JULY 1990

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JULY 1990

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

Consolidation Coal Company v. Secretary of Labor, MSHA, Docket Nos. WEVA 90-3, WEVA 89-234-R, etc. (Chief Judge Merlin, May 24, 1990)

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

Secretary of Labor, MSHA v. Mountain Parkway Stone, Inc., Docket No. KENT 89-27-M. (Judge Weisberger, May 30, 1990)

Arnold Sharp v. Big Elk Creek Coal Company, Docket No. KENT 89-147-D. (Reconsideration of Commission order dated June 13, 1990)

Kathleen I. Tarmann v. International Salt Company, Docket No. LAKE 89-56-DM. (Interlocutory Review of Judge Melick's Order)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 24, 1990

DAVID THOMAS AND GEORGE ISAACS	:	
v.	:	Docket Nos. KENT 89-13-D KENT 89-14-D
AMPAK MINING, 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. (1988) ("Mine Act" or "Act"), complainants David Thomas and George Isaacs have sought discretionary review of that portion of the supplemental remedial decision of Commission Administrative Law Judge Gary Melick in which the judge denied their post-trial motion to proceed individually, on the basis of an alter ego theory, against Geary Burns and Peggy A. Kretzer, the alleged owners of respondent Ampak Mining, Inc. ("Ampak"). 12 FMSHRC 428 (March 1990)(ALJ). In addition, the complainants have moved the Commission, in light of its decision in Ronald Tolbert v. Chaney Creek Coal Co., 12 FMSHRC 615 (April 1990) ("Tolbert II"), to remand this matter to the judge for reconsideration of his denial of their post-trial motion. By previous orders, we granted the complainants' petition for review and suspended briefing. Ampak has not responded to the complainants' motion to remand. For the reasons that follow, we grant the complainants' motion, vacate that portion of the judge's decision denying the complainants' post-trial motion, and remand this matter to the judge for further appropriate proceedings.

The relevant procedural history may be summarized briefly. Thomas and Isaacs filed with the Commission, pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), discrimination complaints against Ampak, and the proceedings were consolidated for hearing and disposition before Judge Melick. In his decision on the merits, the judge concluded that Ampak had discriminated against the complainants in violation of section 105(c)(1) of the Act by laying off the complainants as a result of their protected activities. 11 FMSHRC 2552 (December 1989)(ALJ). At

the direction of the judge, the parties stipulated to the amount of back pay, attorney's fees and expenses to be awarded the complainants. Subsequently, the complainants moved the judge for leave to proceed individually against Ampak's asserted owners, Geary Burns and Peggy A. Kretzer, on an alter ego theory. The complainants have asserted that Ampak will be unable to provide them the stipulated relief because the company is no longer in business, has no assets, and is burdened with substantial debt. The complainants have argued that the owners and the corporation share a unity of interest and are not, in fact, separate legal personalities.

In his remedial decision, the judge awarded complainants the stipulated damages but denied their motion to proceed individually against the owners. 12 FMSHRC at 430. The judge relied upon the Commission's decision in Ronald Tolbert v. Chaney Creek Coal Corp., 9 FMSHRC 1847 (November 1987)("Tolbert I"). There, the Commission denied a discrimination complainant's motion, proffered after the decisions in question had become final, to proceed against an individual owner on an alter ego theory. The Commission held that the course of action was for the complainant to seek the Secretary of Labor's enforcement of the final Commission decisions.

After issuance of the judge's remedial decision in this matter, the Commission issued its decision in Tolbert II. Tolbert II arose after the complainant had heeded the Commission's directions in Tolbert I, and had invoked the Secretary's representation to secure summary enforcement of the Commission's final orders in the United States Court of Appeals for the Sixth Circuit. See 12 FMSHRC at 617. Nevertheless, the respondent had still failed to comply with the enforced orders. Among other things, the Commission concluded in Tolbert II that "[i]n light of the remedial purposes of section 105(c) [of the Mine Act], ... the Commission, in appropriate cases and on such terms as are just, may reopen a discrimination case for reasonable supplemental [Commission] proceedings in aid of compliance." 12 FMSHRC at 618. Pursuant to that principle, the Commission reopened Tolbert to consider the complainant's request for a determination as to the individual corporate owner's possible alter ego status. 12 FMSHRC at 619.

The Commission noted that the individual corporate owner had never been a party to the proceeding. 12 FMSHRC at 619. Accordingly, in remanding the matter to the judge, the Commission directed him to decide whether the complainant should have determined the alleged alter ego's status at a more timely juncture of the litigation and to rule on the precise legal theory and authority upon which any joinder might now be justified. 12 FMSHRC at 619. The Commission further required that the alleged alter ego be afforded the opportunity to be specially heard on the issues affecting his status and, if made a party, be heard on any and all liability or remedial issues affecting him. 12 FMSHRC at 619-20.

Here, the motion to join the alleged individual owners was made before Judge Melick's final decision in this matter. As in Tolbert II, the complainants have raised an alter ego issue that may bear on their ability to recover the stipulated damages. In light of Tolbert II, we

conclude that the complainants' claims of liability on the part of Ampak's owners, based on an alter ego theory, should be considered by the judge. As in Tolbert II, we remand this proceeding to the judge for needed factual findings and legal analysis as to whether Burns and Kretzer may be brought into this proceeding at this stage, whether the complainants should have determined the owners' alleged alter ego status at a more timely juncture, and to determine the precise legal theory and authority upon which such joinder may now be justified. See Tolbert II, 12 FMSHRC at 619. Ampak's owners shall be specially heard on these issues. If the judge concludes that they may properly be made parties to these supplemental compliance proceedings, they shall "continue to be afforded full opportunity to participate on any and all liability or remedial issues affecting them." Tolbert II, 12 FMSHRC at 619-20.

For the foregoing reasons, we vacate that portion of the judge's remedial order denying complainants' motion to proceed against Burns and Kretzer, and we remand this matter to the judge for 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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 26, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 90-87
	:	KENT 90-88
BEECH FORK PROCESSING, INC.	:	KENT 90-89

BEFORE: Backley, Doyle and Nelson, Commissioners

ORDER

BY Backley, Doyle and Nelson, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on June 18, 1990, finding Beech Fork Processing, Inc. ("Beech Fork") in default for failure to answer the Secretary of Labor's civil penalty petitions and the judge's show cause orders in the subject cases. The judge assessed for all three cases the Secretary's proposed civil penalties of $10,123. By letter dated July 12, 1990, addressed to Judge Merlin, Beech Fork petitioned the Commission for an opportunity to continue its contest of MSHA's proposed penalties in the subject cases. Attached to Beech Fork's July 12 letter is a letter dated June 11, 1990, from Beech Fork to the Department of Labor's Mine Safety and Health Administration ("MSHA") that appears to be Beech Fork's answer to the Secretary of Labor's civil penalty proposal filed in Docket No. KENT 90-89. We deem Beech Fork's July 12 letter and attached letter to constitute a timely petition for discretionary review of the judge's default order. For the reasons that follow, we grant the petition, vacate the default order, and remand for further proceedings.

The judge's jurisdiction over this case terminated when his default order was issued on June 18, 1990. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). In its July 12 letter, Beech Fork seeks relief from the default order and explains that it did not timely respond to the show cause orders due to certain changes in its personnel. Beech Fork's letter was received by

the Commission on July 17, 1990. Under the circumstances, we will treat Beech Fork's July 12 letter as a timely filed petition for discretionary review. E.g., Patriot Coal Co., 9 FMSHRC 382, 383 (March 1987).

Beech Fork alleges that because of personnel changes, it was unable to timely respond to the judge's show cause orders. The Commission has generally afforded relief from default upon a showing of inadvertence, mistake, or excusable neglect. E.g., Blue Circle Atlantic, Inc., 11 FMSHRC 2144, 2145 (November 1989). We are unable, on the basis of the present record, to evaluate the merits of Beech Fork's assertions, but in the interest of justice we will permit Beech Fork to present its position to the judge, who shall determine whether appropriate grounds exist for excusing its failure to timely respond. See, e.g., A.H. Smith Stone Company, 11 FMSHRC 2146, 2147 (November 1989).

For the foregoing reasons, we grant Beech Fork's petition for discretionary review, vacate the judge's default order, and remand this matter to the judge for appropriate proceedings. Beech Fork is reminded to file documents connected with this proceeding with the judge and to serve counsel for the Secretary with copies of any of its filings. 29 C.F.R. §§ 2700.5(b), 2700.7. */

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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*/ Pursuant to 30 U.S.C. § 823(c), we have constituted ourselves as a panel of three members to exercise the powers of the Commission in this matter.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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July 27, 1990

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 89-67-M
v.	:	
	:	
MIDWEST MINERALS, INC.	:	

Before: Ford, Chairman, Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

At issue in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (1988) ("Mine Act" or "Act"), is whether there is support for certain findings of the trial judge. This case arose in the wake of four citations issued to Midwest Minerals Inc. (Midwest) on August 11, 1988, pursuant to section 104(a) of the Mine Act. 30 U.S.C. §814(a). Each citation charges a violation of 30 C.F.R. §56.9002 which stated that: "Equipment defects affecting safety shall be corrected before the equipment is used." 1/ The equipment defect cited was an inoperative grade retarder on each of four haul trucks.

A hearing in this matter was held on September 28, 1989, before Administrative Law Judge Gary Melick. Midwest appeared pro se through its safety director, who was also Midwest's sole witness. The Secretary also presented only one witness, Robert Earl, the MSHA inspector who issued the subject citations.

In his decision, Judge Melick upheld the violations and found that they were significant and substantial, that Midwest had consciously avoided abating the violations and that Midwest was highly negligent. The judge assessed a $300.00 penalty for each of the four violations. (The Secretary had proposed a $20.00 penalty for each violation). Midwest's petition for discretionary review of the judge's decision was filed pro se through the company's

1/ Shortly after these citations were issued, 30 C.F.R. 56.9002 was replaced by a new standard, 30 C.F.R. 56.14100(b), which provides: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

president, Richard Atkinson. After the Commission granted Midwest's petition for review. Midwest retained legal counsel who filed a brief in support of the petition for discretionary review and a motion to have the matter remanded to the administrative law judge and reopened for the taking of additional evidence.

In seeking a remand and a reopening of the record, Midwest relies on Fed. R. Civ. P. 60(b)(1) and (6)("Rule 60(b)"). 2/ The essence of Midwest's claim for relief is that its pro se representative at the hearing before the judge failed to introduce material evidence relevant to Midwest's defense against the Secretary's allegation of violation, failed to interpose objections during the presentation of the Secretary's case, and failed to cross-examine the Secretary's witness or file a post-hearing brief.

Thus, Midwest asserts that its representative failed to properly present its position at the hearing. Further, Midwest links this failure to emotional and medical problems allegedly suffered by its representative, and purportedly manifesting themselves and coming to Midwest's attention subsequent to the hearing.

The Secretary opposes Midwest's motion to remand and reopen. The Secretary essentially argues that Midwest consciously chose a non-lawyer as its representative at the hearing and cannot now belatedly invoke Rule 60(b) to avoid the consequences of the adverse decision Midwest received from the administrative law judge. The Secretary asserts that to grant Midwest's request to reopen this proceeding for the taking of additional evidence would be tantamount to giving Midwest a "second turn at bat." Sec. Br. at 5.

We agree with the Secretary that, under the circumstances presented, a reopening of the record pursuant to Fed. R. Civ. P 60(b) is not warranted. Under the Mine Act, proceedings before this independent adjudicatory agency are adversarial proceedings conducted in conformity with the procedural dictates of the Act, applicable provisions of the Administrative Procedure Act, and the Commission's Rules of Procedure, 29 C.F.R. Part 2700. Although these proceedings are legal in nature, the Commission's rules permit parties appearing before the Commission to be represented by non-attorney representatives. 29 C.F.R. § 2700.3. In fact, it is not uncommon for parties to choose to appear before the Commission without the assistance of an attorney, to diligently present their evidence and arguments, and to prevail on the merits.

2/ Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> *****
>
> (6) any other reason justifying relief from the operation of the judgment.

On the other hand, it is also not uncommon for a party choosing to appear without legal counsel to fail to present its case in a manner which best preserves all available legal rights that could contribute to the successful advancement of the party's cause. This consequence, which should not be entirely unexpected, directly flows from the party's choice of its representative.

Because the adequacy of a party's representation at a hearing is linked to the party's choice of its representative, we must look askance at any request that Rule 60(b) relief be granted because the party's chosen representative is claimed to have performed ineffectually at the hearing before the judge resulting in an adverse decision. Routinely granting such relief would, as the Secretary has suggested, unfairly provide a losing party "a second turn at bat". Here Midwest is pursuing a claim that a medical condition manifesting itself subsequent to a representative's appearance at a hearing should excuse his "poor" performance at the hearing. Such a claim would necessitate a collateral inquiry into such person's medical fitness at the time of the hearing, a diversion we find unnecessary in this case.

Instead, we find more pertinent a review of the proceedings as conducted before the administrative law judge. Our review of the transcript in this proceeding does indeed reveal, from a trained legal point of view, a rather passive participation by Midwest's lay representative. We cannot say, however, that his representation was totally ineffectual or markedly different from the caliber of pro se representation frequently demonstrated in proceedings before the Commission. More importantly, we find nothing suggestive of the type of mistake or excusable neglect that is contemplated by Rule 60(b) as grounds for obtaining relief from a judgment. It is also important to note that even after the judge's adverse decision was rendered, Midwest nevertheless chose to file its appeal of the judge's decision through a different lay representative, whose pro se petition might also be viewed as failing to preserve all legal arguments that otherwise may have been available to Midwest in this appeal

For these reasons, in the exercise of our discretion, we conclude that a reopening of this proceeding on the theory advanced here is unwarranted and would set an unwise precedent for proceedings conducted before this Commission. Accordingly, Midwest's motion to reopen and remand this proceeding for the taking of additional evidence is denied. 3/

In its petition for discretionary review Midwest makes several challenges which can be addressed summarily. Midwest challenges the judge's finding that,

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3/ The Secretary's motion to strike an attachment to Midwest's petition for discretionary review, and attachments to its brief and portions of the brief itself, has been considered, as has Midwest's opposition thereto. Upon consideration we grant the motion to strike the attachment to the petition for discretionary review. We deny the motion to strike the attachments to the brief insofar as they were submitted in connection with Midwest's motion to reopen. We grant the motion to strike those portions of the brief addressing the merits of the case which refer to the attachments and other evidence not entered into the record before the judge.

during a compliance assistance visit (C.A.V.), it did not dispute MSHA's position that inoperative grade retarders affect safety. Midwest also asserts that: the inspector who issued the citations did so out of animus towards it; the cited trucks were all purchased as used vehicles; the trucks came with disconnected grade retarders; Midwest employees misuse the retarders; grade retarders can be a hazard in themselves; and that it is common mining practice to have the devices disconnected.

