it had violated the Mine Act, asserting that Bush was discharged "for good and sufficient cause, to wit, insubordination, refusal to carry out work assignment and making threatening and derogatory remarks and gestures toward the Plant Superintendent." The judge concluded that Bush's discharge did not violate the Mine Act.

In essence, the judge held that at the time of Bush's July 24 work refusal and subsequent outburst, he did not have a reasonable belief that unloading acid was hazardous. The evidence led the judge to conclude that Bush would not unload acid under any circumstances. 4 FMSHRC at 371. The judge based this conclusion on his findings that by the time of Bush's final work refusal Union Carbide had "rectified" the acid leaks and blow backs of which he had complained; that at the July 23 meeting, Union Carbide had discussed each of Bush's complaints and the corrective action taken and Bush failed to identify any further safety problems at the meeting's close; and that his July 24 work refusal immediately followed this meeting and was accompanied by his unvarying and unenlightening refrain that acid unloading would "never" be safe and was not his job anyway. 4 FMSHRC at 370-71.

While the judge recognized the hazards of acid unloading, he held that "when all precautions have been taken, it does not mean that an employee may ... refuse to do the work under the protection of the Act." 4 FMSHRC at 371. Because he found that a work refusal under those circumstances "cannot be considered reasonable," he concluded that Bush's refusal on July 24 was unprotected. The judge found that Bush was discharged in part because of his July 24 work refusal and in remaining part because of his other unprotected conduct on that date. 4 FMSHRC at 368, 370-71. The judge dismissed the discrimination complaint on the grounds that firing Bush for his unprotected July 24 work refusal and for other unprotected activity could not amount to a violation of the Mine Act. 6/

6/ Certain aspects of the judge's legal analysis require clarification, although they do not affect the correctness of his dismissal of the discrimination complaint. In addition to finding that Bush's July 24 work refusal was unprotected, the judge also found that Bush's earlier safety complaints were protected, that he made a protected safety complaint at the time of his July 24 work refusal, that Union Carbide discharged Bush in part for the latter complaint, and that it would not have fired him in any event for his unprotected activity alone. 4 FMSHRC at 370.

At first glance, these findings would suggest a conclusion of discrimination. However, Union Carbide expressly discharged Bush solely for the events of July 24 (the Secretary does not argue otherwise), so that Bush's safety complaints prior to that date, protected or not, are not directly relevant. Further, Bush's statement on July 24 that the job was unsafe was not a separate complaint, but instead was merely the

(footnote 6 continued)

II.

In order to establish a prima facie case of discrimination, a complaining miner must prove that he engaged in protected activity and that the adverse action was motivated in any part by the protected activity. Secretary ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary ex rel. Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). It is undisputed that Union Carbide fired Bush for the "totality of [his] conduct" on July 24, including his work refusal, insubordination, and threatening and derogatory remarks and gestures. Bush's insubordination and opprobrious conduct are not protected by the Mine Act. 7/ Consequently, the narrow question before us in this case is whether Bush's work refusal was protected. If it was not, then firing him for it does not give rise to a violation of the Mine Act.

For a work refusal to come within the protection of the Mine Act, the miner must have a good faith, reasonable belief that the work he refuses to do is hazardous. The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed; the burden of showing good faith does not, of course, amount to a burden of demonstrating the absence of bad faith. Robinette, 3 FMSHRC at 807-12. 8/ In determining if the miner's belief is a reasonable one

footnote 6 continued

expression of his final work refusal. The expression of this work refusal cannot be divorced from the refusal itself. If the work refusal lacked the protection of the Mine Act, so did the words communicating it. We disavow any suggestion to the contrary in the judge's reasoning. In sum, the judge's decision must be read in light of his ultimate conclusion. We are satisfied that, with the clarifications discussed in this note, he properly based his dismissal of the complaint on his conclusion that Bush's July 24 work refusal was not protected. Similarly, we interpret the judge's discussion of the operator's motivation in firing Bush as meaning merely that Bush was fired in part for his work refusal and in part for his other unprotected conduct on July 24.

7/ Bush's angry words and threats occurred after he refused to work and are separate from that refusal. Therefore, this is not a case requiring us to decide whether objectionable conduct occurring directly in the course of the alleged protected activity operates to strip that activity of its claim to protection. See Robinette, 3 FMSHRC at 817. See generally Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 729-31 (5th Cir. 1970), and authorities cited.

8/ To the extent that note 14 in Robinette (3 FMSHRC at 811) may suggest that the burden of proof on any issue shifts to the operator, it has been misread. The burden of proof remains with the complainant at all times on all issues of his or her case, including good faith and reasonableness. As Robinette correctly holds, "the 'ultimate' burden of persuasion never shifts from the complainant." 3 FMSHRC at 818 n. 20.

under the circumstances, the judge looks to the miner's account of the conditions precipitating the work refusal, and to the operator's response. The judge then evaluates the relevant testimony as to "detail, inherent logic, and overall credibility." Robinette, 3 FMSHRC at 812.

As indicated above, the judge's conclusion that Bush's July 24 work refusal was unreasonable is based on his findings that Union Carbide had corrected the hazardous conditions about which Bush had previously complained, and had so informed Bush on July 23. After being informed, Bush failed to articulate any further safety problems. When he continued to refuse to unload the acid on July 24, he merely invoked his ritualistic litany that acid unloading would never be safe, and besides was not his job. We are persuaded that substantial evidence supports the judge's findings and conclusions.

The record establishes Union Carbide's continuing concern about miners' complaints and its willingness to address them. As requested by Bush and other miners on July 9 and by Bush on July 22, Union Carbide corrected the acid leaks and blow backs. In addition, the operator initiated the July 23 meeting with Bush, where Snyder informed Bush of these corrections and tried without success to discover Bush's remaining safety complaints. Union Carbide's good faith and desire to cooperate were further demonstrated by Piper's July 23 request that Myers inspect the unloading procedure as soon as possible. Where, as here, the necessary communication between the miner and operator has occurred and management has taken corrective measures at some point repetition of the same complaint and work refusal loses the protection of the Mine Act.

In this context, the evidence does not support the reasonableness of Bush's continuing belief in a hazard. Indeed, the judge virtually discredited Bush's testimony. It is significant that after July 9, no one aside from Bush seems to have complained to management regarding the acid unloading procedures. At no time did Bush file a grievance under the union contract or raise his concerns with the union safety committee of which he was a member. Moreover, at the July 23 meeting, Bush was unresponsive to Union Carbide's repeated attempts to discover why he was still concerned about the unloading procedure. On July 24, after both Speaker and Piper asked Bush if he were refusing to do his assigned work, he merely repeated that the procedure was unsafe, would never be safe, and was not his job. While it is true that Piper interrupted Bush at that point, we do not believe the interruption was legally significant. The record fails to show that Bush would have said anything more illuminating than he had said four times already. Rather, the record reveals that Bush's testimony overall as to what he told his supervisors with regard to his safety concerns was vague, unspecific, and subject to memory lapses. 9/

9/ Even testimony that at first glance seems to support Bush's position, fails to do so on closer examination. Thus, although Bush knew on July 23 that Hardin was burned, there is no testimony that Bush thought the burn was caused by a safety defect. The judge made no findings on the cause of the burn and Bush did not testify as to what he believed. Similarly, as discussed in footnote 5, although on the morning of July 24 Bush observed the unloading procedure he did not then complain of any hazards. His testimony as to what he observed that morning is ambiguous as to whether he believed a hazard actually existed at that time. Further, the judge found that Union Carbide had corrected the acid leaks.

In sum, the judge inferred from the evidence that Bush would not unload acid under any circumstances. In so doing, the judge credited the operator's testimony that it had remedied the acid leaks and had conveyed this information to Bush, and discredited Bush's testimony pertaining to reasonable belief in a hazard. We emphasize that a "judge's credibility findings and resolution of disputed testimony should not be overturned lightly." Robinette, 3 FMSHRC at 813. Here, in the presence of substantial evidence to support his findings, we see no reason to take the exceptional step of overturning this basis for the judge's decision. We are persuaded, as was the judge, that Bush's belief in the hazard was not "a reasonable one under the circumstances," in that Bush's account of the conditions responded to was not persuasive in "detail, inherent logic and overall credibility." Robinette, 3 FMSHRC at 812. We reach this result also because acid unloading is a necessary and integral part of Union Carbide's operations and, like working on high steel or, indeed, in a mine, always poses some element of risk. Bush's work refusal was therefore unprotected and the operator's firing him in part for that refusal did not amount to a violation of the Mine Act. 10/ Like the judge, we will not penalize Union Carbide for refusing to tolerate indefinitely Bush's unchanging refrain and work refusals.

III.

One last point remains to be discussed. Union Carbide asserted at oral argument--as it had before the judge--that the Rifle Plant is not a "mine" within the meaning of the Mine Act. We disagree. Substantial evidence supports the judge's findings that vanadium is a mineral and that facilities at the plant are used in the work of "preparing" vanadium. 4 FMSHRC at 369.

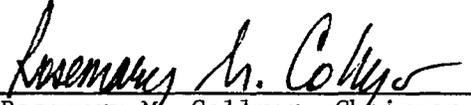
The Mine Act specifically includes within its coverage "lands ... structures, facilities, equipment ... used in ... the work of preparing ... minerals. 30 U.S.C. § 802(h)(1). It is clear Congress intended this expansive definition of "mine" to be broadly construed. 11/ While we have recognized that the "inclusive nature of the Act's coverage ... is not without bounds" (Carolina Stalite Co., 4 FMSHRC 423, 424 (March 1982), appeal filed sub nom. Donovan v. Carolina Stalite, Nos. 82-1467, 82-1830, D.C. Cir.), the situation here is readily distinguishable from cases where we declined to apply the Mine Act. See Stalite, 4 FMSHRC at 424-425; and Elam, 4 FMSHRC at 5, n. 3. Rifle is an integral part of Union Carbide's corporate structure, and some of the vanadium-bearing

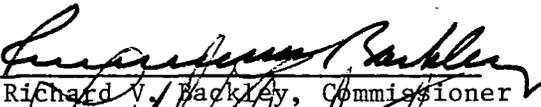
10/ Because we have determined that Bush's work refusal was not based on a reasonable belief that a hazard existed, we need not reach the question of his good faith.

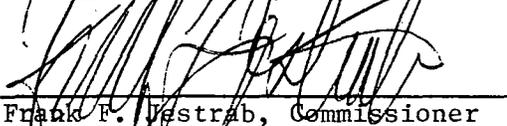
11/ Oliver Elam Co., 4 FMSHRC 5, 6 (January 1982), citing S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor and Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978).

ore prepared at Rifle is mined by Union Carbide. Moreover, the distillation of the vanadium concentrate at the plant is a necessary preliminary step to commercial use. Such mineral preparation falls within the scope of the Mine Act. 12/

Accordingly, on the bases discussed above, we affirm the judge's dismissal of Bush's complaint of discrimination.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank F. Vastrab, Commissioner


L. Clair Nelson, Commissioner

12/ We also believe it is desirable as a matter of policy that a single federal agency inspect all of Union Carbide's facilities engaged in related operations, that is, its mines and its primary and secondary preparation facilities. 30 U.S.C. § 802(h)(1). As pointed out at oral argument by counsel for the Secretary, without rebuttal by Union Carbide, until this proceeding Union Carbide had not disputed the Mine Safety and Health Administration's jurisdiction, and had permitted inspection without protest for a number of years.

Commissioner Lawson dissenting;

I am in agreement with the majority that this is a mine, but the record does not support its conclusion that the complainant, a miner with fifteen years employment at Union Carbide, and at the time of his termination a safety committee representative for his union, was discharged for unprotected activity. It is undisputed that miner Bush had never been disciplined before, for any reason. Tr. I 78.

The proposition that substantial evidence furnishes strong support for the decision of a trial court is not in dispute. What is at issue are the numerous evidentiary gaps, misinterpretations, and inconsistencies in the decision of the judge below, which presents to the Commission a decision unsupported by the record in this case. Substantial evidence is either wholly absent from this record--indeed any evidence in a most critical area--or so misstated as to be of little or no value for purposes of review.

For example, although the judge found complainant had engaged in protected activity (4 FMSHRC 370), and the operator has not challenged this finding on review, the majority here has determined that Bush's activity was not protected (slip op. at 4, 5, and n. 6), thus ignoring the presumably substantial evidence on which the judge relied in reaching that conclusion.

As the majority concedes, the judge erred in recounting and relying upon a nonexistent conversation of July 24th, in the clearly determinative underpinning for his decision:

The complainant did engage in protected activity in that he complained that the new procedure for unloading acid was unsafe. The complaint was made to complainant's supervisor on several occasions, and including July 24, 1980, the day complainant was suspended. A safety complaint involving a condition adjudged by the miner to be unsafe constitutes conduct protected by the Act.

. . .

After the solution of all the complaints had been explained to complainant in his supervisor's office on July 24, 1980, complainant was again asked to break in on the work of unloading the acid. Complainant again refused, stating that it was unsafe, but when he was asked in what way it was unsafe, complainant offered no explanation. Complainant also stated, as he had before that 'besides, its not my job.' The only conclusion I can come to is that complainant would not unload acid under any circumstances. [Emphasis added]. 4 FMSHRC 370, 371.

Indeed, the July 24th refusal to discuss complainant's safety concerns is revealed by the record as that of Union Carbide's Superintendent, Harold Piper, not miner Bush. It is undisputed that Bush attempted to explain the reasons for his belief that the acid handling procedure was unsafe. However, as Piper stated Bush "started to go through the reasons", but "I cut off his discussion." Tr. II 34-36; Tr. I 150. 1/

I am therefore unwilling to confirm these undisputed decisional contradictions of the judge, by speculating as to what he might have intended to say--but didn't--in particular on the central point critical to the resolution of this dispute. The timing and the content of the verbal exchanges between the parties should not be determined by inference, when Kenneth Bush's job, his fifteen years of employment and service for this operator, depends upon the accuracy of the facts upon which we must base our decision.

It is undisputed that Bush had some years previously witnessed employee Victor Sullivan "severely burned by acid" (Tr. I 90); had himself received acid burns (Tr. I 103); had learned of Hardin's acid burns while working on the acid line on July 23rd and had observed, on the day of his discharge, that valves were still dangerously positioned and likely to cause overflow. Tr. I 144. Yet, in examining Bush's belief to find it unreasonable, neither the judge below nor the majority herein has made any determination nor addressed the issue of whether the complainant's refusal to work was made in good faith. It is established law that the operator has the burden of proving the absence of good faith. Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803, 810-12 & n. 14 (April 1981). 2/

1/ Nor is there any record support for or explanation by the majority of its assertion that this miner's July 24 statement that the job was unsafe was not a separate complaint, nor that Bush's safety complaints prior to July 24 are "not...relevant." Slip op. at 4, n. 6. Certainly the judge found the complaint to be separate (4 FMSHRC 367), and the majority found Bush's angry outburst, which occurred in that same discussion, to be separate. Slip op. at 5, n. 7.

2/ Contrary to the majority's assertion, n. 14 of Robinette has not been "misread":

We are not suggesting that in work refusal litigation the Secretary or miner must demonstrate an absence of bad faith. Ordinarily, the miner's own testimony will expose the credibility of his good faith. Operators may use cross-examination or introduction of other evidence to show that, in reality, good faith was lacking. Thus, in a practical sense, the real evidentiary burden occasioned by the rule will be on operators to prove the absence of good faith. Emphasis supplied.

Robinette at 811 n. 14.

The essential holding below, adopted by the majority herein, is that Bush's work refusal was not based on a "reasonable belief", and is therefore unprotected. Slip op. at 7. That conclusion is founded on, and can only be supported by, as has been noted, the judge's mistaken reliance on a nonexistent conversation. 3/ The basis for the holding below being thus lacking, the decision cannot stand. Bell Lines, Inc. v. United States (1967, SD W Va) 263 F.Supp 40, 46; 5 U.S.C.A. § 557 (c).

Certainly complainant on July 22nd had testified in detail as to his safety concerns (Tr. I 43-45). Union Carbide apparently gave these complaints credence, although the record is unrevealing as to whether or not the changes made in the sulfuric acid handling procedure between the July 22nd complaint of Bush and his discharge on July 24th represented improvements. A valve in the acid line had been replaced, but it is significant that miner Bush was not advised of this change in the acid handling procedure, nor permitted to express himself as to the safety implications thereof.

On July 23rd, miner Hardin had been burned while unloading this sulfuric acid. Thereafter, on July 24th, Union Carbide's Safety Coordinator, Myers, had inspected this procedure, and the method of handling this acid was then modified. Complainant was not informed of nor aware of this modification, nor at the time of his work refusal on the 24th, of the reason for the injury to Hardin. Tr. II 52. Indeed, the record reflects that on the morning of the 24th, Bush observed valves in a position to cause overflowing, as before. Tr. I 143-145.

In any event, whatever opportunity Bush might have had to express his concern as to these procedures was foreclosed, as well as any views he may have had concerning whether the later changes ordered by Myers had corrected the problems of safety involving the acid handling procedure. The majority would, however, confirm complainant's discharge because of Union Carbide's "good faith and desire to cooperate", albeit this operator had withheld critical information from Bush, a safety representative of his fellow miners. Slip op. at 6.

Even more disturbing, and perhaps most pernicious of all, is the majority's clear approval of this operator's refusal to listen, much less respond, to complainant's reasons for his refusal to work. I cannot agree to the promulgation of a rule that condones an operator's refusal to hear an employee's safety complaint, a fortiori one that approves the discharge of a miner who has the temerity to raise such complaint. The law does not require that a miner work under conditions perceived to be hazardous, nor to blindly accept the mine operator's assessment of the safety of the workplace. Patience is to be preferred over peril when the miners' health and safety weighs in the balance. Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 780 (1974) cert. denied 420 U.S. 938.

3/ See United States v. United States Gypsum Co., 333 U. S. 364 (1948) "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 395.

Under the majority's rationale, a hear-no-evil rule has been established, which will henceforth provide an operator with a ready avenue for avoiding responsibility for discrimination. It need only refuse to listen to safety complaints. This certainly is not supported by the Act; indeed it is directly contrary to the language of section 105(c)(1) and Commission precedent, which strongly encourages, if not requires, a miner to inform his employer of the dangers of the mine. Northern Coal Company, 4 FMSHRC 126, 133-135 (1982).

Whether miner Bush would have unloaded acid on the 24th was not therefore meaningfully offered as an option to Bush, given Union Carbide's refusal to listen to the reason or reasons he then believed that the work he refused was unsafe, the unexplained accident to Hardin, and the also unexplained change in the acid unloading procedure, subsequent to that accident, together with Bush's observation on the day he was discharged that valves were still dangerously positioned and likely to cause overflow. The Act and our precedent do not require miners to perform unsafe work, nor that which a miner has a good faith, "reasonable belief" to perceive as unsafe.

To the extent that the majority bases its finding that Bush's belief was not "reasonable" "...because acid unloading is a necessary and integral part of Union Carbide's operation and, like working on high steel, or indeed, in a mine, always poses some element of risk", it decides a question not presented to the judge below, nor raised on review to the Commission. The Act limits Commission review "to questions raised by the petition" and provides that the "Commission shall not raise or consider additional issues...." Sections 113(d)(2)(A) & 113 (d)(2)(B). Here, the majority's finding was neither presented to the judge below nor raised by any party on review. Previously, this Commission has refused to address an argument not raised before the judge. Cowin and Company, Inc., 1 FMSHRC 20, 22, n. 6.

In any event, the suggestion that working with acid poses an element of risk is not at issue in this case, nor is working on high steel. What is at issue are the procedures utilized in handling the acid, and whether these were reasonably perceived by this miner as unsafe.

The majority has viewed this miner's belief not only narrowly, but solely from the perspective of the operator. The belief to be tested, however, is that of the miner. The reasonableness of this miner's belief, on which he based his work refusal, cannot be divined only from the operator's subjective, and not disinterested, assessment thereof. Phillips v. Interior Board of Mine Operations Appeals, *supra*. When viewed from Bush's perspective, the evidence leads to an opposite conclusion, and I submit clearly supports the reasonableness of his belief that this work was unsafe.

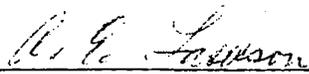
To recapitulate, Bush, on the morning of July 24, went to the acid unloading site to see "[w]hat changes had been made." Tr. I 142. A truck was being unloaded, and it is unrefuted that he observed valves in the position they had been in when acid had previously leaked. Tr. I 144. Nor was Bush told that Safety Coordinator Myers had reviewed the unloading procedures that morning at Plant Manager Piper's request, (Tr. II 52-3) nor was he advised that the faulty connection, which caused acid to splash in Hardin's face, had been replaced. ^{4/} Tr. II 6-7.

^{4/} Rather, Supervisor Snyder had told him "human error" was "partly responsible." Tr. II 72-3. Indeed, the record reflects a dispute between Union Carbide's own witnesses as to the cause of this accident. Tr. II 6-7, 51, 52.

The record reveals that there had never been any discharges of other employees at this mine because of their safety complaints (oral arg. 53, 54), only Bush. Union Carbide presented no evidence that it was company policy to discharge for refusal to perform work because "it isn't my job" (oral arg. 53) or insubordination; indeed, Superintendent Piper testified that "we will not do anything in the heat of an incident other than to suspend". Tr. II 36. The judge, of course, found that Union Carbide would not have fired this miner for the unprotected activity alone (4 FMSHRC 370), and this finding is buttressed by the operator's letter of July 25th, in which it noted that Bush was being discharged "for the totality of your conduct..., including the refusal to carry out work assignments." Exh. C-2. (Emphasis added.)

In summary, we have an undisputedly woefully deficient and unsupported judge's decision, a miner who had made protected safety complaints and had observed still existing unsafe conditions at his workplace just prior to his discharge, a mine operator who refuses to listen to this experienced miner's safety complaints concerning a three-day old, but already modified, procedure for handling sulfuric acid--which had already caused burns to one of complainant's fellow miners--and an employer who admittedly suspended this miner for his refusal to do this work which he, in good faith, reasonably believed to be unsafe.

For the reasons stated, I therefore dissent, would find a violation of section 105(c), and would reverse and remand for appropriate relief.



A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 13, 1983

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
on behalf of Clarence Ball	:	Docket No. VA 80-128-D
	:	
v.	:	
	:	
B&B MINING COMPANY, INC.,	:	
LAUREL MOUNTAIN MINING COMPANY,	:	
ROBERT ESSEKS, JODA BLANKENSHIP	:	

ORDER

This case is before the Commission upon grant of a petition for discretionary review filed by the Secretary of Labor. 30 U.S.C. § 823(d)(2)(A). The issues upon which review was granted concern the appropriate procedures for assessing penalties in discrimination cases brought pursuant to 30 U.S.C. § 815(c), and the appropriate rate of interest to be applied to backpay awards in such proceedings.

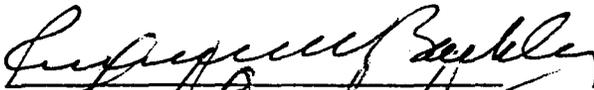
Subsequent to our granting of the petition for discretionary review, the Secretary filed a motion to "withdraw his appeal" and for "dismissal of the proceeding." The Secretary asserts that a penalty has since been separately assessed and paid, and that the amount of backpay and interest payable to the miner has been resolved by an agreement reached in bankruptcy proceedings involving the operator. Therefore, the Secretary submits that the controversies before the Commission in this case are moot. No opposition to the Secretary's motion was filed.

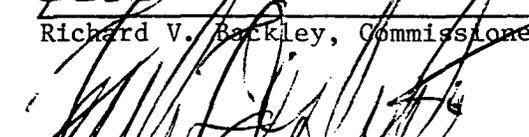
We find it unnecessary to reach the questions of whether the issues in the proceeding before the Commission are moot or, if so, whether dismissal would be required. See Climax Molybdenum Co. v. Secretary of Labor & FMSHRC, No. 80-2187, 10th Cir (March 21, 1983), slip op. at 7-10. Nor do we need to reach the Secretary's argument, in response to our order to show cause, concerning the Commission's jurisdiction over settlements in discrimination proceedings. The questions of law and policy upon which discretionary review was granted in this case are also pending before the Commission in other cases. See, e.g., Arkansas-Carbona Co., Docket No. CENT 81-13-D; Ottawa Silica Co., LAKE 81-163-DM. In light of this fact and based

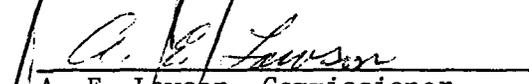
on our review of the entire record in the present case, we find that the case before us no longer presents a "substantial question of law, policy or discretion." 30 U.S.C. § 823(d)(2)(A)(i)(IV). Accordingly, our direction for review in this case is hereby vacated and the administrative law judge's decision stands as the final order of the Commission. See 30 U.S.C. § 823(d)(1).

We wish to point out, however, that the procedure followed in the present case exposes the parties as well as the effectiveness of their compromise agreement to unnecessary risks. Where a matter is in litigation before any tribunal, it is eminently sensible, if not legally mandated, to seek an order from that tribunal before a "binding" agreement between the parties that purportedly disposes of that litigation is effectuated. See also Matter of Gary Aircraft Corp., 698 F.2d 775 (5th Cir. 1983), and cases cited therein.


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 13, 1983

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket Nos. LAKE 80-413-R
MONTEREY COAL COMPANY : LAKE 81-59

DECISION

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1976 and Supp. V 1981). The administrative law judge found that Monterey Coal Company did not violate 30 C.F.R. § 77.216(d). 1/ We granted the Secretary of Labor's petition for discretionary review and heard oral argument. For the reasons that follow, we reverse the judge's decision.

On September 11, 1980, a Mine Safety and Health Administration (MSHA) 2/ inspector issued a citation to Monterey alleging a violation of 30 C.F.R. § 77.216(d). The citation stated:

1/ 30 C.F.R. § 77.216 provides in part:

(a) Plans for the design, construction, and maintenance of structures which impound water, sediment, or slurry shall be required if such an existing or proposed impounding structure can:

(1) Impound water, sediment, or slurry to an elevation of five feet or more above the upstream toe of the structure and can have a storage volume of 20 acre-feet or more; or

(2) Impound water, sediment, or slurry to an elevation of 20 feet or more above the upstream toe of the structure; or

(3) As determined by the District Manager, present a hazard to coal miners.

* * * * *

(d) The design, construction, and maintenance of all water, sediment, or slurry impoundments and impounding structures which meet the requirements of paragraph (a) of this section shall be implemented in accordance with the plan approved by the District Manager.

2/ MSHA succeeded to the enforcement activities of the former Mining Safety and Enforcement Administration (MESA). In this decision references will be to MSHA.

No. 3 slurry and refuse area, impoundment I.D. No. 1211 IL 0726-04, can impound water and/or slurry to an elevation of over 85' above the upstream [toe] of the impounding structure and the water/slurry storage volume is slightly more than 1000 acre feet. Either one of these conditions place the impounding structure in the large size classification. The mine operator has not submitted hydrologic and hydraulic engineering data to support the design of a large size structure. The approval of the engineering plan for design, construction, and maintenance of No. 3 slurry and refuse area was withdrawn in notifications dated June 13 and July 3, 1980. In a letter dated July 29, 1980 additional time was permitted to submit the information for a large structure. As of the date of this action no data has been received.

The citation culminated a protracted and confusing dispute between MSHA and Monterey concerning the impoundment. At the heart of this dispute is the proper "size" and "design storm" classifications for the No. 3 impoundment. A design storm is the worst combination of forces and loads a structure is calculated to sustain without failure. The cited standard requires implementation of "impoundment plans" approved by MSHA's District Manager. The minimum requirements for impoundment plans are contained in 30 C.F.R. § 77.216-2. Although the standards refer to an impoundment's "design storm," they do not specify criteria for choosing an appropriate design storm. Accordingly, both MSHA and the industry use as a guideline the Engineering and Design Manual: Coal Refuse Disposal Facilities, prepared by E. D'Appolonia Consulting Engineers, Inc. (hereafter "Design Manual" or "Manual"). 3/

Table 6.6 of the Manual presents recommended minimum design storm criteria for long term refuse disposal impoundment structures. The Table combines a "size classification" and "hazard potential classification" of an impoundment to reach a "recommended design storm." 4/ Three design storms are set forth in Table 6.6: (1) probable maximum precipitation (PMP) that could conceivably ever occur, given maximized intensity and duration possibilities (this is the most conservative design storm); (2) $\frac{1}{2}$ PMP, and (3) one percent probability (OPP), the storm which would occur or be

3/ The Design Manual was commissioned and published by MESA following the Buffalo Creek impoundment failure which occurred in 1972.

4/ The hazard potential classification concerns both the level of damage and potential loss of life in the event of the impoundment's failure. The parties stipulated that the No. 3 impoundment is "low hazard." In addition to size and hazard potential, additional criteria for determining design storms include "freeboard," "spillways" and "decants." Freeboard is the vertical distance between the water level and the crest of the dam or impoundment. A spillway is a passage (for example: a paved channel) designed to accomodate surplus water over or around a dam or impoundment. A decant system is a system of pipes used to discharge clarified surface water from all impoundments after the fine refuse has settled, and to discharge storm runoff periodically collected in an impoundment during large rainstorms.

exceeded on an average of once every one hundred years and therefore has an OPP of being equalled or exceeded in a given year. 5/ Table 6.6 recommends that an intermediate impoundment of low hazard have a minimum design storm of OPP. A large impoundment of low hazard should have a design storm of $\frac{1}{2}$ PMP.

With this background, we turn to the specific facts of the case. On July 30, 1976, after Monterey submitted its plan for the No. 3 impoundment, MSHA requested "a written justification of the selection of a design storm less than the PMP. Adequate justification could be the use of Table 6.6 ...". On October 6, 1976, Monterey forwarded the requested information including its own response to MSHA's comments as well as a response by Hanson Engineers, an independent consulting firm. 6/ On January 17, 1977, MSHA wrote to Monterey stating that Monterey's justification of a design storm less than the PMP was "satisfactory". Monterey's plan was approved by MSHA on July 6, 1977.

Subsequent to the plan's approval in 1977, the No. 3 impoundment manifested numerous signs of stress. A clay covering on the outside of the structure had been improperly applied, elevating the phreatic surface (water table) and weakening the impoundment structure. In addition, the impoundment had experienced two instances of serious slippage. Boils appeared on the impoundment indicating internal pressure was forcing water through the structure. 7/ Further, the static safety factor computed for purposes of determining slope stability measured less than the minimum permissible reading of 1.5. 8/

As a result of the first slippage, Monterey submitted a plan for remedial construction prepared by Hanson Engineers. The plan included the installation of 14 piezometers to monitor the seepage of water from the impoundment and to measure slope stability. Also as a result of the slippages, MSHA Inspector Eslinger began making more frequent inspections of the No. 3 impoundment. He made an inspection in April, 1980, at which time he collected the piezometer readings, reviewed them and forwarded them to MSHA's "Technical Support" Center for analysis. 9/ There, a major reevaluation of

5/ MSHA assigns either a $\frac{1}{2}$ PMP or OPP design storm only after examination of the circumstances and receipt from the operator of detailed information justifying the use of a less conservative design storm.

6/ Hanson Engineers has provided Monterey with engineering advice and data on the impoundment since 1975.

7/ "A boil is a seep which ... [is] water escaping the dam in a localized area under a high exit gradient, there is a lot of pressure forcing this water out." Mazzei deposition at 28. The record in this case includes the depositions of five MSHA experts. Hereafter, the depositions will be cited by the deponent's name and the page number of the deposition.

8/ 30 C.F.R. § 77.216-2(a)(13) requires inclusion in the impoundment plan of a "factor of safety range for the slope stability." The safety factor is the ratio of the resisting forces to the forces tending to cause movement. See 30 C.F.R. § 77.217(f). MSHA Engineer Eslinger testified that MSHA "like[s] to see at least [a] 1.5 static safety factor." Eslinger at 17.

9/ Pittsburgh Technical Support Center, Division of Safety and Technology, Mine Waste and Geotechnical Engineering Branch.

the design plan was initiated and MSHA personnel discovered that they had overlooked a "discrepancy." 10/ "The discrepancy in this instance was [that] an improper design storm was used. The Engineering and Design Manual, Table 6.6, requires a ½ PMP design storm be used for a structure of this size, rather than the OPP" Joint Exh. 1 (MSHA letter to Monterey, June 13, 1980). MSHA requested further data within 20 days. Monterey responded by forwarding copies of the 1976-1977 correspondence (summarized supra) and stating, "[W]e feel that you will agree that the use of the OPP design storm has already been discussed, justified and approved, and is not an item which you had 'overlooked'."

On July 3, 1980, again MSHA wrote to Monterey:

The justification cannot be accepted, and therefore, approval of the plan is withdrawn effective immediately Table 6.6 ... recommends that for Slurry and Refuse Disposal Area No. 3, a large impoundment of low hazard, that minimum design storm acceptable is the ½ PMP ... we must adhere to these recommendations.

Joint Exh. 3. Monterey responded by letter to MSHA on July 21, 1980:

Based on Table 6.6, ... this impoundment should be classified as an intermediate size impoundment of low hazard potential. This is because the maximum volume of stored water during a design storm will always be less than 1000 acre feet, and the maximum depth of water during a design storm will always be less than 40 feet. It is true that the total impoundment volume is slightly more than 1000 acre feet and the total impoundment height is greater than 40 feet; however, the large portion of this volume and height is, and always will be, occupied by settled fine refuse, leaving a maximum of 405 acre feet of water storage and a maximum of 21 feet of water depth. The inclusion of only water, and not settled fine refuse, in the storage and depth quantities above is supported on page 6.63 of the manual in the section entitled Impoundment Size Classification, which makes a very clear distinction between stored water and settled fine refuse.

Joint Exh. 4.

10/ Apparently MSHA Technical Support advised the MSHA District 8 headquarters by memorandum dated June 6, 1980 of its finding of an error in the design storm. See Rath at 13-14. There is also an implication in the record that there was communication between MSHA and Monterey prior to the letter of June 13, 1980 revoking the plan. Childers at 30-32.

By letter dated July 29, 1980, MSHA stated that no mandatory standard required it to use Table 6.6. In addition, MSHA noted "it is obvious that section 77.216 ... requires design plans not only for water, but also for sediment and slurry impoundments that fall within the criteria. Therefore, where a combination of both refuse and water is trapped behind a structure, it becomes clear that the total volume would be considered if prudent engineering and design is conducted." MSHA gave Monterey until August 12, 1980 to submit the data initially requested on June 13, 1980. On August 7, 1980, at the request of Monterey, a meeting between MSHA officials and Monterey was held at MSHA's District Eight headquarters. The parties unsuccessfully tried to reach an agreement. 11/ On September 3, 1980, Monterey again wrote to MSHA stating that "Monterey and MSHA apparently cannot reach a satisfactory accord." Monterey reiterated the facts and concluded:

To Monterey, MSHA's July 29, 1980, letter is interpreted to mean that MSHA agrees with Monterey's contention that the design is consistent with the Engineering and Design Manual, but that MSHA is not bound by the Manual. This MSHA position on the Manual would certainly seem to contradict the July 13, 1980, [sic] position that the alleged discrepancy was based on the requirements as set forth in the Manual.

Thus, Monterey considered the MSHA approval of area No. 3 "to still be in effect." Joint Exh. 7, at 2-3.

On September 11, 1980, the citation for failure to have an approved plan in effect was issued by MSHA. Monterey contested the citation and the Secretary subsequently instituted a civil penalty proceeding for the alleged violation. 12/

In his decision vacating the citation, the judge framed the issue before him as "whether MSHA was justified in withdrawing its approval, because if not, its subsequent action of issuing a citation was improper." 3 FMSHRC at 1788. The judge resolved the issue in Monterey's favor, stating that "Table 6.6, which MSHA relies on and which it charged Monterey with violating, counts only the water above the settled material in determining the size of a pond for design storm purposes." 3 FMSHRC at 1789. Presumably because under the literal terms of Table 6.6 the impoundment was correctly classified as "intermediate", the judge found that withdrawal of approval was not justified. Therefore, he vacated the citation.

11/ There were also a number of telephone conversations between Mr. Tillman of Monterey and various MSHA officials in an attempt to reach an agreement. See Childers at 24-28 and 47-48.

12/ On September 17, 1980, Monterey submitted additional information to MSHA "to allow Monterey to continue to operate" the No. 3 slurry area. Joint Exh. 8. MSHA reinstated approval of the plan on September 19, 1980 after Monterey submitted the requested data. Joint Exh. 9.

We concur with the judge's statement of the issue: whether MSHA was justified in withdrawing its approval of the plan, and, therefore, whether issuance of the citation for failure to have an approved plan in effect was proper. We disagree with the judge's conclusion, however, and hold that under the circumstances MSHA was justified in withdrawing the plan approval and issuing the citation.

As noted previously, a re-evaluation of Monterey's impoundment was conducted and MSHA discovered that the wrong design storm (the OPP) had been approved. 13/ MSHA admits that the OPP design storm should not have been approved and that if the same plan presently were submitted, it would not be approved. The depositions contain two explanations for the error. During the time when Monterey initially submitted its plan, MSHA was deluged with plan submissions because the standard requiring plans for impoundments had only recently gone into effect. Mazzei at 58-59. In addition, the record reflects that Monterey's plan submissions may have been somewhat confusing themselves in that they referred to more than one design storm. 14/

13/ Actually, the wrong design storm had been approved twice: initially in July 1977, and upon approval of a modified plan in August 1979.

14/ On April 30, 1976, Monterey submitted a number of documents to MSHA. Included was an "Engineering Report for Continued Use of Refuse, Slurry Area No. 3." Pages 4-5 of that report describe runoff and freeboard calculations. They use both PMP and OPP calculations. The "spillway" paragraph on page 5 of the report only refers to OPP precipitation. Later, on July 30, 1976, MSHA requested "a written justification of a selection of a design storm less than the PMP." On October 6, 1976, Monterey responded to MSHA's request by forwarding both Monterey's and Hanson's responses. Inspector Eslinger quoted part of Monterey's response: "According to Table 6.6(c) of the MESA Engineering and Design Manual, ... the decant system of a large impoundment in a low hazard area--large impoundment, low hazard, must handle ninety percent of the half PMP for the area." He continued, "so, ... they're [Monterey] saying that it is a large impoundment of low hazard." Eslinger at 30-31. Counsel for the Secretary offered the following explanation of the confusion:

... [MSHA received] a cover letter from Monterey indicating that the one half PMP should be used and referred to data contained in the attached report from Hanson Engineers. The Hanson document that is attached talks in terms of the OPP rather than the one half PMP.

Childers at 43. See Eslinger at 30-34; Childers at 41-44; Mazzei at 60 and 77; and Wu at 14. Thus, although the record before us does not contain all the various documents referred to, we believe that it is nevertheless clear from the record that some of the confusion may have been caused by Monterey's submissions.

Regardless of the precise cause of the mistaken approval, however, we find that it was a good faith mistake. Insofar as this record establishes, MSHA's consistent practice in classifying the size of impoundments is to measure the height and volume of stored water and slurry. Based on this practice, the No. 3 impoundment should have been classified as "large" with "low hazard" requiring a $\frac{1}{2}$ PMP design storm. However, the impoundment was approved using the less conservative OPP design storm, apparently because only the volume of stored water, and not slurry, had been taken into account. In Penn Allegh Coal Company, 3 FMSHRC 2767 (Dec. 1981), we addressed the effect of a mistaken approval of a provision in a dust-control plan. We held that a good-faith mistake in a plan approval may be repudiated. 3 FMSHRC at 2770. Thus, we hold that MSHA was not bound by its mistaken approval of the wrong design storm.

We further find that MSHA was justified in withdrawing approval of the plan based on its concern over the safety of the impoundment. We base this finding on the purpose of 30 C.F.R. § 77.216; the fact that No. 3 impoundment showed numerous signs of stress; and the conclusion that MSHA's purpose in correcting the design storm error was to increase the safety of the impoundment. We first address the purpose of the standard.

We acknowledge that the literal wording of the citation and the relevant correspondence between MSHA and Monterey do not explicitly state that withdrawal of the plan was based on safety considerations. Rather, Monterey was cited for not having an approved plan in effect and the correspondence between the parties focuses on the dispute about the size of the impoundment and the appropriate design storm. In resolving this dispute, the judge limited his inquiry to the size of the impoundment under a literal application of Table 6.6. We conclude, however, that this classification controversy has unfortunately clouded and distracted attention from the basic purpose of the standard and the real issue in this case, i.e., whether MSHA had proper cause to revoke its previous approval of the impoundment plan.

In explaining the purpose of 30 C.F.R. § 77.216, the Secretary states:

MSHA interprets 30 C.F.R. § 77.216 to require submission of plans for the design, construction, and maintenance of structures which impound water, sediment, or slurry. Such plans must provide for effective containment of potentially hazardous amounts of refuse.

Sec. Br. at 20-21 (emphasis in original). District Manager Childers described the approval process after an impoundment plan is received. He testified that his "primary concern" and the "bottom line" in approving plans is safety. Childers at 38-39. The Secretary further states:

MSHA analyzes plans for the development of impoundments in light of both the resistance of the retaining structure to failure and the likely results given structural failure.

PDR at 3. To emphasize our central observation, we conclude that the purpose of the standard is to assure the safety of impoundments and minimize the risk and effect of failure.

In their depositions, four of MSHA's experts testified at length concerning the history of various safety problems at the impoundment. ^{15/} The first apparent problem was in the construction of the impoundment. The dam is constructed of a coarse refuse material covered by clay. The clay covering was intended to be thin but was applied thickly. Stress was experienced in the impoundment because the clay would not let the water through the structure which in turn raised the phreatic surface (i.e., water table). Also, as noted earlier, the impoundment experienced two instances of serious slippage, first on the south slope in 1978 and then on the west slope in 1979. In addition, Inspector Eslinger observed boils occurring in the area of the most recent slide. Boils were described as problems, an indication of weakness, and a sign of distress. ^{16/} In addition to these difficulties the static safety factor (for slope stability) measured less than the minimum permissible reading of 1.5. Based on the piezometer readings, MSHA found safety factors ranging from just under 1 to 1.3. Inspector Eslinger testified that the impoundment "has always been a borderline on slope stability." ^{17/} We conclude these safety related problems are sufficient to justify MSHA's action in withdrawing the plan approval.

We further find that MSHA's purpose in correcting the design storm error was to increase the safety of the impoundment. Inspector Eslinger acknowledged that the reason for issuing the citation was that MSHA was interested in altering the operational parameters of the pond:

[T]he violation was written and we were seeking to modify the plan to gain this lower operating level which would provide the increased safety for the storage aspect of the storm...

Eslinger at 7-8. Inspector Eslinger further testified that the impoundment was safer with less water in it. Id. at 13. In addition, Mr. Mazzei testified that "if you lower the water level, you're going to lower the intensity of the boils." Mazzei at 29. Thus, MSHA's experts believed that changing the design storm and lowering the water level result in the increased safety of the impoundment.

We also note that two of MSHA's experts testified that had MSHA not corrected the design storm, MSHA would have required Monterey to take other action to increase slope stability. Mr. Eslinger was asked what

^{15/} Eslinger at 14, 16, 36 and 40-42; Rath at 5-6 and 8-9; Mazzei at 7, 27-28, 32, 72, and 74-76; and Wu at 15 and 22.

^{16/} Mazzei at 28; Rath at 8; Eslinger at 14; and Wu at 22.

^{17/} Eslinger at 16-17.

MSHA would have done to increase slope stability if MSHA had not found the design storm error. He replied, "we probably would have requested [Monterey] to do something which may have meant lowering the operational level to insure a minimum [slope stability] of 1.5." Eslinger at 35-36. Also, Mr. Mazzei acknowledged that if the OPP design storm were to remain in effect work would have to be done on the impoundment from a stability standpoint. Mazzei at 74. This testimony supports a finding that MSHA's overall concern was the safety of the impoundment. Thus, we find that MSHA withdrew its plan approval and ultimately issued the citation requiring data to support a more conservative design storm because of valid safety concerns.

We further find that Monterey suffered no legal prejudice as a result of MSHA's actions. In its brief Monterey argues:

The essence of Monterey's grievance and the core of the decision below is that MSHA acted arbitrarily and unreasonably by requiring Monterey to comply with Table 6.6 and then punishing it for doing just that.

Br. at 7. During oral argument, counsel for Monterey stated:

It [MSHA] had the right not to use Table 6.6 or to develop a new standard based on Table 6.6 but taking a different approach. But it didn't do that, at least it didn't tell the world about it if it did.

Oral arg. tr. at 20. At first glance, Monterey's position might appear to have merit. During the submission of the initial plan in 1976 and 1977, Monterey was told to use Table 6.6. Later, in the letters of June 13, and July 3, 1980, MSHA itself relies on the Table as justification for withdrawing the plan approval. MSHA then stated in its letter of July 29, 1980, that it is not required to use the manual and relied on 30 C.F.R. § 77.216 to support its action.

However, insofar as the record in this case reflects, except for the mistake made in the present case, MSHA was consistently interpreting Table 6.6 the same way; there was no change in MSHA's policy or position. All five MSHA witnesses stated that they interpreted Table 6.6 to refer to water plus slurry.^{18/} Therefore, in their view, the No. 3 impoundment was always large in size and always required a ½ PMP design storm.

^{18/} Eslinger at 29; Childers at 33; Rath at 17; Mazzei at 54 and Wu at 20. MSHA's consideration of the total volume of stored water and slurry in classifying the size of an impoundment is based on its documented engineering judgment that, due to the extremely fluid nature of the settled and suspended coal fines, this material, as well as the water, would mobilize and flow in the event of an impoundment failure. Mazzei at 22-23, 50-55; Wu at 16-17; Sec. Br. at 25-8.

We cannot conclude that MSHA's use of the Table or its act of withdrawing the plan approval was arbitrary and capricious. MSHA is not bound by the literal terms of Table 6.6. It is a guideline, not a mandatory standard. Cf. King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981); Alabama By-Products Corp., 4 FMSHRC 2128 (Dec. 1982). Also, of great importance here, Monterey had adequate notice before issuance of the citation of how MSHA intended to apply the Table to its operation and the remedial action that would be required. 19/ Monterey was also given a reasonable time to comply. MSHA's initial action was a letter, not a citation and it allowed 20 days to submit the data. In MSHA's letter of July 29th the time for submission of the data was extended until August 12, 1980 "because of the delays created by correspondence on this matter." Even then, the citation, issued September 11, 1980, was preceded by a meeting and telephone conversations. Thus, prior to issuance of the citation Monterey was given unequivocal notice of and a reasonable opportunity to comply with MSHA's interpretation and use of the Table. Cf. Penn Allegh Coal Co., supra. 20/ In sum, we find the course of action taken by MSHA to have been a reasonable approach, and not arbitrary or capricious.

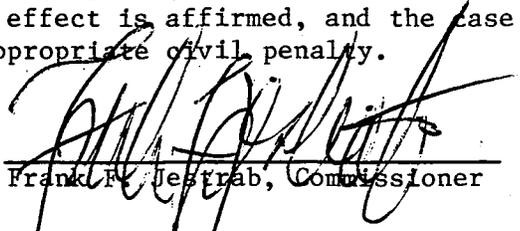
19/ Penn Allegh also describes the actions Monterey has taken:

The requirement of good faith negotiations by both parties eliminates any fear that an operator must forever labor under a provision that has been adopted and approved. If an operator believes a revision is warranted, has engaged in a reasonable period of good faith negotiation, and believes the Secretary has acted in bad faith in refusing to approve the revision, he can obtain review of the Secretary's action by refusing to comply with the disputed provision, thus triggering litigation before the Commission.

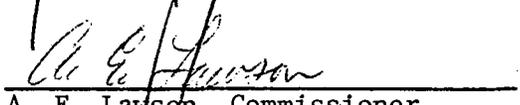
3 FMSHRC at 2773, n.8.

