JUNE 1987

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

JUNE 1987

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

Wilfred Bryant v. Dingess Mine Service, Winchester Coals, Inc., etc., Docket No. WEVA 85-43-D. (Judge Broderick, May 13, 1987)

Peabody Coal Company v. Secretary of Labor, MSHA, Docket Nos. KENT 86-94-R, KENT 86-95-R, 87-154. (Judge Fauver, May 20, 1987)

Con-Ag, Inc. v. Secretary of Labor, Docket No. LAKE 87-15-M. (Judge Merlin, Default Decision of June 1, 1987)

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

Ronald Tolbert v. Chaney Creek Coal Co., Docket No. KENT 86-123-D. (Judge Melick, May 12, 1987)

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket Nos. SE 87-38, etc. (Judge Merlin, May 22, 1987)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 87-15-M
CON-AG, INCORPORATED	:	

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin pursuant to Commission Procedural Rule 63, 29 C.F.R. § 2700.63, issued an Order of Default on June 1, 1987, finding Con-Ag, Inc. ("Con-Ag") in default and assessing a civil penalty of $550. On June 15, 1987, the Commission received from Con-Ag a written request for relief from this default. We deem the request to constitute a timely petition for discretionary review. For the reasons that follow, we vacate the judge's default order and remand for further proceedings.

On May 14, 1986, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Con-Ag a citation in connection with an accident at Con-Ag's crushing plant alleging a violation of 30 C.F.R. § 56.15005 based on a miner's failure to wear a safety belt and line. On November 28, 1986, Con-Ag filed a "Blue Card" request for hearing with respect to the Secretary of Labor's notification of a proposed $550 civil penalty for the alleged violation. On January 22, 1987, the Secretary filed a Proposal for Penalty with the Commission. Con-Ag did not file an answer to the penalty proposal. Consequently, on March 13, 1987, Judge Merlin issued an Order to Show Cause directing Con-Ag to file an answer within thirty days. Con-Ag did not respond to this order.

The show cause order was sent by certified mail to the Wapakoneta, Ohio address that Con-Ag was using at the time of citation. The order was returned undelivered on March 20, 1987, stamped by the United States

Postal Service "Attempted-Not Known." On June 1, 1987, Judge Merlin issued an Order of Default finding Con-Ag in default and assessing the Secretary's proposed $550 penalty. The judge's order states: "On March 13, 1987, you were ordered to file your Answer to the Proposal.... The Order was returned unclaimed. ... Under the Commission's regulations service is complete upon mailing." The default order was sent by certified mail to Con-Ag at the same Wapakoneta, Ohio address.

On June 15, 1987, Con-Ag filed with the Commission a notarized letter signed by Lee Kuck requesting relief from default. Kuck attached to his letter an MSHA change-of-address form providing MSHA with a new address for Con-Ag in St. Marys, Ohio. It appears that this form may have been sent to MSHA on May 29, 1986, a few weeks after the citation was issued and nearly one year prior to the judge's show cause order. Kuck also states that he checked with the Wapakoneta Post Office and was told that the show cause order was returned to the sender "because of improper address." Kuck requests a hearing "due to the fact the address was incorrect, and the fact that MSHA had the correct address."

The Commission has recognized that under appropriate circumstances a genuine problem in communication or with the mail may justify relief from default. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986; Fife Rock Prod. Co., Inc., 8 FMSHRC 1503, 1504 (October 1986). The record does not contain sufficient information to justify our ruling summarily on Con-Ag's claims. In fairness and consistent with Commission precedent in default cases the operator should have the opportunity to present its position to the judge, who shall determine whether relief from default is appropriate. Kelley Trucking, supra.

For the foregoing reasons, the judge's default order is vacated and this matter is remanded for further proceedings consistent with this opinion.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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Chief Administrative Law Judge Paul Merlin
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 1987

DILLARD SMITH	:	
	:	
v.	:	Docket No. VA 86-9-D
	:	
RECO, INC.	:	

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Administrative Law Judge James A. Broderick issued a decision dismissing discrimination complaints filed by Dillard Smith and Lonnie Smith. 8 FMSHRC 1592 (October 1986)(ALJ). The Commission granted Dillard Smith's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

Complainant Dillard Smith ("Dillard") and Lonnie Smith ("Lonnie"), his brother, were employed from 1977 until November 26, 1985, by Reco, Inc. ("Reco"), located in Tazewell, Virginia. Reco was in the business of selling and servicing mine batteries. The Smiths' duties primarily involved the servicing of mine batteries, and at times they were required to work in underground coal mines. Each performed somewhat more than forty hours of such underground work in the six months prior to November 26, 1985.

In November 1979, Dillard had received underground miner training approved by the Department of Labor's Mine Safety and Health Administration ("MSHA") and had earned the appropriate training certificate. See 30 C.F.R. Part 48 (training regulations). Subsequently, he did not receive any annual refresher training or any further underground mining training. Lonnie had never received any training for underground mines.

In June 1985, Dillard had become concerned about working in underground mines without adequate training and he contacted MSHA. He was informed that his training certificate had expired and that he needed forty hours of additional training. That same month he asked his foreman, Steve Williams, about annual refresher training for himself and

underground training for Lonnie. Williams nodded but did not otherwise respond. Dillard did not raise the subject again until the day after his employment terminated.

On November 26, 1985, Dillard and Lonnie were servicing batteries at Reco's shop. Around 9:00 a.m., Williams told Dillard that he had a service call. Dillard asked if the service call was in an underground mine. Williams informed him that it was. Dillard told Williams that he was not going. Williams responded: "Change your clothes and you know where the door's at." Tr. 31. A similar exchange then occurred between Williams and Lonnie. Shortly thereafter, the brothers turned in some company property and left the premises.

On November 26 neither Dillard nor Lonnie told Williams or any other Reco representative his reasons for refusing underground work. When asked on cross-examination at the hearing in this matter why he had not told Williams of his reasons for refusing his assignment, Dillard replied: "[Williams] did not ask me." Tr. 32.

The next day, on November 27, 1985, Dillard returned to Reco's offices for his paycheck. He was told by Reco's receptionist/secretary that it had been mailed to him the previous day. Dillard told the secretary to tell Jack Pyott, Reco's president, that the reason he did not go underground was that "[his] training had expired." Tr. 61.

Meanwhile, also on November 26, Reco had decided to terminate its mine battery sales and service business. This decision followed discussions with Commonwealth of Virginia officials concerning health and safety violations cited during an August 1985 state inspection. The Virginia officials agreed not to pursue the violations contingent on Reco's terminating its mine battery business. The company ended its battery business on December 6, 1985, although certain limited wrap-up functions were performed for a few months thereafter.

Dillard and Lonnie filed discrimination complaints with MSHA pursuant to section 105(c) of the Mine Act, 30 U.S.C. § 815(c), but following an investigation of their allegations MSHA determined that no discrimination had occurred and declined to prosecute complaints on their behalf. 30 U.S.C. §§ 815(c)(2) & (3). The complainants then filed their own discrimination complaints with this independent Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3). Commission Judge Broderick consolidated the cases and held a joint hearing. On October 17, 1986, the judge issued his decision dismissing both complaints. Only Dillard sought review before the Commission.

In his decision, Judge Broderick initially concluded that the complainants had engaged in a protected work refusal on November 26. He found that they had a reasonable belief that it was hazardous to work underground without the miner's training mandated by section 115 of the Mine Act, 30 U.S.C. § 825, and the Secretary's implementing regulations at 30 C.F.R. Part 48. 8 FMSHRC at 1596. He also stated that "there is no evidence that [their work refusal] was other than in good faith." Id. Resolving conflicts in testimony as to whether Foreman Williams had

fired the brothers immediately after their November 26 work refusal, he found that they were in fact discharged at that time. Id. The judge went on to conclude, however, that the complainants "were not discharged for activity protected under the Act" (8 FMSHRC at 1597) because they had failed to communicate adequately their safety concerns, citing Simpson v. Kenta Energy, Inc., & Roy Dan Jackson, 8 FMSHRC 1034, 1038-40 (July 1986), pet. for review filed, No. 86-1441 (D.C. Cir. August 7, 1986); and Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-35 (February 1982). 8 FMSHRC at 1596-97.

Specifically, the judge found that it was "clearly reasonably possible" for the complainants to have told Williams on November 26 that they were refusing to work underground because of their perceived lack of required training. 8 FMSHRC at 1597. The judge found that Dillard's single request for training in June 1985 was insufficient to supply the necessary communication on November 26, 1985. The judge determined that Dillard's statement to Reco's secretary on November 27, the day after the refusal, was inadequate communication of a safety concern under Simpson and Dunmire & Estle, supra. The judge also noted that by November 27, Reco "ha[d] already decided to cease operations, so it would not have been possible for it to 'address the perceived danger.'" Id., quoting Simpson, supra, 8 FMSHRC at 1039. Accordingly, the judge concluded that no violation of section 105(c) had been established and dismissed the Smiths' complaints.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983)(approving nearly identical test under National Labor Relations Act).

In this proceeding, the fact that Dillard refused an underground work assignment on November 26, 1985, and was fired by his foreman because of that refusal is not in dispute. The primary issue presented, therefore, is whether Dillard's work refusal was protected under the Mine Act. See, e.g., Secretary of Labor v. Metric Constructors, Inc.,

6 FMSHRC 226, 229-30 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985); Dunmire & Estle, supra, 4 FMSHRC at 132-33.

A miner has the right under section 105(c) of the Mine Act to refuse work if the miner has a good faith, reasonable belief that continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12. See also, e.g., Metric Constructors, supra. However, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Simpson, supra, 8 FMSHRC at 1038; Dunmire & Estle, supra, 4 FMSHRC at 133-35. See also, e.g., Miller v. Consolidation Coal Co., 687 F.2d 194, 195-97 (7th Cir. 1982)(approving Dunmire & Estle communication requirement). Among other salutary purposes, the communication requirement is intended to avoid situations in which the operator at the time of a refusal is forced to divine the miner's motivations for refusing work. As we emphasized in Simpson: "[T]he right to make safety complaints and to refuse work under the Mine Act is premised on the belief that communication of hazards and response to such hazards are the means by which the Act's purposes will be attained." 8 FMSHRC at 1039 (citations omitted). As further stated in Simpson, a miner's failure to communicate his fear regarding a hazard negates the opportunity for the operator to address the perceived danger and would have the effect of requiring us to accept the untenable presumption that no action would have been taken by the operator regarding the miner's concern. 8 FMSHRC at 1039-40.

Neither of the Smith brothers communicated to Reco on November 26 any reason for his work refusal on that date. The judge found that "[i]t was clearly reasonably possible for Complainants to tell Williams that they refused to work underground because they lacked training" (8 FMSHRC at 1597), and substantial evidence supports this conclusion. Dillard was asked several times at the hearing why he had not communicated his asserted training concern, but provided no answer other than that Williams had failed to ask him his reasons for refusing his work assignment. The responsibility for the communication of a belief in a hazard that underlies a work refusal rests with the miner. The record also supports the judge's conclusion that Dillard's single question concerning training some five months prior to his refusal was too far removed in time and too limited in nature to supply continuing notice of a complaint or an implied communication of safety or health concerns on November 26. Although Dunmire & Estle indicates that under appropriate limited circumstances a post-work refusal communication may suffice, there must be good reason for any delay. On the facts of this case, Dillard has not advanced any acceptable reason for his failure to communicate the hazard that he perceived until one day after his termination.

Thus, Dillard failed to make the necessary communication of a belief in a hazard and, accordingly, his work refusal was not protected under the Mine Act. Because Dillard's work refusal was not protected, his termination by Reco because of that refusal did not violate the

Act. */

On the foregoing bases, the judge's decision is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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*/ To the extent that the judge held that Dillard had engaged in a protected work refusal apart from his failure of communication, the judge erred. Proper communication of a perceived hazard is an integral component of a protected work refusal in the first instance rather than a wholly separate requirement. Further, under the circumstances of this case, the fact that Reco had determined to cease its battery business is not determinative of the issue whether section 105(c)(1) of the Mine Act was violated. Also, given our disposition, we need not pass on the judge's findings that Dillard had a reasonable, good faith belief in hazards associated with his limited training. We note, however, that it is far from clear on the present record precisely what type of training Reco, as a contractor, was obligated to provide the Smiths in view of their occasional and intermittent servicing work in mines. See 30 C.F.R. § 48.2 (definitions of "miners" who must be provided with new miner training, refresher training, and hazard training). Under the circumstances, that point need not be resolved here.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 1 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 86-6-M A.C. No. 29-01936-05503
v.	:	Sundt Crusher
M.M. SUNDT CONSTRUCTION COMPANY, Respondent	:	

DECISION AFTER REMAND

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Brian Murphy, Loss Control Manager, M.M. Sundt Construction Company, Tucson, Arizona, pro se.

Before: Judge Morris

On September 15, 1986, the Federal Mine Safety and Health Review Commission remanded the captioned case and directed that the judge give respondent an opportunity to explain its failure to comply with a prehearing order that resulted in a default.

Such an opportunity was afforded and respondent filed various documents supporting its request for a hearing. Inasmuch as the Commission has indicated that a default is a harsh remedy the judge granted respondent's request and set the case for a hearing on the merits.

The hearing took place in Albuquerque, New Mexico on January 21, 1987. The parties waived their right to file post-trial briefs.

Issues

The issues presented are whether the violations occurred; if so, what penalties are appropriate.

Stipulation

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

1. M.M. Sundt is the owner and operator of the mine.

2. Respondent is subject to the Act.

3. The Federal Mine Safety and Health Review Commission has jurisdiction.

4. The inspector was a duly authorized representative of the Secretary.

5. A true and correct copy of the citations were served on the operator.

6. The penalties will not affect the operator's ability to continue in business.

7. Respondent abated in good faith.

8. The operator has a good history with only two prior violations.

9. The operator should be considered a large company since it is one of the top 400 contractors in the country.

10. Respondent's employees were wearing ear plugs and respirators on the day of the inspection (Tr. 4).

Citation 2091027

This citation alleges respondent violated 30 C.F.R. § 56.5050(b). The regulation provides in part as follows:

> § 56.5050 Exposure limits for noise
>
> (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971. "General Purpose Sound Level Meters" approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by

a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound level dBA slow response
8	90
6	92
4	95
3	97
2	100
1-1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

Summary of the Evidence

Petitioner's Evidence

MSHA Inspector Archie Fuller testified as to both citations. He indicated that a dosimeter records noise levels in excess of 90 dBA. The level appears in a digital display (Tr. 26, Ex P-9). He also discussed a typical dosimeter test to calibration (Tr. 27).

Employee Steve Morrison, a crusher laborer, was exposed to excessive noise caused by the cone crusher, the belt transfer, jaw crusher and generator (Tr. 28, 29). Morrison was working in and around this equipment (Tr. 29). Morrison was tested for about eight hours (Tr. 30). Two other employees were not overexposed. The crusher operator was protected by an insulated booth. The oiler was exposed to 97.4 dBA (Tr. 50).

The inspector also uses an instrument that records an instant sound level readout (Tr. 30). The instant readout of the large equipment ranged from 92 to 98 dBA.

The dosimeter on Morrison indicated a readout of 139 percent or approximately 92.5 dBA (Tr. 31). Anything reading over 90 dBA constitutes overexposure.

Excessive noise can cause loss of hearing.

The inspector recommended that the employee clean the area when the crusher was shut down (Tr. 33).

Three workers were monitored for noise but only Steve Morrison was overexposed (Tr. 41).

Cleaning around equipment is a continuous activity. A dosimeter does not get in the worker's ear (Tr. 46).

Respondent's Evidence

Bryan Hoyt Murphy testified he has been the loss control manager for Sundt Corporation for 14 years. The company has a number of plants around the United States (Tr. 53, 54).

Concerning the noise levels, the company had no proof that the inspector's equipment was improperly calibrated. Further, the company had insufficient manpower to rotate its workers. In addition, the employees were protected by personal protective equipment; i.e., foam earplugs. If properly put in the ears, a 10 to 18 dBA attenuation could be expected (Tr. 58).

Except for mufflers already installed, there are no other engineering controls that could reduce the noise level (Tr. 59).

Evaluation of the Evidence

The Secretary's evidence establishes a violation of the noise regulation. Employee Morrison was exposed to a noise level in excess of the permissible limit.

Respondent did not rebut the Secretary's evidence but relies on the fact that the worker was wearing foam earplugs. It is claimed that such earplugs reduce the noise level.

I reject respondent's argument. Even though the earplugs may reduce the noise level, the regulation requires the use of feasible administrative or engineering controls. The fact that only one of two miners in the area was exposed indicates that administrative rotation controls were readily available. Cf. Jet Asphalt and Rock Company, Inc., 3 FMSHRC 940 (1981); Callanan Industries, Inc., 5 FMSHRC 1900 (1983).

The citation should be affirmed.

Civil Penalty

The statutory criteria to assess civil penalties is contained in 30 U.S.C. § 820(i). Most of the statutory criteria has been addressed by the stipulation of the parties. Concerning the remaining elements the gravity appears low since only exposure over a long period can effect a worker's hearing. The operator's negligence must also be considered as low because it believed its workers were protected by earplugs.

On balance I believe the $20 civil penalty, as proposed by the Secretary, is appropriate.

Citation 2091028

This citation alleges respondent violated 30 C.F.R. § 56.5001(a) which provides as follows:

> § 56.5001 Exposure limits for Airborne Contaminants.
>
> Except as permitted by § 56.5005 -
> (a) Except as provided in paragraph (b), the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1

through 54, which are hereby incorporated by reference and made a part hereof. This publication may be obtained from the American Conference of Governmental Industrial Hygienists by writing to the Secretary-Treasurer, P.O. Box 1937, Cincinnati, Ohio 45201, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

Summary of the Evidence

Archie Fuller, an MSHA mining inspector for nine years, has been trained regarding silica (Tr. 9-14).

Inspector Fuller calibrated the dust pump the day before his inspection (Tr. 15). The witness further explained the methodology used in taking a dust sample (Tr. 16-21, Ex P-7). The result in an 8-hour sampling indicated an employee was exposed to a .88 shift weighted average of silica. The threshold limit value (TLV) is .34 (Tr. 19, 21). Three samples were taken. One was voided, one was not in violation and one analysis caused the issuance of Citation 2091028 (Tr. 20, 48).

MSHA is concerned about silica because of the hazard of silicosis, a lung disease. Silica will reduce the elasticity in a person's lungs (Tr. 22,23).

Employee Jim Blackwell, who maintains and greases moving parts on the crusher and conveyors, was the employee who was exposed (Tr. 23, 25). The employee would not have been exposed if he had performed the function when the crusher was shut down. In addition, he could have been rotated with another employee (Tr. 25). Further, the sprinklers which were frozen could have been fixed (Tr. 25, Ex R-11).

In cross-examination the inspector indicated he calibrated the dust sampler at the MSHA field office in Grants, New Mexico. The altitude at that location is about 6200 feet as compared with 5300 at the work site (Tr. 34). The inspector felt the difference in altitude would not affect the result "that much." The sampling pump was a Bendix Micronair (Tr. 35, 51). The pump is not calibrated at the factory (Tr. 36).

On the day of the inspection the temperatures in Bloomfield were never higher than 37 degrees, with a low of about 30 (Tr. 36, 37). The inspector considered the water sprays to be engineering controls (Tr. 37).

Blackwell was sampled outside the respirator and he was exposed to silica-bearing dust, especially if his respirator had a leak in it, was improperly fit, slipped down, or if he took it off (Tr. 39, 40). If the respirator was tight-fitting he wasn't exposed (Tr. 41).

Blackwell's respirator was MSHA, OSHA and NIOSH approved (Tr. 39, 40).

Concerning the dust citation, Brian Murphy, respondent's witness, indicated the engineering controls were shut down the day the citation was issued. In addition, the company did not have a sufficient number of workers on the site to rotate them (Tr. 54).

Mr. Murphy attempted to obtain information as to the extent a 900 foot difference in elevation would affect the test equipment. However, the National Safety Council and NIOSH could not give a definitive calculation (Tr. 55).

The worksite was at 5000 feet and the pump was calibrated at 6000 feet. At the higher altitude the pump would be drawing more air (Tr. 56).

Evaluation of the Evidence

As a threshold matter it is apparent that the pump was calibrated for 6000 feet and the worksite was 900 feet lower. The inspector agreed that this could cause some difference. In short, I agree with respondent's witness that the calibration at 6000 feet would cause the pump to draw more air when used at the lower elevation. This could readily overload the sampling. In addition, one cassette was voided and a third did not establish a violation.

On balance, I conclude that the Secretary did not sustain his burden of proof.

For the foregoing reasons Citation 2091028, and all penalties therefore, should be vacated.

Conclusions of Law

Based on the entire record and the factual finding made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 56.5050(b) and Citation 2091027 should be affirmed.

3. Respondent did not violate 30 C.F.R. § 56.5001(b) and Citation 2091028 should be vacated.

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

ORDER

1. Citation 2091027 and the proposed penalty of $20 are affirmed.

2. Citation 2091028 and all penalties therefor are vacated.

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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JUN 2 1987

HOWARD H. ROSS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 87-43-D
RICHLAND COAL COMPANY, Respondent	:	BARB CD 86-83
	:	Surface No. 1 Mine

ORDER OF DISMISSAL

On May 20, 1987, Counsel for both Parties jointly filed a settlement in which they indicated that all matters in this case are settled, and that they agreed for a dismissal with prejudice.

Accordingly, it is ORDERED that this case is dismissed with prejudice.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 2 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 87-21 A.C. No. 05-03644-03534
v.	:	Coal Creek Prep Plant
MID-CONTINENT RESOURCES, INC., Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Cetti

Statement of the Case

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (Mine Act"). The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges the operator of a coal mine with violating two safety regulations, 30 C.F.R. § 77.400(a) which requires the guarding of moving machine parts, and 30 C.F.R. § 77.1700 which prohibits working alone in hazardous conditions.

This proceeding was initiated by the Secretary with the filing of a proposal for assessment of a civil penalty. The operator filed a timely appeal contesting the existence of the alleged violations and the amount of the proposed penalties of $6,000 and $1,000 respectively.

Discussion

When this civil penalty proceeding was called for hearing on April 28, 1987, the parties announced upon the record that they had reached a settlement.

In Citation 2831741, counsel for the petitioner moved that the penalty be reduced from the $6,000 originally proposed to $1,000. Respondent, in turn, moved to withdraw its notice of contest.

Petitioner's motion was based on the fact that in preparing the case for hearing it was determined that the negligence in this case was not as high as originally assessed.

In Citation 2831742, counsel for the petitioner moved to vacate the citation. Respondent had no objection.

The motion to vacate Citation 2831742 was based on the fact that further study of the evidence revealed that a "hazardous condition" within the meaning of safety standard 30 C.F.R. § 17.1700 did not exist.

Conclusion

After careful review and consideration of the pleadings, arguments, and the information placed upon the record at the hearing, I am satisfied that the proposed settlement disposition is reasonable, appropriate and in the public interest.

Accordingly, the motions made at trial are granted.

ORDER

1. Citation No. 2831741 is affirmed and respondent is ORDERED to pay a civil penalty of $1,000 within 30 days from the date of this decision.

2. Good cause having been shown, Citation No. 2831742 and its related proposed penalty are vacated.

August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 2 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 87-26 A. C. No. 46-06870-03510
v.	:	
HIGH POWER ENERGY, Respondent	:	
HIGH POWER ENERGY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 86-408-R Citation No. 2566728; 6/30/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Twenty Mile Surface No. 901

DECISION

Appearances: Virginia K. Stephens, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor;
Roger L. Sabo, Esq., Millisor & Nobil, Columbus, Ohio, for High Power Energy.

Before: Judge Melick

These consolidated cases are before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", to challenge the issuance by the Secretary of Labor of a citation charging High Power Energy with a violation of the regulatory standard at 30 C.F.R. § 77.1303(uu). The general issues before me are whether High Power Energy violated the cited standard and, if so, whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e., whether the violation was "significant and substantial". If a violation is found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

The citation at bar, No. 2566728, charges as follows:

> Two workmen (blasters) proceeded to re-enter a charged area after an electrical storm had approached the blast site. A premature ignition occurred resulting in fatal injuries to the workmen. This condition/practice was determined by an examination and investigation at the site.

The cited standard, 30 C.F.R. § 77.1303(uu), provides that "when electric detonators are used, charging shall be suspended and men withdrawn to a safe location upon the approach of an electrical storm."

It is not disputed that on Saturday, June 28, 1986, at 1:15 p.m. an unintentional detonation of explosives occurred at High Power Energy's Twenty Mile Surface Mine causing the deaths of employees Randall Roop and Michael Roop. The incident occurred at what was known as work site "A" in an area 30 feet wide and 128 feet long being prepared for blasting. Within this area 17 56-foot deep holes had been drilled and loaded with approximately 748 pounds of ANFO explosive and an electric blasting cap each. The shots were thereafter wired in series by Michael Roop, Randall Roop, and Lee Horrocks, each admittedly an experienced and qualified blaster.

According to Horrocks, when he arrived on the blast site around 11:30 that morning, all but three holes had already been loaded with explosives. The weather at that point in time continued to be "nice". As they were wiring up the holes and connecting a lead line, gray clouds began to appear. According to Horrocks, as he was then stretching the lead line away from the blast site, he saw it begin hailing about 100 feet away "down the hill" and saw lightning "some distance away". By that time, however, the blast area had already been evacuated. As he finished stretching the lead line to the blasting truck parked in a safe area previously designated for the ignition, it began to rain. It took only a minute from the time he began stretching the lead line to the time he arrived at the truck.

Michael Roop, Gary Collins, and Horrocks entered the truck cab to get out of the rain. Shortly thereafter Randy Roop approached the truck and reported that upon checking with a galvanometer, he found the shot to be dead (meaning that there was a defect in the electrical system preventing the planned ignition). Horrocks told Randy Roop to get into the truck so he would not get wet. Randy stepped up to the truck momentarily then, apparently changing his mind, stepped off and said, "That's all right".

According to Horrocks, Michael Roop then asked for two raincoats and left the truck following Randy Roop. A minute or so later Horrocks saw lightning in the rear-view mirror, followed immediately by the unplanned shot blast that killed both Roops. The storm lasted only three or four minutes and the sky cleared again.

Gary Collins testified that after he finished drilling the holes for the explosives, he parked the drill truck on the upper bench road and returned to help stem the holes loaded by the blasting crew. Collins recalled seeing lightning about one minute before the shot went off but this lightning was about 10 miles away and came only after he was already in the blasting truck. According to Collins, everyone was out of the blast area when the black cloud first came over the mountain.

Chilton Holcomb testified that he arrived at the blast site around 11 that morning and helped load the ANFO into the holes. The holes had already been loaded and the wires connected when Holcomb first saw a flash of lightning one to three miles away in the hollow below. There were also dark clouds over the hollow but they were some distance away. It was not clear to him which way the storm was then moving and the sun was still shining overhead. Holcomb then drove the drill rig to a safe area around a protected curve in the upper bench road where Blasting Foreman Billy Collins also waited. Collins gave three siren signals announcing the "all clear" for the shot but the shot failed to fire. Holcomb testified that he then proceeded around the protected curve with Billy Collins to see what was going on and he then saw lightning, followed by the blast.

High Power Energy's Blasting Foreman, Billy Collins, had supervised blasting crews since 1975. He testified that Randy and Michael Roop, the deceased, had worked for him for 17 years and he considered them to be the best explosives loaders and the best "safety wise" of all the employees he ever had. When Collins arrived at the blast area, the drill had already pulled out and all but two holes had already been loaded. He recalled warning the blasting crew about a black cloud he saw on the horizon, but at that point they had only one or two holes to complete. They had already hooked up the lead line when Collins left in his truck to warn the "dumping crew" of the impending shot. Collins proceeded to the far end of the upper bench road, waved to Randy Roop signalling that the shot was ready, then pulled some 450 to 500 feet away around the bend and out of sight in an area protected from the blast. It was not raining at that point and Collins blew his siren three times as a preblast warning. At that point a thunderstorm appeared from the other

direction over the top of the mountain behind him. Three or four minutes elapsed after the siren blast and nothing happened. Collins then returned around the bend to see the blast site and saw two men returning to the shot. As he was exitting his truck, the shot prematurely detonated.

Thomas Dickerson, the inspector from the Federal Mine Safety and Health Administration (MSHA) who issued the citation at bar, opined that if Foreman Billy Collins had been present at the blasting truck, the accident would not have happened. Dickerson acknowledged that there was no industry practice or standard requiring a foreman to be present at the triggering location at a blasting site. Dickerson also observed that many mines do not even have a blasting foreman and that it was not contrary to safe industry practice to not have a foreman present at the actual blast site.

The Secretary concedes in this case that the blasting crew, and, in particular,, Randall and Michael Roop, were experienced in blasting and aware of the procedures for withdrawing from a blast site when electrical storms are approaching. Indeed, the Secretary acknowledges that the fatalities occurred when the victims, who knew an electrical storm was present, failed to comply with a known company policy and federal regulations requiring persons to be withdrawn to a safe location away from the blast area during an electrical storm.

The evidence is clear that there was a violation of the cited standard in this case but that such violation was solely the result of the unforeseeable and aberrational behavior of the two deceased employees. The employees were indeed in the process of evacuating the blast site and most likely had already evacuated the blast site to a safe area upon the first evidence of an approaching electrical storm. It is acknowledged that the deceased employees were highly qualified and experienced blasters who were well-trained and knew of the prohibitions against being on a blast site during an electrical storm. Under the circumstances, it could not reasonably be foreseen that those employees would, in the midst of a downpour and evidence of an electrical storm, return to the blast site. It is conceded by the Secretary that it was not standard or accepted industry practice to require a blasting foreman to be present at the triggering location and, indeed, it was acknowledged that Foreman Billy Collins' presence to block one entrance to the blast site on the upper bench road was not inconsistent with safe practices.

The law is well established, however, that an operator is liable for violations of the Act committed by its employees,

even if it is totally without fault. Sewell Coal Co. v. FMSHRC, 686 F.2d 1066 (4th Cir. 1982); Allied Products Co. v. FMSHRC, 666 F.2d 890 (5th Cir. 1982); Secretary v. Asarco, Inc., 8 FMSHRC 1632 (1986); Southern Ohio Coal Co., 4 FMSHRC 1459 (1982); American Materials Corp., 4 FMSHRC 415 (1982); Kerr-McGee Corp., 3 FMSHRC 2496 (1981); El Paso Rock Quarries, Inc., 3 FMSHRC 35 (1981).

It is also clear from the evidence in this case that the violative condition was of high gravity and "significant and substantial". Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). In assessing a penalty herein I have also considered that the mine operator is of modest size and has no real history of prior violations. Most significantly, however, I find that the violation was not the result of any operator negligence. Indeed, as previously indicated, the evidence clearly shows that the violation was the result of unanticipated and aberrational employee behavior beyond the control of the operator's agents.

Within this framework of evidence, no more than a nominal penalty of $1 is appropriate.

ORDER

Contest proceeding Docket No. WEVA 86-408-R is denied. Citation No. 2566728 is affirmed and High Power Energy is directed to pay a civil penalty of $1 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 3 1987

JOE ARNOLDI, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 85-161-DM
v.	:	
	:	Coeur Mine
ASARCO, INCORPORATED, Respondent	:	

DECISION

Appearances: Nathan S. Bergerbest, Esq., Cotten, Day, Doyle, Washington, D.C., for Complainant; Fred M. Gibler, Esq., Evans, Keane, Koontz, Boyd, & Ripley, Kellogg, Idaho, for Respondent.

Before: Judge Morris

Complainant Joe Arnoldi brings this action on his own behalf alleging he was discriminated against by his employer, ASARCO, Incorporated, in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. § 801 et seq.

The applicable statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C.A. § 815(c)(1), in its pertinent portion provides as follows:

> No person shall discharge or in any other manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties, a hearing on the merits was held in Spokane, Washington commencing on December 2, 1986.

The parties filed post-trial briefs.

Applicable Case Law

In order to establish a prima facie case of discrimination under Section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

Summary of the Evidence
Complainant's Evidence

Wendell Kunst, William Arthur, MSHA Inspector James Arnoldi, Joe Arnoldi and Kim Bradshaw testified for complainant.

On March 18, 1985 WENDELL KUNST had been assigned to stope 277 at level 3100. His co-worker, also a production miner, was Bob Chavez. Complainant Joe Arnoldi (sometimes hereafter referred to as Joe, or Mr. Arnoldi) served as the nipper. Joe gets supplies for the miners and operates the hoist in the raise (Tr. 14-16, 33, 336). A nipper's performance is important to the efficiency of the mining operation (Tr. 16). Joe had done a good job for the miners on other occasions (Tr. 16). They never found him "goofing off" and his work never adversely affected their production (Tr. 17).

On March 18 the miners left Joe at the tugger, about 60 feet above the stope, with instructions to await their call for the skip (Tr. 18, 19, 21). They didn't call for it. Kunst didn't see Joe sleeping that morning nor did he know one way or another if he was sleeping (Tr. 18-20).

Kunst saw Michael Lee (mine manager) and William Arthur (shift boss) that morning. Lee and Arthur didn't ask if Joe was sleeping or unresponsive to their needs (Tr. 19, 30, 31).

It is important for the nipper to stay alert at all times (Tr. 20). Kunst thought the tugger was safe. But it was in close proximity to the haulage train (Tr. 21, 22). A miner can tell when a train approaches (Tr. 23).

WILLIAM ARTHUR, shift foreman at the Coeur Mine, didn't see Arnoldi sleeping on March 18 (Tr. 25). Arthur further identified a document filed with the Idaho Industrial Commission. The document stated that the shift boss and mine superintendent both observed Joe Arnoldi asleep at the top of 277 (Tr. 25-28). In fact, Arthur indicated that Arnoldi's eyes were open when he saw him (Tr. 28).

Arthur had been walking about six or seven feet behind Lee as they approached the 277 stope. They were checking to see if the miners were doing the work safely and if they needed material (Tr. 29). When Arthur first saw him Arnoldi was six feet from the tugger sitting down or leaning against a rock or some burlap.

He then heard Lee tell Arnoldi that he wasn't supposed to be sleeping on the job (Tr. 30, 35, 55). Lee had no conversation with Arthur before he took Arnoldi out of the mine except to ask if such action was justified (Tr. 31). To take a miner to the top usually means he's going to be fired (Tr. 32). Arthur didn't recommend to Lee that Arnoldi be fired or suspended (Tr. 32, 33).

Arthur had been interviewed by MSHA special investigator Lopez. He kept one copy of the interview and turned one over to Andre Douchene, the mine manager (Tr. 37, 40). Arthur did not indicate to the company attorney, Fred Gibler, that he did not want to verify the accuracy of the MSHA statement. However, Mr. Gibler represented such was Arthur's position (Tr. 38, 56). Lopez did not followup with Arthur (Tr. 57).

In February 1985 MSHA inspector Jim Arnoldi and Don Downs issued ASARCO a loose ground citation. The cited area was under Arthur's jurisdiction (Tr. 39, 57). Mine manager Douchene attempted to fire miners Ernie Myles and Bob Magoon because of the citation (Tr. 40). Douchene wanted them fired because they had disregarded his directions to bar down the slab. Joe Arnoldi was the nipper for Magoon and Myles (Tr. 40, 58). Douchene cooled down when he learned Arthur had told them not to further bar down the loose ground (Tr. 41, 58). Jim Arnoldi and Downs also inspected the 277 raise, on the 3100 level (Tr. 59).

The tugger at the 277 raise, 3100 level is mounted on a 10 x 10 and it hoists timber and supplies in the raise. It has 700 feet of cable (Tr. 42, 43). When the tugger is raising the skip the operator would be watching either the wire drum or the skip (Tr. 44, 45). Arthur has observed Joe Arnoldi operating the

tugger while standing on the 10 x 10 cap (Tr. 45). Arthur has seen other miners operate the tugger in a similar fashion (Tr. 45). The cap is behind the timber and the haulage train track (Tr. 46). Some tuggers were mounted on the other side of the timber. This particular tugger was mounted between the haulage train track and the timber because there was already a tugger bench mounted there (Tr. 46). The clearance between the train track and the tugger measures 30 to 32 inches (Tr. 46). When a miner is operating the tugger it would be 20 inches from the back of his foot to the train track. The train itself extends about 10 inches so the clearance is about 7 to 10 inches when the train passes (Tr. 47, 48).

Arthur didn't consider this a safety hazard because the operator probably didn't stand there when the train went by. By moving one step either direction the tugger operator would be out of the way (Tr. 47, 48).

The slusher, weighing 400 to 500 pounds, is the heaviest item hoisted by the tugger (Tr. 48). If a train were to come through while lifting the slusher the nipper would be expected to set the brake and move aside (Tr. 49). The nipper could see lights on the five car train for 100 feet or more (Tr. 49). However, a curve obstructs the motorman's visibility of Arnoldi's location (Tr. 49, 50). If the engine was pushing the train the motorman would be 40 to 50 feet back towards the rear of the train (Tr. 50). Usually there is a miner, called a swamper, who rides on the second car of the train (Tr. 51).

A nipper can usually see the train with his side vision (Tr. 54). There are no special safety rules directing the motorman to stop and be certain that the nipper is busy at the 34-277, 3100 level (Arnoldi's work station)(Tr. 54).

When the train is in motion it rings a bell. But the exhaust fan near Arnoldi's work station might drown out such noise (Tr. 54). Neither Joe Arnoldi nor any other miner ever complained to Arthur about the height of the tugger or its distance from the track (Tr. 59). During a work shift a nipper would operate the tugger, at the most, an hour and a half (Tr. 60). An exception would arise when the operator was raising a crib. That operation might take all day (Tr. 60).

Arthur has never had any problems with nippers getting out of the way of trains (Tr. 61).

On March 18 the train motor was not running. The train was sitting at the top of 277, right at the tugger (Tr. 61).

Witness Arthur identified his handwritten statement from his notebook (Exhibit E). Arthur didn't talk to Lee or Andre Douchene before writing his notes (Tr. 64).

On the morning of March 18th the temperature at Arnoldi's work station was 75 to 80 degrees (Tr. 66). Arnoldi's position was a good place to sit (Tr. 66). Arnoldi's area was reasonably clean that day.

Other than for Lee's statement Arthur does not have any reason to believe that Joe Arnoldi was sleeping that morning (Tr. 68).

MSHA INSPECTOR JAMES ARNOLDI has been assigned to the Spokane Coeur d'Alene, Idaho field office for ten years. He is well respected by a large majority of his fellow inspectors (Tr. 70-72).

MSHA's lead inspector is normally permanently assigned to a mine and he normally issues the citations arising during any inspections (Tr. 73). The "second" inspector could also write citations. If they both observed a violation the lead inspector would write the citation (Tr. 73). Inspector Arnoldi was not the lead inspector for ASARCO's Coeur unit (Tr. 74). Don Downs had that position (Tr. 75). Most of the time Inspector Downs was alone when he inspected the Coeur mine (Tr. 75).

In 1984 Inspector Arnoldi had conducted hoist inspections at the mine (Tr. 76). In February 1985 Inspector Arnoldi's supervisor assigned him to the Coeur mine as the second inspector (Tr. 75, 76). The next MSHA inspection commenced February 5 and concluded February 21 (Tr. 76).

Inspector Arnoldi's status was questioned at the mine and, in front of shift bosses and manager Carole Ward, Downs stated that Arnoldi was just his XXXX secretary and he was there to take notes (Tr. 77, 116, 117). Inspector Arnoldi complained to his supervisor about Inspector Downs' comments (Tr. 78).

During the inspection in February 1985 Inspector Downs issued three citations. Inspector Arnoldi participated and concurred with Downs that the citations should have been issued (Tr. 79, 80). An S & S citation was issued for loose ground on a hanging wall (Tr. 80). Bradshaw and Bill Arthur were also present (Tr. 80). The two miners involved in this incident were initially fired for this willful violation. Joe Arnoldi was, in effect, an MSHA informant concerning this event (Tr. 81). Inspector Arnoldi advised Downs that the loose ground violation was more serious than they had initially anticipated (Tr. 82). There was a second loose ground citation (Tr. 82). ASARCO did not dispute the S & S loose ground citation but the company disputed the non S & S loose ground citation (Tr. 86).