There is no evidentiary support in the record for any of these contentions. 4/ Furthermore, all of these matters were raised for the first time in Midwest's petition for review and therefore cannot be considered by the Commission. Ozark-Mahoning Co., 12 FMSHRC 376, 379 (March 1990); Union Oil Co. 11 FMSHRC 289, 301 (March 1989).

Midwest also challenges the judge's finding that the cited trucks were moved out of the MSHA district in which they were cited in order to avoid repairing the retarders. In his decision the judge states: "Moreover apparently to avoid making the repairs the cited trucks were moved out of the MSHA district in which they had been cited." 11 FMSHRC at 2172. Midwest asserts that the judge's finding that the operator moved its trucks in order to avoid abatement is not supported by substantial evidence. We agree. The record contains no evidence that Midwest's movement of its equipment subsequent to the issuance of the citations at issue was an attempt to avoid compliance with the Mine Act. At the hearing the Secretary did not assert that Midwest was engaging in intentional avoidance of abatement. Rather, Inspector Earl testified that the period between the C.A.V. and the date the citations were issued was insufficient time for Midwest to repair the retarders. Tr. 27-28. Also, Earl extended the time for abatement of the citations because Midwest informed him that they intended to contest the citations. Tr. 28. Further, Earl explained that while the trucks had been moved to another MSHA District, they were moved because Midwest's operation was a portable one that moved among various locations. Tr. 30. In short, the record establishes that Midwest's movement of its equipment was not an attempt to avoid compliance, but was consistent with the very nature of the operation. 5/

In her brief on review, the Secretary asserts that the judge's finding that Midwest was attempting to avoid repair of the retarders was a permissible inference. Although inferences may be relied on where appropriate, "any such inference ... must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact inferred." Garden Creek Pocahontas Co., 11 FMSHRC 2148, 2153 (November 1989). Measured

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4/ Midwest's safety director did testify that it had been Midwest's practice over a fifteen year period to disconnect the devices and that in so doing the operator had not been previously cited. Such testimony, however, cannot be extrapolated to indicate a widespread industry practice.

5/ Midwest's assertion at the hearing that a different MSHA district did not subsequently cite the trucks for the disconnected retarders was intended to show inconsistent MSHA enforcement, not that the trucks had been moved for the purpose of obtaining a different enforcement result.

against this standard, we find that the facts of record regarding the reasons for nonabatement militate against utilization of the inference sought by the Secretary.

On review Midwest vigorously argues that the judge's erroneous conclusion as to intentional avoidance of compliance had a serious impact upon the judge's evaluation of the negligence criterion relevant to assessment of the civil penalty. 30 U.S.C. § 820(i). We agree.

In arriving at his conclusion with respect to negligence the judge states, "In any event the failure of Midwest to have repaired the defective grade retarders before the inspection at bar and the continued use of the trucks without grade retarders therefore constitutes high negligence." 11 FMSHRC at 2172. That conclusion ignores, however, the testimony by Inspector Earl (noted earlier) that there was insufficient time between the C.A.V. and the enforcement inspection for Midwest to have completed the repairs, Tr. 28, and that he had granted a 30 day extension of the time for abatement because Midwest intended to request a conference with the agency to discuss the matter of the grade retarders and the citations. Id.

Also, Midwest's safety director testified that Midwest had not been cited previously for a lack of grade retarders and that, in the week before the hearing, he was informed by MSHA Inspector Ramirez that the trucks had not been cited by MSHA for lack of grade retarders during their operation in Kansas. Tr. 34. Inspector Earl stated that he considered Midwest's negligence "moderate" since, while in the Kansas area, the trucks "apparently have been allowed to go ahead with the retarders unhooked." Tr. 27. 6/ As we have recently observed in a similar context, "[t]he fact that seemingly conflicting MSHA policies left [the operator] in doubt as to what was required for compliance with [a standard] is a factor which militates against finding that [the operator's] conduct" was of an aggravated nature. Utah Power & Light Co., 12 FMSHRC 972, (May 1990).

In the circumstances presented, we conclude that substantial evidence does not support the judge's finding of high negligence and that the inspector's finding of moderate negligence was appropriate.

6/ The judge also recognized the inconsistency in enforcement, as reflected by his statement that "[m]aybe MSHA ought to get together and decide what they ought to do." Tr. 36.

Therefore we vacate the judge's finding of high negligence. We find the penalty amount proposed by the Secretary to be appropriate and we accordingly assess a penalty of $20.00 for each violation. See Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 5 1990

JOHN ETHERIDGE,	:	DISCRIMINATION PROCEEDING
	:	
Complainant	:	Docket No. PENN 90-21-D
	:	PITT-CD-89-26
v.	:	
	:	
VALLEY COAL COMPANY,	:	Valley No. 11 Mine
	:	
	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On November 13, 1989, you filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act 1977. On March 22, 1990, a show cause order was issued directing you to provide information regarding your complaint or show good reason for your failure to do so. The show cause was mailed to you certified mail, return receipt requested. You have however, not responded and complied with the show cause order.

Accordingly, this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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THE FEDERAL BUILDING
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JUL 6 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 90-39-M
Petitioner	:	A.C. No. 29-00775-05506
	:	
v.	:	Docket No. CENT 90-58-M
	:	A.C. No. 29-00775-05507
HOMESTAKE MINING COMPANY,	:	
Respondent	:	Homestake Mill

DECISION

Appearances: Janice L. Holmes, Esq., Office of the Solicitor U.S. Department of Labor, Dallas, Texas, for Petitioner;
Wayne E. Bingham, Esq., Crider, Calvert & Bingham, Albuquerque, New Mexico, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of Complaints Proposing Penalty in the captioned dockets pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

At the outset of the hearing on June 5, 1990, the parties consummated negotiations resulting in the amicable resolution of the issues arising out of the three Citations involved in the above two dockets. Their settlement agreement was proposed and considered on the record of the hearing and my bench decision approving such is here affirmed.

ORDER

In Docket No. CENT 90-39-M, Citation No. 3277887 is MODIFIED to delete the "Significant and Substantial" designation thereon, is otherwise affirmed, and the penalty of $20 agreed to by the parties and assessed at hearing (T. 9), shall be paid by Respondent to the Secretary of Labor within 30 days from the date of the issuance of this decision.

In Docket No. CENT 90-58-M, Citations numbered 3277890 and 3277990, the prosecution of which having been withdrawn by Petitioner, are VACATED.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 6 1990

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 89-17-R Citation No. 3012076; 10/25/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 5 Mine Mine I.D. # 01-01322
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 89-47 A.C. No. 01-01322-03727
v.	:	No. 5 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama for the Secretary of Labor;
H. Thomas Wells, Jr., Esq., Maynard, Cooper, Frierson, and Gale, P.C., Birmingham, Alabama for Jim Walter Resources, Inc.

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 contest Citation No. 3012076 issued by the Secretary of Labor pursuant to Section 104(a) of the Act against Jim Walter Resources, Inc., (Jim Walter) and for review of civil penalties proposed by the Secretary of the violation alleged therein. More particularly Jim Walter seeks review in this case of a citation issued for its refusal to acquiesce in the Secretary's demand that its Ventilation and Methane and Dust Control Plan (Plan) contain a provision stating as follows:

> When methane content in any bleeder entry or any return except a section return exceeds 1.0 volume percentum, mine management shall submit a plan and obtain approval by the district manager. This plan

shall detail additional procedures and safeguards which will be utilized to insure safety.

The citation as amended alleges a violation of the standard at 30 C.F.R. § 75.316 and charges as follows:

> A citation is hereby issued in that the mine operator adopted proposed changes in their approved Ventilation System and Methane and Dust Control plan dated Sept. 27, 1988, which has not been approved by the District Manager. Refer to cover Letter 9-1V-52 dated September 28, 1988, and response cover letter dated October 25, 1988.

The September 28, 1988, letter from Jim Walter Mine Manager James Beasley and referenced in the above citation reads as follows:

> I request that the cover letter for the No. 5 Mine Ventilation System and Methane and dust Control Plan signed by me on September 27, 1988, be revoked and that the last paragraph of that letter that reads as follows be deleted.
>
> > "When methane content in any bleeder entry or any return except a section return exceeds 1.0 volume percentum, mine management shall submit a plan and obtain approval by the District Manager. This plan shall detail additional procedures and safeguards which will be utilized to insure safety."
>
> We shall comply with part 75.305.

The response from Acting MSHA District Manager Boone to Mine Manager Beasley dated October 25, 1988, referenced in the citation, reads as follows:

> The request dated September 28, 1988, which deletes a statement on the approved Ventilation System and Methane and dust Control Plan dated September 27, 1988, has been received, and cannot be approved.
>
> Additional procedures and safeguards are required to insure safety in the return areas of the above mine because of the potential of the methane content in the return to change very rapidly. A daily inspection of the return entries will assure that a continuing evaluation will be conducted and immediate corrective measures can be undertaken.

The Commission discussed the underlying legal authority for the litigation of disputed Ventilation Plans in Secretary v. Carbon County Coal Co., 7 FMSHRC 1367 (1985). It stated in this regard as follows:

> The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission. Penn Allegh Coal Co., 3 FMSHRC 2767, 2773 (December 1981). Carbon County proceeded accordingly in this case. The company negotiated in good faith and for a reasonable period concerning the volume of air to be supplied the auxiliary fans. Carbon County's refusal to acquiesce in the Secretary's demand that the plan contain a free discharge capacity provision led to this civil penalty proceeding.

It is not disputed in this case that Jim Walter negotiated in good faith and for a reasonable period concerning the disputed provision and it was Jim Walter's refusal to acquiesce in the Secretary's demand that the plan contain the cited provision that led to this contest and civil penalty proceeding. While the Commission did not designate in the Carbon County decision the party having the burden of proof nor did it set forth the standard of proof to be applied, the parties hereto have agreed that the Secretary, as the moving party attempting to include the disputed provision in the Ventilation Plan has the burden of proof. See 5 U.S.C. § 556 (d). I have determined that the Secretary must prove by a preponderance of the evidence that, without the Secretary's proposed change, the mine operator's Ventilation Plan does not provide an adequate measure of protection to the miners in the subject mine.[1]

---

[1] The Secretary argues that whatever decision is made by the MSHA District Manager, whether to impose a new plan provision over the operator's objection or whether to refuse to include a provision the operator desires, is to be reviewed under an "arbitrary and capricious" standard. The "arbitrary and capricious" standard is however only applicable under the Administrative Procedure Act to judicial review of final administrative action following the administrative hearing. See 5 U.S.C. § 706(2)(A).

On the merits, Williams Meadows, a supervisory mining engineer for MSHA and a graduate mining engineer with extensive engineering and supervisory experience in the mining industry, testified that all mine ventilation plans in his sub-district i.e. the Birmingham Sub-District of MSHA District 7, are examined by him for approval or disapproval. It was Meadows' recommendation that Jim Walter's proposed Ventilation Plan not be approved without the disputed provisions and, in addition, that the following provisions be included:

> A plan shall be submitted by the operator, in detail, showing the proposed procedures and safeguards which will be utilized to insure the safety of all persons underground. This plan shall include, but is not necessarily limited to, the following information:
>
> 1. The entire area shall be examined by a certified person, at intervals not to exceed 24 hours. During this examination this main return and bleeder splits shall be examined, including the area immediately before the air enters the return shaft. Just prior to entering a return shaft, the methane content of this air shall be less than 1.0 volume per centum. Records must be made of all these examinations.
>
> Electrical equipment shall not be operated in an area where the methane content in the air is 1.0 volume per centum or more.

It was Meadow's expert opinion that since the Mary Lee Coal Bed in which the subject mine was operating is the highest methane liberating coal bed in the United States and because of the fluctuation of methane levels in this mine, additional precautions were necessary for safe mining operations. According to Meadows, fluctuations in methane levels are caused by, among other things, the rate of mining advancement, the mine design and differences in degassification efforts.

Robert Keykendall, an experienced MSHA Coal Mine inspector, testified that he issued a section 107(a) imminent danger withdrawal Order on March 8, 1990, for methane in the return air course in excess of 2 percent. Bottles samples taken at that time showed methane levels of 2.64 and 2.26 percent. It is not disputed that the cited area was subject to "fire boss" examinations and that according to the examination books the area had been "fire bossed" and no methane found only three days before the withdrawal order was issued. It may reasonably be inferred from this evidence that indeed in this coal seam of high methane, examinations more frequently than once weekly, are warranted.

In support of its position Jim Walter called as its witness Charles Stewart, General Manager for safety and training. According to Jim Walter records, during calendar years 1987, 1988, and 1989, there were only two citations issued for violations of the standards at 30 C.F.R. § 75.308, 309, 310, 316 and 329. While this evidence of course tends to rebut the testimony of Meadows that MSHA had relied upon the issuance of prior citations in determining that the levels of methane fluctuated within the subject mine, it nevertheless does not negate the Secretary's case.

The credible expert evidence in this case clearly supports the position of the Secretary that in this admittedly highly gassy mine more specific precautions are warranted in the Ventilation Plan than are required by the general provisions of law. The Secretary has met her burden of proving that operation of the subject mine without the disputed provisions would indeed be unsafe.

Accordingly I find that Jim Walter violated 30 C.F.R. § 75.316 in at least technically operating its No. 5 Mine without the disputed provisions in its Ventilation Plan. Inasmuch as the citation was issued pursuant to a Secretarial policy providing for the challenge for disputed ventilation plan provisions and the violation was of limited duration and not hazardous I find the proposed civil penalty of $20 to be appropriate.

ORDER

Jim Walter Resources, Inc., is directed to pay a civil penalty of $20 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 6 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 89-113
	:	A.C. No. 01-00851-03718
v.	:	
	:	Oak Grove Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Petitioner;
Billy M. Tennant, Esq., U.S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania, 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). Petitioner seeks a civil penalty assessment in the amount of $1,000 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.316. The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Birmingham, Alabama. The parties filed posthearing arguments, and I have considered them in my adjudication of this matter.