20/ In fact, Monterey was not required to lower the actual water elevation then present in the impoundment. At the time the citation was issued the facility was operating at about 660 feet. Stipulation No. 18. Utilizing an OPP design storm, it could operate at up to 662 feet. Utilizing the $\frac{1}{2}$ PMP design storm, it could only operate at an elevation of 660.5 feet.

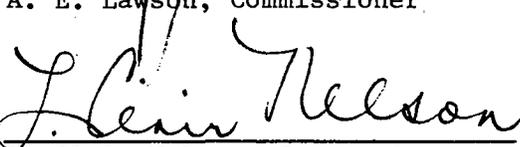
Accordingly, the decision of the judge is reversed, the citation for failure to have an approved plan in effect is affirmed, and the case is remanded for the imposition of an appropriate civil penalty.



Frank F. Jestrab, Commissioner



A. E. Lawson, Commissioner



L. Clair Nelson, Commissioner

Collyer, Chairman and Backley, Commissioner, dissenting:

We dissent. The record in this case shows that MSHA did not withdraw approval of Monterey's plan for the design of its impoundment because of concerns about the stability of the structure. Approval of the plan was withdrawn solely because of a dispute between MSHA and Monterey over the correct meaning of the guidelines contained in Table 6.6 of the Design Manual.

MSHA's interpretation was wrong and the citation should be vacated. Any attempt to label this interpretation a "good faith mistake" fails because of MSHA's actions in the dispute, as outlined below. Under proper circumstances, MSHA may not necessarily be bound to the guidelines in Table 6.6. However, when it relies on specified guidelines for issuing a citation, as here, it is bound by the terms of those guidelines alleged to have been violated.

In order to properly understand the basis for this controversy, the genesis and purpose of Table 6.6 should be explained. Table 6.6 is only one section of a major effort on the part of the government to set standards for the design and maintenance of coal impoundments and handling of coal waste after the Buffalo Creek disaster in 1972. The Mining Enforcement and Safety Administration (MESA), MSHA's predecessor, contracted with E. D'Appolonia Consulting Engineers to develop a design manual to provide guidance to inspectors and industry alike. The result was published under the title: "U.S. Department of Interior, Mining Enforcement and Safety Administration, Engineering and Design Manual-Coal Refuse Disposal Facilities." As the correspondence in this case illustrates, the Manual has been used since publication as the official parameter against which all impoundments are measured.

Table 6.6 in the Design Manual is what MSHA uses to determine the "size", "hazard potential", and "design storm" for coal refuse impoundment structures. ^{21/} Although other textbooks and references are also consulted by MSHA in reviewing impoundment plans, none of these other references is used to determine the size, hazard potential or design storm for impoundments. ^{22/} Thus, the "size" classification, which is at the heart of the dispute in this case, is entirely the creation of the authors of Table 6.6 and that table is the only source that is used by MSHA to make such "size" classifications for coal refuse impoundments.

The nature of Table 6.6 also needs a fuller explanation than is provided in the majority opinion. Table 6.6 is arranged like a matrix. The proper design storm for an impoundment is determined by matching the "size" variable with the "hazard potential" variable for each facility. There are three size classifications: small, intermediate, and large. These classifications are based on the maximum volume and depth of stored water. There are also three hazard potential classifications: low, moderate, and high. The hazard potential classifications are based on the severity of damage that would occur if an impoundment failed.

^{21/} Mazzei at 16-17.

^{22/} Mazzei at 15-17.

It is undisputed that Monterey's No. 3 impoundment has a "low" hazard potential. ^{23/} For a facility with a "low" hazard potential like the No. 3, the One Percent Probability (OPP) is the appropriate design storm if the impoundment is "intermediate" in size. If it is "large" in size, the design storm should be one-half Probable Maximum Precipitation (1/2 PMP).

As the majority points out, Monterey by letter dated July 30, 1976, was requested to submit a justification of the selection of the OPP design storm for its No. 3 impoundment. In this letter, MESA stated, "Adequate justification could be the use of Table 6.6." Monterey submitted the requested material and its plan for an "intermediate" impoundment was approved on July 6, 1977. In July of 1980, MSHA withdrew its approval and in September of that year issued the citation that gave rise to this proceeding. The basis for the citation was Monterey's failure to have an engineering plan for a "large" size impoundment.

The dispute between MSHA and Monterey centers on whether the size classifications contained in Table 6.6 are based on the total volume and depth of stored water or on water plus settled solids or slurry. If water only is counted, both parties acknowledge that the impoundment is intermediate in size and the OPP is the appropriate design storm. If water plus slurry is counted, the impoundment becomes large in size under Table 6.6 and the design storm should be 1/2 PMP.

The record plainly shows that the size classifications in the Table are based on water only. On page 6.3 of the Table, it is explained that the size classifications are based on water "above any settled material." The explanation of Table 6.6 continues with the statement that:

... These volumes and height limitations represent conservative values compared to those typically specified for water impoundments.... However, coal refuse impoundments often contain settled fine refuse in addition to water, which could contribute significantly to downstream damage in the event of an embankment failure.... These limits reflect a conservative approach to account for possible added damage due to settled slurry.

Table 6.6 at 6.63 and 6.64. Joint Exhibit 6.

This language means two things: first that the "size" classifications in the Table are based on water only; and second, that the authors took into consideration the potential damage of water plus

^{23/} The description in the Table of an impoundment with low hazard potential is: "Facilities located in rural or agricultural areas where failure would cause only slight damage, such as farm buildings, forest or agricultural land, or minor roads."

slurry in drafting the size portion of the Table. It shows that the authors of the Table took into account the differences between water and slurry in developing the design storm criteria for impoundments and deliberately based the size classifications on water only by using conservative figures.

That the authors of the Table intended to base their formulation on water only is confirmed by the principal editor of the Manual who was "directly involved in the development of Table 6.6." The testimony of Mr. Richard D. Ellison, the principal editor of the Manual and Executive Vice President of D'Appolonia Consulting Engineers, introduced by both parties in Joint Exhibit 10, reads:

... these dimensions relate to the water above any settled solids, and do not include the depth and volume of settled solids. This differentiation between water and settled solids was understood and considered at the time that Table 6.6 was being developed. Accordingly, the discussion about how to use Part A of the Table, on Pages 6.63 and 6.64 of the Manual, makes specific reference to the fact that only the water should be considered.

Thus it cannot be disputed that the Table applies to water only and that it was designed to apply to water only. In fact, MSHA's expert witness, Dr. Wu, Chief, Mine Waste and Geotechnical Engineering Division, Bruceton Safety Technological Center, Bruceton, Pennsylvania, admitted that the Table applies to water only. Wu at 16-17. We emphasize this point not only because the majority minimizes it but because it is necessary in a review of MSHA's actions. The majority suggests that the judge was being overly "literal" in applying the Table. The judge, however, interpreted the Table as it is written and as it was intended to be interpreted. The Table must be "modified" to apply to water plus slurry.

The reinterpretation of the Table in this fashion is illogical and tortuous. Table 6.6 is an engineering formula, not some phrase in a statute or regulation susceptible to various interpretations. One cannot take the formula, alter the definition of one of its terms, and then proceed to use it as if the formula retained any rational validity. Perhaps the judge put it best:

[MSHA] cannot ... successfully charge an operator for the violation of the handbook's Table 6.6 and at the same time ignore the definitions of the terms used in that Table. The formula for deriving the circumference of a circle is only valid if "R" equals the radius, and "Pi" equals approximately 3.1414. A change in the meaning of any of the terms destroys the effectiveness of the formula and the same is true of Table 6.6.

The decision of the majority sanctions this illogical reinterpretation of the Table. No attempt is even made to provide a scientific or technical justification for modifying the specifications contained in the Table. This omission is not surprising because MSHA has advanced no engineering reason to explain why slurry should be counted when using this Table. In fact two MSHA officials thought they were correctly interpreting the Table as written. In this regard, Charles Rath, MSHA's Supervisory Coal Mine Technical Specialist and author of the letter revoking approval of the plan responded as follows:

Question: What if you were to learn that we were right, that Monterey Coal Company has correctly interpreted how one makes these calculations to determine the size of the pond, would you recommend approval of the plan you disapproved in June? In other words, would you withdraw?

Rath: Certainly if it could be proved that the interpretation is incorrect, that that wasn't the intent of the engineering parameters or whatever, why, certainly I wouldn't have any reservations about that.

Rath at 22. (See also, Rath at 20, 28-29; Eslinger at 21-23.)

Two other MSHA engineers said that they thought that the authors of the Table made a "mistake," but they provided no reason for that belief. 24/ The confusion on the part of MSHA's expert witnesses is not surprising given the fact that the slurry is already accounted for by the use of conservative numbers. Essentially, MSHA's present position "counts" the slurry and settled materials twice.

24/ The MSHA engineers surmised that a "mistake" was made because the authors of the Table drew on the experience of the Corps of Engineers and the Bureau of Reclamation, agencies that are in the business of building structures that retain water only. Wu at 16-17; Mazzei at 12-14.

The belief that the authors of the Table did not take into account the difference between coal refuse impoundments and impoundments that retain only water is refuted by the language of the Table itself. The explanatory material on size classification in the Table says: "These volume and height limitations represent conservative values compared to those typically specified for water impoundments..." Table 6.6 at 6.63. In addition, Mr. Ellison, the principle editor of the Manual, unequivocally stated that the difference between water and settled solids was understood and considered when the Table was developed.

Thus even the unfounded suppositions offered by MSHA to explain why slurry should be counted do not appear to be accurate. If the Table does not represent prudent engineering, it should be changed in its entirety and not modified arbitrarily because of unfounded guesses.

Despite this, the majority finds that MSHA was justified in withdrawing approval of plan. The majority gives three principal reasons for upholding MSHA action in this case: (1) withdrawal of the plan was prompted by legitimate concerns over the stability of the structure; (2) MSHA has consistently interpreted Table 6.6 to include water plus slurry; (3) Table 6.6 is not a mandatory standard and MSHA is not bound by its literal terms. None of these rationales stands up under scrutiny.

First, the assertion that MSHA's concerns about the stability of the dam prompted withdrawal of the plan is simply not supported in any fashion by the record. The dam had developed surface indications of possible stress -- the boils and slippage so emphasized by the majority. In response to these indications, MSHA had only recommended that the structure be closely monitored. Obviously, these signs of possible stress did not mean the dam was unstable, only that it bore watching. With the agreement of MSHA, Monterey had installed peizometers to monitor the dam in order to determine whether any corrective action were needed. The only relationship the monitoring project had to the citation was that the supposed "discrepancy" in approving an OPP design storm in 1977 was discovered while the plan was being reviewed in connection with the monitoring. 25/

Both the citation and the correspondence between the parties show that approval of Monterey's plan was withdrawn solely because MSHA believed that Table 6.6 dictated a 1/2 PMP design storm for this impoundment. Not only did the initial MSHA withdrawal letter state that its action was based upon the fact that "Table 6.6 requires a 1/2 PMP design storm to be used for a structure of this size" (Joint Ex. 1), but a subsequent response to Monterey's defense of the plan was even more to the point:

Table 6.6 ... recommends that for ... a large impoundment of low hazard, minimum design storm acceptable is the 1/2 PMP, 1/2 the Probable Maximum Precipitation. We must adhere to these recommendations.

Joint Ex. 3. Neither the citation nor subsequent correspondence ever mentioned safety considerations as a basis for withdrawal of the plan. 26/

25/ See Joint Ex. 1; Eslinger at 4-8, 16-21; Rath at 8-12.

26/ Even if it were true that safety considerations prompted revocation of the plan, MSHA's withdrawal of plan approval would be legally defective for its very failure to state the true reason. The Commission, like a reviewing court, "must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the Court is powerless to affirm the administrative action ..." Secretary v. Chenery Corp., 332 U.S. 194, 196 (1947). See also Burlington Truck Lines, 371 U.S. 156, 169 (1962) (the law requires "an agency's discretionary order be upheld if at all, on the same basis articulated in the order by the agency.")

But there is an even greater problem with the majority's conclusion that safety considerations prompted revocation of the plan. The MSHA officials involved in this case have repeatedly disavowed the suggestion that safety concerns were the basis for their action. Charles Rath, the author of the letter revoking approval of the plan, denied that revocation of the plan was related to concerns about stability. 27/ The man who issued the citation, Charles Eslinger, a mining engineer who specializes in impoundments, was also emphatic that the design storm "error" was the only reason for revocation of the plan. He confirmed Rath's statement that MSHA did not require lowering the level of the pond because of stability problems. Eslinger said that "we would not at this time do anything about the stability aspect" except to closely monitor the facility. 28/

27/ The following exchange during Rath's deposition shows this:

Question: ... [was] the withdrawal of the plan's approval because of the design storm error as we discussed another way to get at a concern with the stability of the dam?

Rath: No, not at all. (Rath at 39-40).

28/ Here is what Eslinger said during his deposition:

Question: When the plan approval was withdrawn in June, it was withdrawn because of a design storm error, is that correct?

Eslinger: Right. That's the only consideration. ...

Question: But the approval was only withdrawn for this reason? It wasn't withdrawn because of the phreatic level consideration, is that correct?

Eslinger: No, at this time we felt that we were only going to address the problem of the wrong design storm. We did not require that it be lowered because of the stability. We felt that at sometime in the future maybe we would have to do that.

Question: But you would continue to monitor closely?

Eslinger: Continue to monitor, inspect. They're required by regulations to make a reading of those piezometers once every seven days and we can request them for that information. And we felt that we would not at this time do anything about the stability aspect, although this in itself would probably help the stability analysis because you're lowering the water level a foot and a half. But that was not ... it was just based on the design storm, that was the only consideration.

Eslinger at 21-23. See also, Mazzei at 36.

On this record, the judge quite rightly found that MSHA did not revoke approval of the plan because the impoundment was unsafe. To overturn that finding, the majority has had to skirt direct testimony that the citation was issued solely because MSHA incorrectly believed that the wrong design storm was used. The majority has also completely ignored the fact that the MSHA officials who issued the citation repeatedly and consistently denied that stability problems prompted their action.

We can understand their reasons for taking this path, for to uphold the citation is a formidable task given the evidentiary record developed below. The specter of disaster, as opposed to the evidence which we are statutorily required to review, is conjured up to justify this arbitrary administrative action. The majority engages in the following line of reasoning: the impoundment had shown "signs of stress"; reinterpreting the Table would result in a lower water level; lowering the water level would increase the safety of the structure; therefore, the reasons for disapproving the design storm can be disregarded because safety will be enhanced in any event.

It is irrefutable that the safety of any impoundment is increased when the water level is lowered. Less water means less pressure on the structure. An impoundment that contains nothing is safest of all. The majority marries this less-is-safer notion with the fact that the operation of the dam was being monitored to reach the conclusion that withdrawal of the plan was justified. Repeated references to slippage, boils and instability create the impression that MSHA stepped in to protect the public interest when it withdrew the plan.

The severity of the safety problems at this facility have been exaggerated. MSHA has always considered this impoundment to have a "low hazard potential" on a scale of low, medium, and high. The firm of Hanson Engineers, Inc. which has inspected, conducted remedial construction upon, and closely monitored the No. 3 impoundment since 1975, gave the following assessment of the stability of this structure:

Based upon field observations and the field and laboratory data developed over the years, it is [the] opinion ... of Hanson Engineers, Inc. that the embankment distress experienced at the No. 3 impoundment is basically a surface feature, and that it does not suggest that the mass stability of the embankments has deteriorated. The static and dynamic factors of safety for mass stability reported by Hanson Engineers, Inc. in March 1979 for a pond elevation of 662.0 (i.e., minimum static factor of safety = 1.7 and a minimum dynamic factor of safety = 1.2 to 1.3) are considered to be reasonable estimates of safety against failure as based upon the standards of practice of the profession and the present state of the art. These factors of safety would not be significantly different for pond levels 1 to 2 ft. higher or lower than elevation 662.0.

The sworn professional opinion of this firm is that the maintenance of this impoundment at the 662 foot water level, a level consistent with the use of an intermediate size classification, combined with the monitoring program, represents "prudent engineering practice for the continued safe operation of the No. 3 impoundment." Joint Exh. 11.

It was also apparently the opinion of MSHA that this impoundment posed no immediate risk. 29/ If such a risk did exist, MSHA could have and should have issued an imminent danger order. Requiring that the water level be lowered a foot and a half, an action that would have no significant effect on the safety of the structure according to Hanson Engineers, would not have been an adequate corrective measure if this facility posed any real danger.

What we have here is a massive attempt at post hoc rationalization. Put in the vernacular, MSHA clearly goofed. It ordered Monterey to amend its plan to drop the water level a foot and one-half because MSHA believed that the Manual dictated this result. Because the Manual did not dictate that result, as Dr. Wu admitted, safety concerns were seized upon to cloak this mistake. The record shows what MSHA did and why it did it. We cannot ignore the facts and find that safety compelled withdrawal of the plan.

The additional reasons given by the majority for upholding this citation also evaporate when examined. The majority says that MSHA's action should be sanctioned because MSHA has consistently interpreted Table 6.6 to refer to water plus slurry, "insofar as the record in this case reflects." The record in this case does not "reflect" any such evidence to support a "consistent interpretation." The evidence on whether MSHA has consistently interpreted Table 6.6 is scant. It consists only of the statements of MSHA's witnesses made during this litigation that they interpreted Table 6.6 to refer to water plus slurry. Two of those witnesses thought they were correctly interpreting the Table as written. 30/ In this very case, a size classification based on water only was approved when the initial plan was reviewed in 1976-77. No published material to substantiate a consistent agency-wide practice apparently exists. Thus, we do not know that MSHA has always interpreted the Table in this fashion.

29/ Inspector Eslinger stated "There is a degree of hazard associated with an impoundment structure. Just like when you operate a car there is a degree of hazard.... And when you build an impoundment, there is some hazard associated with it." But, said Inspector Eslinger, "I don't see it failing in the near future. I would think there would have to be serious deterioration of the quality of the structure before it failed." Eslinger at 15; see Rath at 39-40; see also Mazzei at 39-40, 74 (his concerns could be adequately addressed through close monitoring rather than lowering the water level).

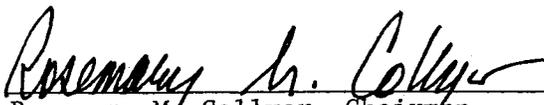
30/ Rath at 20, 22, 28-29; Eslinger at 21-23.

More importantly, even if MSHA has consistently interpreted the Table to refer to water plus slurry, that alone does not warrant according deference to MSHA's interpretation. The majority cites no authority (because there is none) that an agency's interpretation should be deferred to simply because the agency has been consistently mistaken.

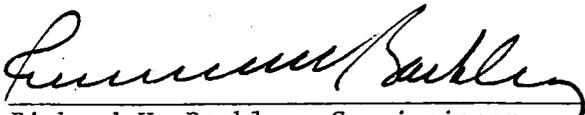
Deference is accorded to an agency's interpretation only when the agency's interpretation is reasonable. ^{31/} The interpretation advanced by MSHA is wholly unreasonable. Not only is it contrary to the plain meaning of Table 6.6 and the plain intent of engineers who formulated the Table, it is inherently illogical. Moreover, not a shred of evidence has been presented on which we as adjudicators could base a finding that MSHA's interpretation is reasonable. In the face of this, blessing MSHA's interpretation simply for the reason that it may have been consistent has no basis.

Lastly, the majority excuses MSHA's arbitrary action in this case on the grounds that MSHA is not bound by the literal terms of Table 6.6 because it is a guideline, not a mandatory standard. The principle that an agency is not bound by guidelines that have not been promulgated as regulations is inapposite here. MSHA withdrew approval of Monterey's plan for the very reason that Monterey allegedly did not comply with this guideline.

MSHA is not bound to follow the guidelines in Table 6.6. New standards for selecting design storms should be developed if they are needed. But when MSHA does follow Table 6.6 and when it requires Monterey to follow Table 6.6, it must do so rationally and correctly within the terms of the Table. MSHA has broad discretion in regulating coal refuse impoundments through the plan approval process. But that discretion can be abused. We must dissent because such an abuse took place in this case.



Rosemary M. Collyer, Chairman



Richard V. Backley, Commissioner

^{31/} Lucas Coal Company v. Interior Board of Mine Operation Appeals 522 F.2d 581, 584 (3rd Cir. 1975).

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 1 1983

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 82-118
: A/O No. 42-01279-03060 V
v. :
: Belina No. 1 Mine
VALLEY CAMP OF UTAH, INC., :
Respondent :

DECISION

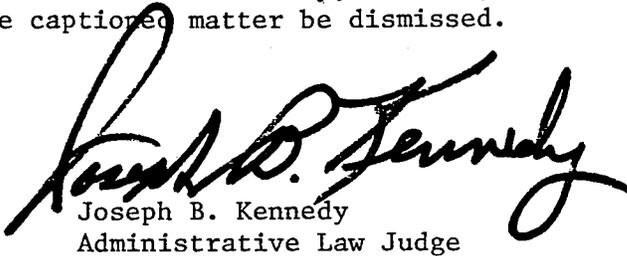
At a hearing in Salt Lake City on or about March 23, 1983, the parties moved to approve settlement of the captioned penalty proceeding. The single violation was bottomed on the charge that a continuous miner operator had committed a condoned violation of the operator's approved control plan by working his continuous miner 30 feet inby the last row of permanent roof supports. The settlement proposed was \$1,000.

Based on an independent evaluation and de novo review of the circumstances the trial judge rejected the settlement on the ground it was insufficient to deter future violations and insure voluntary compliance either by management or the contract miners. Whereupon, the parties agreed to submit a proposal to increase the amount of the penalty to \$2,500 and to make a matter of record a reprimand of the two individuals responsible for the violation together with an assurance from management that recurrence of such conduct would be the subject of disciplinary action, including discharge.

It is my firm belief, often expressed, that unless and until contract or day-rate miners (rank-and-file miners) are sanctioned for knowing violations of the mandatory health and safety standards the purpose and policy of the Mine Safety Law will never fully be achieved. The Secretary and the Unions, of course, do not agree. Nevertheless, I will continue to use the limited power vested in my office to impress on rank-and-file miners the vital necessity for compliance with mining practices that time and experience have shown to be essential to the preservation of the industry's and the nation's most precious resource--the miner him/herself.

The premises considered, I find the renewed motion to approve settlement is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the penalty agreed upon, \$2,500 on or before Friday, June 24, 1983 and that subject to payment the captioned matter be dismissed.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 3 1983

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 82-312
Petitioner	:	A.C. No. 36-04595-03501
v.	:	
	:	Mahoning Creek No. 2 Mine
CARPENTERTOWN COAL & COKE CO.,	:	
Respondent	:	

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Robert W. Thomson, Esq., Reed, Smith, Shaw & McClay, Pittsburgh, Pennsylvania, for Respondent.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Petitioner brought this proceeding, seeking civil penalties for two alleged violations of the mandatory safety standard contained in 30 C.F.R. § 75.316 allegedly occurring on March 24, 1982. At the commencement of the hearing, the Secretary moved that the petition be dismissed with respect to one of the citations because investigation subsequent to its issuance disclosed that it had been issued in error and that the Respondent was not in violation of the standard as charged in the citation. Respondent did not oppose the motion. The remaining citation charges that Respondent violated its approved ventilation plan because an evaluation point (also called a monitoring point) was in an area that could not be reached because of loose rock and water accumulations in the travelway.

In January, 1982, Respondent requested approval of an amendment to its ventilation plan which would include the relocation of the No. 9 evaluation point because of dangerous roof conditions. The request was denied by the MSHA district office on the ground that the revised location of the evaluation point would not assure adequate ventilation in the idled worked-out areas. In April, 1982, (after the issuance of the citation) the relocation was approved contingent on the establishment of five ventilating boreholes, to be drilled from the surface to the old No. 9 evaluation point.

Respondent contends that the evidence does not establish the alleged violation of 30 C.F.R. § 75.316; and that the denial by MSHA of the request for relocation of the evaluation point was arbitrary, capricious and unlawful.

Pursuant to notice, the case was called for hearing on April 14, 1983, in Pittsburgh, Pennsylvania. Lester C. Walker, Federal coal mine inspector and Alex O'Rourke, MSHA supervisory mining engineer, testified on behalf of Petitioner; Carl Nagodi, Respondent's resident engineer, and Donald Lilley, Respondent's Director of Health and Safety, testified for Respondent. Closing arguments were made by counsel for both parties, and each was given the opportunity to file posthearing briefs. A brief was filed on Respondent's behalf.

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

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of the Mahoning Creek No. 2 Mine, an underground coal mine in Armstrong County, Pennsylvania. The subject mine produces goods which enter interstate commerce.

2. Respondent is a medium sized operator. There is no evidence that a penalty imposed herein will affect its ability to continue in business, and I therefore find that it will not.

3. Respondent demonstrated good faith in abating the alleged violation.

4. Respondent's history of prior violations is good.

5. The ventilation plan for the subject mine approved by MSHA on October 26, 1981, and in effect on March 24, 1982, required regular weekly air readings to be taken at designated evaluation points shown on the mine map which was part of the plan. One of the designated evaluation points, number 9, in the 1 left off the Northwest Mains section, was not travelable on March 24, 1982, because of loose rock and water accumulations.

6. On March 24, 1982, Inspector Walker issued a citation charging a violation of 30 C.F.R. § 75.316-2(f)(1) because the No. 9 evaluation point in the ventilation plan was no longer travelable. The citation was modified on July 14, 1982, to allege a violation of 30 C.F.R. § 75.316 and to state that the weekly examination was not being performed due to loose rock and accumulations of water.

7. The area of the number 9 evaluation point had been "dangered off" by a State of Pennsylvania mine inspector prior to March 24, 1982, because of the roof condition. The roof could have been repaired and the area made safe by timbering and cribbing it. This, however, would have involved a considerable amount of work.

8. Inspector Walker had visited the same area of the mine in early January and noted the deteriorating roof conditions at that time.

9. On January 18, 1982, Respondent requested that monitoring points No. 9 and No. 12 be relocated because of dangerous roof conditions and flooding. This was done at least in part as a result of the suggestion of Inspector Walker.

10. MSHA denied approval of the request by letter dated February 2, 1982, on the ground that the revised locations of the evaluation stations "would not assure the idled worked-out areas . . . would be adequately ventilated."

11. A supplemental request pertaining evaluation point No. 12 was submitted to MSHA on March 3, 1982.

12. On March 18, 1982, MSHA approved the relocation of evaluation point No. 12 subject to certain conditions. It repeated that permission was not granted to relocate the No. 9 evaluation point.

13. The proposed relocation of evaluation point No. 9 was approved April 22, 1982, subject to establishing boreholes at locations acceptable to the MSHA District Manager, and subject to certain other conditions.

14. The citation referred to in Finding of Fact No. 6 was terminated on April 22, 1982, because "a new map was submitted and approved by the District Manager showing the relocation of the No. 9 evaluation point in the 1 left off Northwest mains section."

15. There is no history of methane liberation in the subject mine.

16. The purpose of the evaluation points in the ventilation plan is to assure ventilation in abandoned or worked-out areas of the mine. The original request was denied because in MSHA's judgment, to move the point 1,300 feet outby as requested would mean "1300 feet less of the mine that we could assure ventilation in."

17. The revised request for relocation of evaluation point No. 9 was granted because it included a proposal to drill boreholes from the surface to the original evaluation point 9 which would assure ventilation from the borehole to the relocated point 9. The revised request was based on numerous meetings between Respondent and MSHA, and the possibility of drilling boreholes had been discussed at these meetings.

18. It was and is the position of Respondent that all the air that would have been measured at the original point 9 was being measured at the relocated point 9, and that the boreholes had no effect on the movement of air between the two points.

ISSUES

1. Was Respondent in violation of 30 C.F.R. § 75.316 on March 24, 1982, as charged in the citation as modified?
2. Can Respondent in a penalty proceeding raise the issue whether MSHA's refusal to modify an approved ventilation plan was arbitrary, capricious and illegal?
3. If so, was the refusal by MSHA to modify the approved ventilation plan as requested by Respondent prior to the issuance of the citation herein arbitrary, capricious and illegal?
4. If a violation of a mandatory standard is found to have occurred, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

1. Carpentertown Coal and Coke Company was subject to the provisions of the Federal Mine Safety and Health Act in the operation of its Mahoning Creek No. 2 Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. On motion of the Secretary, the petition will be dismissed with respect to the violation charged in Citation No. 1144824. The Secretary stated that the facts did not show a violation as alleged, and that the citation was issued in error.
3. Respondent's brief discusses the citation (1144826 issued April 14, 1982) alleging a violation of 30 C.F.R. § 75.200 and the withdrawal order issued April 20, 1982, for failure to abate the violation alleged. The citation was subsequently vacated and the order declared void. Neither the citation nor the withdrawal order are before me in this proceeding, and I do not pass upon their propriety. Respondent states, however, that it agreed to drill boreholes only in order to obtain MSHA's permission to relocate the evaluation point and get the withdrawal order lifted.
4. The evidence shows prima facie, that Respondent on March 24, 1982, was in violation of its approved ventilation plan and therefore was in violation of 30 C.F.R. § 75.316.

DISCUSSION

Respondent argues that 75.316 only requires the adoption of a plan approved by the Secretary and that it include certain information. It is much too late to argue that the provisions of an approved ventilation plan are not themselves enforceable as mandatory safety standards under the Mine Safety Act. See Zeigler Coal Company, 4 IBMA 30 (1975), aff'd sub nom Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Secretary v. Mid-Continent Coal and Coke Company, 3 FMSHRC 2502 (1981); Secretary v. Freeman United Coal Mining Company, 5 FMSHRC 590 (1983) (ALJ). There is no question here but that the approved plan

required that air readings be taken at evaluation point No. 9 which on March 24, 1982, could not be reached because of adverse roof conditions and water accumulations. Therefore, prima facie, the ventilation plan was not being complied with, which ipso facto is a violation of a mandatory health or safety standard. However, prior to the issuance of the citation, Respondent had requested a variance in the plan to relocate evaluation point No. 9, which request had been denied. The basic issue in this case is whether the requested variance and its denial can be asserted in defense of what otherwise would be a violation of the plan.

5. A mine operator may not unilaterally change an approved ventilation plan without MSHA approval even if it is shown that the change enhances rather than diminishes safety. Secretary v. J. & R. Coal Company, 3 FMSHRC 591 (1981) (ALJ). The Secretary is charged by law with protecting safety in the nation's mines in the public interest. Under section 303(o) of the Act (repeated in 30 C.F.R. § 75.316), a mine operator must adopt "a ventilation system and methane and dust control plan" which the Secretary must approve before it is effective. The Act contemplates that the Secretary and mine operators will cooperate in developing and revising such plans in accordance with changing conditions in the mines.

6. I conclude that a mine operator may, in a proceeding to assess a penalty for violation of an approved plan, challenge the reasonableness of MSHA's refusal to modify the plan which had been requested by the operator. In Zeigler v. Kleppe, supra, the Court of Appeals stated at page 407 that a mine operator might contest an action seeking to compel adoption of a plan with terms not designed for the specific circumstances of the mine involved and, at page 410, that the imposition of "outrageously ultra vires plan provisions" nominally adopted by a mine operator would not be enforced by a court. By analogy, I conclude that an operator who has unsuccessfully sought a variance may, in a penalty proceeding for violation of a provision of the plan, defeat the action if he can show either that compliance with the terms of the plan was impossible or that MSHA's denial of the variance was arbitrary, capricious or unreasonable.

7. Compliance with the ventilation plan requirement that air be monitored at evaluation point No. 9 was not impossible as of March 24, 1982. Both the Inspector and Respondent's Safety Director agreed that the roof leading to the "old" evaluation point 9 could have been supported with cribs and posts. It would have been a major and difficult task but was not impossible. Furthermore, as is previously stated herein, MSHA approved the relocation of the evaluation point when boreholes were included in the request. According to O'Rourke, MSHA would also have approved a modification of the plan involving sealing off the abandoned area. Compliance was therefore not impossible.

8. The initial refusal of MSHA to approve the relocation of evaluation point 9 and its insistence on the establishment of boreholes to the surface before approving the requested relocation were not arbitrary, capricious or unreasonable.

DISCUSSION

MSHA initially rejected Respondent's request to relocate the evaluation point 9, because moving the point outby meant that to the extent it was moved, that much less of the abandoned area could be assured to have ventilation. (Tr. 40). MSHA had, prior to March 24, 1982, suggested the drilling of boreholes to assure ventilation in the affected area, but Respondent did not include a proposal to drill such boreholes until April 22, 1982. It is the position of Respondent that the air measured at the proposed relocated evaluation point 9 would also measure the air at the old evaluation point 9 and that the boreholes did not give any additional information as to ventilation. MSHA's position was stated by Alex O'Rourke, a supervisory mining engineer, whose primary duty is to evaluate plans or programs including revisions thereof, submitted by mine operators to the MSHA District Manager. Respondent's position was stated by Donald Lilley, its Director of Health and Safety, formerly a training instructor with MSHA, who had no professional training in mining engineering. The evidence shows a bona-fide technical dispute concerning a very limited issue. Even if I accepted the conclusions of Mr. Lilley (and Respondent), I would not conclude that MSHA's position was unreasonable, arbitrary or capricious. The law requires MSHA's approval for a variance. MSHA may not impose unreasonable conditions or arbitrarily deny a request, but obviously may impose reasonable conditions and need not grant every good-faith request to modify a plan proposed by a mine operator. There is no evidence in this record to support Respondent's hyperbolic statement that "this is a case where bureaucratic bungling and red tape with not a little governmental arrogance caused a problem that need never have arisen." The evidence does show a disagreement as to whether the modification originally sought by Respondent would enable MSHA to assure itself that the abandoned area in question would be ventilated. It is MSHA's responsibility to approve plans only when it has that assurance. The conditions it imposed in this case were neither unreasonable nor arbitrary.

9. Since I concluded that MSHA did not unlawfully reject Respondent's request for modification of the approved ventilation plan, I need not address the contention raised by Respondent that the Mine Act's failure to provide a means for direct review of the MSHA action denying the requested variance is unconstitutional.

10. The violation charged in the citation and found herein to have occurred was not serious.

11. There is no evidence that the violation was the result of Respondent's negligence.

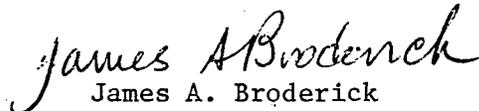
12. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation found is \$20.

ORDER

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

1. Citation No. 1144824 is VACATED and the penalty proceeding with respect to the violation charged in the citation is DISMISSED.

2. Respondent shall within 30 days of the date of this decision pay the sum of \$20 for the violation of 30 C.F.R. § 75.316 charged in Citation No. 1144823 and found herein to have occurred.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 3 1983

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No: WEST 81-268
Petitioner : A/O No: 42-00081-03027 V
: :
v. : Co-op Mine
: :
CO-OP MINING COMPANY, :
Respondent :

DECISION

Appearance: Phyllis Caldwell, Esq., Office of the Solicitor, U.S.
Department of Labor, 1585 F.O.B., 1961 Stout Street,
Denver, CO for Petitioner
Carl E. Kingston, Esq., 53 West Angelo, Salt Lake City,
UT 84115 for Respondent

Before: Judge Moore

At the outset of the trial it was stipulated that respondent's annual production was approximately 141,233 tons and that it employed approximately 25 miners. As to the history of prior violations there was some question about the printout because it covered more than a 2-year period. While MSHA, in its assessment formula, only considers violations within 2 years of the one being assessed, such limitation does not bind this Commission or its administrative law judges. The computer printout was received in evidence as Exhibit P-1.

The printout has many flaws, however, and is not self-explanatory. For example it includes assessed violations which have not been paid and there is no indication whether they have been contested or vacated or whether respondent has simply refused to pay. Such alleged violations are clearly not a part of the history of prior violations. A substantial number of the alleged violations listed on the computer printout occurred between January 6, 1979 and January 26, 1981. Specific dates of the alleged violations are not listed. The earliest order issued in the instant case was issued on January 6, 1981. While it is unlikely that all of the listed violations were issued between January 6 and January 26 of 1981 I can not make the assumption that they were not so issued, and even if I did I would have no way of knowing how many occurred prior to January 6 of 1981. The entire right half of Exhibit P-1 is stricken from the record. As to the left hand column it does show that some time prior to January 6, 1979 respondent had paid \$12,578 in civil penalties.

Government Exhibit P-3 is a mine map with numerous markings thereon. There are five different colors used on the map. The testimony transcribed at pages 12 through 17 purports to describe what these various colors represent. I find that the description is inadequate and that the mine map is of very little value in resolving the issues in this case. The mine map attached to the government's brief is very good, however.

While it was not mentioned in the briefs, respondent brought out in the course of the examination of the inspector, that at the time the citations involved in this case were issued, the United Mine Workers of America was on strike, and while Co-op's mine was a union mine it was not organized by the United Mine Workers and was not on strike. The inspector's brother "was president of the union." (Tr. 87). I presume the witness meant the local United Mine Workers chapter. The Co-op mine was organized by the International Association of United Workers Union. (Tr. 150). 1/ I find that bias on the part of the inspector was not established.

Withdrawal Order No: 1022260 alleges a violation of 30 C.F.R.75.1704 in that two separate and distinct travelable passageways for use as escapeways were not being maintained. The reason that they were not being properly maintained was that a roof fall had occurred in the intake air escapeway and the debris was in a pile that was about eight feet long and four to five feet high. The inspector considered that as blocking the passage which was one of the two escapeways. The other escapeway (return air) will be considered later.

Mr. Bill Stoddard described the areas as follows--"this area was a problem area. We had two parallel faults about 50 feet apart, and the roof had dropped down about four feet, the roof of the mine dropped down about four feet for 50 feet, then back up. So it was a problem area." (Tr. 61). After discussing the roof bolts and wire mesh that were holding up the roof he said the cave-in material was about two feet high and four feet across, that there was no loose roof and he could see that the section foreman had driven his tractor over the two feet of mud and gone on to work. "So it wasn't blocked off and I went in and talked to Kevin at that time about it."

Mr. Nathan Attwood, a mine foreman, was not in the mine at the actual time of the inspection but was there on the same day, January 6. He stated that both escapeways were travelable in a safe manner. (Tr. 137).

Mr. Kevin Peterson another mine foreman said in the area where the June 6 order was issued, he had conducted a pre-shift examination, barred down some material with other material previously barred down, created a two foot high mound and driven his tractor over the mound and on into the face area. He was with the inspector during the inspection and the tracks where he had driven the tractor over the pile earlier in the day were visible.

1/ For some reason witnesses Attwood and Mattingley were left out of the index to the transcript.

After considering the testimony discussed above, I find that there was no roof fall in the area as stated by the inspector, but a pile of debris that had been barred down from the roof. I further find that the tractor had been driven over the pile of debris and that the escapeway on intake air was not blocked by the pile of debris. Referring to this area the citation says "a roof fall and bad top is present between the number 13 and 14 crosscut in the intake air entry..." Everyone who testified concerning this area admitted it was a problem area with "bad top" but that does not mean that the "bad top" was not properly supported. It is significant to me that the inspector did not, on January 6, 1981, issue any roof control citations. I therefore find the intake escapeway was not blocked by either debris or dangerous roof conditions.

The other escapeway is partially in return air and partially along a belt entry. The inspector said the roof was supported by cribs and cross bars and that they had "tremendous weight on them." (Tr. 21). He stated "when he started around that crib and to get down into that hole, the amount of pressure that was on those cribs and on those crossbars, there wasn't no way that I was going to go through it." (Tr. 22). Concerning the same area and the secondary escapeway Mr. Peterson said:

"and we got right here to these cribs and Mr. Jones said that he didn't want to go any further and that he couldn't get through there. And we had been going through there and the belt man had been going through there and we continued to go through there setting timbers and cribs and carrying timbers and cribs in there, because we realized that was a problem area and we were supporting it." (Tr. 126).

When asked if there was anything in either the primary or secondary escapeway that would prevent safe passage on January 6, he answered no.

In balancing the testimony of the various witnesses I find that the government has not sustained its burden of proof with respect to this withdrawal order.

Although it was not mentioned at the trial or in the briefs, the inspector in this case failed to check the block which would make this a citation. He checked only "order of withdrawal" block. In Kontiki Coal Corporation vs. Secretary of Labor 1 FMSHRC 1476 (October 25, 1979), and in Secretary of Labor vs. Wolf Creek Collieries Company which is reported in the first unpaginated volume of FMSHRC decisions dated March 1979, the judges had found violations and assessed penalties, but had vacated withdrawal orders because of the failure of the Secretary to establish the underlying citations. In reversing the judges, the Commission stated that it was improper to vacate a withdrawal order in a penalty proceeding. Both of those Commission decisions involved the 1969 Coal Act and in each, the alleged violation was established. In my opinion that is an entirely different situation than the instant situation where I have found that no

violation existed. It would make no sense to leave a non-imminent danger order, that was issued solely because of an alleged violation of a safety standard, undisturbed in the face of a finding that no violation occurred. I therefore vacate the withdrawal order.

Withdrawal Order No: 1022262 charges that the operator failed to follow its roof control plan and adequately support the roof of the return air entry. The part of the return air entry involved herein was not designated as an auxiliary or secondary escapeway. Concerning this return entry, the inspector stated:

"When we got in here a-ways we encountered some bad top... I think we was in about 600 feet. And then he wanted to take me through a door out into the belt entry and I told him no I wanted to stay in the return entry because.....

JUDGE MOORE: You say bad top. Bad enough so you wouldn't walk under it?

WITNESS: It was getting bad--it was getting bad; it was so high in there that it was hard to sound it with your thumping stick, so really I was getting a doubt in my mind as to how much further I wanted to go.

But anyway, he told me we couldn't go on through the return entry, that there were some large caves in that area. And I said, 'well, how have they been making their examinations?' He said, 'well, we've been making it up to this point and then going into the belt entry and up around'". [Tr. 36-37].

He then ran into what he called "big caves" where the material from the roof filled the entire entry, he could possibly crawl over the pile of coal but he would have to go up above the roof line to do so. He referred to the caved-in material as coal, but he did not issue any citations for coal accumulations. It was later explained that plenty of air could go over the top of the mound and that the inspections were made by going as far as the caved-in material on one side and then going back out into a belt entry, walking past the cave area, and then back into the return air area and then to proceed in the opposite direction to inspect the entry as far as that end of the cave area was concerned. This had been approved by MSHA for a long time (Tr. 75). A few days before inspector Jones arrived at the mine the operators were advised that because of an explosion in an eastern mine, MSHA had changed its position and would henceforth insist that a return airway be maintained so that all of it could be walked through. The statement on page 7 of the government's main brief "allowing large roof falls to remain in the return air entry is clearly a violation of the operator's roof control plan" may be true. I have not seen the plan or been informed of what it requires, but such plans are usually concerned with supporting a roof rather than cleaning up after a roof fall. The last paragraph beginning on page 7 of the government's main brief states:

Mr. Stoddard, the mine manager, said that he thought that allowing this condition to exist was okay because an MSHA supervisor or "some inspector" was "aware" of or had seen it, or "some" circular said it was okay. Yet Mr. Stoddard had never applied for a variance and had never gotten one. (Tr. 108-109). He did not have a copy of any circular nor was he able to be specific about the foundation for his assumption that some "variance" he thought he had was "changed." Respondent clearly knew he would be using this defense at trial and could have supported this hearsay testimony with the "documents" referred to or with the MSHA supervisor's testimony, if such evidence did exist. Respondent never attempted to obtain the presence of Mr. Matekovic (the supervisor referred to) at the trial, either by subpoena or through this counsel's cooperation. As a mine operator, Mr. Stoddard is charged with the knowledge that any variance must be in writing. For obvious reasons he chose to assume that he had authority to leave the deteriorated conditions in this entry. It would have taken a great deal of his miners' time and labor to rehabilitate this entry. When this order was issued the operator knew he had to completely abandon that entry. It was easier to establish a return air entry somewhere else because "we couldn't rehabilitate that cave" (Tr. 77).

The language quoted above implies that the circular that Mr. Stoddard testified about either does not exist or that the government does not know whether it exists or not. If the government can prove that the circular referred to does not exist, it should consider prosecuting Mr. Stoddard for perjury. If the circular does exist, and the Solicitor's office is aware that it exists, then it should question the propriety of including the above statement in its brief.

Nevin Mattingly is an electrician and vice president of the local International Association of United Workers Union. As such he is concerned with the safety of the miners. He accompanied Mr. Jones on January 8 and did not see any dangerous roof and stated that every time he had gone through the area it "looked sufficient."

In its reply brief the government challenges the credibility of Mr. Mattingly. On page 4 the following appears:

Mr. Stoddard, an owner and the mine manager clearly stated that "we're non-union. (Tr. 87)". Yet the operator attempted to present Mr. Mattingly as a union representative in an effort to establish him as a credible and objective, even adversary voice.

On Page 87 of the transcript it is explained that the U.M.W. was striking and that the inspector's brother was an officer of the local UMW. The following ensued:

JUDGE MOORE: And you're a non-union mine?

WITNESS: We're non-union. We're not a UMW mine.

I was the one that asked the question and as I understood the answer the second sentence was a correction of the first. It is certainly not enough to challenge the credibility of Mr. Mattingly. Whatever else the government may have established about the conditions at the mine it did not establish a roof control violation and that is what the order charges. I find a violation has not been proved and I vacate the order.

Citation No: 1023061 alleges a violation of 30 C.F.R. 77.202 for accumulations of float coal dust and coal fines in various areas of the tipple. The dust standard for surface areas provides:

"coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts."

The accumulations described by the inspector were certainly extensive enough to be considered "dangerous amounts". The accumulations consisted of float coal dust and coal fines. The inspector described coal fines as "ground-up coal dust that is too heavy to float on the air. (Tr. 51). While I can not accept the inspector's opinion that this mixture of unsuspended coal fines and float coal dust could be ignited with a match and could burn as rapidly as gunpowder (black powder) it was nevertheless combustible, and a source of ignition in the form of a fire in a bucket was in the area. I find that there was a violation and that respondent was negligent. The hazard involved was serious but respondent exhibited good faith abatement. I agree with the recommendations contained in the "Narrative Findings for a Special Assessment" (Exhibit P-2) and assess a penalty of \$800.

It is therefore ORDERED that respondent pay to MSHA, within 30 days, a civil penalty of \$800.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail

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Mr. Hastings alleges that he was discharged in violation of section 105(c)(1) of the Act.^{1/} The essence of his complaint is that he was discharged after complaining of a job-related illness which he believed made it unsafe for him to bar down loose rock. He seeks reinstatement and back pay.

A full hearing on the merits was held in Denver, Colorado, following which both parties submitted briefs.

REVIEW AND DISCUSSION OF
THE EVIDENCE

I

The undisputed evidence shows that complainant Hastings, a miner in respondent's underground uranium mine, was discharged by respondent at the end of his work shift on April 30, 1982. According to Hastings' testimony, the series of events leading to his discharge began on April 27, 1982, when he entered an area filled with blasting smoke and fumes out of concern for Richard Milligan, his shifter, who had walked into the area earlier and had not reappeared within two or three minutes. Hastings asserted that the smoke generated by the explosive used had a reputation for causing pneumonia-like lung symptoms. Milligan wore no respirator when he entered the smoke, according to Hastings, but Hastings did wear one. Hastings urged Milligan to come out, and Milligan obliged him. Hastings acknowledged that Milligan appeared "normal," but claimed that he, Hastings, was coughing.