Inspectors Downs and Arnoldi attended the closeout conference with company representatives Andre Douchene and Kim Bradshaw (Tr. 83). Douchene was also the elected miner's representative (Tr. 83, 84). Inspector Arnoldi had told some of the miners that they could elect their own miner's representative from within the ranks of the miners (Tr. 85). In discussing the non S & S citation Inspector Arnoldi pointed out that the ground fractures had no oxidization around them. Douchene then got redfaced and puffed up he said that "you may be the law but I'll show you who the law is around here". He then stormed out the door (Tr. 87). In two or three minutes he returned and stated

"All I need is one letter to get rid of you around here." Inspector Arnoldi told him to write the letter (Tr. 87). He also stated he was there under supervisory orders and he didn't care to be at the mine (Tr. 87). Douchene then stated that the inspector was involved in a conflict of interest with his family working there. In addition, Douchene stated "You have too much [family] here to XXXX around too much" (Tr. 87, 88).

MSHA's conflict of interest policy, set for in Exhibit C3, does not prohibit an inspector from inspecting a mine where a relative works (Tr. 89, 91). Joe Arnoldi was his only blood relative at the mine. However, by marriage there are two stepsons, two brothers-in-law, nephews and an uncle. There were enough relatives to be concerned about retaliation (Tr. 92, 123). Joe is the only relative working at the Coeur unit with the last name of Arnoldi (Tr. 92).

The inspector told his supervisor about Douchene's remarks (Tr. 92, 93).

On March 19, 1985, the following day, MSHA was intending to inspect ASARCO's hoist at the Galena mine three miles from the Coeur mine (Tr. 93, 94). In arranging this inspection Inspector Arnoldi called Douchene and told him they would inspect the hoist. Then ASARCO's schedule would be "straightened out for the year" (Tr. 95). The inspector denied there was anything to straighten out on the hoist inspection (Tr. 95). In that conversation Douchene didn't tell Inspector Arnoldi that Joe was suspended, [or was about to be suspended]. Inspector Arnoldi hadn't seen his son for a week (Tr. 95).

Later that afternoon Mike Lee called Inspector Arnoldi and said he wanted Joe to come to the mine as soon as possible (Tr. 97). The next night Inspector Arnoldi learned that Joe had been fired (Tr. 97). Inspector Arnoldi did not immediately connect his son's discharge with his official inspection activities (Tr. 97).

The hoist inspection at the Coeur unit was cancelled due to a hoist malfunction at a different mine (Tr. 98).

Joe advised his father that Douchene had told him to "rustle" every day and keep rustling and he'd get his job back (Tr. 99).

Sometime in May Inspector Arnoldi wrote a statement (Exhibit C4). At that point he believed ASARCO was discriminating against another relative, Steven White (Tr. 100). This particular incident involved an injury to White coupled with Douchene's directive that White return to work or be terminated (Tr. 100, 101, 135).

Inspector Arnoldi claimed that Andre Douchene intimated him in violation of the U.S. Criminal Code (Tr. 103). If the inspector had inspected the tugger at the 34-277 raise 3100 level he would have issued a citation due to the fact that there was

only ten inches between the tugger and the railroad car (Tr. 104, 138). Joe told his father about this unsafe condition (Tr. 139). The inspector probably didn't tell Joe to put the complaint in writing. The inspector did not inspect it himself (Tr. 139, 140).

Inspector Arnoldi has inspected the Coeur mine a dozen times in a three year period (Tr. 104, 105). Except for the February 1985 inspection, Carole Ward was the unit manager. Joe Arnoldi was originally hired by ASARCO after his father had a discussion with the manager (Tr. 105-108). Inspector Arnoldi did not solicit Ward for a job for his son (Tr. 144). Ward knew Mr. Arnoldi was an MSHA inspector because he had been there several times (Tr. 108). In 1982 or 1983 other MSHA inspectors conducted the regular inspections at the mine (Tr. 108).

Inspector Arnoldi has reviewed MSHA's conflict of interest policy at least annually (Tr. 124). He had not told his supervisor that he had seven or eight family members at the Coeur mine (Tr. 125). But he told his supervisor that he didn't feel comfortable going there. The MSHA supervisor knew he had many relatives working at the mine (Tr. 125, 126, 142). Inspector Arnoldi didn't feel there was a conflict of interest to investigate a mine where relatives work (Tr. 141, 142).

About noon on March 19, 1985 Inspector Arnoldi called Mr. Douchene and advised him of a hoist inspection. At that time prior notice of such an inspection was an accepted practice. The prior notice permitted the operator to have its ropemen and electricians available (Tr. 126, 127).

On May 15th, when he wrote his explanation seeking criminal penalties against Andre Douchene, Inspector Arnoldi knew the company claimed Joe had been caught sleeping. But nothing appears in the statement to that effect (Tr. 128-130; Ex. C4). The inspector's son claimed he had not been sleeping and the operator took a contrary view (Tr. 131). In his statement Inspector Arnoldi also wrote that he thought Douchene's statements at the closing conference were made in jest. But he meant he hoped he was only jesting. Since Douchene was "immediately" angry Inspector Arnoldi didn't believe he was merely jesting (Tr. 131, 132; Ex. C4).

Inspector Arnoldi agrees that it is not a safe practice to sleep in the raise (Tr. 138).

The witness believed that Andre Douchene carried out his threats by terminating his son (Tr. 143).

In 1981 MSHA inspectors were passing out miner's rights booklets at the mine (Tr. 85). The MSHA manual instructs the inspector to notify miners of their rights and the booklet serves that purpose (Tr. 86).

It was Andre Douchene who ran the inspectors off the site for distributing the rights booklet (Tr. 85, 110-112). No citations were written as a result of that incident (Tr. 113). When he was recalled as a witness Inspector Arnoldi changed his testimony and indicated that Dave Lewis, and not Andre Douchene, was the ASARCO manager at the time of the pamphlet incident (Tr. 365-366, 371).

Larry Nelson, the supervisor of the local MSHA office, in a written memorandum, stated the MSHA pamphlets could be distributed (Tr. 366, 367; Ex. C23).

JOE ARNOLDI is now employed as a downhole driller and he resides in Michigan (Tr. 147, 148). In his current employment he has received no warning slips or complaints about his job performance. He also works overtime at his present job (Tr. 148).

The witness was employed by ASARCO from April 19, 1981 to March 20, 1985. In the instant case he seeks reinstatement (Tr. 149). Before moving to Michigan he worked for the U.S. Forest Service for a month and for an asphalt company for a few weeks (Tr. 150).

In high school Joe's highest grade in English was a "D". He also failed the course on one occasion. After quitting high school he worked in the oil fields and elsewhere. He eventually received a general education diploma (Tr. 151).

At ASARCO his entry level job was that of a mucker. He was later promoted to nipper motorman (Tr. 152). He also filled in stopes and worked with the repair crew (Tr. 152). His pay was based on production (Tr. 153).

ASARCO maintains a warning slip procedure. A miner is terminated if he receives three such slips in a 90 day period. Joe has received nine warning slips (Tr. 153, 190).

On August 7, 1981 he received, deservedly, a warning slip for carrying explosives on a battery locomotive (Tr. 154, 191).

On April 18, 1983 he received a slip for failing to follow orders and for unsatisfactory work. He stated why he didn't deserve this warning (Tr. 154, 230).

On April 27, 1983 he was injured on the job when struck in the left wrist by rocks falling down the raise (Tr. 154, 155, 214, 215; Ex. C5). Joe told his supervisor, Charlie Castelli, he wasn't going to get under the raise in these circumstances. His supervisor then issued a warning slip for poor work (Tr. 155, 156, 191). This incident was discussed at a safety meeting on May 25, 1983 (Tr. 157; Ex. C6).

Mr. Arnoldi suffers from allergies. His condition was diagnosed at age 7 (Tr. 158, 159; Ex. C7). He has continued to receive treatment while employed by ASARCO (Tr. 160, 194). He always presented a doctor's release when he returned to work. A failure to present a doctor's release will result in an unexcused absence. ASARCO's health fund paid the medical bills (Tr. 161, 195, 196). When the allergies are really severe Joe did not go to work. He believes the concern about his allergies renders it unsafe for him to be on the job (Tr. 161, 162).

Mr. Arnoldi received two unexcused absences in the 30 day period before August 11, 1983. At that time he was visiting his doctor for his allergy condition (Tr. 162). The ASARCO health plan also paid for those visits (Tr. 163). Because he had a doctor's excuse he didn't think he should have received the absences (Tr. 163, 226).

On October 14, 1983 he received a warning slip and a five day suspension for allegedly sleeping on the job. Joe denied he was sleeping. He protested to Andre Douchene on the third day. Douchene put him back on the job the following day (Tr. 169, 170, 200). Ron Maehl's diary entry of October 14-83 explains the reason for the layoff (Tr. 170; Ex. C12). This warning slip was not deserved (Tr. 227).

Mr. Arnoldi couldn't recall if he deserved the warning slip of May 22, 1984. But he thought it was "okay" because Andre Douchene had said they were allowed to miss two days a month (Tr. 198, 199).

On May 22, 1984 a warning notice for hauling a chain and motor was not deserved because he was a passenger on the motor. However, he did not protest the notice; it only makes things worse to complain (Tr. 199, 200).

On July 27, 1984 the witness received a warning slip for two unexcused days off in a 30 day period. The absence was because of allergies. He believed that warning notice was deserved (Tr. 164, 197, 227, 229).

On August 16, 1984 he received a slip for three days unexcused absences which was partially duplicative of the prior warning slip (Tr. 164, 197). The diary of Michael Lee explains the August 16th warning (Tr. 164; Ex. C9). The diary indicates that Mr. Arnoldi did not show up for work on July 20, July 27 and August 15th (Tr. 166). He had a justifiable excuse since he was under a doctor's care and suffering from, and being treated for, allergies on these dates (Tr. 166, 167, 221, 229; Ex. C10).

On December 4, 1984 he received a warning notice for failing to report for work on November 16 and December 3 but he thought he might have been on vacation (Tr. 168, 169; Ex. C11).

Joe's father is MSHA Inspector Jim Arnoldi, who inspected the Coeur unit in February 1985 (Tr. 171, 172). As a result of that inspection co-workers Magoon and Myles told Joe Arnoldi they had been fired. Also Douchene was mad because ASARCO had been cited for loose ground (Tr. 172, 173). Joe related this information to his father (Tr. 173, 206). Joe was aware of his miner's rights but Magoon and Myles were not (Tr. 205, 206).

On March 18, 1985 Joe arrived at work about 6:35 a.m. (Tr. 173). The shift starts at 7 o'clock (Tr. 174). He was nipping at the 277 raise for Chavez and Kurst. The miners instructed him to await their signals (Tr. 174, 175). After some preliminary work he sat down behind the tugger. The temperature was 90 to 95 degrees and he felt a little faint. The fan had been turned off (Tr. 175, 207).

While sitting five or six feet from the tugger Bill Arthur and Mike Lee walked up. Lee said "caught you sleeping". Joe didn't tell Lee that this was the second time he'd been caught sleeping. Lee asked Joe what I had done for the weekend. [Joe had attended a St. Patrick's Day party in Butte, Montana](Tr. 176, 207). After talking about the weekend, Lee and Arthur went down the raise. Lee subsequently reappeared and said he was going to bring Joe out for sleeping (Tr. 177). Lee also indicated he was going to talk to Douchene. Joe didn't see Douchene that morning. About ten minutes later Lee told Joe he was temporarily suspended. Lee also asked Joe of an address where he could contact him (Tr. 177, 178). Two days later, on March 19th, Lee requested that Joe come to the mine (Tr. 178). Lee then fired him. He was given his paycheck but no vacation check. Joe believed he was fired in retaliation for his father's MSHA activities (Tr. 179). His termination notice read "absolutely no rehire" (Tr. 375).

The following day Joe contacted Douchene and was told to keep on rustling and he'd hire him back like he did Bob Elisoff.

Joe didn't tell Douchene or Lee that he wasn't sleeping on the morning of March 18th. He believed that being aggressive would not get his job back.

He rustled by asking Lee or Douchene every morning at the main office for 55 or 60 days if they were hiring. He was not reoffered a job at the Coeur unit (Tr. 180, 181, 375, 377). He was treated fairly except towards the end (Tr. 182).

After being fired Joe filed for unemployment benefits with the State of Idaho. In filling out the state forms he couldn't write well and he couldn't write the reason why ASARCO discriminated against him. The reason he wanted to put down was that he was discriminated against because of his dad's MSHA inspections. He also wanted to state he was not sleeping. The papers he filed are accurate (Tr. 205; Ex. R-A). Instead of putting down his reasons why he was fired he put down ASARCO's reasons, i.e., that

he had been caught sleeping at the 277 raise (Tr. 183, 200-203, 230, 231; Ex. R-A). The State of Idaho held he was ineligible for unemployment benefits and he later told that his appeal time had lapsed (Tr. 213, 218).

In his complaint filed with MSHA he alleged that his complaints about the tugger caused him to be fired. The complaint was that he couldn't operate the tugger comfortably and he could not see over the drum to observe the skip (Tr. 184, 185). Joe had been instructed not to operate the tugger when the train was in the area. But he could not hear the train or see its trip lights (Tr. 85, 186). Ninety percent of the time the swamper stayed back at the raise to pull down the muck (Tr. 186). There was no means of communicating with the train motorman who is 50 to 60 feet back from the front when he is pushing the train. Joe complained about the height of the tugger as well as its proximity to the haulage train track. His complaints were directed to Bill Arthur and also discussed in a safety meeting. He also told his father that the tugger was too high and too close to the tracks. His father said he wasn't inspecting in that area and he recommended that Joe talk to Bill Arthur.

Arthur thought the tugger was fine. To compensate for the height of the tugger Joe stood on a piece of timber set between the tugger and the track. He thought this was dangerous since the fifth wheel could hang up and derail the train (Tr. 186-188, 207-209). There were a few times when Joe was busy with the tugger and had to jump out of the way of the train (Tr. 188).

When he was a motorman Joe complained about the condition of the brakes and the controllers on the locomotive. He wrote up this condition on December 21, 1982 and the following days (Tr. 189). The motors were fixed on December 28, 1982 (Tr. 189). Joe does not claim that the 1982 incident caused him to be fired (Tr. 190).

Joe did not know what happened at the February 21, 1985 close out conference but his father told him about it and said he should "watch his back" (Tr. 212). He learned about the conference about the time he filed his report with MSHA's special investigator Lopez (Tr. 212).

KIM BRADSHAW, the company's safety engineer, works with the Coeur and Galena units. He is in charge of training and safety (Tr. 244, 322). The unit manager and mine superintendent set safety policy for the Coeur unit (Tr. 245).

Bradshaw attended a closeout conference on February 21, 1985. MSHA Inspectors Jim Arnoldi, Don Downs, and Emmett Sullivan were present. Andre Douchene, the Coeur manager, was also present (Tr. 247). The conference had concluded and Arnoldi said he would be inspecting the mine; further, he said to Andre that if they had better management they wouldn't have a problem. Andre took it in jest, laughing and smiling. He replied "You may be

the law but we will see who the law is around here (Tr. 248-252). The further thrust of the statement was that a letter would prevent Jim Arnoldi from inspecting the mine (Tr. 253). The comment about the letter followed after Jim Arnoldi stated that Downs was going to be moved and that he would be the next inspector (Tr. 254). Bradshaw was not involved when Joe Arnoldi was fired 26 days later (Tr. 254, 255, 331-336).

Bradshaw conducts and keeps minutes of his safety meetings (Tr. 255, 325, 326). His notes would summarize any problems (Tr. 256). On October 25, 1983 miner Chavez commented that the boss was sleeping. Bradshaw didn't distinctly remember taking the complaint to management (Tr. 258). Nor did Bradshaw know if the comment was investigated (Tr. 258, 259). The company policy concerning sleeping on the job was discussed at safety meetings (Tr. 259; 263, 264; Ex. C17). The company policy prohibits sleeping in the mine. Punishment for sleeping could include warning slips, time out, or being brought out of the mine (Tr. 261, 265). Bradshaw has probably told miners they would be suspended if they were caught sleeping (Tr. 262).

Joe Arnoldi expressed concerns about safety. Particularly, he thought a swamper should ride in the second to last car (Tr.265). Swampers are not assigned to every haulage train in the Coeur unit (Tr. 266).

Joe also complained about the incident in which he was injured. The miners were instructed at the next meeting to watch out for nippers below (Tr. 267). Joe also complained about trip lights. The lights are on the trains at the mine (Tr. 269). At a safety meeting on February 15, 1983 the interaction of miners and haulage trains was discussed (Tr. 270, 271; Ex. C19).

Bradshaw has received MSHA training and he was familiar with 30 C.F.R. § 57.905 concerning train movements (Tr. 272, 273).

Neither on March 18, 1985 nor at any other time did Joe Arnoldi express any concern about the proximity of the tugger to the train track, or about its height (Tr. 273, 328). Bradshaw measured the distance from the back of his foot to the train track at 19 inches. It was 30 inches from the track to the tugger. The train extends out on both sides of the track some 8 to 12 inches (Tr. 275-277). Arnoldi's work station was situated between the tugger and the train track. The tugger could only be operated from this position. In sum, the distance between the back of the nipper's foot and the moving train would be seven inches (Tr. 277). Trip lights, warning bells, miners' cap lamps are designed to warn people of the train's movements. Trains that pass the 34-277 raise at the 3100 level are pushed (Tr. 278). There were two curves, one 30 degrees and the other 40 degrees. On the 40 degree curve Bradshaw hadn't tested it but he believed the motorman, 47 or 48 feet back, could not see Arnoldi at his work station (Tr. 279-281). A nipper at this location, if he was looking, could see the trip light when the train was rounding the

40 degree curve (Tr. 282, 286). If people were engaged in normal activity they probably would not hear the train (Tr. 282, 283). The noise level at this location, excluding the train, was measured at 70 dBA. A nearby auxiliary fan, which operated continually, was measured at 85 dBA. The tugger exhaust runs about 100 dBA (Tr. 284). The noise from the tugger would override the train noise. The bell on the train is 75 dBA (Tr. 285). In sum, the noise from the tugger and the fan would prevent a miner from hearing the train. Accordingly, neither the bell nor the light were effective in warning people with certainty that the train was coming at the 34-277 raise, 3100 level (Tr. 286). The company has never been cited for the tugger nor for a train coming close to a nipper (Tr. 329, 341).

Joe should be able to see the illumination of a cap light. While the motorman wears the same cap light as any other miner Joe would probably not be able to tell if it was a train or another miner approaching (Tr. 286-289). The motorman should be able to see the illumination from Joe's light (Tr. 289). The intense part of the head light is directed ahead but there is also illumination to the side (Tr. 291).

ASARCO has safety procedures for haulage trains but no specific rules relating to Joe's work station (Tr. 291, 292). The safety manual states that the motorman must stop until everyone is in the clear (Tr. 292). Bradshaw had not heard any complaints concerning the train at Joe's work station (Tr. 292, 293). There are "slow down" signs at air doors but no such signs on the curves at 34-277 raise, 3100 level (Tr. 293). The safety meetings never discussed the hazards at 34-277 raise, 3100 level (Tr. 294, 295). The safety manual does not discuss any hazards at that location nor is there any company policy or speed restriction relating to the location (Tr. 295, 299). Bradshaw had never instructed any motormen to get out and be sure that no miner was operating the tugger at the 34-277/3100 location before moving a train past that area (Tr. 297). Nor was that discussed at the safety meetings. There are some areas in the mine where you would not want to operate the train at full speed. The safety manual stresses that the motor must be under control at all times (Tr. 298). The motorman knows where to slow down (Tr. 299).

Trains infrequently derail at the Coeur unit. Such derailments are usually caused by loose track or muck (Tr. 300).

ASARCO does not have its own heat standards in the mine. The ventilation system, generated by fans, automatically runs at all times (Tr. 302).

In 1984 the Coeur mine accident/incident rate was about 1.4 (Tr. 304). MSHA usually investigates any nonfatal accidents at the mine (Tr. 306, 307).

When Joe started in 1981 he was instructed of his rights under the Mine Act (Tr. 308, 309). But he was not given a copy of the MSHA booklet because there is no such legal requirement (Tr. 309). Management did not want the Miner's Rights booklet distributed for that reason (Tr. 309, 310). After 1981 Bradshaw did not distribute the booklets as part of the miners' orientation (Tr. 310). In teaching the newly hired miners Bradshaw reviews a typed copy of the booklet (Tr. 311).

On March 18, 1985 Andre Douchene had been elected as the miners' representative by two ballots. There are 150 miners at the mine (Tr. 314).

On December 8, 1981 MSHA inspectors Alvin Fischer and Donald L. Myers handed out MSHA booklets (Tr. 317, 318). One of the booklets were turned over to the then unit manager, David L. Lewis (Tr. 318). After an investigation it was concluded that it was not MSHA's responsibility to distribute the pamphlets. Lewis then wrote to Russell, the MSHA subdistrict manager for the Coeur mines (Tr. 318, 319). A conversation followed with the inspectors and Lewis directed them to stop such distribution (Tr. 319; Ex. 21). On February 24, 1982 the then Assistant Secretary of Labor for Mine Safety and Health confirmed that the practice of distributing such pamphlets was "not representative of any official MSHA policy" (Tr. 347, 348; Ex. U).

Respondent's Evidence

MSHA Inspector Donald F. Downs, Mike Lee and Andre Douchene testified for respondent.

DONALD F. DOWNS, an MSHA inspector for over 12 years, is assigned to the Coeur d'Alene office (Tr. 383).

He first began inspecting ASARCO in 1984. There have been 12 quarterly inspections (Tr. 385). He couldn't recall definitely if he inspected the tugger at the 277 raise, 3100 level (Tr. 386, 413). Downs has talked to Joe at his worksite but Joe has never expressed any concerns about the tugger (Tr. 387, 388). No citation was ever issued regarding the tugger (Tr. 388, 412; Ex. C27). Inspector Jim Arnoldi, who accompanied the witness in February 1985, never suggested a citation should be issued concerning the tugger (Tr. 388). Generally, at a close out conference, the parties review the just concluded inspection. At this conference, on February 21, 1985 Jim Arnoldi announced that he would be the next inspector. Downs denied that. Douchene said he wasn't going to have him (Arnoldi) there because he had too many relatives and he had a conflict of interest (Tr. 390). He'd just write a letter and get rid of him (Tr. 391, 391). As they walked out the door Arnoldi said to Douchene that "If you was a good manager, you wouldn't have this problem". Douchene also stated to both inspectors that "You may be the law but we'll see who the law is around here". Downs replied that they were

"both the law" (Tr. 390, 414). There could have been some profanity but that is quite common at a close-out conference (Tr. 392).

Downs did not consider the statements made by either man at the close-out conference to be threats (Tr. 394). Jim Arnoldi never took it as a threat (Tr. 394).

Hecla Mining Company had at one time written to Downs' subdistrict manager complaining he was "coming down too hard" (Tr. 393, 394, 440).

Downs denies ridiculing Jim Arnoldi in front of ASARCO employees; nor had he ever done anything to hurt his feelings (Tr. 394, 395).

In the inspector's opinion it is not a safe practice for a nipper to be asleep on the job (Tr. 96). Inspector Downs observed Joe Arnoldi on one occasion when he thought he was asleep (Tr. 396, 397). He never reported this incident to his supervisors, or anyone, nor did he enter it in his notes.

Don Myers, another MSHA inspector, told Downs that he had observed Joe sleeping during working hours (Tr. 397, 432, 433). He learned this before Joe was fired (Tr. 398).

In cross examination, Downs agreed he had refused to answer interrogatories filed by complainant in the case (Tr. 399). But complainant's counsel never sought to talk to him (Tr. 437). The Solicitor advised Downs that he could talk to ASARCO's attorney and testify as to any factual matters (Tr. 400, 432; Ex. C25).

Downs considered Andre Douchene a business type friend rather than a personal friend (Tr. 434). Around May 1985 Downs gave a written statement to MSHA's special investigator Lopez (Tr. 405).

In February 1985 Downs was the lead inspector at the ASARCO mine. The second inspector, as compared with the lead inspector, could write a citation if he saw a violative condition. Downs could not recall inspecting a mine with Jim Arnoldi before February 1985 (Tr. 410). At that inspection the two inspectors were together for only one week of the 12 week inspection (Tr. 412).

Andre Douchene may have turned red and gotten angry with Jim Arnoldi when he said the citation was deserved (Tr. 418). Downs didn't put Douchene's statements in his official report. He didn't think either party meant them (Tr. 418).

Downs didn't know if Douchene ever wrote a letter about Jim Arnoldi. Downs believed that mine managers can influence the assignment of mine inspectors (Tr. 420). Downs has no family working at the Coeur unit (Tr. 421).

Jim Arnoldi told Downs that Joe had been fired (Tr. 422). He didn't suggest at that time that Douchene was carrying out his threats although it occurred 26 days later (Tr. 422).

In March 1985 the MSHA hoist inspection team consisted of Jim Arnoldi, Moose Guttramsen and Arnold Peterson (Tr. 423, 424). Downs was aware that Jim Arnoldi called Andre Douchene to schedule a hoist inspection on March 19, 1985 (Tr. 425, 462). Downs was also aware that Joe got a phone call to come up to the mine (Tr. 426).

Witness Downs didn't believe that MSHA's manual suggested that it would be a conflict of interest to inspect a mine where an inspector's relatives worked. Nor was there a conflict to inspect a mine owned by a company by whom the inspector had been formerly employed (Tr. 430).

The Coeur unit has had two fatalities: one occurred when the mine was under construction (Tr. 439). The witness discussed the unit in relation to the national average (Tr. 439, 440).

MIKE LEE, 30 years of age and experienced in mining, served as ASARCO's mine superintendent (Tr. 442, 443, 499, 500). His duties include safety and production (Tr. 444). He usually averages five hours underground each day. There are approximately 150 employees at the Coeur unit (Tr. 445). The mine has 17 stopes plus three development crews and 40 contract miners.

When Lee came to the Coeur mine Joe Arnoldi was swamping, motoring and nipping. Occasionally he did some fill-in mining. Lee would see Joe about once a week when inspecting the work areas (Tr. 446). A nipper would probably run the tugger all day long (Tr. 448). If the nipper is sleeping the stope miners are not getting the service they need (Tr. 448, 449).

Employees at ASARCO receive warning slips for absenteeism, breaking safety rules underground, and unsatisfactory work (Tr. 449). The first such warning is usually verbal; warning slips follow. Whether a worker is terminated depends on his offense (Tr. 450).

Lee has personally disciplined Joe with warnings and notices about his job performance (Tr. 451).

On August 16, 1984 Joe was given a warning slip and two days off for excessive absenteeism (Tr. 451, Ex. F, G, H). He was warned to straighten up his absenteeism problem (Tr. 452). Joe's work performance was "pretty poor" (Tr. 453, 454). Fellow employees also complained and stated they didn't want to work with him.

Joe did not bring his allergy condition to Lee's attention (Tr. 454). Company policy requires a worker to report that he will be off prior to the start of any shift. When returning he

should have a doctor's release (Tr. 454, 455). Lee doesn't look through employees' medical records (Tr. 456). The absenteeism policy is posted as well as discussed with the employees (Tr. 456). If the worker misses two shifts within 30 days he would receive a warning notice (Tr. 457).

On March 18, 1985, in the course of their regular inspection, Lee and Bill Arthur went to the top of the 277 raise on the 3100 level (Tr. 458, 459). Lee was in the lead and he had to walk around a motor parked on the station side. As he moved past the drift post he observed Joe Arnoldi leaning back on holey boards stalked in the form of a chair. His closed eyes, deep breathing, open mouth and perfectly still position caused Lee to conclude that Joe was sleeping. Lee went within a couple of feet and he woke him up by flashing his light in his eyes. Joe sat up with a start (Tr. 459, 460, 501, 502). Lee said something like "It's a long time from lunch time to be sleeping." Joe replied "Yeah, I know that" (Tr. 460). Lee then told Joe not to do anything while he checked the crew below. He would then return to talk. Lee didn't tell the miners about Joe because he didn't think it was their concern. At the time they were pulling a sand line and that didn't require any materials (Tr. 462).

When they climbed back out Lee told Arthur he had caught Joe sleeping. He asked Arthur if he was justified in "taking him out." Arthur concurred; Joe would not necessarily be fired but he could be in very serious trouble (Tr. 463, 464). As Lee and Joe discussed the matter Joe acknowledged that he wasn't supposed to be sleeping. Further, he had been caught sleeping before. Lee then told Joe he had no choice except to take him out of the mine.

Lee then escorted Joe to his office (Tr. 464, 465, 467). Lee had Joe sit in his office while he talked to Andre Douchene (Tr. 465). Lee and Douchene discussed Joe's work record, discipline, efforts at rehabilitation, etc. Lee strongly recommended that Joe be terminated. Douchene disagreed; he thought it best to put him on indefinite suspension and mull it over to make sure they were making the right decision (Tr. 465). Lee then told Joe he was suspended. He was also told he may or may not get his job back. Lee also indicated he'd contact him so he wouldn't have to come to the mine every day. Joe said to contact him through his father (Tr. 466-467).

Lee's notes reflect that he didn't care if Joe slept on his lunch break (11:00 a.m. to 11:30 a.m.) but he was sleeping at 7:45 a.m. (Tr. 466, 467). A lot of miners had complained that Joe was always sleeping (Tr. 557, 558).

At the end of the shift Lee and Douchene again discussed the situation and decided they'd sleep on it (Tr. 468, 470).

On October 14, 1983 Ron Maehl was the Coeur mine superintendent. His diary on that date reflects that Joe was suspended five days for sleeping underground (Tr. 468, 469, 582, 583; Ex. I). The diary also indicated that on August 11, 1983 Joe was advised that all of his grace periods were over (Tr. 469, 470; Ex. J).

The following day, March 19 at mid-morning, Lee and Douchene discussed Joe's past record and related matters. Douchene decided he should be terminated (Tr. 470, 471). The decision to fire him had nothing to do with the fact that his father was an MSHA inspector (Tr. 472).

Lee was not aware of Joe's contention that some of the warning slips he had received were not deserved (Tr. 471). On Tuesday afternoon Lee contacted Inspector Arnoldi and asked him to have Joe come into the office. Inspector Arnoldi replied "I'm going to inspect your XXXX hoist today" (Tr. 472). The inspection did not come about. Joe appeared at the mine on the morning of the 20th (Tr. 473). At that time Lee and Joe reviewed the situation. Lee then advised him he was terminated immediately. At the conference Joe did not claim any of the work notices were not justified. Three or four times after that he came up rustling (Tr. 474). Several times he talked to Lee and other times with Douchene (Tr. 475). Lee filled out a termination statement for Joe writing on it "absolutely no rehire" (Tr. 476; Ex. C24). The notation was Lee's personal feelings because Joe was such a poor worker. Lee didn't tell Joe to rustle but what he wrote is not inconsistent with a suggestion to rustle because they are obliged to state that the same opportunities exist for everyone (Tr. 477). Lee has made similar notations on five to ten termination notices (Tr. 477). The company has not rehired anyone when such a notation was made.

Lee knew the company contested Joe's claim for unemployment compensation benefits filed with the State of Idaho (Tr. 478). Lee didn't think the company would rehire Joe in view of that claim (Tr. 479).

With his memory refreshed by hearing prior witnesses Lee restated the events at the close-out conference of February 21st (Tr. 479, 480, 491, 492-494, 498). [The witness, in his deposition, stated he did not remember the details at the conference (Tr. 491-496)]. However, he testified that at the conference Inspector Arnoldi said he was going to inspect the plant and shut it down. Douchene said Arnoldi had too much family working there. Lee considered this a typical close-out conference. He thought the statements were made in jest; neither man was threatening the other (Tr. 482).

The inspection in February 1985 and the close-out conference of February 21 were not factors in the decision to terminate Joe Arnoldi (Tr. 482).

Lee had never discussed with Joe the height of the tugger or its proximately to the tracks. He could not remember Joe making any complaint at the safety meetings (Tr. 483).

It is unsafe for a nipper to sleep on the job (Tr. 484, 485).

At ASARCO the shift boss has authority to give a worker two days off (Tr. 486). Any leave in excess of two days had to be approved by Lee or Douchene (Tr. 486).

Joe would not necessarily be advised when the trains were to operate past his work station (Tr. 504).

The Coeur policy guide states the company absenteeism policy (Tr. 508; Ex. C29). The policy requires that an absence be excused (Tr. 509-513).

Lee's diary entry of December 13, 1984 reflects an incident involving safety. The individuals involved were Arthur Lee and Buss Lomas (Tr. 523, 524; Ex. C30).

In the absence of Douchene, Lee could probably fire someone at the mine. If Douchene was gone he would check with Fred Owsley (Tr. 536).

On March 22, 1985 Lee wrote a draft of ASARCO's response to Joe's application for unemployment benefits (Tr. 538, 539; Ex. C32). The report states that Bill Arthur as well as Lee observed Joe sleeping at the top of the 277 raise (Tr. 539). Apparently Arthur had not observed Joe sleeping (Tr. 540). Lee had not checked the records of other employees to see how previous sleeping incidents had been handled (Tr. 541).

On October 9, 1983 Coeur employee Paul Stull was given a warning slip for sleeping (Tr. 541; Ex. C33). R.J. Maehl was the superintendent at that time (Tr. 542). The slip said he had already been warned once (Tr. 543; Ex. C34). Stull had been warned verbally by Maehl, Douchene, Korst (general mine foreman) and Charlie Castell (shift boss) on separate occasions previously (Tr. 543, 544). It was explained to Stull that the next warning would mean termination (Tr. 544).

Lee carefully tracks absenteeism at the Coeur unit (Tr. 545). Stull worked 21 weeks at the mine but his record does not indicate any disciplinary action (Tr. 547). In 21 weeks the area supervisors found it necessary to warn Stull about sleeping four times and Ron Maehl caught him sleeping a fifth time (Tr. 547). The termination slip for Stull says Maehl would want him re-employed. The reason he left was to attend school (Tr. 548); Ex. C36). Ron Maehl may have just suspected Stull was sleeping (Tr. 549). It is not fair to compare Paul Stull's record with Joe Arnoldi's record. Arnoldi's record is worse (Tr. 587).

Joe was given a warning slip on April 18, 1983 for failing to follow orders and unsatisfactory work (Tr. 551). This was

given to Joe for his failure to follow an order to work in an unsafe place (Tr. 551). An additional warning slip was issued for carrying explosives on top of a battery locomotive (Tr. 551). The hauling of a chain saw and motor was also a safety rule violation (Tr. 552).

Joe was issued only one unsatisfactory work and failure to follow orders during this time at the Coeur. However, Lee had general knowledge that Joe was not a good worker (Tr. 552, 553). Joe Arnoldi was treated differently than other employees because he was given a second chance (Tr. 587).

Corey Weikel has not been fired by ASARCO although he had a number of warning slips from January 1983 to the end of March 1985 (Tr. 558, 559). On August 11, 1983 Corey, who eventually turned into a good hand, was suspended for five days. He was also told that if he abused the company policy he would be terminated (Tr. 559, 560, 571). Two weeks later he was back on the job. Maehl again talked to him about his overall work attitude, attendance record and other matters.

Corey received a warning slip and two days off on June 22, 1983 for absenteeism (Tr. 561; Ex. C38).

On August 11, 1983 Corey received a warning slip for tearing out an air door (Tr. 589, 652).

It is not valid to compare Corey's work record with Joe Arnoldi's record. Corey was a good hard worker (Tr. 589).

On June 22, 1983 Ron Maehl's diary reflects he came on Randy Arthur on a bedboard and in a bewildered state. When asked what he was doing he replied he was "just sitting". Maehl said Randy Arthur had no "gippo" attitude, suggesting that he lacked get up and go (Tr. 563, 564). The diary entry further states that he cannot or will not work unless prompted (Tr. 564).

On August 10, 1983 Randy Arthur received a warning slip for failing to follow orders (Tr. 564).

On December 23, 1983 another warning slip was issued to Randy Arthur for riding a timber truck (Tr. 564, 565). Arthur was not terminated (Tr. 565). At one point Ron Maehl removed Arthur from his contract job. This move would reduce his wages from $150 to $250 a day to $95 to $100 a day. Somewhere in 1984 he bid back into the stope job (Tr. 566). If Lee had caught Randy Arthur sleeping, coupled with everything else, he would have fired him (Tr. 566). Arthur had a serious diabetic problem (Tr. 567). It is not valid to compare Joe Arnoldi's record to Randy Arthur (Tr. 590).

Tom Benson received a warning slip for being absent on July 22, 1983. On August 31, 1983, Maehl's diary states that Benson had a "sluggish attitude" at work. On October 31, 1983 Maehl

told Benson he would be fired if his work performance didn't improve (Tr. 568). On November 22, 1983 Lee issued a verbal warning to Benson for tardiness (Tr. 568, 569). A discussion about tardiness followed on December 27, 1983 because Benson's conduct of arriving "at the whistle" was barely acceptable. On February 8, 1984 Lee gave him an unexcused absence. He had not called in (Tr. 569). On September 26, 1984 Benson was promoted to stope miner (Tr. 569, 570). Benson eventually became a pretty good worker (Tr. 570, 590).

Ron Maehl threatened employees a lot (Tr. 570). In Lee's view sleeping is a complete and blatant disregard of the employer. It further shows a total lack of responsibility on the part of the employee (Tr. 571).

When Ron Maehl caught an employee sleeping he would sign off on a termination slip indicating that the man could be a rehired (Tr. 573).

James Leischner received four warning slips in one year. On January 19, 1983 he also received a two day suspension for absenteeism. On March 21, 1983 a warning slip was issued for leaving powder and primers in a raise. On July 14, 1983 he received a warning slip for hauling explosives on a motor (Tr. 574). Following this, on December 30, 1983 there was a warning slip for hoisting powder and primers (Tr. 574, 575). Leischner is still working there. The company does not have a set policy that a certain number of warning slips mandates termination (Tr. 575).

Lee's diary of May 30, 1985 mentions Joy Neal and L. Lyle (Tr. 576). Lee had observed Joy sitting on the station smoking a cigarette. She was told she was paid to work, not sit (Tr. 576). She later quit working at the mine (Tr. 577).

For the period Commission Judge Kennedy ruled as relevant (January 1, 1983 to March 31, 1985) ASARCO issued 94 warning slips (Tr. 578). During the same period Delmar Howard, Larry Nellsch, Earl Crabtree and Bob Elisoff, were fired by ASARCO. Elisoff was later rehired (Tr. 578, 579).

Delmar Howard and Larry Nellsch were in jail and unavailable for work (Tr. 580; Ex. P,Q). Both of these men received fewer warning notices than Arnoldi. Both were terminated for absenteeism. Lee would rehire them (Tr. 593-596). The witness discusseed Larry Nellsch's warning slips (Tr. 594, 595).

Earl Crabtree was fired for absenteeism. Bob Elisoff was fired for various reasons (Tr. 580). Elisoff rustled for a long period of time and was rehired (Tr. 581).

Exhibit C-38 is a fair representation of the warning slips that are generally issued for the reasons stated (Tr. 582).

It is important, for various reasons, for the company to know ahead of time whether a worker will be absent from work (Tr. 583).

Occasionally a warning slip is not signed by the issuing supervisor; nor is it necessary for the employee to sign the slip (Tr. 583, 584).

In 1981, at the Galena mine, Lee fired Jim Reed for sleeping; in addition, he fired two workers in July 1986 for the same offense. None of the three workers had prior warning notices (Tr. 587).

Even though an "absolutely no rehire" notation is written on a termination slip a man can be rehired if he can show the company that he has changed (Tr. 591).