Issues

The issues presented in this proceeding include the following: (1) Whether the respondent violated the cited mandatory safety standard; (2) whether the alleged violation was significant and substantial (S&S); and (3) whether the alleged

violation cited in the contested section 104(d)(2) order resulted from an unwarrantable failure by the respondent to comply with the cited standard.

Assuming the violation is established, the question next presented is the appropriate civil penalty to be assessed pursuant to the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

2. Sections 110(a), 110(i), 104(d), and 105(d) of the Act.

3. Mandatory safety standard 30 C.F.R. § 75.316.

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

Stipulations

The parties stipulated to the following (Tr. 8-9):

1. The respondent is a large mine operator subject to the jurisdiction of the Act.

2. Payment of the civil penalty assessed for the alleged violation in question will not adversely affect the respondent's ability to continue in business.

3. The respondent timely abated the alleged violative condition in good faith.

Discussion

The contested section 104(d)(2) S&S Order No. 3188462, issued by MSHA Inspector Judy A. McCormick on February 1, 1989, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.316, and the condition or practice cited is described as follows:

> The current approved ventilation Methane and Dust Control Plan was not being complied with in the face of the No. 2 entry. The roof bolting machine was in the face and the blowing curtain was not being used. It was laying on the machine. The extendable line curtain (Bo Strip) had been taken down back to the permanent curtain which was 24 feet from the deepest point of

penetration of the face. This is the third such violation in 3 inspection shifts. The crosscut to the right was being turned in on the third cut.

Petitioner's Testimony and Evidence

MSHA Inspector Judy A. McCormick confirmed that she inspected the number two entry of the number 10 section on February 1, 1989. She stated that she found two roof bolters standing by an energized roof-bolting machine, and the ventilation extending exhausting line curtain was 24 feet from the face of the number two crosscut. This condition was a violation of the respondent's ventilation plan because the plan required the curtain to be maintained to within 10 feet of the deepest point of penetration of all working places except during the extraction of pillars (Tr. 13-15).

Ms. McCormick identified exhibit P-3 as the respondent's approved ventilation plan, and she stated that the provision which was violated appears at page 10, item H-1. She stated that this provision has been in effect for several years. She confirmed that the number two entry was a working face, and that pillars were not being mined because it was an advancing section (Tr. 16).

Ms. McCormick stated that the curtain must be maintained to within 10 feet of the face in order to provide ventilation to the face and to control methane and carry away dust, and if this is not done, there is a potential for methane build-up. The mine is a gassy mine and it is subject to weekly spot inspections. The average annual methane liberation through the five mine fans was in excess of 11 million cubic feet every 24 hours, and in the event the curtain is not maintained to within 10 feet of the face it is very likely that methane will accumulate at the face (Tr. 17-18).

Ms. McCormick believed that methane accumulations presented an ignition, fire, and explosion hazard, and that "bad burn" injuries would be highly likely in the event of a fire, explosion, or ignition. She confirmed that prior to her inspection MSHA conducted an investigation of a methane face ignition which occurred when a line curtain was not maintained within 10 feet of the face, and this resulted in burns to two people (Tr. 19-21, exhibit P-4).

Ms. McCormick identified exhibit P-5, as copies of two prior citations which she issued on the number 10 section during the day shift for failure to maintain the line curtain to within 10 feet of the face (Tr. 23-24). She also confirmed the issuance of a prior section 104(d)(2) order on the number 9 section where another order was still outstanding, and another occasion on that section when 1.4 percent methane accumulated at the face when a

curtain was taken down and the respondent was not aware of it because there was no methane detector available and the foreman had not tested for methane. She confirmed that she issued an imminent danger order in that instance (Tr. 26, Exhibits P-6 through P-8).

Ms. McCormick explained that she issued the unwarrantable failure order in this case for the following reasons (Tr. 27):

> A. I felt that it could have been a particularly hazardous situation and since this was true, the operator had a heightened duty to be aware of what electrical equipment was doing in the face. Also it was repetitious of previous violations on this section as well as in the mine.

Ms. McCormick further explained that the roof-bolting machine was an ignition source because it generates heat capable of igniting methane. Machine permissibility violations and friction from the drill bits would also be sources of ignition, and she considered these factors in the context of continued roof bolting work. She also considered the prior unwarrantable failure and imminent danger orders (Tr. 28-29).

Ms. McCormick confirmed that she determined the distance the extendable curtain was back from the face by measuring it with a tape, and she confirmed that she took a methane reading of 0.2 percent approximately 20 to 22 feet from the face. She would expect the methane reading to be higher at the face because of poor ventilation due to the distance of the curtain from the face (Tr. 30-33).

On cross-examination, Ms. McCormick confirmed that when she arrived at the area in question the roof bolters were not bolting and were performing no work. She stated that they told her that they had pulled the extendable curtain back and were preparing to start roof bolting after installing the blowing curtain. Ms. McCormick confirmed that the installation of the blowing curtain is a normal practice during roof bolting (Tr. 37). However, she stated that the extendable curtain should not have been pulled back prior to the installation of the blowing curtain, and that the roof bolters admitted that they were aware of this, but offered no explanation as to why they had done it out of sequence (Tr. 38). She stated that the roof-bolting machine was positioned to begin roof bolting (Tr. 42).

Ms. McCormick stated that the area in question was a working place, that coal had previously been extracted, and the place was being prepared to be roof bolted (Tr. 45-46). She reiterated that she based her unwarrantable failure finding on the fact that

the respondent had a heightened duty to insure that the cited practice was not occurring in the face area, particularly in light of the hazardous situation caused by the failure to maintain the curtain to within 10 feet of the face (Tr. 48).

Ms. McCormick stated that the section foreman was not with the roof bolters when she arrived on the section and she met him while leaving the section, but could not recall speaking with him (Tr. 50). She agreed that the owl shift and day shift were changing places, that a miner had just finished cutting coal and was going to another entry, and that the two roof bolters had just entered the area to begin bolting, but had not actually commenced bolting (Tr. 52-53).

Ms. McCormick agreed that the two roof bolters had been present in the area for a very short time, and that they would normally install the blowing curtain, withdraw the extendable curtain, and begin bolting. She confirmed that when she arrived in the area, the roof bolters had moved the extendable curtain back and had not put up the blowing curtain (Tr. 54). All that was required to abate and terminate the order was the installation of the blowing curtain. She confirmed that the blowing curtain was laying on the roof-bolting machine (Tr. 56).

Ms. McCormick stated that a ventilation curtain was up at the last row of permanent roof supports where she took the methane reading, and that the roof-bolting machine was being ventilated. She confirmed that she did not check the machine for any permissibility violations, assumed that it was permissible, and that no machine tramming or roof bolting was taking place (Tr. 59). She stated that any "S&S" finding would be based on continuing normal mining operations, and that she would have expected the roof bolters to start bolting (Tr. 59). She believed they would have installed the blowing curtain if they had intended to do so before commencing bolting, but conceded that she did not ask the bolters what they intended to do next or whether they intended to install the blowing curtain before they began bolting (Tr. 60).

Ms. McCormick did not know if the two roof bolters were involved in any of the previous citations, but she confirmed that Foreman Rollins was involved in the two prior citations on the number 10 section. There was no equipment in place in those instances, and the curtain had simply not been kept up after the bolting and servicing of the equipment had been completed, and no mining activity was taking place (Tr. 61-62).

Ms. McCormick agreed that the narrative statements supporting the "special" civil penalty assessment for the contested

order which indicate that roof bolting was taking place without the blowing curtain up, and that the blowing system of ventilation was not being used during roof bolting are incorrect (Tr. 67-69).

Ms. McCormick agreed that the roof bolters were present for 5 to 10 minutes at most before she arrived at the place in question, and she would not have expected the fire boss to see the condition and take corrective action. With regard to the section foreman, she believed that in light of the prior history of citations, the foreman "should check when equipment operators go into a place to make sure that they are legal before they start" (Tr. 73).

Ms. McCormick stated that even if the roof bolters had pulled back the extended curtain with the intention of putting up the blowing curtain they would still be in violation because one type of ventilation may not be removed in preparation of installing another type and the face ventilation must be maintained 10 feet from the face at all times (Tr. 77-78). In view of the fact that the blowing curtain was on the machine, Ms. McCormick concluded that no attempt was made to install the blowing ventilation system prior to moving back the exhaust system. The proper sequence would have been to put up the blowing curtain first before pulling the extendable curtain back. It may not be done in reverse order because the face would be left unventilated. In this case, the blowing curtain was simply laying on the machine. She explained that the curtain normally is stored on the machine, but that in this case it was there because it had not been installed to within 10 feet of the face (Tr. 79-81).

Ms. McCormick confirmed that the roof bolters told her that they had pulled back the blowing curtain, and even if they had told her they were going to install it, it would not have made any difference because there was no ventilation at the face (Tr. 85). She confirmed that the two roof bolters were from the "owl shift" and had not been replaced by the day shift, and that the shifts were just changing. She confirmed that the machines are not usually shutdown between shifts and they are usually in use between shifts. The midnight shift foreman, Mr. Rollins, was still in charge of the bolters (Tr. 87).

Ms. McCormick confirmed that the blowing curtain should have been installed on the last row of permanent roof supports and that this would have placed the curtain 22 to 24 feet from the face until the last two rows of bolts are installed and miners are pulling out (Tr. 88). She confirmed that the face area was not being ventilated by either the blowing ventilation system or the exhaust system. However, there would still be some air at part of the face, but not the amount which would normally be distributed if the line curtain were closer to the face. She

agreed that there was no activity within 24 feet of the face at the time the order was issued (Tr. 92).

Ms. McCormick confirmed that ventilation plan item 2 on page 10 was partially complied with in that the regular line brattice was installed to within 30 feet of the face, but the extended line curtain was not within 10 feet of the face as required by the plan provision at the top of page 11 which states "an extended line curtain to within 10 feet of the face as left by the continuous mining crew" (Tr. 93).

Respondent's Testimony and Evidence

Joseph Nogosky, Safety Manager, U.S. Steel, Southern Division, testified that he was aware of the circumstances surrounding the issuance of the contested order because he conducted an investigation immediately after the midnight shift came out of the mine. He spoke with the shift foreman Glen Rollins, and Mr. Rollins informed him that the inspector issued the order for not having the blowing curtain up while the roof bolter was operating. Mr. Rollins told him that he did not know what occurred because he spent most of the shift 500 feet from the face working on a problem at the feeder and was not aware that the inspector was on the section until she told him that she had issued the order (Tr. 107).

Mr. Nogosky stated that the two roof bolters in question were experienced, and he confirmed that during the course of his investigation regarding the contested order, the roof bolters informed him that while the roof-bolting machine was being trammed into the face area, it was turned toward the right corner of the entry at an angle and the ATRS at the front of the machine became entangled in the extendable line curtain. The machine was stopped, and the extendable curtain was retracted so that it could be disentangled from the machine. The roof bolter operator got out of the machine and was preparing to hang up the blowing curtain when Ms. McCormick appeared on the scene. The bolters tried to explain that the machine had hooked up on the curtain, but the inspector said it did not matter, left to make a methane check, and told the bolters to put the curtain up (Tr. 108-111).

Mr. Nogosky stated that the use of the blowing curtain is a ventilation plan provision imposed by MSHA as part of the approved mine ventilation plan, and he explained that the roof bolters would first position the roof-bolting machine where they were going to put up their first row of bolts. They would then extend the extendable curtain to within 10 feet of the face and then put up the blowing curtain and slide the extendable curtain back. In this case, in view of the fact that the extendable curtain got caught in the machine, they retracted it before putting up the blowing curtain. He stated that he would probably have done the same thing under the circumstances (Tr. 116). He

also stated that the roof bolters told him that they had just pulled the machine in "no more than a couple of minutes" before Ms. McCormick arrived, and that they intended to put up the blowing curtain and start bolting (Tr. 117-118).

In response to bench questions as to why the roof bolters in question were not called to testify in this case, Mr. Nogosky explained that they expressed a willingness to testify at the time the order was issued because they were upset that it was issued and they were afraid that they would be disciplined by the company. In view of their work records, and his belief that they were telling the truth about the curtain being entangled in the machine, Mr. Nogosky decided not to discipline the roof bolters. However, when he contacted them to testify in this case, they stated that they had changed their minds and did not wish to testify. Respondent's counsel indicated that it was then too late to subpoena the bolters for testimony (Tr. 120-123).

Mr. Nogosky did not believe that the violation was an unwarrantable failure because the foreman was not present, and the two roof bolters were trying to do the right thing when the curtain became entangled in the machine when it was operating in a narrow space. He stated that it is not unusual for ventilation to be interrupted by a rock fall, or a piece of equipment running into a curtain, and as long as such a situation is recognized and steps are taken to correct it, he did not believe that such an occurrence would constitute a violation of the ventilation standard (Tr. 126).

On cross-examination, Mr. Nogosky confirmed that he did not accompany Ms. McCormick during the inspection, and that section foreman Rollins was not aware that she was on the section. He confirmed that he conducted his investigation of the order the same day it was issued, and he confirmed that the chairman of the safety committee, the general mine foreman, and the acting mine superintendent were present during his inquiry. He confirmed that Ms. McCormick did not participate in his inquiry, and that he made no effort to contact her because on prior occasions when he has asked her to participate in such investigations she has declined (Tr. 129-133). Mr. Nogosky confirmed that he simply made notes of the investigation, which lasted "maybe a couple of hours," but that he prepared no formal report, and had nothing in writing to support his testimony concerning what the roof bolters told him (Tr. 134).

Mr. Nogosky conceded that the approved ventilation plan required the blowing curtain to be put up first before the extendable curtain was put up, and that in this case the blowing curtain was not up when the inspector was there. He disagreed

that this situation warranted an order, but that "if you go strictly by the letter of the plan without taking in any mitigating circumstances," he agreed that a section 104(a) citation would have been in order (Tr. 141).

Mr. Nogosky stated that one of the roof bolters told him that he had a hook which is used for hanging the blowing curtain in his hand when Ms. McCormick appeared, and Mr. Nogosky believed that one could assume that the roof bolter was going to put up the curtain (Tr. 143). Mr. Nogosky stated if the blowing curtain was not long enough to reach, it was possible that this prevented the roof bolters from putting it up. However, he conceded that this would depend on the prevailing situation, and that he was not present when the conditions were observed and cited by the inspector (Tr. 144-145).