1/ Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

That night, according to Hastings, he experienced fever, nausea and coughing. The following day he reported to work with "more or less the effects of a cold." He mentioned an earache and "a bad sore throat." Early in his shift on the morning of April 28, he testified, he complained to his mining partner, Herbert Rowe, of feeling ill, and Rowe advised him to go home. His sore throat was mild at that time, but he had developed extreme dizziness and Rowe was afraid for their mutual safety if he tried to work in that condition. Rowe, Hastings testified, advised him that he was protected by the MSHA rules under such circumstances.

Hastings further testified that he told his shifter, Milligan, when Milligan arrived at the work area, that he was too sick to work safely. He also testified that he mentioned to Milligan that his illness resulted from the smoke he breathed the day before. The conversation also touched on Hastings' accumulation of penalty points for prior absences. According to Hastings, he told Milligan he couldn't get "points for this one." Milligan, he asserted, disagreed, saying, "Don't bet on it."

Hastings thereupon left for home. On the following day he saw a physician who made a diagnosis of "pharyngitis" and prescribed an antibiotic. He also did a throat culture which later proved negative for streptococcus. On April 29, Hastings called the guard shack to report that he would not report to work that day because of continuing illness. On April 30, 1982, he returned. At the end of his shift on that day he received a discharge notice. It was dated April 29, but the parties stipulate that it was effective at the end of the April 30 workday. Hastings had worked for Cotter since April 6, 1981. He protested the discharge to Marv Murray, the mine superintendent, contending, he testified, that the absence should have been excused. Murray, according to Hastings, was only interested in counting points and told him the discharge was automatic and that he could not make an exception, especially since others had been discharged on the same basis.

Thereafter, Hastings testified, he filed a grievance through the union, and a complaint with MSHA. The record discloses that the grievance complaint was unsuccessful, and that MSHA refused to prosecute the complaint before this Commission.

Herbert Rowe, Hastings' mining partner, testified in Hastings' behalf. His testimony on the events at the mine on April 27 and 28 generally supported that of Hastings. Rowe was unable, however, to give more than vague support to Hastings' testimony about the substance of Hastings' conversation with Milligan. Specifically, he was unable to say that Hastings ever mentioned more than that he was sick and had to go home. He could not substantiate, though he was present during the April 28 conversation, that Hastings ever mentioned that the smoke incident on the April 27 was the cause of his illness.

Cotter based its defenses upon a straightforward denial that Hastings' discharge had any relationship to a safety complaint. According to Cotter, complainant's departure from work on April 28 was treated as an unexcused absence. Cotter's only witness, Duane Dughman, its vice president for administration, testified that he was familiar with the circumstances leading to Hastings' discharge, and made the final decision himself. It was based, he asserted, upon excessive absenteeism, and done in accordance with the company's published disciplinary policy which had been in effect since November of 1980. As described in Dughman's testimony, and set forth in respondent's exhibit 1, this policy provided for progressive discipline for "chargeable" absences. Absences for non-job-related illnesses or injuries were chargeable, the witness explained, but each period of verified illness was considered a single incident, irrespective of the number of days involved. (Absences for death in the family, union business, weather, industrial injuries, etc., "non-chargeable.") Also, miners could, through good attendance, accumulate credits against chargeable absences.

Sanctions, Dughman asserted, were applied progressively, commencing with warning, advancing through suspensions, and ending with outright termination. The testimony and disciplinary rules also explained an elaborate penalty point system with specific numbers of points allowable to each offense. When points reached 100, discharge was automatic. These were computed over a six months "moving period" so that no miner accumulated points indefinitely; those over six months old were stricken from the work record.

Dughman testified that in the six months preceding the April 28 incident, Hastings had accrued six chargeable absences and one tardiness violation. Cotter then introduced, through Dughman, copies of disciplinary and suspension notices issued to Hastings reflecting those violations. None of these, according to the witness, were appealed or challenged by Hastings. He further testified that as of April 28, a further chargeable absence meant an automatic termination, which he approved. The discharge was taken through the grievance procedure by the union. A copy of the arbitrator's decision finding a good cause discharge was introduced. (Respondent's exhibit 10). Likewise, a Colorado referee's decision granting only reduced unemployment benefits for complainant was introduced. (Respondent's exhibit 11.) The referee found insufficient proof that the discharge was for job-related illness.

Dughman also testified that the operator had a well publicized policy requiring the filing of reports of job-related illness or injury on a readily available form. Hastings, he declared, had never filed one. He further testified that Hastings had not filed for reimbursement of the physician's fee for his examination and treatment on April 29. These services, he said, would have been eligible for workman's compensation payment had they been for a job related illness or injury. Also, according to Dughman, Cotter had a temporary injury pay policy which would have paid benefits for on-the-job illness, but Hastings never made a request for payment.

Finally, Dughman maintained that at the time he approved the discharge neither he nor any of the company officials with whom he conferred had any knowledge that Hastings' illness was, or was alleged to be, job-connected.

Complainant disputed none of the fundamental facts revealed in Dughman's testimony. He conceded the previous absences, disciplinary notices and suspensions, and the adverse point totals. He did, however, resist any inference that his failure to file an accident report or apply for the various benefits for job-related illness showed that he did not believe his injury was caused by smoke inhalation. He took no such steps, he maintained, because he was discharged as soon as he returned to work on April 30, and had no opportunity for filings (Tr. 52).

III

Upon the record before me, I must conclude that complainant has failed to prove that respondent discharged him because he engaged in protected activity under the Act. It is now well settled that the Act extends protection to miners who refuse to work under conditions they believe to be unsafe or unhealthful, so long as that belief is reasonable and held in good faith. Secretary of Labor ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds; Consolidation Coal Company v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981); Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981).

The instant case, however, does not present the common situation where a miner refuses a work assignment because of what he perceives to be unsafe or unhealthful condition or practice in the mine. Here, in a sense, Mr. Hastings perceived his own physical condition to be the hazard. He contends that he is protected against discharge because his physical symptoms made it dangerous for him to bar down loose rock. Presumably, he would have undertaken the task as a matter of routine had he felt well.

The discrimination provisions of the Act are silent, of course, upon the issue of illness or temporary physical impairment as an element in a miner's decision to refuse to work. Clearly, however, we need not linger over any notion that sickness or injury, without more, are encompassed within the protective intendments of the Congress. Nothing in the language of section 105 suggests that the miner who is ill or otherwise unfit to perform the duties ordinarily associated with his position may present himself for work

and then refuse assigned tasks with impunity because his impairment renders their performance unsafe. ^{2/}

Complainant, indeed, appears to make no such contention. In his post-trial brief his able representative stresses the alleged occupational origin of Mr. Hastings' symptoms of April 28. The suggestion is that a refusal to work based upon a miner's safety concerns growing out of a partial incapacity because of an occupational illness must fall within the ambit of the Act's protection. ^{3/} The argument is summarized at page five of the brief in this statement:

The facts are that the complainant was discharged because he became ill as a direct result of being exposed to unhealthful conditions while removing a fellow workman from the contaminated area.

Had it not been necessary for Hastings to retrieve his shifter from the smoke-filled blasting area, the argument goes, he would not have been too ill to safely bar down rock. Since Cotter is responsible for safety in the mine, the argument continues, the shifter's act in entering the shot area before the air had cleared - an act violative of company safety policy - was attributable to the company, and Hastings' rescue effort was to have been anticipated. Therefore, Hastings inability to work safely on April 28th took on the character of a protected activity.

The legal question posed by the argument need not be decided here because complainant has failed to present evidence sufficient to establish the necessary factual predicate: that his symptoms on April 28, 1982 were caused by entering the shot area. I must reach that conclusion for several reasons.

2/ The Commission, so far as I know, has never entertained the question. In Bryant v. Clinchfield Coal Company, 4 FMSHRC 1380 (1982), however, Judge Kennedy made what I consider to be a sound general statement of the law:

Any claim of protected activity that is not grounded on an alleged violation of a health or safety standard or which does not result from some hazardous condition or practice existing in the mine environment for which an operator is responsible falls without the penumbra of the statute

I do not believe a miner can, consistent with the good faith, reasonable belief requirement, present himself as willing and able to work ... and at the same time claim a protected right to refuse that work because of his impaired physical condition....

3/ In Eldridge v. Sunfire Coal Company, 5 FMSHRC 408 (1983), Judge Koutras held that a miner's refusal to work an extra shift out of fear of exhaustion and fatigue was a reasonable, good faith, safety-related act, entitling him to a claim of protected activity under the statute. See also Bryant v. Clinchfield Coal Company, supra, note 45 at 1422, in which it is postulated that a job-related injury or illness adversely affecting a miner's capacity to work safely "may well justify a refusal to work."

First, there was no evidence that the shifter, Milligan, who entered the smoky area without a respirator, suffered any ill effects. Hastings and Rowe conceded that Milligan showed none after he emerged from the smoke. The undisputed record shows that he was at work on the following day. Hastings, on the other hand, wore a respirator (though he did question whether he had a tight fit).

Second, if Hastings was convinced that his symptoms and subsequent absence from work were attributable to smoke exposure on the job, it is noteworthy that he neither filed an accident report with Cotter (Tr. 68), nor a workman's compensation claim for payment of his physician's fee (Tr. 87), nor a claim for temporary injury pay for the days he missed work, a benefit offered by Cotter. Such actions would have been consistent with belief in a job-related respiratory condition. Nothing in the record suggests that these steps could not have been taken after his discharge.

Third, the objective medical data, to the extent such data were introduced at trial, failed to support Hastings' position. The physician's billing (exhibit C-1) shows the diagnosis as "pharyngitis," a general term for irritation or inflammation of the pharynx. Hastings urges that since a throat culture was negative for streptococcal infection, his throat problem could not have been caused by a "germ," and was therefore the product of the smoke inhalation. The assertion is too broad. Nothing of record suggests that laboratory studies were done to rule out an infective process attributable to other microorganisms including, for example, the common cold virus or an influenza virus. Neither is there any indication that the treating physician ever departed from his highly generalized and undifferentiated initial diagnosis of pharyngitis. Had he ever concluded that complainant's condition was work-related, that opinion would likely have been made known at the hearing.

Fourth, evidence that Hastings actually informed his shifter, Milligan, that he was not only ill, but suffering from a work-related illness, is at best weak and uncertain. Had Hastings believed on April 28th that his illness was job-related, it is likely that he would have stressed that belief to his supervisor. Complainant's witness Rowe testified at one point that Hastings' "total conversation" with shifter Milligan was that "he was sick and going home" (Tr. 19). Later, he testified that he "believed" safety was mentioned (Tr. 25). Then he summarized the Hastings-Milligan conversation this way:

Basically, Mr. Hastings' told Mr. Milligan that he was not well. He was a hazard to himself and to me; that he was going home. Mr. Milligan stated, "you will probably lose your job over this." He says, "I'm not telling you to go home and I'm not telling you to stay. You have to make the decision." [Tr. 25].

When asked pointedly if Hastings told Milligan that his illness was caused by blasting smoke, he replied "I honestly don't remember" (Tr. 25).

Hastings did testify that he informed Milligan, as his immediate supervisor, that he was ill because of the blasting smoke (Tr. 33, 105). The force of this testimony is diminished, however, by the fact that his recitals of the basis for his complaint made in the earlier stages of the case omit any mention of the smoke incident, or job-related illness generally. His original complaint filed with MSHA mentions only that he was ill with vertigo, earache, and a sore throat. His separate complaint before this Commission, filed three months later, relates the same symptoms with no reference to cause. Similarly, as brought out in cross examination, the interview statement to the MSHA investigator, which Hastings reviewed and edited, was silent on the smoke matter. He acknowledged that he responded to the investigator's question about the content of his conversation with Milligan with the statement, "Oh, yeah I told him I was sick and that I had to get out." (Tr. 54, 57). Hastings explains this by asserting that he mentioned the smoke incident to the investigator, but that in the recorded and transcribed interview the investigator asked no questions about it (Tr. 54). He also spoke of "not introducing at that stage what happened on 4/27." (Emphasis added.) (Tr. 57.) Concerning the lack of reference to the smoke matter in his two complaints he testified: "... in these complaints I'm trying to cite the article under the Act that would cover such activity as being absent on 4/28 and 4/29/82" (Tr. 57). Despite these explanations, the reasonable inference is that there was, at the very least, a marked shift in emphasis between the time of discharge and the time of trial from the mere fact of illness to a theory of job-caused illness.

Fifth, I note that in two adjudications prior to this one, complainant failed to convince the triers-of-fact that the illness occasioning his absence and consequent discharge was job-related. On August 13, 1982, a referee for the State of Colorado, ruling on an unemployment benefits claim, held that complainant had not established that his illness was caused "by conditions on his job." (Exhibit R-11.) Likewise, on September 15, 1982, the arbitrator who heard Hastings' complaint under the labor agreement between Cotter and the Oil, Chemical and Atomic Workers Local No. 2-947 found that the evidence did not establish "an occupation-related illness." (Exhibit R-10 at 9.) These collateral determinations carry no great weight in this present case, but warrant mention in that the referee and arbitrator, confronted with the same issue as this judge, also found the miner's evidence insufficient.

IV

In summary, I am convinced that complainant was ill on April 27 and April 28, 1982, as he contends. I am further convinced that he told his immediate supervisor that he was too ill to work. I am not convinced, however, that complainant's evidence showed that his illness was caused by smoke inhalation. The previously listed weaknesses in complainant's proofs, considered singly, could perhaps be explained away; taken together, however, they effectively undercut the credibility of the claim. For the reasons discussed earlier, absent a job-related cause of his illness, Mr. Hastings can make no case that his refusal to work was reasonable, and therefore a protected activity. No sensible reading of the Act or its legislative history permits an inference that its anti-discrimination provisions were intended to supplant the customary ways in which employers and employees settle questions concerning illness and sick leave policy where the illness is not work-related. These matters remain a matter of management discretion, as tempered by the collective bargaining process.

There is a further difficulty with complainant's position. Section 105(c) plainly requires that protected activity claims be founded upon a safety complaint made to the operator. ^{4/} Safety concerns held privately by a miner, in other words, can scarcely furnish a discriminatory motive for discharge. Since I hold that an illness or injury, not acquired in a work situation, cannot qualify as a basis for safety-related discharge under the Act, it follows that a complaint by a miner of incapacitation due to such a condition cannot stand as a safety complaint, whether he speaks of it in terms of safety or not.

The earlier discussion in this decision concerning Hastings' April 28th illness dealt with the dual questions of whether the miner's illness was in fact job-related, and whether at that time he believed it to be job-related. As noted there, I did not find persuasive proofs that he conveyed to Milligan, his supervisor, a belief that his illness was due to inhalation of blasting smoke. Those same reservations about the content of his dialogue with Milligan are relevant to the question of whether a complaint was registered. Since respondent failed to sustain his burden of demonstrating that a meaningful complaint was made, his claim of protected activity must fail on that separate ground, as well. Any colorable complaint arising from a claim of illness must include an assertion or notice in some form that the illness was job-connected.

V

Based upon the findings that (1) complainant's illness was not shown to be job-related, and (2) that no safety related complaint cognizable under the Act was lodged with the operator, I conclude that Mr. Hastings was not discharged for engaging in protected activity.

ORDER

Accordingly, this complaint of discrimination is ORDERED dismissed with prejudice.


John A. Carlson
Administrative Law Judge

Distribution:

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4/ Taylor Adkins et al v. Deskins Branch Coal Company, 2 FMSHRC 2803 (1980)

Citation 160837

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 56.3-50. 1/

Petitioner's uncontroverted evidence establishes the following facts:

Earl B. Diggs, an MSHA inspector experienced in mining, issued this citation when he learned that two miners were working on a pile of rocks some 50 yards square (Tr. 7, 8, 10-12, 35, Exhibit P3). The men on the boulders lacked a sound footing while holding a 65 pound air drill (Tr. 10-11). The boulders ranged in size between two and a half feet to seven feet in diameter (Tr. 10-11). If the boulders shifted they could fall and crush the miners (Tr. 12, 13).

One or two weeks later it was found the condition had been corrected. The boulders had been separated and blocked to prevent movement. Drilling of the boulders would take place on the ground (Tr. 13).

The foregoing facts establish a violation of Section 56.3-50. The citation should be affirmed.

Citation 160839

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 56.18-10. 2/

Petitioner's uncontroverted evidence establishes the following facts:

Don McCoy, in charge of respondent's quarry, advised Inspector Diggs that at the time there were no supervisors trained in first aid (Tr. 14, Exhibit P4). Further, respondent's employees hadn't been offered first aid training (Tr. 14).

1/ The cited standard provides as follows:

56.3-50 Mandatory. Material, other than hanging material, to be broken by secondary drilling and blasting, or by any other method shall be positioned or blocked to prevent hazardous movement before persons commence breaking operations. Persons who perform those operations shall work from a location where, if movement of material occurs, those persons will not be endangered.

2/ The cited standard provides as follows:

56.18-10 Mandatory. Selected supervisors shall be trained in first aid. First aid training shall be made available to all interested employees.

On a prior inspection MSHA had offered such training, at no cost, to respondent (Tr. 15). Forty miners were affected by this citation (Tr. 16).

The foregoing facts establish a violation of Section 56.18-10. The citation should be affirmed.

Citation 160840

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 56.5-3. ^{3/}

Petitioner's uncontroverted evidence establishes the following facts:

Inspector Diggs observed dust around the collar of a drill hole. Two miners were drilling without water. Dust was flying (Tr. 16, 17, 18).

"Collared" as used in the regulation means that when starting to drill water is added up to the steel. This causes the hole to harden and round out. (Tr. 17).

The equipment available for dust control wasn't fit for use. Hoses in the water tank had been disconnected and there was no water in the tank (Tr. 17).

It is necessary to drill wet to keep down the dust. This prevents miners from being exposed to possible silicosis caused by exposure to silica dust (Tr. 17).

There were no dust control measures at this site although there are three types of dust control measures available (Tr. 18).

The foregoing facts establish a violation of the regulation. The citation should be affirmed.

Civil Penalties

Petitioner proposes the following civil penalties for the citations:

Citation	160837	\$275
	160839	445
	160840	305

3/ The cited section provides as follows:

56.5-3 Mandatory. Holes shall be collared and drilled wet, or other efficient dust control measures shall be used when drilling nonwater-soluble material. Efficient dust control measures shall be used when drilling water-soluble materials.

The mandate to assess civil penalties is contained in Section 110(i) [now 30 U.S.C. 820(i)] of the Act. It provides:

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Concerning prior history: I find respondent has an extensive adverse history. The computer printout, admissible as a business as well as a public record, indicates respondent was assessed 326 violations as a result of 30 inspections (Tr. 19-27, Exhibit P2). At the request of the Petitioner the Judge further took official notice of prior cases involving these parties. These cases were docketed as Denver 79-139-PM; Denver 79-140-PM; Denver 79-176-PM.

Concerning size: respondent is a large operator. This is indicated by the evidence that there were 174,470.4 annual man hours expended at this quarry (Answers to Interrogatory No. 4).

Concerning negligence: These violative conditions should clearly have been known to the operator.

Concerning the effect on operator's ability to continue in business: This is essentially an affirmative issue to be established by the operator. Buffalo Mining Co., 2 IBMA 226 (1973).

Concerning gravity: The gravity is apparent and severe in two of these citations. The first aid training citation could, under some circumstances, be equally severe.

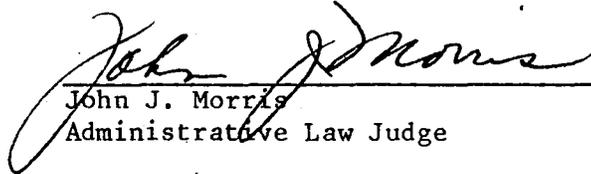
Concerning good faith: The record establishes that respondent abated the violative conditions.

After considering all of the statutory criteria I conclude that the penalties proposed by petitioner are appropriate.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citations 160837, 160839, and 160840 are affirmed.
2. The proposed civil penalties of \$275, \$445, and \$305 are affirmed.
3. Respondent is ordered to pay the sum of \$1,025 within 40 days of the date of this order.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 9 1983

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: CENT 81-248
Petitioner	:	A/O No: 41-02876-03012 V
	:	
v.	:	Little Bull Creek Mine
	:	
ZEUS CORPORATION,	:	
Respondent	:	
	:	
SECRETARY OF LABOR, et al	:	Civil Penalty Proceeding
Petitioner	:	
	:	Docket No: CENT 81-252
v.	:	A/O No: 41-02876-03011 V
	:	
AMISTAD FUEL CORPORATION,	:	
Respondent	:	

DECISION

Appearance: George Collins, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square Building, Dallas, TX 75202
David M. Williams, Esq., P.O.B. 242, San Saba, TX 76877

Before: Judge Moore

At the hearing the parties agreed that under the Commission's National Gypsum decision, 3 FMSHRC 822 (1981) the two violations involved in the citations in these cases would not be considered significant and substantial. Consequently, the citations would not have triggered the special assessments procedure if they had been issued after that decision.

The narrative statements accompanying the special assessments are not contained in the file but the attorneys, with the obvious agreement of the inspector explained the situation. This was an experimental mine in west Texas and the company was unable to obtain the certification of electrical inspectors to make the examinations required by 30 C.F.R. 77.502-2. The examinations were in fact made by competent electricians but none had yet met the definition of "qualified person" contained in 30 C.F.R. 77.103.

The special assessments were \$1,000 for each violation. The parties proposed that I modify the citations to eliminate the significant and substantial findings, affirm the citations as modified and assess a penalty of \$20 for each violation. In the interest of uniformity of

treatment, inasmuch as that is the way the matter would be handled if the same violations were discovered today, I agreed to accept the proposal.

The two citations are therefore modified to eliminate the significant and substantial findings and as modified they are affirmed. As to the civil penalty, I find there was no hazard, that the history of prior violations was small and that there was good faith abatement. In the circumstances I find no negligence and although the record does not contain the size of the company or operation, I do not believe that that criterion matters in the circumstances of this case.

Respondents are accordingly ORDERED to pay a civil penalty to MSHA in the total sum of \$40. The payment is to be made within 30 days.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: Certified Mail

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/db

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 9 1982

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATIVE (MSHA), : Docket No. LAKE 81-190-M
Petitioner : A.O. No. 11-02051-05011-V
 :
v. : Docket No. LAKE 82-65-M
 : A.O. No. 11-02051-05014-A
 :
TAMMSCO, INC., :
HAROLD SCHMARJE, : Tammsco Company Mill
Respondents :

DECISIONS

Appearances: J. Philip Smith, Trial Attorney, U.S. Department of Labor, Arlington, Va., for the petitioner; Malachy J. Coghlan, Esquire, Chicago, Illinois, for the respondents.

Before: Judge Koutras

Statement of the Proceedings

These are consolidated civil penalty proceedings under sections 110(a) and 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. §§ 820(a) and 820(c).

In Docket No. LAKE 81-190-M, Respondent Tammsco, Incorporated, the operator of the Tammsco Company Mill, a silica-producing plant located in Tamms, Alexander County, Illinois, is charged under section 110(a) of the Act with violating the mandatory safety standard under 30 CFR § 57.5-5.

On May 7, 1981, MSHA Inspector George LaLumondiere issued a section 104(d)(1) Citation No. 0501241 to Tammsco, citing an alleged violation of mandatory standard 30 CFR 57.5-5, and the condition or practice described on the face of the citation states as follows:

The Ruff Buff bagging machine was not hooked into the dust collection system of the mill. The dust control plan submitted on 4-14-80 states that all bag machines will have dust collectors as engineering controls to control silica dust. This bagger is in use and a pallet of Ruff Buff was partially loaded. This is an unwarrantable failure.

In Docket No. LAKE 82-65-M, Respondent Harold Schmarje, the Tammsco Company plant manager, is charged under section 110(c) of the Act with knowingly authorizing, ordering, or carrying out the aforesaid violation as an agent of the corporate operator, Tammsco.

A consolidated hearing was conducted in these proceedings in Chicago, Illinois, October 6-7, 1982, and the parties appeared and participated fully therein. By agreement of counsel, posthearing depositions of several additional witnesses who did not testify at the hearing were taken in Evansville, Indiana, November 3-4, 1982. The parties submitted posthearing briefs and proposed findings and conclusions, and all of the arguments presented have been considered by me in the course of these decisions.

Issues

1. Whether Respondent Tammsco, Inc., the corporate mine operator, committed a violation of 30 CFR § 57.5-5 under section 110(a) of the Act, and, if so, the appropriate civil penalty which should be assessed against said operator pursuant to section 110(i) of the Act.
2. Whether Respondent Harold Schmarje, acting as an agent of the corporate mine operator, knowingly authorized, ordered, or carried out the aforesaid violation under section 110(c) of the Act, and, if so, the appropriate civil penalty which should be assessed against him individually pursuant to section 110(a) of the Act.
3. Additional issues raised by the parties are identified and discussed in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.
2. Commission Rules, 29 CFR 2700.1 et seq.
3. Sections 110(a) and 110(c) of the Act. Section 110(a) provides for assessment of civil penalties against mine operators for violations of any mandatory safety or health standards, and section 110(c) provides as follows:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) (emphasis added).

An "agent is defined in Section 3(e) of the Act (30 U.S.C. § 802(e)) to mean "any person charged with responsibility for the operation of all or part of a coal mine or other mine or the supervision of the miners in a coal mine or other mine."

4. 30 CFR § 57.5-5 provides in pertinent part as follows:

Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment.

Testimony and evidence adduced by the petitioner

Max B. Slade, Acting Chief, Division of Health, Metal and Nonmetal Section, MSHA, Arlington, Virginia, testified as to his background and experience (exhibit P-1), and confirmed that he was familiar with the respondent's mining operation. He first became aware of silica dust problems at the plant in 1976, and he was concerned about the company's noncompliance record, as well as its advertising claims that its product was an amorphous type silica which should be of no concern to MSHA as a health problem. Amorphous silica is not as harmful as crystalline silica. As a result of the company's claims, and since MSHA's analysis indicated that the silica was crystalline, Mr. Slade requested NIOSH to conduct a health hazard evaluation of the workers at the plant to determine if the silica was in fact amorphous and whether it was harmful, and he did so by letter received by NIOSH on April 18, 1979 (exhibit P-3) (Tr. 20-28).

In response to questions concerning exhibit P-2, a computer print-out depicting the prior history of section 57.5-5 citations at the plant, Mr. Slade agreed that many of those listed are in fact one citation in which the abatement time had been extended (Tr. 30). In general, many of the citations address specific pieces of equipment or job descriptions of miners, and that the equipment or individual miner is subjected to dust exposure tests as required by Part 57 of the regulations. Dust samples obtained through these tests are submitted to MSHA's analytical lab in Denver, Colorado, and if the results show that an operator is out of compliance a citation will issue and the operator would be expected to bring the airborne contaminants within the allowable limit (Tr. 32).

In response to a question as to what caused MSHA to initiate a NIOSH survey of the plant in question, Mr. Slade responded as follows (Tr. 33-34):

THE WITNESS: The company had sent us numerous correspondence, pictures, microscopic analysis of their product, claiming that it was amorphous silica and should not be regulated under the silica dust standard, that it should be regulated under the amorphous dust standard. Our individual laboratory showed that it was crystalline silica and we needed some cooperation from NIOSH to verify this fact.

JUDGE KOUTRAS: Now, was this communication from the respondent, from the company in this case, in the context of defenses to each of these citations that were issued against the company, or is it in connection with some other general--

THE WITNESS: Usually some other general correspondence, just trying to make an agreement with us that we would not treat them as a crystalline silica operation but we would allow them a more liberal TLV, that we would allow them to have more dust contamination in the atmosphere than is allowed with crystalline silica.

Cathy Moring, Industrial Hygienist, NIOSH, Morgantown, West Virginia, testified as to her background, experience, and expertise as reflected in the report which she co-authored, exhibit P-5, and she also confirmed that exhibit P-3 is a copy of the letter from Mr. Slade requesting NIOSH's technical assistance. She confirmed that NIOSH conducted a dust survey at the plant, and this included a "walk-through" survey in May 1979, and the company physician and union were contacted in connection with the survey. An "industrial hygiene medical survey" of the current and ex-employees was conducted in July 1979, and in August 1979, the workers surveyed were notified of the results of the survey. In September 1979, the preliminary interim medical reports findings were published, and the final technical assistance report was presented to MSHA and the company in March 1980, (exhibit P-5, Tr. 37-41). Ms. Moring confirmed that she and Dr. Banks, whose name appears on the report, conducted the survey together and she co-authored it. Dr. Banks is no longer with NIOSH, and is in private medical practice in New Orleans (Tr. 42). She explained the survey procedure as follows (Tr. 45-46):

THE WITNESS: The procedure that we go by, we receive a written request from MSHA to provide technical assistance, from there on it's our ball-game. We contacted the president of the company,

the local union, the company physician, to let them know we were coming, that this is the type of information we wanted to look at, we would like to take a walk-through survey of the facility, we'd like to look at their medical records, their environmental sampling records, compliance type records, so we can get an idea of the history of the facility. From that determination we can plan our strategy as to how we should investigate the plant to find out if there was a potential health hazard existing in the facility, so that we come back in July to take environmental sampling to determine the exposures that the workers have at that date and time. We also provided chest X-rays and under informed consent to all workers. We had a few refusals. And we also contacted ex-workers because of the seriousness of the disease in question.

The information is then, all prior identifiers is taken out of this information and reported back to the company, to the union, to the regional OSHA and MSHA offices, and individual copies to people that participated in the surveys are given back their medical findings and referrals from our physicians that say, "You need to seek further attention", or "from the findings we found there seems to be no problem."

JUDGE KOUTRAS: And I take it the recommendations that are contained in this report at Page 9 are recommendations to the plant, to the company. Is there any followup done on this?

THE WITNESS: We make our recommendations and at a later period of time the Division Director, Dr. Merchant of this facility, offered the assistance of our control technology group to assist these companies in improving their conditions.

Ms. Moring testified as to some of her findings, as follows (Tr. 53-55):

Q. Now, let me just ask you this question specifically before I ask you to discuss the findings in the report. Did you find in your survey the silica at this particular plant to be of the amorphous or the crystalline type?

A. It is 98 to 100 per cent crystalline structure.

Q. Now, I would like you to at this time discuss very briefly your findings in that report and your conclusions?

Q. Can you explain the difference between the two types of silica, what the effect of them is?

A. Amorphous silica has no crystalline structure. It is considered to be less toxic and its degree of toxicity is under question right now in the scientific field. Crystalline silica has crystalline structure. This particular product is microcrystalline, meaning that, where the name amorphous came from if you look at an electronmicrograph you will see an amorphous structure, a structure that has no definite size of shape; if you look closer its an amorphous conglomerate of crystals, so it's truly a microcrystalline quartz.

JUDGE KOUTRAS: Now, from a layman's point of view, the amorphous type is something that is not likely to adhere to--

THE WITNESS (interrupting): With silicosis the exact way it causes, silica causes the disease is still unknown, there are several theories on it. It is accepted fact that amorphous silica is not as toxic as crystalline silica and there have been suggestions in the literature that microcrystalline is more toxic than the crystalline structure.

JUDGE KOUTRAS: So, between the two the amorphous is the lesser of two evils, if I could characterize them, take license with that type of characterization?

THE WITNESS: Right.

Q. Would it also be fair to say that amorphous is less harmful?

A. Same thing, less harmful, less toxic.

Q. And the micro, did I understand you to say that according to your survey this was microcrystalline, which is even worse than crystalline by itself?

A. That hasn't been proven yet. It is the suggestion in other studies that microcrystalline may be more fibrogenic than the regular crystalline.

And, at Tr. 56-58; 59-60:

A. Our first conclusion is that NIOSH considered the situation down at Tammsco to be of imminent danger status, basing it upon the health hazard present,

exposure to health hazard present can cause irreversible harm and can shorten life. We feel there's a very serious hazard.

JUDGE KOUTRAS: O.K., as of the date of this?

THE WITNESS: As of the date, based on our results of the day we were there, the 17 workers that we sampled were over-exposed to free silica according to the NIOSH recommended standards. Our standards are not the same as MSHA.

JUDGE KOUTRAS: All right, hold it now. Your recommended standard?

THE WITNESS: We have a recommended standard of 50 micrograms per cubic meter.

JUDGE KOUTRAS: Fifty?

THE WITNESS: Micrograms. To compare that with the NIOSH standard, if you're looking at 100 per cent quartz, our standard is essentially half of MSHA's enforceable standard.

JUDGE KOUTRAS: And where is MSHA's enforceable standard found, do you know?

THE WITNESS: It's confusion, it's a calculation, if you look on Page 4 --

MR. SMITH (interrupting): Well, that's the TLV we gave you, Your Honor.

THE WITNESS: Right, the formulas used for MSHA.

MR. SMITH: That's Petitioner's P-4, Your Honor.

JUDGE KOUTRAS: All right?

THE WITNESS: The bottom line to our study is that 27 per cent of the current and ex-workers that we studied with people that worked greater than one year in this environment had radiologic evidence of, radiographic evidence of silicosis. That's seven people in 26 that we saw; three current workers and four ex-workers for the overall prevalence of 27 per cent.

JUDGE KOUTRAS: All right, stop there just a second, if I may interrupt you.

So, assuming that as of that study they had a work force of 26 people, three people still on the job had it?

THE WITNESS: If they had a work force of 26 people, seven people.

JUDGE KOUTRAS: I thought you said some of those were ex-workers.

THE WITNESS: There were 15 current workers.

JUDGE KOUTRAS: Now, does the study indicate whether or not, what the length of exposure, whether they had contact with other industries, other environments, et cetera, et cetera, is that all accounted for?

THE WITNESS: That's all accounted for in here. We take a detailed work history to identify a possible silica exposure and we take radiographic evidence and pulmonary function studies, so we were very good about that.

We also found that one current worker and one ex-worker had pulmonary massive fibrosis which I'll let Dr. Richards explain further. It's complicated silicosis, is another term that is used for it, it's a more serious type of disease progressing where ultimately death is attributed to heart and respiratory failure. We feel it's a very serious hazard.

* * * * *

Q. Let me interrupt you right there, since His Honor brought up this point. Assuming that the product has not changed and they're still producing the same silica there at this plant that they were in 1979, is this in fact a harmful airborne contaminant?

A. Yes, it can be with appropriate levels.

On cross-examination, Ms. Moring conceded that the report she prepared, exhibit P-5, containing a number 79-104107, and exhibit R-1, which is a draft sent to the company and the union for review and possible technical changes, and is numbered 79104, are different in that the latter does not contain an appendix which refers to dust control improvements through use of baggers with shrouds or hoods (Tr. 87). She conceded that the draft report with the appendix included was not submitted to the company for review (Tr. 88).

Ms. Moring testified that she was present at the plant during the sampling survey in question, but only for two shifts on July 23, over a 24-hour period, and that Dr. Banks stayed for the entire three days of July 24 through 26 (Tr. 90). She identified other persons who were present during the survey, and indicated that their names appear at page 12 of the report (Tr. 91). She confirmed that she has not returned to the plant since the survey (Tr. 92).

In response to questions concerning exhibit R-2, an American Industrial Hygiene Association Journal, Vol. 42, dated January 1981, Ms. Moring confirmed that out of the 27 silica flour producers identified in Table No. 1 of that publication, two are located in Illinois (Tr. 100). She also confirmed that out of the 27 locations itemized in the report, she has surveyed only three, including the respondent's plant (Tr. 101), and she further confirmed that she would have no reason to know what, if any, dust control improvements or tests were made since her survey of 1979, and stated that "I can only talk about what the conditions are now and were in 1979, and make judgments on that" (Tr. 110-111). She elaborated by stating as follows at Tr. 111-112:

JUDGE KOUTRAS: Are you trying to tell me that on May 7, 1981, when the inspector went in there and saw the silica dust being admitted into the atmosphere from this bagging device that did not have a shroud on it, was as bad as it was in 1979 when you were there?

THE WITNESS: No, I am talking hypothetically as we were before about the fact that in 1979, if the situation existed today as it was in 1979 that the people around that environment would be over exposed.

In response to further questions, Ms. Moring testified as follows, at Tr. 114-124:

Q. One other question, his Honor mentioned to you in hypothetical about if you came upon a situation and the shroud, or hood as I think you refer to it, was not in place on the bagger machine and given the same conditions that you saw at the time you conducted your survey, would it be necessary to take a sample, let's say, on May 7, 1981, when this violation was issued, in order to show over-exposure of the employees who were working in that same area?

A. Well, obviously, from our report you can look in the bagging section and they were some of the highest over-exposed people in the whole facility so from that statement, also I do know that MSHA conducts a periodic sampling period several times a year and if the exposure -- hypothetically, if the exposure, if you are over-exposed prior to the date you are speaking

of, if conditions are the same and no engineering controls have been implemented, then you would be over-exposed at that time as well with this bagging.

Q. When you say over-exposed you are referring to the allowable TLV limits?

A. Right.

Q. Ms. Moring, you just mentioned controls and respirators. When you were at Tamms in July of '79 how many different products did they, in fact, make, do you recall?

A. No, I don't, I am not sure it is in here. They had several products and I don't believe it is in the report.

Q. How much, if any, effort did you make to distinguish between a product such as rough buff on one end and a very fine product on the other end, did you take that into effect?

A. Yes, we took both samples ourselves of some of those covered products and sent them to a laboratory for investigation and found out they were all the same quartz material. We did get a close breakdown on particle size ourselves.

Q. Could it have been as many as six products that they made, seven?

A. I have that brochure myself.

Q. Then you are prepared to suggest that in some of these products as much as 90 per cent of it is under 5 microns and some of these products it might be three microns?

A. Yes, that is possible. In an air-classifying system you are not going to get 100 per cent classification of 5 microns, nothing more and nothing less. You are always going to have--it is going to be the majority of the material.

Q. Then what we are saying is that it is possible to have a product which could be--which could have a percentage diminimus, a very small percentage of respirable silica. If we take this kind of standard it is very easy to have and if we take even NIOSH's

standard of 52--incidentally, are we taking 52 standard then it is conceivable, is it not that a rough buff product would have virtually no respirable dust, certain rough buff products could have virtually no respirable dust, would you agree to that?

A. No. No. 1, I have no--we did not sample the rough buff product ourselves. I have seen laboratory analysis on the product itself, and I think in any of these products because of the air classification system that it viewed that you are going to have it, just like a bell-shaped curve on normal distribution that most of the products are going to be as advertised as far as whatever the micron size is. You are going to have a percentage of below and a percentage that is above, as well.

Q. Do you know what a classifier is, Mr. Moring?

A. Air classifier?

Q. Yes.

A. Yes, it separates the particles by their organic size.

Q. Is it possible that an air classifier, it can separate particles so there would be no respirable particles? Is it possible?

A. I am not that familiar with the air classifier.

Q. Let me ask you, you are talking about dust controls and you mention among others, hoods and respirators. In your NIOSH report you mention, among others, dust collectors, vacuum cleaners, preventive maintenance, monitorizing dust levels, housekeeping, mass sconic spray, wall and floor enclosures and it seems to me that you didn't mention specifically a shroud in that report. Do you recall?

A. We don't refer to it as a shroud, per se, we refer to it as a hood.

Q. Are you prepared to say that if we took a shovel full of this silica dioxide from July of 1979 and put it in the bagger and put a sampler on it and another identical bagger and we took a shovel full of this in May 1981 and put the same sampler on it, that we would come out with the same results?

A. As far as I know. I think you are asking me, if the process hasn't changed, if the material is the same?

Q. All of these identical.

A. As far as I know if these things have not changed, things that would affect the particle size and the product itself, yes, you would see the same thing.

Q. That they would be the same, a year, two years later?

A. Yes, I think so. I want to make one clarification on your last statement about engineering shroud, we don't say shroud, per se, but in our jargon we do. We talk about engineering controls, and one of the engineering controls is ventilation system, i.e., shrouds, hoods, ductwork, fans.

* * * * *

Q. One final question on rough buff sampling, the particular coarse product that we talked about classifying. I am handing you what purports to be a Department of Labor memorandum from a Mr. Hollenbeck-- I am sorry, from a George Weems to a Mr. Hollenbeck, "subject, particle size distribution analysis of rough buff product at Tammsco", and ask you to direct your attention to these micron ranges.

A. On this 6 per cent.

Q. Right, what does that say? Does that say what they did, is they took this rough buff product and they put it through a 325 mesh and everything that was respirable stayed on top and only 6 per cent was under the screen?

A. No.

Q. It does not say that?

A. It says they took this product and put it through minus 325 mesh screen, which is 44 microns, and 6 per cent of it passed through that screen and 6 per cent of the bulk product is less than 44 microns. Then they took that material and put it through a culture counter and by optically sizing it they got this type of particle size range.

THE WITNESS: No, 94 per cent. That is 98 per cent of the 6 per cent is what they consider respirable.

MR. COGHLAN: So you did, in response to the Judge's question, indicate that the 94 per cent that stayed above the screen was not respirable?

THE WITNESS: Into the lung.

MR. COGHLAN: Well, was not respirable into the--

THE WITNESS: It can still be respirable but not at that 44 micron.

BY MR. SMITH:

Q. But is it the type of respirable material that we are concerned about in this proceeding?

A. It is still toxic material, still silica.

JUDGE KOUTRAS: Let me ask the question another way. Let's assume you have sampled the material and found that none of it sifted through and none of it was respirable according to your definition, would an operator be subject to a citation under this particular standard for failure to control airborne, harmful airborne contaminants?

THE WITNESS: I can't answer that.

BY MR. SMITH:

Q. All right, I wanted to ask you this, what happens to the non-respirable dust after it gets on the floor under traffic?

A. I mentioned that before, that it is dry and feet walking, machinery running over it, any type of action such as that activity, grinds the particles, changes the particle size and can--the main problem with dust being on the floor is that as people move there are air currents that can become reentrained in the atmosphere.

Q. Is it at that point no longer non-respirable?

A. Yes, if the particle size is such. It changes the particle size, it may make it smaller, smaller particles get into the lungs.

Q. Isn't that really the heart of the problem?

A. Right, that is the problem.

Q. And that is very typical at a bagger system if you don't have the proper controls on it?

A. Sure, because there is someone standing there. In any plant.

* * * * *

JUDGE KOUTRAS: What is rough buff?

THE WITNESS: One of their products.

JUDGE KOUTRAS: It is what?

THE WITNESS: I assume it is an abrasive type of material.

JUDGE KOUTRAS: I take it that they mine silica and they process it and they produce five or six different products from it and rough buff is one of the products?

JUDGE KOUTRAS: When you said you did not sample the rough buff machine, did you say that the rough buff was not sampled?

THE WITNESS: In our study I don't know what the products were at our bagging operations that were bagged that day.

JUDGE KOUTRAS: Let's assume that rough buff was not one of the products that was sampled during your survey. What effect would that failure to sample have on whether or not rough buff, of the type that this inspector cited in '81, how does that fit in?

THE WITNESS: I think it makes sense to laymen and is scientifically sound as well, I know that interim samples periodically were taken as far as I know, other samples have been out of compliance in the plant almost consistently. I think there were a few cases where they were in compliance. The samples were taken on Day 1 and they were out of compliance, on Day 15 no samples were taken and the machine still operated, there was a visible cloud or puff of this type of airborne. On Day 30 samples were taken again and the situation is the same throughout and it is reasonable to assume that if they took a sample that day the same situation would be true.

JUDGE KOUTRAS: So are you suggesting that if this particular manufacture, or this particular plant manufactures six products and that at some time during the compliance history of this plant MSHA samples all the products, and assuming no changes, that at some future date you can assume that that same product that is airborne would be as harmful as it was the first time it was subjected to a test?

THE WITNESS: The conditions should not change, yes, what you see that day is what you are going to see the days around.

JUDGE KOUTRAS: What if this particular manufacturer manufactures the same six products but only five are ever subjected, one is not sampled for some reason, can you come to the same conclusion with respect to the one product that has not been sampled, ever sampled?

A. I think you have to use your judgment in that case and from what I am aware from this situation that there is evidence of airborne high concentrations, i.e., you can see a cloud visibly. Like this is the plant, it is one room and the conditions are pretty well even throughout, so you don't have enclosures around--like say, if you had an enclosure around the bagger would that be contained there. So that any type of--if that product was bagged that day and you saw the visible, physical signs of dust in the air, then I think it is a good assumption, yes, that the same problem exists and that people around that and through the building are being over exposed. It contributes to the overall dust load.

JUDGE KOUTRAS: Do I get the impression that what NIOSH is attempting to achieve and what MSHA would like to achieve here is not so much that this one particular rough buff bagging machine be addressed but that the overall ventilation in this entire plant, so that would avoid all these problems, is that what they are trying to do?

THE WITNESS: What NIOSH would like to see is the workers not be over exposed to silica dust.

JUDGE KOUTRAS: In the entire plant?

THE WITNESS: Right, and we are concerned about all those workers' health.

JUDGE KOUTRAS: Well, in this case, let's assume that I come to the conclusion that this operator failed to comply with the standard by not achieving compliance at this rough buff bagging machine and I sustain the citation and the violation and fine him \$400 for the violation, how does that cure your over-all concern about the rest of the plant?

A. As far as NIOSH is concerned it is until the levels of the overall plant are brought down to the limits that have been set by law or by NIOSH recommended standards we feel there still is a health hazard. We are hard nosed about that type of thing.

Dr. Thomas B. Richards, Staff Physician, Clinical Investigation Branch, Division of Respiratory Disease Studies, NIOSH, Morgantown, West Virginia, testified as to his background and expertise. He identified a copy of the NIOSH survey report concerning the plant in question, exhibit P-5, and confirmed that he had read it thoroughly, and testified as to his conclusions concerning the findings made in that report (Tr. 142-150).

On cross-examination, Dr. Richards confirmed that he had never visited the plant in question, and he indicated that his testimony is based on his reading of the report, as well as his experience and training, and "review of the literature" (Tr. 150). He also confirmed that he had done no actual personal work with silica (Tr. 151).

In response to question concerning silicosis, Dr. Richards testified as follows (Tr. 152-155):

Q. Would you agree with this statement, the common denominator in all cases of silicosis is the inhalation of a high concentration of crystalline silica of particles less than 10 microns in diameter are respirable, but the particles most likely to be deposited in the alveoli spaces in the lung which caused the disease, are only 1 to 3 microns in diameter. Would you agree with that statement?

A. Let me rephrase the statement because it has multiple parts to it. The factors that would lead to silicosis, no. 1, the type of dust as I tried to explain. There are several different types of silica dust. No. 2 is the concentration of dust. No. 3 is the exposure of the individual and No. 4 is probably an individual factor because there are some discussion as to whether there are I guess you would call it like an egg-shell worker, a person who has an anti-body reaction, whatever, and is much more sensitive to it than other people. In terms of what people can breathe in on the size of the particles, if it is somewhere in the 5 to 10 micron size,

more likely or not those size particles will be blocked out by the nasal hairs or screened out somewhere in the upper respiratory system. We are talking about particles that are getting down into the lungs, would be somewhere between 0 to 5 microns and the 5 micron size in terms of silica is probably the particle size that is causing the most damage for acute silica is a very small size.

Q. Would you agree with the statement to the effect that if chronic, it might have no effect whatsoever on life expectancy, any different that a city dweller?

A. Let me again divide this into categories.

Q. Is there a way that could be answered yes or no?

A. If you ask me to answer it yes or no I will have to lump everything together and I will say that silicosis will reduce your life by 6 to 11 years. If you want me to separate it out, separate out certain forms of chronic silicosis that don't seem to cause quite as much damage, as I said, there are several factors involved. One of which is an individual's response to it. Like anything, you may have some people who react more, some people who react less.

Q. Have any of the tests that were done that are in your report there, have you ascertained whether or not any of these people had T.B.?