Workers were hired at the Coeur unit after Joe Arnoldi was terminated (Tr. 599).

ANDRE DOUCHENE is currently employed by Round Mountain Gold Corporation. Previously he worked for ASARCO starting as an engineer and attaining the position of manager of the Coeur unit (Tr. 602). As the unit manager he is responsible for the entire mine. He reported to Fred Owsley, general manager for the division (Tr. 603). Douchene has the final authority in hiring and firing employees (Tr. 603, 604). He did not normally become involved in disciplining unless an employee claimed he was treated unfairly (Tr. 604).

Joe Arnoldi was employed at the Coeur before Douchene arrived. At some point Douchene learned that Joe's father was an MSHA inspector (Tr. 604, 605). Inspector Arnoldi abated some citations but he was prinicipally the hoist inspector until February 1985. At that time he became as part of the inspection team (Tr. 605).

Inspector Arnoldi had not written a citation while Douchene was at the Coeur. MSHA inspected the mine on a quarterly basis. Douchene would see Joe about three days out of each week. Joe's duties as a nipper included supplying the miners in the stope with materials. Nippers are there for efficiency as well as safety (Tr. 606, 607, 642). Joe and Douchene never discussed the tugger nor did Joe make any safety complaints about the tugger. Other workers also operated the tugger at the 277 raise, 3100 level (Tr. 607, 609). However, Joe did complain and he was upset about an incident when he was hit on the wrist when a rock came down the raise. The incident was brought up at a safety meeting and workers were warned about letting material fall down the shaft (Tr. 608). Douchene attends about half of the six separate monthly safety meetings. Except for the one instance at no time did he hear Joe express any safety concerns (Tr. 609). Joe was not a member of the safety committee.

Douchene was the elected miners' representative at the Coeur unit. He was concerned this could be a conflict of interest but no conflict ever arose. If a conflict had occurred Douchene would have stepped down as the miners' representative (Tr. 610, 641, 642). The miners could always vote him out of the position (Tr. 611). He was never really comfortable with such an appearance of impropriety (Tr. 652, 656). On one occasion as the miner's representative Douchene signed a variance document concerning a manway opening and raise (Tr. 652, 653).

Douchene recalled that Lee came into the office and said he'd caught Joe sleeping underground (Tr. 611). This was within an hour after the crew had gone underground (Tr. 612). Douchene didn't talk to Joe that morning (in his deposition he stated otherwise).

Lee and Douchene discussed Joe's past record for a minute or two (Tr. 612, 668). Both men knew Joe had received a lot of warning slips and had been disciplined for sleeping. Joe was then suspended without pay pending further investigation. Lee and Douchene discussed Joe later that day, after Douchene had obtained his file folder (Tr. 613, 673, 674). No decision was made at that time. The following day Lee and Douchene went over Joe's record. They decided they had done all they could to try to get Joe to become a good employee. He was discharged (Tr. 615). Specifically they considered the fact that he'd been caught sleeping twice, his past record, and his absenteeism. Apparently their talks had not "sunk in" (Tr. 615).

Concerning the first sleeping incident Ron Maehl had wanted to discharge Joe but Douchene refused because he hadn't brought Joe out from underground. Ron gave him five days off. Later that week Joe returned and stated he'd learned his lesson. He also objected to the way they woke him up. Apparently Ron had pitched a small pebble at his chest. Douchene agreed the five day suspension was too severe so he let him come back the following day. But the three days of discipline stood (Tr. 616).

About four or five days after he was fired in March 1985 Joe came back and said he thought he'd learned his lesson. Douchene disagreed. He further denied that they had blackballed him (Tr. 617, 618). Joe asked if he could rustle and Douchene replied affirmatively. There were three or four meetings. Joe would ask if a job was available and Douchene would state there was none. If Joe had convinced Douchene that he had in fact changed then he would have rehired him despite the "no rehire" notation on the termination notice (Tr. 618, 619). There was no further conversation with Joe as to why he was terminated (Tr. 619).

Joe never advised Douchene that his prior warning notices were not justified (Tr. 619).

Douchene participated in the close-out conference in February 1985 but not the inspection. Three citations were dis-

cussed at the conference. One loose ground citation was designed as S & S (Tr. 620). The citation involved Magoon and Myles (Tr. 621). The previous day Douchene had observed the slab and he told the two men to bar it down. When the citation followed Douchene called the men into Lee's office and asked them if they knew the nature of insubordination. Discussion followed and Myles explained that Bill Arthur had told them that it wasn't necessary to further bar down the slab (Tr. 621). Subsequently, Douchene told Arthur that he (Arthur) was wrong about the slab.

Douchene frequently argued about citations at the close-out conferences (Tr. 622). After the February 1985 conference was over Douchene asked Downs who was to be the new inspector. Jim Arnoldi said he was to be the new inspector. Douchene didn't take him seriously. Douchene replied, with profanity, that he had a lot of family up there and would be a conflict of interest for him to be there (Tr. 623, 624). It's possible Douchene could have said something like "You may be the law, but we'll see who the law is around here" (Tr. 659). Douchene mentioned writing a letter. If Arnoldi had become inspector he would have talked to Larry Weberg (Arnoldi's supervisor) about it (Tr. 624, 659). He didn't remember the exact sentence but he agreed the gist was "You've got too much family working here to XXXX around too much" (Tr. 659, 660). By writing a letter Douchene meant that the company could file an official complaint. He did not then intend to do that.

As they were going out the door Inspector Arnoldi made a statement about poor management and the company wouldn't have to worry about safety inspectors if it had better management. Douchene did not take anything Arnoldi said as a threat (Tr. 625).

Douchene was probably grinning when he made the statements. Jim Arnoldi was also grinning; this was his typical badgering and the give and take at a close-out conference (Tr. 627).

Inspector Arnoldi has eight to ten relatives at the Coeur, about ten percent of the work force (Tr. 626). None of the Arnoldi relatives at the Coeur unit are on the management level (Tr. 709).

When the decision to terminate Joe was made a month later, the close-out conference was not a factor. Douchene and Lee, in deciding to terminate Joe, did not discuss the fact that his father was an MSHA inspector (Tr. 627).

On March 19, 1985, Inspector Arnoldi was the only MSHA hoist inspector. On that day he told Douchene that he was coming to inspect the hoist and "straighten him out". The decision had already been made to terminate Joe but his father was not told about it (Tr. 628, 667). In deciding to terminate Joe, Douchene did not look at anyone else's record and such a comparison would not be valid (Tr. 629). Joe was the only one caught sleeping twice. Douchene and Lee had talked to Joe and tried to get him to become a good employee (Tr. 630).

Paul Stull was a temporary employee hired by Fred Owsley (Tr. 631). Douchene didn't catch him sleeping nor did he specifically warn him about sleeping (Tr. 632, 633; Ex. C34).

It is not valid to compare Joe Arnoldi with Paul Stull because Joe was a permanent employee. Stull didn't make a bed, lay down and go to sleep (Tr. 633).

Exhibit C3 sets forth MSHA's conflict of interest standards. In Douchene's opinion there was a conflict of interest because of Inspector Jim Arnoldi's family at the mine (Tr. 634, 639, 644). He could be influenced in either direction, either too harsh or overlooking matters. Joe Arnoldi was hired by Carole Ward at his father's request (Tr. 635, 644, 645, 648). Jim Arnoldi came to the Coeur unit quite a bit unofficially. At times he asked about Joe and inquired why he hadn't been put to mining (Tr. 635). Douchene indicated Joe didn't have a good enough work record (Tr. 635, 636).

Douchene was familar with the contest procedures. A lot of Inspector Downs' citations were justified (Tr. 643).

About two weeks after the February 1985 inspection Larry Weberg, Jim Arnoldi's supervisor, came to the Coeur. When asked if he had a problem with Jim Arnoldi inspecting the mine Douchene indicated he had a lot of family there (Tr. 650, 657). Douchene did not write a letter to MSHA (Tr. 658).

In 1984 the Coeur unit reached a high of 11 citations (Tr. 664).

Douchene has never fired anyone "on the spot" without due consideration (Tr. 678).

When he spoke to Inspector Arnoldi on March 19 he did not mention that they were considering terminating Joe (Tr. 678, 679).

The decision to terminate Joe was made before Inspector Arnoldi called to schedule the hoist inspection (Tr. 679). The decision had been made the morning of the 19th and the paper work was already in process (Tr. 680). It is not company policy to notify relatives of an employee's position with the company (Tr. 680).

There were four additional hourly employees terminated between January 1, 1983 and March 31, 1985 (Tr. 683, 684). Larry Nellsch and Delmar Howard were terminated because they were absent from work (Tr. 684). Bob Elisoff and Earl Crabtree were terminated for excessive absenteeism (Tr. 685; Ex. C42). During the relevant period no employee was fired except for absenteeism. Each individual is handled as an individual (Tr. 686). Crabtree started with ASARCO in 1967. He was fired. He was again employed at the Galena mine from April 23, 1969 to August 21,

1973 (Tr. 689, 690). He was again fired. Subsequently, he was hired at the Coeur on August 7, 1984 and fired in October 1984. Crabtree received ten slips for absenteeism (Tr. 690). Joe Arnoldi did not have as many slips for absences as did Crabtree (Tr. 691). The company has a printed policy concerning absences (Tr. 692; Ex. C29). Crabtree was discharged for four unexcused absences in a 60 day period (Tr. 694). The last sleeping incident involving Joe Arnoldi was "the straw that broke the camel's back" so far as Joe's discharge was concerned (Tr. 695).

Elisoff was fired on April 7, 1983 by Ron Maehl and Buss Lomas (Tr. 697). He was rehired when he convinced Douchene that he had changed. He rustled every day for maybe two months (Tr. 698, 699). After he was rehired Elisoff received some warning slips, including one for unsatisfactory work and one for excessive absenteeism (Tr. 702, 703).

Elisoff is still working at the Coeur (Tr. 703).

The decision to terminate Joe was based on his work record and the whole business (Tr. 704). During the relevant period 22 employees other than Joe received warning slips for unsatisfactory work, failure to follow orders, and non-safety related conduct. The 22 remain employed by ASARCO (Tr. 704). Paul Stull, the other employee allegedly caught sleeping, did not receive disciplinary days off and was not terminated (Tr. 705). Douchene wasn't sure if Stull was sleeping or not but he warned him for sitting down on the job (Tr. 705).

The disciplinary system at Coeur includes verbal and written warnings (Tr. 706). The lowest level is a verbal warning and the highest level is termination (Tr. 707). Douchene didn't know if Joe rustled every day (Tr. 700). After March 20, 1985 Joe told Douchene that he wanted his job back (Tr. 701). Douchene was never convinced that Joe was serious about getting his job back (Tr. 702).

Evaluation of the Evidence

In view of the Commission's rulings concerning section 105(c) it is necessary to initially determine whether complainant was engaged in a protected activity and whether respondent took adverse action against him for such activity.

It is clear that certain activities in which complainant engaged were protected under the Act. He complained about the positioning of the tugger and its proximity to the train track. However, there is no evidence that respondent took any adverse action for such complaints. MSHA Inspector Jim Arnoldi never inspected the tugger. He merely told Joe to discuss it with Bill Arthur. In turn, Arthur did not think it was a problem. MSHA Inspector Downs inspected complainant's work place but no complaints were made to him about the tugger.

The complaints about the position of the swamper on the train and the trip lights were protected activities but again no adverse action was taken by the company. His safety complaints when he was struck by rocks falling down the raise were protected. But this occurred April 27, 1983, almost two years before he was discharged. No adverse action resulted from that incident and, in fact, it was discussed at a safety meeting and the miners were instructed to avoid such hazards.

The pivotal issue focuses on whether complainant was sleeping on March 18, 1985. A conflict in the evidence exists on this point.

On that particular date Lee and Arthur were on their rounds. Lee, who was in the lead, approached complainant and saw him leaning on a stack of boards. His eyes were closed and he was breathing deeply with his mouth open. He was perfectly still. Lee woke him. Complainant did not deny that he was sleeping. In fact, complainant himself concedes that he didn't tell Lee or Douchene that he wasn't sleeping.

Subsequently, on March 21, complainant filed for unemployment benefits with the State of Idaho. In his printing on the form he related the events of March 18 stating in part that he was "waiting fore (sic) my crew to start work I fell asleep olny (sic) for five min (sic) and ... Mike Lee woke me up" (Exhibit RA).

At the hearing complainant seeks to explain the State of Idaho statement. He states he couldn't write well. He wanted to state on the form that he was not sleeping. He also wanted to put down that he was discriminated against because of his father's MSHA inspections. Instead, he put down respondent's reasons why he was fired (Tr. 183, 200-203; Ex. RA).

Contrary to complainant's assertions I conclude that the statements he made to the State of Idaho were accurate and not false, as he himself conceded at the hearing (Tr. 231, 233).

His claim that he lacks writing skills is not persuasive. A review of the hand printed exhibit (Ex. RA), in my view, accurately set forth complainant's position. Although there are some spelling errors in the text the expression is clear and reasonably articulate.

Sleeping is not a protected activity; accordingly, it follows that respondent did not discriminate against complainant.

If complainant had established that he was terminated in part because of protected activity, I would nevertheless conclude that respondent was motivated by complainant's unprotected activity and would have taken the adverse action for such unprotected activities alone, i.e., for twice falling asleep on the job. Therefore, I conclude that complainant has not established that respondent discharged or otherwise discriminated against him in violation of section 105(c) of the Act.

Arnoldi's post-trial brief asserts that he has established his prima facie case. He particularly relies on the fact that a miner is entitled to have federal mine inspectors conduct their inspection free of any retaliation, citing Mackey v. Consolidation Coal Company, 7 FMSHRC 977, 978 (1985). Specifically complainant refers to the close-out conference of February 21, 1985. At the conference it is essentially uncontroverted that Andre Douchene, the unit manager, made the statements set forth in the evidence. However, I find from the credible evidence that some profanity as well as "give and take" regularly occurs at the close-out conferences at respondent's mine. Further, Douchene didn't take Jim Arnoldi's statements as a threat (Tr. 625, 627). Inspector Downs did not consider any of the statments to be threats (Tr. 394). Inspector Arnoldi's written statement of May 15th indicates that he also thought Douchene's statements were made in jest (Tr. 131, 132; Ex. C4). Mike Lee likewise thought the statements were made in jest (Tr. 482). Kim Bradshaw likewise concurs in this view (Tr. 254).

The evaluation made by these four principals contemporaneously with the event constitutes persuasive evidence that respondent did not intend to discriminate against complainant.

Complainant further argues that the evidence supports an inference that he was fired in retaliation for safety complaints or based on the belief that he was an MSHA informant.

I disagree. Such a view of the evidence is speculative. Even assuming that complainant was an informant there is no evidence that respondent took any adverse action for such activity.

Complainant also argues that Douchene felt MSHA Inspector Arnoldi should not be assigned to the Coeur unit because of the number of relatives at the mine; further, it is plausible to believe that Douchene feared the quality of information that could flow from relatives to an MSHA inspector.

I reject this argument. Plausibility cannot establish a violation of the discrimination section. I agree that Commission precedent holds that adverse action against a miner making safety complaints to MSHA violates the Act. This is so even though management is wrong in its belief that the miner made such complaints as in Moses v. Whitley Development Company, 4 FMSHRC 1475 (1982). In the instant case it is true that complainant claims to have been an MSHA informant.

This view arises from the incident when Joe Arnoldi spoke to his father about the two miners, Magoon and Myles. The two miners had been threatened with termination for failing to bar down a loose slab.

I do not see how this incident establishes discrimination, or an intent to discriminate, against Joe Arnoldi. Even if one

assumes ASARCO knew of complainant's statement there is no persuasive evidence that the company took any adverse action against him. The Magoon/Myles incident started the day before the MSHA inspection. On that day Douchene directed the two men to bar down a loose slab. They apparently began to do so and their supervisor (William Arthur) told them to terminate their activity. The following day an MSHA citation was issued for the same slab. Douchene then called Magoon and Myles into his office. He asked them if they knew the nature of insubordination.

All of these events had occurred before complainant made any statments to his father. Complainant relates that "after the shift was over I talked to Bob Magoon and Bob told him that they were fired and he [Andre Douchene] was mad because he got wrote up for something that he thought he shouldn't have gotten wrote up for" (Tr. 172).

In sum, the Magoon/Myles incident does not establish that respondent discriminated against complainant.

Complainant further contends that the company admits it was motivated to terminate him by virtue of his work record as a whole, citing the transcript at 614. Complainant then argues that his work record includes a refusal to work in an unsafe place. Further, his severe allergy condition rendered it unsafe for him to work.

Complainant has overemphasized a portion of the evidence. The person who made the ultimate decision to fire complainant was Andre Douchene with Mike Lee's strong recommendation. Douchene testified that he and Lee discussed complainant's warning slips and they both knew he had been disciplined for sleeping. The following day Lee and Douchene went over complainant's record. They decided they had done all they could to try to get complainant to become a good employee. Specifically, they considered his adverse work record which was documented. He'd been caught sleeping twice, and he had received numerous warning slips (Tr. 615).

Complainant's additional contention is that his allergies caused him to believe, in good faith, that it would be hazardous to his health for him to work in the mine. In support of his position complainant Atkins v. Cyprus Mines Corporation, 8 FMSHRC 460, 474 (1986).

These arguments are misdirected. As a threshold matter complainant did not refuse to work because of his allergy problems. The cited case is not controlling.

Complainant also argues that respondent refused to rehire complainant in retaliation for his protected activities and for the filing of his discrimination complaint.

The evidence shows that Douchene and Lee told complainant that he could rustle in an effort to get his job back. He did so. Complainant testified he was treated fairly well, except towards the end of the rustling period.

I reject complainant's argument. He was discharged because he was sleeping on the job, an unprotected activity. On this record the filing of his discrimination complaint played no part in the refusal to rehire him. The reference to the hiring and firing of Robert A. Elisoff fails to establish that respondent discriminated against complainant. This is so because complainant was discharged for an unprotected activity. Respondent is not obliged to rehire him. But it can permit him to rustle in an effort to be re-employed.

Complainant's post-trial brief also attacks the credibility of Lee, Downs and Douchene. While there are some discrepancies in respondent's evidence (as well as complainant's evidence) I generally find respondent's evidence to be credible.

Complainant argues his overall work record did not merit his discharge and he was treated less favorably than others.

The function of the Commission is to determine whether discrimination occurred in violation of section 105(c). Disparities in discipline can be strong evidence of discriminatory motives. But it is not the function of the Commission to generally weigh a miner's work record if no protected activity is established.

For the foregoing reasons the complaint filed herein should be dismissed.

Briefs

The parties have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in this decision the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

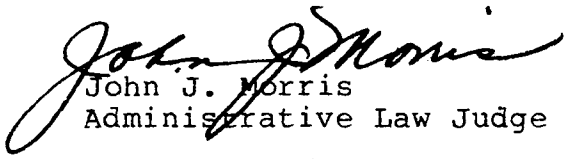
2. Complainant did not prove that he was discriminated against in violation of Section 105(c).

3. Respondent did not discriminate against complainant in violation of the Act.

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

ORDER

The complaint herein is dismissed.



John J. Morris
Administrative Law Judge

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 3 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-260-M A.C. No. 04-03008-05511
v.	:	Oro Grande Mine
VINNELL MINING AND MINERALS CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Cetti

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant ot Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of $241 for four alleged violations of certain mandatory safety standards found in Title 30, Code of Federal Regulations.

The parties have submitted a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a settlement of the case. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	CFR Title 30 Section	Assessment	Settlement
2364566	12/11/84	56.5001A/5	$ 20.00	$ 20.00
2364567	12/11/84	56.5001A/5	105.00	105.00
2671590	7/2/86	56.14001	58.00	30.00
2671591	7/2/86	56.11001	58.00	20.00
		Totals	$241.00	$175.00

Discussion

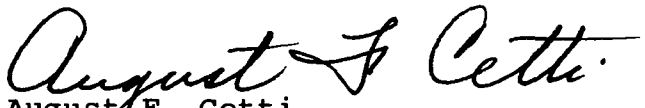
In support of the proposed settlement disposition of this case, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act. In addition, the petitioner has submitted a discussion and disclosure as to the facts and circumstances surrounding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

Conclusion

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

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above totaling $175.00 in satisfaction of the citations in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is dismissed.



August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 5 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 86-101 A.C. No. 15-02705-03587
v.	:	Camp No. 2 Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for Petitioner;
Michael O. McKown, Esq., Henderson, KY, for the Respondent.

Before: Judge Fauver

This proceeding was brought by the Secretary of Labor for civil penalties for alleged violations of safety standards under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

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

FINDINGS OF FACT

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

2. The penalties proposed by the Secretary of Labor would not affect the ability of the operator to continue in business.

3. Camp No. 2 Mine is opened into the Kentucky No. 9 coal seam by one slope and six shafts. The coal seam is about 62 inches thick.

4. On October 10, 1985, about 7:30 p.m., a methane explosion occurred in Camp No. 2 Mine, in the No. 1 unit, section 013. The explosion was in the No. 3 entry working place where a loading machine and shuttle car were operating. The shuttle car had just entered the working place and was

being loaded when its trailing cable arced as it came through the sheave bracket, igniting methane. The explosive fire ball expanded into the first outby intersection then traveled back into the working place and once again went out into the intersection and was self-extinguishing. The explosion caused serious burn injuries to the loading machine operator and the shuttle car operator.

5. The MSHA accident investigation team began their investigation at the mine about 11:00 p.m., October 10, 1985. They gathered a number of eyewitness accounts, which may be summarized as follows:

(a) George Wallace, the loading machine operator, stated that he was in the process of loading a three-way place, and had just completed loading the fall of coal from the crosscut right of the No. 3 entry when the methane monitor deenergized the machine. The line brattice was extended to within approximately 10 feet of the face, and the power was restored to the loader. Wallace then began to position the machine in preparation to load the fall of coal at the face of the No. 3 entry when the explosion occurred.

(b) Harry D. Cowan, the shuttle car driver, stated that he had entered the working place and was in the process of being loaded when his trailing cable arced to the frame as the cable came through the sheave bracket. The methane fire ball traveled into the intersection of the last open crosscut, then back to the face of the No. 3 entry, and once again out into the intersection and was self-extinguishing.

(c) Jim Ashby, shot fireman, was in the crosscut between No. 2 and No. 3 entries, and Donald Strouse, a unit helper, had just walked up to the outby side of the intersection. They saw the cable arc and ignite the methane. Ashby stated that as the flame came into the intersection the second time, he ran to the unit power center shouting to have "someone knock the power."

6. Wallace sustained burns to his arms, back, face, and hands; Cowan sustained burns to his hands, left arm, and face. Coworkers administered first aid and the injured miners were transported to the surface and taken by ambulance from the mine to the Valley View Medical Center, Union County, Kentucky.

7. The No. 1 unit is a conventional mining unit. After blasting, coal is loaded into shuttle cars that dump onto a series of belt conveyors. The mine is developed by the room and pillar system of mining. Pillars are not extracted.

9. In the accident investigation, MSHA Inspector Louis Stanley found that the area was not adequately rock-dusted in that rock dust had not been applied to the roof, face, and ribs of the following places: No. 1 entry from the face outby for 50 feet, No. 2 entry from the face outby 55 feet (No. 3 entry was wetted down after the explosion and was too wet to sample for rock dust), No. 4 entry from the face outby for 50 feet, No. 5 entry from the face outby for 47 feet, and throughout the last open crosscut from No. 1 to No. 6 entries. Based on this condition, he charged Respondent with a violation of 30 C.F.R. § 75.402, in Order No. 2507995, and MSHA assessed a civil penalty of $750. Respondent did not contest this charge. The gravity of this violation was serious.

10. In the accident investigation, MSHA Inspector J.M. Larmouth tested with a multimeter across a 0.1 ohm resistor between the frames of the 480 volt A.C. loading machine and the 300 volt D.C. shuttle car and found that the level of D.C. millivolts was in excess of 150. Because of this condition, he charged Respondent with a violation of 30 C.F.R. § 75.524, in Citation No. 2508383, and MSHA assessed a civil penalty of $750. Respondent did not contest this charge. This was a serious violation that presented another possible source of ignition of methane.

11. In the accident investigation, MSHA Inspector T.W. Cullen found that the trailing cable attached to the shuttle car had exposed bare wires at one place. Because of this condition, Respondent was charged with a violation of 30 C.F.R. § 75.517, in Citation No. 2508003, and MSHA assessed a civil penalty of $750. Respondent did not contest this charge. This violation was serious. The exposed power wires apparently came into contact with the sheave bracket, causing

an electric arc, which was the probable source of ignition of the methane. The arcing of the trailing cable could have been prevented, if the exposed wires had been properly insulated and protected from contact with other metal objects.

12. In the accident invesigation, MSHA Inspector J.M. Larmouth tested the methane monitor on the loading machine and found that it did not work properly. When tested with a 2.5 percent mixture of methane, the monitor would not deenergize the power on the loading machine and the meter on the methane monitor did not register more than 1.75 percent methane when the tests were conducted. Because of the defective monitor, Respondent was charged with a violation of 30 C.F.R. § 75.313-1, in Citation No. 2508385, and MSHA assessed a civil penalty of $2,000. Respondent at first contested this charge but settled at the hearing by withdrawing its contest and agreeing to pay the penalty of $2,000. This was a serious violation. The methane explosion may have been prevented if the methane monitor had been operative and properly maintained.

13. In the accident investigation, MHSA Inspector Stanley found that permanent stoppings had not been installed in the third open crosscut between the intake and return entries. Because of this condition, Respondent was charged with a violation of 30 C.F.R. § 75.316, in Order No. 2507994, and MSHA assessed a civil penalty of $950. Respondent did not contest this charge. This was a serious violation. This condition could have allowed air in the intake entry to escape into the return entry, thus lessening the ventilation reaching the working face.

14. In the accident investigation, Inspector Stanley tested for ventilation at the site of the explosion and found there was no perceptible movement of air. When he attempted to take an air reading at the inby end of the line curtain, 10 feet from the working face, the vanes of his anemometer would not turn and a smoke tube test also failed to disclose any perceptible movement of air. Management had represented to the MSHA investigation team that the evidence at the accident scene had not been disturbed or changed. Based upon this representation and his findings at the scene, Inspector Stanley determined that the ventilation conditions he found were as they had existed at the time of the explosion. Accordingly, he issued Order No. 2507996, charging a

violation of 30 C.F.R. § 75.301-1. This order was contested and is one of the two disputed charges in this proceeding.

15. In the accident investigation, Inspector Stanley found that there were no temporary stoppings (air locks) across Entries 2 and 3 immediately outby the tailpiece as required by the operator's approved ventilation plan. Because of this condition, Inspector Stanley issued Order No. 2507993 charging a violation of 30 C.F.R. § 75.316. This order was contested and is the second disputed charge in this proceeding.

DISCUSSION WITH FURTHER FINDINGS

Order No. 2507996 (Ventilation at the Working Face)

This order charges a violation of 30 C.F.R. § 75.301-1, which provides that:

> A minimum quantity of 3,000 cubic feet a minute of air shall reach each working face from which coal is being cut, mined or loaded . . . .

Inspector Louis Stanley, a Ventilaton Specialist for MSHA, with many years experience, testified that during the accident investigation he could find no perceptible movement of air in the working place of No. 3 entry. He tested for air at the inby end of the line curtain with an anemometer and then with a smoke tube. He stated that the line curtain was in place, 10 feet from the face, and appeared to be tight and intact. The ventilation problem was that the curtain extended only about seven feet into the crosscut. Inspector Stanley stated that Peabody's failure to extend the curtain across the crosscut was the primary reason that there was no air movement at the inby end of the curtain in No. 3 entry. He stated that the line curtain was in very good condition showing no signs of scorching, burning, or tattering, and that neither the inby nor the outby ends were torn but were, in fact, cut smoothly.

Because the curtain looked surprisingly new, Inspector Stanley repeated his question to officials--including Mr. Douglas Rowans, the Mine Superintendent and Mr. Tom Barton, Assistant Superintendent, both of whom testified at the hearing--whether or not the scene of the explosion had been changed. The officials told him that the scene had not

been changed. He relied upon their representations in determining that the ventilation conditions he found at the explosion site had existed at the time of the explosion.

Peabody's other witness, Carol Browning, the Section Foreman, testified to a different fact situation concerning the line curtain. He stated that he arrived at the scene a few minutes after the explosion, more than four hours before all the other hearing witnesses, who arrived as a group about midnight. Browning stated that he found the curtain pushed back into the crosscut and that and that it must have been blown back there by the explosion. He stated that he pulled the curtain along with him as he walked up to the working place of No. 3 entry, and rehung the curtain as he went along. He stated that he rehung the curtain in order to have oxygen as he checked and watered down the working place. He stated that he did not reanchor the curtain on the anchor provided, 10 feet from the working face, but merely looped the end of the curtain over a nail about 15 to 20 feet from the working face. He said that he did not tighten the overhead cable that the curtain hung on, and that the curtain sagged down from the roof in several places. He also said the curtain was scorched for two or three feet on one end, but did not have any holes (other than the eyelets provided for hanging the curtain).

Barton testified that the curtain was scorched in places, that it had some holes, and sagged in several places.

Rowans testified that the curtain was loose and sagged in places. He did not look at it closely to notice whether or not there were holes or scorching.

Browning did not tell anyone he had moved and rehung the curtain, until one or two weeks after the accident investigation. I find there was a strict obligation on the part of Respondent not to disturb or change the evidence at the explosion scene and, if any changes were made, to notify the MSHA accident investigation team of such changes immediately. Respondent may not be heard now to come in with a new version of the facts after the MSHA accident investigation with respect to changes in the evidence that were made by Respondent's own supervisor but not revealed to the MSHA investigation team. Moreover, the key to Inspector Stanley's finding of no air movement at the accident scene was the location of the curtain only seven feet into the crosscut, indicating that the air escaped into the crosscut

and did not reach the working face. I credit Stanley's testimony as to the distance of the curtain's extension into the crosscut over Browning's estimate of the distance, and also over the estimates given by Peabody's other witnesses. The location of the curtain end only seven feet into the crosscut substantially shows that at the time of the explosion the curtain was inadequate to direct the required ventilaton to the working face.

The evidence shows that Browning was in a nervous, emotional state after the explosion. His unit had just had a serious explosion, with severe burns to two miners, due to a number of negligent violations that could have been prevented by the exercise of reasonable care and that would point to his supervision. I do not find that Browning was in a state of mind to register matters very accurately or objectively in his memory, right after the explosion. Also, he did not make notes or diagrams and measurements of the conditions he observed. On balance, his recollections are not accepted as sufficient to rebut Inspector Stanley's recollection, notes and diagrams of what he observed in the working place and crosscut. The other witnesses, Barton and Rowans, also did not make contemporaneous notes or diagrams of the location of the curtain. No company representative objected when Inspector Stanley stated he was going to cite the company for a ventilaton violation at the working face.

Respondent argues that Inspector Stanley's observations of the ventilation conditions at the face were not made while coal was being mined or loaded and therefore cannot sustain a charge of a violation of § 75.301-1, which requires 3,000 cfm of air at "each working face from which coal is being cut, mined or loaded ...." I find that mine management's representations to MSHA that the conditions of the accident scene had not been changed and Inspector Stanley's observation of the curtain extending only seven feet into the crosscut and his finding that there was no perceptible air movement at the face at the time of investigation justify a finding that this ventilation condition existed at the time of the explosion, when coal was being loaded. I credit Inspector Stanley's expert opinion, as a Ventilation Specialist, that the failure to extend the curtain across the last open crosscut in No. 3 entry was the primary cause of the lack of perceptible air movement at the face. I also find that this dangerous ventilation condition existed at the time of the explosion and was a major contributing factor in allowing the buildup of methane to reach an explosive degree.

It is commonly known in underground coal mining that a mixture of 5% to 15% methane in a mine environment is explosive and will remain explosive without adequate ventilaton. The purpose of the 3,000 cfm ventilation standard is "to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases" (see section 303(b) of the Act). The evidence preponderates to show that Respondent violated the ventilation standard as charged in Order No. 2507996.

Peabody's compliance history shows that, in the 24-month period preceding the explosion, Camp #2 Mine was cited for approximatley 50 paid violations of ventilation standards (§§ 75.300, -301, -301-1, -302, -302-1, and -316) many of which were significant and substantial violations, i.e., reasonably likely to result in serious injury to miners. The violation of the ventilation standard involved here contributed to a methane explosion that seriously burned two miners. It was a very serious violation that was due to a high degree of negligence.

Considering the six criteria for civil penalties in section 110(i) of the Act, I find that a penalty of $5,000 is appropriate for this violation.

Order No. 2507993 (Air Locks Outby the Working Face)

This order alleges that "Temporary stoppings (air locks) were not erected across the Nos. 2 and 3 entry (neutrals) at a point just outby the belt tailpiece on the working section ... as required by the approved ventilation and methane and dust control plan" (Exh. G-2-P).

There is no dispute, as shown by Exhibits G-4A-P and R-3-P, that the four temporary stoppings shown by horizontal lines were not in a straight line across Entries 2, 3, 4, and 5, as required by the approved ventilation plan (Exh. G-3-P). However, Peabody contends that a fifth temporary stopping, the vertical line stopping in Exh. R-3-P, was in place to prevent air leakage. If Exhibit R-3-P is accepted as fact, there was a technical violation of the ventilation plan, but it was not serious because the air was still locked in by the fifth temporary stopping. If Exhibit G-4A-P is accepted as fact, there was a serious violation because the gap, shown in that exhibit, would have allowed the air to escape and reduce the ventilation at the working face where the explosion occurred.

Inspector Stanley testified that he took an air reading at the last permanent stopping in the intake side of the unit and found 13,824 cfm (Tr. 41). He took an air reading on the return air side and found 11,742 cfm (see Exh. G-4A-P, upper left side).

Rowans testified that he observed the area after the explosion and found five temporary stoppings as shown in Exhibit R-3-P, and that he made notes and a diagram of his observation when he exited the mine after he inspected the area. He also testified that, in his opinion, Inspector Stanley could not have measured 11,742 cfm in the return if there were a gap in the air locks because the air leakage would have caused a much lower reading.

Barton testified that he knew the fifth temporary stopping was in place because he look a group of teachers through the area that morning and he observed that all of the temporary stoppings (shown in Exhibit R-3-P) were in place (Tr. 135).

The MSHA inspectors entered the mine with management representatives Rowans and Barton (and others) and talked to them at different times while they made their accident investigation. However, the inspectors did not tell the management representatives what citations or orders would be issued until they all left the unit where the explosion had occurred.

Rowans testified that, when Inspector Stanley told Rowans and Barton that he would be issuing an order for a violation concerning the air locks, Barton immediately objected, stating that the air locks were there, but Rowans interrupted him, saying, "I know what he's talking about. *** They're not in a straight line." and with that, Inspector Stanley went on to the next charge (Tr. 191).

I find that there was not a clear communication to management representatives when Inspector Stanley told them what the mine would be charged with concerning the air locks. They did not understand that he was contending that there was a gap in the air locks, and even the written charge did not make that clear. Had Inspector Stanley made it clear to Rowans and Barton that he was contending that there was gap in the air locks that would let air escape, they would have had an opportunity to ask him to go back to the area with

them to see the air locks that Rowans, Barton, and Browning say they observed and Rowans put in a diagram when he left the mine.

In light of this lack of clear communication, the failure of Inspector Stanley to give Rowans and Barton adequate notice of the nature of the charge so they could show him different evidence, and in light of the direct conflict of testimony and diagrams concerning the air locks, I find that the evidence does not preponderate in showing the number of air locks present at the time of the explosion. The evidence does show that four air locks were not in a straight line, and thus a violation of the ventilation plan, but the Secretary has not shown by a preponderance of the evidence that there was a gap in the air locks, i.e., that there was not a fifth air lock as shown in Exhibit R-3-P. I therefore find that the evidence establishes a technical violation of 30 C.F.R. § 75.316. Considering the six criteria for civil penalties in section 110(i) of the Act, I find that a penalty of $50 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 75.301-1, as alleged in Order No. 2507996.

3. Respondent violated 30 C.F.R. § 75.316 as alleged in section 12 ("Condition or Practice") of Order No. 2507993, but the Secretary did not prove by a preponderance of the evidence the allegations in sections 11, 20, 21-A, 21-B and 21-C of such order.

ORDER

WHEREFORE IT IS ORDERED:

1. The motion to approve settlement of Citation No. 2508385 for a civil penalty of $2,000 is GRANTED.

2. Respondent shall pay the above three civil penalties in the total amount of $7,050.00 within 30 days of this Decision.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 5 1987

YOUGHIOGHENY & OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 86-25-R Order No. 2823823; 11/6/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 86-60-R Order No. 2823753; 2/4/86
	:	Docket No. LAKE 86-120-R Order No. 2828630; 8/1/86
	:	Docket No. LAKE 86-121-R Order No. 2828634; 8/5/86
	:	Nelms No. 2 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 86-70 A.C. No. 33-00968-03634
v.	:	Docket No. LAKE 86-74
YOUGHIOGHENY & OHIO COAL COMPANY, Respondent	:	A.C. No. 33-00968-03635 Docket No. LAKE 87-9 A.C. No. 33-00968-03650
	:	Nelms No. 2 Mine

DECISION

Appearances: Robert C. Kota, Esq., St. Clairsville, Ohio, for Youghiogheny & Ohio Coal Company; Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., "the Act" to challenge the issuance by the Secretary of Labor of citations and withdrawal orders to the Youghiogheny & Ohio Coal Company (Y & O) and for

review of civil penalties proposed by the Secretary for the violations alleged therein. The general issues before me are whether Y & O violated the cited regulatory standards and, if so, whether those violations where of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, (i.e., whether the violations were "significant and substantial.") With respect to the withdrawal orders it will also be necessary to determine whether the violations were caused by the unwarrantable failure of the operator to comply with the cited regulation. If violations are found, it will be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

DOCKET NO. LAKE 86-74

At hearing, the Secretary moved to approve a settlement agreement with respect to Citation No. 2823824 proposing a $20 penalty for a non-"significant and substantial" violation. Y & O agreed to the proposed settlement. I have considered the representations and documentations submitted in support of the motion and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

DOCKET NO. LAKE 86-70 and LAKE 86-25-R

The order at issue in these cases, Order No. 2823823, as amended, was issued under section 104(d)(1) of the Act, 1/ and alleges as follows:

1/ Section 104(d)(1) of the Act reads as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of

> Float coal dust was permitted by the operator to accumulate on the mine floor, roof and ribs, of the I return entry and left side connecting crosscuts from survey station 5 + 40 feet to 13 + 20 feet which was a linear distance of 780 feet. This condition had been recorded in the record book on 11-1-85 and 11-5-85 by G. Pepperling, fireboss. Foreman on this section on this shift were G. Torak and J. Corder.

The cited standard, 30 C.F.R. § 75.400 provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Y & O does not dispute that the violation occurred as alleged but maintains that the violation was neither "significant and substantial" nor due to the "unwarrantable failure" of the operator to comply with the cited standard. According to Inspector Frank Homko, of the Federal Mine Safety and Health Administration (MSHA), at the time of his inspection on November 6, 1985, approximately 450 to 500 feet of the return air course in the No. 2 section in the 2 East main North part of the Nelms No. 2 Mine was dark black in color and an additional contiguous 280 to 330 feet was black to dark gray in color from coal dust accumulations. Homko therefore found that approximately 780 linear feet of the floor, roof and ribs in the return air course and 11 connecting crosscuts were in violation of the cited standard.

Inspector Homko observed that electrical equipment was operating on the cited section including continuous-mining machines, ram cars and auxiliary ventilation fans. In addition, he noted that a battery-charging station that was

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fn. 1 (continued)
such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

vented directly into the return air course at issue had exposed bare electrical power conductors. Homko opined that the float coal dust accumulations in the return air course could very well propagate fire or explosion particularly when considered in conjunction with the fact that the Nelms No. 2 Mine liberates over 1,000,000 cubic feet of methane per day.