Mr. Nogosky stated that he was not aware whether the two roof bolters in question were ever disciplined in the past by the respondent, and according to his review of their records, they were not. He conceded that they may have received verbal warnings which may not appear in their records. He confirmed that Milton Presley was the day shift foreman on the day the order was issued, but that he was not responsible for the two roof bolters. Since the violation did not occur on his shift, he did not interview him during his investigation. He stated that Mr. Presley normally would not have been at the location of the violation because his shift starts at 7:00 a.m., and it takes 35 to 45 minutes to get to the number 10 section (Tr. 145-148).

Mr. Nogosky confirmed that U.S. Steel has disciplined foreman Paul Boyd within the past 6 months for failing to have the line curtains within 10 feet of the face, and that this was in connection with the violation issued in October, 1988 (Tr. 149).

Mr. Nogosky explained that a "hot seat change out" is when the owl shift and day shift are exchanging places, and the owl shift does not leave until the day shift arrives and immediately takes over the work. He explained that the two roof bolters in question had not as yet ended their work, and at the time the order was issued, they would have been in the process of bolting since the day crew had not as yet arrived to change out with them (Tr. 151).

Mr. Nogosky stated that he prepared no formal written report of his investigation because everyone who would receive a copy was in the room during his inquiry, and no disciplinary action was ever taken against the roof bolters. He also confirmed that he did not participate in any MSHA civil penalty conference in this case because he has never prevailed and believes that it is a waste of time (Tr. 154). Mr. Nogosky conceded that even though the extendable curtain may have been torn down by the machine, the blowing curtain was not installed, and the roof bolters moved

the extendable curtain back just before the inspector arrived. He conceded that if they had installed the blowing curtain before withdrawing the damaged extendable curtain, there would have been no problem. He explained that the bolters did not put up the blowing curtain because they were concerned about positioning the machine so that they could put up the blowing curtain first and getting it untangled from the other curtain (Tr. 157).

Inspector McCormick was called in rebuttal by the petitioner, and she confirmed that she arrived on the section before day shift foreman Milton Presley, but that she met him when she was leaving the section after she issued the order. She could not recall seeing any other management personnel at that time, and did not recall speaking with Mr. Rollins. She confirmed that the two roof bolters in question gave her no explanation as to why the curtain was not up, and she saw no visible evidence that the curtain had been caught or ripped up in the machine. She further confirmed that after observing the violative condition, she did not leave the area immediately, and stayed for some minutes to allow the bolters sufficient time to install the blowing curtain. She stated that she observed them install the curtain and that it took approximately 5 minutes (Tr. 161).

Ms. McCormick stated that if the roof bolters had mentioned tearing down the curtain she would have taken this into consideration, but she did not know that it would have made any difference because any entangled curtain would not prevent them from installing the blowing curtain prior to pulling back any entangled extendable curtain (Tr. 166).

On cross-examination, Ms. McCormick stated that union safety committeeman Jerry Jones was with her during her inspection. She stated that on the morning of the hearing in this case, Mr. Jones told her that one of the roof bolters had "recently changed his story" and agreed with Mr. Nogosky's testimony regarding the torn curtain, but that the other roof bolter disagreed with this contention. She also stated that "originally they both disagreed with Mr. Nogosky" (Tr. 173). In response to further questions, Ms. McCormick stated that she personally observed the two roof bolters putting up the blowing curtain, but she could not recall seeing any hooks in their hands (Tr. 174).

Jerry Jones, electrician, and chairman of the UMWA mine safety committee, testified that he participated on "the tail end" of the investigation conducted by Mr. Nogosky. He stated that he met roof bolter Harvell after he had been interviewed, and that when he arrived at the meeting roof bolter Smith was at the end of his interview, and he could not recall what he said. Mr. Jones stated that he did not speak with the roof bolters until after the investigation was over. He stated that Mr. Harvell told him that they had not knocked the curtain down and "just actually got caught with the curtain down" (Tr. 177).

Mr. Jones did not speak with Mr. Smith at that time, but did speak with both roof bolters recently, and he talked to them separately. Mr. Harvell again told him that "they just got caught. They didn't knock the curtain down," and Mr. Smith told him that he knocked the curtain down and "was in the curtain" (Tr. 178).

Mr. Jones stated that he attempted to speak with Mr. Harvell and Mr. Smith together in order to reconcile their stories, but could not do so. He confirmed that he did not conduct his own investigation because he found out about the matter late, and that he did not tell Mr. Nogosky or management about the conflicting stories of Mr. Harvell and Mr. Smith because he was unaware of any investigation until it was nearly completed. Since the two men were not disciplined, he believed the matter was over (Tr. 181).

Mr. Jones stated that Mr. Harvell and Mr. Smith told him that they would appear at the hearing in this matter, and that he told them "if you get subpoenaed come and tell it like it happened" (Tr. 183). He confirmed that he suggested to them that if they were not subpoenaed they did not have to appear at the hearing (Tr. 183).

Findings and Conclusions

The Section 104(d) "Chain" Issue

The respondent would not stipulate that the contested order issued in this case was procedurally correct and met all of the statutory requirements for the section 104(d) sequence or "chain." The respondent takes the position that the petitioner made no showing that there was no intervening clean inspection of the entire mine since the issuance of the most recent order under section 104(d). In support of its argument, the respondent asserts that the contested order was based on an order issued on April 4, 1983, but that the most recent order of record was issued on October 11, 1988, and the inspector did not know of an unwarrantable failure order being issued between October 11, 1988, and February 1, 1989, and did not know whether the entire mine had been inspected during that same period.

Inspector McCormick explained the procedure that she follows in determining whether there has been any intervening clean inspection for purposes of the section 104(d)(1) and (d)(2) order "chain." She confirmed that each mine has a uniform file which contains information concerning the "d tracking system," including information as to when the initial citations and orders are issued. She stated that she reviewed the file for the mine in question, and found no intervening clean inspections prior to the issuance of the contested order in this case. Since her supervisors maintain the current inspection status of the mine, the

tracking system would not have been in the file if there were a clean mine inspection during the intervening period of time. She could not specifically recall whether she had issued any section 104(d)(2) orders between October 11, 1988, and February 1, 1989, but stated that "there were lost of D-2s issued during that quarter" (Tr. 98-100).

Respondent's counsel agreed that the mine would have been completely inspector from April 4, 1983, until the date of the issuance of the order by Ms. McCormick. Ms. McCormick confirmed that according to the mine file there were no intervening "clean" mine inspections during this time frame, and that to her knowledge the mine has been "on a d sequence" since April, 1983 (Tr. 101-102).

In view of the unrebutted testimony by the inspector, which I find probative and credible, and absent any credible evidence to the contrary, I conclude and find that the contested order issued by Inspector McCormick was procedurally correct and met all of the prerequisite statutory requirements for the existence of the "section 104(d) chain" of citations and orders.

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.316, because of its failure to follow its MSHA approved ventilation and methane and dust-control plan, in the number 2 entry of the number 10 section. The inspector found that an extendable ventilation line curtain was not being maintained to within 10 feet of the face as required by the plan, and that an available blowing ventilation curtain was not being used. Section 75.316, requires a mine operator to follow its approved plan, and it is well settled that the failure to do so constitutes a violation of this section. See: Co-op Mining Co., 3 MSHC 1206 (1984); Zeigler Coal Company, 3 MSHC 1661 (1984); Jim Walter Resources, Inc., 3 MSHC 1983 (1985); Monterey Coal Co., 3 MSHC 1315 (1984).

The inspector confirmed that the applicable face ventilation plan provision which was violated appears at page 10, paragraph H.1, and it states as follows: "The extendable line curtain or sliding tube will be maintained to within 10 feet of the face in all working places except when pillars are being mined" (exhibit P-3). Paragraph H.2 of the plan, pgs. 10-11, explains the plan provisions for the required installation and use of the extendable line curtain and blowing curtain during normal roof bolting operations.

The credible and unrebutted testimony of the inspector establishes that the cited location at the number 2 entry was a working face, and that pillars were not being mined because the section was an advancing section. The inspector's testimony also

establishes that the extendable ventilation line curtain was 24 feet from the face of the number 2 entry and that the blowing curtain was not installed and was laying on the roof-bolting machine. The respondent does not dispute the fact that the bolters took down the extendable line curtain before installing the blowing curtain, and that the plan required that the blowing curtain be installed before the extendable line curtain is retracted during normal roof bolting operations (page 4, post-hearing brief). Respondent's safety manager Nogosky conceded that the ventilation plan required the blowing curtain to be put up first before the extendable curtain was put up, and that in this case the blowing curtain was not up when the inspector observed the cited conditions. Mr. Nogosky's testimony does not rebut the inspector's credible testimony that she determined the distance of the extendable line curtain from the face by means of a tape measure.

The respondent takes the position that the facts presented in this case do not establish that it has violated its ventilation plan or section 75.316. In support of this conclusion, the respondent argues that its approved ventilation plan contains a provision that allows it to handle "abnormal conditions or situations" on a case-by-case basis, and that in the instant case the situation found by the inspector was abnormal, and that in the circumstances, it was handled properly by the bolters without violating the purpose or intent of the plan.

The respondent points out that the plan requirement for maintaining the extendable line curtain to within 10 feet of the face during roof bolting operations is for the purpose of providing adequate ventilation in the face area. The respondent maintains that the plan provision which requires the blowing curtain to be installed before the extendable curtain is retracted could not be followed in this case because the bolting machine became entangled in the extendable line curtain. The respondent concludes that the roof bolters acted wisely by electing to disentangle the extendable curtain and retract it rather than tearing it down while positioning the machine to begin bolting, and that the extendable curtain no longer served any ventilation purpose in its tangled state. Under these circumstances, the respondent further concludes and argues that the bolters logically were proceeding to install the blowing curtain when they were interrupted by the inspector. The respondent further points out that the roof bolting operation had not commenced when the inspector arrived at the scene, and that but for the inspector's interference, the blowing curtain would have been installed in a minimum amount of time, and there is no evidence that the bolters would not have installed the blowing curtain before commencing bolting.

The respondent asserts that the Commission has recognized that temporary interruptions in ventilation can occur without a

violation resulting. Citing Freeman United Coal Mining Co., 11 FMSHRC 161 (February 1989), the respondent argues that in that case the Commission considered a similar situation where an inspector directed a miner not to rehang a curtain which had been torn down by a shuttle car until the inspector could take an air reading, and found no violation. In Freeman, the Commission stated in relevant part as follows at 11 FMSHRC 165:

> [I]t is clear that in certain circumstances, including the unique factual circumstances presented here, a temporary interruption in the minimum air velocity delivered can occur without a violation of the Act resulting.
>
> While minimum air quantity or velocity requirements of ventilation plans and mandatory safety standards provide an objective test by which the adequacy of a mine ventilation system can be evaluated, other mandatory ventilation standards recognize that the dynamics of the underground mining environment occasionally interfere with attainment of constant minimum quantity or velocity levels. The other standards recognize that disruptions in mine ventilation inevitably occur and that the key to effective compliance lies in expeditiously taking those steps necessary to restore air quantity or velocity to the required level.
>
> For example, it is obvious that an unplanned power outage and the temporary shutdown of the main fan will reduce the quantity and velocity of air delivered to the face areas. Such a contingency is anticipated in the mandatory standards, however, and procedures for the restoration of air and the steps to be taken if ventilation cannot be restored within a reasonable time are outlined accordingly. See 30 C.F.R. §§ 75.300-3(a)(2), 75.321, and 75.321-1.
>
> Similarly, and directly on point with the situation presented in this case, there are mandatory safety standards that anticipate the possible diminution in ventilation caused by damaged or downed line brattice. 30 C.F.R. § 75.302, a standard drawn verbatim from the statute, 30 U.S.C. § 863(c), requires that "[p]roperly installed and adequately maintained line brattice . . . shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation . . . . When damaged by falls or otherwise, such brattice . . . shall be repaired immediately." (Emphasis added.) Furthermore, 30 C.F.R. § 75.302-2 provides that, "[w]hen the line brattice . . . is damaged to an extent that ventilation of the working face is inadequate, production activities in

> the working place shall cease until necessary repairs are made and adequate ventilation restored." These standards recognize that line curtains may be damaged or torn down and that ventilation at the working face may, as a result, be diminished. They also make clear, however, that absent any unusual circumstances, it is the operator's failure to take immediate steps to repair or replace the downed line brattice that constitutes a violation.

And, at 11 FMSHRC 166:

> [C]ompliance with section 75.302-2 would have been achieved but for the inspector's order, mistaken as it may have been, to cease rehanging the line brattice. Had not the inspector intervened, the minimum air velocity would have been restored almost immediately. At the very least, the inspector's unwitting interference with Freeman's abatement skewed the results of the air measurement so as to render it invalid for purposes of establishing a violation insofar as the three-foot gap initially observed by the inspector is concerned. Under these circumstances we conclude that Freeman did not violate its ventilation plan.

Relying on the Freeman case decision, the respondent concludes that if the inspector had not interrupted the roof bolters, there is no reason to believe that they would not have installed the blowing curtains before they began to install the bolts, and that under these circumstances, there was no violation and the contested order should be vacated.

The petitioner takes the position that the evidence clearly establishes that the respondent violated the clear and explicit ventilation plan provision which required that the extendable line curtain be within 10 feet of the face, and that the plan, in clear and unambiguous terms, sets forth the sequence of installing/retracting line curtains during bolting operations. The petitioner argues that it is undisputed that the extendable line curtain was 24 feet from the face and not in compliance with the applicable plan provision, and that the No. 2 entry was a working place and pillars were not being mined. Under the circumstances, the petitioner concludes that the conditions described and cited by the inspector on the face of the order constitutes a violation of the respondent's ventilation plan.

With regard to the respondent's reliance on the Freeman decision as a defense to the violation, the petitioner concludes that it is misplaced, and points out that in the instant case there is no direct evidence of a curtain being torn or any "unwitting interference" by the inspector. On the contrary, the petitioner points out that the inspector asked the bolters if

they knew the proper curtain sequence and "why they didn't do it that way," and that the bolters offered no defense. The petitioner concludes that the respondent simply "got caught" with the curtain behind just as it had on six previous occasions.