A. I note there is a recommendation that they should do annual T.B. skin tests. I am not sure, I can't remember whether they did T.B. Skin tests--

Q. (Interrupting) Doctor, were any of these men coughing blood, do you know?

A. I don't know the answer to that.

Q. Did any of these men lose any weight, do you know?

A. Again, I don't know the answer to that.

And, at pages Tr. 159-160:

JUDGE KOUTRAS: Doctor, do you know what this specific proceeding is about in terms of the citation that was served on the respondent Tammsco?

THE WITNESS: Mr. Smith has explained a little bit about it but I don't pretend to know the whole --

JUDGE KOUTRAS: The operator in this case was cited for failure to provide the rough buff bagging machine with a dust collection system, to wit, some sort of a shroud or a hood that the government contends had been agreed to by this operator. And that is the nuts and the bolts of the citation. The standard cited says that a mine operator is required to control harmful, airborne contaminants insofar as feasible. By prevention of contamination and removal by exhaust ventilation or by dilution. The government takes the position that this airborne contaminant, harmful airborne contaminant, rather could have been controlled or otherwise disposed of by the use of this device.

Now, the study that was conducted by NIOSH, which is Exhibit P-5, was a study conducted of the dust exposure levels at that plant in 1979. This particular citation was issued in 1981. Now, absent any changes would the harmful effects of the airborne contaminants be any more or less in 1981 than they were in 1979 when the study was conducted? In other words, can I assume that once you have an airborne contaminant that is considered to be harmful to the types of tests, the types of analyses that are done in this NIOSH thing, does that mean that all things being equal that that is it, from then on that 15 years being equal that that is it, from then on that 15 years later MSHA can come back and say the mine operator is being out of compliance based on that particular study?

THE WITNESS: The answer to that is yes, and that is why I tried to underline or emphasize the first recommendation of NIOSH that you must have engineering control, absent that engineering control the danger and in NIOSH's point of view we call it imminent danger. We may have a quibble there with MSHA as to why they downgraded this as to not really an imminent danger but if you are reducing the definition of imminent danger you cannot expect abatement before bodily harm would ensue and if you are offering the way your control or abatement this respiratory program, I can guarantee you that the respiratory program, given its fine particle size and problems people always have with the respiratory programs, that it just is not going to work. What we need to have is engineering control. Absent that engineering control that danger will go on and on and people are going to get sick.

MSHA Inspector George Lalumondiere, testified as to his experience and background, and he confirmed that he has conducted numerous at respondent's plant, starting in late 1979, and up to a year ago. He confirmed that the respondent mines silica, and the product is used in the manufacture of paint (Tr. 161-164). There are approximately 17 to 22 employees at the plant, and the plant produces approximately 16,000 to 17,000 tons of product annually. He identified the President of the company as John Norton, and confirmed that respondent Harold Schmarje is the plant superintendent (Tr. 166). The plant operates on a five-day week, two shifts daily.

Mr. Lalumondiere identified exhibit P-8 as a copy of the citation he issued in this case on May 7, 1981, including the modification and termination after abatement of the conditions cited (Tr. 168). He also identified exhibit P-9 as the respondent's dust control plan submitted to MSHA on April 14, 1980, and that is the plan referred to in his citation. He described the conditions cited, and stated the reason for issuing the citation, as follows (Tr. 168):

A. The point that was in violation is that the ruff-buff bagging machine engineering controls were not being maintained on it and were not being utilized on it and the fact that it was tied in to the dust collection system to eliminate the contamination of the worker's atmosphere by removal of dust from the bagging operation.

Mr. Lalumondiere confirmed that the specific dust control plan which was not followed is Item 4-E, which reads "A shroud will be installed or maintained at all bagging machines". He detailed the evolution of the respondent's dust control plan, and confirmed that it was submitted after the plant had been shut down for noncompliance with the dust standards on March 18, 1980, and confirmed further that the plan was modeled after a similar plan submitted by one of the respondent's competitors, Illinois Minerals Company. The plan was voluntary, and the respondent participated in its formulation, modeled after a copy of the plan for Illinois Minerals, and it was in fact the only plan accepted by MSHA in effect at the time he issued his citation of May 7, 1981 (Tr. 170-175).

Mr. Lalumondiere confirmed that the plant was shut down as a result of certain Section 104(b) Orders on October 10, 1979, and these citations affected six occupations which were being performed within the mill, and without these occupations working, the mill could not operate and the respondent shut the entire operation down (Tr. 176). Subsequent modifications permitted the plant to be reopened and operated periodically until such time as the dust control plan was submitted on March 18, 1980, at which time the plant was again reopened (Tr. 178).

Mr. Lalumondiere testified that his belief that Mr. Schmarje knew about the requirement that the dust shroud be in place on the Ruff-Buff

bagger machine while it was in operation stems from the fact that he was aware of the fact that this was a condition for terminating the closure order of October 10, 1979, to permit work to continue on April 14, 1980, after the respondent agreed to follow the dust control plan of that date. Mr. Schmarje was served with copies of these orders and notices (Tr. 260-261).

Mr. Lalumondiere stated that the bagger in question was originally installed sometime in early January 1981, but that it was actually received at the plant sometime in October 1979, but was left in the packing crate for some time. On numerous occasions subsequent to the installation of the bagger, he was at the plant on inspections and observed the shroud lying on the floor by the door. It was his understanding that this shroud lying on the floor by the door was an old shroud which he believed was at one time installed on the old bagger, but sequently removed. While it was supposed to be attached to the new bagger he never saw it attached anytime prior to May 7, 1981. He confirmed that when he asked Mr. Schmarje why the shroud had not been attached to the bagger, Mr. Schmarje advised him that he had only planned to use the bagger for a short time in order to build up a stockpile, and saw no need in wasting time to attached the shroud (Tr. 262).

Mr. Lalumondiere confirmed that when he issued the citation on May 7, 1981, Mr. Schmarje conceded that the dates shown on the bags of silica on the pallets found near the bagger were in fact the dates on which the product in question was bagged, and he also confirmed that at that time Mr. Schmarje admitted that the shroud was not in place on the bagger at the time the material was bagged (Tr. 263).

Mr. Lalumondiere identified exhibits P-17 through P-19 as photographs of the bagging machine in question as it appeared after the shroud was installed and after the citation was abated (Tr. 266). He also identified exhibit R-6 as copies of notes which he made at the time he issued the citation in issue, and he read a notation from those notes as follows: "Bags on pallets for days, from 11/12, all the way up through 5/5/81. This would indicate that the bagger is used regularly, as the superintendent stated it has been, and is being used for stockpiling" (Tr. 293). He confirmed that these notations, made on his inspector's statement, reflect his views that the bagger was used and had been used to bag the material in question (Tr. 294). He confirmed that three of the seven bags which he observed on the pallet near the bagger were stamp-dated May 5, 1981 (Tr. 297). He also confirmed that he observed seven pallets, each with 50 bags of ruff-buff material stored on them, or a total of 350 bags (Tr. 298), and these pallets were located in the same room as the bagger, approximately 20 to 25 feet away from the machine (Tr. 300-301).

Mr. Lalumondiere confirmed that one of the pallets which he observed contained seven bags of ruff-buff material, and they were dated May 5, 1981 (Tr. 304). After randomly checking the dates on the pallets which were fully loaded with 50 bags each, he determined that the dates stamped on the bags were 11/12 to 12/17/80, and 1/8, 3/27, and 8/12/81 (Tr. 305).

He confirmed that he did remove a sample of ruff-bugg from a bag stored on the pallets, and while he believed it was sometime in August 1981, he could not recall the specific date which stamped on the bag from which he removed the material (Tr. 306).

Mr. Lalumondiere confirmed that he personally never saw the bagger in question in operation, and that his conclusion that it was used to bag the material which he found on the pallet near the machine came from Mr. Schmarje, and he also confirmed that he never sampled any of the ruff-buff material in question (Tr. 312-313). However, he did confirm that he did sample the material either on August 20 or 21, 1981 (Tr. 315). He also confirmed that Mr. Schmarje admitted to him that the bagger was used on the days indicated by the stamped dates on the bags of material stored on the pallet near the machine, and that Mr. Schmarje also stated that it was his intent to continue using the bagger to bag material until he had a stockpile built up (Tr. 317).

Max Slade, was recalled, and again confirmed that he accompanied Mr. Lalumondiere on his inspection tour on May 7, 1981, and he described the conditions which he observed while he was with the inspector in the plant (Tr. 323-325). He confirmed that the dust which he observed in the plant came from "general dust from the entire plant, from all three bagging machines and from the various leaks around the plant" (Tr. 326). He also confirmed that he had no way knowing with any certainty that the "tracks of dust" he observed on the plant floor was in fact silica dust from the bagging machine which was cited in this case (Tr. 326). Mr. Slade's explanation as to why the plant was out of compliance on the day the citation in this case issued is reflected in the following colloquy (Tr. 328-333):

A. * * * We went on through the plant, observing the leaks, which were numerous. One leak in particular on the roof of the building was a pile of silica several feet high that was dribbling down over the building and through the cracks and just permeating through the entire building. Dust in the air was visible. This is sub micron-size particles. One report shows that the medium-size particle is around five microns, which is of respirable size. This size particle is not visible to the naked eye, unless it is in extremely high concentrations. Any time you can see dust of this size, it is a scientific fact that there is a violation, if it is silica.

JUDGE KOUTRAS: All right. Stop right there. Would you then suggest a mandatory safety standard, in Part 57, that says whenever an inspector can visibly see with the naked eye airborne dust, that he knows is silica, that there is ipso facto a violation of this standard?

THE WITNESS: No, sir, because you would have to have a particle-size distribution before you could make that determination.

JUDGE KOUTRAS: Is that not true on any given day at this plant?

THE WITNESS: Yes. Well, no, sir, if it is good and clean, you cannot see the dust in the air.

JUDGE KOUTRAS: No, what I am saying is: If you can see dust in the air, at any given time at the plant, you are saying that it is a known scientific fact that there has got to be a violation?

THE WITNESS: That is right.

JUDGE KOUTRAS: Why not just say that in the standards, if one can just come to the conclusion that by visibly looking at it and seeing dust flying that that is a violation?

THE WITNESS: Then we would have to have a standard for every mine and for every different size distribution.

JUDGE KOUTRAS: No, no. The standard could say for this particular mine. For example, if you know that they are mining Product "A" at Plant "A" and the inspector goes in there and sees Product "A" flying through the air, then that is a violation for that plant?

THE WITNESS: We would end up with 15,000 standards. We would have to have a different standard for each operation.

JUDGE KOUTRAS: Do you mean for each product that is mined?

THE WITNESS: Yes.

JUDGE KOUTRAS: There are 15,000 different types of products that are mined, in metal and nonmetal?

THE WITNESS: Every silica plant has different size distributions of the particles because they manufacture different types of material, different grades, proportionates.

JUDGE KOUTRAS: So, in other words, if you have a plant that mines silica, not of the coarseness or the fineness or whatever the terms may be that is being mined at this plant, am I to assume that when you go to that plant and see it flying around, they may not be out of compliance.

THE WITNESS: That is right. You would have to know the size distribution of the material, itself, before you could make that assumption.

JUDGE KOUTRAS: If I were to go out there at the plant this afternoon, let us say, for a site visit, and I see silica dust floating all over the place and I am leaving my own tracks through the plant, as I walk to this bagging machine this afternoon, to look at it, can I assume that, since this particular plant mines the type of silica that MSHA asserts they mine, ipso facto, when I see it with my eye, that is a violation of the standard?

THE WITNESS: Yes, sir. You could assume that.

JUDGE KOUTRAS: Based on what?

THE WITNESS: Based on the size of the material that they grind and bag in that operation.

JUDGE KOUTRAS: Has what? Has already been tested?

THE WITNESS: Has already been tested.

JUDGE KOUTRAS: When?

THE WITNESS: NIOSH tested it. We have tested it. They advertise it in their own literature as submicron size particles. This is the way it is advertised and sold.

JUDGE KOUTRAS: But you can see that the inspector that issued this citation did not test it to support this particular violation, is that not so?

THE WITNESS: He has cited it numerous times. He has tested it numerous times. We have taken a hundred and twenty-some airborne samples in this operation.

JUDGE KOUTRAS: Of Ruff-Buffer?

THE WITNESS: No, of the dust in this plant, which is in the same room with the Ruff-Buffer and which is in the same general area and breathed by the same employees.

JUDGE KOUTRAS: Can I ask a question now, from a layman's point of view? Has the Ruff-Buffer product, itself, the stuff that goes into that bag from that machine, ever been subjected to laboratory analysis?

THE WITNESS: Yes, sir. It has been subjected to a size distribution.

JUDGE KOUTRAS: When was that done?

THE WITNESS: We have it in evidence. You have the analysis sheet marked as, I believe, p-6, in evidence.

JUDGE KOUTRAS: Now, have the other products, that are produced at this plant--somebody mentioned something about a brochure--all of those products, individually, been subjected to laboratory analysis?

THE WITNESS: We have evidence, in evidence here, the NIOSH report, that gives the size distribution of the airborne contaminants.

JUDGE KOUTRAS: So, in other words, what you are telling me is that the inspector goes out to the plant and, if he sees this very same bagging machine, with the shroud off, and sees dust flying all over the place and piled up there, he does not grab a handful of it and put it in a bag and label it and then--

MR. SMITH: He does not have to.

JUDGE KOUTRAS (continuing) -- just a minute -- issues a citation, sends that bag off for analysis, gets the results back and then that will support, but that is not the procedure? Mr. Smith says he does not have to. Is that your understanding of how the inspector supports citations at this operation for dust violations?

THE WITNESS: In many cases, wherever possible, the inspector will take a sample to support the violation. In this case, there was no chance to take a sample. It is not needed in this case because all existing, outstanding citations in that very area are against the very people, the same people, that operate this Ruff-Buff machine. A sample was taken both before and after this May 7th date, all of which show noncompliance.

JUDGE KOUTRAS: Were these outstanding citations against this very same machine or were they outstanding with respect to the people that work in the area which was sampled individually?

THE WITNESS: Outstanding against the airborne contaminants in that area, of which this Ruff-Buff bagger is an integral part. Any dust emanating from that bagger will contribute to the overall dust load of the mill and, as such, is a harmful airborne contaminant.

JUDGE KOUTRAS: What you are saying is that for the several months before this citation, there were some samples taken of the Social Security numbers and the job identification

numbers of people that are in close proximity to this Ruff-Buff bagging machine?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Those samples came back and showed noncompliance.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Citations issued?

TE WITNESS: Yes, sir.

JUDGE KOUTRAS: Citations are not going to be abated until they do something to reduce the levels of exposure to those individuals to bring them into compliance, correct?

THE WITNESS: That is right.

JUDGE KOUTRAS: And that this Ruff-Buff machine citation is an integral part of that entire picture?

THE WITNESS: Yes, sir.

With regard to Mr. Schmarje's prior knowledge that the Ruff-Buff machine was used to bag the materials found by Inspector Lalumondiere on the pallets in question, Mr. Slade confirmed that he heard Mr. Schmarje state that this was in fact the case, and that he also heard him state that the material was bagged without the shroud being in place because he wanted to build a stockpile so that the bagger could be moved to another location, and that he needed an additional few days to move the machine (Tr. 334). Mr. Slade also confirmed that the shroud he observed lying on the floor had obviously not been used since it was covered with dust and dirt, and in view of the fact that he also observed an accumulation of silica material under the machine it was obvious to him that the bagger had been used to bag material without any dust collection system attached to it (Tr. 335).

Mr. Slade identified exhibits P-20 and P-21 as two proposed dust control plans for the plant in question, and the former is a compliance schedule covering five years, and the latter is a compliance plan spanning a period of ten years (Tr. 338-341). He conceded, however, that there is no specific regulatory requirement that a mine operator submit and adopt any specific dust control plan, or to seek MSHA's approval for such a plan (Tr. 353). He also confirmed that at no time did MSHA agree that any engineering controls, except for the ones set forth in the April 14, 1980 dust control proposal, would be acceptable (Tr. 355). Mr. Slade identified exhibit P-22 as a letter dated May 21, 1981 which he sent to Mr. Norton concerning the conditions observed during the inspection which led to the issuance of the citations in this case (Tr. 357).

On cross-examination, Mr. Slade identified exhibit R-7, which a letter dated July 10, 1981, from respondent's president, John Norton, explaining the circumstances surrounding the issuance of the citation, and while the letter is addressed to Mr. Slade, he denied ever receiving it or seeing it prior to the hearing (Tr. 362).

Mr. Slade confirmed that the two-spout bagger and the ruff-buff bagger are two separate machines and are not similar. He also confirmed that he observed the new ruff-buff bagger on May 7th, and also saw the shroud lying in the corner by a door leading to a parking lot, and the shroud was covered with dust. In view of the amount of dust on the shroud, Mr. Slade was of the opinion that it was on the floor more than a day or two prior to May 7th (Tr. 372).

Mr. Slade stated that on May 7th he and Mr. Lalumondiere had a conversation concerning the partial pallet of ruff-buff material which was located near the machine. Mr. Slade observed seven bags on that pallet, and every bag which he could see was dated May 5th. He confirmed that no samples of the ruff-buff were taken, and no effort was made to record the dust levels on May 7th (Tr. 373).

Respondent's testimony and evidence

John Norton, confirmed that he is the owner and sole stockholder of Tammsco, Inc., and has owned the company since 1973. He agreed that a shroud is an accepted engineering control measure for a bagger, and he confirmed that a new bagger was purchased in late 1979, and installed sometime in 1980, and that a shroud was subsequently installed upon it (Tr. 396). He described other dust control measures that he has taken since July 1979, and these included the acquisition and remodification of dust collectors and the changing of circuits throughout the plant. He also confirmed that he has his own dust sampling devices which are used for monitoring purposes, but that he has contracted with several private companies to collect and analyze samples and to report to him in this regard, and some of these companies were among those recommended to him by MSHA. He confirmed that testing was conducted a week after the citation in question was issued (Tr. 395-399).

Mr. Norton denied that the present condition of his plant is as bad as MSHA says it was in the past, and in his opinion, the plant has made improvements and progress since 1979 to achieve compliance with the required dust requirements (Tr. 401).

Harold Schmarje, confirmed that he is respondent's plant manager, was hired in that capacity on February 20 or 21, 1980, and that he has four and one half years' experience as a hard rock miner working in underground mines. He also confirmed that he has experience as a plant engineer dealing with dust control shrouds, including the redesign of such devices. He conceded that such shrouds are acceptable engineering dust control devices for baggers, and that a shroud was installed on the ruff-buff bagging machine at the time the machine was installed. In

addition to the shroud, he testified as to other engineering dust control measures which were taken to control the dust at the plant in question since he has been the manager. He also testified as to certain problems which he encountered in his attempts to control the dust, and the improvements and actions taken by him to insure compliance with MSHA's dust control requirements (Tr. 402-409).

Mr. Schmarje testified that a day or two before the MSHA inspection in question the bagger had been run into and damaged, and he instructed that it be cleaned up and either put back into service or taken "off the line" (Tr. 410). He confirmed that on the day of the inspection he told the inspectors that the shroud had been in place, but that it had been damaged and the machine was not in service. He conceded that he also stated to the inspectors that it was possible that the machine could have been used for a short period of time to remove the material that was in the bin, but that he did not know this was in fact the case. He denied ever telling anyone that he knew the shroud was off the bagger and that he used it in order to continue production. He explained further as follows (Tr. 412-413):

A. Well, what I did say is that, if the shroud were not on there and it had been run, explaining, you know, for the short period of time, "I doubt very much that it would contribute to any dust levels in the plant because that material is the heaviest material that we run." It is the residue, in other words. It has already been run through the system. It has physically and purposely been air swept twice and the fine particles, as much as possible, have been taken out of there to recover.

I think, at the time, that I remarked something like, "If there was something in the area of 2 per cent of fine material left in there, I would doubt it very much and that would probably be adhered--"

One of the problems that we have is that the particles have a tendency to develop a static charge and they have a tendency to stick together. One of our problems is trying to separate that. Now, we succeed in separating it when we put it through the air classifiers and such, but it will have a tendency to combine again afterwards. This is a problem they run into at the dispersion.

At any rate, I made the comment that, "If there were any dust there, it would probably be so closely tied with the other materials that I doubt if it would be liberated at all." That was the gist of the conversation.

Referring to the fact that the people mentioned that I had said that we had run it without and that I intended to run the thing without, no way. I do not proceed that way.

Q. My final question to you, Mr. Schmarje, is: From and after the installation of the shroud, whenever it was, January or February, when that machine went on line, to the time just at, or about, the 7th of May, to your knowledge, did you ever order that shroud off or, to your knowledge, did you ever run that Ruff-Buff bagger, knowing that the shroud was not on it? Yes or no?

A. No, sir. I never have. It has been damaged a couple of times, slightly, and then put back into shape, but no, sir, I never ordered in that manner.

On cross-examination, Mr. Schmarje confirmed that he had previously been interviewed by MSHA special investigator Dennis Haeuber and that he had received a copy of that interview. However, he insisted that his statements made to Mr. Haeuber were taken out of context and that is the reason why he refused to sign the statement (Tr. 141). He identified exhibit P-24 as a copy of the interview, and MSHA's counsel confirmed that the interview was not tape recorded or taken down by a shorthand reporter, but that Mr. Haeuber wrote down the questions as well as the responses made to those answers, and then had it transcribed and sent to Mr. Schmarje for his review and signature. Counsel explained that the normal procedure was to tape record such interviews, but that Mr. Schmarje refused to have this done (Tr. 422). Counsel also confirmed that such statements are not taken under oath since the investigator has no authority to administer such oaths (Tr. 422-423).

Mr. Schmarje testified as to certain contradictory statements made in the interview and he explained some of the recorded answers given to Inspector Haeuber (Tr. 435-443). He also explained some of his interview answers as follows (Tr. 451-465):

THE WITNESS: "Do you have an explanation of why the Ruff-Buff machine was allowed to operate without a shroud in place?"

Again, I would have qualified it, that I would not have allowed the machine to run without the shroud in place and, if it had been run, it would have been run only to empty out the material that was left in.

JUDGE KOUTRAS: What was your response to that?

THE WITNESS: It says, "When I saw the machine was in operation, I let it continue to operate, because I believe the dust levels are negligible. The time element left to produce the material was also negligible."

JUDGE KOUTRAS: Now, when he asked you to explain why you allowed it to operate without a shroud and you responded, "When I saw that machine in operation", that leads me to believe that when you saw it in operation, it did not have the shroud on it, by your response.

THE WITNESS: I did not see it in operation. I saw that the machine did not have the shroud on it. I told the men to make sure that thing is emptied out. Now, if I may go back, maybe I can simplify this and clear it up.

That machine was in a position that was subject to being--what would I say? It was in an inconvenient area, because the forklifts were coming through there off-and-on, traveling through that particular area, when they would pick up the material from the neo-sil bagging area.

I had slated to move that machine, also, to go and reconstruct the machine, itself, because it is now--it was a pressure flow type of bagger and we were experimenting with trying to go to an air flow type bagger. We had already slated to move the machine, to put it into a different position, for two reasons: To test if the air flow type of machine would work with that particular product and, if it would, perhaps we could use with finer products; and the other reason was to eliminate an elevator, which is one of the problems with regard to a dust source. Elevators are very difficult to seal up around bearings and such. That is the reason why it was slated to be moved.

Now, the machine, itself, with regard to the question there--I would not have said that I allowed the machine to run without a shroud on it. I do not do things like that. The only reason that it-- During the period of time--in other words, if the shroud was damaged and it was off of there, if there was any product left in that machine, it had to be emptied out. That is what I am trying to say.

JUDGE KOUTRAS: And they would use it to get that material out?

THE WITNESS: And they would have to use it to get that material out.

Now, the only way you can get it out, other than putting it in a bag--and that is probably where the seven bags came from. I do not know that as a fact. That may have been emptied out beforehand I do not know.

But the only way to get it out of there, and the least dusty way to get it out of there, is to put it in a bag. Otherwise, you have to dump it out either into a vat or a bin or on the floor. And I would have qualified the statement and explained it thoroughly.

* * * JUDGE KOUTRAS: Mr. Schmarje, I am having just a little trouble comprehending this. On May 7th the inspector comes in and gives you this citation, right?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Are you telling me that the shroud had been knocked off a couple of days before he got there on May 7th?

THE WITNESS: The shroud was not actually knocked off. It had to have been removed, cut off of there.

JUDGE KOUTRAS: With a blow torch?

THE WITNESS: Yes, I would assume so.

JUDGE KOUTRAS: From that very machine?

THE WITNESS: From that machine, I would assume so.

JUDGE KOUTRAS: Well, what is this accident we have all been hearing about?

THE WITNESS: Well, the machine was in a bad position and, if they just bumped the shroud, it jams the scales and then the machine cannot be--

JUDGE KOUTRAS: So they have to take it off?

THE WITNESS: If it is just a light bump, they can usually push it back in shape, so on and so forth. That is one of the reasons why we wanted to move the darn thing, because it was in a bad position. Now, if they bump it real hard, they are going to jam the

scales and bend them out of shape and it will not operate. Then they will have to take the shroud off and repair the machine, itself, and then they have to put the shroud back on.

JUDGE KOUTRAS: On May 7th, when the inspector came in and found the shroud off the machine--

THE WITNESS: Yes, sir.

JUDGE KOUTRAS (continuing)--what explanation did you give him as to why it was off the machine?

THE WITNESS: I told him it had probably been bumped into.

JUDGE KOUTRAS: Probably been bumped into.

THE WITNESS: And they removed the--

JUDGE KOUTRAS: And they probably removed it.

THE WITNESS: And the machine was--

JUDGE KOUTRAS: And they probably cut it off with a blow torch, and they probably laid it by the door. Is that what you told them?

THE WITNESS: I did not say probably all--

JUDGE KOUTRAS: But would you not know, as plant superintendent, if this device had been knocked into and somebody took it off and laid it aside? Why would you have to find out sometime later from your lawyer--

THE WITNESS: No, sir. I knew that it had been taken off. I saw that the machine was--Let me back up. On May 7th the inspectors came in.

JUDGE KOUTRAS: Right.

THE WITNESS: O.K. Now, it was approximately a day or two before that I had seen that the shroud was off the machine.

JUDGE KOUTRAS: O.K., and laying there--

THE WITNESS: Right. So I assumed that the machine had been run into again and that they had removed the shroud. I told them, I said, "Get that thing cleaned down. Take it off the line and shut it down." That is it.

JUDGE KOUTRAS: So two days before this inspection, you saw that contraption off the machine, laying down some place?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Your assumption was that the reason it was off and laying down was because somebody probably bumped into it--

THE WITNESS: That is right.

JUDGE KOUTRAS (continuing)--and took it off to do something with it?

THE WITNESS: Correct, for repair.

JUDGE KOUTRAS: You are the plant superintendent?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Why would you make those assumptions, without finding out what did happen to this thing and when it is going to be repaired, who did it, and when they are going to put it back?

THE WITNESS: Unfortunately, I ordered that it be repaired and put back into condition.

JUDGE KOUTRAS: Who did you tell that to?

THE WITNESS: That I do not know. It may have been my assistant. It may have been one of the mechanics.

Mr. Schmarje testified that the silica mined by his company and processed at the plant in question is 99 percent pure silica, but he denied that it was all respirable since it may contain other impurities. He conceded that the ruff-buff product in question was pure silica, and he also conceded that the original characterization of the silica mined by his company as "amorphous" was a misnomer, and that sometime after 1979, after subjecting the silica to high-powered microscopic testing, it was discovered that it was in fact composed of a micro-crystalline structure. He confirmed that the silica processed at his plant is mined from an underground incline mine located some six miles from the plant, and the silica is transported to the plant by truck (Tr. 268-470). The processed silica is used for a number of purposes, including paints, plastics, abrasion rubber, etc. (Tr. 471).

Mr. Schmarje described the process followed in the production of the ruff-buff material in question, and he confirmed that neither his company nor MSHA have ever sampled the ruff-buff. He explained that the ruff-buff bagging

machine has never operated over an eight-hour sustained period of time, and that since the machine is not operated continuously for sustained periods of time, any samples would be negligible, and any airborne contaminants coming from that machine would be minimal (Tr. 472). He also stated that any fine particle respirable dust that would be left in the ruff-buff product during the bagging process would not contribute to the overall plant dust level, because it would have been "air-swept" (Tr. 474). Since the ruff-buff is of a heavier particle size, he did not believe it was as damaging as the other silica dust processed at the plant (Tr. 474).

When asked why MSHA would insist that he have a shroud on the ruff-buff machine if it is not harmful, Mr. Schmarje stated that his position was that since the dust control plan called for a dust control shroud on each machine in the plant, he would insist that it be placed on the ruff-buff bagger. He also alluded to the fact that the NIOSH study in question assumed that no matter where silica was present in his plant, it was a respirable health hazard. He agreed that if it can be established that ruff-buff is respirable, then it would be a hazard, and he further explained his answer as follows (Tr. 477):

THE WITNESS: A standard is for an eight-hour period. It's time-weighted period, I understand, and it is 10 milligrams per cubic meter on time-weighted. What I'm saying is that that machine is never operated for an eight-hour period and that the percentage of fine, respirable dust that would be in there would be so negligible with regard to any testing of such that it would not show up. It wouldn't even appear.

JUDGE KOUTRAS: What standard do you believe MSHA is holding you to?

THE WITNESS: They are holding me to the standard of maintaining a dust collection system on the bagger and it was in place. We complied with those standards, according to the April 14 dust control plan, which had subsequent plans submitted with regard to it.

Mr. Schmarje confirmed that he was not with the inspectors when they found the partial pallet near the ruff-buff bagging machine, nor was he present when they sifted through the bags of material on the pallet. He conceded that the ruff-buff material in those bags was bagged by the machine in question, but he denied telling the inspectors that the material was bagged with the dust shroud off, that he knew it was off, and that he instructed the bagger operator to go ahead and bag the material anyway (Tr. 487). He stated that he explained to the inspectors that the bagger had apparently been damaged, and that when he discovered the shroud was off he instructed the operator to clean the machine out and to take out all of the ruff-buff material left in the machine storage bin. Since there were seven bags of material on the pallet, he had no way of knowing

whether the material had been bagged with the shroud on or off (Tr. 489). He denied making any statements to the inspectors that the bags containing dates of November 12 and December 12, 1980, were bagged without the use of the dust shroud (Tr. 490).

Mr. Schmarje confirmed that the bagging machine in question is not used on a regular basis, that the material bagged with that machine is minimal, and that it is used for the purpose of building up a warehouse stockpile. Once the inventory is reduced, the machine is again used to build up a stockpile (Tr. 491, 492-493). Mr. Schmarje conceded that the ruff-buff bagging machine was used to bag the materials which were stamped 11/12/80, 12/12/80, 12/17/80, 1/8/81, 3/27/81, and 5/5/81, as noted by the inspector on exhibit P-15 (Tr. 494). He also agreed that the machine must have been installed at least as early as November 12, 1980 (Tr. 494).

Ernest Butler, testified that he is employed by the respondent as a maintenance man, and he confirmed that he is a welder and that his duties include the repair of the machines in the plant. He confirmed that the new ruff-buff bagging machine was acquired "somewhere around 1980" as a replacement for the old one. He stated that he installed the dust shroud on the new machine when that machine was installed, and that the shroud was the one which was previously on the old machine (Tr. 504). The installation was made by welding the shroud onto the machine, and he explained how this was done (Tr. 505-506).

Mr. Butler stated that during the week of May 7, 1981, foreman Gene Pool told him that someone had called and requested that a shroud be installed on the ruff-buff bagger, and when he went to look for the shroud he found in "standing back towards the maintenance shop", and it did not have an accumulation of dust on it. Mr. Pool told him had someone had called him and Mr. Pool said "ernie, will you put that shroud back on" (Tr. 507). Mr. Butler then "went to repair the shroud so I could put it back on". During a conversation with Lee Kirby, another maintenance man, Mr. Kirby informed him that the shroud had been damaged when it was run into by a fork lift. Mr. Butler stated further that he believed the shroud had been damaged the day before he was told to reinstall it because he had previously seen it on the machine the day before when he left his work shift (Tr. 508). Mr. Butler described the damage, and the repairs which he made (Tr. 509). He identified exhibit R-9 as his daily worksheet, dated May 8, 1981, and there is a notation "worked on ruff-buff machine. Put hood back on" (Tr. 511).

On cross-examination, Mr. Butler confirmed that he made the original installation of the shroud on the machine the same time the machine was installed, but he could not recall the precise dates (Tr. 512). He also confirmed that to his knowledge since the original installation of the shroud, it had never been off the machine except for the time he rewelded it back on on May 8, 1981 (Tr. 514), and had it been off any other times he would have known about it because he is the only welder available for such work (Tr. 516). He also was of the opinion that the shroud could not have been off overnight because he walked by it "50 times a day" and he would have noticed it (Tr. 518).

In explaining the work he did in putting the shroud back on the machine on May 18, 1981, Mr. Butler explained that after repairing the legs, he had to make additional repairs to facilitate hooking in the air pipe, and he explained that "The hoses for the air pipe were already there, but I had put it in with metal pipe, and whoever took it off had cut it off. Instead of unbanding it, they just cut the pipe out of the way." (Tr. 513). When asked to explain who did this work, Mr. Butler stated that he was told that the mechanic on the second shift cut the shroud off with a welding torch after it was damaged, and someone stacked in the corner, and he was instructed to repair it and reattach it. Mr. Butler also indicated that the mechanic who cut it off "can weld, but not very good" (Tr. 517).

In response to further questions, Mr. Butler identified exhibits 17, 18, and 19 as photographs of the shroud in question, and he indicated that they must have been taken after he reattached the shroud (Tr. 520). He also indicated that he could not remember speaking with anyone about the shroud at the time the citation issued on May 7, 1981, including the inspector, and he confirmed that his work shift is from 7:00 a.m. to 3:00 p.m. (Tr. 520). He identified Inspector Lalumondiere in the hearing room, acknowledged that he knew he was an inspector, but he denied that he knew that Mr. Lalumondiere was the person who issued the citation in question, and he denied that he had ever discussed the citation with him (Tr. 521). In response to further questions as to how long the shroud may have been off the machine prior to May 8, 1981, Mr. Butler testified as follows (Tr. 522-523):

Q. Does it surprise you to hear that Mr. Schmarje even said that thing was off on May 5? That's two days earlier, at the very least.

(No response.)

BY MR. SMITH:

Q. Well, you don't have to answer the question. If you can't answer it, you don't have to. If I tell you that, in point of fact, that shroud was off on May 5, 1981, which is some three days before you repaired it or put it back on, as you put it, May 8, 1981, does that surprise you in anyway?

A. Yes, it does.

* * * *

Q. Mr. Butler, in other words, would it be your testimony that it could have been the 5th or the 6th-- is it consistent with your understanding of this that it could have been the 5th or the 6th that it was knocked off?

A. It could have been. I go by that thing all the time. I don't stop and look at every machine to see if the shrouds are on them.

Q. But you know that--

JUDGE KOUTRAS (Interrupting): Well, let's don't split hairs. Mr. Schmarje himself said it could have been a couple of days. The man is telling you, "In the normal course of business on any given day, I usually walk by there, and if it would have been off, I would have seen it." The question I would ask him, if it was off in November 1980, would you have known about it?

THE WITNESS: Yes, sir.

Paul Riston, testified that he has worked for the respondent for two years, and that his job is to "clean up". He could not recall any specific dates, but confirmed that he told respondent's counsel about "the day" he ran into the ruff-buff machine with a fork lift he was operating, that he didn't think he had done much damage, but "felt bad" about it and went home after the incident (Tr. 527). Mr. Riston reviewed his work "time card" shown to him by respondent's counsel, and he confirmed that it reflects that he worked eight hours on Monday and Tuesday, but that on Wednesday, the record only reflects 5.5 hours, and he believed that is the day he left work after hitting the machine and damaging the shroud (Tr. 529-530). He told no one about leaving work early, could not remember discussing the incident with any supervisor, and he did not know when management found out about it (Tr. 531). He also confirmed that he was afraid he would be fired (Tr. 531).

George Storm, testified that he was employed by the respondent as a mill operator, and he confirmed that he has operated the old and new ruff-buff machines in question. He could not state when the new machine was acquired, but he confirmed that he has used it over a period of six or eight months. He stated that he ran the machine no more than once a month, and that he has run the new one 10 or 15 times (Tr. 533). Prior to May 1981, he may have run it "more than five times", but always with the dust shroud in place and he never operated it without a shroud (Tr. 534). He identified a copy of exhibit R-11, as a statement in question and answer form which was sent to him for his signature after an interview with MSHA's investigator, and he stated that he never returned a signed statement (Tr. 536). Mr. Storm also identified the deceased mechanic who removed the damaged shroud as his brother Henry Storm, and confirmed that they both worked the second shift at the time in question (Tr. 536).

Wayne Vik, testified that he is employed by the respondent as a mine foreman, and also serves as the Union labor representative. He confirmed that at one time the company had an old Regis Ruff-Buff bagging machine, and subsequently purchased a new one. He did not know when the new one was actually installed, but knew that it had been in the plant for a number of months (Tr. 538). He confirmed that during the period January to May of 1981, he had occasion to go through the plant on a daily basis, and that he never observed the bagger in question without the shroud on it (Tr. 539). As far as he knew, the shroud was always affixed to the bagger (Tr. 539).

Mr. Vik testified as the labor representative, he was present during the time MSHA Special Investigator Dennis Haeuber interviewed employees George Storm and Otha McKee (Tr. 539). Mr. Vik stated that Mr. McKee told him that in response to one of the questions asked by Mr. Haeuber, he (McKee) gave a "wrong answer" because he didn't fully understand the question. However, Mr. Vik could not say which particular question or answer confused Mr. McKee (Tr. 542).

On cross-examination, Mr. Vik confirmed that in May 1981, he was the underground foreman, but spent the morning in the mill and the rest of the day in the mine, and he conceded that he was not always around the mill area (Tr. 547). Mr. Vik stated that he was present during the MSHA special investigator's interview with Mr. McKee, but he could not recall the date. MSHA's counsel quoted several "questions and answers" from a copy of that interview, and in response to a question as to whether he recalled Mr. McKee's responses, Mr. Vik stated that he vaguely remembered them, but took no notes. He also stated that while he discussed the interview with Mr. McKee the next day, he could not recall the specific question that Mr. McKee had in mind when he said he gave a "wrong answer" (Tr. 449-550).

Inspector Lalumondiere was recalled by the Court, and he confirmed that exhibit P-15, a copy of his field notes made during the inspection in question, reflect the dates that he found on the bagged ruff-buff product which he found on the pallet by the machine. He confirmed further that Mr. Schmarje acknowledged that the dates shown on the baggs on question reflected the dates on which the materials were bagged by the machine. When asked if Mr. Schmarje was questioned as to whether the dust shroud was on or off the machine on each of the days that the machine was used to bag the materials found on the pallet, he responded as follows (Tr. 576-577):

JUDGE KOUTRAS: Did he tell you, also, that on the dates that those, reflected on those bags, that when that material was bagged, that the shroud was off it and he knew it was off it? Like, for example, that December 1980 date on there.

THE WITNESS: On the dates that are in question here, I asked him if he had run this bagger on this date. He said, "Yes, I had." I asked him why isn't the shroud on. I said, "Had you had it on there?" We specifically asked him--he was asked, yes.

JUDGE KOUTRAS: You asked him, "Did you use this machine to bag this material on December--on November 12, 1980?"

THE WITNESS: On these different dates--

JUDGE KOUTRAS (interrupting): He said, "Yes, the machine was used to bag it."

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And then you asked him a follow-up question, "Was the shroud on the machine on these dates?"

THE WITNESS: I don't remember exactly how I asked him the question. I asked him if he had put the shroud on when he bagged it, and he said that he had never put the shroud on.

JUDGE KOUTRAS: He said he never put the shroud on when he bagged this material on those dates?

THE WITNESS: That's right.

JUDGE KOUTRAS: That's what he told you?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Why is it that in your notes anywhere this seems like a pretty incriminating statement on his part. Why wouldn't you put that in your field notes?

THE WITNESS: Well, if I had to do it over, I'd put a lot more things in them, sir, but--

MR. SMITH (interrupting): It is in the inspector's statement.

THE WITNESS: I believe I put it in the inspector's statement that he stated that he had used it.

JUDGE KOUTRAS: Using it is one thing but using it without the bagger is another.

THE WITNESS: Used it without the shroud.

JUDGE KOUTRAS: On all those dates?

THE WITNESS: Yes, sir.

MR. SMITH: I think it's one of the respondent's exhibits.

When asked about his "inspector's statement" (Exhibit R-7), Mr. Lalumondiere conceded that there is no documentation for the alleged "admission" by Mr. Schmarje that the bagging machine was operated without

a dust shroud when each of the bags found on the pallet were bagged. Mr. Lalumondiere also conceded that his inspector's statement does not reflect any admission by Mr. Schmarje that he made such a statement (Tr. 578). However, he insisted that Mr. Schmarje did admit "that he never put the shroud on" (Tr. 579).

Mr. Lalumondiere conceded that he was not in the plant on each of the days that he noted the machine was used to bag the ruff-buff, and he confirmed that the reason he did not issue any citations on the days he observed the dust shroud off the machine was that it was not in use on those days (Tr. 581). He also confirmed it was possible that the shroud was off the machine and lying on the floor because the machine was not being used. However, when he found the dates on the bags indicating that the machine had been used, he questioned Mr. Schmarje's prior assertions that the machine had not been used (Tr. 582).

Mr. Lalumondiere also conceded that his "inspector's notes" do not reflect any notations concerning his observations that the shroud he observed was "gathering dust". He also confirmed that Mr. Schmarje said nothing to him about the shroud being bumped or damaged by a fork lift (Tr. 585), and in response to additional questions stated as follows (Tr. 588-589):

JUDGE KOUTRAS: O.K. You walked in the mine and you saw the shroud over there on three or four different occasions.

THE WITNESS: Right.

JUDGE KOUTRAS: When I asked you why you didn't issue a citation and why you just simply brought it to Mr. Schmarje's attention, your response was, "I didn't issue a citation, Judge, because they weren't using the machine."

THE WITNESS: Well, I think I better clarify that. I said, maybe you didn't understand me, that I wouldn't issue a citation because this was a new machine, it was installed, and according to what he told me, they were still in the process of getting things working to the way they should on there.

JUDGE KOUTRAS: I see.

THE WITNESS: Therefore, I would not issue a citation. When you get into one where they operate it all the time and you go in there and there's evidence of it, then it's a different situation.

JUDGE KOUTRAS: If you had not found those bags with those dates on them, you wouldn't have cited them?

THE WITNESS: No, sir, I would have had no indication that he was using it. I would have no reason to believe he was using it.

Depositions

By agreement of the parties, and with leave of the Court, depositions of additional witnesses were taken by the parties and were submitted and accepted for the record. The deposition of former MSHA Special Investigator Dennis Haeuber was taken by petitioner's counsel on November 3, 1983. Mr. Haeuber confirmed that he is presently employed as Safety Director by Mulzer Crushed Stone Company, Tell City, Indiana. Included as exhibits to Mr. Haeuber's deposition are the following documents:

1. Mr. Haeuber's investigative report dated July 11, 1981, concerning his "Investigation of a Possible Knowing and Willful Violation at Tammsco Inc."
2. A one page handwritten notation made by Mr. Haeuber during his investigation.
3. A memorandum prepared by Mr. Haeuber, dated May 18, 1981, concerning a conversation with Inspector Lalumondiere.
4. A copy of an interview conducted by Mr. Haeuber with Harold Schmarje on June 17, 1981.
5. A copy of an interview conducted by Mr. Haeuber with John Norton on June 17, 1981.
6. Handwritten notations made by Mr. Haeuber during the aforementioned interviews, including a handwritten "addendum" memorandum prepared by Mr. Haeuber concerning the results of laboratory tests conducted on ruff-buff samples obtained by Inspector Lalumondiere on August 5, 1981.

Mr. Haeuber confirmed that he conducted the special investigation in question and that all of the documents affixed to his deposition are part of his official report of investigation. He confirmed that on May 18, 1981, he and Inspector Lalumondiere had a conference concerning the inspection of May 7, 1981, and that Mr. Lalumondiere told him that Mr. Schmarje had admitted to him that he knew that the cited condition existed, but that he had to produce or stockpile the ruff-buff product. Mr. Haeuber also confirmed that after his interview with Mr. Schmarje on June 17, 1981, Mr. Schmarje stated that "it was quite obvious that the ruff-buff bagging machine had been in use without the shroud being in place. We would not deny that fact, but we believe that the ruff-buff product is heavy enough to stay out of suspension" (Tr. 8). Mr. Haeuber stated that he made a notation of that statement, and it is included as an exhibit to his deposition (Tr. 10).

Mr. Haeuber confirmed that he also interviewed Otha McKee and Lee Kirby, but that Mr. Norton was the only person who returned a statement to him, and Mr. Norton made some corrections and additions to his statement, and they are reflected by circles on the file copy. Mr. Haeuber also confirmed that at different times during his special investigation, both Mr. Schmarje and Mr. Norton took the position that the plant dust control plan of

April 14, 1980, was superseded by a revised plan which had been submitted to MSHA during a meeting with Congressman Paul Simon (Tr. 13). Mr. Haeuber stated further that to the best of his knowledge, everything that is contained in his report of investigation of July 11, 1981 is true.

Mr. Haeuber stated that at no time during his interview with Mr. Schmarje did he in anyway indicate that the dust shroud was on the ruff-buff bagging machine everytime it was operating. In fact, Mr. Haeuber stated that just the opposite is true, and that Mr. Schmarje admitted that the shroud was off the machine when it was operated, and he explained that it was off because the April 14, 1980 dust plan had been superceded, and that the shroud was not needed because the silica materials were coarse and would not be suspended in air (Tr. 16). Mr. Haeuber also stated that at no time during the interview did Mr. Schmarje inform him that the bagging machine had been run into by a forklife or that the shroud had been knocked off (Tr. 17, 23).

With regard to the changes made by Mr. Norton on his interview statement, Mr. Haeuber stated that the date-stamp on the front of the statement reflects that it was received in his office on July 22, 1981 (Tr. 32). Mr. Norton's addition to his statement indicating that the shroud had been damaged was the first time anyone had mentioned this (Tr. 33).

On cross-examination, Mr. Haeuber confirmed that from 1978 to 1981, he inspected the respondent's plant less than ten times, and that Mr. Lalumondiere also inspected the plant during those years and that they would be on inspections together (Tr. 71). Mr. Haeuber also confirmed that he assumed the duties of a "special investigator" or "safety and health specialist" in July 1979 (Tr. 74), and that the only two silica mines he inspected were Tammsco and Illinois Mineral (Tr. 76).

Mr. Haeuber explained the procedure for initiating a special investigation, and he confirmed that after Inspector Lalumondiere issued the section 104(d)(1) citation, they discussed the citation, and Mr. Haeuber then recommended an investigation by filling out the "willful violation review" form which is attached as an exhibit to his deposition (Tr. 100). His investigation actually began on June 17, 1981 when he visited the plant to conduct his interviews, and on that day he met with Mr. Schmarje and Mr. Norton and explained the procedures he would follow in conducting his investigation (Tr. 106-108).

Mr. Haeuber stated that after Mr. Norton's corrected statement reflecting his assertion that the machine in question had been damaged was received in his office, he spoke to no one about the statement and did not pursue the matter further. He stated that he assumed his complaints processor sent the statement to MSHA's office in Arlington, Virginia, and he explained why he did not pursue the matter further as follows (Tr. 136-138):

Q. So, it's your testimony that knowing this, of the damage of the shroud or at least the possibility of it, you discussed it with nobody?