Homko also observed that there had been a history of gas ignitions at this mine and that there was a potential for a hydrogen gas explosion from the battery-charging station with its exposed electrical wiring and that such explosion would be vented directly into the return air course. Homko observed that 14 miners worked on the section and would be exposed to the hazards. Within this framework, I am satisfied that the violation was "significant and substantial" and serious. Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

I also find that the violation was the result of "unwarrantable failure." In this regard, Inspector Homko testified that the company records of its inspections show that the cited area was "firebossed" on November 1, and November 5, 1985. Indeed, page 1 of the record book (Ex. G-5) shows that on November 1, 1985, 5 days before Homko's inspection of the same air course, Union fireboss Gary Pepperling had examined the return and reported that it needed rock dusting. In addition, Pepperling reported again on page 2 of that document that on November 5, 1986, 1 day before Homko's inspection, that the return needed dusting. These reports were countersigned by the mine foreman and mine superintendent. Under the circumstances, it is clear that Y & O management had advance notice of the violative conditions, yet had not corrected them by the time of Homko's inspection.

Y & O's former assistant safety director, Don Statler, who accompanied Homko on his inspection that day, acknowledged the existence of the cited coal dust but observed that they had been rockdusting up to the afternoon shift of the day before. Statler conceded that no rockdusting was being performed at the time he and Homko observed the cited conditions on November 6, 1985. Statler also observed that "action taken" to remedy hazardous conditions reported in the shift books are reported only in the "work assignments" book, so that no inference can be drawn from the absence of "remedial" entries in the shift books. Statler's testimony does not, however, negate the evidence that mine management knew of the violative coal dust, yet had discontinued corrective action to remedy this

serious hazard the day before it was cited. Under the circumstances, the violation was indeed the result of "the unwarrantable failure" of the operator to comply. Zeigler Coal Corp., 7 IBMA 280 (1977); United States Steel Corp., 6 FMSHRC 1423 (1984). For the same reasons it is apparent that the violation was the result of operator negligence.

Order No. 2823823 is accordingly affirmed and the contest of that order is denied.

DOCKET NOS. LAKE 86-74 AND LAKE 86-60-R

The order at issue in these cases, Order No. 2823753, issued pursuant to section 104(d)(2) of the Act [2/] charges a violation of the standard at 30 C.F.R. § 75.301 and alleges as follows:

> The quantity of air reaching the last open crosscut separating the intake from the return, between Nos. H to I entries left side in 2 section 1 east main north was only 1,732 cubic feet a minute and the last open crosscut separating the intake from the return between Nos. B to A entries right side in 2 section 1 east main north was only 4,800 cubic feet a minute. The quantity of air was measured with a chemical smoke cloud. The last open crosscut left side between Nos. H to I entries had just been mined and a twin boom roof bolting machine was operating in this crosscut. This is a super section with two sets of equipment and operators alternating from the left side to the right side each cut of coal."

[2/] Section 104(d)(2) of the Act reads as follows:

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

It is not disputed that in this case there were no intervening "clean inspections."

The cited standard provides in part as follows:

> The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries, and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 3,000 cubic feet a minute.

Again, Y & O does not dispute the violation, but maintains that it was neither a "significant and substantial" violation nor the result of "unwarrantable failure" to comply with the cited mandatory standard. MSHA Inspector Herbert Cook was conducting a spot inspection at the Nelms No. 2 Mine on February 4, 1986, when he noticed that little air was ventilating the last open crosscut. He attempted to use his anemometer between the A and B entries on the right side of the last open crosscut but found because of the minimal air flow he was unable to obtain any reading. Cook then performed a smoke tube test and found from the computed results only 4,800 cubic feet of air per minute.

Cook then proceeded to the left side where two miners were "sweating profusely" as they were working. They asked Cook to check the air because they felt it was insufficient. Cook again attempted to use his anemometer, but found that the blades would not turn. Cook again took smoke cloud readings, and the computed results showed only 1,732 cubic feet of air per minute in the last open crosscut, where 9,000 cubic feet per minute was required. Cook then found that only 9,500 cubic feet per minute of air was coming onto the entire section, whereas, 18,000 cubic feet per minute was the minimum necessary at the intake.

Cook observed that electrical equipment was operating on the section including roof bolters, continuous miners and two battery chargers. He opined that the condition was hazardous because the ventilation was insufficient to remove respirable dust and to dilute methane. Under the circumstances, it may be inferred that the violation was serious and "significant and substantial." Mathies, supra.

I do not, however, agree that the violation was the result of the "unwarrantable failure" of the operator to comply with the standard or of significant operator

negligence. It is undisputed that the preshift report shows that the section was properly ventilated when the readings were taken between 5 a.m. and 8 a.m. that morning. It is further undisputed that the section foreman had verified the adequacy of the ventilation shortly before 9:00 that morning. The mine fan gauge chart shows that the interruption of air flow began shortly thereafter and that the air deficiency was discovered by the inspector at around 9:25 that same morning. In addition, further investigation revealed that the air deficiency was primarily caused by a ventilation door being left open by an independent contractor who was constructing a new air shaft located some 2,000 feet from the section at issue. These mitigating circumstances clearly reduce the degree of negligence and negate an "unwarrantable failure" finding.

In reaching these conclusions, I have not disgregarded the testimony of Inspector Cook and union representative, Larry Ward, that the absence of air should have been known to the section foreman because of the absence of a "fresh breeze." However, I observe that Mr. Ward conceded on cross-examination that the difference between the required ventilation and that found by Inspector Cook was only about 1/2 mile per hour--a difference not detectable by the amount of breeze on the skin. Under the circumstances, Order No. 2823753 is modified to a "significant and substantial" citation under section 104(a) of the Act. See Secretary v. Consolidation Coal Co., 4 FMSHRC 1791 (1982).

DOCKET NOS. LAKE 87-9, LAKE 86-120-R, AND LAKE 86-121-R

At hearing, the Secretary moved for settlement of Order No. 2828630 (Contest Docket No. LAKE 86-120-R) proposing a penalty of $500. Y & O agreed to pay the penalty in full. I have considered the representations and documentation submitted in connection with the proposal and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. In light of the proffered settlement, Y & O also requested to withdraw its contest of said order. Under the circumstances, I accept the request to withdraw and Contest Proceeding LAKE 86-120-R is accordingly dismissed.

Order No. 2828634 alleges a violation of the standard at 30 C.F.R. § 75.1710-1(a)(2) and charges as follows:

> During an inspection requested by a representative of the miners, it was determined that a battery powered scoop tractor (Serial No. 4881141) was used to clean

up coal and other debris in and inby the last open crosscut in the main north section and the battery powered scoop tractor was not provided with a substantially constructed canopy or cab. The height of the coal bed was 62 inches. John Slates (section foreman) instructed David Parrish to operate the battery powered scoop in this area. 8-1-86.

The cited standard, 30 C.F.R. § 75.1710-1(a)(2) provides, in relevant part, as follows:

> Except as provided in paragraph (f) of this section, all self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified in paragraphs (a)(1), (2), (3), (4), (5), and (6) of this section, be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment, he shall be protected from falls of roof, face, or rib, or from rib and face rolls. The requirements of this paragraph (a) shall be met as follows: . . . (2) On and after July 1, 1974, in coal mines having mining heights of 60 inches or more, but less than 72 inches.

The violation is not disputed by Y & O. It acknowledges that the battery powered scoop tractor, absent the required canopy, had in fact been operated inby the last open crosscut on August 5, 1986. Y & O maintains in its posthearing brief, however, that the order, as an order under section 104(d)(1) of the Act, must fail because it cannot properly be issued on an "after-the-fact investigation." See fn. 1 supra. Whether or not this order was issued improperly in this regard is immaterial since I find for the reasons that follow that the order is in any event deficient.

The evidence shows that MSHA Inspector Ervin Dean was performing an inspection at the Nelms No. 2 Mine on August 4, 1986, when he was given a "section 103(g)" request-for-inspection by Union Safety Committeeman Larry Ward. In his request, Mr. Ward alleged that a battery powered scoop had been operated inby the last open crosscut of the main north section of the Nelms No. 2 Mine, without the use of a canopy on August 1, 1986. Based upon this request, Inspector

Dean convened a meeting in the office of Mine Superintendent Charles Wurschum. Present at that meeting were Inspectors Dean and Ohler, Mine Superintendent Wurschum, Safety Director John Woods, and Section Foreman John Slates.

The evidence shows that Slates was the section foreman in charge of the main north section on August 1, 1986, when the violation occurred. Slates admitted that he knew the subject scoop car did not have a canopy and knew that it was required to have a canopy under the pertinent standards. Slates further conceded that he ordered the scoop car to be operated without a canopy in the last open crosscut, and that he knew it was a violation.

On August 5, 1986, Inspector Dean returned to the Nelms No. 2 Mine and performed a physical inspection of the area in which the subject scoop car had been operated on August 1, 1986, and measured the mining height. The mining height in the cited area was found to be 62 inches thereby necessitating the use of a canopy by July 1, 1974, under the cited standard.

The only basis for Inspector Dean's conclusion that the violation was "significant and substantial" however was evidence that the roof in the cited area was "shaly" and that the area was being rehabilitated thereby allowing the roof an opportunity to "work." Dean's opinion that the employee working inby the last open crosscut would be in an area within 25 feet of the face "where most roof falls occur" adds little weight to his conclusion. The scoop was merely performing cleanup work in an area in which other miners could legally be performing other work without a cab or canopy. Accordingly I do not find that the Secretary has met the requisite burden of proof for establishing this as a "significant and substantial" violation. Mathies, supra.

Order No. 2828634 must therefore fail as an order under section 104(d)(1) of the Act, and is accordingly modified to a citation under section 104(a) of the Act. Consolidation Coal Co., supra. For similar reasons, I find that the Secretary has failed to prove the violation to be of high gravity.

I do find, however, that the violation was the result of gross operator negligence and indeed was a willful violation. The responsible section foreman readily admitted that what he did was a violation and that he nevertheless directed his employee to work in the last open crosscut on equipment not provided with the requisite canopy.

Civil Penalties

In assessing civil penalties for the contested violations herein, I have also considered the undisputed evidence of the operator's history of violations, size and good faith abatement of the cited conditions. Accordingly, the following civil penalties are found to be appropriate for the contested violations: Citation No. 2823753 - $750; Order No. 2823823 - $750; Citation No. 2828634 - $400.

ORDER

The Youghiogheny & Ohio Coal Company is hereby ordered to pay the following civil penalties within 30 days of the date of this decision: Citation No. 2823824 - $20; Citation No. 2823753 - $750; Order No. 2823823 - $750; Order No. 2828630 - $500; Citation No. 2828634 - $400. The Contest Proceedings are dismissed or granted in part in accordance with this decision.

Gary Melick
Administrative Law Judge

Distribution:

Robert C. Kota, Esq., Youghiogheny & Ohio Coal Company, P.O. Box 1000, St. Clairsville, OH 43950 (Certified Mail)

Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 8 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 87-40 A.C. No. 05-03644-03535
v.	:	Coal Creek Prep Plant
MID-CONTINENT RESOURCES, INC., Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Cetti

Statement of the Case

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., ("Mine Act"). The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges the operator of a coal mine with violating a safety regulation, 30 C.F.R. § 48.28(a) which requires each miner to receive a minimum of 8 hours of annual refresher training as prescribed in the section.

This proceeding was initiated by the Secretary with the filing of a proposal for assessment of a civil penalty. The operator filed a timely appeal contesting the existence of the alleged violations and the amount of the proposed $200 penalty.

Discussion

When this civil penalty proceeding was called for hearing on April 28, 1987, the parties announced upon the record that they had reached a settlement.

Counsel for the petitioner moved to amend the citation from a significant and substantial violation to a non-significant and substantial violation and to reduce the proposed civil penalty from $200 to $20. Respondent, in turn, moved to withdraw its notice of contest.

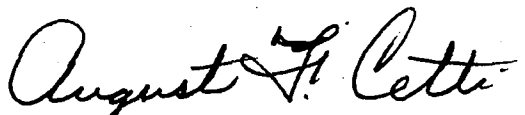
The motions were based on the fact that further study and investigation established that the miner in question had received annual refresher training but the MSHA form sent in by the operator was not properly filled out as to the type of training he received or possibly that he received "underground" training rather than the "surface" training he should have received. The miner had at one time been given complete underground coal training and had received annual retraining as appropriate in January each year. His entire employment with respondent had been on the "Rock Tunnel Project" and in the Coal Basin Preparation Plant.

After careful review and consideration of the pleadings, arguments, and the information placed upon the record at the hearing, I am satisfied that the proposed settlement disposition is reasonable, appropriate and in the public interest.

Accordingly, the motions made at trial are granted.

ORDER

Citation No. 2831755 is amended to allege a non-significant and substantial violation of safety regulation 30 C.F.R. 48.28(a) and, as amended the Citation is affirmed and respondent is ORDERED to pay a civil penalty of $20 within 30 days from the date of this decision.



August F. Cetti
Administrative Law Judge

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 8 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 85-152-M
	:	A.C. No. 04-03008-05509
	:	Oro Grande
v.	:	
	:	Docket No. WEST 86-157-M
VINNELL MINING & MINERALS CORPORATION, Respondent	:	A.C. No. 04-03008-05510
	:	Oro Grande Silica Mine

DECISION

Appearances: Leroy Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner;
Mr. Don L. McRae, Vice President, Vinnell Mining & Minerals Corporation, El Monte, California, pro se.

Before: Judge Lasher

These proceedings were initiated by the filing of petitions for assessment of a civil penalty by the Secretary of Labor pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a)(1977). The Secretary seeks assessment of penalties for a total of 13 alleged violations involved in the two dockets.

After the hearing in Victorville, California on April 8 and 9, 1987, the parties reached a settlement, which is here approved, involving 9 of the 13 alleged violations. Pursuant thereto, Respondent agrees to pay the full amount of Petitioner's initially proposed penalties, to wit:

Citation No.	Penalty
2671481	$ 20.00
2671484	20.00
2671485	20.00
2671486	20.00
2671488	20.00
2364698 (Docket 85-152-M[1]/)	119.00
2671482	91.00
2671487	91.00
2671489	68.00

1/ This Citation is the only one involved in Docket WEST 85-152-M. The remaining 12 Citations are contained in WEST 86-157-M.

With respect to five of these Citations, Nos. 2671481, 2671484, 2671485, 2671486, and 2671488, the Secretary did not designate the violations involved as "Significant and Substantial". As to the remaining four Citations resolved by the agreement, Nos. 2364698, 2671482, 2671487, and 2671489, the parties have agreed that the violations described therein were "significant and substantial".

Four of the original 13 Citations (Nos. 2671483, 2671490, 2671491 and 2671492) remain for disposition. As part of their settlement, the parties agree that the "significant and substantial" designation thereon should be deleted and such will be so ordered subsequently herein. The occurrence of all violations being conceded, the issues involved for determination here are the amount of appropriate penalties which should be assessed for the four violations cited in Citations Nos. 2671483, 2671490, 2671491, and 2671492.

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

Based on written stipulations submitted by the parties prior to hearing, I find this to be a small mine operator (T. 60) with an average history of prior violations (11 in the preceding 24-month period) who proceeded in good faith to promptly abate these four violations upon notification thereof. Payment of appropriate penalties will not jeopardize Respondent's ability to continue in business. The remaining mandated assessment factors, negligence and gravity, are separately discussed below as to each of the four Citations.

CITATION NO. 2671483

The standard infracted, 30 C.F.R. § 56.12032, provides:

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

The violative condition (or practice) involved is described in the subject Citation as follows:

"The main electrical panels cover plates were not in place. The panels were rated on high voltage. In the event a person would come in contact with energized part a serious injury would occur."

When observed by MSHA Inspector Edmundo Archuleta, the cover plates were laying on the ground in an unlocked building, an 8 x 20 trailer. The Inspector was advised that an electrical contractor was installing a new electrical system-but no one was in the area (including employees) when the condition was observed, nor were any warning signs up. The panel (conductors) was energized at the time. A sign on the one door to the trailer said: "Danger High Voltage". The record indicates that had someone tripped or otherwise have contacted the exposed energized wires, a fatality could have resulted. The Inspector felt it was likely that such event could have occurred and that one person would have been exposed to the hazard. Respondent showed that there was no reason for any employee to have been in the building and that the electrical contractor was the one who removed and left off the cover plates. There was no evidence as to the length of time the cover plates were off the panel. The electrical contractor worked for Respondent for approximately four months months and the inspection was conducted approximately midway or toward the end of such period (T. 140).

This is found to be a serious violation which resulted from the negligence of Respondent. Since it is not a "significant and substantial" violation, a penalty of $75.00 is found appropriate.

CITATION NO. 2671490

The standard infracted, 30 C.F.R. § 56.9007, provides:

"Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length."

The violative condition cited is described in the Citation as follows:

"The conveyor belt feeding the stacker conveyor belt was not equipped with an emergency stop device with stop cord. The conveyor belt was in the area where person (sic) walk and work on it."

At the hearing, Respondent contended that while the conveyor had no emergency stop device and was unguarded it had no "walkway" and was not covered by standard. Pursuant to the settlement herein, however, the violation was conceded.

The record indicates that the plant was not operating on the day the violation was observed by the Inspector. The hazard envisaged by the Inspector was that an employee could be caught in the pinch points while cleaning up spillage around the

conveyor. Only one miner would have been jeopardized by the hazard created. Respondent presented convincing evidence that because of the distance above ground at the particular place where an employee might encounter the hazard there was only an extremely remote chance that he would come into contact with the pinch points (T. 213-214, 231-233).

In view of the facts that the plant was not operating on the day the violation was observed, the remoteness of the risk created by the violation ever coming to fruition, and the strength of Respondent's justification for questioning the application of the standard to the condition to begin with, it is concluded that only very moderate degrees of negligence and gravity should be attributed to this violation. A penalty of but $25.00 is found appropriate and is assessed.

CITATION NO. 2671491

The standard infracted, 30 C.F.R. § 56.9007, is the same as that quoted above in connection with the previous Citation. The violative described therein is as follows:

> "The stacker conveyor belt in the main plant was not equipped with an emergency stop device with stop cord. The conveyor belt is located where persons walk by it or have to work on it."

The Inspector's determinations with respect to this Citation were the same as those made in connection with the previous Citation, No. 2671490 (T. 243). The injuries he contemplated had an accident occurred ranged from the type which might result in "lost time" to those which might result in a fatality. The Inspector's opinion was that the Respondent was negligent since the violation was in "plain view" and that the degree of such negligence was but "moderate" since the plant was not in operation on the day of inspection. Respondent's evidence again established that because of the height of the place where the hazard was present it was "possible" but not likely that an injury would result therefrom. As in the case of the violation described in Citation No. 2671490, I conclude that only low degrees of gravity and negligence should be attributed to this violation. A penalty of $25.00 is assessed.

CITATION NO. 2671492

The standard violated, 30 C.F.R. § 56.14001, provides:

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

The violative condition involved is described in the Citation as follows:

"The head pulleys on the west side of the cone crusher under conveyor belt was not guarded. The unguarded pulley was within the reach of persons who walk or work by the unguarded pulley."

The Inspector testified that the injuries which could result from this violation ranged from those resulting in "lost work-days" to fatalities. The hazard he foresaw was "if somebody was cleaning up or doing maintenance, they could come in contact with the unguarded pinch point and somebody could have also stumbled in and fell into the belt." He also attributed but a moderate degree of negligence to Respondent since he felt that after completion of the "expansion" program in progress at the time, Respondent would have installed appropriate guarding. The violative condition was open "to plain view." (T. 263). As with other violations, Respondent established that the plant was not running on the day in question. Respondent also showed that it was quite unlikely that cleaning up spillage would be attempted while the plant was in operation and the belts running (Tr. 266-267). Accordingly, the violation is found to be of a low degree of gravity and to have resulted from only a moderate degree of negligence on Respondent's part. As with the prior three violations, the "significant and substantial" designation is to be deleted-warranting a reduction in penalty. A penalty of $25.00 is found appropriate.

ORDER

Respondent shall pay the Secretary of Labor within 30 days from the date hereof the penalties hereinabove individually assessed for the 13 violations in the total sum of $619.00.

Citation Nos. 2671483, 2671490, 2671491, and 2671492 are modified to delete that portion thereof designating such violations as being "significant and substantial" and are affirmed in all other respects; the other nine Citations involved are affirmed in all respects.

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

Distribution:

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 8 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 85-154-M A.C. No. 05-03695-05512 A
v.	:	Docket No. WEST 85-163-M A.C. No. 05-03695-05513 A
BERT W. BIELZ, JR., and RICHARD McNEELY, Respondents	:	Silver State Mining Corporation Iron Clad Mine

DECISION APPROVING SETTLEMENT

Before: Judge Morris

These are consolidated civil penalty proceedings initiated by the petitioner against respondents in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

In Docket No. WEST 85-154-M respondent Bielz is charged in Citation 2099741 as an agent of the corporate mine operator with knowingly authorizing, ordering or carrying out the operator's violations of the mandatory safety standards published at 30 C.F.R. § 55.5-2 and § 55.5-5.

In WEST 85-163-M the same charges in Citation 2099742 are pending against respondent McNeely as an agent of the corporate mine operator.

Under section 110(a) of the Act, the corporate mine operator was assessed a civil penalty of $1,000 for its violation of 30 C.F.R. § 55.5-2 and a civil penalty of $5,000 for its violation of § 55.5-5. See Secretary of Labor (MSHA) v. Silver State Mining Corporation, FMSHRC Docket No. WEST 84-145-M. The case, decided by Commission Administrative Law Judge Gary Melick on April 2, 1987 has not been appealed.

In the present proceedings under section 110(c) of the Act, a civil penalty of $200 for violating 30 C.F.R. § 55.5-2 and a civil penalty of $2,000 for violating 30 C.F.R. § 55.5-5 were proposed against each of the respondents herein.

Respondents now desire to withdraw their contests in these proceedings and they have tendered to the Secretary two separate checks in the amount of $2,200 each, representing payment in full of the proposed civil penalties herein.

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

Accordingly, I enter the following:

ORDER

1. The settlement is approved.

2. In WEST 85-154-M the Secretary's petition is affirmed.

For the violation of Citation 2099741 a civil penalty of $200 is assessed.

For the violation of Citation 2099742 a civil penalty of $2,000 is assessed.

3. In WEST 85-163-M the Secretary's petition is affirmed.

For the violation of Citation 2099741 a civil penalty of $200 is assessed.

For the violation of Citation 2099742 a civil penalty of $2,000 is assessed.

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 8 1987

HENRY C. STAIRS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEST 86-198-DM
COEUR d'ALENE MINES CORPORATION, Respondent	:	MD 86-34

ORDER DISMISSING WITH PREJUDICE

Complainant Henry C. Stairs died July 10, 1986, leaving no surviving spouse. Although the known next of kin have been contacted, no one has been appointed to serve as Personal Representative of the Complainant's estate or indicated any interest in such an appointment.

Finally, on May 12, 1987, a Notice that the case would be dismissed with prejudice unless a Personal Representative was appointed and made an appearance in this matter within 20 days was sent by certified mail to all known next of kin. There has been no response to the Notice of intention. Under the circumstances Coeur d'Alene Mines Corporation is entitled to an order dismissing the case with prejudice.

ORDER

Good cause having been shown it is ORDERED that the above captioned case be and it hereby is dismissed with prejudice.

August F. Cetti
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUN 9 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 85-312
	:	A. C. No. 36-06352-03505
v.	:	
	:	Iselin Mine
ALT, INCORPORATED, Respondent	:	

DECISION

Appearances: Mark Swartz, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Donald P. Tarosky, Esq., Greensburg, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

The Secretary (Petitioner) filed a petition for Assessment of Civil Penalty for an alleged violation by Respondent of 30 C.F.R. § 77.1001. Pursuant to notice the case was heard in Pittsburgh, Pennsylvania, on March 12, 1987. Wendell A. Hill testified for Petitioner, and Harold Altmire and Jay Altmire testified for the Respondent.

Petitioner, at the onset of the hearing, made a motion to disallow Respondent from introducing evidence on the issues of "significant and substantial" and "unwarrantable failure." Decision was reserved to allow the Parties to brief this issue.

Petitioner filed its posthearing brief on May 7, 1987, and Respondent filed its brief on May 13, 1987.

Stipulations

The Parties have stipulated as follows:

1. Alt, Incorporated owned and operated the Iselin Mine on May 5, 1985, and is subject to the jurisdiction of the Federal Coal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164 (Act).

2. Alt, Incorporated owned and operated the Iselin Mine as of November 19, 1984.

3. The Iselin Mine is a surface coal mine and is subject the regulations found at 30 C.F.R., Part 77.

4. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Act.

5. A copy of Citation Number 2409178 (attached to the Petition for Adjudication (sic.) of Civil Penalty) is an authentic copy of the original citation.

6. The Parties stipulate to the authenticity and admissibility of the following documents:

a. A copy of Citation Number 2409178 issued by Wendell E. Hill on May 15, 1985.

b. A copy of the inspector's notes prepared by Wendell E. Hill concerning his May 15, 1985 inspection of the Iselin Mine.

7. During the period from November 19, 1984 through May 14, 1985, the Alt, Incorporated Iselin Mine had a history of one assessed and paid violation: 104(a) Citation Number 2408087 issued on February 1, 1985, with an assessment of $20.00.

8. The assessment of $500 penalty in this matter will not affect the Respondent's ability to continue in business.

9. Currently, there is no production at the Iselin Mine.

Issues

The issues are whether the Respondent violated 30 C.F.R. § 77.1001 and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and affect of a mine safety or health hazard, and whether the alleged violation was the result of the Respondent's unwarrantable

failure. If section 77.1001, supra, has been violated, it will be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., (the "Act").

Citation

Citation 2409178, issued on May 15, 1985, alleges a significant and substantial violation in that "loose hazardous material was not placed for a safe distance from the top of the highwall there was a piece of rock 10 feet long, 5 and 1/2 feet wide, and 8 to 12 inches thick that had not been removed."

Regulation

30 C.F.R. § 77.1001, as pertinent, provides as follows: "Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls...."

Findings of Facts and Conclusions of Law

I

On May 15, 1985, Wendell A. Hill, MSHA Inspector, with over 13 years of experience as an inspector, arrived at Respondent's Iselin Mine (a surface mine) to make a complete inspection. While in the pit, Hill observed a rock overhanging, or jutting out from the top of the highwall. He estimated the size of the overhanging rock to be 6 feet long, 5 and 1/2 feet wide, and 8 to 10 inches thick. He told the two miners, who were working in the pit, to stay clear of the rock. He then proceeded to the top of the highwall to make a closer examination of the rock. He observed a crack 2 or 3 feet from the tip of the rock. He testified that there was no dirt or other material on top of the rock that was jutting out. Hill described the rock as sand rock and estimated its weight to be more than a ton. Hill brought the rock to the attention of the Respondent's President, Harold Altmire, and indicated that it should be taken down. Altmire agreed to cooperate, and made a road to the top of the highwall so that a backhoe could be driven there to remove the rock. Jay Altmire, a miner employed by Respondent, took the backhoe to the top of the highwall to remove the rock. Hill testified that he stood off to the side approximately 6 feet from the highwall when the backhoe was removing the rock. It was further his testimony that no dirt had to be removed from the top of the rock and that it was only necessary to remove soil from behind the rock. He further stated that when the bucket of the backhoe initially touched the back of the rock, which was lying on solid ground, the tip fell off. He estimated that it took approximately 30 seconds for the backhoe to dislodge and push the rock

down the highwall. When Hill returned to the pit, he measured two large pieces of rock that had fallen down as being 6 feet long, 5 and 1/2 feet wide, and 8 to 10 inches thick, and 3 feet wide, 4 feet long, and 8 to 12 inches thick respectively. He indicated that the latter rock was the piece that had broken off when the bucket of the backhoe touched the rock.

Hill offered his opinion that prior to its removal the rock was loose as it was overhanging the highwall and there were no rocks on top of it. He also opined that it could have been shaken loose by vibrations from equipment present at the mine or from thunderstorms. He also testified, in essence, that rain could have washed out the dirt around the rock and caused it to fall.

Harold Altmire, who has over 25 years experience running open pit mining operations, testified that the rock at issue had been in the same position for about 5 or 6 days prior to May 15, 1985. He stated, in contrast to Hill, that when he saw the rock during a preshift examination on May 15, 1985, he was about 12 feet away and did not see any cracks in it. He testified that when he observed the rock from the pit that it was not extended over the edge of the pit. He also said that there was rock, soil, dust, and clay on top of the rock in question and that in addition it was covered by another rock. All these observations were corroborated by Jay Altmire, who further testified, in contrast to Hill, that the latter was not present when he operated the backhoe, and that it took him (Jay Altmire) approximately 4 minutes to remove the dirt from the rock and push it off the highwall. Harold Altmire also testified that after Hill told him to remove the rock, the latter drove up the haul road and returned after the rocks were removed. Jay Altmire testified that about a week prior to May 15, his brother tried to remove the rock with a dozer and could not. Harold Altmire testified that in his opinion the rock was not in any danger of falling. He said that if he thought there was any danger of the rock falling, that he would have removed it as he would not have wanted to cause any injury to his two sons who were the only miners working below in the pit.

Harold Altmire's testimony with regard to the condition of the rock was corroborated by the testimony of his son Jay. The latter's testimony that Hill was not present when he (Jay Altmire) removed the rock finds some corroboration in the testimony of Harold Altmire. However, I have adopted that version testified to by Hill. There was no motive adduced which would tend to impeach the credibility of Hill's testimony. On the other hand, the father-son relationship between Respondent's only two witnesses, tends, to some extent, to dilute the corroborative nature of their testimony. Moreover, the veracity of Hill's testimony is but-

tressed by the existence of contemporaneous notes that he made of his inspection. In a note, which, according to his testimony, was written when he observed the rock from the pit, he described the rock as being 6 feet long, 5 and 1/2 feet in width, and 8 to 12 inches thick, and being "at top of highwall edge" (emphasis added). (Government Exhibit 2, page 5.) Also, on pages 8-9, of Government Exhibit 2, there are contemporaneous statements by Hill that "once the backhoe was in place at the top of the highwall the piece of crack 3 feet wide by 4 feet by 8 to 12 inches thick broke off and rolled into the pit." Page 7, of Government Exhibit 2, contains a contemporaneous statement that it took the backhoe 30 seconds to move the rock. Also, I find Hill's description of the rock more reliable. When he observed it on May 15, from the top of the highwall, he was only 6 feet from the rock and examined it specifically as he was apparently concerned about its condition when he had observed it from the pit. In contrast, although Harold Altmire had seen the rock prior to May 15, when he saw it on that date he was 12 feet away, and observed it in the course of his general examination. Inasmuch as his attention had not been specifically drawn to the rock, in contrast to Hill, it is concluded that Altmire's examination of the rock on May 15 was not as thorough as that of Hill's.

Accordingly, based on the testimony of Hill, I conclude that on May 15, 1985, there was a portion of rock, approximately 6 feet long, 5 and 1/2 feet wide, and 8 to 12 inches thick, with a crack in the tip, that was hanging over the top of the highwall. I also conclude, based on the testimony of Hill, that there were no rocks or other material on top of this portion of the rock. Based upon these conditions, I conclude that the rock was "loose" and was within the purview of section 77.1001, supra. In reaching this conclusion I took into account the plain meaning of the term "loose" as defined in Webster's New Collegiate Dictionary as follows: "1a: not rigidly fastened or securely attached b(1) : having worked partly free from attachments...."

Although Harold Altmire indicated that, in his opinion, the rock was safe, he did not specifically rebut any of Hill's opinions that the rock could have been shaken loose by vibrations, or washed out by rain water. Accordingly, I find that the rock in question constituted a "hazardous" material within the purview of section 77.1001, supra. This conclusion is further buttressed by Hill's testimony, which I previously adopted, that the rock had a crack in it, and when initially touched by the bucket of the backhoe, resulted in the tip breaking off and falling down to the pit. Thus, I find that section 77.1001, supra, has been violated.

II

Although Respondent did not contest the citation herein within 30 days, I find good cause to excuse Respondent, based upon the testimony for Altmire, that when the section 104(d)(1) order

was terminated on May 15, 1985, he assumed that the matter had been resolved. Petitioner has not alleged that it has suffered any legal prejudice in Respondent's being allowed to present evidence on the issues of "significant and substantial" and "unwarrantable failure." In these circumstances, I find 29 C.F.R. § 2700.22 to be controlling, in that the Respondent should not be precluded from challenging the findings, in the citation, of "significant and substantial" and "unwarrantable failure." Accordingly, I deny Petitioner's motion to disallow Respondent from introducing evidence on the issues of "significant and substantial" and "unwarrantable failure."

III

Respondent has argued that, considering the testimony of its witnesses, there is no basis for a finding of "significant and substantial." However, applying the criteria set forth by the Commission in Mathies Coal Company, 6 FMSHRC 1 (January 1984), I find, based upon the testimony of Hill, that I found reliable, that section 77.1001, supra, has been violated and that the violation herein constituted a discrete safety hazard. Furthermore, concerning the dimensions of the rock, and its characterization as sand rock, as testified to by Hill, and considering that this rock has a weight of about 150 pounds per cubic foot, as indicated by Government Exhibit 4, page 18, I conclude that there was a reasonable likelihood that in the event of the rock falling there would be an injury, of a reasonably serious nature, to either of the two miners, who were working in the area. In this connection, I note the testimony of Jay Altmire that he was working throughout the area of the pit unprotected, and it was the uncontradicted testimony of Hill that rock falling down the highwall into the pit could have bounced through the window of the equipment being operated by John Altmire causing serious injury. Accordingly, based on the above, I conclude that the nature of the violation herein was "significant and substantial."

IV

Respondent has argued that any alleged violation was not due to its "unwarrantable failure", as Altmire testified that a State Inspector, who inspected the subject mine on May 10, 1985, did not mention the hazard of the rock. Nor did the latter cite Respondent for the alleged condition. I did not place much weight on the conclusions of the inspector, a person who did not testify. Further, the written State Inspection Report, Respondent's Exhibit 2, does not indicate that the subject rock was specifically examined.

In essence, it was the testimony of both Harold Altmire and Jay Altmire that they were aware of the existence of the rock prior to May 15. Harold Altmire even saw the rock when he made his preshift examination on May 15, 1985. Accordingly, I conclude based, on the testimony of Hill, that a close examination of the rock by either of Respondent's witnesses, as performed by Hill, would have revealed a crack in the rock and the fact that the rock was hanging over the highwall. Thus, I conclude that the violation herein resulted from Respondent's "unwarrantable failure."

V

Having considered the criteria in section 110 of the Act, supra, and considering the Respondent's high degree of negligence and the seriousness of the violation, I conclude that the penalty of $500, as proposed by Petitioner, is appropriate.

ORDER

It is ORDERED that Respondent pay the sum of $500, within 30 days of the date of this decision, as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 10, 1987

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

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

In response to the Disapproval of Settlement and Order to Submit Information dated May 6, 1987, the parties have now submitted additional information to justify the proposed settlement of Order No. 2644520A. The penalty was originally assessed at $300 and the proposed settlement is for $150.

In the joint motion to approve settlements dated April 4, 1987, the parties represented that the 50% reduction in the originally assessed amount was justified because "negligence [was] less than originally assessed." Because no reasons were given to support this representation, the motion was denied and the parties were ordered to submit additional information.

The operator's attorney now advises that the operator had in effect a safety manual and a policy prohibiting the subject activity. In addition, she states that affidavits of the individuals involved indicate that despite the violation they were in fact, attempting to perform the construction in a safer manner than may otherwise have occurred.

The Solicitor represents that letter from the operator's attorney contains the factual basis for their decision to reduce the penalty.

It appears that reduction in the negligence factor is warranted under applicable Commission precedent. Southern Ohio Coal Company, 4 FMSHRC 1459 (1982). However, the operator must be aware that it has a duty not only to have a safety policy, but to enforce it through appropriate measures including supervision and training.

In light of the foregoing I approve the recommended settlement.

With respect to the three other violations involved in this case, the Solicitor has moved to vacate Order No. 2644520B and the operator has agreed to pay the original assessments of $300 each for Order Nos. 2644520C and 2644520D. The April 4, 1987, motion to approve settlements addressed these violations in light of the six statutory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. I accept these recommended settlements.

Accordingly, the motion to approve settlements is GRANTED and the operator is ORDERED TO PAY $750 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 11 1987

METTIKI COAL CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. YORK 87-1-R
	:	Order No. 2701331; 9/10/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. YORK 87-2-R
	:	Order No. 2701332; 9/10/86
	:	Docket No. YORK 87-3-R
	:	Order No. 2701333; 9/11/86
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 87-5
	:	A. C. No. 18-00621-03568
v.	:	
	:	"A" Mine
METTIKI COAL CORPORATION, Respondent	:	

DECISION

Appearances: Susan Chetlin, Esq., Crowell & Moring, Washington, DC, for Mettiki Coal Corporation;
Edward Fitch, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," to challenge three withdrawal orders issued by the Secretary of Labor under Section 104(d)(2) of the Act and for review of civil penalties proposed by the Secretary for the violations alleged therein. 1/

1/ Section 104(d) of the Act reads as follows:
"(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and

Order Number 2701331 alleges as follows:

"In the A-portal in the designated haulage number 4 intake air entry beginning about 100 feet inby the tunnel lining and extending inby to break number 10 where 7 x 9 inch wooden cross-bars had been installed for additional roof supports there were no indications that the operator of this mine made an effort to promptly reset the dislodged legging that had been dislodged by diesel powered equipment (rubber tire) one leg under one end of 12 of the bars has been dislodged and both legs under both ends of 9 of the bars had been dislodged."

The Secretary alleges that these facts constitute a violation of that part of the standard at 30 C.F.R. § 75.202

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fn. 1 (Continued)
if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

(entitled "Roof Support Materials") which reads as follows: "Except in the case of recovery work, supports knocked out shall be replaced promptly."

The Mettiki Coal Corporation (Mettiki) does not dispute the factual allegations set forth in the order, but maintains that those facts do not constitute a violation of the cited standard since the cited "leggings" that had been dislodged were not in fact performing a roof support function. Mettiki claims that, consistent with that part of the cited standard requiring "safety posts, jacks, or other devices" be used as temporary supports to hold crossbars in place during installation, once the crossbars at issue herein were permanently installed with roof bolts there was no continuing obligation to keep the legs in place. Finally, Mettiki argues that while the regulation admittedly requires that any device performing an active support function must be promptly replaced if dislodged, the legs cited herein were not performing such a function.

According to Blucher Allison, Mettiki's chief engineer, (a graduate mining engineer with 41 years experience in the mining industry) Mettiki was, at the time the order was issued, in full compliance with its roof control plan. It is a "full roof bolting plan" with roof bolts as the primary means of support. According to Allison the cited legs had been placed under the crossbars as temporary support in compliance with Item Number 7 of its roof-control plan (Exhibit C-5) while the crossbars were bolted into the roof. The legs were not subsequently removed after the crossbars were affixed with roof bolts because it was not cost effective to do so.

The crossbars were bolted on 2 foot centers with two 6 foot resin-grouted bolts and one 16 foot combination bolt. Allison observed that once the crossbar was bolted into position it formed a laminated beam of strata by putting the roof into compression and the legs then no longer contributed to the roof support. Indeed Allison opined that should the roof bolts ever fail the legs would fail too. Accordingly, he also believed that there was no likelihood of a roof fall resulting from the removal of the legs alone. Allison also observed that the roof control plan does not require legs under crossbars except when timbering is used as the sole means of roof support. (See Item Number 10 of the Roof Control Plan, Exhibit C-5).