In Consolidation Coal Company, 3 FMSHRC 2207 (September 1981), Judge Melick affirmed a violation of section 75.316, for the failure by the operator to ventilate an entry with a line curtain. Although the evidence established that the curtain had been in place 2-1/2-hours prior to the issuance of the citation, but had been taken down for some unexplained reason, the judge found that the absence of the curtain at the time the citation was issued was still a violation.

In Windsor Power House Coal Company, 2 FMSHRC 671 (March 1980), Commission review denied April 21, 1980, Judge Melick affirmed a violation of section 75.316 because of the operator's failure to maintain adequate ventilation at a working face as required by its ventilation plan. Even though the evidence showed that mining was temporarily halted in the cited area because of a mechanical breakdown, the judge found that the absence of the required ventilation constituted a violation.

In Co-Op Mining Company, 5 FMSHRC 2004 (November 1983), former Commission Judge Virgil Vail affirmed a violation of section 75.316, because of an operator's failure to install a line curtain as required by its ventilation plan. Although the judge considered the fact that the curtain may have been down for only a short time due to possible rib sloughage, he found that such an unusual occurrence was no defense. Citing Zeigler Coal Co., 4 IBMA 30 (1975), aff'd 536 F.2d 398 (D.C. Cir. 1976), and Consolidation Coal Co., supra, the judge found that when an operator departs from his ventilation plan, a violation of section 75.316, is established.

In Consolidation Coal Co., 8 FMSHRC 612 (April 1986), Judge Morris affirmed a violation of section 75.316, because of the operator's failure to maintain the proper air velocity at a face as required by its ventilation plan, even though the air reaching the face may have been interrupted for no more than 30 seconds because of a ventilation curtain being pushed against a rib by a shuttle car trailing cable.

In the Freeman case, the mine operator was cited for a violation of section 75.316, for failing to maintain the proper air velocity at the end of a the line curtain as required by its approved ventilation plan. The facts show that the inspector observed that the curtain which was installed across the intake entry directing intake air to the face was down in the corner of the room, causing a gap of approximately 3 feet in the curtain. When the inspector proceeded to the face to take an air reading, a trailing cable of a shuttle car became entangled in the line

curtain, tearing an 18 to 20 foot gap in it. A shuttle car operator heard the curtain tear, and after seeing the large gap, immediately prepared to rehang the curtain as he had been trained. At the same time, while the inspector was preparing to take his air reading at the end of the curtain at the face, he was informed that he would not get an accurate reading because outby in the entry, the line curtain was being rehung. The inspector then walked back from the face, into the room, and directed the shuttle car operator not to hang the curtain because he had to take an air reading at the face before the curtain could be rehung. The shuttle car operator testified that had he not been interrupted by the inspector, it would have taken him about 3 to 4 minutes to rehang the curtain. The inspector proceeded to take an air reading, found an insufficient velocity of air at the face, and issued the violation.

I find that the facts presented in the Freeman case are distinguishable from those presented in the instant proceeding. In Freeman, the evidence established as a fact that the ventilation had been temporarily interrupted by a torn curtain which occurred while the inspector was on the scene, and the operator was in the process of restoring the ventilation and abating the violation shortly before the citation was issued. Since the inspector had knowledge of these facts, but nonetheless intervened and ordered the operator not to rehang the curtain, which would have restored the ventilation and cured the problem, the Commission concluded that the inspector's interference with the operator's efforts to immediately abate the condition by rehanging the torn curtain could not support a violation.

In the instant case, the evidence establishes that the inspector had no personal knowledge that the extendable curtain had been purportedly snagged by the machine and that this may have caused a temporary interruption in the ventilation or somehow prevented the roof bolters from installing the curtain and having it in place at the time of her arrival on the scene. The inspector's unrebutted testimony reflects that when she arrived at the scene, the roof-bolting machine was positioned to begin bolting, the extendable curtain had been moved back and positioned 24 feet from the face, and the blowing curtain was lying on top of the machine.

Although the inspector conceded that if the bolters were to follow normal procedures, they would first install the blowing curtain, withdraw the extendable curtain, and then begin bolting, she found that the bolters had moved the extendable curtain back and had not put up the blowing curtain as required by the plan. Although she also believed that the bolters would have installed the blowing curtain if they had intended to do so before commencing bolting, she concluded that the bolters had not installed the blowing curtain before retracting the extendable curtain because the blowing curtain was lying across the machine and had not been

installed to within 10 feet of the face as required, and that the resulting reverse procedure followed by the bolters resulted in an unventilated face area. Further, while it is true that the inspector did not ask the bolters about their intentions, or whether they intended to install the blowing curtain before they began bolting, she confirmed that it would have made no difference since the removal of one type of ventilation in preparation for the installation of another type of ventilation would still constitute a violation because face ventilation was not being maintained at all times 10 feet from the face.

The inspector confirmed that she saw no evidence of any work being performed by the bolters, and that they were simply standing by the machine and offered no explanation as to why they had removed the ventilation curtains out of sequence, or why the curtains were not installed. She saw no evidence that the extendable curtain had been caught or ripped by the machine, and after remaining at the scene to allow the bolters sufficient time to install the blowing curtain, she observed this being done within 5 minutes. She confirmed that had the bolters told her that the curtain was torn down by the machine, she would have taken this into consideration, but that it would have made no difference since any entanglement of the extendable curtain would not have prevented the bolters from installing the blowing curtain before retracting the extendable curtain. The inspector further confirmed that union safety committeeman Jerry Jones was with her during the inspection, and that on the morning of the hearing, he told her that both roof bolters disagreed with Mr. Nogosky's contention that the curtain had been caught in the machine, but that one of the bolters had "changed his story" and confirmed that the curtain had been caught in the machine, but the other bolter told him that this was not the case.

The respondent's assertion that the extendable curtain had been caught in the roof-bolting machine is based on the hearsay testimony of its safety manager Joseph Nogosky. He testified that in the course of his investigation concerning the issuance of the order the roof bolters informed him that the extendable curtain became entangled in the roof-bolting machine while it was being trammed in the entry and that the curtain was retracted so that it could be disentangled from the machine. Mr. Nogosky stated further that the bolters told him that they retracted the curtain before putting up the blowing curtain, that they intended to install the blowing curtain before starting bolting, and were in the process of doing so when the inspector arrived on the scene, and that they tried to explain the circumstances to the inspector, but that she stated that it did not matter and instructed them to hang the curtain up before leaving. He also stated that one of the bolters told him that he had a hook in his hand preparing to hang up the blowing curtain, and that one could assume from this that the bolter was going to install the curtain.

Mr. Nogosky was not with the inspector during the inspection and issuance of the citation, and he confirmed that he made no formal report of his investigation and had nothing in writing to support his testimony concerning what the bolters purportedly told him. Although he indicated that he had made notes, they were not produced or offered during the hearing. The two roof bolters in question did not testify, and their pretrial depositions were not taken. Mr. Nogosky stated that the roof bolters initially expressed their willingness to testify, but later changed their minds, and it was then too late to subpoena them. Although Mr. Nogosky indicated that other individuals may have been present when he interviewed the roof bolters, the respondent failed to call any other witnesses for testimony. Mr. Nogosky confirmed that he made no effort to contact the inspector when the order issued to explain what the roof bolters purportedly told him, and that he did not seek a conference with MSHA with respect to the order.

Safety committeeman Jerry Jones testified that he was present at "the tail end" of the investigation conducted by Mr. Nogosky, and he confirmed that the two roof bolters gave him conflicting accounts with respect to whether or not the extendable curtain had been caught in the roof-bolting machine. Mr. Jones stated that one of the bolters told him that the curtain had not been caught in the machine, and the other bolter told him that he had knocked the curtain down with the machine.

Although relevant and material hearsay testimony is admissible in Mine Act proceedings, Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 12 n. 7 (January 1981), aff'd 689 F.2d 632 (6th Cir. 1982), cert. denied, 77 L.Ed.2d 299 (1983), and Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-1137 (May 1984), Mr. Jones' testimony, which I find credible, concerning the conflicting accounts given to him by the two roof bolters, cast serious doubts in my mind with respect to the reliability and probativeness of the purported statements made by these bolters to Mr. Nogosky during his investigation, and I have given little weight to Mr. Nogosky's uncorroborated and undocumented testimony.

Having viewed the inspector during her testimony, I find her to be a credible witness and believe her testimony that she saw no evidence of the curtain being caught in the machine, and that the roof bolters offered no explanation as to why they had not installed the ventilation curtains in question. Further, even if I were to believe that the curtain had been torn, the evidence nonetheless establishes a violation because the blowing curtain was not installed and laying on the machine, and Mr. Nogosky conceded this was the case. Under all of these circumstances, I conclude and find that a preponderance of all of the credible and

probative evidence in this case establishes a violation of section 75.316, and the violation issued by the inspector IS AFFIRMED. The respondent's asserted defense and reliance on the Freeman case, supra, IS REJECTED. I cannot conclude that the circumstances presented were so abnormal as to absolve the respondent from its responsibility to insure that its ventilation plan was followed.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

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

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

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

The inspector's unrebutted credible testimony reflects that the respondent's mine is a gassy mine which freely liberates methane, and because of this, it is subject to weekly spot inspections by MSHA. She believed that the failure to maintain the ventilation curtain to within 10 feet of the face to control methane and carry away hazardous dust presented a potential for a methane buildup at the face, and that such methane accumulations presented an ignition, fire, and explosion hazard, and that in the event of such incidents, it would be highly likely that miners working in the affected area would likely suffer burn injuries.

At the time of the inspection, the inspector was aware of the fact that a methane ignition and fire had previously occurred on another section of the mine on September 19, 1988, and that two miners suffered burns as a result of that incident. MSHA's report of investigation of that incident reflects that the ignition occurred when a flammable methane/air mixture was ignited by heat and/or sparks generated from the cutting head of a continuous-mining machine while cutting top rock down (exhibit P-4). The report also reflects that at the time of the ignition, the ventilation line curtain was approximately 25 feet of the face, in violation of section 75.316, that the cutting sequence mandated by the approved ventilation system and methane dust-control plan was not being followed, and that the continuous-mining machine methane monitor was not properly calibrated.

The inspector also confirmed that she previously issued two citations on January 18, 1989, for violations of section 75.316, and the approved ventilation plan, because of the failure by the respondent to maintain the ventilation curtains to within 10 feet of the face, and that she also issued a citation and section 104(d)(2) order and imminent danger order on December 6, 1988, and October 11, 1988, citing violations of section 75.302-1(a), because of the failure by the respondent to maintain the ventilation curtains to within the required distances from the face (exhibits P-5 through P-8).

In the instant case, the inspectors testified credibly that at the time she observed the cited conditions, the roof-bolting machine was positioned to begin roof bolting, and that the machine was a source of ignition because it generates heat capable of igniting methane. She also believed that any permissibility violations with respect to the roof bolter, and friction from the drill bits, would also be potential sources of ignition.

Although she conceded that the two roof bolters had not actually commenced bolting when she observed the condition, and that no roof bolting was taking place, and she found no permissibility violations, since the mining machine had just finished cutting coal and would be moved to another entry, the two roof bolters were there to begin bolting, and she considered all of these factors in the context of continued mining operations, including her expectation that the roof bolters would normally have started bolting operations. Given her prior experience with previous citations which she had issued for not maintaining the ventilation curtains, I cannot conclude that the inspector's belief that the bolters would commence bolting operations without the required ventilation curtains in place was unreasonable.

The respondent asserts that while there was a momentary interruption to ventilation, little if any hazard resulted, and that the regular line brattice was in place within 24 feet of the face, no mining was taking place, and that 0.2 percent methane was present at the last permanent support 20-22 feet from the face. The respondent acknowledges that the roof-bolting machine was energized, and that the bolters told the inspector that they had pulled the extendable curtain back to prepare for bolting before installing the blowing curtain, and that they knew that the respondent's ventilation and dust-control plan required the blowing curtain to be installed before pulling back the extendable curtain.

The section foreman did not testify in this case. The respondent's safety manager Joseph Nogosky, who did not accompany the inspector and did not observe the cited conditions, conceded that the roof bolters had not as yet completed their work shift at the time the order was issued by the inspector, and that they would have been in the process of bolting since the day crew had not as yet arrived to "change out" with them. Mr. Nogosky also conceded that the ventilation plan required the blowing curtain to be installed first before the extendable curtain was installed, and that the blowing curtain was not up when the inspector observed the cited condition.

After careful review of all of the evidence and testimony, I conclude and find that the credible testimony of the inspector establishes that the violation was significant and substantial. The respondent's assertion that the "momentary lapse" of ventilation did not present a hazard is rejected. The respondent's assertions that no hazard existed because the roof bolter was not in operation and that only .2 percent methane was detected 20-22 feet the face is likewise rejected. In my view, it is highly likely that methane can rapidly accumulate at the face during "momentary lapses" of ventilation, and the inspector explained that higher methane readings may be expected in the face, particularly when a line curtain is not in place.

In United States Steel Mining Co., 3 MSHC 1282 (1984), the judge upheld a violation of section 75.316, and found that it was a significant and substantial violation because the reduced amount of ventilation air reaching the face as a result of a reversal in the air course made concentrations of methane more likely. In the instant case, the mine liberates methane freely and is on a weekly spot inspection cycle. A methane ignition and fire had previously occurred less than 5-months prior to the inspection in question, with resulting burn injuries to two miners. The prior failure by the respondent to maintain the ventilation curtains as required by its plan is evidenced by the prior violations issued by this same inspector. In view of all of this information which was available to the inspector, I conclude and find that her belief that roof bolting would have proceeded in the normal course of mining operations, and that it was reasonably likely that another methane ignition would have occurred because of the failure to properly maintain the ventilation curtains cited in this case, was reasonable in the circumstances. Accordingly, I agree with the inspector's significant and substantial finding, and IT IS AFFIRMED.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

> In light of the foregoing, we 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.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

The Petitioner's Arguments

In support of the inspector's unwarrantable failure finding in this case, the petitioner does not contend that violations are unwarrantable per se, when there exists prior violations of the same standard. The petitioner takes the position that "the unique factual history in this case, especially management's involvement," compels the conclusion that the respondent demonstrated "indifference" or "total lack of interest" regarding ventilation curtain violations, and that such indifference is demonstrated by management's condoning of the curtain violation in question.