A. The report was already sent in. I just added an addendum.

Q. Still, you discussed it with nobody?

A. I didn't need to.

Q. You don't think it has a bearing on these proceedings?

A. It's an alleged.

* * * *

Q. Given this allegation, Mr. Haeuber, wouldn't you think it reasonable to pursue it?

A. No, I do not.

Q. Why not? Would you explain that?

A. Because, for one thing, Mr. Schmarje already indicated that he knew the shroud was off and continued to let the machine operate. For the second thing, this thing. . . this correction that Mr. Norton made was only hearsay. I don't think it was pertinent to the investigation or to the case. And if it came out, let it come out in court.

Q. So, it's your feeling that the allegation of damage to the shroud, at or about the time of the violation, is not pertinent to the case?

MR. SMITH:

He didn't say that. He included it with his report for everybody to see.

Q. In other words, you didn't investigate the possibility of this being a fact, is that right?

A. All the facts that were obtained during the interviews indicated that there was no damage to the shroud. There was nothing mentioned about damage to the shroud. Not one word.

Q. Did you investigate the possibility of the truth of that allegation?

A. What do you mean?

Q. Did you do anything about it once you knew it?

A. No, I did not.

MR. SMITH:

Except, you included it as part of your report?

A. As an addendum, yes.

Q. What report did you include that in?

A. It would have been sent to Arlington, Virginia, in the Final Report of the investigation into the 104(d)(1).

Q. You included the shroud damage allegation in a report to Arlington?

A. I would have included the copy of the interview that Mr. Norton sent back to the Vincennes office. I would have sent that or had my Complaint Processor send that to Arlington to be included in their copy of the investigation.

Q. And when would you have done that, Mr. Haeuber?

A. I don't know when my Complaint Processor did it.

Q. Would you have done it at or about the time you received the corrected statement?

A. Sure, sure. I would say so.

In response to further questions, Mr. Haeuber stated that on previous occasions when he was inspecting the plant for leaks in the duct work or emissions, he would take respirable silica dust samples. However, he denied that he ever directed anyone to take any dust samples after the citation was issued by Mr. Lalumondiere, but was aware of the fact that such samples were taken, and that he included those results as part of his report by the memorandum which is attached to his deposition (Tr. 174-175).

In a separate continuation of Mr. Haeuber's deposition, there is attached the following documents:

1. List of exhibits.
2. Mr. Haeuber's notes and interviews with Otha McKee and Lee Kirby.

Respondent's Mill Operator, Otha McKee was interviewed by Inspector Haeuber on June 17, 1981, and a copy of that "question and answer" interview is a part of the record in this case, and it is also attached to Mr. McKee's deposition taken by petitioner's counsel on November 3, 1982. Pertinent portions of that interview are as follows:

Q. Who instructed you to operate the Rough Buff bagging machine?

A. I don't remember. Several people were in the lunchroom before shift and in general conversation someone said we're running Rough Buff this evening.

Q. Were you aware that when this bagging machine is in operation, that a shroud and ductwork shall be connected into the dust collecting system?

A. No.

Q. Did anyone tell you that the shroud was supposed to be in place when this bagging machine was in operation?

A. No.

Q. Are you familiar with the company dust control plan as submitted by Tammsco, Inc. to the Mine Safety and Health Administration?

A. Yes. I wasn't really familiar with that particular item.

Q. How long had you had experience operating the Rough Buff bagging machine before the citation of May 7, 1981?

A. I don't think that the Rough Buff bagger was operated more than several times prior to that date.

Q. Was the shroud ever in place when you were operating the Rough Buff machine?

A. Yes, after the citation was issued on May 7, 1981.

Q. Do you know what percent silica the Rough Buff product contains?

A. No.

Q. Do you have any idea what airborne respirable silica bearing dust does to human lungs?

A. Yes.

Q. Do you believe that when you were operating the Rough Buff bagging machine without the benefit of a shroud and ductwork to the dust collector that when you were bagging the product, you were afforded all the protection available?

A. Yes.

Q. What type of protection were you afforded?

A. Respirators.

Q. During normal bagging operations with the shroud in place, is there a large quantity of dust present?

A. No.

Q. You've had the opportunity to operate the Rough Buff bagger with the shroud off and with it in place. Can you see any difference in the airborne dust?

A. I can't see any great difference.

Q. Is there anything else that you can think of that we haven't discussed that might aid in the conducting of this investigation?

A. This plant pays more attention to training to make employees aware of hazards of silica.

In his deposition, Mr. McKee claimed he was confused about Mr. Haeuber's use of the term "shroud", and while he specifically rememberd the shroud being in place after the citation issued, he stated that he could not recall whether it was in place when he operated the machine, and when asked whether he specifically recalled operating the machine two days before the citation issued, he stated he could not recall (Tr. 11). He also confirmed that he did not return a signed copy of the statement because he believed that it was inaccurate (Tr. 12).

Mr. McKee stated that he was not present during the inspection of May 7, 1981, and did not know when the violation was cited. He learned about the incident for the first time when he was interviewed by Mr. Haeuber, and he reiterated that he could not recall whether the shroud was on the machine on May 5, 1981 (Tr. 22).

The deposition of respondent's mechanic Lee Kirby was taken by the petitioner on November 3, 1982. Mr. Kirby confirmed that he was previously interviewed by Inspector Haeuber on November 18, 1981, and identified his "question and answer" statement of that date, and a copy is attached to his deposition. Mr. Kirby could not recall what he did with the statement sent to him by Mr. Haeuber for his signature, and Mr. Kirby was questioned by petitioner's counsel about the following questions and answers which appear on the statement in question:

Q. As a maintenance man, have you had the opportunity to work on the shroud and ductwork on the Rough Buff bagging machine? When?

A. Yes.

Q. Prior to May 5, 1981, did you disconnect the collecting shroud and ductwork at the Rough Buff bagger?

A. The Rough Buff bagger and Neosil bagger were swapped or changed, but the Rough Buff bagger was not put back into service then.

Q. Who gave you orders to do this work?

A. Harold Schmarje.

Q. Who do you take your orders or instructions from?

A. Harold.

Q. Have you seen the Rough Buff bagger in operation in the last two months?

A. Yes.

Q. Would that have been before or after May 7, 1981, when the citation was issued?

A. It would have been after May 7, 1981, when the shroud was on.

Q. Do you know the approximate date when the Neosil and Rough Buff baggers were swapped?

A. Possibly the first of the year, maybe January.

Q. Were you instructed to connect or to leave disconnected the shroud and ductwork of the Rough Buff bagger?

A. I think it was on for a period before May 7, 1981, but then the shroud and ductwork were removed for some reason and never replaced.

Q. Who gave you these instruction?

A. I would not know for sure because I was not involved in taking it off.

When asked whether he remembered the questions and answers, Mr. Kirby replied "I don't remember. It's been so long, I actually don't" (Tr. 9). Mr. Kirby stated that prior to May 7, 1981, the bagging machine in question was disconnected and "sitting in the corner" and the shroud was off, but he could not recall how long it was there (Tr. 10). The ruff-buff machine was eventually exchanged for a neosil bagger.

Mr. Kirby confirmed that he did not know Inspector Lalumondiere. He also confirmed that prior to May 7, 1981, the ruff-buff machine was not connected, and the dust shroud was off the machine and he observed it lying in the corner (Tr. 11). He stated further that prior to May 7, 1981,

he observed the shroud on the new ruff-buff bagging machine, but could not recall the date. He also stated that the shroud was knocked off the machine, and while he indicated that "it couldn't be over a day at the most, if at all", he stated that he simply couldn't remember (Tr. 13). When asked to resolve the apparent contradiction in his prior statement that the shroud was "removed", and his present statement that it was "knocked off", he explained that the shroud had been hit and bent, and while he personally did not see the condition of the shroud Paul Riston told him that it had been hit. He also stated that he was not involved in the shroud repair work (Tr. 16). When asked whether he observed the ruff-buff bagger on a daily basis, Mr. Kirby responded that he "didn't pay any attention to it" (Tr. 17). He confirmed that he personally did not observe the shroud, and was simply told that it was knocked off (Tr. 18).

Mr. Kirby stated that at some point in time a new or different ruff-buff bagger was put into production and that he and someone else installed a shroud on it as soon as it was put into production. Subsequently, when the ruff-buff bagger was exchanged for the neosil bagger, the machine and the shroud were disconnected and were placed "over by the door in the corner". The ruff-buff bagger was again moved back into production, and he and Henry Storm put the shroud back on, and the machine continued to operate with the shroud attached. He next worked on the ruff-buff shroud when he and Ernie Butler put the shroud back on after Mr. Riston told him that it had been knocked loose (Tr. 19-21). In summary, he stated that there were two occasions when he and Ernie Butler put the ruff-buff bagger shroud on, and one occasion when he and Henry Storm put it back on. In the meantime, the shroud and the bagger were "sitting over in the corner" (Tr. 22).

Mr. Kirby stated that he did not know whether the shroud was on or off the machine when it was operated by Mr. McKee on May 5, 1981, and he confirmed that he could not personally state whether or not the shroud was on the machine everytime it was used prior to the time of the inspection (Tr. 24).

Neil Handley, employed at MSHA's assessment office in Wisconsin, was deposed by respondent's counsel on November 4, 1982. In reference to a telephone conference held on July 21, 1981, with regard to the citations in question, he stated that he could not recall a conversation with Mr. Schmarje on that day, but confirmed that he has had a number of conversations with Mr. Schmarje in the past. Mr. Handley confirmed that he spoke with MSHA Inspector Roesler about the citations sometime in July 1981, and Mr. Roesler confirmed that the dust shroud was off the ruff-buff machine at the time of the inspection in question (Tr. 6). Mr. Handley denied that he ever spoke with Mr. Slade or with Mr. Petrie, and he identified his "conference worksheet", a copy of which is attached to his deposition. He confirmed several notations he made on this document, and the notations reflect that Mr. Handley "talked to Ray Roesler and Dennis Haeuber. Roesler says that during the inspection Mr. Schmarje admitted he knew this shroud was not in place. Dennie Haeuber indicates that during his special investigation similar information was developed" (Deposition Tr. 15-17; exhibit 1). Mr. Handley's notations also include a statement "talked to Mr. Schmarje and informed him no adjustment would be made in the proposed assessment".

James Petrie, MSHA Industrial Hygienist, Arlington, Virginia, was deposed by respondent's counsel on November 4, 1982. He was shown copies of exhibits P-20, P-21, and P-22, which are copies of respondent's dust plan and an exchange of correspondence between respondent and MSHA, and he denied ever seeing exhibits P-20 and P-22 prior to November 4, 1982, and he stated that the first time he saw exhibit P-21 was when MSHA's counsel Smith showed to him on October 29, 1982.

The deposition of Dr. Aurel Goodwin, MSHA's Deputy Administrator for Metal and Nonmetal Mine Safety and Health, Arlington, Virginia, was taken by respondents' counsel on November 4, 1982, and it is a matter of record in this case. Dr. Goodwin was asked to identify a number of documents which are labeled RD-1 through RD-22, they are included as exhibits to his deposition, and some of them are copies of exhibits made a part of the record during the hearing in this case.

Discussion

Background and history concerning respondent's silica dust problems.

TAMMSCO, INC., the corporate respondent in this case, is an Illinois Corporation engaged in the processing and sale in interstate commerce of various grades of silica products. The company Mill is a silica-producing plant, operated since 1973 by the Corporation, and Mr. John Norton is president and sole stockholder. Respondent Harold Schmarje has been plant manager since approximately February of 1980, and during the material times involved in this case in 1981, he supervised a work force of approximately 17 to 22 miners. In 1981, approximately 16,000 to 17,000 tons of silica was produced by the plant, utilizing some 45,000 manhours, and the plant is usually operated two shifts per day, five days a week. The primary use of the silica product is for the processing of paints, and the material involved in the instant proceeding is "ruff-buff", and respondent asserts that it is the "coarsest product manufactured by the company".

The silica bearing ore is extracted from underground mines located several miles from the plant and mill site and it is transported there by truck. At the mill, the ore is crushed by means of a pulverizer, and the crushed ore is conveyed to a kiln dryer where it is heated, and then through a series of pebble mills for fine grinding. From these mills, the finely ground material is conveyed or "air swept" through air classifiers where it is separated by specification into various product grades. The various grades of materials are then conveyed to large storage bins by bucket elevators, and then to large cone shaped hoppers located above, and attached to, three bagging machines or "bagging stations" for packaging. After packaging or "bagging" at the "bagging stations", the material is placed on pallets and then transported by forklift truck to the warehouse for storage to await sale and shipment by rail or truck to customers.

At the time the citation issued on May 7, 1981, there were three bagging stations in the mill building: dual spout, neosil, and ruff-buff. The mill itself is a building of about 100,000 square feet, and it is separate and distinct from the crusher building and the warehouse, which

is as large and an extension of the mill facility. The ruff-buff bagging machine in question has been described as air powered and equipped with a small plastic nozzle, over which the bag is fitted. Behind the nozzle is a scale which "trips" the machine off at the desired weight, normally fifty pounds. The bagger is designed to be equipped with a hood or shroud device which is connected to a central dust collections system. The shroud acts as a vacuum to collect fugitive dust which not only protects the worker, but preserves the product. Photographs of the machine are part of the record here, exhibit P-17 through P-19.

The record in this case reflects that MSHA's interest in respondent's silica producing plant began sometime in 1973 when it inspected the facility, began sampling the silica dust, and as a result of those tests, began issuing notices, citations, and orders for noncompliance with the requirements of the mandatory dust standards found at 30 CFR 57.5-1 and 57.5-5. According to the testimony of Max Slade, he first became aware of the silica dust problems at the plant in 1976, and he was concerned about the respondent's poor dust compliance record, as well as its advertising claims that its product was an amorphous type silica and not as harmful as the crystalline type silica. Since MSHA's laboratory analysis reflected that it was the more harmful type (crystalline), MSHA requested that the National Institute for Occupational Safety and Health (NIOSH) conduct an environmental and medical survey study of current and former employees of the plant to determine if workers were currently being exposed to hazardous levels of silica dust and to determine the prevalence of silicosis among current and former workers. That study was conducted on July 23, 25, and 26, 1979, and the results are part of the record in this case (Exhibit P-5).

Following the NIOSH study, respondent's plant was effectively shut down by MSHA on October 10, 1979, through the issuance of section 104(b) withdrawal orders because of the respondent's failure to comply with a number of outstanding dust violations which had previously been issued during February, September, and November 1979. The citations were issued because six of the occupations tested at the plant were found to be out of compliance with the applicable dust standards, and without those six occupations working, the plant could not operate. Exhibit P-2 is a six-page table listing the notices, citations, and orders served on the respondent for violations of section 57.5-1 and 57.5-5 from 1974 to May 7, 1981.

MSHA's closing of the plant in October 1979, resulted in a series of meetings and exchanges of communications and correspondence between the respondent, one Congressman, MSHA's local and National enforcement and staff personnel, MSHA's legal counsel, respondent's legal counsel, and officials of the Union representing the plant employees. My personal observation, after reviewing and wading through the voluminous record in this case, is that this flurry of activity came about because: (1) NIOSH's characterization of the silica dust problems at the plant as "an imminent danger" caught MSHA's attention, and MSHA wished to insure compliance with the applicable dust standards; (2) the plant closing caught respondent's attention, and respondent was seeking a way to stay in operation while

still addressing the dust problems; (3) the Union wanted to insure continued operation of the plant and wished to avoid any permanent shut down which would result in loss of employment; (4) legal counsel on both sides were attempting to address the problem, while at the same time advising their clients as to various enforcement and compliance possibilities, and (5) the Congressman's office wished to resolve the issues while addressing all of these concerns.

In order to comprehend the scope and magnitude of MSHA's enforcement efforts at the plant in question, I deem it appropriate to review the record of the citations, notices, orders, and other enforcement actions taken by MSHA's inspection force prior to May 7, 1981, the date on which the citations in the instant proceedings were issued. In this regard, included among exhibits P-16 in these proceedings are copies of four citations issued by Inspector Jack Lester on March 20, 1979, each of which charge a violation of mandatory standard section 57.5-5, because the inspector believed that the two-spout bagger, the clean-up man, the crusher operator, and the mill operator were all out of compliance with the permissible dust exposure levels (Citation Nos. 365172, 365173, 365174, and 365175). In each instance the inspector noted that even though the workers were wearing respirators, "administrative or engineering controls were not being used to control the contaminant and eliminate the need for respirators". The abatement time for each of the citations was fixed by the inspector as April 20, 1979, and in each instance the inspector extended the abatement time several times, up to and including August 10, 1979, and his justification for doing so is noted as "This dust citation is being extended on the basis of the company's abatement plan".

On October 10, 1979, Inspector Lalumondiere issued four section 104(b) withdrawal orders, Nos. 366580, 366581, 366582, and 366583, after finding that the time for abatement of the previously issued citations of March 20, 1979, should not be further extended, and the reason for not extending the abatement time further is noted as "efforts to control this dust problem did not warrant further extension". He ordered withdrawal of the entire milling operation, the entire mill building, the pulverizer crusher, and the two spout bagger.

On April 14-15, 1980, Inspectors Lalumondiere, Roesler, and Haeuber conducted an inspection of the plant while it was still under the previously issued closure orders of October 10, 1979, and copies of their report, as well as the actions taken as a result of that inspection are found in Exhibit P-10. Those documents reflect that the closure orders were terminated, the citations were "reinstated", and the abatement times were further extended. As justification for these actions, Inspector Lalumondiere noted as follows:

In accordance with the company's respirable dust control plan of April 14, 1980, a good faith effort to install feasible engineering controls is now

being made. Moreover, as noted in that plan an effective respirator program is being installed.

* * * However, further sampling and evaluation will be needed to determine if all feasible engineering and administrative controls have been implemented or whether present controls have reduced exposure to below the T.L.V.

In his "field notes" attached as part of Exhibit P-10, Inspector Lalumondiere made the following notation:

The ruff-buff bagger was just being reinstalled, and the neosil bagger had a capture velocity of about 350 F.P.M. When we checked the two spout bagger, we were getting a capture velocity of 400 FPM. This was considered adequate and within that recommended by Denver Tech. Support. A new slide had been installed at the elevator of the crusher to the storage tank and the leaks in the crusher elevator had been repaired. When I checked the #3 elevator, the section that had been leaking so bad before had been replaced. The clean up in the mill and throughout the warehouse was good as it had been washed down. We terminated the orders and reinstated the (6) six dust citations. When we got ready to leave the property, we tried to explain to Mr. Smarje [sic] that the place would have to be kept in its present condition if he wanted to operate, and at this time he became very arrogant. Ray told him that if he did not keep the place in a clean condition and did not keep his leaks repaired, he could be assured that he would not operate and we left it at that.

Exhibit P-11 are copies of section 104(b) closure orders issued by MSHA Inspectors Jack Lester and Bruce Dial on June 27, 1980, and they all cite violations of section 57.5-5. The areas affected by the closure orders are shown as "two spout bagger", "fork lift", "mill building", and "crusher building", and in each instance the inspector noted that "the company failed to follow the dust control plan submitted to MSHA on April 14, 1980". Inspector Dial's field notes, included as part of Exhibit P-11, state in part as follows:

* * Mr. Smarje [sic] came in and said that we picked a good day to come and shut them down, because everything was wrong. He also told us that they were not following the plan that they drew up for wrapping the pallets.

* * We left the property and went to a table in a park to talk about the orders and write them. While we were writing the orders a Mr. Norton "owner" came to the table and ask [sic] what we found. Jack told him

that they were not going by the plan that he wrote up. He ask [sic] if we were going to shut them down and we said that we were going to issue some orders. He said that he was going to call his attorney then.

* * We went back to the plant at 10:10 and issued the withdrawal orders. Jack spoke with there [sic] attorney and we waited till 10:45 to see if the plant was being shut down. We left the plant and called Ray Rossler [sic] and he told us to return to the office.

Mr. Lester's "field notes" contain the following notations:

Smarje [sic], when asked about plastic wrapping the palletized material, stated that he had not been complying with that part of the plan. Only 8 of the 69 pallets in the warehouse was wrapped. * * The attorney for Tammsco talked to me on the phone before we left and wanted me to call Dr. Goodwin. I informed Smarje [sic] that I would have to go through proper channels in order to converse with Dr. Goodwin, and that he would be contacted after we returned to the office.

Mr. Lester's and Mr. Dial's field notes both make reference to the "two spout bagger", and they observed that the area around it was being washed down by employees, but that the dust collector in the catch basin was plugged up on one of the spouts, but that two men were immediately put to work on this. No mention is made of the ruff-buff bagger.

On July 1, 1980, Inspector Lester rescinded his previous closure orders concerning the two-spout bagger and the crusher operator, and reinstated the citation and extended the abatement time. He did so for precisely the same reasons as Inspector Lalumondiere on April 14-15, 1980 (Exhibit P-16).

On August 20, 1980, Inspector Lalumondiere issued four section 104(b) withdrawal orders affecting the mill clean-up man, the mill operator, the crusher operator, and the two spout bagger, as his stated reasons for doing were "due to the lack of good faith effort being put forth by operator and failure to follow dust control plan, this citation does not warrant further extension" (Exhibit P-16). He also issued withdrawal orders for fork life operator and the bag stacker for the same reasons (Exhibit P-12). Mr. Lalumondiere's "field notes", regarding these citations contain the following notations:

* * * There was a pile of dust about six inches high behind the two spout bagger where the catch basin had filled and was spilling over.

* * * There was a bad leak at the neosil feed elevators and also leaks in the screw conveyor above the ruff-buff bagger. A velocity check of the neosil bagger showed only 100 to 150 FMP and the crusher the same thing.

* * * The main elevator on the roof of the building for the neosil and ruff buff was leaking at the neosil slide.

On August 26, 1980, Inspector Haeuber rescinded Inspector Lalumondiere's closure orders of August 29, 1980, reinstated the citations, and he did so for the same reasons quoted above (Lalumondiere). He extended the abatement times to September 29, 1980, and they were further extended to November 10, 1980, February 18, 1981, April 10, 1981, July 8, 1981, September 8, 1981, and in each instance the extensions were granted so that "shift weighted average resampling" could be conducted and the results "calculated to determine the shift weighted average exposure" of the occupations in question. Further extensions for abatement were made up to and including July 6, 1982 (Exhibit P-16).

Exhibit P-14 is an April 13, 1981, memorandum report from Inspector Lalumondiere to Mr. Slade concerning a dust survey conducted at the plant on March 10-11, 1981. Aside from the results of the survey which are attached to the memorandum, Mr. Lalumondiere presents a narrative summary concerning his observations, and it includes observations of "piles of silica dust", "dust collectors venting dust like a steam engine into the atmosphere", "leaking equipment", "dust blowing everywhere" by the main elevator for the 2-spout bagger, "only a few pallets were wrapped", and he concluded his report by stating that "I could see no great improvement of the conditions at Tammsco other than the fact that the employees are more conscientious when it comes to wearing a respirator".

As a result of the dust survey of March 10-11, 1981, Inspector Bruce Dial issued a citation on April 6, 1981, No. 0500426 (Exhibit P-16), citing a violation of section 57.5-5 because the laboratory results from the silica bearing dust for the neosil bagger was out of compliance. Inspector Dial concluded that a violation existed on March 11, 1981, the day the sample was taken, but he indicated on the face of the citation form that "this citation is issued on April 6, 1981." He fixed the abatement time as July 8, 1981, and Inspector Lalumondiere extended the abatement times to September 8, 1981, December 8, 1981, and February 25, 1982.

The compliance extensions through February 25, 1982, were made pending receipt of the results of dust resampling and recalculation to determine the shift weighted average exposure of the neosil bagger. Thereafter, on March 16 and May 17, 1982, Inspector Donald Baker, after noting the results of the dust tests for the neosil bagger, extended the time for compliance to April 26 and July 6, 1982, and in both instances he noted that the extensions were made "to allow time for additional engineering controls to be performed", and he also explained the dates on which he wrote the extensions of the abatement times as "due to the delay in getting the samples analyzed".

Respondent's "dust control plans".

It should be noted at the outset that there are no mandatory MSHA regulations or standards requiring a mine operator subject to the mandatory health and safety standards found in Part 57, Title 30, Code of Federal Regulations, to submit or adopt any specific dust control plan, or to submit

such plans to MSHA for review and approval, and Mr. Slade conceded that this was true (Tr. 353). Thus, absent any such mandate, a mine operator is free to fashion any plan that he wishes, as long as MSHA doesn't object. Any objections by MSHA usually take the form of citations and closure orders, and this forces the operator to review its "plan" so as to achieve "abatement" until the next inspection. In short, such plans are all too often formulated by such "trial and error methods", and the evolution of the respondent's so-called "dust control plan" of April 14, 1980, is in my view a classic example of this.

Respondent's "dust control plan" is in the form of a letter dated April 14, 1980, from John Norton to MSHA's Vincennes, Indiana field office (Exhibit P-9). The letter states that it is in response from MSHA for a revised plan, and Mr. Norton agrees to follow the itemized dust control measures set forth in the letter. Item 4(e) states that "shrouds will be installed and maintained on all bagging machines". Also included among the dust control measures are provisions for "clean-up as necessary" to prevent silica from becoming airborne, "immediate clean-up" of silica spills, repair of leaks, daily and periodic pre-shift and on-shift inspections by a supervisor, dust control measures for equipment, and measures to insure personal respiratory protection for all employees. Attached to the exhibit is a December 18, 1979, Tammsco Inc. notice to all employees concerning the company's program for the use, cleaning and repairing of respirators.

Inspector Lalumondiere's testimony reflects that the "plan" came about after one of the respondent's competitors, Illinois Minerals Company, faced with a closure order from MSHA for noncompliance with the same dust standards, asked for an expedited hearing. According to Mr. Lalumondiere, after the start of the hearing, the parties reached a compromise agreement which permitted Illinois Minerals to resume its operation as long as the company agreed to submit a written "dust control plan" detailing its proposed dust control methods. Faced with a similar closure situation, and in an attempt to have his plant reopened, Mr. Lalumondiere stated that on advice of MSHA's legal counsel, Tammsco's President, John Norton, was advised that the plant could be reopened, but only if Mr. Norton submitted a plan similar to that submitted by Illinois Minerals. At Mr. Norton's request, Mr. Lalumondiere permitted Mr. Norton to copy the provisions of the Illinois Minerals plan, and it was subsequently submitted by Mr. Norton in his letter of April 14, 1980, and Mr. Lalumondiere stated that both plans were basically the same (Tr. 171-172).

During the course of the hearing, as well as during the taking of various depositions, respondent's counsel maintained that the respondent's dust control plan of April 14, 1980, was superceded by a subsequent plan dated September 23, 1980 (exhibit R-8). Although Mr. Norton makes reference to both plans in his interview statement filed with Inspector Haeuber, Mr. Norton was asked no questions concerning these plans by either party during the hearing, and he gave no testimony on this issue. His prior comments to Inspector Hawuber concerning the April 14, 1980, plan is an assertion at page two of his corrected statement that "this plan was dictated to us

by the Mine Safety and Health Administration". His only explanation concerning the September 23, 1980 plan, was in response to a question asking him to explain why the ruff-buff bagging machine was allowed to be operated without a shroud. His response, at page two of his corrected statement is "The dust control plan of April 14, 1980, was superseded by a dust control plan of September 23, 1980".

I take note of the fact that the September 23d plan does not provide for any dust control shrouds. In fact, the "plan" consists of four paragraphs, and an attachment which is dated June 20, 1980, titled "Cost to Upgrade Production", and it appears to be some sort of preliminary cost analysis for two phases covering the years 1980-1989 and 1989-1990. The four paragraphs on the face of the plan itself are as follows:

By means of inspection, repair and clean-up, dust levels will be maintained at or below conditions existing at the onset of the Mine Safety and Health Administration PAR program (September 1980).

Above dust levels will be monitored by equipment specifically designed for measuring respirable dust and under the supervision of a neutral party.

Efforts to bring the plant into dust standard compliance will continue. An overview of the plan to accomplish this is marked exhibit A and attached hereto.

Respiratory protection will be provided and the respirator program will be consistent with American National Standards Institute requirements for a respiratory protective program.

In arguing both the existence of the September 23, 1980 plan, and in support of his assertion that it superceded the April 14, 1980 plan, respondent's counsel produced several documents received for the record as exhibits R-7, R-8, and R-13. These documents are a letter dated July 10, 1981, addressed to MSHA's office in Arlington, Virginia, for the attention of Mr. Slade, a copy of an MSHA "buck slip" or "routing slip" dated 3/26/81, addressed to Mr. Slade from Inspector Roesler, enclosing a copy of the 9/23/80 plan, and a document dated August 4, 1981, which is Mr. Schmarje's "corrected" version of his interview with Inspector Haeuber in which Mr. Schmarje makes reference to the 9/23/80 plan. In addition, attached to the deposition taken of Dr. Goodwin is a copy of a letter dated March 20, 1981, to Dr. Goodwin from Mr. Norton, in which Mr. Norton makes reference to the September 25, 1980 plan, a letter dated July 30, 1981, to Congressman Paul Simon from Mr. Norton, in which Mr. Norton makes reference to the plan, and a letter dated July 15, 1981, from Mr. Schmarje to MSHA assessment officer Neil Handley, which also makes reference to the plan.

Mr. Slade denied ever receiving the July 10, 1981, letter addressed to his attention concerning the second plan, and Dr. Goodwin could not recall seeing the correspondence referred to by counsel during his deposition. Further, Mr. Slade testified that notwithstanding any other "plans", at no time did MSHA ever agree that any engineering controls other than those stated in the April 14, 1980, letter from Mr. Norton would be acceptable (Tr. 355).

In response to certain bench questions concerning the two plans, respondent's counsel asserted that his point in pursuing the existence of the second plan was to establish that the respondent was acting in good faith (Tr. 344). Counsel conceded that the second plan did not repeal the April 14, 1980, requirement that the dust shroud in question be maintained on the bagging machine in question as a feasible and acceptable engineering control (Tr. 344), and he conceded that the shroud was just such a device (Tr. 345-347). His concern is reflected in the following colloquy at Tr. 347-349:

JUDGE KOUTRAS: But what you are saying is that "Judge, if you find for the respondent in this case, on the fact of this case, and dismiss the citation, that means we can take all these devices off all these machines, because we are coming up with a better--we are coming up with a ten-year plan."

MR. COGHLAN: No, I am not saying that, Judge. I am not saying that at all. I am saying that the Secretary is obliged to do certain things under the case law with reference to each plan or submission. In other words, it would appear as though the Secretary appears to be continually negotiating. The Secretary must not continue to negotiate. He has a duty to expressly tell the operator, "Look, we are not negotiating. I want to remind you that there is no revision. There is no refinement. There is no carryover." We are not talking about that. What we are talking about is that you are obliged to keep your agreement. We are not revising it.

Now, in coal, as you know better than I, they have very definite standards and, in coal, the operator has some very special remedies, but in metal, nonmetal, and especially underground, they just do not have it. There is no statutory authority for the plans.

Now, what concerns me is this: This the one definitely had overhanging it for many months, in conversation with various people, criminal sanctions threatened [sic]. I, personally, was advised of this.

JUDGE KOUTRAS: I understand.

MR. COGHLAN (continuing): --this roundabout way of making law, whereas where criminal sanctions are involved, just like Chapter 38 here in Illinois, we need that type and kind of certainty, and that the agent cannot be in doubt when he is told by the operator, "Look, do not worry about it. I was in Washington. There are four more plans going."

JUDGE KOUTRAS: Mr. Coghlan, my only observation to that is that what MSHA probably could do, and probably should have done, to dispell any notion that they are doing it piecemeal is to shut the plant down and leave it shut down.

MR. COGHLAN: So that everybody knows.

JUDGE KOUTRAS: But what happens in the real world is that the operator will do anything in his power to terminate that citation. He will promise MSHA the moon. That is what he did in this case. It is obvious to me in this letter.

When asked by the Court why there is no mandatory standard requiring a mine operator to submit a dust control plan, Mr. Slade responded as follows (Tr. 352-354):

JUDGE KOUTRAS: You know, but I have asked this question time and time again: Why is there not a standard that requires them to come up with a plan?

MR. COGHLAN: That is my question.

JUDGE KOUTRAS: I will ask it again, Mr. Slade. What is the answer?

THE WITNESS: Because we have never been able to get one through public hearings and ALJs.

JUDGE KOUTRAS: What do you mean, "ALJs"? Do you mean to tell me that the Secretary cannot propose a rule to amend "57" to include a provision in there that requires a mine operator in metal or nonmetal to submit a dust control plan?

THE WITNESS: He can propose it, but the objections are usually so strenuous --

JUDGE KOUTRAS: Has it ever been proposed?

THE WITNESS: Yes, sir, it has.

JUDGE KOUTRAS: Has it ever gone to a rulemaking hearing before the Administrative Law Judge of the Labor Department, because we are out of the rule-making business now?

THE WITNESS: I do not know.

JUDGE KOUTRAS: In other words, when it is published in the Federal Register and the Secretary gets objections from the industry, then he just drops it?

THE WITNESS: In many cases, yes.

JUDGE KOUTRAS: I am talking about the specific proposal, rule-making, for a requirement that mine operators submit a plan to MSHA for review.

THE WITNESS: Well, there are Presidential guidelines and such that demand a reduction in paper work. They demand to--

JUDGE KOUTRAS (interrupting): In my humble opinion, the lack of such a specific mandatory standard generates more paper work rather than cutting it down, because what I see in this case is plans done by correspondence and by law firms and by Congressmen and by lawyers in the Solicitor's Office.

That is the way these plans are written. I am suggesting to you, Mr. Slade, that you promulgate a standard that tells any mine operator, "You are required to come up with a plan within X number of days of starting to dig that first piece of whatever you are digging there, and you submit that plan to MSHA for their review. We will give you suggestions and the guidelines and, once you go through the filtering process, there is the requirement."

THE WITNESS: I assure you that the air quality standards under proposal right now will include that proposal.

Findings and Conclusions

In Docket No. LAKE 81-190-M, the corporate operator Tammsco Inc. is charged under section 110(a) of the Act with a violation of mandatory standard 30 CFR 57.5-5. The citation charges that on May 7, 1981, the ruff-buff bagging machine, which is in use, was not hooked into the dust collection system of the mill as stated in a dust control plan submitted by the company on April 14, 1980. In Docket No. LAKE 82-65-M, Respondent Harold Schmarje, the plant manager, is charged under section 110(c) of the Act with knowingly authorizing, ordering, or carrying out this same alleged violation as an agent of Tammsco Inc.

The interpretation and application of the term "knowingly" as used in the Act has been the subject of litigation before this Commission. MSHA v. Everett Propst and Robert Stemple, 3 FMSHRC 304 (1981). In MSHA

v. Kenny Richardson, 1 FMSHRC 874 (July 1979; ALJ Michels), 3 FMSHRC 8 (January 1981), the Commission held that the term "knowingly" means "knowing or having reason to know", and it rejected the assertion that the term requires a showing of actual knowledge and willfulness to violate a mandatory standard. In this regard, the Commission adopted the following test as set forth in U.S. v. Sweet Briar, Inc., 92 F.Supp. 777 (D.S.C. 1950):

'[K]nowingly,' as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

In Richardson, the Commission held that its interpretation of the term "knowingly" was consistent with both the statutory language and the remedial intent of the Act, and expressly stated that "if a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute". On appeal to the Sixth Circuit, the Court affirmed the Commission's decision, Richardson v. Secretary of Labor, FMSHRC, 689 F.2d 632, decided October 1, 1982. */

The respondents in these proceedings are charged with violations of mandatory standard section 57.5-5. This standard requires that employee exposure to harmful airborne contaminants be controlled, insofar as feasible, by prevention of contamination, removed by exhaust ventilation, or by dilution with uncontaminated air. Thus, the standard on its face, does not require the complete elimination of such harmful airborne contaminants. It simply requires that employee exposure be controlled by prevention, removal, or dilution, and these control measures are directly dependent on the development and application of feasible and acceptable engineering control measures so as to insure that any employee exposure is limited to or does not exceed those exposure levels mandated by the threshold limit values mandated by mandatory section 57.5-1. Section 57.5-5, contains two exceptions. The first exception comes into play if no accepted engineering dust control measures have been developed. In this case, employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels as long as they wear respirators, and as long as the company's "respirator program" meets the requirements of subsections (a), (b), and (c) of section 57.5-5. A second limited exception is dictated by the "nature of the work involved", i.e., occasional entries into contaminated areas while establishing controls, performing maintenance, or conducting investigations, and in these cases employees are required to wear respirators.

MSHA has the burden of proof in these proceedings, and it must establish by a preponderance of the credible testimony and evidence that (1) employee exposure to harmful silica dust exceeded the permissible levels, and (2) there existed feasible engineering or administrative controls to control employee exposure to such dust, and that these controls were not utilized.

*/ Cert. denied, No. 82-1433, May 16, 1983.

The Dictionary of Mining, Mineral, and Related Terms, published by the U.S. Department of the Interior, Bureau of Mines, defines "silicosis" as follows at pgs. 1012-1013:

Lung disease caused chiefly by inhaling rock dust from air drills. * * * A condition of massive fibrosis of the lungs marked by shortness of breath and resulting from prolonged inhalation of silica dusts by those, as stonecutters, asbestos workers, miners, regularly exposed to such dusts.

According to the information contained in the preface to the 1973 TLV Booklet published by the ACGIH, the term "threshold limit values" refer to airborne concentrations of substances and represent conditions under which it is believed that nearly all workers may be repeatedly exposed day after day without adverse effect. These values refer to time weighted concentrations for a 7 or 8 hour workday and 40 hour workweek, and the amount and nature of the information available for establishing a TLV varies from substance to substance.

The specific threshold limit values for contaminants are set out in section 57.5-1, which adopts by reference the dust exposure limits set out in the 1973 edition of the American Conference of Governmental Industrial Hygienists (ACGIH) publication TLV's Threshold Limit Values for Chemical Substances in Workroom Air (exhibit P-4). The TLV or threshold limit value which establishes the maximum exposure for any particular contaminant is obtained by a formula found in this publication.

Although the respondent in this case initially indicated that it believed its silica products to be of the amorphous type, the record in this case establishes that it is crystalline, and the respondent conceded that this was the case. The TLV formula for crystalline silica is set out at pgs. 32-33 of the ACGIH TLV Values, exhibit P-4, and in a letter dated May 21, 1981, from Max Slade to Mr. John Norton, Mr. Slade states in pertinent part as follows:

In your letter to Representative Simon you say that, 'the MSHA allowable dust level in the workplace environment total is .1 milligram in eight hours.' This is a misconception, the MSHA allowable limit for airborne respirable dust is expressed by the formula $10 + (\% \text{ Quartz} + 2)$, and is listed in milligrams of dust per cubic meter of air (mg/m^3). For dust containing 50 percent free crystalline silica (quartz) the allowable limit would be $10 + 52$ or $0.192 \text{ mg}/\text{m}^3$. The average white male under a moderate work load will breathe approximately 22 cubic meters of air in an 8-hour work day. If this air contained $.192 \text{ mg}/\text{m}^3$ of dust, a person would breathe 4.22 milligrams of dust in 8 hours or 21.1

mg per 40-hour week, or 1012.8 mg per 48-week year.
This is some 40 times greater than the amount you
indicated as the MSHA allowable limit.

In order to determine the adequacy of a mine operator's dust control measures, mandatory standard section 57.5-2, requires that "dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures". Thus, it seems clear to me that there is a direct inter-relationship between the mandatory standards found in sections 57.5-1, 57.5-2, and 57.5-5, and that the clear intent of these standards is to provide a regulatory mechanism for addressing dust hazards by establishing requirements for (1) identifying the existence of hazardous dust levels in the working environment, (2) seeking means to control employee exposure to such hazards, and (3) providing a means for a mine operator to address the problem and come up with workable solutions.

Respondents' defense to the citations is the assertion that on May 6, 1981, the shroud which had been welded on to the ruff bugg bagging machine was knocked off and demolished by a fork life operator. Further, respondent maintained that the new ruff buff bagger had been in place since January 1981, and that it was operated intermittently by Mr. George Storm, who stated that he never operated the bagger without the shroud (Tr. 218-219). Counsel also maintained that Mr. Storm had previously told MSHA investigator Dennis Haeuber that the shroud was always on the machine when he operated it (Tr. 221). He also maintained that the shroud which was installed on the new bagger was in fact the shroud which was on the old bagger, and that after the new one was moved to its present location, the old shroud was welded on the bagger after some modifications were made to accommodate it (Tr. 221). He argued further that the plant as it was on July 23, 1979, was not the same as on May 7, 1981, and that no valid sample was taken that day to substantiate the violation (Tr. 223).

With regard to the lack of samples, respondent's counsel asserted that in this case MSHA has the burden of establishing by a preponderance of the evidence that there was exposure to harmful airborne contaminants, and while it need not test every machine in the plant, if MSHA believes that the ruff-buff product in question exposed an employee to contamination on any given day, it must sample and test the material to support that conclusion on the day it claims the employee was over-exposed (Tr. 384-385). Counsel conceded, however, that if samples were taken a few days before the citation here was issued, and they were found to be out of compliance, then one can assume that on those days, employees were in fact exposed to harmful airborne contaminants (Tr. 384).

MSHA's counsel argued that the physical conditions (airborne silica) of the plant which Mr. Slade and Mr. Lalumondiere observed on the day of the inspection in question, coupled with the fact that dust samples taken before and after that date showed the plant was still out of compliance are important factors in any determination concerning the presence of

harmful airborne contaminants. In addition, counsel pointed out that since the NIOSH study, as well as the fact that continuous dust surveys and samples show noncompliance, the respondent is still mining the same silica and nothing has changed (Tr. 387).

At the close of MSHA's case in chief, respondent's counsel moved that the citations be dismissed on the grounds that MSHA has failed to establish employee exposure to harmful airborne contaminants by means of prevention, removal, or dilution. Counsel asserted that MSHA's evidence failed to establish the exposure necessary to establish the violations, and that evidence of harmful exposure two years earlier is insufficient to establish the kinds of violations issued on May 7, 1981. He concluded that any prior sampling was done at times unrelated to the alleged violations in question (Tr. 393-394). The motion was DENIED (Tr. 394).

MSHA's failure to test or sample the ruff-buff material in question

MSHA's mandatory air quality standards as found in section 55.5-1, 56.5-1, and 57.5-1, as well as the requirements for controlling employee exposure to harmful airborne contaminants as found in sections 55.5-5, 56.5-5, and 57.5-5, has been the subject of litigation before this Commission and the courts, and a review of some of these cases follows below. In each instance cited, the question of whether MSHA had established a violation of the airborne contaminant control requirements of sections 55.5-5 and 57.5-5, were dependent on dust samples and tests, based on the TLV requirements found in sections 55.5-1 and 57.5-1. Further, the question of whether a particular airborne dust contaminant was "harmful", and whether employees were unduly exposed to such dusts, has consistently been determined by testing and sampling to establish that employee exposure to such dust exceeded the recognized TLV.

MSHA v. Washington Construction Company, DENV 79-371-PM, 3 FMSHRC, 2125, decided September 14, 1981, involved a quartzite quarry in which the respondent was charged with violations of section 57.5-5, because the results of the sampling of three miners in regard to airborne contaminants revealed that they were subjected to harmful exposure based upon the threshold limit values adopted in accordance with the regulation. The cited miners were exposed to ten, six, and three times the allowable limits, and while they were wearing respirators, the evidence established that accepted engineering control measures (water sprays) could have been applied in order to control the amount of airborne contaminants, thus permitting the respondent to be in compliance without the use of respirators.

MSHA v. Johnson, Stewart & Johnson Mining Company, WEST 79-175-M, decided August 17, 1981, 3 FMSHRC 1937, involved a citation for a violation of section 56.5-5, after a pit laborer, who was sampled for dust exposure during a period of 445 minutes, was exposed to silica bearing dust in the amount of .92 milligrams per cubic meter. The Judge found that according to the threshold limit value adopted by the regulations, .42 milligrams per

cubic meter should not have been exceeded. He also found that it was feasible to reduce the harmful airborne contaminants by use of water incorporated in the plant's crusher spray system.

In Climax Molybdenum Company v. MSHA, WEST 79-72-RM, decided April 16, 1981, 3 FMSHRC 964, Judge Moore took note of the fact that out of the nine cases involving alleged violations of section 55.5-5, which he had docketed for trial, eight were dismissed on motion by MSHA on the ground that there was no evidence to support the citations. With regard to the remaining case, the citation alleged that the quartz-bearing dust level around a floor jaw crusher operator was 1.02 Mg/m^3 , where the threshold limit value (TLV) was $.49 \text{ Mg/m}^3$, and that feasible engineering or administrative controls were not being used to reduce the dust levels to the point where respirators could be eliminated. Judge Moore vacated the citation, and he did so on the ground that MSHA's testing procedures were flawed and suspect, and that the testimony of its laboratory technician in support of the citation was confused and unclear.

MSHA v. Pacer Corporation, DENV 79-257-M, decided by Judge Michels on August 28, 1979, 1 FMSHRC 1081, involved a citation for an alleged violation of section 55.5-1, and the citation there charged that a rock sorter was exposed to silica dust in excess of that permitted under section 55.5-1(a). Judge Michel's decision contains a comprehensive review of MSHA's dust sampling procedures, and based on the facts presented he vacated the citation and dismissed the case on the ground that the sample results in support of the citation in question contained unexplained wide variations in the percent of free silica found in the samples, and that the inaccuracy and uncertainty of the testing methods, as demonstrated by the record before him, led him to conclude that a violation had not been established. Although the Commission directed review of this decision in October 1979, it subsequently vacated its order for review in April 1980.

MSHA v. DiCamillo Brothers Mining Company, WEST 81-210-M, April 21, 1982, 4 FMSHRC 718, involved a citation issued for a violation of section 57.5-5, after a miner died when he was exposed to an excessive buildup of carbon monoxide, as determined by tests taken the same afternoon of the accident. Although the fatality apparently occurred when the ventilation was "circuited", the Judge held that the operator had an absolute obligation to insure that the contamination limits set out in section 57.5-5, as expressed in TLV's, were not exceeded.

In a recent case decided on March 21, 1983, by the 10th Circuit Court of Appeals, Climax Molybdenum v. Secretary of Labor & FMSHRC, No. 80-2187, the Court affirmed the Commission's decision in Climax Molybdenum Co., DENV 70-102-M, 2 FMSHRC 2748 (Oct. 1980), 1 FMSHRC 1044 (Aug. 1979 decision by ALJ Michels), affirming Judge Michel's dismissal of Climax's application for review of citations charging it with alleged violations of the mandatory dust standards found in mandatory standards 30 CFR 57.5-1 and 57.5-5. Judge Michel's dismissal of the case prior to a hearing

on the merits was predicated on the fact that MSHA decided to vacate the citations and sought dismissal of the case on the ground that it could not prove that Climax was not using all feasible dust control methods at the cited mining operation. Notwithstanding MSHA's vacation of the citations, Climax insisted that it was entitled to a declaratory order interpreting the cited dust standards and specifying that it was in fact using all feasible controls. In response to Climax's assertions that it was entitled to such declaratory relief, the court made the following observations at page 10 of its "slip opinion":

We recognize that in the case before us, there exists considerable uncertainty regarding the proper interpretation of the FMSHA dust regulations. We are sympathetic to the plight of industries that must structure their operations and make long-term capital investments in the face of this uncertain regulatory environment. Nevertheless, the scope of our review of the Commission's denial of declaratory relief is limited to a determination of whether the Commission abused its discretion. In this case, the Commission provided reasonable justifications for the denial of Climax's request for declaratory relief. The Commission noted that the present dust regulations were unclear, in part, because the government's position on dust regulation is presently undergoing reformulation. The Commission may reasonably withhold declaratory relief in anticipation of a clearer exposition of government policy. The Commission also suggested that Climax has shown no special need for declaratory relief; Climax faces no greater peril than other mining companies in interpreting the content of the regulations. The Commission may reasonably choose to reserve its use of declaratory relief for special cases in order to conserve its administrative resources. Given the Commission's justifications, we conclude that it did not abuse its discretion in denying declaratory relief. (emphasis added).