MSHA Inspector Phillip Wilt disagreed with Allison and maintained that the legs were in fact "supports" within the meaning of the cited standard. It is apparent however that Inspector Wilt was not familiar with the support system being used by Mettiki in the cited entry. Wilt did not know the length of the roof bolts being used and apparently thought that

timbering was the primary method of roof support. Under such a system it is essential that the crossbars be supported by legs (Tr.42). Indeed Wilt thought that the roof bolts here were used only to hold the crossbars in position to protect workers should the legs become dislodged. Under the circumstances I am not persuaded by his testimony. I am convinced by the expert testimony of Mining Engineer Allison that the displaced legs were not in fact permanent "roof supports" within the meaning of the cited standard. The fact that temporary supports have been left in position does not alone make those supports a part of the permanent support system. Under all the circumstances there was no violation and the order must therefore be vacated.

Order Nos. 2701332 and 2701333 allege violations of the standard at 30 C.F.R. § 75.305 and more particularly that part of the standard that reads as follows:

> In addition to the preshift and daily examinations required by this Subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in . . . at least one entry of each intake and return air course in its entirety . . . . The person making such a examinations and tests shall place his initials and date and time at the places examined, and if any hazardous conditions are found, such conditions shall be reported to the operator promptly . . . . A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book, approved by the Secretary, kept for such purpose in an area on the surface of the mine, chosen by the mine operator, to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

Order Number 2701332 alleges as follows:

> In the A-portal beginning at the entrance of the Number 4 intake designated haulage entry on the surface and extending inby to the east mains track haulage entry there are no initials, dates, and time to indicate that this entry is being examined at least once each week by a certified person for hazardous conditions, there are date boards posted at various locations in this entry and there were initials and dates on three of the boards. One was 10/2/85, one was 12/12/85 and one was 5/28/86 indicating that the 5/28/86 date could have been the last date this entry was properly examined by

a certified person in its entirety, the distance of the affected area was about 6000 feet.

Order Number 2701333 alleges as follows:

> This inspection began at 10:00 a.m. at Break Number 9, survey station number BR-95, and extended inby a distance of 3200 feet to survey station number A-827 in the Number 1 Skipper Return Air Entry and there were no initials, dates, or times throughout the entry to indicate that this entry was being examined in its entirety by a certified official at least once each week for hazardous conditions, including tests for methane. There were initials, date, and time indicating that the entry had been examined in its entirety by L. Sliger, certified official this date, 9/11/86, prior to this inspection. But according to other initials and dates in various locations in the entry the last examination conducted prior to this date was 4/02/86, conducted by Alan Smith who was at that time mine foreman at this mine.

Mettiki does not dispute the factual allegations contained in these two orders, and indeed, readily acknowledges that the cited entries were, in fact, not inspected under the cited standard. It nevertheless maintains that there was no violation of the standard because "at least one entry of each intake and return air course was examined in its entirety" in accordance with the standard. Mettiki points out that the standard requires a weekly examination of only one entry of each intake and return air course, but does not require the examination of all entries of each intake and return air course. The Secretary maintains, on the other hand, that each of the cited entries in the above orders were separate and distinct "air courses" and did not constitute separate entries of the same air course. Accordingly the Secretary argues that the violation is proven as charged.

It is undisputed that Metiki's "A" Mine is ventilated by an exhaust fan with the air entering the Number 4 and 5 entries and then proceeding to all areas of the mine. The Skipper Number 1 intake entry is ventilated with mixed air from both the Numbers 4 and 5 entries. At the Number 9 crosscut some of this air separates into the main section through the Number 5 track entry (which was being examined in compliance with 30 C.F.R. § 75.305). The air from the Skipper Number 1 intake and the Number 5 track entry again merges at the Number 40 crosscut. Indeed the undisputed evidence shows that the air in the skipper entries mixes freely with that in the E-Mains.

MSHA Supervisor Barry Ryan, opined that the Skipper Number 1 intake entry constituted a separate air course and accordingly was subject to weekly inspections under the cited standard separate from the inspections performed in the Number 5 track entry. Ryan's opinion was however completely arbitrary and not based on any definition of the term "air course" in any relevant statute, regulation, MSHA policy, or industry past usage. Moreover the Secretary presented no evidence of any prior consistent enforcement under his proferred definition of the term "air course" that might have established that Mettiki was on notice regarding the Secretary's interpretation. See Jim Walter Resources Inc. v. Secretary, 9 FMSHRC _____, Docket No. SE 85-36-R, et. al., May 29, 1987. To the contrary it is clear from the language of the regulation that each air course may consist of more than one entry. Mettiki's position herein is consistent with that language.

The Secretary similarly argues that with respect to Order Number 2701333, Mettiki's weekly examination of the Number 7 and Number 9 return escapeways was not sufficient because the Number 3 Skipper Return Air Entry [2]/ was a separate "air course" requiring a separate weekly inspection under the cited standard. However, for the reasons previously stated I find no legal or evidentiary support for the Secretary's arbitrary definition of the term "air course." To the contrary I find that Mettiki was examining on a weekly basis "at least one entry of each....return air course in its entirety" and was therefore in compliance with the cited standard.

Under the circumstances Order Nos. 2701332 and 2701333 must be vacated.

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[2]/ The entry at issue was cited in the Order at bar as the No. 1 Skipper Return Air Entry but the undisputed evidence shows that it was actually the No. 3 Skipper Return Air Entry. The order at bar was never amended to correct this error but in light of the findings herein, that issue is now moot

ORDER

Order Nos. 2701331, 2701332, and 2701333 are VACATED and the contests of those Orders are GRANTED. Civil Penalty Proceeding Docket Number YORK 87-5 is DISMISSED.

GARY MELICK
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 12 1987

THE HELEN MINING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 86-94-R Order No. 2696214; 1/28/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Homer City Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-181 A. C. No. 36-00926-03634
v.	:	Homer City Mine
THE HELEN MINING COMPANY, Respondent	:	

DECISION

Appearances: William T. Salzer, Esq, Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor; Ronald B. Johnson, Esq., Wheeling, West Virginia, for the Helen Mining Company.

Before: Judge Weisberger

Statement of the Case

In these proceedings, Helen Mining Company (Respondent) seeks to contest a section 104(d)(2) order issued on January 28, 1986. The Secretary (Petitioner) seeks a civil penalty for an alleged violation of 30 C.F.R. § 77.200. Pursuant to notice, these cases were heard in Pittsburgh, Pennsylvania, on December 16 - 17, 1986, and February 2 - 3, 1987. William McClure, Roger Jordan, George Hazuza, Shirley Rine, and Robert Nelson, testified for the Petitioner. Josep Dunn, Victor Tagliati, and Lynn Harding testified for the Respondent.

On February 26, 1987, in Pittsburgh, Pennsylvania, the Secretary took a deposition of Charles S. Battistoni.

The Petitioner submitted its Proposed Findings of Fact and Memorandum on April 13, 1987, and the Respondent submitted its Proposed Findings of Fact and Posthearing Brief on April 21, 1987. Time was allowed for Reply Briefs to be submitted, and Respondent submitted its Reply Brief on May 29, 1987. Petitioner did not file any Reply Brief.

On May 7, 1987, Petitioner filed a Motion for Decision and Order Approving Settlement to approve a settlement reached between the parties concerning order number 2696220.

Stipulations

1. The Helen Mining Company owns and operates the Homer City Mine and is subject to the jurisdiction of the Federal Coal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164 (Act).

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Act.

3. The subject order (number 2696214) and termination thereto were properly served by a duly authorized representative of the Secretary, William McClure.

4. A copy of order number 2696214 (attached to the Petition for Assessment of Civil Penalty) is an authentic copy of the original citation.

5. No intervening clean inspection within the meaning of the Act has been conducted at the Homer City Mine; consequently, the contestant is within the chain sequence of section 104(d) orders.

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based on the fact that the Homer City Mine had an annual production for 1985 of 807,434 tons of coal and production to the third quarter of 1986 of 617,250 tons of coal.

7. At the time of the issuance of order number 2696214 by Inspector Bill McClure, 13 of 53 forepole pad extensions were not in contact with the mine roof along the H-Butt No. 4 shortwall panel of the Homer City Mine.

8. At the time of the issuance of order number 2696214, the gap between the top of the forepole pad and the mine roof, at the 13 shields in question, ranged from between 2 to 14 inches.

Findings of Fact

1. On January 28, 1986, 9:45 a.m., MSHA Resident Inspector William McClure conducted a quarterly inspection at the H-Butt No. 4 shortwall panel at the Homer City Mine owned by The Helen Mining Company.

2. The shortwall method of mining utilizes a continuous mining machine which moves along the face of the shortwall panel and cuts a ten foot wide block of coal from the face. The length of the shortwall face at the H-Butt No. 4 panel was between 250 and 300 feet. The shortwall system employs a mechanized roof support system - hydraulically powered shields, made by Gullick-Dobson Ltd., that advance with the face.

3. Support is provided by a pressure arch from the main canopy of the shield to the coal face. This causes pressure to be exerted in the face area.

4. As the continuous miner makes its cut along the face, the individual shields on the headgate side of the panel are partially advanced into the void created by the miner's cut. As the shield is partially advanced, the forepole extension is extended towards the face in the area where coal has been removed. It takes approximately 2 hours for the miner to complete a pass.

5. The forepole pad component of the shield measures 48 inches wide by 28 inches long. The forepole pad is hydraulically extended out from within the forward canopy of the shield towards the face for a distance of approximately 5 feet. The forepole is designed to support up to approximately 14 tons where it is against the roof. If it is not against the roof, there is uncertainty as to its support capacity if hit by material falling from the roof.

6. The function of the forepole extension is to reduce the area of unsupported roof between the forward canopy tip and the face. (Tr. 98, 437; Deposition Tr. pp. 19-20.) It is not a critical area of a support (Tr. 440).

7. After McClure observed that some of the forepole pads were not touching the roof, Mick Lloyd, a representative of the manufacturer, who was present, told him that the forepoles should be in contact with the roof. I adopted this testimony as it was corroborated by Robert G. Nelson, a supervising Coal Mine Safety Health Inspector for MSHA, who testified for Petitioner. Also I note that in a deposition taken on February 26, 1987, Charles S. Battistoni, a MSHA Mine Health Safety Specialist on roof control, in essence stated, that on February 5, 1986, at a meeting with Respondent's staff, Lloyd agreed that the canopy tips should be

against the roof once the miner has cleared the shield. (Deposition Tr. 20-21.) It is significant that this is reflected in notes taken by Battistoni on the day of the meeting (Deposition 9-12, 21).

8. At the time of Inspector McClure's inspection, a void or caved area existed above three to four shields in the headgate entry where the operator had previously used cribbing and additional roof bolts to provide roof support over these shields. According to McClure this indicated to him that there was a "bad roof" at the headpole entry and "approximately" into the coal face (Tr. 104). The following day there were breaks and cracks observed over the shields in the immediate face area. (Tr. 506.)

9. Four of the 13 forepoles were not in contact with the mine roof due to a cavity in the roof above the pad where the roof had fractured and had fallen.

10. The 13 forepole pads not in contact with the roof were within 4 feet of the face. As a consequence of the cavity over two of the shields whose pads did not touch the roof, the area of the roof that was unsupported was approximately 8 feet by 3 feet. The remaining nine forepole pads were not in contact with the mine roof due to the fact that the continuous miner operator had cut too high into the mine roof.

11. The continuous miner was cutting too deeply into the roof since January 7, 1986, the date of the installation of the miner, 3 weeks prior to the issuance of order number 2696214. This problem was due to poor mining practices and Respondent was aware of this problem. Failure to correct the gap created by the miner at the end of a pass led to a bigger gap during the next pass by the miner.

12. Of the 13 forepole pads not in contact with the roof, four were adjacent.

13. Eight to 10 feet of mine roof extending outby the face was unsupported due to the lack of contact between the 13 forepole pads and the mine roof.

14. During a shift, five or six workers may travel underneath the forepole extensions to fulfill their work assignments. This finding is based upon the uncontradicted testimony of Roger Jordan, who works as a beltman for Respondent, and who serves as the Union's Safety Committee Man. He testified that every time he was at the face, at the shortwall section, he saw miners walking under the forepole pads.

15. In this section of the mine, pot outs occur on a daily basis.

16. Five or 6 of the 13 forepole pads not in contact with the roof, were approximately 2 inches below the roof. Contact with the roof could have been made by placing logging in the gap. This can be done from under the adjacent support.

17. There was approximately a 6 inch gap between the roof and 3 or 4 of the forepole pads. Contact with the roof could have been made by placing one crib block between the gap and the pad.

18. There was approximately a 14 inch gap between the roof and 3 or 4 of the forepole pads. This gap could have been bridged by constructing cribbing. A worker constructing such cribbing would be exposed to unsupported roof.

19. Respondent's approved roof control plan does not explicitly provide that the forepole pads be in contact with the roof.

20. Prior to the issuance of the subject order, Respondent did not have any knowledge that a failure to maintain roof contact with the forepole pad, at a point no greater than 4 feet from the face, constituted a violation of the roof control plan.

Regulatory Provision

30 C.F.R. § 75.200 provides as follows:

> Each Operator shall undertake to carry out on a continuing program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travel ways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

Approved Roof Control Plan

Drawing No. 16(b) states as follows:

***

3. The space in between the shield canopy extensions and the coal face shall not exceed 4 feet. Where this spacing is exceeded, roof supports shall be installed not to exceed 4 foot spacing before any work or travel is permitted in this unsupported area, except for the purpose of installing supports.

Issues

1. Whether the Respondent violated the approved roof cont: plan.

2. Whether the approved roof control plan provided that t] forepole pads of the Gulick-Dobson shield be in contact with the roof.

3. If the Respondent did not violate the roof control pla: whether it violated 30 C.F.R. § 75.200.

4. If a violation of a regulatory provision or the approv roof control plan occurred, was it of such a nature as could have significantly and substantially contributed to the cause a affect of a safety hazard.

5. If a violation of a regulatory provision or the approv roof control plan occurred, whether such violation was caused b Respondent's unwarrantable failure.

Discussion and Conclusions of Law

Based upon the Parties' stipulations, I conclude that the Helen Mining Company is subject to the jurisdiction of the Federal Coal Mine Safety and Health Act of 1977, and that I hav jurisdiction over this proceeding.

I

On January 28, 1986, when Federal Mine Inspector William McClure inspected the shortwall section of Respondent's Homer City Mine, 13 of 53 forepole pad extensions of the Gulick-Dobso shields, which were positioned within 4 feet of the face, were not in contact with the roof. McClure issued a 104(d)(2) order predicated upon the language of paragraph 3 of Drawing Number 16(b) of the approved roof control plan. However, a plain read

of paragraph 3, supra, reveals that it does not specifically require the forepole pads to be in contact with the roof at a point no more than 4 feet from the face. Furthermore, the second sentence of paragraph 3, supra, requires roof supports before any travel is permitted in the area "where this spacing is exceeded." The spacing that is referred to, clearly relates back to the first sentence of paragraph 3, which sets forth a maximum of 4 feet between the shield's canopy extensions, (the forepole pads) and the coal face. Inasmuch as all the forepole extension pads in question were not more than 4 feet from the face, it would appear that the installation of roof supports, pursuant to the second sentence of paragraph 3, supra, is not required.

Petitioner argues, in essence, that contact with the roof is the "requisite element of roof support." Although the record, in general, appears to support this proposition, it must be concluded, due to the language of paragraph 3, supra, that the roof control plan did not specifically require the forepole pads to be in contract with the roof no more than 4 feet from the face.

Furthermore, Petitioner has failed to establish that it was the clear intent of the parties, for the approved roof control plan to require that the forepole pads be in contact with the roof. On the other hand, in this connection, it is significant that Lynn Harding, who had served as Respondent's assistant safety director and safety director since 1976, has indicated, in essence, that the approved roof control plan for the shortwall operation using shields similar to those involved in the instant case, has been in effect for over 10 years and that MSHA never issued a citation or a safe-guard or an order pertaining to gaps between the forepole pads and the roof. This would tend to have some probative value with regard to the intent of MSHA when the language contained in paragraph 3, supra, was drafted. Joseph Dunn, Respondent's general mine foreman, indicated that he wrote the shortwall roof control plan 10 years ago, and that it was not his intent, in preparing the plan, that the forepole had to be in contact with the roof.

Inasmuch as a roof control plan, once approved, must be followed in the same fashion as a mandatory regulatory standard, it is of critical importance that the plan be unambiguous as to the requirements imposed upon the mine operator. I thus find that inasmuch as paragraph 3, supra, does not specifically mandate roof supports where the forepole pad extension is not in contact with the roof, the order issued herein cannot be predicated upon a violation of the approved roof control plan.

II

At the hearing, Counsel were asked to brief the issue as to whether, assuming a finding that the roof control plan was not violated, there still could be found a violation of a mandatory

regulatory standard. The Respondent, in essence, argues that because the inspector relied on the requirements of the roof control plan, this case must be decided upon a consideration of the requirements of that plan. In essence, Respondent argues that if it be found that it has not violated its roof control plan, then there should not be any consideration of whether a violation of the regulatory standard, section 75.200, supra, has occurred. In support of its position, Respondent relies upon the Commission's decision of Secretary v. U. S. Steel Mining Company, 7 FMSHRC 1125 (August 1985). In its decision, the Commission, in 7 FMSHRC, supra, at 1133, vacated the conclusion of the Judge, who originally heard the case, that section 75.200, supra, was violated even though the roof control plan was not. The Commission's action in this regard was based upon its remand to the Judge to make further specific findings with regard to the requirements of the roof control plan in question. As such, the Commission did not find, as a matter of law, that once it has been determined that a roof control plan has not been violated, that an inquiry may not be made as to whether section 75.200, supra, was violated. The Commission's usual practice, upon annunciating a rule of law, is to present a thorough discussion of the legal issues involved along with citations to pertinent authorities. In contrast, in U.S. Steel Mining Co., supra, the Commission limited its decision to a discussion of the need to ascertain the requirements of the roof control plan in question. It did not present any discussion as to whether, as a matter of law, a violation of section 75.200, supra, can occur absent a violation of a specific roof control plan.

In contrast, in cases before the Interior Board of Mine Operations Appeals, the Board had held that it is not necessary to provide a violation of a roof control plan to sustain the violation where the roof is not adequately supported. (See North American Coal Corp., IBMA Docket No. 73-42, 3 IBMA 93 (April 17, 1979); Ziegler Coal Co., Docket No. 73-29, 2 IBMA 216 (September 18, 1973).) It is significant to note that in Rushton Mining Company, IBMA Docket No. 77-19, 8 IBMA 14 (June 23, 1977), the Board held that the roof control plan is the minimum and it does not absolve the operator of the responsibility for additional supports. These cases have been followed by Commission Judges in cases cited by the Petitioner (See, Secretary v. CF&I Steel Corporation, 3 FMSHRC 1870 (July 1981); Secretary v. Leslie Coal Mining Company, 3 FMSHRC 1648 (June 1981).

Furthermore, the Federal Mine Safety and Health Act of 1977, supra, is a manifestation of the Congressional concern to enact legislation that would have the effect of protecting miners from the hazards of roof falls (see Secretary of Labor v. Consolidation Coal Company, 6 FMSHRC 34,37 n.4 (January 1984)). Thus to preclude an inquiry as to whether the statuary standard, section 75.200, supra, has been violated strictly on the basis that the Inspector's order was predicated upon a violation of the roof

control plan alone, would appear thwart Congressional intent to have miners protected from the hazards of roof falls. Accordingly, even though the Respondent herein did not violate the roof control plan, an inquiry must be had as to whether the regulatory provision, section 75.200, supra, has been violated.

As pertinent, section 75.200, supra, provides that ". . . . the roof . . . . of all . . . . working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." In Secretary v. Canon Coal Company, 9 FMSHRC 667 (April 1987), the Commission set forth the test to be used in determining whether section 75.200, supra, has been violated. The Commission, Secretary of Labor v. Canon Coal Company, supra, at 668 stated as follows:

> Questions of liability for alleged violations of this broad aspect of this standard are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the standard seeks to prevent. c.f. Ozark-Mahoning Co., 8 FMSHRC 190, 191-92 (February 1986); Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983); U.S. Steel Corp., 5 FMSHRC 35 (January 1983); Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982). Specifically, the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective -- not subjective -- analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue. See, e.g., Great Western, supra, 5 FMSHRC at 842-43; U.S. Steel, supra, 5 FMSHRC at 5-6.

Respondent's position, in essence, is that the manufacturer of the Gulick-Dobson shield never advised it that the forepole pad has to be in contact with the roof, that MSHA had never cited it in the past for not having forepole pads in contact with the roof, and that MSHA had never required it in the past to have the pads in contact with the roof. Respondent also relies upon testimony from Victor Tagliati; its shortwall coordinator, as well as from Dunn and Harding to the effect that the forepole pad does not have any support function and just serves as overhead protection from falling material. Also relied upon is Dunn's testimony that the forepole pads provide equivalent support whether they are in contact with the roof or 14 inches below the roof.

I do not find Respondent's arguments to be persuasive. Dunn and Tagliati testified, in essence, that from July 1985, when the Gulick-Dobson shields were installed until January 28, 1986, when the citation was issued, representatives from the manufacturer of the shields were at the mine on a daily basis. They each testified that they were never told by the manufacturer's representatives that it was not proper not to have the forepole pads in contact with the roof. However, I accepted the testimony of McClure, as corroborated by Nelson, that after he observed, on January 28, 1986, that some of the forepole pads were not touching the roof, the manufacturer's representative, Mick Lloyd told him the forepole pads should be in contact with the roof. I therefore, conclude that in fact Lloyd made this statement to McClure. It thus might be inferred that since Lloyd told McClure that the forepole pads should be in contact with the roof, it is likely that Lloyd made the same statement on other occasions to Respondent's employees.

Tagliati, Dunn, and Harding, all testified, in essence, that the forepole pad does not have any support function and its purpose is for overhead protection from rocks. While the record is clear that in creating a pressure arch the main support comes from the canopy portion of the shield, the forepole pads are, nonetheless, designed to support 13.9 tons. Dunn testified that the forepole pad does not have to come in contact with the roof and that it provides equivalent support if it is in contact with the roof or if it is 14 inches below. On the other hand, George Hazuzza, who presently reviews roof control plans on behalf of MSHA, testified, in essence, that although the forepole pad can support, in a static situation, approximately 13.9 tons, it is uncertain how much weight the forepole pad can support if it is not in contact with the roof, as it would depend upon the size and weight of material falling from the roof and the amount of distance it would fall from the roof to the forepole pad. I find this testimony of Hazuzza to be well reasoned, and I adopt it. Hence, it is clear that a reasonably prudent person familiar with the mining industry would have recognized the hazard created in not having the forepole pad placed up against the roof. This is especially true in the case of the four adjacent shields, whose forepole pads were not in contact with the roof, leaving a unsupported area of approximately 160 square feet.

I have taken in to account the testimony of Tagliati that a 14 inch gap, which existed between 3 or 4 of the forepole pads and the roof, could be bridged by constructing cribbing. Respondent argues that the individual constructing such cribbing would be exposed to an unsupported roof. Inspector McClure was of the opinion that a unsupported roof is a greater hazard than the exposure to an individual to an unsupported roof while constructing cribbing to support the roof. I adopt the opinion of McClure. I find

that a substantial hazard to exist as the gap between the roof and the forepole pad, can lead to unsupported roof being exposed for the duration of a pass by the miner which can take up to 2 hours.

Based on all the above, I conclude that Respondent violated section 75.200, supra.

III

Petitioner has, in essence, alleged that the nature of Respondent's violations of section 75.200, supra, fall within the purview of section 104(d)(1) of the Act, as they "...could significantly and substantially contribute to the cause and effect of a coal ... mine safety or health hazard...." (section 104(d), supra) In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (6 FMSHRC, supra, at 3-4.)

As discussed above, infra, I have already found that a mandatory safety standard, i.e., 30 C.F.R. § 75.200, has been violated. Accordingly, the first element of Mathies, supra, has been satisfied.

The evidence establishes that in the Respondent's shortwall section the Gulick-Dobson shields create a pressure arch which causes pressure on the face. According to the uncontradicted testimony of McClure, at the date of inspection, there was a caved-in area above three or four shields in the headgate entry which indicated to him that there was "bad roof" at that point and also "approximately" into the face (Tr. 104). Dunn and Tagliati testified that the roof condition, on the section in question on the date the citation was issued, was "good." However, it is noted that Tagliati indicated in the area in which the citation occurred there are pot outs on a daily basis and there could have been pot outs on the day of the order. Indeed, it was the uncontradicted testimony of Shirley Rine, a MSHA Coal Mine Inspector assigned to roof control duties, that the day after the citation was issued, he observed "cracks and breaks over top (sic.) shield right into the immediate face area." (Tr. 506.) Further, it is significant to note that four adjacent

shields had forepole pads not in contact with the roof, thus leaving an area of approximately 160 feet unsupported. Moreover, this area could have remained unsupported for the duration of a pass which takes approximately 2 hours. In addition, I noted the fact that 3 or 4 forepole pads were 14 inches below the roof, thus creating uncertainty as to the weight the pad would support if hit by falling rock. Taking all these factors into account, I conclude that a discrete safety hazard was created with a reasonable likelihood that this hazard will result in injury. It further is clear, as established by all witnesses to whom the question was posed, that rock falling from an unsupported roof could seriously injure or kill a person below. In this connection, I conclude, based upon the credible testimony of Jordan and McClure, that as many as five or six workers during the shift may travel underneath the forepole extensions to fulfill their work assignments (see finding 14). I therefore conclude that the violation 30 C.F.R. § 75.200 was such a nature as could significantly and substantially contribute to the cause and affect of a coal mine safety hazard.

IV

It is the Secretary's position that the violation herein constitutes a "unwarrantable failure" to comply to the provisions of 30 C.F.R § 75.200. The Commission, in United States Steel Corporation v. Secretary of Labor, 6 FMSHRC 1423 (June 1984), held that:

> ....an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation order because of indifference, willful intent, or a serious lack of reasonable care. (United States Steel Corporation v. Secretary of Labor, 6 FMSHRC, supra, at 1437).

Petitioner argues, in essence, that the gap between the forepole pad and the roof was caused by the Respondent's poor mining practices in not handling the remote control continuous miner properly. Petitioner also argues that in preshift inspections it should have been observed that 13 forepole pads were not in contact with the roof. Although the violative condition was caused by Respondent's poor mining practices and was readily observable at the date the citation was issued, I find that the Petitioner has not established that the reason for the Respondent not remedying the violative condition was due either indifference, willful intent, or serious lack of reasonable care. The critical issue is not what caused the violative condition, but rather the operator's motive in not correcting the violative condition. It is noted, in this connection, that the roof control plan did not

explicitly require the forepole pads to be in contact with the roof. Further, according to the uncontradicted testimony of Dunn, Tagliati, and Harding, for 10 years prior to the date the citation was issued, MSHA had never written a citation for forepole pads not being in contact with the roof, in spite of, according to the uncontradicted testimony of Tagliati, the inspectors being present when such conditions have existed. Based upon these factors it must be concluded that operator's failure to have forepole pads in contact with the roof was neither as a result indifference or willful intent. Further, although I have held infra, that a reasonably prudent person familiar with the mining industry would have recognized the hazardous condition of an unsupported roof caused by the forepole pads not being in contact with the roof, I am not deciding that this established a serious lack of reasonable care. (c.f. U.S. Steel Corporation, supra.) The operator's lack of reasonable care did not reach this high degree as it was based upon its reasonable interpretation of its roof plan, the long history of not being cited for similar conditions, and its reasonable belief that a serious hazard was entailed in placing supports in the gap between the pads and the roof. Accordingly it is concluded that violation herein of 30 C.F.R § 75.200 does not constitute an unwarrantable failure to comply with the Act.

V

I have considered all the criteria in section 110(i) of the Act. The Parties has stipulated as the size of the operator's business which I interpret as being large. I find that there is no evidence that the civil penalty proposed by the Secretary will have any detrimental affect on the operator's ability to continue in business. I also find that the operator did demonstrate good faith in abating the violation in a timely fashion. I further find that the operator, in violating 30 C.F.R § 75.200, was negligent to a moderate degree, but that its action did not indicate a serious lack of reasonable care. I further find that the gravity of the violation was serious with regard to the 3 or 4 of forepole pads that were approximately 14 inches lower than the roof. I also find that the gravity of violation was serious with regard to the four adjacent forepole pads not in contact with the roof. However, I find that the gravity was only slight with regard to the 5 or 6 of the 13 forepole pads that were only approximately 2 inches below the roof. Based upon all these factors I find that a penalty of $600 is appropriate.

Concerning order number 2696200, issued on February 3, 1986, Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $700 to $150 is proposed. I have considered the representations and

documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. I further conclude that the modifications of the order to a section 104(a) citation is proper.

ORDER

It is ORDERED that the operator pay the sum of $750, within 30 days of this decision, as a civil penalty for the violations found herein.

It is further ORDERED that order number 26926220 be modified to a Section 104(a) Citation. As modified the citation is affirmed. The contest is thus GRANTED in PART and DENIED in PART.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUN 22 1987

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 86-127-M
Petitioner	:	A.C. No. 12-00109-05508
v.	:	
	:	Docket No. LAKE 86-128-M
SELLERSBURG STONE COMPANY,	:	A.C. No. 12-00109-05509
Respondent	:	
	:	Sellersburg Stone Mine

DECISIONS APPROVING SETTLEMENTS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for 13 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The petitioner has now filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of the proposed settlements. The citations, initial assessments, and the proposed settlement amounts are as follows:

Docket No. LAKE 86-127-M

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
2633854	06/17/86	56.14001	$119.00	$ 65.00
2633855	06/17/86	56.14003	119.00	65.00
2633859	06/17/86	56.14001	192.00	138.00
2633860	06/17/86	56.11012	119.00	119.00
2844942	06/17/86	56.14003	119.00	65.00
2844943	06/17/86	56.11012	119.00	119.00
			$787.00	$571.00

Docket No. LAKE 86-128-M

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
2844949	06/17/86	56.14003	$119.00	$ 65.00
2844950	06/17/86	56.14003	119.00	65.00
2844954	06/17/86	56.14003	119.00	65.00
2844955	06/17/86	56.14003	119.00	65.00
2844960	06/17/86	56.14003	119.00	65.00
2844962	06/17/86	56.11012	119.00	119.00
2844963	06/17/86	56.14003	119.00	65.00
			$833.00	$509.00

Discussion

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

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of these cases, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlements ARE APPROVED.

ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the citations in question within thirty (30) days of the date of these decisions and order, and upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

JUN 22 1987

DANIEL S. ALEXANDER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 85-106-DM
v.	:	MD 84-60
FREEPORT GOLD COMPANY, Respondent	:	Jerrett Canyon Project

DECISION

Appearances: Thomas L. Stringfield, Esq., Elko, Nevada, for Complainant;
R. Blain Andrus, Esq., Steven, G. Holloway, Reno, Nevada, for Respondent.

Before: Judge Lasher

This proceeding arises under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1982) (herein "the Act"). Complainant's initial complaint with the Labor Department's Mine Safety and Health Administration (MSHA) was dismissed. Both parties were well represented at the hearing. 1/

Complainant contends that he was discharged by Respondent on January 3, 1984, from his position as a permanent mill employee because of his engagement in activities protected under the Federal Mine Safety and Health Act of 1977 (the Act). Respondent contends that Complainant was discharged for his excessive absenteeism and, secondarily, because of his accident rate.

FINDINGS

General

The correct name of Respondent is Freeport-McMoran Gold Company. It is a subsidiary of Freeport McMoran, Inc., a Delaware corporation authorized to do business in the State of

1/ The hearing was held during a 3-day period, October 27, 28 and 29, 1986. For each day of hearing there is a separate transcript beginning with page one. Accordingly, transcript citations will be prefaced with "I" "II" and "III", respectively, in this manner: "I-T. __", "II-T. __" and "III-T. __".

Nevada (I-T 43-44). Respondent owns and operates the subject open pit gold mine which is located 52 miles northwest of Elko, Nevada. At the time the events pertinent herein occurred its payroll was approximately 320 and its current payroll is approximately 420. Ore tonnage figures for the two periods (then and now) are 3,200 tons and 4,000 tons, respectively (I-T. 43, 48). During 1983, the ore was brought from the mine, which was 7-9 miles from the mill at which Complainant worked, in haul trucks and placed in a dump; from the dump a loader would carry the ore from the dump and deposit it in an area where it was placed on belts and carried into the mill where it was crushed (I-T. 49). During the pertinent period (1983-1984) the mine operated 24-hours per day (3 8-hour shifts) seven days a week (I-T. 45) and the employees were not represented by a union (I-T. 51).

The Complainant, Daniel S. Alexander, commenced employment with Respondent on December 20, 1982, as a temporary employee. On February 14, 1983, he became a regular employee in the mill (where approximately 100 employees worked at the time) and on April 2, 1983, he was advanced to "Technician D" which was the first step in a five-step progression to becoming a Mill Operator Specialist (I-T. 47). He was still in the Technician D position at the time of his discharge some eight months later on January 3, 1984.

Complainant's immediate supervisor for most of 1983 was R.T. Albright, shift foreman. (I-T. 50). His immediate supervisor for the last two months of his employment and when he was discharged was Mill Foreman Thomas E. Watkins (I-T. 65). During most of 1983, the next-level supervisor above Albright was Edward G. Walker, General Mill Foreman, and above Walker was the Mill Superintendent, Richard Johnson (I-T. 50, 51). Above Mr. Johnson in management echelon in most of 1983, but not at the time of Complainant's discharge was the Mill Manager, David J. Collins.

Protected Activities

Complainant engaged in various activities which are protected by the Act prior to his discharge. Thus he had complained that a radial stacker needed to be repaired (I-T. 91-92, 114-120). Complainant also testified, in very general terms, that he had filed two written safety complaints, at unspecified times. The first complaint was a suggestion to modify a carbon transfer line so that it would not "blow off" and scald an operator. Complainant was unable to recall the nature of the second written complaint. Complainant also testified he made verbal complaints about the radial stacker and about putting up guards around the feeders (I-T. 118-120); he was but one of several (I-T. 88) who made such complaints about the stacker. Complainant was not shown to be a leader or vanguard of safety militancy at the mine or even that he was the most vocal, or particularly vocal, spokesman in safety matters.

While Complainant engaged in some protected activities, it is also noted that the quality of such were not heated, controversial or the type which ordinarily would be provocative or invitatory of retaliation. Nor does this record reveal any immediate or spontaneous reaction on the part of any of Respondent's foremen or management personnel to Complainant's actions demonstrating hostility or anti-safety animus.

Respondent's Absenteeism Policy

Respondent's "Employee Handbook" (Exhibit C-2) is issued to new employees. Title III, Benefits, Section I, "Salary Continuation for Disability" thereof states inter alia:

> "All permanent full-time employees upon the completion of 30 consecutive days of Company recognized service become eligible to receive continuing income during periods of short term disability from illness or off-the-job injuries under the Company's wage and salary continuation plan."
>
> X X X X X X X X X X X
>
> If you are unable to report for work as scheduled, you are expected to notify your supervisor promptly. Except for extenuating circumstances, failure to notify your supervisor will result in loss of benefits.
>
> X X X X X X X X X X X
>
> "Excessive use or abuse of this program for minor illness may result in a review by management to determine whether or not the employee may continue employment. Two (2) day's absence for minor illness each three months will be considered as excessive absence and will result in a review."

Title VII, Personnel Procedures, Section E "Attendance and Absenteeism" states:

> "Employees are expected to be at work on all working days except in the case of illness or other excused absences. If you need to be absent from work, you are required to obtain authorization from your immediate supervisor. Excessive absenteeism for any reason will not be tolerated and you will be subject to appropriate disciplinary action. You will be notified whenever your attendance is unacceptable," (emphasis added).

Title V, Problem Solving System, Section B, "Basic Areas Requiring Discipline" of the Employee Handbook states in pertinent part:

"1. Definitions of Minor Rule Violations. These are violations which in themselves, are not reason for discharge. However, repetitive violation of these rules will result in progressively more severe discipline and may end in discharge. The following is illustrative of minor violations: a) Tardiness or absenteeism (page 27, T.E. C2)."

The Employee Handbook is but a "guide" to Respondent's policy (I-T. 51, III-T. 38, 40, 49, 99).

Summary of Complainant's Absences

February 6, 1983. Reason: Sick. This absence occurred while Complainant was a temporary and eight days before be became a permanent employee.

April 15, 1983. Reason: Sick-Flu.

April 20, 1983. Reason: Fixing broken windows.

April 23, 1983. Reason: Sick.

April 24, 1983. Reason: Sick.

May 7, 1983. Reason: Complainant's father-in-law died.

June 2, 1983. Reason: Flu.

June 25, 1983. Reason: To repair windows.

November 17, 1983. Reason: Sick.

November 18, 1983. Reason: Still sick.

All 10 of these absences were "excused" absences (I-T. 7-8). Complainant, however, was absent on January 1, 1984 as a result of a "Driving Under the Influence" incarceration; this absence was not excused (III-T. 49) and was a "major" rule violation (III-T. 75, 76, 100). In his testimony (III-T. 107), Complainant conceded the existence of alcohol and marital problems and such, as hereinafter noted, were of some concern to Respondent's management who took various actions to assist Complainant therewith. The record demonstrates that the alcohol problem at least extended up to the time of his discharge.

Complainant's Absence on January 1, 1984.

Complainant was arrested by the Elko County Sheriff's Department for DUI (Driving Under the Influence) at approximately 12:30 a.m. on January 1, 1984, and booked at 1:05 a.m. for DUI (Ex. C-4).

The booking sheet (Ex. C-4) reflects that he called his foreman, Tom Watkins at 1:20 a.m. 2/

Complainant's version of the events following his arrest follows:

Q. What did you do after you were arrested?

A. I made a phone call to my supervisor Tom Watkins.

Q. How was that phone call made?

A. It was made in jail, the jailer dialed the number and handed the phone to me.

Q. Describe the conversation with Mr. Watkins?

A. I told him that I had been arrested for D.U.I. I was trying to make bail to be to work on time in the morning and I asked him if I should go ahead and call Freeport and tell them I wasn't going to be there or to wait and see if I could make bail and get there on time or get there at all. And he said if you are not there I'll know where you are at and so I just told Tom I would get there as soon as I could.

Q. At that point, did you think you were going to be absent that day?

A. I wasn't for sure, I was hoping I wold get out in time.

Q. Did you make any other phone calls to Tom Watkins that morning?

A. After I was arrested, I went home and I called Tom and it was already after the shift had started and I told him that I had made bail and that I wanted to report to work, I would have a tardy, but --

Q. You had-- had you ever gotten a tardy before?

A. No, I felt it would be better to have a tardy than an absentee and I would get there as soon as I could and Tom said, well, don't worry about it, just come in tomorrow on your regular scheduled shift, so I did.

Q. Did you come in the next day on your regular shift?

A. Yes, I did. I worked full shift on January second.

2/ While Watkins denied receiving such telephone call (I-T. 53-54), such denial is not credited in view of the testimony of the arresting officer, Carl L. Marr, and the booking officer, James L. Black, to the contrary (I-T. 74, 77-79). Complainant's account of this conversation (II-T. 116) is accepted.

Q. What happened after the shift?

A. Directly at the end of the shift, I believe it was Tom Watkins who handed me a slip [3]/ saying that I was on suspension and not to return to the mill site until January fourth.

Q. You heard Tom Watkins say you never called him that day at all. Did you hear him testify to that effect?

A. Yes, I heard him say that.

Q. Is there any question in your mind you talked to him that day?

A. No, there is not. (II-T. 116-117).

Complainant's Accident Record

March 13, 1983. While using his 992 loader, Complainant accidentally tore the ladder off the loader (Ex. C-3-VI).

April 6, 1983. Complainant's knee was bruised and injured when a cable snapped while he was helping put a feed chute in place.

May 1, 1983. Complainant sustained minor (small) cyanide burns on both arms while taking cyanide flow meters apart to clean them.

June 21, 1983. While not wearing a face shield, Complainant had cyanide sprayed in his face.

July 17, 1983. The tip of Complainant's little finger was smashed while he was placing a piece of rebar under the wheels of a radial stacker.