In support of its argument, the petitioner asserts that Inspector McCormick was assigned to the subject mine in September, 1988, and that her initial involvement with curtain violations occurred when she terminated two section 104(d)(2) orders which had been issued on September 20, 1988, on the No. 9 section for violations of section 75.316, and the same ventilation plan at issue in the instant case (exhibit P-4). The petitioner points out that one of the orders was issued for a violation of the identical plan provision which was violated in this case (failure to maintain an extendable line curtain to within 10 feet of the face), that the violation contributed to a

methane ignition, that burned two miners, and that the respondent's section coordinator, Paul Boyd, was present during MSHA's investigation of that incident.

The petitioner asserts that 3 weeks after the aforesaid methane ignition, Inspector McCormick issued a section 104(d)(2) order on October 1, 1988, on the No. 9 section, for a violation of section 75.302-1(a), for failure to maintain a line curtain to within 10 feet of a face where a continuous-mining machine was in operation (exhibit P-6). Petitioner points out that the respondent's section coordinator Paul Boyd was in the working place at the time of the violation, and since Mr. Boyd had been involved in the previous MSHA investigation of the September, 1988, methane ignition, it concludes that Mr. Boyd condoned the violation issued by Inspector McCormick.

The petitioner asserts that the next experience Inspector McCormick had with line curtain violations was on December 6, 1988, when she issued a section 104(a) citation for a violation of section 75.302(a), after finding that a line curtain on the No. 9 section had bene partially removed by a scoop crew, and that this condition contributed to an imminent danger which she issued in connection with the citation in that 1.4 percent methane was detected at the face (exhibits P-7, P-8).

The petitioner states that the final line curtain violation detected by Inspector McCormick prior to the issuance of the contested order in this case occurred on January 18, 1989, when she issued two section 104(a) citations for violations of section 75.316, for the failure to install line curtains to within 10 feet of the face in the No. 3 and No. 4 entries of the No. 10 section. The petitioner asserts that these violations were not particularly hazardous because no equipment was in either place at the time. However, the petitioner views these citations as significant because Glenn Rollins, the owl shift foreman responsible for the two roof bolters in the instant case, was also "involved" with the two prior citations. Under the circumstances, the petitioner believes that the issuance of these citations had no deterrent effect because the order issued by the inspector in the instant case came 2 weeks later for a violation of the same regulation on the same mine section.

The petitioner believes that after the September ignition in which two miners were burned, "one would think that line curtain violations would be non-existent at the Oak Grove Mine." Yet 3 weeks after the ignition, the section coordinator condoned the same violative practice on the same section, and notwithstanding these two events, line curtain violations continued, and the inspector found three identical violations on the same section within three inspection shifts. The petitioner concludes that the serious nature of these violations and their recurring frequency demonstrates an "indifferent" attitude and a "total or

nearly total lack of interest" by the respondent and that it appears that the respondent considered the violations of "little consequence" as evidenced by their recurring frequency.

The Respondent's Arguments

The respondent argues that only a mine operator can commit an unwarrantable failure violation, and that under section 3(d) of the Act, an operator includes a person who operates, controls or supervises a mine but does not include a rank-and-file miner. Citing Rochester & Pittsburgh Coal Co., 11 FMSHRC 1978, 1983 (October 1989), the respondent takes the position that the conduct of a rank-and-file miner cannot be imputed to a mine operator for purposes of an unwarrantable failure finding and that the action of the two roof bolters in this case are immaterial in determining whether an unwarrantable failure occurred since the actions of the respondent's management personnel alone are relevant.

The respondent asserts that the inspector's belief that an unwarrantable failure occurred because "a particularly hazardous situation" existed that imposed a "heightened duty" upon the respondent "to be aware of what electrical equipment was doing in the face," and that she considered the fact that the line curtain was further than 10 feet from the face to be a particularly hazardous condition is impossible to reconcile with the ventilation plan which requires the extendable line curtain to be retracted before the first row of bolts is installed. Respondent asserts that as bolting progresses, the curtain is advanced to the first row of bolts outby the row being set, and that the curtain is not extended to within 10 feet of the face until bolting is completed. Under these circumstances, the respondent concludes that the "particularly hazardous situation" is an approved practice under its ventilation plan.

The respondent argues that the inspector's perception that the respondent had a "heightened duty" to be aware of what the equipment was doing in the face is based on an erroneous assertion that the day shift section foreman Milton Presley should have checked on the roof bolter operators (Tr. 48-51). Respondent points out that the cited incident occurred at 7:14 a.m., before the "hot seat" crew change took place and that the roof bolters were owl shift crew members who were supervised by that shift's section foreman Glen Rollins, and that Mr. Presley and his day shift crew had not yet arrived on the section (Tr. 51, 164-165).

With regard to the inspector's reliance on the respondent's history of prior violations, the respondent asserts that the fact that a similar violation occurred in the past does not establish inexcusable neglect if such a violation reoccurs. The respondent points out that the previously cited conditions in the No. 10

section were not similar to the conditions cited in the instant case and there was no equipment in the place where the curtain had not been maintained within 10 feet of the face. Further, there is no evidence that the two bolters in this case were involved in the prior incident. Under the circumstances, the respondent concludes that foreman Rollins had no reason to closely supervise two experienced bolters in the performance of routine work when they had exhibited no carelessness or neglect in the past, and he had no obligation to be present while they moved the roof-bolting machine into place to commence bolting, and that his failure to supervise their every move is not aggravated conduct amounting to an unwarrantable failure.

The evidence establishes that during a "hot seat" change between working shifts there is little or no interruption in the production cycle and the equipment is not shutdown and is generally in use between shifts. The inspector conceded that when she arrived at the scene, the shifts were in the process of changing, and that the two roof bolters were from the "owl shift" and were only present for 5 or 10 minutes prior to her arrival. Although the inspector also conceded that she would not have expected the fire boss to observe that the ventilation curtains were not in place and take appropriate action, she believed that in light of the prior history of citations, the section foreman should have checked on the roof bolters when they were in the cited area to insure that they complied with the ventilation plan.

The evidence further establishes that Inspector McCormick was on the section during the day shift. She testified that the section foreman was not on the section when she arrived and that he was "outby." She stated that she met him as she was leaving the working place, but she could not recall speaking with him, and she conceded that she made no inquiries to determine when the foreman had last been with the roof bolters. She identified the foreman as the day shift foreman Milton Presley, but she admitted that the owl shift section foreman who was responsible for the supervision of the roof bolters in question was Glen Rollins and that he was leaving the section as she was coming in (Tr. 48-52). Although the inspector testified on direct that she spoke with Mr. Rollins (Tr. 51), she later testified that she could not recall speaking with him (Tr. 160). She also confirmed that she encountered Mr. Presley after she had issued the violation (Tr. 159).

I find the inspector's expectation that day shift foreman Presley should have been present to observe the roof bolters to insure the proper placement of the ventilation curtains to be unreasonable. As the day shift foreman, Mr. Presley had no supervisory responsibility for the roof bolters who were under the supervision of Mr. Rollins, and at the time the inspector met Mr. Presley she had already issued the violation. With regard to

Mr. Rollins, although the inspector indicated that she was leaving the scene to find him (Tr. 61), her testimony that she may have spoken with him is contradictory, and there is no evidence that she ever discussed the matter with him or that she had any evidence that he was never present when the roof bolters may have been working on the section, or that he was aware of the fact that the ventilation curtains were not in place.

I find no support for the inspector's belief or suggestion that foreman Rollins should have been present when the roof bolters were performing their work to insure that the ventilation curtains were properly in place. There is no evidence that the roof bolters were other than experienced miners, nor is there any evidence that they were ever involved in any of the other previously issued citations relied on by the inspector as part of her unwarrantable failure finding. The inspector testified that the roof bolters would normally go about their business and install the ventilation curtains before beginning their roof bolting duties. In the absence of any evidence that the roof bolters were not properly trained, were ignorant of the requirements of the ventilation plan, or had engaged in previous acts of carelessness or neglect, I find no basis for concluding that Mr. Rollins should have been expected to be present when they were preparing to roof bolt in order to insure that the ventilation curtains were properly in place. Notwithstanding the issuance of the prior citations, and the fact that Mr. Rollins may have been aware of these citations, I find no reason why he should be required or expected to be present in each and every working place on the section to personally supervise his crew while they go about their work. If the petitioner believes that such a requirement may be necessary as part of the respondent's ventilation plan, it may wish to explore this further as part of the regulatory ventilation plan approval process.

With regard to Mr. Rollins' "involvement" with the previous citations issued by the inspector on January 18, 1989, no further testimony or explanation was forthcoming from the inspector as to the extent of Mr. Rollins' involvement other than that the citations were issued on the number 10 section. I take note of the fact that the citations were served on J. C. Simms, and that they were issued during the day shift at 9:30 and 9:35 a.m. (exhibit P-5). The inspector confirmed that these previously issued citations did not involve any roof-bolting machine in place in the face area, and in fact, the inspector conceded that no mining activity was taking place, and no equipment was in place in the cited areas, and the petitioner conceded that the violations were not particularly hazardous.

With regard to the petitioner's arguments concerning the respondent's section coordinator Paul Boyd, and his "involvement" with the prior citations in September, 1988, and October, 1988, the record reflects that Mr. Boyd's "involvement" with the

September, 1988 citations which resulted from the methane ignition, was limited to his participation in the MSHA investigation of that incident (exhibit P-4). Mr. Boyd's "involvement" in the October, 1988, was more direct in that Inspector McCormick served the violation on him, indicated in the face of the order that "the section coordinator" was in the place at the time the violative conditions were observed, and she testified that this was in fact the case (Exhibit P-6, Tr. 25, 33).

I take note of the fact that the prior citations concerning Mr. Boyd were issued on the No. 9 section, and not the No. 10 section where the violation in the instant case occurred. The October, 1988, citation concerned a violation of section 75.302-1(a), and a continuous-mining machine, rather than a roof bolter, was operating in the section. MSHA's report of investigation reflects that the September, 1988, citations concerned a methane ignition which occurred when a continuous-mining machine was cutting down top rock.

Although Inspector McCormick testified that a section coordinator, such as Mr. Boyd, had supervisory authority over all of the section foremen, she confirmed that his supervisory authority was limited to the foremen on the No. 9 section, and not to foremen on the No. 10 section, or foremen in general (Tr. 33). There is no evidence that Mr. Boyd exercised any supervisory authority over section foremen Rollins or Presley, the foremen on the No. 10 section at the time the violation in the instant case was issued.

I find no evidence to support the petitioner's conclusion that the respondent's section coordinator Paul Boyd <u>condoned</u> violations of the respondent's ventilation plan or violations of the previously cited safety standards. Such a conclusion concerns possible criminal conduct and should not be made or taken lightly. If the Secretary truly believes that a culpable section foreman or other member of mine management has engaged in any such egregious conduct with respect to violations of the law she should seriously consider instituting a section 110(c) proceeding against the offending party rather than "bootstrapping" such an <u>unsupported</u> conclusion as part of an unwarrantable failure argument. Further, if the Secretary also believes that a mine operator's mine management has exhibited "indifference" or a "total lack of interest" regarding repetitious violations, she should seriously consider the timely implementation of the "pattern of violations" provisions found in section 104(e)(1) of the Act. In my view, the use of these available statutory sanctions would provide a more direct and effective means of insuring compliance in an appropriate situation.

In the instant case, the unrebutted testimony of safety manager Joseph Nogosky reflects that the respondent took disciplinary action against Mr. Boyd as a result of the October,

1988, citation issued by the inspector (Tr. 149). The record also reflects that Mr. Nogosky conducted an investigation of the contested order in this case, and that the mine safety committee, the general mine foreman, and the mine superintendent were present during the inquiry. Mr. Nogosky confirmed that he spoke with foreman Rollins and the roof bolters in an effort to ascertain why the order had issued, and he stated that it is a common practice at the mine for management to investigate all unwarrantable failure orders (Tr. 109). Mr. Nogosky further confirmed that the roof bolters were not disciplined because he believed they reacted properly to an "abnormal situation" (Tr. 121).

In view of the foregoing, I cannot conclude that mine management was indifferent or "lacked interest" in the order issued by the inspector in this case. The record establishes that management disciplined section coordinator Boyd, and following its customary procedure, investigated the circumstances surrounding the issuance of the contested order by the inspector in this case. Further, the UMWA chairman of the mine safety committee Jerry Jones testified that he conducted no investigation of the incident, failed to tell mine management about the conflicting "stories" related to him by the two roof bolters, and no testimony was forthcoming from Mr. Jones about any of the prior citations or the asserted general neglect of ventilation curtain requirements on the part of mine management. I also take note of the fact that the cited conditions in this case were abated within 6 minutes, that the two prior citations issued by the inspector in January, 1989, were terminated within 10 and 20 minutes, and that the citation of December, 1988, was terminated within 13 minutes.

The petitioner in this case does not contend that repetitious violations of a mandatory standard may per se serve as the basis for an unwarrantable failure finding. Inspector McCormick testified that part of her unwarrantable failure finding was based on the respondent's prior violations (Tr. 27, 29, 61), but that this was but one factor that she considered (Tr. 29). The other factor which she considered was her belief that the respondent had a "heightened duty to be aware of what the electrical equipment was doing in the face" because in her view, the violative conditions presented a "particularly hazardous situation" which the respondent should have been aware of (Tr. 27, 47-48). In my view, the inspector's concern about any hazards associated with the cited conditions is relevant in the context of a gravity or "S&S" finding, rather than the unwarrantable nature of the violation.

The thrust of the petitioner's unwarrantable failure argument is its belief that mine management has engaged in a course of conduct which establishes that it condones violations of its ventilation plan and has clearly demonstrated an "indifferent" attitude and "lack of interest" in insuring compliance with the

mine ventilation plan. However, in view of the above findings and conclusions, and after careful consideration of the entire record in this case, I find no evidentiary support for the petitioner's arguments and conclusions concerning the conduct of mine management in this case. I cannot conclude that the petitioner has established any aggravated conduct on the part of the respondent with respect to the contested order issued by the inspector in this case. Under the circumstances, the inspector's finding in this regard IS VACATED, and the order IS MODIFIED to a section 104(a) citation, with "S&S" findings.