In his post-hearing brief, respondents' counsel argues that MSHA has presented no evidence whatsoever of any tests made or samples analyzed at or about the time of the inspection of May 7, 1981. With regard to the March 10-11, 1981, plant survey and tests made on those dates (exhibit P-14), counsel points out that the occupations and equipment which were surveyed are not part of the citation issued on May 7, 1981. As for the August 21, 1981, ruff buff particle size analysis (exhibit P-6), counsel points out that this was done after the citation issued. Even so, counsel points out further that the commercial value of the silica product is directly in proportion to the degree by which it is refined. Counsel asserts that the respondent manufactures its product to detailed specifications. The reason for the existence of the process is to change the particle

size of the raw silica ore deposit, and the finest product manufactured is almost 100% respirable, i.e., airborne and harmful. Since the results of MSHA's August 21, 1981, particle size analysis of the ruff-buff product taken from the plant discloses that it is 94% larger than 44 microns, or almost totally nonrespirable, counsel maintains that MSHA has failed to explain its contradictory opinion that if the ore comes from the same deposit, it is all harmful, i.e., respirable.

Respondent's counsel argues further that MSHA's position in this case that the conditions at the plant have not changed since 1979 is not supported by the facts. In support of its assertion that the plant conditions were not the same at the time the citation issued on May 7, 1981, counsel cites the testimony of John Norton concerning the capital expenditures made and as detailed in a letter to Dr. Goodwin of June 6, 1980, as well as Mr. Schmarje's testimony regarding five major innovations since February 1980 (Tr. 404). Exhibits R-3 and R-12, which are part of Dr. Goodwin's deposition, reflect the improvements made at the plant to address the dust control problems, including completed or ongoing work with respect to 15 of the NIOSH recommendations, and these negotiations and changes have taken place during the interim period spanning the NIOSH study and the inspection of May 7, 1981 (Tr. 217-219).

Exhibit R-9 is a copy of a dust evaluation study conducted at the plant by MSHA's Denver Technical Support Group during December of 1979, and January of 1980. At hearing and in his brief, respondent's counsel argued that these reports establish that due to certain plant modifications and improvements in controlling the dust, as reflected in this report, the conditions at the plant as of the time of those reports were not the same as those which may have existed at the time of the NIOSH study. Counsel argued that with the dust collecting equipment in place, as shown in these surveys, the dust levels which may have existed in July of 1979 could not be the same as those which may have existed as of May of 1981 (Tr. 380-383).

In response to counsel's arguments, Mr. Slade conceded that the respondent has made improvements and modifications to the plant, particularly in the Crusher Room. However, Mr. Slade indicated that the continuing dust problems stems from the fact that the respondent has neglected the maintenance and clean-up recommendations. Even though dust control measures have been taken, and control devices have been installed, it was his position that the respondent did not properly use or maintain the dust control devices which it had available (Tr. 382).

Mr. Slade confirmed that in a letter to Mr. Norton, he acknowledged that improvements were made to the dust control plan and that money has been spent on some basic controls. However, Mr. Slade was of the following opinion (Tr. 385):

The maintenance and upkeep and housekeeping of the plant is rotten. Their attitude toward dust control is rotten. What money they are putting in is being

wasted because it is not being maintained and the housekeeping is not being adhered to.

MSHA's post-hearing brief contains no discussion concerning the requirement for sampling. However, during the course of the hearing, MSHA's counsel took the position that no sampling was required to support the citation in question because the respondents are not charged with a violation of section 57.5-1, but are charged with a violation of section 57.5-5, for failure to maintain the engineering controls (shroud) on the cited ruff-buff bagging machine (Tr. 478). However, counsel conceded that the term "harmful airborne contaminant" means any such contaminant which does not meet the requirements of section 57.5-1 (Tr. 477).

In support of his position that no sampling or testing was required to support the citation, counsel asserted that the bagging machine in question was an integral part of the plant and that the area around that machine was not in compliance with the dust standards at the time the citation issued on May 7, 1981. In addition, counsel maintained that the evidence establishes that even if the machine were only operated for an hour or two, it would contribute to the prevailing atmosphere, and without the dust shroud, the contaminants from the machine would necessarily contribute to the overall dust conditions which were out of compliance (Tr. 279).

When reminded of the fact that each of the citations and orders issued in 1979, 1980, and 1981 (exhibits P-11, P-12, P-16), for violations of section 57.5-5, were supported by dust samples showing noncompliance, counsel asserted that the ruff-buff bagger in question was not operated everyday or for long periods of time, and that different people may have operated it at any given time. Given the fact that the ruff-buff bagger was located in close proximity to two other bagging devices, and with men working in that area, the lack of shrouds or the failure to comply with the dust standards contributes appreciably to the overall over-exposed work atmosphere (Tr. 484). He also stated as follows (Tr. 485-486):

JUDGE KOUTRAS: But I'm just a little curious as to how one can determine specifically how much of a contribution the Ruff-Buff product has made to a person that's breathing it in if they don't test it. I mean, to me, that sounds like common sense that they would test over an eight-hour period--but you apparently take the position that it contributes and it's all mixed in together--

MR. SMITH (Interrupting): Well, let me say this to that, as far as I know. You can't force the operator, to make somebody stand there and make them be tested for a whole eight-hour period. That's number one. But they did make an analysis of the Ruff-Buff product. That's in evidence and it's been explained by Mr. Slade and others that, you know, this was respirable and it was within the limits there.

I'm informed that three pounds, every fifty-pound bag would be respirable. So you're talking--three pounds of fifty-pound bags, 6 per cent would be respirable. My colleague wanted me to say that for the record.

Although Ms. Moring testified that samples of some of the silica products were taken and analyzed during the NIOSH survey, the ruff-buff product was not sampled (Tr. 117). With regard to the ruff-buff particle size analysis conducted on the two samples by MSHA's Denver Tech Center, as reflected in the August 31, 1981, memorandum (exhibit P-6), Ms. Moring explained that those test results reflect that 94% of the tested ruff-buff was not considered to be of sufficient size to render it respirable into the lung, but it is still considered to be toxic silica. She also explained that the tests indicated that 98%, of the remaining 6% of tested material would be respirable, and when asked whether the 94% found to be nonrespirable would render it any less a "harmful airborne contaminant", she responded "yes and no", and explained her answer as follows (Tr. 127-128):

THE WITNESS: Yes and no. No, it is not because at a 44 micron particle it cannot be inhaled into deep lung where it would cause damage. Yes, because as a 44 micron particle if any of this spills, gets stepped on, gets run over, whatever, it is reborn, so it can be ground down by these actions.

When asked whether her answer would be different if the ruff-buff tests showed that none of it was respirable, she answer as follows (Tr. 128-129):

JUDGE KOUTRAS: Let me ask the question another way. Let's assume you have sampled the material and found that none of it sifted through and none of it was respirable according to your definition, would an operator be subject to a citation under this particular standard for failure to control airborne, harmful airborne contaminants?

THE WITNESS: I can't answer that.

When asked if she knew what an "air classifier" was, Ms. Moring responded that "it separates the particles by their organic size". When asked whether it was possible for such a device to separate particles so that there would be no "respirable particles", she responded that she was "not that familiar with the air classifier" (Tr. 117-118). She also conceded that she had not looked at or read sections 57.5-1 or 57.5-5 (Tr. 69).

Ms. Moring went on to articulate her concern that the normal activities carried on in the plant around the areas where baggers are located can cause the nonrespirable silica dust to be reentered into the atmosphere, and if changes occur in the particle size it could get into the lungs.

She also confirmed that NIOSH's concern is over the fact that the entire plant presents a problem with employees being over-exposed to harmful levels of silica dust.

MSHA's position that dust samples and tests are not required to support the citation in this case is further reflected in the following colloquy with Max Slade (Tr. 389-391):

JUDGE KOUTRAS: The reason I brought up this particular example, Mr. Slade, is that I take it when, when I read in these gravity sheets, I mean these narrative statements, the inspector's findings, which parrot the NIOSH study or which parrot some study that says that silicosis is this and this is that, that when the inspectors are obviously doing at this plant, for example, is that they are accepting all of this thing as gospel and they have regurgitated in these statements to support citations of the standard, are they not?

THE WITNESS: I believe, in the case of silica, it is a world-known fact that respirable silica causes silicosis.

JUDGE KOUTRAS: I am not taking issue with that.

THE WITNESS: So it is each inspector using his own individual thoughts and knowledge on the hazards of silica.

JUDGE KOUTRAS: Can an inspector go to this plant and make a determination that silica is not hazardous and not issue a citation?

THE WITNESS: No, sir.

JUDGE KOUTRAS: Why can he not?

THE WITNESS: Well, I guess he could, but he would probably be questioned on it.

JUDGE KOUTRAS: He is not making that as independent judgment. He is accepting a fact that silica is a harmful airborne contaminant.

THE WITNESS: Let me rephrase that. An inspector could go to this plant and say, "Well, I do not think this is a hazard," and not issue a citation on it.

JUDGE KOUTRAS: What would be the circumstances under which he would do that?

THE WITNESS: Ignorance on the inspector's part.

JUDGE KOUTRAS: Would part of the answer be that he tested and found that they were in compliance?

THE WITNESS: Oh, yes. If they are in compliance, then they are not exposed to an airborne contaminant.

JUDGE KOUTRAS: But you are saying here that they are under "continuing noncompliance" and on this very day they were out of compliance, with these outstanding citations, and that is why this inspector thought it was not necessary to even take a sample?

THE WITNESS: That is right.

JUDGE KOUTRAS: All right, just so I understand that.

MR. SMITH: Plus the physical conditions that he observed there on that day of the silica around in the air.

JUDGE KOUTRAS: Now, if Mr. Coghlan produces the mystery witness, who sampled the dust on that day and found that that machine was in compliance, your case goes down the "tube", does it not?

MR. SMITH: It sure would.

MSHA's Metal and Nonmetal Mine Safety and Health Inspection and Investigation Manual, 1981 Edition, contains an entire Chapter 64 dealing with health inspections and testing and sampling procedures. Chapter 65 of the Manual deals with the procedures to be followed by inspectors when issuing citations and orders, and the procedures for issuing citations of health standards are found in Chapter 65, Part II-AA, and the information contained therein at pgs. 65-AA-1 is as follows:

a. Airborne Contaminants

(1) Procedures for Writing Citations

If mine employees are found to be exposed to airborne contaminants in excess of the permissible limit defined in 30 CFR 55/56/57.5-1 and the decision is made to issue a citation 55/56/57.5-1 and 55/56/57.5-5 shall be treated as one standard for purposes of issuing the citation, and only one citation shall be written as a violation of standard 55/56/57.5-1/.5-5.

The body of the citation must contain all pertinent information, such as the TLV or permissible limit, the shift or time weighted average (SWA/TWA), the airborne concentrations of the contaminant, information on personal protection, the source of contaminant, the date of the over-exposure, the date

results were determined and the date the citation is issued and/or the reason for the over-exposure. Obvious deficiencies or breakdown in the control system for the contaminant should also be documented.

Chapter 66 of the Manual is devoted to application of the standards in order to assist inspectors in determining the intent and purpose of any given standard which he may cite. The application for section 57.5-5 is found at pgs. 66-D-1 through D-3, and they are essentially the same as those quoted above, and the application of section 57.5-5 is specifically conditioned on a finding that exposure to airborne contaminants is in excess of the permissible limit defined in section 57.5-1.

There is no credible evidence in this case concerning the mining employment history of any miner whose environment was measured by any respirable dust samples from the ruff-buff bagging machine in question. MSHA's position seems to be that because the shroud may not have been in place when the ruff-buff was bagged, the contamination from that product contributed to the overall silica dust environment of the plant as a whole, as well as in the immediate bagging area, and therefore was obviously out of compliance with the requirements of section 57.5-5. (Tr. 232-236). When asked whether any of the miners whose occupations were out of compliance either before or after the time of his inspection of May 7, 1981, operated the ruff-buff bagging machine which was cited, Mr. Lalumondiere responded that "I don't know who was operating the bagging machine" (Tr. 237). When asked whether any of the social security numbers for the miner occupations which were out of compliance on May 7, 1981, were directly related to the cited ruff-buff bagging machine, Mr. Lalumondiere responded "there would be none of them on that particular bagger, sir, because they would do a respirable dust sampling by using a dust pump to determine the TLV and TWA" (Tr. 237). He also indicated that it would have been "scientifically impossible" for the bagger to be in compliance without a dust shroud (Tr. 238).

Although he confirmed that several occupations and pieces of equipment were out of compliance as of the date of the inspection of May 7, 1981, when asked whether he issued any citations for the "piles of silica dust" he observed that same day, Mr. Lalumondiere stated that he did not. During a colloquy which followed this answer, MSHA's counsel indicated that "they cite somebody for the failure to have the controls. That's the standard. They have to go by what the standard is" (Tr. 235). And, at Tr. 236, where counsel states "you don't cite each little pile by pile. You cite it the way they have to do it within the standards".

Although it is true that at the time the citation was issued, respondent was out of compliance with the required TLV dust levels for several occupations and equipment, the fact is that MSHA permitted the plant to remain operational by extending the abatement times, and in one instance cited during the hearing, one citation was issued on March 11, 1981,

and the abatement times were extended to July 6, 1982, a period of 16 months. When asked whether the respondent's noncompliance record is based on the fact that respondent was doing nothing to control its dust levels, MSHA's counsel responded that respondent was "not doing enough" (Tr. 481).

The fact that the respondent today is still mining the same silica it was mining in 1979 does not necessarily mean that in any given case the silica dust is in fact a "harmful airborne contaminant" subject to a citation or closure order. In response to this very same question, NIOSH expert witness Moring stated that "it can be with appropriate levels" (Tr. 60). She also confirmed that she had no knowledge regarding any dust control improvements or dust surveys made at the plant since the 1979 survey, and that her testimony was based on the prevailing conditions as of the 1979 survey period (Tr. 110-112).

After careful review and consideration of all of the evidence and testimony in these proceedings, as well as the arguments presented by the parties, I conclude and find that MSHA has failed to establish that the levels of employee exposure to any harmful silica dust generated by the bagging of the ruff-buff product without the dust shroud attached to the cited bagging machine exceeded the acceptable threshold limit value mandated by section 57.5-1. In my view, in order to support a violation, MSHA must take into account the prevailing conditions as of the time a citation is issued, and without testing, sampling, or consideration of any improved dust control measures taken by an operator, I fail to comprehend how it can expect to establish a violation.

Respondent TAMMSCO's failure to attach the dust shroud to the ruff-buff bagging machine.

The effectiveness of a dust shroud, and the fact that it is an acceptable and feasible engineering measure for the control of harmful levels of silica dust is not in dispute. Further, the parties are in agreement that the citation of May 7, 1981, was issued because of the alleged failure by the respondents to insure that the dust shroud was on the machine when the bagged ruff-buff material which Mr. Lalumondiere observed during his inspection was bagged. MSHA's evidence in support of the citation consists of certain "admissions" purportedly made by Mr. Schmarje to Inspector Lalumondiere during the inspection of May 7, 1981, in the presence of Mr. Slade and Supervisory Inspector Raymond Roesler. In support of these "admissions" by Mr. Schmarje, Inspector Lalumondiere made reference to certain bags of ruff-buff material which he found stored on some pallets on May 7, 1981. He noted the dates stamped on those bags, and he claims that Mr. Schmarje admitted that the ruff-buff had been bagged by the machine in question on the dates stamped on those bags, and that he also admitted that on each days the materials were bagged, the machine was used without the shroud attached to it.

MSHA's position is that Mr. Schmarje admitted that the dust shroud in question was never on the ruff-buff bagging machine, and since this was the case, any material bagged by that machine was bagged without the required engineering control. Respondent denies that this is the case, but suggests that for a few days prior to the inspection the shroud was off the machine, and the reason it was off was because it had been damaged by a forklift and had to be removed for repairs. Respondent also suggests that any bagging of ruff-buff which may have taken place during a day or two while the damaged shroud was off the machine came about during the "necessary work" required to remove the silica from the machine in order to facilitate the repairs and that these were "exceptional circumstances".

At the hearing held in this case, Mr. Laumondiere testified that while he did not tour the entire warehouse, there were seven pallets near the bagger, with fifty bags of material per pallet, and one pallet had seven bags of material at the bagger, and the dates on those bags were 11/12/80, 12/12/80, 12/17/80, 1/8/81, 3/27/81, and 5/5/81 (Tr. 211). He confirmed that he asked Mr. Schmarje about these bags, and that Mr. Schmarje admitted that the bagger was used on the dates indicated to bag the product, that he knew the shroud was not in place, and that the dust collector had not been hooked up because the bagger was going to be moved as soon as the stockpile was built up (Tr. 212). Mr. Lalumondiere could not recall whether the dust control plan was discussed with Mr. Schmarje at the time of the inspection, and the bagger was not in use that day. Abatement was achieved by installing a shroud and tying it to the dust collecting system, and he abated the citation when he went back to the plant on May 11, 1981 (exhibit P-8, Tr. 213). A maintenance man told him that the shroud which had been lying by the door was the one which was installed and that this took about two hours (Tr. 214).

In a pretrial deposition taken on June 29, 1982, Inspector Lalumondiere testified that the ruff-buff bags which contained the dates in December, January, and March, and which he found on the "partial pallet" by the ruff-buff bagging machine on May 7, 1981, the date of his inspection, were not among those on that pallet, but were among those stacked on the seven pallets stored in the warehouse. He also testified that the dates found on the partial pallet by the machine were all dated May 5, 1981. When asked why he had listed the December, January, and March dates as being found on "one pallet", he replied "no reason whatsoever. That's just rough draft field notes that I have" (Deposition transcript pgs. 64-68).

In a post-hearing deposition taken by petitioner on November 3, 1982, Inspector Lalumondiere identified copies of his "field notes" made during his inspection of May 7, 1981, and he confirmed that at that time Mr. Schmarje admitted to him, in Mr. Max Slade's presence, that the dust shroud was not on the ruff-buff machine at the time it was used to bag the materials shown by the dates on the bags he found stored on the pallets. Mr. Lalumondiere stated that at no time did Mr. Norton or Mr. Schmarje, or anyone else at the plant, tell him that the machine had been damaged (Tr. 3). When asked why his "field notes" (exhibit P-15) do not reflect the admissions by Mr. Schmarje, he responded as follows (Tr. 5-8):

A. Well, I don't make notes of the exact conversation that took place between the two of us. This is notes here that are strictly worth only something to me. I can go back through these and recollect things that went on during that time. And. . .

Q. In other words, you prepared these notes strictly for yourself, not for somebody else to cross examine, is that right?

A. That's true.

Q. Now, you wouldn't have . . . you put down there certain dates that you found the pallets, which indicated to you that the Ruff Buff bagging machine was operated, is that correct, sir?

A. These were dates that material had been bagged and stacked on pallets and stamped with these dates. And on these, I can remember from looking at these dates . . . after we talked to Schmarje, he said that's the way they do it. They stamp the dates on them when they bag. He said on these dates they had run the Ruff Buff bagger. And when we asked him about the shroud on it, he said, no, he had never had it on.

Q. Now, it wouldn't have been a violation if the shroud had been on. So, you just didn't put that down, is that right? In other words, what does that indicate to you? My question to you originally was, why didn't you put Mr. Schmarje's admission down in your notes?

A. Like I said, I didn't put down word for word. I put on here, on the second page back here, that the Ruff Buff bagger had never been hooked up to the dust collector.

When shown a copy of Special Investigator Haueber's deposition which makes reference to a memorandum prepared after speaking with him, Mr. Lalumondiere was asked whether that memorandum confirms that Mr. Schmarje admitted that the shroud was not in place when the bagger was being used. Mr. Lalumondiere responded as follows (deposition pg. 8):

Q. And does this confirm what you just said a while ago, that Mr. Haeuber. . . Mr. Schmarje, rather, did admit that the shroud was not in place when the bagger was being used, the Ruff Buff bagger?

A. It says it's indicated to his. . . to him that he knew the condition existed, yes. That Mr. Schmarje stated to me that he knew the condition existed.

MSHA Supervisory Inspector Raymond Roesler did not testify at the hearing in this case. In his deposition of June 29, 1982, he makes reference to some "field notes" which he made on May 7, 1981 when he accompanied Mr. Lalumondiere on the inspection in question. He confirmed that he told Mr. Lalumondiere to count the pallets which contained ruff-buff and to note the dates shown on the bags. He confirmed that he observed some pallets some 15 feet north of the bagging machine, and one partial pallet by the machine itself "with some bags on it that had just been bagged a couple of days prior" (Deposition pg. 67). When asked if she remembered the dates on that partial pallet, Mr. Roesler responded--"I couldn't say offhand", "It could be the fifth", and he stated further that "I don't remember what the conversation was" (Tr. 86). In short, it seems clear to me that Mr. Roesler simply had no recollection as to the dates on any of the bags found on the pallets in question.

With regard to the so-called admissions by Mr. Schmarje concerning the dust shroud in question, apart from the fact that he confirmed that the shroud was not on the bagging machine in question on May 7, 1981, and apart from the fact that he confirmed that he saw a shroud lying on the floor on a previous occasion when he visited the plant, Mr. Roesler did not testify as to any admissions purportedly made by Mr. Schmarje to Mr. Lalumondiere on May 7, 1981. As a matter of fact, Mr. Roesler conceded that on May 7, 1981, Mr. Schmarje made no statements to him concerning the use of the machine (Tr. 93). He also stated that while Mr. Lalumondiere may have spoken with Mr. Schmarje that day, he (Roesler) could not remember any conversations with Mr. Schmarje, and stated "chances are very great that I probably didn't" (Tr. 94). Further, when asked whether he was present during any conversations between Mr. Slade, Mr. Lalumondiere, and Mr. Schmarje on May 7, 1981, concerning the ruff-buff machine, Mr. Roesler replied "I was with him, but I couldn't say for sure what was even said", and that he couldn't remember (Tr. 94).

In view of the foregoing, it seems clear to me, that contrary to any inference that Mr. Roesler may have heard Mr. Schmarje make certain admissions concerning the dust shroud, Mr. Roesler could not recall any such admissions or conversations which purportedly took place on May 7, 1981, at the time of the inspection and the issuance of the citation.

With regard to Max Slade's corroboration of Mr. Schmarje's "admissions", his testimony on this point is as follows (Tr. 334):

Q. Did you overhear Mr. Schmarje admit that the pallets that were dated indicated that the Ruff-Buff bagging machine was operated on those dates?

A. When the pallets were discovered, Mr. Schmarje was overseeing the repair of the two-spout bagger. We went to him and spoke about the condition around the Ruff-Buff bagger and Mr. Lalumondiere asked him about the dates on the pallets. I heard him say that, yes, that was the date that this material was bagged and he

asked him why the shroud was not in place and he says, "well, we only use it for a short time and, besides, I wanted to get some material stockpiled, so we could move the bagging machine."

Q. Did you overhear Mr. Schmarje indicate that they were going to continue to use it to stockpile?

A. He said that he wanted to get a stockpile built up so they could take a few days to move the machine.

Inspector Lalumondiere's field notes, as well as his inspector's statement (exhibit R-7), make no mention whatsoever of any "admissions" by Mr. Schmarje concerning the use of the cited bagging machine without the shroud attached. In addition, I find Mr. Lalumondiere's testimony of record, including his depositions, to be contradictory and confusing with respect to his documentation of the dates found on the bagged ruff-buff materials. I also find it quite surprising that during the special investigation conducted by Mr. Haeuber he asked no specific questions concerning the dates on the bagged materials. Except for a general question of Mr. Schmarje as to how much ruff-buff was stored in the warehouse, the copy of his interview with Mr. Schmarje contains no questions concerning all of the dates testified to by Mr. Lalumondiere.

The special investigation conducted by Mr. Haeuber in this case leaves much to be desired. Aside from the fact that none of the statements are sworn, signed, or dated, some of the critical issues are developed by broad and general "questions and answers". The lack of procedures concerning tape recording of the interviews has resulted in serious questions of credibility and accuracy with regard to the information being developed. Mr. McKee claims he did not understand some of the key questions asked and stated that he was confused. Mr. Schmarje's edited version of his interview (exhibit R-13), was never submitted, and Mr. Schmarje complained that many of the questions were leading, and that his answers were taken out of context. Mr. Norton's statement was subsequently corrected and edited.

The evidence in this case supports a finding that at the time of the inspection on May 7, 1981, the cited ruff-buff machine was not in use and that the dust shroud was not attached to the machine. However, I cannot conclude that MSHA has established through any credible testimony or evidence that the dust shroud was never installed on the machine, and that Mr. Schmarje knew it. In this regard, I take note of the fact that the record in this case suggests the existence of an "old" and "new" ruff-buff bagging machine, as well as the existence of an "old" and "new" dust shroud, and at times the witnesses were confused as to which was which. Further, while there is testimony that Inspector Lalumondiere observed a shroud lying on the floor during inspections prior to May 7, 1981, Mr. Lalumondiere conceded that he may have been confused when he gave his deposition (Tr. 225-230), and during the hearing the parties agreed that the shroud which was described as "lying on the floor" was not the device the inspector had in mind at the time the citation was issued (Tr. 224).

I can find no credible evidence in this case to support a conclusion that Mr. Schmarje in fact admitted to Inspector Lalumondiere on May 7, 1981, that the shroud was off the machine on each of the days that the ruff-buff materials were bagged. Petitioner's counsel conceded as much (Tr. 498), but he argued that on each occasion prior to the time the dates were detected on May 7, 1981, when Mr. Lalumondiere was at the plant and saw the shroud on the floor, Mr. Schmarje's response was that the bagging machine was not being used. Counsel conceded that the reason the inspector did not issue previous citations when he observed the shroud lying on the floor and off the machine is that if the machine is not in use when he is there, there is no way he can prove a violation. Further, counsel pointed out that on each occasion when the inspector observed the shroud on the floor, he took Mr. Schmarje's word that the machine was not in use. However, when he found the stamp-dated bags during his inspection of May 7, 1981, he concluded that the machine had been used on the dates stamped on the bags which were stored on the pallet next to the machine, and when he confronted Mr. Schmarje, the inspector claims he (Schmarje) admitted that the materials were bagged with the shroud off and that he knew it (Tr. 498-501).

Although the record adduced in these proceedings does support a conclusion that the bagged ruff-fubb materials observed by Inspector Lalumondiere on May 7, 1981, were bagged by the cited machine on the dates stamped on the bags, except for the ones dated May 5, 1981, I cannot conclude from the evidence presented by MSHA that on each of the other dates the materials were bagged without the use of a shroud.

With regard to May 5, 1981, I believe that the record supports a conclusion that the dust shroud was off the machine that day, and that the bagger was used to bag ruff-buff without the shroud in place. Since the plant in question is a relatively small operation, and since it is obvious that Mr. Schmarje was directly involved in its operations, and was directly responsible for supervising the workforce, I find it rather incredible that at the time of the inspection of May 7, 1981, he was totally oblivious or ignorant of the fact that a forklife had struck and damaged the cited bagger. Since he and MSHA have obviously been at odds with each other about the dust problems over a long period time, it seems to me that both Mr. Schmarje and Mr. Norton would have initiated an inquiry immediately on May 7th to document the fact that the shroud had "just been damaged a few days before". After viewing respondent's witnesses on the stand during their explanation of the purported damage to the bagger and shroud, I simply do not believe their account of the purported accidental striking of the ruff-buff bagging machine two days before the citations were issued.

In addition to my rejection of the respondent's testimony concerning the alleged damage to the shroud, I take note of the fact that part of the respondent's defense in this case is the assertion that the applicable dust control plan in effect at the time the citation issued was one in which protective shrouds are not mentioned at all. In view of the fact

that the respondent has consistently taken the position that the ruff-buff machine is not used on a regular basis, and has consistently maintained that the material and product is the coarsest produced in the plant, one can reasonably conclude that it is more likely than not that at the time the ruff-buff was bagged on May 5, 1981, two days before the inspection, it was bagged without the shroud attached, and that Mr. Schmarje was aware of this. The "accidental striking of the bagger by a fork-lift" defense simply supports the conclusion that the shroud was off the bagger on May 7, 1981, and that respondents knew or should have known that it was not on the machine.

In view of the foregoing, I conclude and find that MSHA has established that the dust shroud in question was not on the cited ruff-buff bagging machine on May 7, 1981, and that the machine was used to bag the ruff-buff product on May 5, 1981, without the shroud attached. I further conclude and find that MSHA has not established through any credible evidence that the cited ruff-buff bagger was used prior to May 5, 1981, without the dust shroud attached.

Insofar as Mr. Schmarje is concerned, I conclude and find that MSHA has established that when the ruff-buff bagger was used to bag the materials on May 5, 1981, that Mr. Schmarje knew, or had reason to know, that the bagger was used without the dust shroud attached. As to any times prior to May 5, 1981, I cannot conclude that MSHA has proved its case against Mr. Schmarje by a preponderance of any credible evidence.

Although the citation issued in these proceedings implies a violation of "the dust control plan submitted on April 14, 1980", I fail to understand how MSHA believes it can establish a violation of such a plan when there is no mandatory standard requiring an operator to submit or adopt any dust control plan. The gravamen of the offense here is the assertion that the respondent failed to utilize an acceptable engineering dust control measure, namely the shroud, on the bagging machine which was cited, and to that extent MSHA has established this allegation. However, since MSHA failed to sample or test the ruff-buff product, and since I have concluded that such tests were required to establish that the product was in fact a harmful airborne contaminant within the meaning of MSHA's air quality standards at the time the citation issued on May 7, 1981, the fact that the shroud was not on the machine makes no difference. In short, I believe that MSHA must prove that a contaminant is harmful within the meaning of its standards as part of its requirement that an operator take appropriate control measures.

ORDER

In view of the foregoing findings and conclusions, Citation No. 0501241, issued by Inspector Lalumondiere on May 7, 1981, charging the respondents with violations of 30 CFR 57.5-5, IS VACATED, and MSHA's proposals for assessment of civil penalties against the named respondents in these proceedings ARE REJECTED, and these proceedings are DISMISSED.

Postscript

In my view, the record in this case is an example of the futility of MSHA's silica dust enforcement efforts at the plant in question, and citing the plant manager and a bagging machine that is seldom used is not going to solve the problem. The lack of viable mandatory standards to require the respondent to adopt a dust control plan which can be enforced, as well as the lack of an enforceable mandatory standard requiring the respondent to adopt and maintain a dust clean-up program, has resulted in protracted piece-meal enforcement spanning a period of some ten years.

Subsequent to the 1979 NIOSH study and plant closure, MSHA's enforcement efforts have focused on individual pieces of equipment and selected critical occupations. Citations issued for noncompliance appear to be routinely extended for long periods of time to afford the respondent additional opportunities to come up with feasible engineering controls or to await the results of long-delayed dust sampling. Each time a withdrawal order is issued or threatened, the respondent manages to somehow come into compliance, thereby averting plant closure.

No recent overall dust survey has been made at the plant since the 1979 NIOSH study and the survey conducted by MSHA's Denver Technical Support Group. While I have no reason to question the particular expertise of MSHA's NIOSH witnesses who testified in these proceedings, I do take note of the fact that Ms. Moring has not been back to the plant since the 1979 survey (Tr. 92), and Dr. Richards has never visited the plant (Tr. 150). Absent any current studies or information concerning the apparent on-going dust problems, and absent any indication on the effect of respondent's dust control efforts, as recognized by MSHA's own technical support evaluation, as of the date of the 1981 date of the citations in question in these proceedings, MSHA's attempts to achieve realistic compliance by focusing on the plant manager hired in 1980, and one isolated bagging device seems to be an exercise in futility. In my view, respondent's irregular use of the cited ruff-buff machine, and the payment of a civil penalty on behalf of its plant manager, is an insignificant price to pay for a dust problem which this record suggests has been present since the day the plant began operation in 1973.


George A. Koutras
Administrative Law Judge

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/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 10 1993

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No: CENT 81-101-M
Petitioner : A/O No: 34-00508-05008
 :
v. : Wigley Quarry and Mill
 :
C & O MATERIALS CORPORATION, :
Respondent :

DECISION

Appearance: Frances Valdez Valdez, Esq., Office of the Solicitor,
U.S. Department of Labor, 555 Griffin Square Building,
Dallas, TX 75202
Mr. Don C. Cook, President, C & O Materials Corporation,
P.O.B. 274, Fittstown, OK 74821

Before: Judge Moore

Approximately 4 years ago the combination imminent danger order and citation (hereinafter citation) that is involved in this case was issued to respondent along with a number of other citations. All of the other citations have been disposed of in one way or another but this citation got sidetracked and the assessment process took about 2 years. Respondent sees something sinister in this delay. He thinks the inspector and MSHA are trying to harass him.

I find that there was no attempt by the inspector, MSHA or the Solicitor's office to harass respondent. It was an oversight.

Respondent plant crushes limestone into gravel and the citation was issued because the inspector saw and photographed two men removing rocks from the crusher feeder and the crusher was de-energized in the sense that the switch was off but there was no lock on the switch as required by 30 C.F.R. 56.12-18. The standard requires that when work is being done on electrical equipment the equipment be de-energized and that the switch be locked in the "off" position with the key in the possession of the miners working on the equipment. It was the inspector's opinion that the feeder was of a type with moving plates forming a metallic belt and that if both the feeder and crusher were energized by someone the two miners would be carried into the crusher and killed or injured.

Complainant's exhibit 3 is the photograph that the inspector took of two men in the feeder. The photograph is deceptive in that it appears that

the two men are down in a hole at the end of the feeder. Actually, they are crouched down in a grizzly (similar to a cattle guard) which the smaller stones fall through. This grizzly is on the same level and a part of the vibrating feeder system used by respondent. Nothing moves the rocks toward the crusher but the vibrations. If the feeder had been turned on while the men were standing on the grizzly they would have felt the vibrations but I accept respondent's testimony that they would not be pushed toward the crusher.

The entrance to the crusher was guarded by several heavy chains and the rock to be crushed normally passes through these chains and then falls an unspecified number of feet into the impact crusher. A drawing was made by respondent of the operation of the crusher and it was received as respondent's exhibit No: R-5. After the hearing respondent submitted manufacturer's drawing of the equipment.

According to respondent the crusher can not be accidentally started. Two switches have to be closed in sequence and a button held in for thirty seconds before the crusher will operate. In these circumstances, if the imminent danger were before me on review, I would make a finding of no imminent danger, and vacate the order. No one disputed respondent's testimony that if the feeder were in operation it would merely tingle the miner's feet rather than move them through the chains and into the crusher. I find the chance of injury remote. I can readily see, however, how the inspector, thinking that a moving metal belt was involved would have had concern for the safety of the miners.

The citation was abated by putting a lock on one of the switches that energizes the crusher. As respondent points out, the men were not working on the crusher, they were working on the feeder. But even though there are two separate pieces of equipment with separate switches, they are joined together and work together and I think it reasonable to consider the crusher and its feeder as a unit of electrical equipment that the miners were working on when they removed large rocks from the grizzly at the entrance to the crusher.

Under this interpretation, despite the lack of hazard, the miners were working on a piece of electrical equipment and the equipment was not de-energized and locked out as required by the standard.

A standard identical to the one involved in this case, but not concerned with crushed rock, was considered by the United States Court of Appeals for the Ninth Circuit in Phelps Dodge Corporation vs. Federal Mine Safety and Health Review Commission, 681 F 2d. 1189 (1982). In that case the Court found that the standard was designed to protect against electrical hazards not physical hazards, and it referred to the "fair warning" doctrine. Under that doctrine a standard is unconstitutionally vague if it fails to give "fair warning" as to what is prohibited. I read the

opinion to hold that the standard is unconstitutionally vague except to the extent that it is applied to protect against injury from electrical shock. */ This is more than a mere interpretation of a safety standard. It is a statement that if the standard does not mean what the Court thinks it means, then it is unconstitutional. The Court found that Judge Merlin and the Secretary had abused their discretion in applying the standard to non-electrical hazards.

The Commission and ultimately the Courts will have to decide the extent to which the Commission is bound by an unconstitutionality finding of a United States Circuit of Appeals. I am going to follow the Ninth Circuit holding and dismiss this case. I will make the findings, however, that there was good faith abatement, that although the mine has a moderate history of violations it is smaller than average, and that the gravity and negligence involved were extremely low. Were it not for the Ninth Circuit opinion I would have found a violation and assessed a penalty of \$50.

The citation portion of the combined citation and imminent danger order is VACATED and this case is DISMISSED.

Charles C. Moore, Jr.
Charles C. Moore, Jr.,
Administrative Law Judge

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*/ In MESA vs. Kaiser Steel Corporation, 3 FMSHRC 2463 (November 3, 1981) the Commission considered a similar, but not identical, provision of the Coal Mine Act.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 15, 1983

WESTMORELAND COAL COMPANY, : NOTICE OF CONTEST
Contestant . :
 : Docket No. WEVA 83-140-R
v. :
 : Order No. 2140708
SECRETARY OF LABOR, : 2/18/83
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Hampton No. 3 Mine
Respondent :

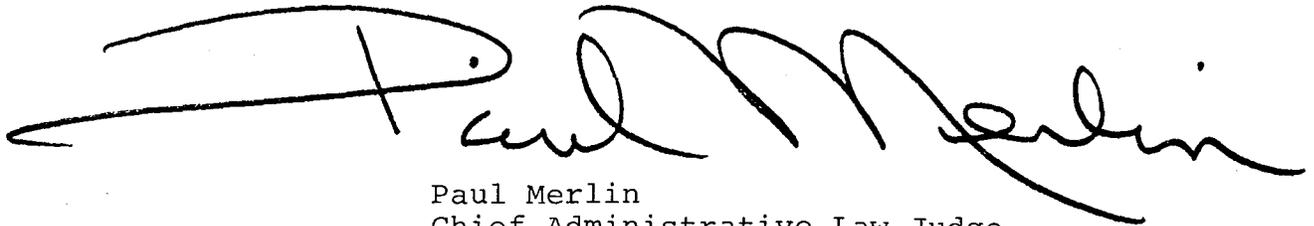
ORDER OF DISMISSAL

On April 4, 1983, Westmoreland Coal Company filed a Notice of Contest of the above-captioned order. On April 13, 1983, the Solicitor filed a motion to dismiss the notice of contest for untimely filing.

The Solicitor's motion explained that the order was received by the operator on February 18, 1983. The Solicitor cited section 105(d) of the Act which provides that a notice of contest to an order be filed within 30 days of its receipt. Based thereon the Solicitor argued that since the order was not contested until March 31, 1983 1/, it was not filed within the requisite 30-day period.

The Solicitor's motion to dismiss must be granted. Section 105(d) of the Act is clear in directing that an operator contest issuance of an order within 30 days from the order's receipt. 29 C.F.R. § 2700.20. Island Creek Coal Company, 1 FMSHRC 989 (August 3, 1979) affirming PIKE 79-18 (January 30, 1979) reported at 1 MSHC 2143-2144. In this case, the operator waited 41 days before mailing the notice of contest.

In light of the foregoing, this case is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

1/ The notice of contest was mailed to the Commission and the Solicitor by certified mail on March 31, 1983 and received by the Commission on April 4, 1983.

Distribution: Certified Mail.

F. Thomas Rubenstein, Esq., Westmoreland Coal Company, P. O.
Drawer A & B, Big Stone Gap, VA 24219

David E. Street, Esq., Office of the Solicitor, U. S.
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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

JUN 16 1983

PITTSBURG & MIDWAY COAL : Application for Review
MINING CORPORATION, :
Applicant : Docket No: WEST 82-131-R
: Order No: 1016966; 2/24/82
: Und. Citation No. 1016965; 5/23/82
v. :
: Edna Strip Mine
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION, :
Respondent :
SECRETARY OF LABOR, et al : Civil Penalty Proceeding
Petitioner :
: Docket No: WEST 82-170
: A/O No: 05-00303-03015 H
v. :
: Edna Strip Mine
: :
PITTSBURG & MIDWAY COAL :
MINING CORPORATION, :
Respondent :

DECISION

Appearance: Phyllis K. Caldwell, Esq., Office of the Solicitor,
U.S. Department of Labor, 1961 Stout Street, Rm. 1585,
Denver, CO 80294, for the Secretary of Labor,
John A. Bachman, Esq., The Gulf Companies, 1720 So.
Bellaire Street, Denver, CO 80222 for the Operator,
Pittsburg and Midway Coal Mining Corpn.,

Before: Judge Moore

After inspecting the mine on February 23 and 24, 1982, Inspector Horbatko issued the imminent danger order involved in this review proceeding and civil penalty case. In it he charged a violation of 30 C.F.R. 77.1000 because the operator was not in compliance with its ground control plan. That section of the regulation states:

"each operator shall establish and follow a ground control plan for the safe control of all high walls, pits and spoil banks to be developed after June 30, 1971 which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure high wall and spoil bank stability."

It should be noted that unlike ventilation plans and roof control plans ground control plans do not require the approval of MSHA. On March 9, 1982 the inspector amended the order to add several charges and change the violation from Section 77.1000 to Section 77.1002. Section 77.1002 provides:

"when box cuts are made, necessary precautions shall be taken to minimize the possibility of spoil material rolling into the pit."

After the civil penalty suit was filed MSHA filed a motion to plead in the alternative a violation of either section 77.1000 or 77.1002. The operator did not oppose the motion and the issues are therefore, did the operator violate either 30 C.F.R. 77.1000 or 30 C.F.R. 77.1002 and did an imminent danger exist?

I am convinced from MSHA Exhibit 4, the mining dictionary ^{1/} and the testimony at the trial, including that of the inspector, that the area involved in this imminent danger order was not a box cut. Thus, Section 77.1002 has nothing to do to do with the area of the mine involved in this closure order. The box cut is the initial cut involving two high walls, and the spoil has to be dumped on to one of these high walls. This operation did begin with a box cut but that was thirteen pits earlier and long ago. The charge that Section 77.1002 was violated is DISMISSED.

The ground control plan filed by the operator in 1977 requires a fifty foot pit width and states that it proposes a spoil bank angle of 1-1/4 to 1 which is the same as 38°. The wording of the plan is peculiar in that fifty feet is a required width but the proposed angle of the spoil bank is merely a goal. There are two seams of coal being mined at the Edna Strip Mine. The top seam is about 75' underground and is 5-1/2 feet thick. Ten feet below that is another 2' seam of coal. The operator first mines the top seam for the entire length of the pit and then goes back and shoots the 10 feet of parting material and removes that to get to the lower 2' coal seam. The order herein is concerned only with the mining of the top seam.

The pit is mined from west to east and there is a station marker every 100 feet. The station numbers get higher as you approach the east end of the pit. The area of the mine closed by the order is "east of survey station 18, off ramp number 5, for approximately 150' to the end of the pit." There was a great deal of testimony concerning the condition of the mine to the left (west) of survey station 18 and a slump that had occurred there three days before the order was issued. As far as this order is concerned, however, the relevant area of the pit is east of station 18. The inspector saw large rocks that had fallen off the high wall east of station 18 and these may have been pulled down by the dragline rather than having fallen out of their own accord.

This is a standard strip mine operation. The dragline rests on the

^{1/} "A Dictionary of Mining, Minerals and Related Terms."

bench and removes the overburden from the south side of the pit and drops it on to the spoil bank to the north. After the dragline has moved some 200' east of a particular section the drillers come in and drill the coal, then the blasters shoot the coal and the coal is then loaded and hauled out of the pit. By this time the dragline has removed the overburden from another section and the operation repeats itself until the east end of the pit is reached. There was some question as to the exact location of the dragline when the order was issued, but it was somewhere on the edge of the branch at the east end of the pit. At the time the order was issued the dragline was attempting to remove the overburden east of station 18 but the spoil kept falling back into the pit. When the dragline operator tried to remove the tow of the spoil, other spoil would roll into the area, and he was having difficulty in finding a place to drop the spoil. This was caused by the fact that he had dumped high spoil on the right hand side and could not dump over it or reach over it to dump, and a road was hampering his ability to dump even if he swung a 270° arc to his left. He asked the inspector if he had any suggestions. The inspector had none and on measuring the angle of the spoil bank with a level, he found the bank steeper than 40°. He could see that the width of the pit was very narrow in the area where the dragline was working. While admitting there was no imminent danger at the time he actually issued the order he thought one would be created in a short time. When questioned about the term "imminent danger" he said it could be a danger that is about to happen or could be "down the road aways." The Solicitor's attorney brought out the definition pronounced by the Interior Department's Board of Mine Operations Appeals to the effect that death or injury might occur before the condition can be abated "if normal mining practices continue."

The operator's witnesses testified that if they had been unable to solve the problem with the dragline they intended to put a bulldozer on top of the spoil bank and shove the spoil down toward the pit to create a more shallow bank. To some extent the spoil bank had been scaled down by the dragline. The next step would have been to try to remove the spoil off of the pit bottom with bulldozers and haul it to the other end of the pit. The inspector thought that would be a very uneconomical way to mine this area. There was, however, about \$50,000 worth of coal east of station 18.

The theory advanced by counsel for MSHA in its closing argument, was that the operator wanted that coal so badly that he was going to bring his drills and blasters and trucks and operate on top of the boulders and unconsolidated material that had fallen down from the spoil bank. That makes no more sense to me than it did to the mine operator.

If the operator did try to get its drills and blasters and bulldozers and trucks to operate in the area east of 18 before the area had been properly prepared for such activities an imminent danger would exist. But that is not the normal mining practice and there is no evidence that respondent intended to mine in that manner.

While, as stated earlier, the inspector did admit on cross examination

that there was no imminent danger at the time he issued the order, it was his earlier testimony that both the imminent danger and the violation resulted from the fact that the operator had not complied with its ground control plan. The spoil bank was not at the proper angle east of station 18 and the pit was less than 50' in width. Considering the nature of a dragline operation, when the dragline first gets to the top of the coal seam, the pit is necessarily only the width of the dragline which in this case was 10 or 12 feet. This creates neither an imminent danger nor a violation. The ground control plan must be interpreted to mean that the pit should be 50' wide before the drillers, blasters and loaders enter the area. No one entered the area in this case, and the order was issued while the operator was still trying to clear the pit area east of station 18. If the operator had tried to enter the area east of station 18 to mine, before the pit had become 50' wide, it would have been a violation of its ground control plan. Whether an imminent danger existed would depend on the likelihood of rocks falling off the spoil bank rather than whether or not the ground control plan had been violated. I find there was no imminent danger and there was no violation. It is interesting to note that at the present time the ground control plan under which this pit is operated allows a width of from zero to 150 feet and a spoil bank angle of 45°.

The order is vacated and these two cases are DISMISSED.

With respect to Citation No: 1016965, an examination of the "Application for Hearing" reveals that the company did desire to contest both this citation and the previously discussed withdrawal order. If our docket office had been aware of that, it would have assigned two separate docket numbers. It is only in civil penalty cases that multiple citations and orders are assigned the same docket number.

Through accident or oversight Pittsburgh paid the penalty which resulted from this citation and while there was testimony concerning this alleged violation at the trial the government did not try to uphold the citation and I considered such testimony as background information. At page 232 of the transcript the government attorney specifically stated that the citation and standard 77 C.F.R. 1713 was not involved in this case. Certainly the fact that the company had paid the assessment would lead government counsel to believe that the citation was not being contested.

Without deciding whether a mining company has a right to a hearing concerning the validity of a citation even though it has paid the assessment, I will hold that where the assessment is paid through accident or oversight, and where the clear intent to challenge the citation is apparent, that the company did not waive its right to a hearing on the validity of the citation. Nevertheless, the record as it stands is not adequate for me to make a decision, but on the other hand I do not want to hold up the decision as to the order. I will therefore separate the two notices of contest and assign a different docket number to the contest of the citation. It will be WEST 82-131-R-A. If the company still thinks a hearing or ruling on the citation is necessary, I will receive further

evidence on the matter in the form of affidavits, references to the transcript of the hearing conducted in Glenwood Springs, Colorado, or if the parties desire, I will conduct another hearing.