December 21, 1983. Complainant bruised his back when he slipped and fell on ice while climbing out of a bridge feeder. [4]/

3/ Ex. R-17.

4/ While Complainant contends that the reports of the six accidents he was involved in in 1983 were safety complaints, these reports were completed by Respondent's management personnel on standard forms and in the course of Respondent's normal procedure for documenting accidents. The strong preponderance of the evidence is that the accident reports are not safety complaints. If Complainant's logic were carried out to its normal conclusion the more accidents a miner were involved in the more protected safety activities he would be seen to have engaged in. The concept of this argument has no credible foundation in the record and is rejected. Respondent is found justified in considering Complainant's overall accident record as part of its determination to discharge Complainant following the DUI absence on January 1, 1984.

Complainant's Counseling and Disciplinary Record

On May 13, 1983, Complainant's performance was reviewed with him by his immediate supervisor, shift foreman R.T. Albright, and the mill general foreman, E.G. Walker, and Complainant was counseled concerning his excessive absenteeism (II-T. 204-207, 219-221, 227).

On June 13, 1983, the Complainant was given a letter of reprimand for excessive absenteeism by the mill general foreman, E.G. Walker. The Complainant was advised therein that it was his responsibility to attend work regularly, he was notified that it would be necessary for him to provide a doctor's certification verifying any future illness, and he was warned that if he failed to fulfill his responsibilities further disciplinary action up to and including discharge would be taken (II-T. 80, 209-210, 221-225). 5/

On June 27, 1983, the Complainant was referred by Respondent to the Community Mental Health Center for counseling. The Complainant was referred by a counselor, (R.D. Herman, Ph.D. Cand, M.F.C.) but refused to enter an alcohol and drug rehabilitation program at Truckee Meadows Hospital in Reno, Nevada (II-T. 211-212, 226-227).

Complainant was counseled by the mill manager, D.J. Collins, on September 26, 1983, about his excessive accident rate. It appeared at that time that Complainant had had a number of personal problems and that such were probably the cause of his accidents (II-T. 210, 211, 227-232).

By memo dated November 23, 1983 (Ex. R. 16; III-T. 16-18), Complainant was given the following warning by George D. Harris, the general mill foreman at the time, concerning the subject of absenteeism:

> It is the responsibility of every employee to maintain his/her personal health in such a manner as to provide for regular attendance at work. Your absence of November 18, 1983 was the seventh (7th) separate absence since April 15, 1983. You have been absent with pay for a total of seven (7) days since that date.
>
> The company is not questioning whether you were in fact sick or disabled on the above occasions; however, your absenteeism is disruptive to your fellow workers and to the efficient operation of your work group.

5/ As above noted, Title V, Problem Solving System, Section B, "Basic Areas Requiring Discipline" of the Employee Handbook (Ex. C-2 at p. 27) provides that minor rule violations, if repetitive, can result in progressively more severe discipline and may end in discharge. "Absenteeism" was specifically listed as an illustration of this principle.

This letter is being given to you in order that you will be aware of your attendance record and to impress upon you that excessive absenteeism reduces the value of an employee to the company, and in addition, to notify you at this time that it will be necessary for you to bring a doctor's certification verifying any future illness to insure pay for any such absence. I hope that it will help you to correct your absenteeism problem and that further discipline will not be necessary.

If you fail to fulfill your responsibility as an employee to maintain your personal health in such a manner as to provide for your regular attendance at work, then further disciplinary measures will be taken up to and including discharge."

Respondent's Termination Report dated 1/4/84 and signed by D.S. Barr (then Mill Operations Manager) pertinent to Complainant reflects that the "Reason for Separation" was "Absenteeism/Lateness," that the effective date of Complainant's dismissal was January 3, 1984, that Complainant's Attendance and Cooperation were "unsatisfactory," that his initiative was "fair," and that his Job Knowledge and Quality of Work were "satisfactory". Under the heading "Additional Comments" the following notation appeared: "Recommended Mental Health Counseling & Alcohol & Drug Abuse Counseling, general negative response. Dismissed for unexcused absence, DUI, after written warning for absenteeism. Also a safety problem." (Ex. R-18(a)).

While Complainant had never been disciplined for engaging in unsafe practices, he was seen as being a "safety problem" on the basis of the various accidents he had been involved in during the year of his employment (II-T. 37). Prior to the discharge of Complainant, Respondent had not discharged any other employee solely for "excused absences." However, absenteeism can be excessive, whether or not excused (Employee Handbook, Ex. C-2, Sections E and I; I-T. 61-64; III-T. 73).

Douglas Scott Barr, Respondent's mill operations manager at the time, who effectively recommended Complainant's discharge (II-T. 86; III-T. 65, 66, 80, 93), credibly and effectively gave his reasons for this decision:

"Q. Let me go back. You said you took into account the number of incidences. Did you also take into account the type of absences that were reflected in the file?

A. We did. Primarily they were minor infractions, each one. It is just that there was a repetitve series, substantial number of them, there were several that were at best questionable. But, yet they were excused and minor in their own right. The situation that called it to our attention, there was a major violation we were considering an unexcused absence, he hadn't any unexcused absences there before."

Q. What unexcused absences are you referring to?

A. The one on the first of January.

X X X X X X X X X X X X

Q. Why did you consider the D.U.I. in this case particularly grievous?

A. Well, first off, it's unreported, it's-- it's in a situation where it's a common problem, not saying common, but one in which we take a very great care to see if we can get people out on the first of January and its's a difficult time of the year for us so we need all the people we can get. So, a person's absence, unexcused, unscheduled and just unexcused, gives us gret difficulty at that point. The subject had just went through a warning period in November, which I was aware of and concerning his absenteeism, and a later time it was apparent under the continuation of the type of absences, that we had a problem before, an individual had been recommended for counseling, considering alcoholism, I'm going to say substance abuse, that's a better term.

Q. Did you consider that there-- that the fact is that you had stated in your additional comments, there was negative, general negative response to the recommendation for mental health counseling and alcohol and drug abuse counseling, particularly significant in relationship to the D.U.I. on January 1?

A. Yes, I think it is. The alcohol abuse, substance abuse, was an underlying issue in quite a few of the items that were discussed. (III-T. 49-51).

CONCLUSIONS AND DISCUSSION

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir., 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected

activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FSMHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); Donovan v. Stafford Constr., Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test); and Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986).

It goes without saying that the concept of discrimination to be dealt with here is relatively narrow, i.e., that contemplated by the 1977 Mine Safety. Matters-or allegations-of general unfairness, failures, or inequities in the employee-employer relationship are not subject to remedy under this Act. While I have found that Complainant marginally engaged in protected activities, there is no nexus between such activities and the adverse action (discharge) taken by Respondent.

There is little, if any, direct or indirect evidence of discriminatory motivation in the record, bearing either on (1) Respondent's purposes in discharging Complainant, or (2) Respondent's attitude and approach to the safety activities of its employees. The great weight of the probative, substantial evidence supports Respondent's position that it discharged Complainant because of excessive absenteeism primarily, and his accident record secondarily, with some documented and sincere attendant concern for what it perceived to be alcohol/marital problems in Complainant's life (III-T. 107). Although Complainant attempted to establish that Respondent discouraged safety reporting or accident reporting by giving awards and dinners to employee groups having the best accident-free record, Complainant himself testified:

> "It was Freeport's policy, as far as anytime you so much as got a scratch you were to report it as an accident to keep similar accidents from happening, if possible and point out hazards and just also to cover yourself in case-- they give you an example, somebody got a scratch and got blood poison and the guy didn't turn it in and ended up paying for it out of his own pocket." (T. 118).

Another Complainant's witness, when asked whether he had observed an atmosphere "discouraging the reporting of minor accident or complaining about safety" (I-T. 107), replied:

> "In a sense, it was more of an implied discouragement, if people reported too many minor accidents, scraped fingers, if they got up to a certain amount, they were considered unsafe and had to go to special training or had to go to counseling with being an unsafe worker."

Respondent established that its practices were intended to encourage and reward good safety practices and that its activities in this respect were common throughout the industry (II-T. 189).

Complainant's contention that Respondent was engaged in conduct calculated to discourage safety reporting is rejected. Establishment of discriminatory motivation is difficult and seldom accomplished through direct proof. Secretary of Labor on behalf of Johnny N. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), reconsideration den. 3 FMSHRC 2765 (1981); Brazell v. Island Creek Coal Company, 4 FMSHRC 1455 (1982). Here, Complainant did not establish through any probative or convincing evidence that Respondent had a pattern or policy, formal or otherwise, of retaliating against miners for making safety complaints. Again, although the contention was raised, there was no probative substantial evidence that Respondent had ever retaliated or taken adverse action against safety complainants in other matters which might indicate a general pattern or background of discriminatory conduct. A history of management hostility to safety complaints, while argued, was not to any degree of persuasion established on this record. The record is devoid of admissions or statements by Respondent's management personnel indicating an anti-safety reporting animus. Nor are there writings, accounts of conversations, or oral statements made by Respondent's foremen, or other officers, from which the existence of a discriminatory animus can be inferred. There is no evidence of resentment or antagonism on Respondent's part traceable to any of Complainant's activities protected under the Act. Complainant's evidence, apparently of necessity, was general and unpersuasive in these regards. Further belying the existence of discriminatory motivation were Respondent's various efforts to assist Complainant with his background difficulties. In short, I find no probative evidence from which it can be determined or inferred that Respondent's motivation, solely or in part, was discriminatory toward Complainant for his engagement in any protected activity. It is concluded that Complainant failed to establish a prima facie case of discrimination recognizable under the Act.

Even assuming arguendo, and such is not the situation here, that Complainant did establish that part of Respondent's motivation was his engagement in protected activities, based on Complainant's absence and accident record and its own impressive record of prior counseling and warnings to Complainant in 1983, Respondent established a clear and strong justification for discharging Complainant for his unprotected activites and that such action was taken and would have been taken for such unprotected activities alone. See Gravely v. Ranger Fuel Corp., 6 FMSHRC 799 (1984).

ULTIMATE CONCLUSIONS

Complainant failed to establish by substantial probative evidence that his discharge was motivated in any part by his

engagement in protected activities. Thus, Complainant failed to establish a prima facie case of discrimination under Section 105(c) of the Act.

Even assuming arguendo that Complainant did establish by a preponderance of the reliable, probative and substantial evidence that his discharge was motivated in some part by his protected activities, Respondent clearly showed by a strong preponderance of the evidence that it was motivated by Complainant's unprotected activities, i.e., his absenteeism and accident record, and that it would have taken the adverse action (discharge of Complainant) in any event for such unprotected activities.

ORDER

Complainant having failed to establish Mine Act discrimination on the part of Respondent, his complaint is DISMISSED.

Michael A. Lasher, Jr.
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 22, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 87-102 A. C. No. 36-00926-03658
v.	:	Homer City Mine
HELEN MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

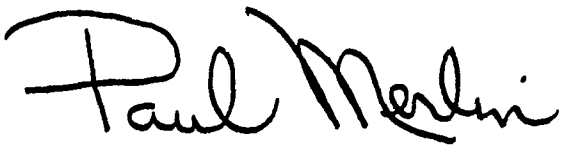
Before: Judge Merlin

The Solicitor has filed a motion to approve settlement of the violation involved in this cases. The original assessment was $800 and the proposed settlement is for $500.

The subject order was issued for a violation of 30 C.F.R. §75.200 when an MSHA inspector detected six missing roof bolts and one loose roof bolt at the M butt construction overcast in the Muddy Run area. The Solicitor represents that a reduction from the original assessment is warranted because the special assessment narrative erroneously stated that a "foreman was observed in the unsupported area." The inspector, however, did not observe individuals working under unsupported roof, and did not charge such conduct in his order.

In light of this information regarding the discrepancies between the assessment narrative and the factual basis for the order, I approve the recommended settlement.

Accordingly, the motion to approve settlement is GRANTED and the operator is ORDERED TO PAY $500 within 30 days of the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
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JUN 22 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-14-M A.C. No. 02-02253-05501
v.	:	Mohave Concrete
MOHAVE CONCRETE & MATERIALS INC., Respondent	:	

DECISION AFTER REMAND

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Mr. Larry Rinaldis, Mohave Concrete & Materials, Incorporated, Lake Havasu City, Arizona, pro se.

Before: Judge Morris

On November 18, 1986, the Federal Mine Safety and Health Review Commission remanded the captioned case and directed the judge to consider either the sufficiency of the cause asserted or the underlying merits of the case.

Subsequently Chief Administrative Law Judge Paul Merlin ruled that the operator should not be held in default. He further assigned the case to the undersigned for a hearing on the merits.

The hearing took place in Las Vegas, Nevada on February 19, 1987. The parties waived their right to file post-trial briefs.

Issues

The issues presented are whether the violations occurred; if so, what penalties are appropriate.

Stipulation

At the commencement of the hearing the parties agreed the Secretary could present evidence of one unguarded machine part and one junction box. In turn this evidence would be generally applicable to the similar remaining citations (Tr. 6, 7).

They further agreed that respondent is a small operator without any adverse history (Tr. 8-10).

Summary of the Case

Ronald W. Barri, an MSHA inspector for eight years, inspected respondent's plant on June 5, 1985 (Tr. 15, 16).

The plant was in operation and no one claimed it had been shut down or was being repaired. When he arrived on the site he talked to the dispatcher, who directed him to the foreman (Tr. 16, 17). The foreman shut down the plant before beginning the inspection (Tr. 17).

In connection with Citation 2366229 the inspector observed that the tail pulley of the main plant conveyor was unguarded. Any employee servicing or cleaning the area could come in contact with it (Tr. 18; Ex. P15). At the time an employee was removing large rocks and roots from the conveyor. If a person was pulled into the tail pulley he could be severely injured (Tr. 19).

The State of Nevada had inspected respondent three weeks before the MSHA inspection (Tr. 19, 20). The state representative reported to MSHA that the plant was in bad shape.

Citations 2366229, 2366232, 2366233, 2366234, 2366235, 2366236, 2366237, 2366238, 2366241 and 2366244 all relate to the unguarded movable machine parts.

Citation 2366236, involving the crusher flywheel and drive, because of the exposure involved a more serious hazard than the remaining citations (Tr. 20, 21; Ex. P5, P6). The gravity of the remaining conditions was pretty much the same (Tr. 21). Further, the observability and duration of the conditions were about the same (Tr. 22).

Respondent abated the violations within the specified time but the new guards were insufficient. They did not prevent a person from reaching behind and contacting the pulleys (Tr. 22).

The described condition of the unguarded machine parts resulted in the issuance of ten citations for the violation of 30 C.F.R. § 56.14001. The cited regulation provides as follows:

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

Citation 2366231 relates to a junction box for the feed conveyor drive motor. The box did not have a cover (Tr. 24; Ex. P17). If a short occurred the conveyor frame could be energized. This 440 volt exposure could electrocute the four workers in the

area who might contact the frame. The junction box, which was readily observable, was five or six feet above the ground (Tr. 25). The foreman indicated this condition had existed for some time (Tr. 25, 26).

Citations 2366231, 2366239, 2366240, 2366242, 2366243, 2366245 and 2366246 all involve junction boxes with the same conditions as previously described (Tr. 26). Exhibit P14 shows a switch on the three-quarter inch rock conveyor. The switch was in use and energized (Tr. 26, 27).

The condition of the junction boxes caused the inspector to issue seven citations for the violation of 30 C.F.R. § 56.12032. The cited regulation provides as follows:

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

The inspector further observed a well traveled path, equivalent to a walkway, alongside the feed conveyor for the main plant. The failure to provide such an emergency stop cord resulted in the issuance of Citation 2366230 for a violation of 30 C.F.R. § 56.9007. The cited standard provides as follows:

> Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

Two employees were exposed to the hazard, one was directly alongside the conveyor. A worker in this position could contact the moving conveyor, or the troughing idlers (Tr. 27, 28). Death or serious injury is a probable result from this hazard. It was indicated the condition had been there for several years (Tr. 28).

The inspector saw where the power cables enter into the metal switch gear boxes. The boxes were not equipped with proper fittings (Tr. 29, Ex. P14). The condition could cause the metal frame to cut through the insulation of the cable thereby causing a short. If a short occurred anyone touching the box could be electrocuted. Since the cables were in good condition it was unlikely that an accident would occur (Tr. 30).

The above condition resulted in the issuance of Citation 2366247 alleging a violation of 30 C.F.R. § 56.12008. The cited standard provides as follows:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The mine had been in operation for several years before the inspection but the company had not notified MSHA of its activities (Tr. 31).

This situation resulted in the issuance of Citation 2366258 alleging a violation of 30 C.F.R. § 56.1000. The cited standard provides as follows:

> The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether operations will be continuous or intermittent.
>
> When any mine is closed, the person in charge shall notify the nearest subdistrict office as provided above and indicate whether the closure is temporary or permanent.

At the time of the inspection the plant was running. In addition, the inspector saw the conveyors in motion, they were also shipping cement at a nearby batch plant. Further, an employee was picking rocks off the conveyor and another was running a loader feeding the plant. An additional worker was running a bulldozer pushing sand (Tr. 46, 47).

When he appeared the day following the inspection Mr. Polidori didn't claim the plant hadn't been in operation nor did he claim there had been a test run that day (Tr. 51).

Quinto Polidori, President of Mohave Concrete, testified for the respondent. He indicated the company also has a plant at Lake Havasu City, Arizona. They have been in operation for 12 years and never been cited (Tr. 69).

The plant involved in the instant case has been in operation for four and one-half years. The company does its best to keep and maintain a safe operation. The company received its lease from the Fort Mojave Indians in 1981. At that time he was told that no permit was required (Tr. 70).

At the time of this inspection the plant was not in operation. The jaw crusher had been removed. Further, the rock had been emptied from the hopper and it was picked up by hand (Tr. 71). The condition the inspector observed was temporary since they were emptying the hopper by hand (Tr. 71).

The company has had no difficulty with the lessor Indian Tribe (Tr. 72; Ex. R6).

The parties stipulated that if Mr. Rinaldis testified he would indicate that the company previously had some incompetent people working for it. Further, he would testify that Mr. Polidori is a safe operator (Tr. 75).

Witness Polidori further explained his drawing showing his conveyor and hopper (Tr. 77, 78; Ex. R5). At the time the jaw crusher was broken down and flat on the ground (Tr. 78). The plant was not in operation (Tr. 86, 88, 100)

During the inspection the conveyor was on the ground. The workers put the conveyor down to empty the hopper (Tr. 80). Also the guard was off so the machine could be tested (Tr. 81, 82).

The plant had been shut down three or four weeks, after the crusher broke down. This occurred after the state inspection (Tr. 83).

When the operation is run without a crusher it is referred to as a pit run. Since materials were inside the hopper, they did not operate as a pit run (Tr. 84).

In Citation 2366236 the guard was on the ground because repairs were being made (Tr. 87). The witness denies there is a part that should be guarded in Citation 2366237 (Tr. 89; Ex. P7, P9). In connection with Citation 2366241 there was a guard but a worker was changing the whole setup (Tr. 90; Ex. P9).

Concerning Citation 2366231 there was a cover but it had been taken off for repairs (Tr. 91).

Evaluation of the Evidence

Concerning the unguarded machine parts the pivitol issue focuses on whether the plant was in operation at the time of the inspection. The inspector's testimony is clear that it was functioning. On the other hand, respondent's evidence is, at times, obscure.

I find from the credible evidence that the plant was in fact in operation on the day of the inspection. Inspector Barri's testimony was precise on this issue; the employee was picking rock from the conveyor. Another worker was operating a loader; some conveyors were in motion (Tr. 46, 47). The owner, who was not present at the site until the following day, never claimed the plant was not in operation (Tr. 51). However, I agree with respondent's president, Quinto Polidori, that an unguarded part was being repaired on the day of the inspection. The presence of the worker picking rocks from the conveyor confirms this view. As a result of the repairs a worker could not be exposed and it is appropriate to vacate Citation 2366236 (Tr. 87; Ex. P5, P6).

The remaining guarding citations should be affirmed as the workers were exposed to these moving unguarded parts.

The citations relating to the cover plates should also be affirmed. All of the cited junction boxes lacked cover plates. Respondent claimed one of the boxes was being repaired. However, no credible evidence supports this assertion. In addition, respondent's witness was not present on the day of the inspection.

The citation concerning the lack of a stop device along the conveyor should be affirmed. The conveyor did not have a walkway as such but Inspector Barri observed a well traveled path adjacent to the conveyor. Such a path would be equivalent to a walkway within the terms of § 56.9007.

Concerning the power cables entering the metal gear box the evidence establishes that the metal frames lacked proper fittings. The citation should be affirmed.

Respondent asserts that since it was a lessee on an Indian reservation it did not have to notify MSHA of its activities. Respondent's argument is contrary to the law. A general statute in terms applicable to all persons includes Indians and their property interests. FPC v. Tuscarora Indian Nation, 362 U.S. 99, 80 S. Ct 543, 4 L. Ed. 2d 584 (1960); Donovan v. Coeur d'Arlene Tribal Farm, 751 F.2d 1113 (1985).

The citation alleging respondent's failure to notify MSHA of its activities should be affirmed.

Civil Penalties

The statutory criteria to assess a civil penalty is contained in Section 110(i) of the Act, now 30 U.S.C. § 820(i). It provides as follows:

> 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 connection with the above guidelines it appears that respondent has no adverse prior history. However, this could readily arise from the operator's failure to report its activities to MSHA. The parties agree as to the small size of the operator (Tr. 10); hence, the proposed penalties appear appropriate. The violative conditions involving the moving machine

parts, cover plates, conveyor and bushings were open and obvious. The operator must, accordingly, be considered as negligent. The failure to notify MSHA should also be considered as negligence on the part of the operator. The operator had another site not located on an Indian reservation. As such he should have inquired as to his rights as a lessee of Indian property. Whether the imposition of penalties would adversely effect the operator is an affirmative defense, Buffalo Mining Co., 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974). Respondent offered no evidence on this issue. Except for the reporting requirement the gravity of the remaining violations is moderate. I credit the operator with statutory good faith. The company attempted to abate the conditions, although the inspector later found its guarding of the machine parts was inadequate. The deficiency was then corrected.

On balance, I believe the civil penalties set forth in the order of this decision are appropriate.

Based on the entire record and the factual findings made in the narrative portion of this decision I conclude that the Commission has jurisdiction to decide this case. Further, I enter the following:

ORDER

1. (Unguarded moving machine parts): The following citations are affirmed and penalties are assessed as noted:

Citation	Penalty
2366229	$50
2366232	50
2366233	50
2366234	50
2366235	50
2366236	Vacated
2366237	50
2366238	50
2366241	50
2366244	50

2. (Junction boxes)

Citation	Penalty
2366231	$20
2366239	20
2366240	20
2366242	20
2366243	20
2366245	20
2366246	20

3. (Emergency stop device)

Citation	Penalty
2366230	$30

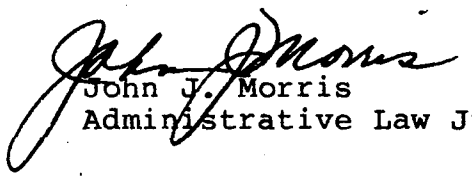
4. (Insulated bushings)

Citation	Penalty
2366247	$20

5. (Failure to notify MSHA)

Citation	Penalty
2366258	$10

6. Respondent is ordered to pay to the Secretary the sum of $650 within 40 days of the date of this decision.



John J. Morris
Administrative Law Judge

Distribution:

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 23 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 87-107
	:	A. C. No. 36-05018-03643
v.	:	
	:	Cumberland Mine
U. S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to approve settlement for the violation involved in this case. The original assessment was $136 and the proposed settlement is for $30.

The subject citation was issued for a violation of 30 C.F.R. § 75.503 because the inspector believed that a headlight on a Joy continuous miner was not maintained according to permissibility standards in that the headlight on the machine was "loose and not making a ground connection." The Solicitor represents that a reduction from the original assessment is warranted, because "subsequent to the issuance of the citation, the Secretary's representative learned that a third wire existed that grounded the headlight; consequently, no hazard existed from the permissibility violation." The citation was then modified to reduce the gravity of the violation to "no likelihood of occurrence."

In light of the information regarding the existence of a third wire that grounded the headlight, I accept the Solicitor's representations and approve the recommended settlement for a nonserious violation.

Accordingly, the motion to approve settlement is GRANTED and the operator is ORDERED TO PAY $30 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 25 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 86-120-M A.C. No. 41-00995-05510
v.	:	
	:	Van Horn White Marble Mine
TEXAS ARCHITECTURAL AGGREGATES, INCORPORATED, Respondent	:	

DECISION

Appearances: Jill D. Klamm, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
David M. Williams, Esq., San Saba, Texas, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $20 for an alleged violation of the mandatory noise standards found at 30 C.F.R. § 57.5-50(b). The respondent filed a timely contest and answer and a hearing was held in Austin, Texas. The parties were afforded an opportunity to file posthearing briefs, but they declined to do so.

Issues

The principal issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory health standard, and (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil

penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

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

4. Mandatory standard 30 C.F.R. § 57.5-50, provides as follows:

> 57.5-50 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971. "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.
>
> PERMISSIBLE NOISE EXPOSURES
>
> | Duration per day, hours of exposure | Sound level dBA, slow response |
> |---|---|
> | 8 | 90 |
> | 6 | 92 |
> | 4 | 95 |
> | 3 | 97 |
> | 2 | 100 |
> | 1-1/2 | 102 |
> | 1 | 105 |
> | 1/2 | 110 |
> | 1/4 or less | 115 |

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

NOTE. When the daily exposure is composed of two or more periods of noise exposure at different levels, their combined effect shall be considered rather than the individual effect of each.

If the sum

$$(C_1/T_1) + (C_2/T_2) + \ldots (C_n/T_n)$$

exceeds unity, then the mixed exposure shall be considered to exceed the permissible exposure C_n indicates the total time of exposure at a specified noise level, and T_n indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

$$\log T = 6.322 - 0.0602 \text{ SL}$$

Where T is the time in hours and SL is the sound level in dBA.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

Stipulations

The parties stipulated to the following (Tr. 6-8):

1. The respondent's products affect commerce and the respondent is subject to the jurisdiction of the Act and this Commission.

2. The respondent's size as stated in terms of annual man-hours worked is 129,227 production tons or man-hours worked, and the size of the respondent's Van Horn White Marble Mine is 11,385 productions tons or man hours.

3. The total number of MSHA inspection days at the mine in question during the 24-months preceding the issuance of the citation in this case is 27, and during this time period the respondent was issued civil penalty assessments for three violations.

4. The imposition of a civil penalty assessment for the violation in issue in this case will not adversely affect the respondent's ability to continue in business.

5. On February 7, 1985, MSHA Inspector David Lilly conducted an inspection of the subject mine and issued a citation alleging a violation of mandatory standard 30 C.F.R. § 57.5-50(b). At the time of the inspection, personal hearing protection was being worn by the drill operator.

Discussion

Section 104(a) Citation No. 2236193, February 7, 1985, cites an alleged violation of 30 C.F.R. § 57.5-50(b), and the cited condition or practice is described as follows:

> The full shift exposure to mixed noise levels of the 12 EH LeRoi drill operator in the south central heading exceeded unity (100%) by 235.9 times (235.9%) as measured with a dosimeter. This is equivalent to an 8 hour exposure of 96 dBA. Personal hearing protection was being worn.

The inspector fixed the abatement time as February 21, 1985, and on April 25, 1985, he extended the abatement time to May 4, 1985, and noted as follows:

> The operator has done several things to try to engineer out the noise, moving the compressor, shielding the drill rotation head and changing bits more often. SLM survey of 30 min. showed the drill opr. to still be out of compliance. A partial dosimeter survey avg. (sic) out to confirm the SLM. The operator plans to do more engineering on the drill to further reduce the noise level.

On June 6, 1985, the inspector extended the abatement time further to September 3, 1985, and noted as follows:

> The operator stated that he had called the manufacturer of the LeRoi 12 EH drill for sound reduction instructions and the engineer for the manufacturer had told him there were no engineering controls to reduce the noise, that they had incorporated all technology available during construction of same, and would send a letter to MSHA from the manufacturer stating this. Denver Technical Support for MSHA was contacted by Sidney Kirk and was told by them that the noise could be reduced and that they would come to the mine and provide assistance.

On August 27, 1985, the inspector extended the abatement time to October 7, 1985, and noted that "The mine was not in operation, a resurvey for mixed noise of the 12 EH LeRoi drill operator could not be made."

On November 7, 1985,the inspector extended the abatement time to January 10, 1986, and noted that "The Denver Technical Support Group is scheduled to assist during that week to attempt to reduce the noise exposure."

On January 7, 1986, the inspector extended the abatement time to January 31, 1986, and noted as follows: "On January 7, 1986, some tests were made and simulated structures positioned and did show a substantial reduction in the drill operator position to noise. Additional time is needed for the operator to construct the protective barrier on the drill."

On February 4, 1986, the inspector extended the abatement time to March 31, 1986, and he noted that "The protective barrier has been completed on the drill. Additional time is needed for Denver Technical Support to do a noise study."

On April 15, 1986, the inspector terminated the citation, and he noted as follows:

> On April 15, 1986, a resurvey of noise on the stated drill was conducted by the Denver Technical Support Group. A reduction of noise exposure of 5 dBA had been accomplished. There is no further engineering control available at

this time. However, hearing protection must still be worn to prevent the driller from over-exposure.

MSHA's Testimony and Evidence

MSHA Inspector David P. Lilly testified as to his background, experience, and training, and confirmed that in addition to his regular mine inspections, he conducts approximately 15 to 20 noise surveys a year as part of his inspections. He explained the use of a dosimeter, and confirmed that he conducted an inspection of the mine on February 7, 1985, and that he took a noise survey that same day. After calibrating the dosimeter testing devices, they were installed on a truck driver who hauled material from the underground mine to the crusher, and on the LeRoi drill helper who was assisting the driller underground. Mr. Lilly described the drill as an air percussion drill used to drill vertically and horizontally.

Mr. Lilly stated that during the noise survey period he took periodic sound level meter readings with a testing device that reads out in decibels rather than in percentages and that he recorded the results. At the end of the day, his sound level meter readings confirmed the results of the dosimeter test results which reflected that there was an over-exposure to noise. The dosimeter readings were considerably over the allowable noise exposure of 90 decibels for an 8-hour period of exposure (Tr. 11-17).

Mr. Lilly confirmed that during the survey shift in question, the drill helper and operator continually wore Wilson "muff-type" hearing protection. However, the protectors were old and worn, and since the identification numbers were worn off, it was difficult to ascertain whether or not they were MSHA approved protectors. Mr. Lilly also confirmed that on the basis of his 14 years of experience as an underground miner, and statistics, a continual over-exposure of noise levels in excess of 90 decibels will eventually cause hearing deterioration to a point where there will be a complete loss after time. He stated that when he worked as a miner, personal hearing protection was not available, and that he suffers from a loss of hearing (Tr. 18).

Mr. Lilly confirmed that he discussed possible solutions to reduce the noise level of the drill with mine superintendent Carl Schiller, and recommended that the air lines to a large compressor located 20 feet from the drill be extended so as to move the compressor as far away from the drill as

possible. The compressor was a source of "a tremendous amount of noise." Mr. Lilly also recommended that dull drill bits be replaced with new ones so as to reduce the noise (Tr. 19). Mr. Lilly confirmed that he made several follow-up visits to the mine to monitor the noise levels and extended the abatement times while the respondent attempted to reduce the noise levels through engineering and contacts with the drill manufacturer (Tr. 21). After further discussions with his supervisor, it was decided to contact MSHA's Denver Technical Support Group to assist the respondent in finding solutions to the drill noise levels. The technical group had prior experience with air track drills and were able to get substantial noise reductions in similar drills at other operations. Since he was reassigned to another inspection area at the time the technical support group surveyed the drill noise, he had no personal knowledge of the detailed results of MSHA's further testing, but did understand that a reduction in the drill noise level was achieved (Tr. 23).

On cross-examination, Mr. Lilly confirmed that he had inspected the mine in question since the latter part of 1982, and he recalled an old drill that was used outside, but he never observed it in operation. The LeRoi drill which he observed in use underground during his February 7, 1985, inspection was "in real good shape like it was fairly new" (Tr. 25).

Mr. Lilly confirmed that the mine in question is a marble mine, and it is the only mine of this kind in his inspection area. He stated that the cited drill is used "off and on" during the working shift, but this makes no difference since his noise survey is taken over a full 8-hour shift and the dosimeter averages the noise exposure over the full 8-hour working period. Mr. Lilly confirmed that his noise survey on February 7th was the first one he has conducted at the mine, and he could not state whether prior surveys had been made by MSHA. He was not aware of any prior noise citations served on the respondent during the time it has operated the mine (Tr. 27-28).

Mr. Lilly confirmed that the white marble mine in question is worked by six employees, and he compared it to a small underground potash mining operation. He also confirmed that the respondent uses the same employees to work its open pit mines at Eagle Flats (Tr. 30). Since he transferred out of the area when MSHA's technical support group came in, Mr. Lilly could not state the engineering and production costs of the noise shield which was constructed to alleviate

the noise level, nor could he state the number of hours spent by the technical staff in developing the shield (Tr. 30).

In response to further questions, Mr. Lilly described the LeRoi drill as a large track mounted piece of machinery, and he stated that the operator stands at the control station while operating the drill boom. He confirmed that the drill operator is positioned further back from the drill helper who cleans and collars the drill steel. He confirmed that only the drill helper was surveyed with a dosimeter because he spends more time in the area where the actual drilling is performed. However, on subsequent noise surveys, he would probably test the drill operator and a loader operator, and he tries not to survey the same individual again (Tr. 33-35).

Mr. Lilly confirmed that the drill is also used for scaling loose material, and that over an 8-hour shift the drill is in operation for approximately 4 to 5 hours (Tr. 36). Mr. Lilly also confirmed that the results of his noise survey on February 7th indicated that the drill noise exposure was 235.9 percent over the allowable limit, and that this translates into a noise exposure average of 96 dBA's, or 6 dBA's over the allowable limit of 90 dBA's over the full shift noise survey period (Tr. 38-39). Mr. Lilly identified the noise sources as the drill and the compressor. The resulting noise levels to which the employees are subjected are high frequency directional noises coming from the air hammer and the "ringing" of the rotating steel drill bits, and if one were to place a barrier between the employees and the noise source, a small reduction in the noise will result (Tr. 39). The noise survey is based on a particular occupation and takes into account the normal required duties of the person being tested at any given time. In the instant case, a determination was made that the drill and compressor were the main sources of noise exposure to the area where the drill helper was required to work (Tr. 41).

Mr. Lilly stated that his experience with similar drill shielding devices in connection with MSHA's technical support at another mining operation confirmed that such devices effectively result in a great reduction of the drill noise exposure. In his opinion, shielding devices are practical at the respondent's mining operation and they do not hamper the operator's ability to drill or control the drill (Tr. 42).

Mr. Lilly conceded that while his citation makes reference to a drill "operator," the noise survey results are equally applicable to the drill helper because both individuals alternated at both occupational positions and the actual

noise tests were conducted on the drill itself (Tr. 45). The work sheet and notes which accompanied the citation state that two individuals were exposed to the drill noise, and this would include both the drill operator and the helper because they alternately operate the drill, and his sound level meter reading were taken around the drill areas, including the control station, and they were all over 100 decibels (Tr. 48).

Thomas M. Lloyd, Physicist, MSHA Safety and Health Technology Center, Denver, Colorado, testified as to his education and experience, and confirmed that his work includes testing noise levels, designing engineering noise controls and modifications, and retesting such controls to assure positive results. He confirmed that during his 7 years of employment with MSHA he has been personally involved in conducting 15 noise surveys a year. He has also been involved in at least 10 noise control modifications for underground drill machines, and he confirmed that MSHA performed technical assistance noise and engineering control surveys at the respondent's mine in January and April, 1986, and he identified exhibits G-4 and G-5, as MSHA's reports and recommendations concerning its technical assistance (Tr. 82-87).

Mr. Lloyd explained what takes place during his technical assistance visits to mines, and he confirmed that exhibit G-4 is the report he prepared with respect to his January 6-8, 1986, visit to the mine in question. He confirmed that a two-side temporary noise barrier was constructed out of plywood as a diagnostic procedure, and when the noise level was tested with the barrier in place, a reduction in noise resulted, and he concluded that if a permanent shield was constructed for the drill in question, there would be some noise reduction generated (Tr. 87-90).

Mr. Lloyd confirmed that the April 8, 1986, survey and follow-up noise measurements were made by another member of his MSHA group, and he identified photographs of the shielding device constructed out of panels of safety glass mounted on a wooden frame (exhibit G-5; Tr. 91). Mr. Lloyd stated that the shielding device creates an acoustical "shadow zone" for the person standing behind the shield, and it serves to interrupt the noise between the operator and the drill (Tr. 91). He confirmed that such partial barrier noise control treatments for drilling machines have been used successfully in at least 10 other underground mines (Tr. 92).

Mr. Lloyd stated that he made it clear to the respondent that his services were available to help in the construction

of the barriers for the drilling machine in question, and he estimated that the cost for the wooden frame and safety glass materials to construct the barrier would be "in the area of $300," plus the labor to construct it (Tr. 93).

Mr. Lloyd stated that the partial barrier shield constructed with some scrap plywood during his January, 1986, survey resulted in drill noise reduction at that time, and when the final barrier was constructed and installed, MSHA's follow-up survey reported in April, 1986, indicated a measured drill noise reduction of five decibels. He described the method for testing the noise levels utilizing the shield and indicated that the test results are compared with the noise level readings taken before the shield was in place (Tr. 93-95). He stated that all of the noise exposure that was generated during the surveys in this case was generated from the drill machine itself (Tr. 94). Mr. Lloyd confirmed that other than the barrier shield which has been constructed and installed on the drill in question, nothing further can be done at this time to reduce the noise exposure, and no further drill changes are required at this time (Tr. 97).

On cross-examination, Mr. Lloyd reiterated that there is no other feasible control to reduce noise exposure other than the noise control shield that has been installed on the LeRoi drill in question (Tr. 97). He also reiterated that MSHA's Denver Safety and Health Technology Center offers free engineering consultant service to the mining industry to help keep the costs down (Tr. 99). Mr. Lloyd stated further as follows (Tr. 100-101):

> Q. You have heard testimony that the operator of the drill is required to go outside of the barrier to clean off the glass.
>
> A. Uh-huh.
>
> Q. And based on that, do you still feel that the feasibility and the effectiveness of this barrier is valid?
>
> A. Yes, and there are several reasons I feel that. First of all, it has been done several other places in other mines and worked effectively, using glass barriers, and we have -- the feedback that I have gotten from the other projects I have worked on is that it is somewhat of a nuisance and certainly an additional responsibility for the operator to keep the

glass clean, but in general a bottle of Windex or some cleaner of that sort is sufficient to keep it clean.

Q. And did you make any notations about this operation relative of the levels of dust and mud splattered as compared to these other places you have visited?

A. There is -- all I really have to go by are the pictures that we have shown in the report, because I was not in that follow-up survey, but I would say it was comparable to other places we have seen situations of that degree.

And, at (Tr. 105-106):

Q. I'm still not sure I understand why you are satisfied with this -- at this particular moment in time.

A. Okay. I feel that the control as installed has met the requirements -- my personal requirements -- my definition of feasibility, and that is that noise control has provided a substantial noise reduction. A 5 decibel noise reduction will reduce the noise level -- or noise exposure in half for the time spent behind the shield, so it provides significant noise reduction.

It also was constructed -- or could have been constructed using a minimal amount of money. It is not -- whether the company decided to use technical support assistance in constructing the shield or not was their decision, but the amount of money spent could have been minimized to somewhere in the order of $300, and so economically I feel it is feasible.

And discussions with the drill operator at the time I made the initial determination of the two-sided shield indicated that there would not be a problem with constructing the shield as we had laid it out. And, I might add, that we purposely left the top of the shield open -- or I am sorry -- we did not put a roof on top of that enclosure because when

you are drilling in the vertical position he needed to see the top of the drill, so we left that -- that was a further addition that we had considered and decided not to go with that.