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

The parties stipulated that the respondent is a large mine operator and that the payment of the civil penalty assessment for the violation will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

Good Faith Abatement

The parties stipulated that the violation in question was timely abated by the respondent. The record establishes that abatement was completed within 5 or 6 minutes when the roof bolters installed the required ventilation curtains. I conclude and find that the cited conditions were timely abated in good faith by the respondent.

Gravity

In view of my "S&S" findings, I conclude and find that the violation was serious.

Negligence

I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care to insure that the required ventilation curtains were installed and in place at the time the inspector observed the cited conditions, and that this failure on the respondent's part was the result of ordinary negligence.

History of Prior Violations

The petitioner did not produce or offer a computer print-out listing the respondent's prior compliance record. The pleadings include an MSHA Form 1000-179, which is a part of the proposed assessment "papers" served on the respondent, and the information contained therein reflects that the respondent was cited for 518 assessed violations during the 24-month period preceding the issuance of the contested order. However, in the absence of any

computer print-out or further information concerning the total number of section 75.316 violations, I am unable to make any specific conclusions or findings other than to take note of the total number of prior assessed violations attributable to the respondent. However, I have taken this information into consideration, including copies of the prior citations which are of record in this case, which reflect four prior violations of section 75.316.

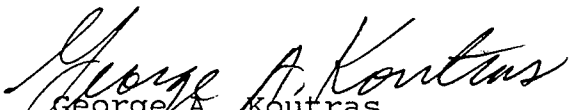
Civil Penalty Assessment

The respondent took issue with the narrative findings of MSHA's "Special Assessment" office which indicates that the roof bolters were actually installing roof bolts at the time the inspector observed the cited conditions. The inspector agreed that these "assumptions" are incorrect and that the bolters were not installing roof bolts when she observed the violative conditions. The respondent also took issue with several other "assumptions" and "conclusions" which appear in the narrative findings, and he inspector agreed that some of these are incorrect (Tr. 67-73). It is clear that I am not bound by any "special assessment" made in this case, nor am I bound by the narrative statements made in support of the proposed civil penalty assessment made in this case. In any event, I find merit in the respondent's objections to the accuracy of these statements and have considered its arguments in connection with the civil penalty assessment which I have made in this case.

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $500 is reasonable and appropriate in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $500 for the violation which has been affirmed in this case. Payment is to be made to the petitioner within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.



George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 6 1990

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 90-47-R Order No. 3098641; 12/14/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Dilworth Mine
	:	Docket No. WEVA 90-50-R Order No. 3311391; 12/6/89
	:	Blacksville No. 2 Mine

DECISION

Appearances: Walter J. Scheller, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant;
Page H. Jackson, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Respondent.

Before: Judge Maurer

These 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., hereinafter the "Act".

Pursuant to notice, these cases were called for hearing in Morgantown, West Virginia on March 21, 1990, and were heard at that time. On June 1, 1990, the parties filed post-hearing briefs which I have considered along with the entire record in making this decision.

At the hearing, the contestant moved to withdraw the application for review in Docket No. PENN 90-47-R based on the fact that section 107(a) Order No. 3098641 had been vacated. The Secretary had no objection and I granted that motion on the record and therefore dismissed the contest proceeding.

Docket No. WEVA 90-50-R; Order No. 3311391

Order No. 3311391, issued pursuant to section 107(a) of the Act, was issued on December 6, 1989, by MHSA Inspector Lynn

Workley at the Blacksville No. 2 Mine operated by the contestant. That order charges as follows:

> Information gathered from miners and site inspection indicates that it is a practice at this mine for wiremen to install wire above rail placed on unsecured ties over low and irregular areas. Dan Meyers and Pete Yost both stated that they have slipped and fallen while attempting to install wire in such areas.

On December 6, 1989, Inspector Workley was told by a Mr. Michael Ayers, who is the President of the union local and a safety committeeman, that a hazardous condition existed in that wiremen were working off unsafe platforms while hanging wire in the Six South grade job area. He reported that there had been several instances where the wiremen had nearly fallen.

Inspector Workley went into the mine to have a look for himself. He was accompanied by Jay Simes, the miners' representative and Todd Moore, the Company safety representative. When he arrived in the Six South area, he also met Mr. Daniel Myers, one of the wiremen.

They proceeded to the Six South supply track. The bottom in this area had been graded, but was irregular with bumps and dips which had loose unconsolidated lumps and small pieces of rock strewn along it. The wooden ties had been laid down, but the rails were not spiked to these cross-ties. Since the bottom was irregular, the rails laid along the entry were six inches to a foot and a half above the cross-ties in places. The wooden cross-ties on the mine floor were on loose, unconsolidated material and were tipped in various directions. The rails themselves had been joined together at 10 to 12 foot intervals with steel ties. The mine roof in this area varied from six and one-half to nine feet above the mine floor. The trolley wire was already installed approximately 72 inches above where the top of the rails would eventually be when the rails were installed and ballasted with crushed limestone. The wire would also be approximately six inches outside the gauge of the rail.

Inspector Workley stepped up on a rail in an area where it did not rest on the wooden cross-ties and found that the rail bounced up and down under his weight. Mr. Moore stated to the inspector that the company didn't want the wiremen to install wire that way. They wanted them to lay down boards on the cross-ties for a platform to work on. However, in the considered opinion of the inspector, that would not have provided a stable work platform either. The inspector testified that he told Mr. Moore that he (the inspector) didn't think that you could lay boards on ties which tip from one side to the other and roll

forward and back as well and make a stable work platform out of it.

Mr. Daniel Myers has been employed by Consolidation Coal Company at the Blacksville No. 2 Mine since 1971 and has been a wireman for the past five years. As such, he installs trolley wire in construction and development areas of the mine.

Installation of the trolley wire involves drilling holes in the roof, making up wire hangers, installing them, including lining them up and tightening them, placing the trolley wire on the hangers and pulling it tight with come-alongs and placing the trolley wire into the trolley clamp of each hanger and tightening up that clamp.

The established practice at the Blacksville No. 2 Mine was to install the trolley wire prior to spiking the rails to the cross-ties at least in those areas of the mine where the bottom was low and irregular. Mr. Myers testified that to tighten the wire hangers, a wireman stood on a five-gallon bucket resting on the loose and unsecured cross-ties. When he tightened the trolley wire in the trolley clamp, he stood on the rail suspended between high areas of the mine floor. Mr. Myers further testified that when tightening the hangers and trolley clamps "[y]ou put your whole body into it because you [sic] got to get that thing tight because you got motors and stuff." If the wrench slips during this tightening process '[y]ou're going off of whatever your standing on."(Tr. 74). Myers also testified that he has fallen a number of times while tightening wire hangers and trolley clamps where the cross-ties were loose and unsecured and believed that he could be seriously injured from such a fall. He opined that when the rails are spiked to the cross-ties, a wireman has a more secure footing since the cross-ties don't wobble.

On December 6, 1989, Myers related to Inspector Workley that the wiremen were installing trolley wire in the above fashion, i.e., standing on five-gallon buckets or on top of the steel rails.

Inspector Workley considered what he had been told by Moore, Ayers, and Myers and his own direct observation in the Six South supply track and determined that an imminent danger existed and so issued the order at bar. He believed that the practice of installing trolley wire over unsecured cross-ties in low and irregular areas of the mine posed several hazards to miners. One was that a cross-tie would tip or roll under a wireman causing him to be thrown to the mine floor or to strike parts of his body against the rail, cross-ties, or the mine floor. Another was that a wireman standing on the rail could easily slip off and

fall onto the steel rail. Inspector Workley characterized these hazards as "[s]lip or trip and fall, stumble and fall."(Tr. 33). He further testified that such an accident could result in strains, sprains, broken bones, dislocations of bones, or if a wireman struck his head on the steel rail, even fatal injuries.

There was much testimony from the operator's management personnel to the effect that the wiremen had been instructed to build platforms to make their job function safe. More specifically, Myers in particular, was told not to stand on a five-gallon bucket to reach over his head to install trolley wire. I find credible that testimony that the wiremen had been instructed to build the necessary platforms to make their work area safe prior to the issuance of the imminent danger order at bar. Furthermore, Myers admits that on at least one occasion he was told to build a platform or to spike the rails to the ties before hanging the trolley wire. He also admits to having stood on a five-gallon bucket to perform his work both before and after he was specifically instructed by mine management not to do so.

Nevertheless, the practice existed whereby wiremen stood on five-gallon buckets placed on the top of teetering wooden ties that were loose and unsecured while they worked off-balance over their heads. They also stood on the unsecured moving rails to work over their head on the trolley wire. The major point here is that these practices in fact existed whether Consolidation Coal Company management wanted them to or not.

Section 3(j) of the Act defines an imminent danger as:

> The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

The test of validity of an imminent danger order is whether a reasonable person given a qualified inspector's education and experience would conclude that the facts indicated an imminent danger. Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 804 F.2d 741 (7th Cir. 1974). See also C.D. Livingston, 8 FMSHRC 1006 (1986); and United States Steel, 4 FMSHRC 163 (1982).

In Rochester & Pittsburgh Coal Company v. Secretary of Labor, 11 FMSHRC 2159, 2163 (November 1989), the Commission adopted the position of the Fourth and Seventh Circuits in Eastern Associated Coal Corporation v. Interior Board of Mine Operation Appeals, 491 F.2d 277, 278 (4th Cir. 1974), and Old Ben Coal Corp. v. Interior Board of Mine Operation Appeals, 523 F.2d 25, 33 (7th Cir. 1975), holding that "an imminent danger exists

when the condition or practice observed could reasonably be expected to cause death or serious physical harm if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." In the Old Ben Corp. case, the court stated as follows at 523 F.2d at 31:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb .... We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (Emphasis added).

The Commission stated as follows at 11 FMSHRC 2164:

In addition, R&P's focus on the relative likelihood of Coy being injured while under the moving belt ignores the admonition in the Senate Committee Report for the Mine Act that an imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess, Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978). Instead, the focus is on the "potential of the risk to cause serious physical harm at any time." Id. The Committee stated its intention to give inspectors "the necessary authority for the taking of action to remove miners from risk." Id.

According to MSHA Inspector Workley, the imminent danger order was issued because of a "practice" which existed in this mine as set out above. Inspector Workley maintained that this "practice" constituted an "imminent danger" because of the injuries which might reasonably result from an unabated continuation of this practice. I concur with the inspector that the cited practice could reasonably be expected to cause serious physical harm" if not discontinued.

I further find that the operator had at least permitted a dangerous practice to exist by allowing these wiremen to install trolley wire in the manner described earlier in this decision. The fact that company management instructed the miners to install the wire in some other safer fashion is not persuasive because it is obvious to me that they have not taken adequate measures to assure compliance with their directives in this regard. One miner testified at the hearing that he is still standing on five gallon buckets to install this wire.

I conclude from the entire record herein that the inspector could not have been reasonably assured that this practice would be abated before a serious injury accident occurred. Under these circumstances, I further conclude that the inspector as well as the record herein provides a cogent and compelling rationale for issuing the order at bar and the facts presented in this record fully support and meet the legal standard for the affirmance of this order. Accordingly, I find that there was an imminent danger and affirm Order No. 3311391.

ORDER

Order No. 3311391 is affirmed and Contest Proceeding Docket No. WEVA 90-50-R is dismissed.

Order No. 3098641 has been vacated by the Secretary and therefore the contestant's motion to withdraw the application for review docketed at PENN 90-47-R is granted and the proceeding dismissed.

Roy J. Maurer
Administrative Law Judge

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JUL 6 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-25 A.C. No. 05-03455-03576
v.	:	
ENERGY FUELS COAL INCORPORATED, Respondent	:	Southfield Mine

DECISION

Appearances: Margaret A. Miller, Esq., Robert J. Murphy, Esq. Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a petition for assessment of penalties by the Secretary of Labor pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820 (1977) (herein the "Act").

This matter was consolidated and scheduled for hearing with two other penalty dockets, WEST 89-440 and WEST 90-52. At the commencement of the hearing on June 12, 1990, an overall settlement had been concluded and was announced covering all three citations involved in this docket. Such settlement agreement was considered and approved from the bench and is here affirmed. The prosecution of Citation No. 3077006 is to be dropped on the basis of insufficient evidence. As to Citations numbered 3077007 and 3077008, the "Significant and Substantial" designations thereon are to be deleted and penalties of $50 each are to be paid by the Respondent.

ORDER

1. Citation numbered 3077006 is VACATED.

2. Citations numbered 3077007 and 3077008 are MODIFIED to delete the "Significant and Substantial" designations thereon and are otherwise AFFIRMED.

3. Respondent, if it has not previously done so, shall pay to the Secretary of Labor, the total sum of $100 as and for the civil penalties above specified and here assessed.

Michael A. Lasher, Jr.
Adminstrative Law Judge

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JUL 6 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-52 A.C. No. 05-03455-03577
v.	:	
ENERGY FUELS COAL INCORPORATED, Respondent	:	Southfield Mine

DECISION

Appearances: Margaret A. Miller, Esq., Robert J. Murphy, Esq. Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a petition for assessment of penalties by the Secretary of Labor pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820 (1977) (herein the "Act").

This matter was consolidated and scheduled for hearing with two other penalty dockets, West 89-440 and WEST 90-25. At the commencement of the hearing on June 12, 1990, a settlement had been concluded and was announced covering all five citations involved. Such settlement agreement was considered and approved from the bench and is here affirmed.

Petitioner's original administrative penalty assessments for the five citations was $79 each. Pursuant to the settlement, Respondent agrees to pay in full the $79 assessments for Citations numbered 3077014, 3077065, and 3240478. As to Citations numbered 3077061 and 3077067, Petitioner agrees that the "Significant and Substantial" designations thereon should be deleted and the parties concur as to assessment of $50 penalty for each.

ORDER

1. Citations numbered 3077014, 3077065, and 3240478 are AFFIRMED.

2. Citations numbered 3077061 and 3077067 are MODIFIED to delete the "Significant and Substantial" designations thereon and are otherwise AFFIRMED.

3. Respondent, if it has not previously done so, shall pay to the Secretary of Labor, the total sum of $337 as and for the civil penalties above specified and here assessed for the five subject citations.