Pittsburgh and Midway Coal Mining Company is accordingly directed to advise me, within 20 days, whether it wants to pursue this matter. If not, I will dismiss docket No: WEST 82-131-R-A. But if the company indicates that it does want to pursue this matter further, the parties are directed to inform me whether they want the opportunity to present further evidence at a hearing. In this connection, if Denver, Colorado, is a convenient place for a hearing on the citation, I will be attending a conference in Denver on the 13th and 14th of September and could probably hear this matter on Thursday or Friday of that week.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail

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John A. Bachman, Esq., The Gulf Companies, 1720 So. Bellaire
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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

JUN 20 1983

RICHARD C. JOHNSTON,	:	COMPLAINT OF DISCHARGE,
Complainant	:	DISCRIMINATION, OR
v.	:	INTERFERENCE
	:	
OLGA COAL COMPANY,	:	Docket No. WEVA 82-236-D
Respondent	:	
	:	HOPE CD 82-23
	:	
	:	Olga Mine

DECISION

Appearances: James A. Swart, Esq., Beckley, West Virginia, and Mary Lu Jordan, Esq., Washington, D. C. (on the brief), for Complainant; James R. Haggerty, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the complaint of Richard C. Johnston, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "1977 Act," alleging that the Olga Coal Company (Olga) reduced his level of pay on or about June 18, 1981, in violation of his statutory rights as a miner deemed to have been transferred because of pneumoconiosis and therefore contrary to section 105(c)(1) of the 1977 Act. 1/ 2/ Evidentiary hearings were held on Mr. Johnston's complaint in Bluefield, West Virginia.

1/ Section 105(c)(1) provides in part as follows:
No person shall *** in any manner discriminate against *** or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner *** in any coal *** mine subject to this Act because such miner *** is the subject of medical evaluations and potential transfer under a standard published pursuant to § 101 *** or because of the exercise by such miner *** on behalf of himself or others of any statutory right afforded by this Act.

2/ In John Matala v. Consolidation Coal Company, MORG 76-53 (April 5 1979), the Commission held that review of discrimination complaints of a miner based on allegations that the miner suffers from pneumoconiosis should be resolved under the specific statutory provisions set forth in section 428 of the Black Lung Benefits Act rather than under the general anti-discrimination provisions in section 110(b) of the Federal Coal Mine Health and Safety Act of 1969, the "1969 Act". That case was, therefore, in accordance with the provisions of section 428 of the Black

Motion to Dismiss

At hearing, Olga renewed in a Motion to Dismiss its argument made in prior motions that Complainant had failed to meet the time deadlines set forth in sections 105(c)(2) and 105(c)(3) of the 1977 Act. Under section 105(c)(2), of the 1977 Act, the miner who believes that he has been discriminated against "may, within 60 days after such violation occurs, file a complaint with the Secretary". There is no dispute in this case that the alleged discriminatory event; i.e., Mr. Johnston's reclassification from pay grade 4 to grade 1, occurred on or about June 18, 1981, and that Mr. Johnston did not file a complaint of discrimination with the Secretary of Labor, Mine Safety and Health Administration (MSHA), until February 16, 1982, more than seven months later.

Whether an extension of the filing deadline should be granted depends on whether "justifiable circumstances" exist for the delay and whether the operator was prejudiced by the delay. Joseph W. Herman v IMCO Services, 4 FMSHRC 2135 (1982). The Commission said in that case that the time limit might warrant extension where the miner, within the statutory 60 days, brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

In this case, Johnston does not deny that as early as June 18, 1981, he knew he could have filed a discrimination complaint with MSHA. His only explanation for not doing so until February 16, 1982, was that he was advised by the Union Safety Committeeman, Leonard Sparks, that he should first exhaust the grievance procedures under the collective bargaining agreement. Although the grievance procedures were apparently exhausted as of November 17, 1981, there is no explanation why Mr. Johnston did not even then file his complaint with MSHA for almost three more months.

The operator claims that it was prejudiced by the delay because two of its witnesses were no longer its employees at the time of the hearing. It claims that a Mr. Hick left Olga in December 1981 and resided at the time of hearing in South Carolina, and that a Joe McIntyre left Olga in September 1982 and resided at the time of hearing about 100

Fn. 2 cont'd.

Lung Benefits Act, transferred to the Department of Labor for adjudication by one of its Administrative Law Judges.

The case at bar is brought, however, under the revised provisions of section 105(c)(1) of the 1977 Act, and by virtue of section 101(a)(7) of the 1977 Act and regulatory standards published pursuant to that section, i.e., 30 C.F.R., Part 90, effective February 1, 1981. Accordingly, this case comes within the jurisdiction of this Commission.

miles from the hearing site. Hick's testimony concerning the execution by Johnston of a purported waiver of his option to transfer to a low dust area of the mine (pursuant to former section 203(b)(2) of the Federal Coal Mine Health and Safety Act of 1969) may indeed have been relevant to this case. However, in the absence of a proffer as to the precise testimony to be elicited from Hick and McIntyre and reasons for the non-production of the witnesses, I cannot conclude that the operator has been prejudiced.

In summation, it appears that the Complainant did bring a complaint about his pay reduction to the attention of his employer through grievance procedures initiated on June 18, 1981, that he relied upon the representations of his union safety committeeman that he should first exhaust these procedures before filing with MSHA, and that the delay between the exhaustion of his grievance proceedings on November 17, 1981, and the filing of this discrimination complaint with MSHA on February 16, 1982, was not significant. In light of these extenuating factors and insufficient evidence of prejudice to the operator caused by the delay, I conclude that the complaint should be deemed to have been timely filed.

I further find that Johnston did, in fact, satisfactorily comply with the filing requirements set forth in section 105(c)(3). It is undisputed that the MSHA letter dated March 16, 1982, finding no discrimination, was received by Johnston on or about March 21, 1982. It is also undisputed that on April 15, 1982, Johnston filed with the Commission a letter expressing his disagreement with the MSHA decision. While another Administrative Law Judge has ruled that the filing of that complaint had not been perfected until July 2, 1982, I find for the limited purpose of tolling the period of limitations that Mr. Johnston's filing was constructively accomplished on April 15, 1982, the date his letter was filed with the Commission. Accordingly, filing for this purpose was accomplished within the 30 days required by section 105(c)(3). The operator's Motion to Dismiss is accordingly denied.

The Merits

As clarified in Mr. Johnston's post hearing brief, his complaint is limited to an assertion that he was entitled to the rights of a "transferred miner" under section 101(a)(7) of the 1977 Act ^{3/} and that Olga

^{3/} Section 101(a)(7) of the 1977 Act authorizes the Secretary of Labor to promulgate mandatory health and safety standards to protect miners against exposure to certain hazards. In particular, that section provides as follows:

Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such

interfered with those statutory rights in violation of section 105(c)(1) of the 1977 Act by reducing his rate of pay in June 1981 from grade 4 to grade 1, a reduction at that time of \$5.30 per day. ^{4/} There is no dispute that Mr. Johnston's wage rate was in fact reduced as alleged. Moreover, there is no dispute that if Mr. Johnston had been in fact transferred in accordance with the provisions of section 101(a)(7) of the 1977 Act (and in accordance with 30 C.F.R. Part 90 of the regulations), such a reduction in pay would have been a violation of both section 101(a)(7) and an unlawful interference with those statutory rights under the provisions of section 105(c)(1). The dispute herein accordingly centers on the question of whether in June 1981 Mr. Johnston met the criteria to be a "transferred miner" under section 101(a)(7) of the 1977 Act (or a "Part 90" miner under the regulations promulgated pursuant to that section; i.e., 30 C.F.R. Part 90).

A transferred or "Part 90" miner is defined in 30 C.F.R. § 90.2 as "a miner employed at an underground coal mine or at a surface work area of an underground coal mine who has exercised the option under the old section 203(b) program [former section 203(b) of the Coal Mine Health and Safety Act of 1969] or under section 90.3 (Part 90 option; Notice of Eligibility; exercise of Option) of this Part to work in an area of a mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air, and who has not waived these rights." Johnston argues that he should be deemed to have exercised the option in 1972 under the old section 203(b) program and that he accordingly should have been brought under the new regulations as a transferred "Part 90" miner. Thus he argues his rate of pay could not legally have been reduced.

There is no dispute that Mr. Johnston had been notified in accordance with former section 203(b) of the 1969 Act of his rights to transfer to another area of the mine because of X-ray evidence showing his development of Category 2 Simple Pneumoconiosis. In particular, he was notified by letter dated November 30, 1970, from the Department of Health, Education and Welfare, by letter dated October 28, 1971, from the Federal Bureau of Mines, and by letter dated November 12, 1973, from the Federal Mining Enforcement and Safety Administration. While

Fn.3 cont'd.

mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer.

^{4/} Johnston does not allege that he was discriminated against because he was "the subject of medical evaluations and potential transfer" under section 105(c)(1). See fn. 1/ supra.

Mr. Johnston initially sought to exercise his transfer rights in January 1972, he apparently changed his mind and executed a written waiver of these rights on February 24, 1972 (Exhibit 0-1). It is undisputed that he never since that date has made any effort to exercise his transfer rights.

The evidence shows that in January 1972 Johnston was offered the option to transfer to a less dusty area on the "hoot owl" or night shift. Johnston was then working the day shift and, according to him, he elected to waive the transfer option rather than transfer to the night shift. 5/ According to the regulations then in effect, Johnston did not, upon exercising the transfer option, have the choice of remaining on his regular shift. See 36 F.R. 20601, October 27, 1971. Johnston's contention that his waiver of the transfer option was invalid or "involuntary" because he was not offered a transfer to the day shift is accordingly without merit.

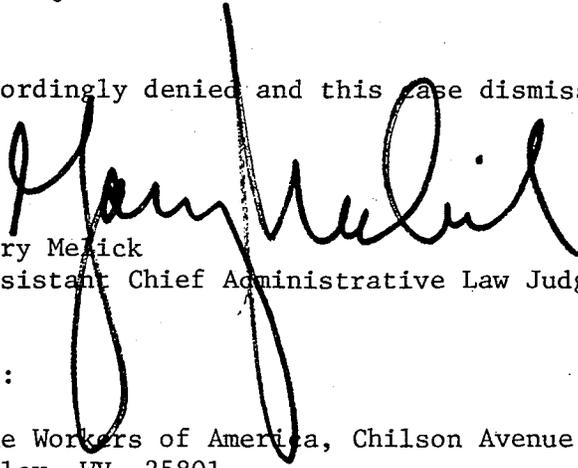
While subsequent regulations issued pursuant to section 101(a)(7) of the 1977 Act did require that the mine operator transfer the miner exercising his transfer rights to a position on the same shift or shift rotation on which he was employed immediately before the transfer, those regulations did not take effect until February 1, 1981. See 46 F.R. 5585, January 21, 1981. 6/

Within this framework of evidence, it is clear that Johnston's waiver of his transfer rights in February 1972 was not invalid but was a completely voluntary and intentional relinquishment of the right to transfer as it then existed. Johnson v. Zerbst, 304 U.S. 450 (1938). Accordingly, Johnston cannot be "deemed" to have exercised his transfer rights. He has not therefore met his initial burden of proving that the reduction in his pay grade in June 1981 was in violation of sections 101(a)(7) or 105(c)(1) of the 1977 Act. Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Secretary, 663 F.2d 1211 (3d Cir. 1981); Boitch v. FMSHRC, 704 F.2d 275 (6th Cir. 1983), reh'g granted on other grounds, May 23, 1983.

5/ While Johnston also alleged at hearing that he turned down the transfer option because he believed there was just as much dust on the "hoot owl" shift, the evidence does not bear this out. The uncontradicted testimony of Mine Superintendent Dwight Strong was that the "hoot owl" shift was then a non-producing maintenance shift with a record of lower dust levels.

6/ The evidence in this case is insufficient to indicate when Mr. Johnston first knew of this revision in the regulations or that he failed to exercise his transfer option because he did not know of these revisions. On the record before me I am unable to speculate why he did not exercise the option after these revisions.

The Complaint herein is accordingly denied and this case dismissed.



Gary Melick
Assistant Chief Administrative Law Judge

Distribution (by certified mail):

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nw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 22, 1983

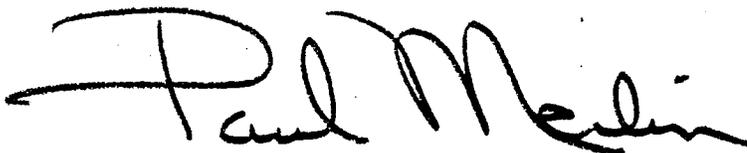
KENTLAND-ELKHORN COAL CORP., : Application for Review
Applicant :
vs : Docket No. PIKE 78-399
: :
SECRETARY OF LABOR, : Order No. 063798; 6/23/78
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Feds Creek No. 1 Mine
and :
UNITED MINE WORKERS OF AMERICA: Respondents :
:

ORDER OF DISMISSAL

The above-captioned matter has been reassigned to the undersigned administrative law judge.

This proceeding is an application for review of an order filed by Kentland-Elkhorn Coal Corporation. The operator has filed a motion to withdraw its application for review.

Accordingly, it is hereby ORDERED that this matter is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

Distribution: By certified mail.

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of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Ms. Joyce Hanula, Legal Assistant, UMWA, 900 15th St., N.W.,
Washington, DC 20005

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 24, 1983

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 81-139
Petitioner : A.C. No. 36-00808-03056
 :
v. : Russelton Mine
 :
REPUBLIC STEEL CORPORATION, :
Respondent :

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor,
U. S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner, MSHA;
Bronius K. Taoras, Esq., Kitt Energy Corporation,
Meadow Lands, Pennsylvania, for Respondent,
Republic Steel Corporation.

Before: Judge Merlin

Statement of the Case

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Republic Steel Corporation for an alleged violation of 30 C.F.R. § 75.604(b).

The hearing was held as scheduled on March 15, 1983. Documentary exhibits, oral testimony and oral arguments were presented by the parties. At the conclusion of the hearing both parties waived the filing of written briefs and agreed I should render a decision based upon the transcript of the hearing and documentary evidence (Tr. 102-103).

The Mandatory Standard

Section 75.604(b) of the mandatory standards, 30 C.F.R.
§ 75.604(b) provides as follows:

§ 75.604 Permanent splicing of trailing
cables.

When permanent splices in trailing
cables are made, they shall be:

* * * * *

(b) Effectively insulated and
sealed so as to exclude moisture.

The Cited Condition or Practice

Citation No. 843121 cites a violation of 30 C.F.R.
§ 75.604(b) for the following condition:

A permanent splice installed in the
trailing cable on shuttle car Serial No.
11341 being used in the (012) 4 west off 10
mains section was not effectively sealed so
as to exclude moisture and a seven inch long
area had the outer jack removed and was not
reinsulated to the same degree as the remainder
of the cable.

Stipulations

At the hearing, the parties agreed to the following
stipulations which were accepted (Tr. 5-11, 13):

1. Republic Steel Corporation was the owner and
operator of the Russellton mine when the citation
at issue in this case was written.
2. The operator and the Russellton Mine were subject
to the jurisdiction of the Federal Mine Safety
and Health Act of 1977 at the time the citation
was written.
3. The presiding administrative law judge has
jurisdiction over this proceeding.

4. The inspector who issued the subject citation was a duly authorized representative of the Secretary.
5. A true and correct copy of the subject citation was properly served upon the operator.
6. Imposition of any penalty in this proceeding will not affect the operator's ability to continue in business.
7. The alleged violation was abated in good faith.
8. The mine was medium in size during the year prior to the issuance of the subject citation.
9. The Russellton Mine has been out of production since October 1982, although it has not been sealed and is being maintained for possible future production.
10. The operator was medium in size during the year prior to the issuance of the subject citation.
11. The condition or practice stated in the body of the subject citation, other than the fact that the shuttle car was being used, existed. The operator does not agree that the shuttle car was being used.
12. During the two years prior to the issuance of the subject citation, the operator and the mine had an average history of violations of 30 C.F.R. § 75.604(b).
13. All witnesses are accepted generally as experts in coal mine health and safety.

Discussion and Analysis

This case presents a fundamental conflict in the evidence between MSHA and the operator which can be resolved only by a determination as to the credibility of those who testified. The inspector who issued the subject citation testified that the supervisory inspector who was accompanying him on the inspection told him when they were in the face area to return outby and to look at a defective

splice in the subject shuttle car (Tr. 14, 33-34). The issuing inspector stated that only the shuttle car operator was present when he arrived at the shuttle car and inspected the splice (Tr. 21, 25). His inspection of the cable revealed a splice with a sleeve that was not bonded to the outer jacket so as to exclude moisture (Tr. 14-15). The cable had been pulled off its reel and was lying on the ground (Tr. 23-24). He testified that the violation was not being corrected when he first observed it, that the splice had not been cut out of the trailing cable and that it was still a part of the cable (Tr. 21, 24).

The supervisory inspector testified that he saw the shuttle car operator pulling the cited trailing cable off the reel and that he helped her with this task (Tr. 45). While he was helping her, he saw a splice and another part of the cable which he thought needed attention. He said that he may have commented to the shuttle car operator that the splice looked bad (Tr. 46). He admitted that his recollection of this subject was not plain and he did not recall how long he helped her or whether they pulled the cable off together or alternately (Tr. 48, 98). Similarly, his recollection of seeing the splice was hazy. He was not clear about how much of the cable had been pulled off before the splice appeared or whether he saw the splice as it was being pulled off the reel rather than when it was lying on the ground (Tr. 49-50). He testified that he did not recall what he said about the splice, if anything at all (Tr. 98-100). The supervisory inspector testified that he has the authority to issue a citation but stated that instead he went to the face area and told the other inspector to go look at it (Tr. 46, 50-51).

The temporary shuttle car operator had served in that capacity approximately six times prior to the day the subject citation was issued (Tr. 56). Her section foreman reminded her as a shuttle car operator that the general procedure was to remove the entire cable from the machine and inspect it before energizing the cable (Tr. 57, 61, 66). She stated that she followed the general procedure on that day (Tr. 57, 61). She knew the cable was not energized because she saw that it was unplugged and she did not plug it in (Tr. 61). She started to remove the cable from the reel when the supervisory inspector walked past her (Tr. 57-58). She stated that he did not help her remove any of the cable. She said that she would remember if someone helped her because it is a difficult job (Tr. 57-58, 68-70). Moreover, she testified that the supervisory inspector did not point

out any deficiencies in the cable (Tr. 58-59). She pulled the portion of the cable containing the defective splice off the reel after the supervisory inspector passed her (Tr. 65). She felt she needed another opinion about the condition of the splice and went to alert the mechanic a few minutes after the supervisory inspector had walked passed the shuttle car (Tr. 59-60). The mechanic agreed that there was a problem with the splice. He went to get his equipment to repair it and she went to inform the section foreman of the problem (Tr. 60). She testified that she and the mechanic next cut the defective splice out of the cable (Tr. 62). Then the issuing inspector and several other people arrived at the shuttle car (Tr. 62-63). The splice was already cut out of the cable and was lying on the ground when the issuing inspector arrived and issued the citation (Tr. 63-64). The operator's mechanic and section foreman also testified and confirmed the evidence given by the shuttle car operator (Tr. 77-78, 89-90).

After observing and listening to the witnesses, I accept all the testimony of the shuttle car operator including her evidence that the damaged splice had been cut out of the trailing cable of the shuttle car and that the cable was being repaired before the citation was issued. The testimony of the shuttle car operator was clear, consistent and therefore, wholly credible. I also accept the testimony of the operator's other witnesses. I reject the inspector's testimony that when he arrived to check the cable no abatement of the condition had begun and the supervisory inspector's testimony that he stopped and helped the shuttle car operator unreel the cable. As already noted the supervisory inspector's testimony was vague, contradictory and therefore unconvincing. The evidence given by both inspectors is far outweighed by that given by the shuttle car operator and the operator's other witnesses. Since the defective splice was no longer part of the cable when the inspector observed the permanent splice, the condition described and therefore the alleged violation did not exist when the citation was issued. Under such circumstances the citation must be vacated.

At the hearing the Solicitor argued that a violation still existed even if the splice was cut out before it was cited because the splice had been defective. He cited Consolidation Coal Company, 1 FMSHRC 542 (June 1979) in support of his position. In that case it made no difference that the operator had begun abatement of a roof control violation when the condition was cited by MSHA. However, there the violation remained in existence when the withdrawal order was issued. In the present case there was no

violation at the time the citation was issued. The citation alleges a violation of 30 C.F.R. § 75.604(b), which requires that permanent splices in trailing cables be effectively insulated so as to exclude moisture. By the time the inspector issued the citation, however, the defective splice was no longer in the cable.

ORDER

Accordingly, it is ORDERED that Citation No. 843121 be Vacated and that the petition for the assessment of civil penalty be DISMISSED.

A handwritten signature in black ink that reads "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution: Certified Mail.

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Bronius K. Taoras, Esq., Kitt Energy Corporation, 455 Race
Track Road, P. O. Box 500, Meadow Lands, PA 15347

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 28 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),))	CIVIL PENALTY PROCEEDINGS
Petitioner,))	DOCKET NO. CENT 80-386-M
v.))	A/C No. 29-00573-05025 F
UNC MINING & MILLING,))	DOCKET NO. CENT 80-387-M
Respondent.))	A/C No. 29-00573-05026
))	MINE: Northeast Church Rock Mine

DECISION

APPEARANCES:

Eloise V. Vellucci, Esq., Office of the Solicitor
United States Department of Labor
555 Griffin Square, Suite 501
Dallas, Texas 75202
For the Petitioner

Wayne E. Bingham, Esq., Pickering & Bingham
920 Ortiz N.E.
Albuquerque, New Mexico 87108
For the Respondent

Before: Judge Virgil E. Vail

PROCEDURAL HISTORY

These consolidated cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. In each case, the Secretary seeks to have a civil penalty assessed for an alleged violation of a mandatory safety standard. After a date for hearing was set, the parties entered into an agreement to submit these cases on a written stipulation of facts and briefs which have now been filed.

Based upon the entire record and considering all of the arguments of the parties, I make the following decision. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

ISSUES

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed

in this proceeding; and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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

STIPULATIONS

The parties stipulated to the following: 1/

UNC Mining and Milling (herein UNC) operates an underground uranium mine located approximately 20 miles northeast of Gallup, McKinley County, New Mexico, on State Highway 566. The mine is designated as the Northeast Churchrock Mine. In December, 1979, the mine was operated on three 8-hour shifts a day, 6 days a week. In December 1979, 916 persons were employed. Of these, 650 worked underground.

Access to the mine was through two vertical, 14-foot diameter, 4-compartment shafts connected to two mining levels. A modified room and pillar method of mining was used in conjunction with diesel-powered trackless and track haulage systems. A blueprint of pertinent portions of the mine is attached hereto as Exhibit #1. Portions marked in red are those haulage-ways which are relevant to the instant case.

UNC maintains an extensive inspection and safety program. In December, 1979, UNC employed some twenty-eight persons to specifically administer mine safety and training, as indicated by an organizational flow chart attached hereto as Exhibit # 2. This chart does not include the various superintendents, foremen and shift bosses who also are charged with responsibility for safety.

UNC issues a safety booklet to each employee. See Exhibit # 3. Alex Garcia, the employee who was fatally injured in this case, received a copy of the safety booklet. See Exhibit # 4.

As part of UNC's safety training program, employees are given training courses in mining and first aid. Employees are then tested to determine what

1/ The parties also stipulated to eleven exhibits attached to the stipulated facts filed in this case.

learning occurred. Alex Garcia after attending these training courses scored 96% on the mining examination and 90% on the first aid examination. See Exhibits # 5 and # 6. Alex Garcia also received training from his previous employer Kerr McGee. See Exhibit # 7. Additionally, Garcia had received task training as a clam operator and a triprider. See Exhibits # 8 and # 9. In December, 1979, Garcia was also in the process of being task trained as a motorman. He had completed on-the-job training, which is the method employed for task training.

UNC's task trainer is Zorro Davis. Davis had observed Garcia (sic) operate the motor (underground locomotive) and determined that Garcia was a competent operator. Davis had not issued Garcia a task training certificate, although one would have been issued after testing and based on Garcia's performance.

On December 18, 1979, the following persons, among others, were employed on swing shift at UNC's Northeast Churchrock Mine.

B. J. Chavez	level foreman
George Otero	acting level foreman
James Kepler	track shift boss
Harry Morgan	track crew
Bob Masters	skip tender
Norris Ross	shift boss
Sam Sullivan	motorman
Alex Garcia	triprider

Swing shift began at 4:00 p.m. At the beginning of the shift, James Kepler instructed Sam Sullivan and Alex Garcia that they could pull any of the available raises (load loose mined ore from stock piled areas). Sullivan and Garcia pulled a couple of trips (hailed a couple of loads of ore) from the 8, 10 and 11 raises to the trench (unloading area) at the No. 1 shaft. They then went to the number 2 raise to pull a trip. This occurred before 5:30 p.m. On arriving at the number 2 raise Sullivan and Garcia could not get to the raise because ground from the top of the haulage-way had fallen on and blocked the track. Sullivan and Garcia left to pull other raises. They encountered no difficulties in driving the Clayton 225 locomotive through the haulage way between the A2-A2 1.4 switch and the A2-A2 3.8 switch.

At approximately 5:30 p.m. track shifter James Kepler walked to the number 2 raise and for the first time noticed the ground on the track. Sometime after 5:30 p.m. Sullivan and Garcia notified Kepler of the ground on the tracks. Nothing was mentioned concerning broken timber in the haulage way. There was not much ground on the track but it was enough to prevent passage.

Between 5:30 p.m. and 8:00 p.m. Kepler instructed a track crew consisting of Harry Morgan and others to clean the ground from the tracks. At 8:30 p.m. Kepler walked to the number 2 raise to ascertain whether the track had been cleared. The track crew had not yet cleared the track. As Kepler was coming from the number 2 raise he met the track crew coming to

clear the track. Kepler did not return to the number two raise with the track crew but continued on his routine.

At approximately 10:00 p.m., the track crew notified Kepler that the track had been cleared. Kepler in turn notified Bob Masters, the skip tender (person responsible at the base of the shaft for lifting ore out of the mine), that the track had been cleared. Masters was so notified because Masters told Sullivan and Garcia where stock piled ore could be loaded.

The last time Kepler saw Sullivan and Garcia was shortly after 10:00 p.m., after he had been notified that the track near the number 2 raise had been cleared. At this time Kepler said nothing to Sullivan or Garcia.

At approximately 11:00 p.m. B.J. Chavez, the level foreman, saw Sullivan and Garcia at the trench near the No. 1 shaft. By this time, Chavez had heard that the track near the number two raise had been cleared. Chavez had heard this from Masters or others. Chavez told Sullivan he could pull the number 2 raise as the track was clear. Also at approximately 11:00 p.m. George Otero, the acting level foreman, came into the trench area. Chavez asked Otero if he had double checked the number 2 raise to make sure that the track was clear. Otero said he had not. Chavez said he would check the raise and proceeded to walk toward the raise.

As Chavez walked toward the number two raise, he passed Sullivan and Garcia at the A-1 switch where they were picking up track tools. Between the A-1 switch and the 1.8 switch Sullivan and Garcia passed Chavez. They then stopped at the 1.8 switch to unload the track tools. While Sullivan and Garcia were stopped at the 1.8 switch, Chavez passed them. Sullivan and Garcia then passed Chavez at the A1-A2 switch.

At 11:20 p.m. Chavez caught up with Sullivan and Garcia at the A2-A2 1.4 switch where the Clayton 225 motor was stopped. Norris Ross, the shift boss, was at the A2-A2 1.4 switch at this time and Ross and Chavez talked about equipment. Also, Chavez told Sullivan and Garcia not to pull the number 2 raise until he had checked the track.

While Chavez finished talking to Ross, Sullivan and Garcia proceeded from the A2-A2 1.4 switch to the A2-A2 3.8 switch with Sullivan walking ahead of the locomotive and Garcia driving the locomotive. Throughout the shift and throughout several prior shifts Sullivan and Garcia had traded off operation of the locomotive as part of Garcia's on the job training in preparation for Garcia taking over complete operation of the locomotive when Sullivan went on vacation.

Chavez finished his conversation with Ross and walked toward the A2-A2 3.8 switch. Ross went the opposite direction to the number 1 shaft.

After Sullivan reached the A2-A2 3.8 switch he walked on ahead to the location of the ground fall. Garcia waited with the locomotive at the A2-A2 3.8 switch. Sullivan observed that the ground fall had been cleared from the track but that the wire mesh support above the track had a hole in it through

which the ground had broken and fallen on the track and that some rock was still hanging in the mesh. This had not been repaired by the track crew.

After Sullivan observed the hole in the mesh he yelled the status to Garcia. Shortly thereafter, Chavez arrived at where Garcia was stopped with the locomotive. Garcia reported to Chavez what Sullivan had reported to Garcia. Chavez directed Garcia not to pull the number 2 raise. Garcia then motioned to Sullivan to board the last car pulled by the locomotive and Garcia and Sullivan proceeded toward the A2-A2 1.4 switch.

Chavez waited for the locomotive and cars to pass him. As Sullivan passed Chavez, Chavez instructed Sullivan to pull the number 14 raise. Chavez then walked to where the ground fall had occurred and found it as described by Garcia.

As Chavez walked from the A2-A2 1.4 switch to the A2-A2 3.8 switch, he noticed no broken timber. This was the first time Chavez had been through the area on this shift. Likewise Sullivan noticed no broken timber as he walked the track from the A2-A2 1.4 switch to the A2-A2 3.8 switch at approximately 11:20 p.m. Sullivan had noticed a broken timber the week prior to December 18, 1979, but this had been replaced upon finding it broken.

After Chavez observed the area of the ground fall and the mesh, he walked past the A2-A2 3.8 switch toward the A2-A2 1.4 switch and observed for the first time one broken timber.

As Sullivan and Garcia proceeded from the A2-A2 3.8 switch to the A2-A2 1.4 switch Sullivan observed for the first time one broken timber. Garcia was operating the locomotive and Sullivan was riding in the last car. Sullivan could not at all time see Garcia. As the train approached the A2-A2 1.4 switch, Sullivan sensed something was wrong as the train appeared to be moving only at a coasting slow speed.

Sullivan, when able to do so, climbed over the cars to the locomotive. By this time, Chavez had caught up with the train and observed Sullivan climbing over the cars to the locomotive and putting the brake on the locomotive. Chavez likewise climbed over the cars to the locomotive and joined Sullivan, where they found Garcia has sustained a head injury which eventually resulted in his death.

Garcia was given first aid which included mouth to mouth respiration by Chavez, and was transported to the hospital in Gallup, New Mexico where he died at 1:05 a.m. on December 19, 1979.

At 2:00 a.m. on December 19, 1979, UNC's Manager of Safety, Kay Kofford was notified by UNC's Inspector of Mines Lolo Martinez that an accident involving Alex Garcia had occurred. Kofford immediately proceeded to the Northeast Churchrock Mine, went into the mine to the beginning of the haulage-way between the A2-A2 1.4 switch and the A2-A2 3.8 switch and secured

the area. No one had been in the area from the time of the accident until Kofford secured the area.

At 9:00 a.m. on December 19, 1979, MSHA inspectors Charles H. Sisk, Ned D. Zamarripa, and Francis T. Csepregi arrived at the Northeast Churchrock Mine. They along with UNC employees and Charles D. Lunger from the New Mexico Mine Inspector's Office entered the mine, proceeded to the location of the accident and began inspection at approximately 10:00 a.m.

The investigation revealed that no one had been in the area since the time of the accident. The Clayton 225 locomotive was at the A2-A2 1.4 switch.

MSHA inspectors directed that measurements be taken. From the front of the locomotive to where Garcia's hard hat was found measured 231 feet. The highest point on the locomotive measured 61 inches from the track rail. The top of the locomotive is dome shaped with the sides of the top of the locomotive being less than 61 inches from the track rail. See Exhibit # 10.

The locomotive measured 42 inches wide. At the front of the locomotive is a compartment from which the motorman operated the locomotive. Within the compartment is a builtin seat. The top of the front of the locomotive measured 54 inches from the track. See Exhibit # 10. One broken timber cap was found.

At the location of the timber cab (sic), next to the broken timber cap, the haulage way measured 82 inches across the bottom, 76 inches across the top and 61 1/2 inches from the top of the rail to the top of the haulage way. The broken timber cap measured 57 inches from the track rail at its lowest point which was on the side of the haulage way. The other side of the broken timber cap measured 62 inches from the track rail. Timber caps to either side of the broken timber cap and the cap next to the broken timber cap measured greater than 62 inches from the track rail and up to 96 inches or more at the switches. The timbers were not marked with warning signs or devises (sic).

During the course of the inspection, MSHA inspectors directed Sam Sullivan to dirve (sic) the motor through the area between the A2-A2 1.4 switch and the A2-A2 3.8 switch and drop off the cars at the A2-A2 3.8 switch. Sullivan then was directed by MSHA inspectors to repeatedly drive the locomotive between the A2-A2 1.4 switch and the A2-A2 3.8 switch. MSHA inspectors and UNC supervisory personnel repeatedly walked through the area during the course of the inspection. After measurements were taken, Kay Kofford was allowed to wedge a stull (vertical support) under the broken timber so it would not drop further down. This was the first corrective action which was taken. Prior to, during and after the inspection no ground fell in the haulage-way between the A2-A2 1.4 and the A2-A2 3.8 switches. When enlargement of the haulage way began in late December no ground had fallen.

After the inspection, the area was again closed to access. The area was opened again after the entire distance between the A2-A2 1.4 switch and A2-A2

3.8 switch was enlarged. UNC spent six months and \$214,500.00 in this process. See Exhibit # 11.

Throughout this process, despite repeated requests, MSHA inspectors gave UNC personnel no indication of how large the haulage-way should have been made.

As the result of the inspection conducted by MSHA, UNC received a number of citations including citation number 152050 (A copy is attached to the complaint) for violation of § 57.9-104 which requires conspicuous marking of obstructions which create a hazard. UNC paid the penalty resulting from citation 152050.

DISCUSSION

Docket No. CENT 80-386-M

On December 19, 1979, during an investigation of a fatality at the respondent's Northeast Churchrock Mine, a mine inspector for the Mine Safety and Health Administration (MSHA) issued a 104(a) citation No. 151666 which stated as follows:

There was no safe access for the person operating a Clayton (#225) haulage locomotive through the area of low clearance between the A2-A2 1.4 switch and the A2-A2 3.8 switch on the 1700 level in that the measured height of the Clayton #225 locomotive was 61 inches from its top down to track rail and at the timber cap 45 feet north from the A2-A2 3.8 switch it was measured 61 1/2 inches over the track rail.

Supervisor J. Kepler (track shifter) said he made a trip through this area at about 5:30 p.m. and also again about 8:30 p.m. the swing shift of 12/18/79 and at about 11:00 p.m. he directed trip rider Garcia (whom he also said was at the controls of the Clayton #225 motor) and motorman Sullivan to go through the area of low clearance between A2-A2 1.4 switch and A2-A2 3.8 and pull some muck from # 2 raise in A2-A2 3.8 track drift.

Supervisor B. Chavez (level foreman) said he was standing near the A2-A2 1.4 at about 11:20 p.m. as Clayton # 225 motor and 4 empty mine cars went by and entered the area between A2-A2 1.4 switch and A2-A2 3.8 switch. He said he followed and went through this same area to the A2-A2 3.8 switch where this motor was setting stopped with trip rider Garcia at the controls. He said he discussed an earlier fall at # 2 raise area with motorman Sullivan. He said he then told them (Garcia) not to go through to #2 raise and just to leave the area and go back out. He said the motor and the cars went back through the low clearance area between A2-A2 3.8 switch and A2-A2 1.4 switch.

The stipulated facts show that at the time of the accident Garcia was operating the locomotive and Sullivan was riding in the last ore car as they

traveled from A2-A2 3.8 switch towards the A2-A2 1.4 switch. As the locomotive approached the A2-A2 1.4 switch, Sullivan sensed something was wrong as the train appeared to be moving at a coasting speed. Sullivan climbed over the cars to the locomotive and found Garcia had sustained a head injury which ultimately resulted in his death.

Prior to the accident Chavez had walked from A2-A2 1.4 switch to the A2-A2 3.8 switch to check on a reported ground fall and did not see a broken timber in the area. Sullivan had also walked the same area at 11:20 p.m. and had not observed a broken timber. However, as Chavez walked back past A2-A2 3.8 switch towards the A2-A2 1.4 switch he saw one broken timber. Sullivan also saw the broken timber as the locomotive and cars proceeded towards the A2-A2 1.4 switch. The broken timber cap was located 45 feet north of the A2-A2 3.8 switch and would be between that switch and A2-A2 1.4 switch.

Petitioner contends that respondent's failure to provide adequate height in the tunnel through which the haulage locomotive traveled violated 30 C.F.R. § 57.11-1 which states as follows:

Mandatory. Safe means of access shall be provided and maintained to all working places.

Respondent has challenged the citation in controversy for the following reasons: (1) that it has always provided and maintained safe passage and safe transportation of employees to and from working areas and thus could not have violated section 57.11-1; (2) that standard 57.11-1 is unconstitutionally vague; (3) that the standard is overbroad; (4) that 57.11-1 is a general standard and specific standards exist which could have been cited but were not; and (5) that respondent paid the penalty for a specific standard relating to the condition of the haulage-way between A2-A2 1.4 and A2-A2 3.8 switches and thus should not be assessed twice for the same violation. Respondent also contends that the hazard is not defined in 57.11-1 and that the violation should not have been designated as significant and substantial. Further, a claim is presented by the respondent alleging that it should be reimbursed the sum of \$214,500.00 expended in reconstruction of the haulage-way as abatement of the citation.

Based upon a careful review of the stipulated facts and exhibits in this case, I reject respondent's arguments and find a violation of the cited standard occurred.

- I. Respondent has always provided and maintained safe passage and transportation to and from working areas and thus could not have violated section 57.11-1.

In support of its position, respondent points out that miners Garcia, James Keller, Harry Morgan and his track crew, and Chavez had all passed through the haulage drift between the A2-A2 1.4 and A2-A2 3.8 switches, either walking or riding, without incident prior to the accident. Furthermore, miners had passed through the area on prior shifts due to the #2 raise being an active working area of the mine from which ore was being drawn.

This argument is predicated on a false premise that because an accident or injury had not occurred in the past, no hazard existed in the passage-way due to the low clearance. The facts do not support this contention. First, the measurements taken by the MSHA inspectors following the accident involving Garcia show that at a point near the broken timber cap there was 1/2 inch of clearance between the top of the locomotive and the top of the passage-way. The locomotive at its highest point was measured to be 61 inches from the top of the rail. The front of the locomotive was 7 inches lower to allow the operator to have vision to the front. At the point where the broken timber cap was discovered, there was 57 inches clearance on its lowest side from the rail. These measurements indicate by the limited amount of clearance provided for passing locomotives and ore cars that there is no room for error or an unexpected event. The broken timber cap is an example of an event that portends the existence of a dangerous condition. The primary issue here is whether, in light of the minimum amount of clearance, "safe means of access" is provided. I find that this situation in the haulage-way of an active working area of the mine creates a hazard to the safety and health of the miners and therefore violates the provisions of standard 57.11-1. Further, the strongest support for this position is the fact that an accident did occur at this location resulting in a head injury to a motorman on the locomotive and ultimately his death.

Respondent also argues that the standards under the Act applying to underground coal mines makes provisions for cabs and canopies but allows variances which permit the mining machines to operate with extremely limited clearance in mining the coal seams. I find no merit in this argument as we are not involved with the equipment used to extract coal here but rather with a haulage-way used for the movement of locomotives and ore cars from one location to another. Also, it not the purpose in deciding the facts in this case to consider them in light of the provisions that apply to underground coal mining. They are distinct and separate provisions.

2. Standard 57.11-1 is unconstitutionally vague

Respondent in his brief argues that the operator has no way of knowing what "safe means of access" requires and therefore it is vague and unclear. For example, "means of access" may be defined in terms of passage-ways themselves or in terms of conveyances which transport persons through passage-ways. In contrast, respondent alleges that sections of the underground coal standards specify certain distances concerning clearances in haulage-ways.

The Commission in a recent decision addressed the argument of a standard being unconstitutionally vague in Alabama By-Products Corporation, 4 FMSHRC 2129-2130 (December 1982), and stated as follows:

In order to pass constitutional muster, a statute or standard thereunder cannot be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connolly v. Gerald Constr. Co., 269 U.S. 385, 391 (1926). Rather, "laws

[must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 109, 108-109 (1972).

Therefore, under 30 C.F.R. § 75.1725(a) in deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. (emphasis added). See e.g., Voegele Co. Inc. v. OSHRC, 625 F. 2d 1075 (3d Cir. 1980).

This test was applied by the Commission in U.S. Steel Corp., 5 FMSHRC 3 (January 1983), which stated that the adequacy of an operator's efforts to comply with a general standard should be evaluated by reference to an objective standard of a reasonably prudent person familiar with the mining industry and the protective purpose of the Act. Also, see Great Western Electric Company, _____ FMSHRC _____ (May 25, 1983).

I conclude from the stipulated facts presented in this case that a reasonably prudent person familiar with the peculiarities of the mining industry would recognize that a hazardous condition was created by the limited clearance in the haulage-way and would increase the height of this section of the mine. As stated before, the mere existence of a 1/2 inch of clearance between the top of the locomotive and top of the haulage-way should indicate to management that the slightest deviation in the top or supports, such as timbers, or a careless mistake by a motorman or miner riding in the ore cars could cause serious injury. Based upon the criteria set by the Commission in their recent decisions and the facts presented in this case, I find that the general standard is not unconstitutionally vague.

3. The standard is overbroad.

I likewise reject the argument that the standard is so ambiguous and overbroad as to be void under the statute. Again, the Commission has stated in Alabama By-Products Corporation, supra, as follows:

Broadness is not always a fatal defect in a safety and health standard. Many standards must be "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). See Ryder Truck Lines, Inc. v. Brennan 497 F. 2d 230, 233 (5th Cir. 1974).

In the present case, I find that the requirement in the standard that the operator must provide and maintain a "safe means of access" to all working places is neither overbroad nor ambiguous. There is no question that

this particular standard can be applied to a "myriad" of different circumstances and locations in the mine. However, the requirement of a "safe means of access" in a mine must be considered to be a basic requirement for the protection of the miner's health and safety. The difficulty in application of a standard to a given situation, as is the case in many standards, is the different interpretation as to what is considered "a safe means of access." As examples, in Homestake Mining Company, 2 FMSHRC 23167 (August 1980)(ALJ), the judge decided that in a passageway where a ladder was installed for a distance of six feet a clearance of only 13 inches between the ladder and the back of the passageway was dangerous to miners climbing up and down with their equipment and did not provide a "safe means of access," and violated 57.11-1. In The Hanna Mining Company, 3 FMSHRC 2045 (September 1981), the Commission affirmed a finding that travel underneath an overhead belt by miners was an "unsafe means of access" and violated 57.11-1 as did a large ore spill in an aisle. These representative cases indicate several different types of situations where the standard 57.11-1 was applied. I see a similarity between the application of the standard in those circumstances and varied locations and the conditions in the haulage-way being considered here. First, the haulage-way is a location in the mine that must be considered a "working place" for miners. Under section 57.2, Definitions, "working place" means any place in or about a mine where work is being performed.

I conclude that the respondent has failed to establish in his arguments that the Secretary exceeded his rulemaking authority under the Act in adopting the general standard at issue requiring that a "safe means of access" be provided and maintained in the "working place" of the mine.

4. Standard 57.11-1 is a general standard and there exist specific standards which could have been cited but were not.

Respondent contends that the enforcement scheme and standards under the Occupational Safety and Health Act of 1970 (OSHAct) are similar to those of the Federal Mine Safety and Health Act of 1977 (MSHAct). Further, that it is a well established doctrine under OSHAct that if there exists an applicable specific standard and that standard is not cited because a more general standard is cited, the citation of the general standard must be vacated. Trojon Steel Company, 3 OSHA 1384 (1975). It has been held by Occupational Safety and Health Review Commission that a citation for the violation of section 5(a)(1) is invalid and will not lie where a duly promulgated occupational safety and health standard is applicable to the condition or practice that is alleged to constitute a violation of the Act. Brisk Waterproofing Company, Inc., 1 OSHA 1263 (July 1973). Respondent suggests that the Federal Mine Safety and Health Review Commission should follow this precedent in the interest of administrative and judicial economy (Resp. Br. 14).

This defense must be rejected. Admittedly, the OSHAct and MSHAct acts have similar statutory language and were enacted to protect the health and safety of certain employees in the work place. However, there are some very

distinct differences in the two laws as adopted by Congress. One of the most noticeable differences involves the provisions of section 5(a)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq., 84 Stat. 1590 which is frequently referred to as the "general duty clause."^{2/} This provision of the OSHAct was adopted by Congress to take effect where there was not a precise standard to cover every conceivable situation that may arise. See Senate Committee on Labor and Public Welfare, S. Rept. No. 91-1282, 91st Cong., 2d Sess (1970 at 9, 10, p. 21).

The "general" designation under which section 57.11-1 is listed in the MSHAct is for a different purpose than the respondent would contend. "General" in this instance, refers to the fact that this standard applies to both "Surface and Underground" mining under a heading of "Travelways." These titles are listed in the regulation under the heading "§ 57.11 Travelways and escapeways."

5. Respondent should not be required to pay twice for the same condition or violation

The facts show that respondent was also issued Citation No. 152050 in connection with the investigation of the accident in this case and citation being contested herein. Citation No. 152050 alleged a violation of standard § 57.9-104 which states as follows:

Mandatory. Warning devices or conspicuous markings shall be installed where chute lips, ventilation doors, and obstructions create a hazard to persons on equipment.

The citation reads as follows:

"The timber caps in A2 haulage drift between A2-1.4 and A2-3.8 did not have warning devices or conspicuous markings to warn persons operating a clayton locomotive of the low clearance area. The timber caps range from 57" to 67" in height from the track rails. The clayton locomotive measures 61" from the track

2/ Sec. 5(a) Each employer-

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

rail. A2 haulage drift is the only haulage access from # 2 and # 4 ore raises in 3.8 haulage drift on 1700 level."

Respondent argues that Citation No. 152050 involves the same area, measurements and same alleged violation being considered in this case involving No. 151666. Further, respondent has paid the proposed penalty assessment involving 152050 and that it would be res judicata to retry this again.

The respondent fails in this argument for the facts show that two violations of mandatory safety standards occurred here. First, the respondent was cited for, and I find, violation of 57.11-1 requiring a safe means of access be provided and maintained to all working places. As to Citation No. 152050, the violation charged was for failure to have warning devices or conspicuous markings installed where a hazard existed. These are two separate violations. It is well settled that the 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related mandatory standard. El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981), Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982).

6. The violation of Section 57.11-1 was not significant and substantial.

Respondent contends that because the standard cited here is so vague as not to define the hazard, it should not have been designated as significant and substantial.

I also reject this argument as being without merit. The standard must be given a rational and reasonable interpretation. The "safe access" referred to must be viewed in the light of the danger that exists to miners who are working in the area and in this instance traveling on the locomotive and ore cars through this area of restricted clearance. The standard must be construed to effectuate its obvious purpose - safety. To accept respondent's interpretation would be inconsistent with that purpose.

The test for a "significant and substantial" violation was laid down by the Commission in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822, April 7, 1981, also a civil penalty case. In that case the Commission held that a violation is "significant and substantial" if: "[B]ased upon the particular facts surrounding that violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."