Q. Then it is your position then that this was an inexpensive improvement so long as MSHA provides physicists to do the engineering?

A. Well, yes, and we did.

With regard to the use of personal hearing protection, Mr. Lloyd stated as follows (Tr. 128-129):

THE WITNESS: That is correct. The noise -- one of my points was that the amount of noise reduction provided by the hearing protection is almost random. It is just so variable that it is very, very difficult to protect that. We are using hearing protection as a last -- you know, it is the absolute last thing that we could think of that would do any good at all.

To rely on hearing protection as -- to give a predicted amount of noise reduction just -- it is just not reasonable based on the tests. We have made over 200 tests of ear muff type protectors in the field, and our concern is that people will be relying on hearing protection to drop the noise level to that last whatever number you want to pick.

When you design an engineering control, it is fixed on the machine, and any time spent behind that will lower his average daily noise exposure. It would be real unlikely to go back and sample that person for all day and come out higher or the same then -- it may not be 5 decibels lower, but it is bound to be somewhat lower.

And my point is, given that that hearing protection is unpredictable in its ability to reduce noise for the operator, the engineering work, in conjunction with the hearing protection, seems to be the most reasonably way to approach it.

Mr. Lloyd confirmed that he is not aware of any drills on the market which are available, as manufactured, that will bring the respondent into compliance with the 90 dBA requirement of the standard. In order to achieve compliance, or attempt to do so, an operator must modify any drill that it purchases, or the manufacturer must make certain modifications, and MSHA is available to assist with the design of a suitable engineering noise control (Tr. 142-143).

Respondent's Testimony and Evidence

Joe R. Williams, respondent's general manager and president, testified as to the scope of his mining operations, and confirmed that the Van Horn, Texas White Marble Mine is the only underground mine which he operates. Mr. Williams also confirmed that six employers, including superintendent Carl Schiller, work at the mine, as well as at two other surface mining locations (Tr. 49-53).

Mr. Williams confirmed that the cited LeRoi hydraulic track drill is in use at the subject mine, and that prior to the use of that drill, a LeRoi air track drill and a Gardner-Denver track drill were used. The air track drills were very noisy in comparison to the hydraulic drill currently in use. Mr. Williams identified copies of three invoices reflecting the purchase and trade-in of the drills which he referred to, and he confirmed that the cited drill was purchased in November, 1983 (exhibit R-1, Tr. 58).

Mr. Williams identified a copy of a letter dated May 24, 1985, after the citation was issued, received by Mr. Schiller from the Chief Engineer, LeRoi Division, Dresser Industries, concerning the cited drill, and it states as follows (exhibit R-2, Tr. 59):

> I enjoyed discussing the very interesting aspects of your LeROI hydraulic drill rig application last week. I regret that we could not be of more help to you in complying with MSHA noise level requirement of 90 dBA, 8 hour average for operator.
>
> We are required by EPA to silence portable compressors; but as you know, there is presently no national requirement for rock drills. I believe federal legislation on noise purposely avoided restrictive rules on rock drills because of the lack of any feasible

means to implement. Many rock formations like your marble can only be penetrated economically by percussion drilling means. Percussion drilling is by nature very noisy.

Over the years we and others have experimented with various schemes to reduce percussion drill noise. Perhaps the biggest advance made in this direction was the development of the hydraulic actuated hammer which completely eliminated the pneumatic bark of pulsating and expanding air from the machine cylinder. Even with this advantage which you are utilizing, the impulsive energy generated still has to travel down the steel to bit to do any work.

Noise emanating from the rapidly struck drill steel is, of course, the principal remaining sound source and we have found no commercially feasible way to control it. Various forms of telescoping enclosures and vibration dampers have yielded marginal improvements but have been, in general, too cumbersome and unreliable to allow reasonable production levels.

On applications we have been involved with, earmuffs and other personal ear protection have satisfied local special requirements.

Mr. Williams also identified a copy of a letter dated June 7, 1985, from Mr. Schiller to Inspector Lilly, forwarding a copy of the Dresser Industries letter, and it states as follows (Tr. 59):

We are using a LeROI 12 EH drill with a LeROI 175 compressor. We have attempted twice to reduce noise but failed to bring this machine into compliance. Please note paragraphs three and four in the attached letter in relation to citation #2236193 issued February 7, 1985 and extended April 25, 1985.

We would like to have this citation extended until suitable engineering controls are invented.

We have an existing personal protective equipment program requiring drillers and drillers

helpers to wear EAR (brand) plugs or David Clark Company Model 10A hearing protectors.

Mr. Williams identified a photograph of the cited drill in question, and a photograph of the drill as modified by the noise shield recommended by MSHA's technical support group (Tr. 61, exhibits R-3, R-4).

Mr. Williams could not state whether prior MSHA noise citations have ever been issued at the mine, and he stated that "those drills are out of compliance with the regulation, and always have been and always will be" (Tr. 64). He confirmed that protective ear muffs or ear plugs have always been worn by his employees since he began his mining operation (Tr. 64). He stated that the drill operator and helper are behind the noise shield only when they are at the controls, and he described their duties with respect to the drilling operation (Tr. 64-66). He confirmed that the sum total of the noise emanating from the operation of the drill includes noise from the compressor, the hydraulic mechanism engine, and the percussion of the steel drill as it drills into the formation, and that the greater noise comes from the steel drill (Tr. 66).

Mr. Williams stated that the glass panes on the noise barrier accumulate mist and dust and need to be wiped off, and that in certain drilling positions, the barrier creates some handicap. Mr. Williams could not state how much time MSHA's engineering staff spent on developing the barrier, and while he had no accurate answer as to what it cost his company to construct the barrier, he stated that "it cost several thousand dollars of time, personnel's time" (Tr. 67). He confirmed that Mr. Schiller, who is a mining engineer, constructed and mounted the barrier on the drill (Tr. 68).

On cross-examination, Mr. Williams stated that while he was never a miner, he has had 25 years of experience in the "engineering field," and that his personnel have attended various MSHA training schools (Tr. 69). Mr. Williams confirmed that he has discussed the drill noise problem with Mr. Schiller a number of times, and he considers Mr. Schiller to be a conscientious and good engineer. However, they could not come up with any solutions, and Mr. Williams does not believe that MSHA's solution with respect to the noise barrier device "is worth a damn" (Tr. 71).

In response to further questions, Mr. Williams stated that he traded in the air drill for the cited hydraulic drill because the hydraulic is far less noisier and is less costly

to terms of maintenance. He did not believe that the hydraulic drill was tested for noise when he received it because everyone knew it was inherently noisy and used ear plugs when it was operated (Tr. 73). However, if a less noisier drill that meets the noise regulations comes on the market, he would purchase one (Tr. 75).

Mr. Williams stated that he was not too enchanted with MSHA's recommended noise shielding device because "it is kind of awkward, . . . and according to Carl Schiller, he says it really doesn't make but about one decibel difference." Mr. Williams does not believe that the device is a good noise deterrent, and in his opinion, MSHA's reported 5 decibel noise reduction with the use of the barrier "is questionable" (Tr. 75). He confirmed that the drill operator still wears the protective ear muffs (Tr. 75).

Mr. Williams conceded that the expense of constructing the barrier in question was a one time expense, and that it was installed only on the cited drill. He expressed some concern over what the future will bring, and whether or not MSHA will at some later time require him to install other noise devices to achieve compliance. When asked whether there was a problem with amortizing the cost of the noise shield, while at the same time "keeping MSHA happy," Mr. Williams responded "I have no objection to that. We did it . . . we spent the money. Now if they are satisfied, it would tickle me" (Tr. 76).

Discussion

In MSHA v. Callanan Industries, Inc., 5 FMSHRC 1900 (November 1980), an inspector cited a sand and gravel mine operator with a violation of 30 C.F.R. § 56.5-50, a noise standard identical to that found in section 57.5-50, after conducting an 8-hour dosimeter noise survey on an air track drill used in a stone quarry. At the time of the survey, the drill operator was wearing ear muffs, but the survey results showed that for the 8-hour shift, the operator of the drill was exposed to 103.6 dBA, the equivalent of 660 percent of the 90 dBA permissible noise exposure level established by the standard.

After the citation was issued, an engineer from MSHA's Pittsburgh Technical Support Center conducted a noise survey on the air track drill for the purpose of suggesting noise controls. Subsequently, MSHA suggested that the drill cylinder be modified to accommodate a muffler, and stated that Callanan could either purchase a muffler commercially or

construct one itself. MSHA concluded that the attachment of a muffler would result in a noise reduction of approximately 5 dBA, and it estimated the cost at $2,672.78. Callanan took the position that the proposed drill shell modification was not feasible because it was too costly to transport the drill for retrofitting, and it stated that the drill in question was valued at under $2,500. MSHA took the position that the proposed engineering control was feasible because it was both technologically achievable and reasonable from a cost standpoint.

The judge held in Callanan's favor and vacated the citation. He found that the MSHA's cost estimate with respect to the engineering control was "too imprecise to allow a proper economic analysis," and he found no "reasonable assurance that there would be an appreciable and corresponding improvement in working conditions as a result of the proposed controls."

The Commission reversed, and rejected any notion that a "cost-benefit analysis," as that term is commonly understood and used, is the appropriate analytical method for determining whether a noise control is required. The Commission construed the term "feasible" as "capable of being done," and it concluded that the determination of whether use of an engineering control to reduce a miner's exposure to excessive noise is capable of being done involves consideration of both technological and economic achievability. In allocating the burdens of proof required to make this determination, the Commission offered the following guidelines at 5 FMSHRC 1909:

> [I]n order to establish his case the Secretary must provide: (1) sufficient credible evidence of a miner's exposure to noise levels in excess of the limits specified in the standard; (2) sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source; (3) sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control; (4) sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and (5) a reasoned demonstration that, in view of elements 1 through 4 above, the costs of the control are not wholly out of proportion to the expected benefits. After the Secretary has established each of the above elements, the operator in

rebuttal may refute any of the components of the Secretary's case.

In Todilto Exploration and Development Corporation v. MSHA, 5 FMSHRC 1894 (November 1983), an inspector cited a violation of 30 C.F.R. § 57.5-50(b), after conducting an 8-hour noise survey with a dosimeter on a jackleg percussion rock bolt drill in an underground uranium mine and finding that the drill operator was exposed to 114 dBA. The drill operator was wearing ear plugs and muffs, and the drill was not equipped with a muffler. The violation was abated by the installation of a muffler on the drill. However, subsequent noise readings with a sound level meter showed that excessive noise levels still existed, and the readings established that the drill operator's average noise exposure levels ranged between 110 dBA and 113 dBA. Even though Todilto attached a muffler to the drill, the drill operator was still required to wear personal protective equipment.

The judge found that the drill operator was exposed to an excessive noise level, and although he also found that MSHA established that the installation of the muffler was an engineering control available to Todilto, since the exposure to noise was still not within permissible levels as required by the regulation, even with the muffler attached, the judge concluded that the installation of the muffler was not a feasible engineering control, and he vacated the citation. On appeal, the Commission reversed and stated as follows at 5 FMSHRC 1896-1897:

> [W]e hold that a control may indeed be "feasible" within the meaning of 30 C.F.R. § 57.5-50(b) even though it does not reduce the miner's exposure to noise to permissible levels set forth in subsection (a) of the standard. Our holding is based upon the express wording of the noise standard. Section 57.5-50(b) unambiguously provides that when excessive noise exposure levels exist, "feasible administrative or engineering controls shall be utilized." It continues, "[i]f such [feasible] controls fail to reduce exposure to within permissible levels, personal protection equipment is to be provided and used . . . ." (Emphasis added). Thus, the noise standard clearly contemplates that in a given case a control might not reduce the noise exposure level to within permissible levels, but nevertheless be a "feasible" control required to be

> implemented. To allow a mine operator to proceed directly to the use of personal protective equipment and thereby avoid implementing otherwise feasible administrative or engineering controls, solely because use of the controls themselves does not achieve permissible exposure levels, would be to allow circumvention of the standard's clear requirement that excessive noise levels first be addressed at their source. We note that under the judge's approach a control that reduces the level of noise from 114 dBA to 91 dBA (on the basis of an 8-hour exposure period) would not be feasible simply because it fails to reduce the noise level to 90 dBA. We find no support for this result in the standard.

Upon remand of the Callanan case, the parties agreed to settle the matter, and the operator paid a $78 civil penalty assessment for the noise violation in question, 6 FMSHRC 139 (January 1984).

The Todilto case was remanded for the judge's determination as to whether or not MSHA proved a violation of section 57.5-50(b) for failure by the operator to implement a feasible engineering control within the parameters of the Commission's guidelines as enunciated in Callanan, supra. On April 17, 1984, the judge issued his decision and found that MSHA had established that the drill operator was exposed to an excessive noise level, that the muffler was a technologically achievable engineering control capable of reducing the drill operator's noise exposure, and that the cost was not unreasonable for the benefits achieved. The judge found that Todilto was in violation of section 57.5-50(b), and stated in pertinent part as follows at 6 FMSHRC 934 (April 1984):

> Therefore, based upon the credible evidence in this case; and the Commission's decision in Callanan, I find that the Secretary has proven the respondent violated mandatory standard § 57.5-50(b) by failing to implement the feasible engineering control (muffler) which was available to it. The fact that the muffler did not reduce the noise level to that required by the standard is not a proper reason for an operator to avoid the control and go directly to personal protection equipment. The standard contemplates the use of such personal equipment only after all other "feasible"

engineering controls are installed to achieve the best results possible.

In MSHA v. Landwehr Materials Inc., 8 FMSHRC 54 (January 1986), Judge Broderick affirmed a citation for a violation of section 56.5-50(b), after finding that a shovel operator at a limestone quarry who was wearing personal hearing protection was exposed to a 96 dBA noise level for an 8-hour shift. After the termination date for the citation was extended, MSHA's Denver Technical Support Group performed a noise control survey which showed that the noise level in the shovel operator's environment was reduced by approximately 33 percent, from an average of 101 to 98 dBA, when a vinyl curtain was installed between the shovel operator and the engine compartment of the shovel. While significant, this reduction did not bring the noise level down to the permissible 90 dBA specified in the cited standard, and personal protection equipment was still deemed necessary. Judge Broderick found that the installation of the vinyl curtain was a feasible engineering control available to reduce the operator's noise exposure, and that Landwehr's failure to utilize this feasible noise control constituted a violation of section 56.5-50(b).

MSHA's Arguments

During oral argument at the hearing, petitioner's counsel asserted that the respondent must use those available technologically feasible engineering controls to reduce the noise level as much as possible before resorting again to personal hearing protection (Tr. 78). Counsel maintained that on the facts of this case, the petitioner has established a prima facie violation of section 57.5-50(b) by the respondent pursuant to the guidelines established by Callanan Industries, Inc. and Todilto Exploration and Development Corporation, supra. Counsel asserts that petitioner has established that miners were over-exposed to the drill noise, that there was a technologically available engineering control, and that a "technical violation" of the cited standard has been established (Tr. 140-141; 146). Counsel concluded that since the inspector modified the citation to delete his "significant and substantial" (S&S) finding, "the references in regard to negligence are no longer a part of the citation" (Tr. 150).

Respondent's Arguments

During oral argument at the hearing, respondent's counsel conceded that the cited drill was out of compliance with MSHA's noise requirements limiting the noise exposure to

90 dBA's over an 8-hour work shift (Tr. 139-140). However, counsel took the position that the respondent did what it could to reduce the drill noise, and he expressed concern that even though MSHA concedes that even with the use of the noise barrier, there are no additional feasible engineering controls available to further reduce the noise, other inspectors in the future may require the respondent to use additional controls to achieve total compliance (Tr. 138). Counsel asserted further that while it has received prior citations for noise violations, it has required its employees to wear personal hearing protection, purchased a quieter drill, and consulted with the drill manufacturer in order to achieve compliance (Tr. 146-147). Considering these past compliance efforts, counsel took the position that it was in compliance with the intent of the standard and was not negligent, and he preferred that MSHA issue some sort of "warning" or advice to the respondent as to how to continue in compliance, rather than issuing citations and seeking civil penalty assessments (Tr. 147-148). Counsel believes further that since MSHA has established that no further feasible engineering controls are available, the citation should have been withdrawn (Tr. 149-150).

Findings and Conclusions

The respondent in this case is charged with a violation of the noise exposure requirements of mandatory standard 30 C.F.R. § 57.5-50(b), for exceeding the noise exposure level for the operator of a LeRoi 12 EH hydraulic track mounted drill which was in use underground at the mine. Although the citation makes reference to the "drill operator," Inspector Lilly explained that the results of MSHA's noise surveys are equally applicable to the drill operator and drill helper because they essentially occupy the same occupational position, alternate their work during a normal work shift so that each individual functions at any given time as both the drill operator and helper, that they are both exposed to the same noise levels emanating from the drill, and that the noise tests and surveys measured the noise exposure from the drill and its components.

The essential facts in this case are not in dispute. Although the respondent's original answer denies that a violation occurred, the respondent has not rebutted the petitioner's credible evidence and testimony establishing that the drill in question is out of compliance with the applicable cited noise standard. As a matter of fact, respondent's general manager and president Joe Williams candidly conceded that the cited drill is out of compliance with the cited

noise standard, and "always will be." Further, during the course of the hearing, respondent's counsel, who happens to be Mr. Williams' son, conceded that the drill is out of compliance with the required 90 dBA noise exposure level over an 8-hour shift (Tr. 139-140). Under the circumstances, I conclude and find that the petitioner has established by a preponderance of the credible evidence in this case that the noise exposure resulting from the underground operation of the cited drill was in excess of the permissible limitation of 90 dBA, and that the drill operator and helper were exposed to an excessive noise level amounting to a noise dose over an 8-hour period which was 235.9 percent in excess of that permitted by the standard, resulting in an average 8 hour noise exposure of 96 dBA's. Accordingly, I further conclude and find that the petitioner has satisfied the initial requirements enunciated by the Commission in Callanan Industries, Inc., supra, and has presented sufficient credible evidence of miner exposure to noise levels in excess of the limits specified in the standard.

The next consideration is whether the petitioner has presented credible evidence as to the availability of a technologically achievable engineering control capable of reducing the drill operator or helper's exposure to excessive noise. The facts show that after the citation was issued, and during the extended abatement period, the respondent attempted to reduce the drill noise exposure by moving the compressor, shielding the drill rotation head, and changing the bits more often, all to no avail. In addition, the respondent consulted with the drill manufacturer, only to be told that all available technology to reduce the drill noise had been incorporated into the drill during its construction, and that no additional engineering controls were available for noise reduction on the drill as manufactured.

Subsequent to the respondent's efforts at reducing the drill noise levels, MSHA provided technical assistance to the respondent as testified to by Mr. Lloyd, and as reflected in his report prepared jointly with MSHA Safety and Health Specialist Donald D. Rapp (exhibit G-4), as well as in a subsequently issued report prepared by MSHA General Engineer Richard J. Goff (exhibit G-5). The evidence shows that as a result of Mr. Lloyd's technical assistance, which included the construction of a prototype noise barrier from scrap plywood to form a barrier between the drill operator and the face where the drill cut into the material being mined, the noise levels dropped. Following Mr. Lloyd's recommendations, the respondent subsequently fabricated a two-sided barrier from plywood and tempered safety glass, and it was installed

on the drill. Mr. Goff's report reflects that the recorded drill noise levels before and after the installation of this barrier showed a reduction of 5 dBA's in the drill noise level, and he concluded that there was no additional suitable treatment for the drill. He also concluded that personal hearing protection was still needed, and that with the installation of the barrier, the personal protection would be more effective against the lower noise levels resulting from the use of the barrier.

Inspector Lilly testified that in his experience with similar shielding devices at another mining operation, they have proved to be effective in reducing drill noises. He also believed that the barrier in question is a practical method for reducing noise exposure and that it does not hamper the drill operator's ability to drill or control the drill. Mr. Lloyd confirmed that the use of similar glass barriers have proved effective in the past, and while some of his "feedback" reflects that keeping the glass clean may be a nuisance, it can be kept clean by the operator. Mr. Lloyd also confirmed that his technical assistance visit to the respondent's mine included discussions with the drill operator, and he found that the construction and lay-out of the barrier presented no problem. Mr. Lloyd also confirmed that the top of the enclosure was left off to afford visibility while the drill was used in the vertical position. The respondent did not call the drill operator or mine superintendent Schiller to testify in this case, and it has not rebutted the testimony of Inspector Lilly or Mr. Lloyd.

Mr. Williams did not appear to be too enchanted with the noise barrier and he questioned its effectiveness as a noise deterrent. He also indicated that the glass had to be wiped off, and that in certain drilling positions, the barrier was a handicap. However, he did not suggest that the barrier presented any safety hazards, nor did he offer any credible engineering evidence to support his opinions and conclusions regarding the use of the barrier. In short, I cannot conclude that the respondent has rebutted the petitioner's evidence which leads me to conclude and find that the construction, installation, and use of the barrier in question is a technologically achievable engineering control capable of reducing the drill noise sources and the drill operator and helper's noise exposure.

With regard to the question as to whether or not the noise barrier in question is an engineering control which is economically achievable, I take note of the fact that in Callanan Industries, Inc., supra, at 5 FMSHRC 1909, the

Commission stated that this may be established by "sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control." In the case at hand, the evidence establishes that the initial diagnostic noise barrier used by Mr. Lloyd during MSHA's technical assistance survey was constructed from scrap plywood. Mr. Lloyd estimated the cost of the one finished barrier, which consisted of a two-sided wooden framed and glass barrier, at $300 plus the cost of labor to construct it (Tr. 93). Utilizing MSHa's technical support personnel to minimize the costs, Mr. Lloyd believed that the construction and utilization of the barrier was an inexpensive and economically feasible noise control improvement (Tr. 105-106).

Mr. Williams confirmed that mine superintendent Schiller constructed and installed the noise barrier, and while he could not state what it cost, he estimated that "it cost several thousand dollars of personnel time" (Tr. 67). However, there is no credible evidence to support the respondent's estimate of the "personnel costs." The respondent failed to call Mr. Schiller or to present any other evidence to substantiate Mr. Williams' conclusions. Photographs of the barrier in question (exhibit R-4), and those which are included as part of MSHA's technical assistance reports, reflects that the barrier is a relatively simple piece of equipment mounted to the side of the drill at the operator control station. Further, the record in this case establishes that the costs of developing the barrier, including the engineering technical assistance and advice leading to its construction and installation, were all at MSHA's expense. In addition, Mr. Lloyd confirmed that any future technical assistance, if necessary, will be at MSHA's expense, as long as the respondent avails itself of its services. Under the circumstances, I conclude and find that the petitioner has established by a preponderance of the credible evidence that the cost of the single noise barrier in question is not economically prohibitive, and that the respondent has failed to produce any credible evidence to the contrary.

It seems clear in this case that the installation of the noise barrier in question resulted in a reduction of 5 dBA's in the drill noise level, as well as a reduction in the level of noise exposure for the drill operator and helper, and that this was achieved at a reasonable cost. Under the circumstances, I conclude and find that the development and installation of the drill noise barrier were not wholly out of proportion to the resulting noise reduction benefits which have been achieved in this case. The fact that the 5 dBA noise reduction with the use of the barrier did not bring the

respondent into total compliance with the permissible level stated in subsection (a) of section 57.5-50, is no reason to excuse the respondent from using the barrier or from continuing to use personal hearing protection in conjunction with the barrier. Todilto Exploration and Development Corporation, supra, at 5 FMSHRC 1896-1897.

In view of the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation of the cited mandatory standard, 30 C.F.R. § 57.5-50(b), by a preponderance of the credible evidence adduced in this case, and the citation IS AFFIRMED.

History of Prior Violations

The parties have stipulated that for the 24-month period prior to the issuance of the citation in question, the respondent was assessed for three violations. While it is not clear from the record whether or not the respondent's past compliance record includes citations for violations of section 57.5-50(b), this burden in of the petitioner. The petitioner has produced no evidence of any prior noise violations. Under the circumstances, I conclude and find that the respondent has a good compliance record.

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

The record establishes that the respondent is a small mine operator. The parties have stipulated that the civil penalty assessment for the violation in question will not adversely affect the respondent's ability to continue in business.

Gravity

The record in this case reflects that the employees working around the drill were wearing personal hearing protections. In addition, the respondent had purchased or traded in an old drill for a quieter one prior to the issuance of the citation, and there is no evidence of any long-term noise exposure. Once the noise barrier was installed, the respondent was still barely out of compliance, but the personal hearing protection was more effective against the lower noise levels resulting from the use of the barrier. Under the circumstances, I conclude and find that the violation was nonserious.

Negligence

On the fact of this case, I cannot conclude that the respondent was negligent. The record establishes that the respondent required the drill operator and helper to wear personal protective devices and they were being worn at the time of the inspection. In addition, the respondent had purchased or traded in its old drill for a newer one in its attempts to limit the drill noise exposure.

Good Faith Compliance

The record established that the respondent took timely steps to abate the violation, and cooperated fully with MSHA in its attempts to comply with the noise standard in question. I conclude and find that the respondent demonstrated good faith compliance.

Civil Penalty Assessment

In view of the foregoing findings and conclusions, and taking in to account the requirements of section 110(i) of the Act, I conclude that a civil penalty assessment in the amount of $20 is reasonable for the citation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $20 for section 104(a) non-"S&S" Citation No. 2236193, February 7, 1985, 30 C.F.R. § 57.5050(b). Payment is to be made to MSHA within thirty (30) days of the date of this decision, and upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 29 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 86-8
	:	MSHA NO. 15-13469-03544
v.	:	
	:	Mine: Green River No. 9
GREEN RIVER COAL COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Flem Gordon, Esq., Gordon and Gordon, Owensboro, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A modification of the order at bar to a citation under Section 104(a) of the act is proposed and Respondent has agreed to pay the proposed penalty of $500 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement if GRANTED, and it is ORDERED that Respondent pay a penalty of $500 within 30 days of this order.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
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JUN 29 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-225 A.C. No. 42-00093-03532
v.	:	Sunnyside No. 1 Mine
KAISER COAL CORPORATION OF SUNNYSIDE, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
James A. Holtkamp, Esq., VanCott, Bagley, Cornwall and McCarthy, Salt Lake City, Utah, for Respondent.

Before: Judge Cetti

This is an enforcement proceeding brought by the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charging the operator of an underground coal mine with the violation of safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Mine Act).

The Secretary charges the operator with the violation of safety standard 30 C.F.R. § 75.205 with respect to the requirement that the operator test ribs of the mine as well as the roof and face before any work or machine is started, and as frequently thereafter as may be necessary to ensure safety.

The respondent filed a timely appeal from the Secretary's proposal for penalty dated September 2, 1986. After proper notice to the parties this matter came on regularly for hearing before me as a administrative law judge of the Federal Mine Safety and Health Review Commission on February 4, 1987, at Salt Lake City, Utah. Oral and documentary evidence was introduced, both parties were ably represented by counsel. Post-trial briefs were filed, and the case was submitted on March 30, 1987.

Issues

The issues presented in this case are:

(1) Whether the practice at the mine of examining but not testing the ribs of the mine constitutes a violation of 30 C.F.R

§ 75.205, and (2) whether the alleged violation was "significant and substantial".

Stipulations

1. Kaiser Coal Corporation of Sunnyside is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. Kaiser Coal Corporation of Sunnyside is the operator of Sunnyside Mine No. 1, MSHA I.D. 42-0093-03532.

3. Sunnyside Mine No. 1 is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").

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

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent, Kaiser Coal Corporation of Sunnyside, on the dates and at the places stated therein, and may be admitted into evidence for the purpose of establishing issuance of the citations, and not for the truthfulness or relevancy of any statements asserted therein.

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

7. The proposed penalty will not affect respondent's ability to continue in business.

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

9. Kaiser Coal Corporation of Sunnyside is a large mine operator with 817,276 tons of production in 1986.

10. The certified copy of the MSHA assessed violations history accurately reflects the history of this mine for the two years prior to the date of the citation.

11. If a violation of 30 C.F.R § 75.205 is found the Secretary's $1,000 proposed penalty is the appropriate civil penalty.

Applicable, Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq. Sections 104(a) and 101(c).

2. The safety standard, 30 C.F.R. § 75.205.

Summary of Evidence

On March 7, 1986, Jerry Dimick, a safety engineer, was kneeling next to a rib. In that position, while examining a malfunctioning crusher, he was fatally injured when a large piece of the rib slid down and rolled over him. The piece of rib which fell on him was approximately 6' x 4' x 2', with a feathered edge on one side. Five to seven people were required to lift the piece of coal off Mr. Dimick.

The citation alleges a violation of safety standard 30 C.F.R. § 75.205 which provides:

> Where miners are exposed to danger from falls of roof, face, and ribs the operator shall examine and test the roof, face, and ribs before any work or machine is started, and as frequently thereafter as may be necessary to insure safety. When dangerous conditions are found, they shall be corrected immediately.

Under the heading "condition or practice" the citation alleges the following:

> A test of the rib condition was not conducted after a visual examination was made for crosscut No. 28 and inby to the longwall face of the 129th Left longwall section. A service representative was performing an examination of a piece of equiptment [sic] that was not operating properly. This person was required to place himself in a close proximity to the lower rib. The untested rib fell striking the victim causing fatal injuries. This violation was issued during the investigation of a fatal accident which occurred on March 7, 1986.

The Respondent's Case

The respondent, Kaiser Coal Corporation of Sunnyside, in its post-hearing brief accurately summarizes the evidence upon which it is relying to prove its case. Respondent states that on March 7, 1986, Jerry Dimick, a service engineer for Halbach and Braun, arrived at the Kaiser Sunnyside No. 1 Mine for the purpose of examining a malfunctioning Halbach and Braun crusher at the 19th left outside longwall area (Tr. 29-30). Mr. Dimick was an experienced miner, having worked underground several years prior to becoming a service representative (Tr. 44). Mr. Dimick met Duane Wood, the general longwall foreman, at the bathhouse and asked to go with Mr. Wood into the mine to take a look at the crusher (also referred to a chunk breaker and as a stage loader) (Tr. 157).

Mr. Dimick and Mr. Wood reached the longwall face at 19th Left after 11:00 a.m. (Tr. 157-58). They first noticed water leaking from a hose going to the crusher. After the leak was repaired, Mr. Dimick checked the valves on the controller of the crusher (Tr. 158).

Mr. Dimick knelt down between the crusher and the rib to look at the equipment. Mr. Dimick's back was toward the rib (Tr. 162-63). Mr. Wood crossed over the crusher to the "up-dip" side to look at the crusher from the other side (Tr. 159). While Mr. Dimick was kneeling down looking at the crusher, Mr. Gary Kuhns, a section foreman, came from the bottom of track entry and walked by Mr. Dimick on his way to the face (Tr. 92). Mr. Kuhns proceeded to help the headgate operator shovel loose coal from the bottom jacks. As he looked toward the area where Mr. Dimick was kneeling, Mr. Kuhns saw the rib slide down and roll over in the area where Mr. Dimick was kneeling (Tr. 34, 92-93). Mr. Kuhns estimated the piece of rib which fell on Mr. Dimick to be six feet by four feet by two feet, with a feathered edge on one side (Tr. 93).

Mr. Kuhns ran to Mr. Dimick and shouted for Mr. Wood. Mr. Wood came over the crusher and, with Mr. Kuhns, tried to lift the coal but could not. The section crew came down the face and five to seven people were required to lift the piece of coal off Mr. Dimick (Tr. 160).

Mr. Dimick was transported to the hospital and passed away while in intensive care that evening.

An investigation team composed of representatives from the Mine Safety and Health Administration ("MSHA"), the Company, the State Mine Inspector, and the miners undertook an investigation beginning at about 6:00 p.m. on March 7 (Tr. 15-16). At approximately 8:00 p.m., the investigation team was notified that Mr. Dimick has passed away. At that time, the MSHA inspectors issued a section 103(k) withdrawal order (Order No. 2834841)(Tr. 27).

MSHA subsequently interviewed a number of employees of Kaiser, including those who had worked and traveled in the area prior to the accident. All of the miners reported that they had visually examined the rib as they traveled and could see no apparent anomaly or problem (Tr. 33-34, 38, 58). During the hearing, both Mr. Wood and Mr. Kuhns testified that they had carefully examined the rib visually immediately before the accident and had concluded that the rib was sound (Tr. 91-92, 155-56). In fact, Mr. Kuhns testified that he had been though the area "a dozen times or more during that shift, and there had been no changes, and I pay particular attention to changes" (Tr. 95).

Mr. Wood testified that Tony Gabossi, the manager of the MSHA office in Price, told him that if there had not been a fatality, the citation would not have been issued (Tr. 171). In addition, Mr. Andrews testified that if Mr. Dimick had survived, no closure order would have been issued (Tr. 63-64).

Rib Conditions in Mine Generally

The Kaiser Sunnyside No. 1 Mine is a deep mine with up to 2,500 feet of overburden, which places considerable weight upon the coal. The coal is "soft," meaning that it yields to pressure from the weight. As a result, there is considerable sloughing of

coal (Tr. 142). There has never been any suggestion from MSHA that the sloughage be cleaned up regularly, as it actually serves to help support the ribs (Tr. 143-44).

Because of the nature of the coal in the mine, sounding or tapping and listening to the ribs is ineffective in detecting problems because the coal sounds the same whether it is tight or loose (Tr. 40, 41, 79-80, 129). The practice of the miners at Kaiser is to examine visually the ribs in their working and travel areas. If a crack, overhang, or other problem is identified, the procedure is to bar the rib down using a pry bar or equivalent before beginning work (Tr. 142, 147).

Mr. Wood and Mr. Howell testified that during their years at the Sunnyside No. 1 Mine, they had accompanied MSHA inspectors many times underground, and except for visits by Mr. Lee Smith of MSHA in the aftermath of the accident, they recalled no inspector either tapping or directing that someone tap the ribs for the purpose of testing their soundness (Tr. 152, 201-02). In fact, the citation was abated through hazard training of the employees on roof and rib control, which did not include any instruction on physical testing of the ribs (Tr. 74-75). It is significant that Mr. Andrews attended the training which constituted the abatement, and did not either instruct the miners himself that physical tapping is necessary or require that the company instruct the miners on the need for physical tapping of the ribs (Tr. 74-75, 187-88).

Mr. Wood and Mr. Kuhns testified that tapping the ribs at the Sunnyside No. 1 Mine could present a hazard because, even if the coal had been tight before the tapping, the tapping could act to loosen the coal. At that point, the loose coal would be a hazard and would have to be barred down (Tr. 96, 148-49).

Mr. Andrews, the MSHA inspector who issued the citation, testified that tapping the coal to observe visually whether there is any problem, either through movement or through chunks falling from the ribs, was the best way to determine its soundness. In fact, Mr. Andrews testified that after hitting a rib to test it, an individual should hit it again "to see if the first test had caused it to become loose enough to fall when you tapped it again, or if it would create some type of crack which you could visually see and try to bar down" (Tr. 61). However, Mr. Andrews also testified that if sloughage comes off the rib after it is hit, it does not necessarily mean the rib is loose (Tr. 62).

Mr. Andrews could not identify either time or distance intervals within which the tapping should be done, except to state that under ideal rib conditions, the rib should be tapped every two or three steps, stopping if "there was a different sound" (Tr. 69-73). However, in the twelve and one-half years he worked in and inspected the Sunnyside No. 3 Mine, he could recall no instance where he walked along a rib, tapped it, and detected a problem through sound (Tr. 73-74).

Mr. Andrews testified that even if tapping and sounding is ineffective, he would require it as an MSHA inspector because the regulation requires both visual and physical examination and testing (Tr. 85).

Petitioner's Case

On March 7, 1986 Bruce Andrews, a coal mine safety and health inspector, received information that a serious accident had occurred at the Kaiser Sunnyside Mine No. 1. Mr. Andrews, along with another coal mine Inspector Jerry Lemon, proceeded to the mine and arrived at the Sunnyside Mine at approximately 6:00 p.m. on March 7, 1986 (Tr. 15). Upon arrival at the mine Mr. Andrews and Mr. Lemon were met by the safety director for Kaiser Coal, Jerry Howell. Mr. Howell accompanied the inspectors underground and the party proceeded to the 19th left longwall section crosscut 28, the site of the accident (Tr. 16).

Upon arrival at the accident site, Mr. Lemon conducted a visual examination and testing of the ribs next to the lower part of the crusher (Tr. 22). Mr. Lemon then proceeded across the crusher to the uphill side of the ribs. There he noticed that there were cracks in the ribs and was told by the safety director that no one was allowed to be on the topside of the crusher or the uphill rib because of the unsafe condition of the ribs (Tr. 23). Mr. Lemon, however, did perform tests on the rib at that time (Tr. 211, 212). While performing those tests, Mr. Lemon asked to be brought a scaling bar so that he could bar down the loose ribs (Tr. 26).

The next morning, March 8, 1987, Mr. Andrews returned to the accident site. He was accompanied by Ted Caughman, a Senior Special Investigator for MSHA, and Tony Gabossi, supervisor in the MSHA Price Field Office (Tr. 28). The inspectors conducted interviews with persons who were in the area of the accident and who had information regarding the accident (Tr. 29).

The interviews with these persons showed that the victim of the accident, Mr. Jerry Dimick, arrived at the mine on the morning of March 7th (Tr. 30). Mr. Dimick, a representative from Halbach and Braun a mining service company, reported to the mine to check the malfunctioning crusher (Tr. 30). Mr. Dimick was met by Duane Wood, the general longwall foreman for Kaiser Coal, and the two men proceeded underground to the crusher zone area (Tr. 31). Upon arriving at the crusher Mr. Wood indicated that he conducted a visual examination of the roof and ribs in that area (Tr. 31, 155). Mr. Wood looked at the rib in the area near where Mr. Dimick would be working on the crusher and saw no cracks in the ribs. He had traveled the area several times that morning with crew members who also visually examined the rib and did not see any problems (Tr. 155). Prior to Mr. Dimick entering the area however, no testing of the ribs was conducted (Tr. 35). Mr. Dimick then proceeded to examine the crusher. In order to conduct the examination Mr. Dimick knelt down on the downhill side of the rib between the crusher and the rib (Tr. 32). While

Mr. Dimick was in that position, Mr. Wood crossed over the crusher to the other side and was looking underneath the crusher from the uphill side of the rib. Although the safety director indicated to Mr. Lemon that no one was to be on that uphill side, Mr. Wood indicated that on that particular day he crossed to the upper rib, visually examined the rib, but conducted no testing on that uphill side (Tr. 178).

While Mr. Dimick was examining the crusher from the kneeling position, two miners, Gary Kuhns, a section foreman, and Darrell Leonard, passed by him on the lower side of the crusher. Both of these miners indicated that they visually examined the rib as they walked by Mr. Dimick but did no testing (Tr. 33, 34). Mr. Kuhns testified that when walking past Mr. Dimick, he had no more than two feet of space in which to walk between Mr. Dimick and the rib (Tr. 91). In fact, Mr. Kuhns had to turn to the side in order to get around Mr. Dimick (Tr. 91). Mr. Kuhns walked past Mr. Dimick and proceeded to the head gate area of the longwall section. While he was helping the head gate operator Mr. Kuhns looked down the entry, saw Mr. Wood on the uphill side of the crusher but could not see Mr. Dimick on the bottom of the downhill rib (Tr. 34). Mr. Kuhns then saw a rib, approximately 6' x 4' and 2' thick, slide and tip over in the area where he had seen Mr. Dimick kneeling (Tr. 34, 93). Mr. Kuhns shouted to Mr. Wood and the two men ran over to find Mr. Dimick trapped under the fallen rib (Tr. 34, 93, 94).

On the day of the accident, March 7, 1987, several other miners had been traveling in the area and passing between the crusher and the downhill rib. The area was a walkway for the longwall crew who passed through this section when they went to work in the morning, when they went to lunch, and when they left the area at the end of the day. Anyone traveling from the longwall face to the head gate had to pass through this particular area (Tr. 35). The miners passing through this area on March 7th indicated that they had conducted a visual examination of the rib but had not conducted any testing of the ribs on the lower side of the crusher (Tr. 35).

Mr. Kuhns indicated that when he walked past Mr. Dimick to the headgate area, he visually inspected the rib as he walked by but did not conduct any physical test of the rib nor did he observe anyone else conducting a physical test of the rib (Tr. 94). In fact, Mr. Kuhns testified that he does not make it a practice to physically test those ribs (Tr. 95). During the time Mr. Dimick was in the area between the rib and the crusher, no one conducted a test of the rib, nor were there any test of the rib conducted prior to Mr. Dimick's entering the area (Tr. 42).

It is the Secretary's position that prior to the accident, several things occurred in the longwall section that indicated that the ribs should have been tested.

The ribs in this mine could have been tested prior to the accident in one of two ways to determine if there were any

hazards present. First, a sounding test, also known as the sound and vibration test could have been conducted. Sounding to test the rib is merely to hit the rib and listen for the sound. A sharp ringing sound will indicate the rib is fairly stable and a drummy hollow sound will indicate that the rib is weak or fractured (Tr. 111). Where the ribs are prone to sloughing or pressure they will sound hollow or loose. A hollow sound indicates that the rib should be scaled down (Tr. 40). Although a sounding test is not always accurate it is one of the several ways in which to determine the competency of the ribs and is more valuable in some areas of the mine than others (Tr. 111, 112).

The second test that can be done to determine the competency of a rib is a physical test. A physical test is conducted in much the same way as the sound and vibration test. The test is conducted by hitting the rib with a scaling bar or some other long instrument. Once the rib has been hit or tapped the person conducting the test can then watch the rib to see if there are any indications of movement in that piece of coal or rib. A movement will indicate a need to pull down the rib (Tr. 39, 40, 114).

While neither of these two methods of testing roof and ribs is fool proof, they are helpful in locating unstable ribs (Tr. 112). A visual observation alone may fail to detect a hazard that a sounding method or the physical method of testing may detect. The test may also confirm a hazard that is already suspected (Tr. 112). The two tests, the sounding test and the physical test, are both conducted with a long bar or stick.

In the Sunnyside Mine both the sounding test and the physical test are appropriate (Tr. 120). It is acknowledged, however, that different types of ribs require different types of control and evaluation (Tr. 121). It is the Secretary's position that the conditions or type of rib will not excuse an operator from conducting the tests required by the regulation. Which test to use, sounding or physical, depends on the condition of the mine and the ribs at the time. Mr. Wood testified that sounding probably would not have told them anything about the rib in the area of the accident on March 7th (Tr. 179). However, he did admit that a visual examination of a rib cannot always tell where there is a problem (Tr. 181), and that it is possible that a physical test, that is tapping of the rib and then observing to see if anything occurred, would have shown a problem in the area of the accident (Tr. 179, 191, 192). The mine inspectors agree that a sounding test in this mine may give a false indication but a physical test is the best indication of a problem, partly because this mine uses yieldable pillars which are prone to sloughage (Tr. 41). A visual examination alone is not an accurate indication of the condition of the ribs and does not always reveal a fall danger (Tr. 102, 210). Therefore, in working around roof and ribs a miner first makes a visual examination or observation to detect a hazard and then additional tests are conducted to reveal the presence of any further hazards (Tr. 102).

It is the Secretary's contention that tests, in addition to visual examination, are required under the Mine Safety and Health act when certain conditions exist that may post a danger to a miner (Tr. 43). There are several indications that would reveal to a miner that he may be exposed to danger and more than a visual examination is necessary. The indications present in this case were listed by the Mine Safety and Health inspectors who testified in this case.

Bruce Andrews has been a mine inspector for nine and a half years, has worked at the Sunnyside No. 1 mine, and has extensive experience with roof and rib control (Tr. 12, 14). Lee Smith is, and has been for one and a half years, a supervisor roof control specialist for the Mine Safety and Health Administration (Tr. 98). Prior to becoming the supervisor roof control specialist Mr. Smith was a Mine Safety and Health inspector for seven years and worked in the coal mines for approximately four and a half years (Tr. 99). Mr. Smith is in charge of all roof control plans; his primary specialty is roof control and he has had extensive training in roof and rib control (Tr. 99, 100).

Mr. Andrews and Mr. Smith both indicated that under the circumstances present at the Sunnyside No. 1 mine on March 7, 1987, a physical test should have been conducted of the ribs in the area where Mr. Dimick was working based on four specific items. These items should have been known by the management and should have indicated to mine management a danger from a rib fall and a need for a test. The four items are: 1) the history of the mine; 2) the proximity of Mr. Dimick to the rib; 3) the fact that Mr. Dimick was not an employee of the mine; and 4) the shearing operation that had occurred approximately fifteen minutes prior to the accident.

The testimony is undisputed that the Sunnyside No. 1 mine has a history of bad ribs. Mr. Smith has conducted an inspection of the Sunnyside No. 1 mine on two occasions; each time for the purpose of examining the roof and ribs. The first inspection occurred in the summer of 1986, several months prior to this accident and was prompted by the fact that Sunnyside Mine had been listed as a mine with a high incident rate of accidents resulting from fall of roof and ribs (Tr. 105, 108, 109). On his first visit Mr. Smith was conducting a six-month review of the Sunnyside No. 1 mine roof control plan. On that visit Mr. Smith found that the areas in the Sunnyside Mine he visited had ribs that were unstable, showed evidence of sloughage and appeared to be incompetent (Tr. 106). The sloughage and the problem with the ribs began shortly after initial development in the areas he visited (Tr. 106). The problem is in part caused by overburden at this mine that exerts pressure on the coal seam in a downward manner and places excessive weight on the ribs (Tr. 108). On his first visit to the mine Mr. Smith discussed problems concerning the ribs with mine management and was told by management that they were certain that the ribs were incompetent and acknowledged that the rib problem was due to various conditions, one of them being the amount of overburden (Tr. 108, 109).

Mr. Smith made his second visit to the Sunnyside No. 1 mine on February 7, 1987, and again inspected the rib conditions. Again, the ribs showed evidence of sloughage, there were fracture lines and evidence that the ribs were unstable (Tr. 110).

Based on his observations of the Sunnyside No. 1 mine, Mr. Smith considers it proper to first conduct a visual observation of the ribs. Then, using the sounding method or the physical test, the miner should determine if the ribs are loose and should be pried down (Tr. 111). In a mine with these conditions, where there is a history of the mine that indicates a particular coal seam has poor or substandard ribs, then more than a visual observation is required to prevent a hazard (Tr. 113). Again, the visual observation of a rib may not always indicate a hazard but the history of the mine indicates that further testing should be completed (Tr. 113). Here given the history of the Sunnyside Mine and the unstable ribs along with the incident rate indicated by Mr. Smith, there is a need to do tests to determine if a hazard exists (Tr. 115, 116).

Bruce Andrews, a coal mine safety and health inspector, who has extensive experience in coal mines and has worked in the Sunnyside Mine agreed with Mr. Smith that it is general knowledge that the condition of the ribs in that mine are substandard (Tr. 47). Mr. Andrews also indicated that the overburden was a particular problem and contributed to the unstable condition of the ribs (Tr. 47). The substandard condition of the ribs should have been known to the miners who work in that mine and in the particular area of the accident (Tr. 47).

Mr. Kuhns, a miner and section foreman at Kaiser Coal, indicated that he was aware that the ribs were not particularly good in that mine (Tr. 91) and the two witnesses for the operator, Duane Wood and Jerry Howell, agreed that they were aware of the substandard condition of the ribs in the Sunnyside Mine. Mr. Wood indicated that mine management is aware of the ribs problem (Tr. 176) and that MSHA has always discussed sloughage in entries with Kaiser Coal (Tr. 174). In fact, that subject has come up with almost every inspector involving Kaiser. There was sloughage caused by the poor condition of the ribs around the area where Mr. Dimick was working and that sloughage made it difficult to walk in the area (Tr. 175, 176). In most cases throughout the mine, Mr. Howell testified, the ribs are soft, they show signs of sloughage and failure, making it necessary for Kaiser to keep a close eye on the ribs and to pry down the bad spots (Tr. 176). Finally, Jerry Howell, safety manager at Kaiser Coal, indicated in his testimony that ribs were bad at the time of the accident in March of 1986 (Tr. 206).

As Mr. Smith testified, when he visited the mine he saw sloughage which indicated that the ribs were loose, were being subjected to stress, and indicating that the ribs could become unstable and incompetent (Tr. 118). Mr. Smith's testimony along with that of Mr. Andrews and the miners who worked in the Sunnyside Mine leave no doubt that there was a history of sloughage

and bad ribs in the Sunnyside Mine. The Secretary points out that this factor is very important in considering when a test of the ribs should be conducted.

The second factor addressed by the mine inspectors in considering that a test was necessary prior to the accident is the proximity of the workplace to the rib. When a miner's work position brings him into close proximity of the rib a physical test is appropriate (Tr. 103). In certain areas of the Sunnyside Mine where there is no equipment, miners can walk in the center of the walkway a distance from the rib thereby avoiding exposure to a hazard from a rib fall. In fact, in most areas of the mine the miners as well as the mine inspectors, walk in the middle of the walkway so as not to get too close to the ribs (Tr. 82, 207). Sunnyside Mine instructs its miners to walk in the middle of the entry to, in effect, position themselves as far away from the ribs as possible (Tr. 116). However, in the area where the accident occurred, it was necessary to walk closer to the rib than in other areas of the mine (Tr. 82). Whenever a miner's work position would place him closer to a rib than the center of the entry, there is a need to test the rib (Tr. 117).

Here Mr. Dimick was positioned between the crusher and the lower rib. He was in a kneeling position with his back towards the rib, a dangerous position as it would be difficult for him to observe the rib from that location and be aware of the condition of the rib (Tr. 117).

Not only was the kneeling position significant, but the fact that Mr. Dimick was in close proximity to the rib, within a few feet and directly in line for any fall of the rib. Mr. Kuhns testified that he was required to walk sideways in order to pass Mr. Dimick, indicating that Mr. Dimick was kneeling within a few feet of the rib. In addition, on March 7th other miners were traveling in the longwall area and had no choice but to walk very close to the rib. This was another indication that a physical test should have been conducted. Since Mr. Dimick was required to work just a few feet from the rib in a confined area, the ribs should have been tested (Tr. 43).

In conjunction with Mr. Dimick's working position in the mine, that is, kneeling very close to the rib, mine inspector, Mr. Andrews and the supervisory roof control specialist, Mr. Smith, both indicated that another factor they considered in determining whether a test of the rib should have been conducted is that Mr. Dimick was not an employee of the mine (Tr. 44). In fact, Mr. Wood, the longwall foreman who accompanied Mr. Dimick underground, testified that he would go to an extra length to inspect the ribs when accompanying someone into the mine who is not an employee of Kaiser Coal (Tr. 177). The obvious reason for conducting a test when a non-employee is present in the mine is that the non-employee may not be aware of the history or condition of the ribs and, therefore, may be unknowingly subjecting himself to a hazard.

The fourth, and final, factor discussed by the inspectors in this case relative to the need for a physical or sounding test is that mining was going on near the location where Mr. Dimick was working and the shearing process had been completed only fifteen minutes prior to the accident. As Mr. Smith testified, most roof fall fatalities occur within 25 feet of the face. The closer you get to where the coal production is being done the greater your chances of being involved in a fatal accident (Tr. 118).

Mr. Dimick was working in an area near the headgate entry at the crusher. The headgate entry is an area of primary activity where the actual mining of coal is being conducted (Tr. 36). Just prior to the accident, approximately fifteen minutes earlier, the longwall shearing machine had come down and cut through the headgate entry and then traveled back up the longwall face (Tr. 36). This shearing procedure involves weight transference or a transfer of stress, which in turn has an effect on the rib (Tr. 103). The procedure generally causes sloughage and the ribs to loosen (Tr. 36). The closer the shearing process is to the rib, the more likely it is to cause a problem or weaken the rib, particularly in the case of the yieldable pillar that is present in the Sunnyside Mine (Tr. 104).

Mr. Andrews, who worked in this mine, was aware of the effect that the shearing procedure had on the ribs (Tr. 37). It follows then, that miners and management who work in the mine would be aware of the effect of the shearing process on the ribs. Since this process had occurred approximately fifteen minutes prior to the accident, changes would have occurred in the area where Mr. Dimick was working, thereby exposing him to a danger of rib fall (Tr. 37). Therefore, because of the work being done in the longwall section, the conditions of the rib were continually changing, and a test should have been conducted prior to Mr. Dimick working in a position directly next to the rib (Tr. 84).

It is the Secretary's position that the standards express testing requirement (in addition to visual observation) was written as a result of the large number of fatalities and serious injuries due to rib and roof falls. The standard has a two-part requirement, first, the mine operator must observe or visually examine and, second, it must conduct a test (Tr. 122). The frequency of testing depends on the mining conditions, the characteristics of the coal seam, the position of the worker, and the type of work being performed, among others (Tr. 122). Even though testing is required by this standard, prior to the accident that took the life of Mr. Dimick, no one at the Sunnyside No. mine had been instructed to do any sound testing or physical testing of the ribs. Respondent does not instruct the miners in the Sunnyside Mine to physically test the ribs at any time (Tr. 207).

Discussion and Findings

At the hearing the parties stated that the primary issue in this case is the proper interpretation of the safety standard 30

C.F.R. § 75.205 as it applies to the condition of the ribs in the Sunnyside No. 1 mine. The standard, in pertinent part, provides as follows:

> Where miners are exposed to danger from falls of roof, face, and ribs the operator shall examine and test the roof, face, and ribs before any work or machine is started, and as frequently thereafter as may be necessary to insure safety.

It is the operator's position that testing the ribs in this mine is not only ineffective in detecting hazards but would actually increase the potential hazard. Therefore, respondent argues the safety standard as it applies to the mine in question should be interpreted to require visual examination of the ribs but not testing. It is the operator's contention that the testing of the ribs in the Kaiser Sunnyside No. 1 Mine is useless because it wouldn't demonstrate any problem and would weaken the ribs and thus would create a potential hazard. In other words that testing the ribs would diminish safety rather than enhance safety.

The safety standard 30 C.F.R. § 75.205 reflects the provisions of Section 302(f) of the Mine Act. It is well established that the meaning of a statute or regulation must, in the first instance, be sought in the language in which it is framed, and if that is plain the sole function of the Courts is to enforce it according to its terms. Caminetti v. The United States, 242 U.S. 470. When the language is clear and unambiguous it must be held to mean what it plainly expresses. Thus, the safety standard by use of the conjunctive "and" clearly requires both visual examination and testing of the ribs where miners are exposed to danger from falls of ribs.

With respect to respondent's contention that testing of ribs is useless, it is noted that Mr. Wood, Kaiser's general longwall foreman, when asked if testing of the rib adjacent to where Mr. Dimick was kneeling (the rib that came down and crushed him) would have alerted him to the fact that there was a defect or a potential hazard, replied "I don't know if the tapping procedure would have done any good or not" (Tr. 191, 192).

Even assuming, arguendo, that respondent is correct in its contention that testing of the ribs in the Sunnyside No. 1 mine diminishes safety rather than enhances it, the remedy does not lie in obtaining a ruling in an enforcement proceeding that the mandatory standard as applied to its mine requires an interpretation of the standard that is different than that applied to mines generally i.e. that visual examination without testing is sufficient to comply with the requirement of the safety standard. Such a ruling would not only defy the plain meaning of the regulation but conflicts with the previous Review Commission's rulings on the defense of diminution of safety and the need to comply with the provisions of § 101(c) of the Mine Act.

In Sewell Coal, 5 FMSHRC 2026, the Review Commission stated that section 101(c) of the Mine Act preserves the same basis for granting a variance that were contained in section 301(c) of the 1969 Coal Act. Under the modification provisions of the Mine Act, the decision to grant or withhold a variance is made by the Secretary of Labor. The MSHA regulation implementing section 101(c) provides for an initial decision by an administrator of MSHA with the right of appeal ultimately to the Assistant Secretary of Labor for Mine Safety and Health. 30 C.F.R. §§ 44.13 44.33.

The Review Commission pointed out in Sewell Coal that the phrase "diminution of safety" in Section 101(c) of the Mine Act: "serves as one of the following two bases for a determination by the Secretary that an operator may depart from otherwise mandated compliance with a standard: (1) If an alternative method of achieving the results of the standard exists with no loss in the measure of protection afforded to the miners by the standard; or (2) if application of the standard to the mine will diminish the safety of the miners."

In Penn Allegh Coal Company, Inc., 3 FMSHRC 1392 at 1397-98, the Review Commission ruled that an operator is foreclosed from bypassing this statutory modification procedure and unilaterally determining to forego compliance with a mandatory standard.

In Florence Mining Co., 5 FMSHRC 189, the Review Commission stated that questions of diminution of safety must first be pursued and resolved in the context of a modification proceeding provided for in Section 101(c) of the Act and held that the Review Commission does not have jurisdiction to rule on petitions for modification in enforcement proceedings.

With respect to respondent's argument that it relied or should be allowed to rely on the acts and statements of MSHA officials implementing regulations, the U.S. Court of Appeals in Emery Mining Corp., (CA 10) 1983), sub nom Emery Mining Corp., v. Labor Department (Secretary) affirmed 3 MSHC 1001, 3 MSHC 1585 held that to the extent that an operator relies on interpretation by MSHA officials of the Act's implementing regulations, the operator assumes the risk that the interpretation was in error. Estoppel does not run against the federal government. Federal Crop Insurance v. Merril, 332 U.S. 381.

Section 30 C.F.R. § 75.205 is a mandatory safety standard that requires visual inspection and testing of the ribs where miners are exposed to dangers from falls of the ribs. In this case it is clear from the evidence that the decedent Mr. Dimick and other miners were in an area where they were exposed to danger from falls of the ribs. It is undisputed that the Sunnyside No. 1 mine has a history of bad ribs; that Mr. Dimick had to work in a kneeling position in close proximity to the rib; that other miners had to turn almost sideways when they passed between Mr. Dimick and the rib; and that approximately fifteen

minutes before the accident the longwall shearing machine had come down and cut through the headgate entry and traveled back up the longwall face.

The violation of 30 C.F.R. § 75.205 was a significant and substantial violation of a mandatory safety standard. The MSHA inspectors testified that there was a serious safety hazard because the operator failed to test the ribs. Even Mr. Wood, respondent's longwall foreman admitted that physical testing of the rib might disclose the hazard in that area (Tr. 179, 191). There was a reasonable likelihood that the hazard contributed to what would and did result in Mr. Dimick's fatal injury. There was a reasonable likelihood that the injury in question would be and in fact was of a reasonable serious nature.

The parties stipulated that if a violation of 30 C.F.R § 75.205 was found that the appropriate penalty would be the $1,000 penalty proposed by the Secretary. This stipulation is accepted and the appropriate civil penalty is found to be $1,000.

Findings of Fact and Conclusions of Law

1. Kaiser Coal Corporation of Sunnyside is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. Kaiser Coal Corporation of Sunnyside is the operator of Sunnyside Mine No. 1, MSHA I.D. No. 42-00093.03532.

3. Sunnyside Mine No. 1 is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, U.S.C. § 801 et seq. ("the Act").

4. As an Administrative Law Judge of the Federal Mine Safety and Health Review Commission I have jurisdiction to hear and decide this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent, Kaiser Coal Corporation of Sunnyside, on the dates and at the places stated therein.

6. Mr. Dimick and other miners were exposed to a danger from the fall of the ribs and the operator did not test the ribs and thus was in violation of the mandatory safety standard 30 C.F.R. § 75.205.

7. The violation is significant and substantial.

8. Kaiser Coal Corporation of Sunnyside is a large mine operator with 817,276 tons of production in 1986.

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

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

11. The $1,000 proposed civil penalty will not affect respondent's ability to continue in business.

12. The appropriate penalty for the violation of 30 C.F.R. § 75.205 is $1,000.

ORDER

Based upon the above findings of fact and conclusions of law it is ordered that respondent shall pay the above civil penalty of $1,000 within 30 days of this decision.

August F. Cetti
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 1987

FLORENCE MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 86-297-R
v.	:	Order No. 2697882; 8/14/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Florence No. 2 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 87-16
	:	A.C. No. 36-02448-03575
v.	:	Florence No. 2 Mine
FLORENCE MINING COMPANY, Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, for Secretary of Labor;
R. Henry Moore, Esq., Florence Mining Company, Pittsburgh, Pennsylvania, for Florence Mining Company.

Before: Judge Fauver

These consolidated proceedings were brought under the Federal Mine Safety and Health act of 1977, 30 U.S.C. § 801, et seq. The company seeks to vacate a withdrawal order charging a violation of a safety standard, and the Secretary seeks to uphold the order and to have a civil penalty assessed for the violation charged.

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

FINDINGS OF FACTS

1. Respondent operates an underground coal mine, known as Florence No. 2 Mine, which produces coal for sale or use in or affecting interstate commerce.

2. On August 14, 1986, Inspector Ronald Gossard issued an order pursuant to § 104(d)(2) of the Act alleging a violation of 30 C.F.R. § 75.1704 for an incident on August 13, 1986, involving the replacement of the hoist rope at the Florence No. 2 Mine. The order reads as follows:

> The slope hoist facility approved by MSHA to transport injured miners from the mine was removed from operation to replace the hoist cable while miners were underground. The hoist was not available for use from 9:30 a.m. to 3:00 p.m. on August 13, 1986. The operator's approved plan requires a person trained to operate the hoist shall be available when miners are underground to transport injured persons to the surface. This requirement implies that the hoist will also be available for use when miners are underground.
>
> The order is a result of a 103(g)(1) request from a representative of the miners dated August 14, 1986.

3. The underground workings of the mine may be reached by a slope from the surface. It is a "dual compartment" slope with a track entry in one compartment and a belt entry in the other. The slope is about 620 feet long, 16 feet wide and 6 feet high. In the first 200 feet of descent the grade is about 16 degrees. This is the steepest part of the slope, and after this section the grade lessens to 5 degrees. There is track in the slope used by the materials hoist that lowers supplies and equipment into the mine. A walkway runs down the slope on the left side of the entry. Along the entire length of the slope walkway a handrail and lighting are provided. With the exception of about 100 feet where ties are placed across the walkway to prevent damage to the hoist rope around a curve, the walkway is concrete and relatively smooth. The part crossed by ties (100 feet) is uneven and would require careful stepping to carry a stretcher up the slope.

4. The walkway is used by all miners entering and exiting the mine on three shifts. The miners walk down the slope and use transportation at the bottom to travel farther into the mine. At the end of the shift, miners walk up the slope. Descent by walking usually takes two to three minutes. It takes longer to ascend the slope.

5. Early in August, 1986, the company decided to replace the hoist rope because of damage to the rope. While the hoist rope did not yet meet the criteria for mandatory retirement of the rope, it was felt that it should be changed. Management decided that this would be done on August 13, 1986, a production day, so that the hoist could be used the next weekend to lower a new continuous miner into the mine. There was no safety reason requiring that the hoist rope be changed on a production day, and it would have been feasible to change the rope on a Saturday or Sunday when miners would not be underground.

6. Some of the work of replacing the rope began on August 12, when one end of the new rope was unspooled and taken into the hoist house. The new rope was stretched from the hoist house to the top of the slope where it lay until work began the next day to replace the old rope.

7. Sometime after 9:30 a.m. on August 13, when the day shift miners were working underground, the old rope was taken off the hoist, and it was removed from service. Replacement of the rope took until about 3:30 or 4:00 p.m.

8. After the new rope was installed, there were some problems with twists that were observed in the rope. The midnight shift did not go into the mine until 5:00 a.m. on August 14, while management sought to correct the condition.

9. A union complaint was made to MSHA pursuant to § 103(g) of the Act concerning the twists in the rope. Inspector Gossard went to the mine about 9:00 a.m. on August 14, in response to this complaint.

10. Inspector Gossard inspected the hoist rope to determine if the twists in the rope had caused any damage. After he determined that no damage had occurred and that no violation existed, he was given a second § 103(g) complaint concerning the replacement of the rope while miners were underground. He investigated this complaint and found that the hoist rope had been changed the previous day while miners were underground. There was no dispute about this incident occurring, and management acknowledged that the hoist had been taken out of service to change the hoist rope, from

about 9:30 a.m. to 3:00 p.m., on August 13. Based upon his investigation, Inspector Gossard issued § 104(d)(2) order charging a violation of 30 C.F.R. § 75.1704. The order was issued August 14, 1986.

DISCUSSION WITH FURTHER FINDINGS

The Secretary's Authority Under § 104(d)

§ 104(d) of the Act provides:

> (d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized represenative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar

violations, the provisions of paragraph (1) shall again be applicable to that mine.

Respondent argues that the issuance of a § 104(d)(2) order charging an unwarrantable failure violation is improper when it results from an "investigation" rather than an "inspection." A number of decisions or orders of Commission judges have so held. Four of those cases are pending on review before the Commission.

This line of cases began with Judge Steffey's decision in Westmoreland Coal Company v. Secretary, Docket No. WEVA 82-340-R, Order Granting in Part Motion for Summary Decision (May 4, 1983). The other decisions follow the reasoning of the Westmoreland decision.

Westmoreland involved thirteen § 104(d)(2) orders issued July 15, 1982, based on an investigation conducted in December 1980, which followed a mine explosion which occurred November 7, 1980. Judge Steffey concluded from his study of the legislative history of the 1969 Act that an inspection was thought to be capable of being conducted in a single day, and an investigation could take weeks or months. He thought it significant that the 1977 Act permitted a citation or an imminent danger closure order to be issued "upon inspection or investigation," whereas the 1969 Act requirement that unwarrantable failure orders be issued "upon any inspection" was continued in the 1977 Act. Judge Steffey concluded that "Congress did not intend for unwarrantable failure provisions of § 104(d) to be based on lengthy investigations" or upon "a belief" that a violation occurred. The orders before him were based not "upon an inspection but upon sworn statements taken during an accident investigation made 19 months prior to the time the orders were issued." Judge Steffey's order vacating the withdrawal orders was based on the facts that they resulted from subsequent investigations and not from an inspection and that they were not issued "promptly" as required by § 104(d)(2).

The "unwarrantable failure" designation was first enacted in the Federal Coal Mine Safety Act Amendments of 1965, Pub. L. 89-376. Called the "reinspection closing order," the new provision was added "to stem certain recurrent violations of safety standards in underground coal mines." S. Rep. No. 89-1055, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. Ad. News 2072, 2075. Attempts to limit the scope and applicability of the new provision were flatly rejected. Id. at 2077-2079. In including the provision in the 1977 Act, Congress again stated that the "unwarrantable failure" section should be broadly construed.

Noting that the Interior Board of Mine Operations Appeals in some early 1969 Act cases had taken "an unneccessarily and improperly strict view of the 'gravity test' contained in the provision [Eastern Associated Coal Corp. 3 IBMA 331 (1974)]," the Senate Report stated its approval of the Board's less restrictive reinterpretation in Alabama By-Products Corp., 7 IBMA 85 (1976). S. Rep. 95-181, 95th Cong., 1st Sess. 31-32 (1977). Similarly, the Senate Report rejected the Board's initial interpretation of the term "unwarrantable failure to comply" as too narrow, and fully embraced the liberalized definition set forth in Zeigler Coal Company, 7 IBMA 280 (1977) (discussed further below), which stated that "the inspector's judgment must be based upon a thorough investigation..." (at 296).

The legislative history of the 1977 Act shows that Congress did not intend to change the unwarrantable failure provisons of the 1969 Act. The language of § 104(d) was carried over intact, and after referring to the above liberalized reinterpretations by the Interior Board of Mine Operations Appeals, the Senate Committee Report stated: "These decisions considerably restored the unwarrantable failure closure order as an effective and viable enforcement sanction in essentially the same form ...." S. Rep. No. 95-181, 95th Cong., 1st Sess., 32 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legistative History of the Federal Mine Safety and Health of 1977, at 620 (1978).

The 1969 Act used only the term "inspection" in § 104, which provided for issuance of notices of violation (citations under the 1977 Act) and closure orders for imminent danger and unwarrantable failure to comply. However, the case law under the 1969 Act shows that notices and orders could be issued without the inspector actually observing the cited condition or conduct. Sewel Coal Company 2 IBMA 80 (1975); Rushton Mining Company, 6 IBMA 329 (1976); Peabody Coal Company, 1 FMSHRC 1785 (1979).

The 1977 Act uses the term "inspection or investigation" in referring to citations (§ 104(a)) and imminent danger withdrawal orders (107(a)). It uses only the term "inspection" in referring to 104(b) closure orders for failure to abate a citation, and in referring to 104(d) citations and orders.

Even though only the term "inspection" is used in § 104(d), the "findings" required, i.e., an unwarrantable failure and a significant and substantial violation, clearly require a thorough investigation of the circumstances of the

violation, the background facts, the actual or constructive knowledge of the mine operator, etc. Thus, the word "inspection" is not per se a limitation on the inspector's role and authority in § 104(d). Similarly, § 103(g)(1) of the Act uses only the term "inspection" concerning the right of a representative of miners (or a miner if there is not a representative) to require MSHA to come to the mine in response to a complaint of a violation of the Act or of an imminent danger. Clearly, if the operator corrects the condition before the inspector arrives MSHA may still proceed with an investigation of the § 103(g) complaint despite the use of the term "inspection." Otherwise, the miners' important right to complain to MSHA could be frustrated by on-off compliance depending on the presence of an inspector. Also, there are many kinds of violations that can be established by undisputed evidence, e.g., mine records or statements of mine management, even though the violation may have ceased before the inspector arrives. To say that this type of evidence cannot substantiate a § 104(d) citation or order unless the violation is still in progress when the inspector arrives is to pursue a narrow, restrictive interpretation of the statute. Congress, however, intended a liberal construction of the Act to effectuate its purposes. The focus of § 104(d) is the operator's failure to abide by a safety and health requirement, not the inspector's discovery of the violation in progress.

For all these considerations, I must disagree with those of my colleagues who have held that an "inspection" as used in § 104(d) limits the inspector's authority to apply that section only to violations he observes in progress. I hold that § 104(d) citations and orders may be issued for violations that are reasonably recent, consistent with the prompt disposition intended by § 104(d), even though the violation ceased before the inspector's arrival on the scene. Relevant factors in determining the reasonableness of the inspector's use of § 104(d) authority may include the recency of the violation, the quality of the information relied upon, the time spent in the investigation, the extent to which controlling facts are undisputed, e.g., facts that are evident from mine records, statements of mine management, or undisputed statements of eye witnesses.

In the instant case, the violation was quite recent, only the day before the inspector arrived, and it was quickly established by acknowledged, undisputed facts. These facts showed that the hoist had been deliberately shut down from about 9:30 a.m. to 3:00 p.m., on August 13, 1986. The inspector also found that the approved escape facilities plan required that a person trained to operate the hoist shall be

available when miners are underground to transport injured persons to the surface. He reasonably concluded that this provision of the approved plan meant that mine management was required to keep the hoist in service while miners were underground.

Title 30, C.F.R. § 75.1404 Escapeways provides in pertinent part:

> Except as provided in §§ 75.1705 and 75.1706 at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways ... shall be maintained in safe condition and properly marked .... Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be at or in each escape shaft or slope to allow persons to escape quickly to the surface in the event of an emergency. [Emphasis added.]

There is no provision or exception allowing the operator to close or remove the approved escape facilities for 5 1/2 hours while miners are underground. It was therefore a violation of this section to shut down the hoist while miners were underground.

Was the Violation "Unwarrantable"?

The Senate Report on the 1977 legislation rejected the Interior Board of Mine Operations Appeals' initial interpretation of the phrase "unwarrantable failure to comply" in Eastern Associated Coal Corporatin, 3 IBMA 1331, 356 (1974), as too narrow, and fully embraced the more liberal definition set forth in Zeigler Coal Company, 7 IBMA 280 (1977), as follows (quoted in the Senate Report from the decision's syllabus): The phrase unwarrantable failure to comply means "the failure of an operator to abate a condition or practice constituting a violation of a mandatory standard it knew or should have known existed, or the failure to abate such a condition or practice because of indifference or lack of reasonable care." S. Rep. 181, 95th Cong., 1st Sess. 31-32 (1977), reprinted in Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 619-620 (1978).

The Zeigler case was on remand from the United States Court of Appeals for the District of Columbia Circuit, which had reversed the Interior Board and indicated a strong rejection of the Board's interpretative approach in Eastern Associated Coal Corporation.

On remand, in describing its earlier interpretation of § 104(d), the Board stated: "In Eastern Associated Coal Corp., supra, 3 IBMA at 356, we gave the legislative history only passing reference, preferring instead to place our own gloss upon the statutory language ['unwarrantable failure to comply']." 7 IBMA at 288. The earlier "gloss" was actually agency rejection of a clear Congressional intent. The Board described this prior interpretation as follows (7 IBMA at 286):

> In past cases, we have taken the position that an inspector's finding of an unwarrantable failure to comply should be sustained where MESA establishes by a preponderance of the evidence that the violation in question was the product of intentional or knowing failure to comply or a reckless disregard for the health and safety of the miners. We rejected the theory that the term "unwarrantable failure to comply" is synonymous with ordinary negligence in the occurrence of a violation. Eastern Associated Coal Corp., 3 IBMA 331, 356, 81 I.D. 567, 1974-1975 OSHD par. 18,706, aff'd on reconsideration, 3 IBMA 383 (1974); Freeman Coal Mining Company, 3 IBMA 434, 81 I.D. 723, 1974-1975 OSHD par. 19,177 (1974).

In remanding the first Zeigler decision, the Court of Appeals cautioned the Board to take due account of the legislative history of § 104(d) (see 7 IBMA at 287). On remand the Board quoted and followed the legislative history, overruled its Eastern Associated Coal decision, and reinterpreted the meaning of "unwarrantable failure to comply" based on the Congressonal intent, not the "gloss" the Board had previously put on it. In doing so, the Board recognized the following two pertinent pieces of the 1969 legislative history of the phrase "unwarrantable failure to comply" as used in §§ 104(c)(1) and 104(c)(d)(2) of the 1969 Act, which are identical to §§104(d)(1) and 104(d)(2) of the 1977 Act (at 7 IBMA 289):

> The primary piece of legislative history is the definition of the term "unwarrantable failure" set forth in the report of the Conference Committee, House Comm. on Ed. and Labor,

Legislative History, Federal Coal Mine Health and Safety Act, Comm. Print, 91st Congress, 2d Session (hereinafter referred to as Leg. Hist.), pp. 1108-1151. At page 1119, the Committee defined that term as follows:

> The term "unwarrantable failure" means the failure of an operator to abate a violation he knew or should have known existed.

A secondary source of pertinent legislative history is the Statement of the House Managers which was a report by the House conferees to the full House on the outcome of the Conference Committee's deliberations. In relevant part, the House Managers stated at Leg. Hist., p. 1030:

> ***The managers note that an "unwarrantable failure of the operator to comply" means the failure of the operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care on the operator's part.

Thus in Zeigler, based upon the definition clearly expressed in the 1969 legislative history, the Board overruled its prior board-made definition, and reached the following holding:

> [W]e hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care. The inspector's judgment in this regard must be based upon a thorough investigation and must be reasonable. [7 IBMA 295-296.]

In reaching this holding, the Board added: "We are well award that the terms of fault employed by the conferees and the House Managers are largely synonymous with negligence, one of the most familiar terms in American law." 7 IBMA 296, Fn. 4.

In the 1977 Act, Congress carefully chose to retain § 104(d) intact, without changing a word and by adopting the clear, decisive legislative history of the phrase "unwarrantable failure to comply." I therefore hold that the phrase means the failure of an operator to abate a condition or practice constituting a violation of a mandatory standard it knew or should have known existed, or the failure to abate such a condition or practice because of indifference or lack of reasonable care.

Respondent relies upon the Commission's decision in United States Steel Corporation v. Secretary, 6 FMSHRC 1423 (1984), in contending that the Commission has changed the definition approved by Congress in the 1969 legislative history, repeated by the Interior Board in Zeigler, and again expressly approved in the 1977 legislative history of § 104(d).

I do not interpret the Commission's decision as requiring a change in the legislative history definition of "unwarrantable failure to comply." In United States Steel, the Commission did not consider the 1969 legislative history (which is crucial to an understanding of the current § 104(d)), and the Commission was careful to point out that the case before it did "not require [it] to examine every aspect of the Zeigler construction" (6 FMSHRC at 1437). The Commission's statement that followed --

> but we concur with the Board to the extent that an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied, prior to issuance of a citation or order, because of indifference, willful intent, or a serious lack of reasonable care --

does not purport to be a restrictive definition based upon reconsideraton of the legislative history, but is merely one kind of proof of an "unwarrantable failure to comply." If the Commission's language were intended to be a new, restrictive definition, rejecting the holding in Zeigler and the unequivocal definition in both the 1969 and 1977 legislative histories, it would too closely resemble the overruled and Congressionally-repudiated Eastern Associated

Coal decision of the Interior Board to be expected to be announced by the Commission without its careful analysis and reinterpretation of the legislative history. Absent such an analysis and reinterpretation by the Commission, I do not construe the Commission's decision in United States Steel Corporation as rejecting the definition stated in Zeigler and in the 1969 and 1977 legislative histories.

Whether the clear legislative history definition or the example added by the Commission in United States Steel Corporation is applied in this case, I find that Respondent demonstrated an unwarrantable failure to comply with the cited safety standard when it deliberately shut down the hoist for 5 1/2 hours on a production day. Respondent knew or should have known that its approved escape facilities plan and 30 C.F.R. § 75.1704 required that it maintain the hoist in operating condition while miners were underground, and it acted with indifference to the safety standard and with a serious lack of reasonable care when it closed the facility on a production day. It could have readily changed the hoist rope on a weekend, when miners were not underground.

Was the Violation "Significant and Substantial"?

A "significant and substantial" violation is described in § 104(d)(1) of the Act as a violation of "such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." The Commission interpreted this language in Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981), as follows:

> [A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission discussed the standard of proof for a significant and substantial finding, as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed

to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The purpose of the approved escape facility, the hoist, is to provide safe and relatively fast transportation of injured persons from the mine. This facility is an important emergency protection of miners who may be injured underground. It is faster than using a stretcher to carry a miner up the steep, 620 foot slope, and it is superior to a stretcher in allowing more effective first-aid and immobilizing care. For example, a stretcher case could not be administered CPR while moving, but an injured person could receive CPR and other first aid while going up the hoist; a stretcher case would be jostled while being carried up the long, steep slope, but an injured person on the hoist would not be jostled. Because of the superiority of the hoist over using a stretcher to ascend the slope, the established practice since the hoist was approved as an escape facility was to transport injured persons out of the mine by the hoist rather than by stretcher. By shutting down the hoist for 5 1/2 hours while the day shift miners were underground, mine management consciously removed an important emergency protection of the miners. This reduction of their safety and health protection could significantly and substantially contribute to the cause and effect of aggravated injury, or even death, e.g., in case of severe shock, internal bleeding or burns. The violation was therefore significant and substantial within the meaning of 104(d).

The Amount of a Civil Penalty

Respondent is a large operator. Its annual production is about 8 1/2 million tons, and its No. 2 mine produces over 400,000 tons annually. The No. 2 mine has a history of 166 paid violations in the 24 months preceding the order issued in this case.

Considering the six criteria for civil penalties in § 110(i) of the Act, I find that a civil penalty of $400 is appropriate for the violation found herein.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.

2. Respondent violated 30 C.F.R. § 75.1704 as charged in Order No. 2697882.

ORDER

WHEREFORE IT IS ORDERED that:

1. Order No. 2697882 is AFFIRMED, and the contest proceeding in PENN 86-297-R is DISMISSED.

2. Respondent shall pay the above civil penalty of $400 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

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