From the facts before me in this case, there was a reasonable likelihood that miners traveling on either the locomotive or ore cars through the area in the haulage-way of the mine cited herein as having restricted clearance could receive injuries of a "reasonably serious nature" by having a part of his person come in contact with the top of the haulage-way. In the instant case, a miner suffered head injuries, ultimately resulting in his death. This is sufficient, as an example of the potential hazard that existed in the area, to meet the test set out by the Commission, and warrants that the violation of the standard be designated as significant and substantial.

In view of my finding that a violation of standard 57.11-1 existed as alleged in Citation No. 151666, I am not obliged to make a determination of the merits of respondent's contention that it should be reimbursed for the funds expended increasing the clearance in the haulage-way. The fact is that respondent was required to do so in abatement of the alleged violation, which ultimately was accomplished and the hazard eliminated.

PENALTY

After respondent abated the violation, the Secretary terminated the withdrawal order and proposed a civil penalty of \$7,500.00 for the alleged violation.

As part of the stipulated facts in this case, it was shown that respondent's mine employed 916 persons in December 1979, operating three eight hour shifts six days a week. This would indicate a large mine operation.

No argument was advanced by respondent that payment of the proposed penalty in this case would jeopardize its ability to continue in business. Therefore, it is presumed that if a penalty is assessed, it will not do so.

The Secretary appended to his brief filed in this case a certified copy of a computer print-out showing respondent's assessed violation history beginning December 20, 1977 through December 20, 1979, the day of the accident. Respondent raised no objection to this computation of assessed violations so it is presumed that it does not disagree with the figures. The printout shows for the period covered, that respondent was assessed and has paid the penalty for 245 violations.

I find from the facts in this case that the negligence on the part of respondent was high as the restricted clearance in the haulage-way was visible to all who traveled through this area. However, the stipulated facts do not show that respondent's supervisors, or Sullivan, Garcia's partner, saw the broken timber cap before the accident occurred. I do not find that this condition of a broken timber cap was established as the direct cause of the injury to Garcia, although it may have been, but rather, find that the

~~restricted height in this haulage-way was the hazard and the cause of the injury to the miner.~~

The gravity is also high. The seriousness of the type of injury that occurred in this case should have been foreseen by the respondent. Also, the lives of many miners were endangered by this condition as the haulage-way was regularly used and is an active working part of the mine.

The respondent did abate the hazard by enlarging the haulage-way and providing adequate clearance in the area. This required respondent to expend the sum of \$214,500.00 plus lose some production in the mine. When assessing a penalty where there is a vacated withdrawal order, it is proper to take into account the economic loss suffered by the operator as a consequence of the order. See North American Coal Company, 1 MSHC 1131, 3 IBMA 93 (April 1974).

I conclude, based on all of the above findings and factors, that a penalty of \$2,000.00 is proper in this case. I believe a reduction in the amount of the proposed penalty assessment is warranted for the reason that the respondent did pay another penalty without contest and expended a large sum of money in abatement of the violation.

DOCKET NO. CENT 80-387-M

This case involves a 104(a) ^{3/} Citation No. 151667 issued to the respondent alleging a violation of 30 C.F.R. § 57.3-26. The condition or practice for which respondent is cited is described in the citation as follows:

There is a damaged and broken timber cap creating a hazardous condition for haulage equipment that was directed to travel through the area between A2-A2 1.4 switch and the A2-A2 3.8 switch on the 1700 level in that one of the timber caps 41 feet north from A2-A2 3.8 switch is broken horizontally about half-way along its length and was hanging down to within 57 inches over the left side track rail (looking south).

The haulage equipment (Clayton locomotive #225) directed

^{3/} Sec. 104(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

by Supervisor J. Kepler (track shifter) to travel through this area measured 61 inches from its top to track rail. Supervisor J. Kepler said he passed through this same area twice earlier in the shift.

30 C.F.R. § 57.3-26 provides as follows:

Mandatory. Timbers used for support of ground in active workings shall be set, blocked, or blocked and wedged so that a fit is achieved. Damaged, loosened, or dislodged timbers which create a hazardous condition shall be promptly repaired or replaced.

Without further explanation, Petitioner in his brief stated that he chose not to brief the issues surrounding 30 C.F.R. § 57.3-26 but instead addressed his entire argument to standard 30 C.F.R. § 57.11-1 which refers to the alleged violation contained in Docket No. CENT 80-386-M. This failure on the part of petitioner to afford the adjudicator the benefit of his arguments on the issues in this case could be construed as tantamount to an abandonment of his petition against the respondent. However, I am required to abide by the decisions of the Federal Mine Safety and Health Review Commission which holds that section 110(a) of the Act mandates an assessment of a penalty for any violation of a mandatory safety standard. ^{4/} Island Creek Coal Company, 2 FMSHRC 279 (February 1980), Van Mulvehill Coal Company, Inc., 2 FMSHRC 283 (February 1980). Therefore, if I find a violation of the cited standard, from the stipulated facts in this case, I will assess a penalty.

Respondent has admitted in its brief that a broken timber cap was discovered in the haulage-way at approximately the same time the accident occurred. The remaining issue to be decided is whether the broken timber cap created a hazardous condition contemplated by standard 57.3-26. Respondent argues in its brief that existence of the broken timber cap in the haulage-way between the two switches did not create a hazardous condition. The basis for this reasoning is that 57.3-26 applies to ground control or control of the top of the haulage-way and was not related to the hazard of restrictive clearance or obstructions (Resp. Br. 22-23).

I concur with respondent that this standard is included under part § 57.3 of the regulation that is designated "Ground control" in "Underground" mines. The general tenor of the other standards that precede and follow 57.3-26 are directed towards support and control of ground in underground mines. The question here is what was the hazardous condition cited by the

^{4/} Sec. 110(a) The 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 which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

inspector when he issued this citation? In the condition or practice section in the citation, the inspector wrote "There is a damaged and broken timber cap creating a hazardous condition for haulage equipment" There is no further statement as to whether the hazard was the possibility of a ground fall or cave-in, or rather to a locomotive or miner striking the timber in passing through the area, or both.

It is unfortunate that the Secretary elected not to brief the issues in this case as his arguments and authorities would have been most helpful. However, I am compelled to resolve the issues in spite of this. I am persuaded by a careful review of the statement of the inspector in the citation describing the conditions as he found them that he contemplated a hazard to the equipment from the broken timber falling down into the upper portion of the haulage-way. This determination is based upon the fact that included in this description is the measurements of the restricted clearance created by the broken timber described as "... broken horizontally about halfway along its length and was hanging down to within 57 inches over the left side track rail (looking south)."

If the above assumption is incorrect, and the inspector had intended to cite a hazard for roof control, I would have to find that there was not a violation of the standard. The facts show that the broken timber cap was first observed immediately before the accident occurred. There is no evidence in the stipulated facts to show that this condition had existed for a period of time or that respondent had prior knowledge. Further, there is no evidence that this one broken timber cap amongst the others installed in the area created a hazard of a fall or cave-in. The standard contemplates that timbers that are damaged, loosened, or dislodged and create a hazard shall be promptly repaired or replaced. The crucial word appearing in this standard is "promptly." In the case Magna Copper Company, 3 FMSHRC 349 (February 1981)(ALJ), involving standard 57.3-26 and similar facts, Judge Carlson stated in part as follows:

Respondent is perhaps correct that a mine operator need not replace every damaged or weakened support. But if that is so, the Secretary is doubtless correct in insisting that where a damaged support in a working area of a mine is not replaced, that decision must rest on a thorough and prudent assessment of the effect of weakened support on safety.

In the above case, the damaged support existed for a year and respondent's own safety engineer believed it should have been replaced and a violation was found. That is not the case here. The evidence neither shows that the support was necessary for adequate ground control nor that it had existed for any period of time.

However, if the assumption is correct that the hazard contemplated by the inspector was a danger to the locomotive or miners passing underneath due to a restriction of clearance, then the issue is whether the standard was the proper one to be applied in issuing the citation. In the case of Phelps

Dodge Corporation v. Federal Mine Safety and Health Review Commission, 681 F. 2d 1189 (1982), the United States Court of Appeals for the Ninth Circuit considered the same issue as presented by respondent in this case, although a different standard and unidentical facts. The Court found that the application of a regulation in a particular situation may be challenged on the ground that it does not give "fair warning" that the alleged violative conduct was prohibited. See Daily v. Bond, 623, F. 2d 624, 626-627 (9th Cir. 1980). In the Phelps Dodge case, the contention was that the standard cited was to protect against hazards of electrical shock and not hazards of removing rocks from a chute. The Court concluded and stated as follows:

The regulation inadequately expresses an intention to reach the activities to which MSHA applied it. Therefore, we join in the observation: "If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express" (citation omitted).

The Court found that the Secretary had abused his discretion in applying the standard under electrical hazards to non-electrical hazards.

Under the doctrine adopted in the above case, I find that the standard applied in this case is unconstitutionally vague as to all hazards except when applied to the hazards associated with ground support. As I stated before, I do not find a violation of 57.3-26 as to the requirements of the standard relating to ground control and prompt replacement, or repair of broken timbers. If the Secretary had wished to cite the respondent for a broken timber cap, creating a hazard to the movement of locomotives and means through an area of restricted clearance, there are other standards he could cite. I therefore vacate Citation No. 151667.

CONCLUSIONS OF LAW

1. Respondent was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the Northeast Churchrock Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and the subject matter of these proceedings.

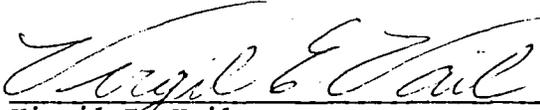
2. Respondent was in violation of the mandatory standard in 30 C.F.R. 57.11-1 by reason of the fact that it failed to maintain a safe means of access to all working places in that there was limited and restrictive clearance height in the haulage-way between A2-A2 1.4 and A2-A2 3.8 switches.

3. Respondent did not violate standard 30 C.F.R. § 57.3-26 and said Citation No. 151667 is vacated for the reason that the standard is unconstitutionally vague as to a hazard to miners because of restricted clearance in the haulage-way due to the broken timber cap dropping or hanging down therein.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 151667 is vacated.
2. Citation No. 151666 is affirmed and respondent shall pay the Secretary of Labor the above-assessed penalty, in the amount of \$2,000.00, within 40 days from the date of this decision.



Virgil F. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 28, 1983

LOCAL UNION 6025, UNITED MINE : Complaint of Discrimination
WORKERS OF AMERICA, :
Complainant : Docket No. WEVA 80-429-D
v. : Bishop Mine
BISHOP COAL COMPANY, :
Respondent :

ORDER OF DISMISSAL

The above-captioned matter has been reassigned to the undersigned administrative law judge.

This proceeding is a complaint of discrimination filed by Local Union 6025, United Mine Workers of America against Bishop Coal Company. The UMWA has filed a letter which advises that a settlement has been reached in this matter. The operator has reimbursed the Local Union for the wages it paid to those miners who participated in the spot inspections at issue. The operator has also paid interest to the Local Union on the wages it paid out and reimbursed the International Union for the costs incurred in prosecuting this matter. The UMWA requests that this proceeding be dismissed.

Accordingly, it is hereby ORDERED that this matter is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 30 1983

SECRETARY OF LABOR, : CIVIL/PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 82-38
Petitioner : A.O. No. 11-00609-03034
v. :
: Captain Mine
SOUTHWESTERN ILLINOIS COAL :
CORPORATION, :
Respondent :

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Brent L. Motchan, Esq., St. Louis, Missouri, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The parties have filed cross motions for summary decision based on the pleadings, affidavits and admissions, and each asserts that there is no genuine issue of material fact necessitating a hearing. Each party has filed a memorandum in support of its position. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this decision, Respondent owned and operated a surface coal mine in Perry County, Illinois, known as the Captain Mine.

2. Bituminous coal is extracted from the subject mine and the operation of the mine affects interstate commerce.

3. Respondent produces over two and one-half million tons of coal annually at the subject mine, and employs approximately 600 miners. I find that Respondent is a large operator.

4. There were 53 violations at the subject mine during the year prior to the violation alleged herein. I find that penalties otherwise appropriate should not be increased because of the operator's history of previous violations.

5. The imposition of a penalty in this case will not affect Respondent's ability to continue in business.

6. On September 18, 1981, Federal Coal Mine Inspector Ronald M. Zara issued a citation to Respondent under 104(a) of the Mine Safety Act charging a violation of 30 C.F.R. § 77.1710(g).

7. The condition which prompted the issuance of the citation was the following:

On September 18, 1981, Tom Johnson, a company engineer, was working approximately 18 feet above the ground on the lazer tower and was not wearing a safety belt. His knee was around the vertical leg of the tower and he was using both hands to reposition the lazer sending unit.

8. The alleged violation was abated when Mr. Johnson was removed from the lazer tower and instructed in the use of safety belts. The citation was then terminated.

9. Respondent had a written safety policy at the time of the alleged violation herein. The policy required all employees to comply with Federal mine health and safety regulations and specifically provided that "safety belts and lines shall be worn at all times where there is a danger of falling." The safety policy contained an enforcement procedure providing for notices of violation, suspension without pay and discharge. Between October 1978 and April 1983, approximately 60 violations notices were issued for violations of the safety policy, four of which were for failure to wear safety belts. In addition, one person was discharged, three were suspended and six received disciplinary letters during the same period of time, for violations of company safety rules.

10. A safety belt was not present on the ground lazer unit where the employee involved herein was working on September 18, 1981. However, safety belts were present in the mine supply office, the safety office and the tipple. The subject employee's office was adjacent to the safety office and approximately 50 feet from the mine supply office. There was also a safety belt present on a machine located about 3 minutes walking distance from the ground lazer unit.

11. The employee had received safety training and specifically had been instructed in the requirement to use safety belts, and the proper method of using them.

12. There is no evidence that any supervisory person was present in the area where the employee was working or was aware that he was working without a safety belt.

REGULATION

30 C.F.R. § 77.1710 provides in part:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

* * * * *

(g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

ISSUES

1. Whether the decision of Judge Koutras reported in 3 FMSHRC 871 is res judicata in the present proceeding.

2. Whether the fact that an employee was working 18 feet above ground in a situation where there was a danger of falling in itself establishes a violation of 30 C.F.R. § 77.1710(g)?

3. If the answer to issue 2 is negative, whether Petitioner has established that Respondent failed to require its employees to wear safety belts where there is a danger of falling.

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the Captain Mine, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. A decision by a tribunal of competent jurisdiction is res judicata in a subsequent proceeding between the same parties involving the same issue, even if the first proceeding is pending on appeal.

DISCUSSION

Under the rule followed in the federal courts, res judicata or collateral estoppel precludes a party from raising an issue that has previously been decided against him even if the prior decision has been appealed. Deposit Bank v. City of Frankfort, 191 U.S. 499 (1903); United States v. Abatti, 463 F. Supp. 596 (D.C. Calif. 1978). A different rule is followed in a minority of state courts, but it seems clear that the Review Commission should follow the federal rule.

3. The case decided by Judge Koutras, Secretary v. Southwestern Illinois Coal Corporation, 3 FMSHRC 871 (1981) involved the same parties and the same mine as the instant case. Respondent was charged with violating the same mandatory safety standard. The Secretary apparently contended that the failure of a miner to wear a safety belt where a danger of falling exists is a violation per se of 30 C.F.R. § 77.1710(g). Judge Koutras decided this issue adversely to the government on the authority of North American Coal Corporation, 3 IBMA 93 (1974). The government had a full and fair opportunity to litigate this issue and is estopped from relitigating it here.

4. Therefore, applying the principle of res judicata, the fact that an employee was working 18 feet above ground in a situation where there was a danger of falling does not in itself establish a violation of 30 C.F.R. § 77.1710(g).

5. Since I cannot assume that the evidence before Judge Koutras is the same as is now before me, his decision is not res judicata on the issue whether Petitioner established that Respondent failed to require its employees to wear safety belts in situations involving a danger of falling.

6. I conclude on the basis of the evidence before me that Petitioner has not established that Respondent failed to require that its employees wear safety belts where there is a danger of falling. The evidence shows clearly that employees were instructed to wear safety belts in such situations and that the instruction was enforced by disciplinary action.

ORDER

On the basis of the above findings of fact and conclusions of law, Petitioner's motion for summary decision is DENIED; Respondent's motion for summary decision is GRANTED; Citation No. 1115998 is VACATED; Petitioner has previously voluntarily vacated Citation No. 1115976. Therefore, the proposal for a penalty is DISMISSED.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUN 30 1983

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. LAKE 82-85
: A.C. No: 11-00590-03141 V

v. :

OLD BEN COAL COMPANY, :
Respondent :

OLD BEN COAL COMPANY, : Contest of Citation or Order
Contestant :
: Docket No: LAKE 82-66-R
v. : Citation No. 1222957; 3/11/82

SECRETARY OF LABOR, and :
UNITED MINE WORKERS OF AMERICA, :
Respondents :

DECISION

Appearances: Mark M. Pierce, Esq., Chicago, Illinois, for Old Ben Coal Company;
Miguel J. Carmona, Esq., Office of the Solicitor, Chicago, Illinois, for the Secretary of Labor

Before: Judge Moore

The above cases were re-assigned from Judge Lasher to me on June 23, 1983, with the statement that Judge Lasher is, because of illness, "unavailable to the agency" as that phrase is used in 5 U.S.C. 554(d).

After considering the evidence, Judge Lasher issued a bench decision which appears on page 231 of the transcript. I have studied that decision as well as the testimony, exhibits, and arguments made in the case.

I agree with the bench decision and adopt it as my own. This bench decision appears below as it appears in the official transcript aside from minor corrections.

This is a consolidated proceeding arising out of the filing of a document entitled Application for Review (Notice of Contest) by Old Ben Coal Company, hereinafter Old Ben, to review Citation No. 1222957 dated March 11, 1982, and a proposal for a penalty filed by the Secretary of Labor, hereinafter the Secretary, seeking assessment of a penalty for the violation charged in the same

Citation. The Citation which was issued pursuant to Section 104 (d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., charges Old Ben with an infraction of its Roof Control Plan in violation of 30 CFR 75.200. In its Application for Review, Old Ben challenges the occurrence of the violation as well as the specific findings contained on the face of the Citation to the effect that the violation was "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard," and also that the violation resulted from an "unwarrantable failure" on the part of Old Ben to comply with the mandatory health and safety standards.

In this hearing Old Ben has conceded that the violation occurred as charged in the Citation thus leaving the issues to be resolved those raised by the two aforesaid concepts inherent in so-called unwarrantable failure violations, that is, "significant and substantial" and "unwarrantable failure." Additional issues, of course, are the amount of penalty which should be assessed for the violation admitted to have been committed by Old Ben. Both parties presented witnesses in this proceeding and submitted documentary evidence and, based upon the evidence of record, I make the following findings:

Preliminary Findings

On December 11, 1982, Jesse B. Melvin, an Inspector with the Mine Safety and Health Administration, arrived at Old Ben's No. 26 mine at approximately 7:30 a.m. and proceeded on a Section 103(i) spot inspection of the mine accompanied by Jim Bolen--Old Ben's "top safety man," according to the Inspector.

At approximately 9:50 a.m., Inspector Melvin observed a continuous miner, operated by James Hawkins, backing out from under an area of unsupported roof. This area, 14 feet by 22 feet, was located in the 10 CM 6 unit, ID 014 in the Main South entries. As charged in the Citation and conceded by Old Ben, the continuous miner had advanced 38 feet in by the east row of roof support (roof bolts) and the machine's operator was 16 feet in by the last roof support in the Second Main South entry.

The pertinent provision of the Roof Control Plan violated appears on Page 56 thereof (Exhibit P-4) and provides: "No work to be performed in by permanent supports unless temporary supports are installed on five foot centers or less."

The unsupported area in question had been marked by the placement of a danger tag on a roof bolt on the prior shift (12 midnight to 8:00 a.m.) but the same was not observed by James Hawkins at the time he proceeded under the unsupported roof. At least one of the reasons for this was the dust which was prevalent in the area at the time.

Old Ben's Section Foreman at the time was Tim Jones. On March 11, 1982, Mr. Jones' crew consisted of two continuous miner operators, Hawkins and John Zimmerman, and, in addition, two shuttle car operators, two roof bolters, one utility tractor operator, and one repairman. At approximately 9:00 a.m., Mr. Jones instructed his employees to clean up the area in question, but Mr. Jones was not present at the time the violation occurred because of a power defect which occurred on another piece of equipment requiring his presence at a place some 600 feet distant from the entry in question. Hawkins commenced cleaning up the general area and worked at this task for approximately 25 minutes before proceeding under the 14 by 22 foot area of unsupported roof. At the time Hawkins proceeded into this area, he was unaware that he was entering into an area not supported by roof bolts in accordance with the Roof Control Plan. However, Hawkins subsequently realized that he was working under unsupported roof and even so did not immediately back out of the area but continued to work under unsupported roof. His total time under unsupported roof was 10 minutes and he continued to engage in cleaning up the area for a period of approximately seven minutes after he realized he was under unsupported roof. Hawkins' reason for doing so was that he "went ahead and cleaned it up" while he was there to avoid "a big move" later on.

When Hawkins first proceeded under the unsupported roof he was alone. Subsequently, the other operator of the continuous miner, John Zimmerman, arrived in the vicinity but Zimmerman never placed himself under unsupported roof. When Inspector Melvin arrived, Zimmerman made a statement to him to the effect that they had gone under roof (meaning unsupported roof) before and that this time they had been caught.

Subsequent to his announcement that a Section 104(d) Citation would be issued, Inspector Melvin determined that there were conditions or circumstances present in the unsupported roof area which would or might have increased the likelihood of the occurrence of the hazard, i.e., that there was a slip in the coal roof and "rock showing in one place of the roof." (Exhibit P-3).

The danger tag placed by the prior shift on the roof bolt in the area in question was installed by the mine examiner at that time because there was bad top in the area of the unsupported roof and not because it was normal practice to place such a tag in all places where there is unsupported roof regardless of the condition of the roof.

Following the determination by Inspector Melvin to issue Citation No. 1222957 he told Jim Bolen, Old Ben's safety mine inspector at No. 26 mine, that to obtain abatement of the Citation, the Roof Control Plan must be read to the crew. The continuous miner operator, Hawkins, was also reinstructed with respect to compliance with the above-quoted provisions of the plan. Hawkins and Zimmerman were advised by Old Ben management that a

letter would be placed in their personnel folders indicating that they were involved in the violation which had occurred. Whether that disciplinary action by Old Ben was ever carried out is unclear since such letters were not in the folders for Zimmerman and Hawkins at the time of this hearing. Hawkins and Zimmerman were not otherwise disciplined nor was Tim Jones, the Section Foreman. No meaningful disciplinary action was meted out by Respondent to Hawkins.

Hawkins had been operating a continuous mining machine for approximately one year prior to March 11, 1982. During that period of time, Hawkins had worked under unsupported roof 10 to 12 times, some of which were in the presence of foremen (sometimes referred to as face bosses). On some of these occasions these foremen made statements to Hawkins to the following effect: "Don't get caught" and "I didn't see you." Prior to the violations on March 11, 1982, Old Ben management personnel had condoned infractions of the same or similar provisions of the Roof Control Plan by Hawkins.

Had the roof fallen while Hawkins was working under it in the unsupported area in question, i.e., had the hazard contemplated by the Roof Control provisions in question come to fruition, Hawkins, the only employee jeopardized by the violation, could reasonably have been expected to sustain injuries ranging from very minor injuries to either permanently disabling injuries or fatal injuries.

Hawkins, 22 years of age, had he been aware of the "slip" in the roof observed by Inspector Melvin, would not have continued working under the unsupported roof area after he had determined that he was working under unsupported roof area.

Although Old Ben has a "good" safety program in terms of its format-which includes instructions and training of new employees and employees who are changing jobs (Exhibits R-2 and R-3),-the salubrious effect of this safety program is undermined if not negatived by the actual attitudes and practices manifested by Old Ben's foremen and other management personnel in the day-to-day operation of the mine.¹

¹The unsatisfactory attitudes of Old Ben's management were credibly described by MSHA's Inspector Supervisor Mike Wolfe who characterized the same as a "lack of sincere desire to comply." This characterization based upon some 12 years' familiarity was supported by the condonation of Hawkins' infractions over a period of time, the computerized History of Previous Violations (Exhibit P-5) submitted in this proceeding, and the statement hereinabove referred to made by John Zimmerman to Inspector Melvin following his determination to issue the Citation in question.

The violation committed by Old Ben on March 11, 1982, did not directly result from negligence on the part of its Foreman, Tim Jones. The violation resulted in a significant degree from Old Ben's careless and indifferent approach with regard to requiring compliance by its miners with safety standards in general and provisions of the Roof Control Plan in particular.

Old Ben is a large coal mine operator with an unusually high number of violations committed in the prior 24-month period preceding March 11, 1982 (719 violations).

Discussion, Ultimate Findings of Fact and Conclusions of Law

Turning now to the question as to whether or not the violation in question was of such a nature as can "significantly and substantially contribute to the cause and effect of a mine safety or health hazard," it is noted that in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822, 825 (April 1981), the Commission defined the phrase "significant and substantial violation" as being one "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in injury or illness of a reasonably serious nature." I have previously found that the occurrence of the event or the hazard contemplated by the provision of the Roof Control Plan violated would likely result in injuries of a reasonably serious nature to or the fatality of the continuous miner operator, James Hawkins. The question remaining under the National Gypsum test is whether or not the violation contributed to the cause and effect of a mine safety hazard.

The Commission noted in National Gypsum that the Act does not define the key terms "hazard" or "significantly and substantially." It was determined that the word "hazard" denotes a measure of danger to safety or health and that a violation significantly and substantially contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. Thus two facets of general concept are raised by this language: (1) the likelihood of resulting injury occurring and (2) the gravity or seriousness of the resulting injury. Significantly, the Commission in National Gypsum made the observation that "we believe that the inspector's independent judgment is an important element in making significant and substantial findings which should not be circumvented." I do not take this statement, however, to mean that the Inspector's determination must govern or is binding as a general rule. It can be rebutted. However, on the record in this case and considering the inherent nature and extreme hazards posed by roof falls generally, I see no reason not to accept the Inspector's testimony with respect to the seriousness of the violation in question and the likelihood of the occurrence happening. This is particularly true in view of the condition of the roof in the unsupported area in question even though the same was actually ascertained after the Inspector made his determination. I conclude that the Secretary in this case has carried its burden of proof with

respect to its "substantial and significant" allegation based upon the various factual findings which I have previously indicated including the length of time Hawkins spent under unsupported roof and the condition of the roof at the time Hawkins was under it. I thus find that there did exist a reasonable likelihood that the hazard was significantly and substantially contributed to by the violation and that there was a reasonable likelihood that the hazard, had it come to fruition, would have resulted in a reasonably serious injury to Hawkins.

Whether the instant violation was the result of an unwarrantable failure of the operator to comply with the roof control requirement contained on Page 56 of the Plan depends on whether the violative condition was one which the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

I have previously found with respect to Old Ben's indifferent approach as to compliance with safety standards and condonation of violations of roof control provisions. Based upon the testimony of Mr. Hawkins and MSHA Supervisory Inspector Mike Wolfe, whose testimony I do credit, I find that Old Ben exhibited a negligent approach toward insuring compliance with the Roof Control Plan in question. The statements of section foremen to Mr. Hawkins on occasions when he was under unsupported roof advising him not to get caught and indicating that he was not being observed--when in fact he was and knew he was--created a climate of enforcement where Old Ben should reasonably have foreseen that Hawkins would continue to violate the Roof Control Plan and the particular provision thereof involved in this proceeding. I thus conclude that this is a pure application of the governing definition of unwarrantable failure and that the mine operator knew of violations and failed to abate the practices constituting such violations, and indeed to some extent the participation of agents of the mine operator (in this case the foremen) involved condonation of violations similar to the ones actually committed by Hawkins in this case. Accordingly, I conclude that the operator through these foremen engaged in, as a minimum, indifference, and, as a maximum, a willful disregard of the safety requirements which in a significant and substantial way contributed to the occurrence of the violation charged. I thus find no merit in the application for review in this proceeding.

Penalty Assessment

I have previously found Old Ben to be a large coal mine operator. It is not one of the giants of the industry. It has an unsatisfactory history of previous violations. It proceeded in good faith to achieve compliance with the safety standard violated upon being notified thereof and in accordance with the abatement terms specified by the issuing Inspector. Payment of a penalty appropriate to the violation will not jeopardize its ability to continue in business. I find that the violation in question was extremely

serious and resulted from the negligence of management personnel to adopt a reasonable enforcement climate with respect to safety matters at its No. 26 mine in general. No specific negligence in connection with this violation is attributable to any specific management person or supervisor. In this connection, I note that the six statutory assessment factors are necessary to be considered but they are not all-inclusive.

I consider that the primary factor shown on the record in this proceeding which would militate for a lessening of the penalty was the testimony of MSHA's Inspector/Supervisor, Wolfe, to the effect that in terms of "incidents" (lost time accidents, etc), the No. 26 mine has a commendable record in that such incidents are below the national average.

Considering these various factors, I conclude that the \$3,000.00 penalty urged by the Secretary in its narrative of findings for a special assessment contained in Docket No. LAKE 82-85 is appropriate and it is so assessed.

ORDER

Citation No. 1222957 is affirmed and the contest of the Citation (Docket No. LAKE 82-66-R) is dismissed.

In Docket No. LAKE 82-85, Old Ben is ordered to pay a civil penalty of \$3,000.00 to the Secretary of Labor within 30 days from the date of this decision.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

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ISSUES

1. Did respondent's activities during "set-up" at the sand and gravel operation mandate compliance with safety regulations promulgated under the Act, and justify issuance of citations for violations?

2. If so, what are the appropriate civil penalties that should be assessed against the respondent for the violations, based upon the criteria set forth in section 110(i) of the Act?

STIPULATIONS

At the outset of the hearing, the parties stipulated to several facts relevant to the assessment of penalties. It was agreed that respondent: 1) is a small business; 2) abated the conditions cited as violations quickly; and 3) had no history of violations prior to the ones assessed in this case. The parties further agreed to the Commission's jurisdiction to decide this case.

SUMMARY OF EVIDENCE

Respondent is owner and operator of a sand and gravel operation at Havarin Ranch Pit and Mill. In late 1978, respondent started the process of setting up a new plant which included installing and testing a recently-purchased rock crusher. This was completed in September 1979.

During January and February of 1979, Inspector Robert Hall of the Mine Safety and Health Administration (MSHA) made two visits to the non-operational facility. Hall visited the plant again on March 27, 1979. At that time, he noted gravel material being loaded onto trucks, hauled to the crusher, dumped into the crusher feed bin, and being processed and stockpiled. Under the authority of section 104(a) of the Act ^{1/}, he issued four safety violation citations regarding such crusher operation.

1/ Section 104(a) provides in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.

EVALUATION OF EVIDENCE

1) Citation No. 371765 - Failure to wear a hard-hat.

Petitioner contends that failure of the crusher operator to wear a hard hat, as noted in citation No. 371765, violates 30 C.F.R. § 56.15-2 which provides as follows:

Mandatory. All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

Petitioner contends that during the operation of the crusher, as observed by the MSHA inspector, the operator was not wearing a hard hat or any other head protection. Petitioner maintains that such an omission represents a hazard to the crusher operator's safety, and thus constitutes a violation of federal regulation. Potential hazards include head injury to an operator caused by falling rock as it is dumped in the crusher bin, and flying rock from the crushing process. The inspector testified that such hazards should have been visually evident to respondent (Tr. 11).

The respondent does not deny that the employee failed to have any head protection, but challenges issuance of the citation on several other grounds. First, respondent argues that the sand and gravel facility was still in a "set-up" status which was not completed until September, 1979. Further, the crusher was not being operated for commercial production but instead, was being run for test and mechanical adjustment purposes only. Finally, the respondent testified that the crusher "operator" was not a true operator, but a man hired and paid only to install and test the equipment (Tr. 13).

I find that the evidence of record shows that the crusher was being operated by an employee, for whatever purpose, and that crushed rock was being produced and stockpiled. The stockpile on the date the citation was issued was ten feet high, a size consistent with on-going operations (Tr. 25).

The threshold issue to be decided, then, is whether the respondent's "set-up" activities required compliance with the Act's safety regulations. "Set-up" activities in this case involved operation of the rock crusher, and exposure of an operator without head protection to obvious hazards such as falling rock and potential head injury. Considering such hazards, I see no justifiable reason to distinguish between such "set-up" activities and those of a commercially productive operation. The mandatory regulatory provision requiring hard hats was therefore properly applied to the respondent's activities, and Citation No. 371765 is affirmed.

2) Citation No. 371766 - Failure to protect eyes.

On the same day, Hall issued a second citation charging that the crusher operator was not wearing any type of eye protection. The standard allegedly violated, 30 C.F.R. § 56.15-4, provides:

Mandatory. All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

Hall testified that at the time of his inspection, he observed the crusher in operation processing material. The employee operating the crusher wore no eye protection (Tr. 10-11). The hazard involved in such a situation is the potential injury to an operator's unprotected eyes due to flying rock particles produced during the mechanical crushing process.

While the respondent does not deny the failure of the employee to wear any type of eye protection, it again contends that the sand and gravel facility was only in "set-up" stages, and seems to suggest that an employee hired only for machinery installations and testing purposes should be outside the control of such safety regulations. Despite the "set-up" status of respondent's facility and the temporary duration of the employee's work, I again find the hazards of such on-going "set-up" activities sufficient to warrant issuance of a citation for failure to wear eye-protection. Accordingly, I affirm Citation No. 371766.

3) Citation No. 371767 - No working platform on crusher.

A third citation was issued when Hall observed that a platform had not been provided on the crusher for the operator. Instead, as noted in the citation, "[t]he operator had to climb upon feeder frame to perform his duties." The standard allegedly violated, 30 C.F.R. § 56.11-1, provides

Mandatory. Safe means of access shall be provided and maintained to all working places.

Hall testified that on the day of the citation's issuance, he observed the crusher operator climb up the crusher, and balance on a 2 1/2 to 3 inch beam over the conveyor belt to do his work (Tr. 41). The operator was observing the feed and removing trash as it passed on the conveyor belt at the time of Hall's inspection (Tr. 42). A loss of balance by the operator would have resulted in either a fall forward onto the conveyor belt, or backwards onto the ground (Tr. 41). To minimize such hazards, the inspector recommended provision of a ladder and platform for easy and safe access.

The respondent did not deny lack of such access, and had corrected the situation with a ladder and platform by the next day. However, in rebuttal,

it claimed that such access to the operating crusher would not be required once all testing of the machinery had been completed. An individual, respondent stated, would need to be in a position over the machine, in order to remove debris, only during "set-up" (a period of about five months) (Tr. 44). In contrast, normal operating procedure would require the operator to stand approximately fifty feet from the machine, and shut down the crusher if a problem developed (Tr. 43).

Despite such testimony as to the temporary nature of difficult and unsafe access, I find that the employee's precarious working position over the operating conveyor belt and the long period of time involved in respondent's "set-up" activities are sufficient to mandate compliance with the Act's safety regulations requiring safe access. Therefore, Citation No. 371767 was properly issued for respondent's failure to provide a working platform, and is affirmed.

4) Citation No. 371768 - No fly-wheel guard.

Citation No. 371768 was issued during the same inspection when Hall observed an unguarded fly-wheel on the crusher. While the crusher had two fly-wheels, one was guarded by location; the one on the operator-side of the crusher was not. The standard allegedly violated by such a condition, 30 C.F.R. § 56.14-1, provides:

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

Hall testified that the dangerous condition created by the unguarded flywheel at respondent's facility was the possibility of a person falling into or getting clothing caught in the flywheel and hence being drawn into the machinery (Tr. 14).

While the respondent does not deny that the flywheel was unguarded at the time of the inspection, it again challenges the citation on grounds related to plant "set-up." First, respondent claims that the crusher machine had a flywheel guard, but that it had been removed to make necessary adjustments. Such adjustments require insertion of a tachometer between the flywheel and a shaft on the flywheel to measure running speed which is affected by the hardness of the rock being crushed (Tr. 20). Visual checks on the action of the flywheel, when the crusher is loaded and operating, are also claimed to be necessary (Tr. 21).

Similar violations of safety standard 56.14-1, committed during set-up operations, have been discussed in previous cases. Administrative Law Judge

Fauver ruled that no "testing" exception to requirements of guarding moving machine parts is expressly included or implied in standard 56.14-1. Union Rock and Materials Corp., 2 FMSHRC 645 (March 1980)(ALJ). In Erie Blacktop, Inc., 3 FMSHRC 135 (January 1981)(ALJ), Judge Koutras found that a respondent's defense that a plant was not yet at full production, when a citation was issued for an unguarded flywheel on a crusher, does not excuse the operator's failure to guard exposed and moving machine parts. In contrast, a conveyor belt that has been shut down and locked out for repairs has no need for guards. The Standard Slag Co., 2 FMSHRC 3312 (November 1980) (ALJ).

Therefore, I find that the danger to the crusher operator's safety during respondent's "set-up" activities was sufficient to justify the issuance of a citation for failure to guard a flywheel. As was suggested by Hall, tests on the moving flywheel could still have been conducted if a hole had been drilled in the guard cover, allowing insertion of a tachometer and limited observation. Accordingly, I affirm Citation No. 371768.

PENALTIES

Since violations have been established, the next issue is the proper amount of civil penalties to be assessed for such violations. Section 110(i) of the Act sets forth six criteria to be considered in determining the amount of the civil penalty:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The Secretary's proposed civil penalties for each of respondent violations are as follows:

<u>Citation No.</u>	<u>Standard Violation</u>	<u>Amount</u>
371765	56.15-2	\$ 40.00
371766	56.15-4	40.00
371767	56.11-1	38.00
371768	56.14-1	66.00
	Total	<u>\$184.00</u>

As stipulated by the parties, respondent's mine had no history of previous violations, and would be considered a small business. No argument was advanced by the respondent that payment of a reasonable penalty would impair its ability to continue in business. Therefore, I presume that no such adverse effect will be suffered through the payment of penalties I assess in this case.

Respondent's failure to enforce head and eye protection requirements, provide safe access to machinery, and use flywheel guards, where such practices are mandated by the Act's safety regulations, constitutes negligence. Negligence is defined in the Act's regulations (30 C.F.R. § 100.3 [d]) as "committed or omitted conduct which falls below a standard of care established by law to protect persons against the risk of harm."

The standard of care established under the Act requires a mine operator "to be on the alert for conditions and hazards in the mine which affect the health or safety of the employees and to take the steps necessary to correct or prevent such conditions or practices." 30 C.F.R. § 100.3(d). Under the facts of this case, the operator failed to exercise reasonable care in preventing or correcting the practices and conditions (creating safety regulation violations) which were known or should have been known to exist, and constitutes ordinary negligence. See 30 C.F.R. § 100.3(d)(2).

In determining the gravity of the violations, consideration must include the following: 1) probability of injury; 2) gravity of potential injury; and 3) the number of workers exposed to such potential injury. 30 C.F.R. § 100.3. In the present case, while potential injuries could have been serious or even fatal, the probability of such injury is moderate. In considering the gravity of the violations, I have recognized that the facility was still at a "set-up" stage, with machinery being operated for test purposes and that only one worker was exposed to the risks cited in these four citations. Therefore, I consider the gravity to be less than originally assessed by the representative of the Secretary.

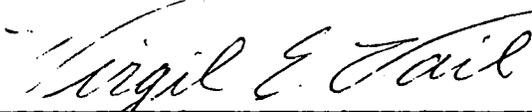
Upon notification of the violations, respondent abated all four violations within one day. Such prompt abatement demonstrated the good faith of respondent in attempting to achieve rapid compliance despite a belief that operations had not yet reached a point where compliance was necessary or practical.

Based upon the stipulations entered into by the parties, the evidence of record, and the criteria for assessing civil penalties as set forth in the Act, I conclude that the civil penalties for each violation should be reduced and assessed as follows:

<u>Citation No.</u>	<u>Reduced Penalty</u>
371765	\$20.00
371766	20.00
371767	20.00
371768	20.00
Total	<u>\$80.00</u>

ORDER

WHEREFORE IT IS ORDERED that citations Nos. 371765, 371766, 371767 and 371768 are affirmed and respondent shall pay the above-assessed penalties totaling \$80.00 within 30 days of the date of this decision.



Virgil E. Vail
Administrative Law Judge

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JUN 30 1983

BRADLEY ABNER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 83-54-DM
ANAMAX MINING COMPANY, : MSHA Case No. MD 83-06
Respondent :
: Anamax Mine

DECISION

Appearances: Bradley Abner, Tucson, Arizona, pro se;
Charles L. Fine, Esq., O'Connor, Cavanagh, Anderson,
Westover, Killingsworth & Beshears, Phoenix, Arizona,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from the position he had with Respondent as a maintenance mechanic, because of activities protected under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., ("the Act"). Respondent filed a motion to dismiss on the ground that the complaint was not timely filed and did not state a cause of action under section 105(c) of the Act. The motion was denied by order issued March 24, 1983.

Pursuant to notice the case was called for hearing in Tucson, Arizona, on June 7, 1983. Bradley Abner testified on his own behalf. Ben Dorris and Linda Trice testified on behalf of Respondent. At the conclusion of the hearing, each party was given the opportunity to argue his position on the record. Based on the entire record and considering the contentions of the parties, I make the following decision:

FINDINGS OF FACT

Complainant began working for Respondent in June, 1979. He was hired as a maintenance mechanic. Although he had previously worked as a welder, a maintenance welder and a mechanic, his job at Anamax was the first job he had in the mining industry.

While employed at Respondent's mine, Complainant at various times worked repairing pumps, repairing cyclones, rebuilding precipitators, and maintaining machinery in the crusher plant. During 1979, Complainant worked in the tailings pond under a foreman whose name he cannot recall. Beginning in 1980 and until June, 1982, he worked under foreman John Murphy. In September, 1981, however; he was detailed to foreman Ben Dorris for about 6 weeks, to help rebuild a precipitator. Subsequently, on another occasion he worked under Dorris rebuilding another precipitator. From June 21, 1982 until he was discharged effective October 7, 1982, he again worked under Ben Dorris.

In December, 1980, at a time when Complainant was working under John Murphy, an employee was killed by a crane. Although Complainant did not witness the accident because he was not working that day, he was interviewed by an MSHA investigator concerning the accident. In Complainant's opinion, the crane was unsafe because of the absence of a "limit switch" to stop the hook from going all the way up. Complainant does not recall whether he talked to his foreman about the absence of a limit switch. He did, however, tell the MSHA investigator "about how the limit switches didn't work and all that." (Tr. 15). About 2 weeks later, Complainant was given a "safety letter" by Murphy because he was not wearing ear plugs. Subsequently, after Murphy found him in a supply room waiting to get a welding rod, Complainant was given a verbal warning for not doing his job.

A few weeks after the crane fatality, an employee was injured by a ram on the crusher machine. Complainant witnessed the injury but did not say anything about it to management.

Dorris was aware of the fatal injury in December 1980 involving the crane, and knew that Complainant was involved in the MSHA investigation. Dorris was not involved in the matter, however, and does not know what Complainant told MSHA.

In approximately August, 1982, Complainant witnessed an incident in which crane operator Lindanar was instructed by his supervisor to raise the crane with the dust bowl attached and it caught under the crusher mantel. Complainant hollered to the foreman to have the crane lowered. Lindanar was suspended for 3 days, but after Complainant told the Labor Relations Department what he saw, the suspension was lifted and Lindanar was paid for his lost time.

Dorris considered Complainant an average worker. Prior to September, 1982, Complainant was never disciplined by Dorris. Company records, however, show that Complainant received a warning because of an unexcused absence from work on February 4, 1982. Complainant received a letter of commendation for a particular job in March, 1982.

On September 13, 1982, Complainant told Dorris that he had just learned that his sister-in-law died and inquired about his entitlement to "funeral leave." Dorris informed him that he was not entitled to paid leave time under the contract. On September 14, Complainant told Dorris that he had changed his mind and was not going to the funeral. Dorris later rechecked the contract provision and determined that an employee was in fact entitled to funeral leave for attending the funeral of a sister-in-law, and he so informed Complainant. Complainant worked September 15, 1982, but was off September 16 and 17; his niece called in and said he was attending a funeral. When Complainant returned to work on Monday, September 20, Dorris asked him for verification that he had attended the funeral.

On October 5, 1982, Complainant submitted a letter dated September 16, 1982, from the Eaton Funeral Home in Franklin, Ohio. The letter requested that Complainant be excused for worked because he attended the funeral of Bernice Gabbard on September 16, 1982. The typed date of the funeral had apparently been altered in ink from September 15 to September 16. The words "RELATIONSHIP: sister-in-law" were typed in, apparently with a different typewriter. Dorris was suspicious of the letter and called the company Labor Relations Department.

Linda Trice, Respondent's Labor Relations Administrator, called the funeral home and learned that the funeral had taken place on September 15, 1982, and the words "RELATIONSHIP: sister-in-law" were not placed on the letter by the funeral home. Trice prepared a series of questions for Dorris to ask Complainant. Complainant maintained that he had attended the funeral of his sister-in-law in Ohio. Complainant was suspended October 7, 1982, pending final determination on disciplinary action, for falsifying records. Pursuant to the collective bargaining agreement between Respondent and the labor unions representing the employees, a hearing was held on October 8, 1982. The hearing was chaired by Linda Trice and was attended by Complainant, Ben Dorris and union representatives. Following the hearing, Respondent decided to discharge Complainant. The decision was made by Williams, Bodde and Trice of the Labor Relations Department and communicated to Complainant by Ben Dorris. The Labor Relations Department is ordinarily not involved in safety matters. Trice was unaware of Complainant's participation in the MSHA investigation referred to earlier herein. The union did not file a grievance on Complainant's discharge. At the hearing herein, Complainant stated that he did not attend the funeral and that the deceased was his wife's aunt. He admitted that the letter from the funeral home was altered at his direction.

On two prior instances employees were discharged by Respondent for falsifying records submitted to the company.

ISSUE

Whether the evidence establishes that Complainant's discharge was related to any activity protected under the Mine Safety Act.

CONCLUSIONS OF LAW

The burden of proof is on the Complainant to establish that he was engaged in activity protected under the Act, and that the adverse action (here, the discharge) was motivated at least in part by the protected activity. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

It is clear that Complainant's participation in the MSHA investigation of the fatal crane accident in December, 1980, was activity protected under the Mine Act. However, the long time interval between this activity and the adverse action itself argues against a relationship between the two. There is no positive evidence of such a relationship. It might be inferred that the action of foreman Murphy about 2 weeks following the MSHA investigation - the safety letter and the verbal warning--were caused by irritation over Complainant's involvement in the investigation. But such an inference could not be made that the discharge of Complainant almost 2 years later was related to that investigation. Complainant expressed his belief that there was such a relationship, but has not offered any evidence to support it. There is no evidence, direct or indirect, that the discharge of Complainant was in any way related to the injury to the employee involving the crusher ram or to the incident involving the crane operator who was suspended.

The stated reason for the adverse action - Complainant's alleged submitting of false documents to obtain funeral leave pay - is entirely unrelated to matters of health or safety. It is not part of my responsibility to consider whether the penalty was warranted or was too harsh. In any event, it was not safety related. Furthermore, it is clear that the persons who made the decision to discharge Complainant were entirely unaware of the activity he relies on here so there could not have been a relationship between the protected activity and the discharge. I conclude that Complainant's discharge did not result from activity protected under the Act.

ORDER

Based upon the above findings of fact and conclusions of law, the above proceeding is DISMISSED.

James A Broderick
James A. Broderick
Administrative Law Judge

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