Michael A. Lasher, Jr.
Adminstrative Law Judge

Distribution:

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

Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, 1700 Broadway, Suite 1700, Denver, CO 80290-1199 (Certified Mail)

/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 6 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DAVID HOLLIS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 90-78-D
CONSOLIDATION COAL COMPANY, Respondent	:	MORG CD 89-07
	:	Osage No. 3 Mine

DECISION APPROVING SETTLEMENT

On June 28, 1990, the Secretary filed a Motion to Approve Settlement. Counsel for David Hollis and Counsel for Consolidation Coal Company signed the Motion indicating they agreed and consented to it. I approve the settlement as set forth in paragraph 8 of the Motion, as it constitutes a fair disposition of the issues raised by the Complaint. Accordingly, the Motion is GRANTED, and pursuant to the settlement, I hereby make all the specific findings as set forth in paragraph 8.(a)(b) and (c).

It is ORDERED that the findings and the terms of the Settlement, as set forth in paragraph 8 of the Secretary's Motion and incorporated herein, are approved.

It is further ORDERED that Respondent shall:

a. Execute and mail an original copy of the notice attached as Exhibit 1 to this Motion to David Hollis and to post a copy of the notice at the Osage No. 3 Mine for a period of not less than 30 days;

b. Expunge any reference to the events of the morning of August 28, 1989, from all records maintained by Consolidation Coal Company which are searchable by the Complainant's name, including but not limited to, the personnel records of Consolidation Coal Company;

c. Give the training program, attached as Exhibit 2 to the Motion, to the superintendent, the mine foreman, all mine safety department personnel at the Osage No. 3 Mine, and to the Regional Safety Manager of Consolidation Coal Company's Northern West Virginia Division within 90 days of the date of this Decision;

d. Provide at least 48 hour written notification of the time and location of all sessions of the training program to MSHA's Morgantown, West Virginia Field Office and that representatives of MSHA have the right to be present at all such training sessions;

e. Pay a civil penalty of $100;

f. Post a copy of the Motion to Approve Settlement and the Decision Approving Settlement at the Osage No. 3 Mine for a period of not less than 30 days.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 6 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DAVID HOLLIS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 90-110-D
CONSOLIDATION COAL COMPANY, Respondent	:	MORG CD 90-03
	:	Osage No. 3 Mine

ORDER OF DISMISSAL

The Secretary filed a Motion to Withdraw Amended Complaint and to Dismiss based on a statement by David Hollis, on whose behalf the original Complaint of Discrimination had been filed, that he is withdrawing his complaint in this matter. Complainant filed a Response on which he indicated that he joins in the Motion. Accordingly, pursuant to 29 C.F.R. § 2700.11, the Motion is GRANTED.

It is ORDERED that this case be DISMISSED.

Avram Weisberger
Administrative Law Judge

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

JUL 9 1990

RICK STEVENSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 89-130-D
v.	:	
	:	DENV CD 89-02
BEAVER CREEK COAL COMPANY,	:	
Respondent	:	Trail Mountain No. 9 Mine

DECISION

Appearances: Jonathan Wilderman, Esq., Wilderman & Linnet, Denver, Colorado, for Complainant; Thomas F. Linn, Esq., David M. Arnolds, Esq. Denver, Colorado, for Respondent.

Before: Judge Morris

This discrimination case,brought by complainant on his own behalf, arises under Section 105(c) of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (the "Act").

After notice to the parties, a trial on the merits commenced in Price, Utah, on April 4, 1990.

On the second day of the hearing, the parties reached an amicable settlement. The consent of all parties to the agreement was expressed on the record and the parties have filed confirming documents.

The Judge, having heard the testimony for a full day, believes the proposed settlement is reasonable.

At the hearing, the parties further requested that the Judge place the terms of the settlement agreement, as well as the transcript of the April 5, 1990, under the seal of the Commission.

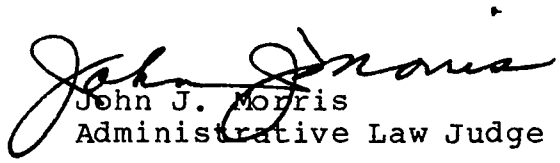
The joint motion to seal said documents is proper and was granted and formalized by an order dated July 5, 1990.

For the foregoing reasons, I enter the following:

ORDER

1. The settlement agreement of the parties herein is APPROVED.

2. The case is DISMISSED.



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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FALLS CHURCH, VIRGINIA 22041

JUL 11 1990

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 89-102-DM
ON BEHALF OF	:	
GILBERT WISDOM,	:	MD 88-60
Complainant	:	
v.	:	State Road 520 Plant
	:	
F & W MINES, INC.,	:	
Respondent	:	

SUPPLEMENTAL DECISION

Appearances: Glenn M. Embree, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for the Complainant;
James E. Foster, Esq., Foster & Kelly, Orlando, Florida, for the Respondent.

Before: Judge Maurer

Subsequent to a hearing on the merits in this case, a Decision was issued on April 30, 1990, finding that the respondent discriminated against the named complainant in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977. The Decision further ordered as follows:

> Complainant shall file a detailed statement within fifteen (15) days of this Decision, indicating the specific relief requested. The statement shall be served on the respondent who shall have fifteen (15) days from the date service is attempted to reply thereto.

On May 22, 1990, the Secretary filed a statement pursuant to this order. On May 31, 1990, in a telephone conference call, both parties indicated that a settlement had been arrived at, and that a signed stipulation and joint motion for approval of their settlement would be submitted anon.

The attorney for the Secretary filed the stipulation and joint motion on July 5, 1990, and it provides as follows:

1. Respondent will pay to Mr. Gilbert Wisdom, as the full and complete relief hereunder, back wages in the gross amount of $5,000, less deductions required by law within 60 days of the date of this stipulation.

2. Mr. Gilbert Wisdom and complainant hereby withdraw the statement of relief, including any and all claims for reinstatement, filed with the Commission on or about May 19, 1990.

3. The Secretary agrees to withdraw her prayer for assessment of a civil money penalty.

I find the above settlement provides a fair resolution of the case and I note that Mr. Gilbert Wisdom, personally, has signed the stipulation and motion.

Therefore, IT IS ORDERED that:

1. The findings and conclusions of my decision issued on April 30, 1990, are REAFFIRMED.

2. Respondent shall on or before the 3rd day of September, 1990, pay to Complainant, Gilbert Wisdom, the sum of $5000, less applicable deductions as back wages.

3. The rights and obligations of all the parties to this proceeding are set forth in the stipulation and joint motion for relief filed on July 5, 1990, and all the parties shall abide by all its terms.

4. This decision is Final.

Roy J. Maurer
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

JUL 12 1990

RANDY CUNNINGHAM,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. PENN 90-46-D
	:	MSHA Case No. PITT-CD-90-3
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Dilworth Mine

DECISION

Appearances: Paul H. Girdany, Esq., Healey Whitehill, Pittsburgh, Pennsylvania, for the Complainant; David J. Laurent, Esq., Polito & Smock, P.C., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a complaint filed by Randy Cunningham, alleging a violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1) (the Act). Respondent filed an answer, and pursuant to notice, the case was heard in Pittsburgh, Pennsylvania, on March 7, 1990. At the hearing, Larry E. Swift, and Randy Cunningham, testified for Complainant, and Louis Barletta, Dan Jones and Richard J. Werth, testified for the Respondent. The parties filed briefs containing proposed findings of fact on April 30, 1990. On May 10, Respondent filed a reply brief; none was filed by Complainant.

Findings of Fact

1. At all relevant times Complainant, Randy Cunningham, a miner, worked as a roof bolter at Respondent's Dilworth Mine.

2. Complainant at all relevant times was an elected safety committeeman for Local Union 1980 of the United Mine Workers of America (hereinafter "UMWA") at Respondent's Dilworth Mine, having been elected to that position in May 1987.

3. Cunningham was the only safety committeeman at Respondent's Dilworth Mine who was working inside the mine.

4. Prior to August 3, 1989, safety committeemen were allowed to leave their work stations early before their scheduled quitting times to investigate safety problems, without seeking approval from Respondent's management.

5. Cunningham's production crew was again assigned to change at the face beginning in July, 1989, and within the first 2 weeks he left early four times on union business.

6. On August 3, 1989, Louis Barletta, Respondent's Superintendent, counselled Cunningham with regard to leaving work early on union business and told him that henceforth he would not be permitted to leave his work station before his scheduled quitting time on a safety issue unless someone else invoked their safety right.

7. On or about August 31, 1989 at a communications committee meeting between officials of the local union and the company, Barletta announced that henceforth no one was allowed to leave work before their scheduled quitting time for any reason except to exercise their individual safety rights. Barletta at that meeting stated that it would be his sole decision as to whether an employee/safety representative could leave work to pursue a safety problem. Complainant and Barletta argued at this meeting about the rights of safety committeemen to pursue safety issues on company time and Complainant again informed Barletta that, if necessary, he would pursue safety issues on company time. Barletta warned Complainant and others that failure to comply with this newly announced policy could lead to disciplinary action.

8. Around the beginning of the midnight shift, October 3, Russell Camilli asked Cunningham if pushing wagons along the haulage with one motor (locomotive) was allowed. Camilli told Cunningham that another employee, Russ Goodwin, was supposed to be working with him, and that foreman Greg Alexander had told them both to use only one motor. At approximately 1:10 a.m., Cunningham asked Jones if he had made such an assignment, and informed him that it is contrary to a safeguard to push wagons with a locomotive. According to Cunningham, Jones indicated that his supervisor had told him that such an activity is allowed. Jones explained that it was his understanding that it was permitted to push with a locomotive from switch to switch. (I accept Jones' version as it is not inconsistent with Cunningham's version. Also, Complainant did not offer any rebuttal by Cunningham to contradict Jones' version). Cunningham then indicated that he would seek the MSHA inspector, as a safeguard would be violated if the assignment were to be effectuated.

9. If a locomotive pushes a wagon, the vision of the miner operating the locomotive can be obstructed, causing hazards such as difficulty seeing trailing wires or persons on the tracks.

10. On October 3, 1989, at approximately 8:00 a.m., MSHA Inspector Koscho was present at Respondent's mine to perform a spot inspection. He generally handled safety hazards at Respondent's mine by gathering oral information, investigating, and writing citations or orders if appropriate, without basing his actions on written 103(g) complaints.

11. At approximately 8:00 a.m., on October 3, Cunningham approached Koscho and asked him whether he had written a safeguard concerning pushing a wagon with a locomotive. Koscho indicated that he thought he had. Cunningham then told Koscho that he thought an incident occurred during the midnight shift. Cunningham asked Koscho if he wanted him to file a 103(g) complaint, but the latter indicated he'd rather have Cunningham find out if the incident occurred. Cunningham said that Robert Camilli was assigned to push a wagon with a locomotive. However, when Camilli was asked by Cunningham in the presence of Koscho, the former indicated he did not perform the task. Cunningham also indicated at that time that Russell Goodwin was also involved in the incident. However, Cunningham told Koscho that Goodwin does not shower in the mine but takes his coveralls and goes home. Koscho asked Cunningham to find out if Goodwin pushed the wagon with a locomotive. He also asked Richard Werth, Respondent's safety director, to talk to Jones and see if the incident occurred. Koscho indicated he would probably be back the next day. [1]

12. Cunningham did not attempt to contact Goodwin at any time subsequent to 8:00 a.m. October 3, until he spoke to him shortly after the start of the midnight shift on October 4. At that time, Goodwin informed Cunningham that he had performed the task of pushing a wagon with a locomotive.

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[1] I reject the argument set forth by Respondent in its brief (pg. 6-8), that it was unlikely that Koscho planned to return the next day. In evaluating whether Cunningham's activities are protected, the key issue is not Koscho's subjective intention, but rather what he told Cunningham. I accept the testimony of Cunningham that Koscho told him he probably would return the next day, as it was essentially corroborated by Swift. The narrative statement by Cunningham on cross-examination, that he was sure Koscho was going to be there, does not negate his previous testimony on direct examination, that Koscho either said he would or probably would return the next day. Also, Werth, who also was present, did not rebut or contradict the testimony of Swift and Cunningham that Koscho said he would return. In this regard, Werth's statement that he did not know when Koscho would return, is inadequate to contradict the specific testimony of Cunningham as to what Koscho said.

13. On October 4, 1989, shortly after the start of the 12:01 a.m. shift, Cunningham told his immediate supervisor, Mel Robinson, that he would be leaving at the end of the regular shift (before the completion of scheduled mandatory overtime) to speak to an MSHA inspector about a safety violation. Cunningham also asked Robinson to get in touch with Dan Jones, the shift foreman, so that he could talk to Jones.

14. Shortly after 5:30 a.m., during the midnight shift of October 4, Cunningham reiterated to Jones that pushing one wagon with a locomotive is against the law. Jones indicated that his foreman Bob Burgh told him it was allowed. According to Cunningham, Jones said specifically that he did not agree with the safeguard, and indicated that he was not going to obey it. In essence, Cunningham told Jones that if the foreman had indicated that the safeguard did not have to be followed, then a violation could also occur on the day shift. He indicated that he therefore felt there was an ongoing safety problem, and wanted to leave his work station to see Swift and Koscho. According to Jones, he told Cunningham that the shift foreman, Mark Watkins, had explained to him, with regard to the safeguard, that it was permissible to go from switch to switch. Jones denied saying to Cunningham that he did not feel he had to follow the safeguard. He was asked whether he ever said he did not agree with the safeguard and answered as follows: "I said that I felt that what I had done that night was not in violation of the safeguard" (Tr. 284-285). I accept the version testified to by Jones as it is essentially consistent with what he had told Cunningham the previous night (See Finding 8, infra).

15. During the midnight shift, October 4, Jones told Cunningham that the incident in which a motor pushed a car occurred the previous night and ". . . that we weren't doing that type of action that night" (i.e. October 4), Tr. 288. He no longer had any intention of clearing tracks by pushing cars with a motor, but did not tell this to Cunningham.

16. During the conversation between Cunningham and Jones on October 4, 1989, at approximately 5:30 a.m., the former told Jones that he wanted to leave his work station at the end of the regular shift (before scheduled mandatory overtime) to speak to Swift and Koscho about the aforementioned violation of the safeguard. Jones indicated to Cunningham that Cunningham was not allowed to leave work, and a discussion took place in which Cunningham stated his rights, as a safety representative, to leave the mine. Jones threatened Cunningham with discipline and gave Cunningham a direct work order to stay at his worksite through mandatory overtime. Cunningham made it clear that despite the direct work order, he intended to exercise his rights as a safety representative, and that he would leave work before

the completion of mandatory overtime to talk to the federal inspector about the safeguard violation.

17. On October 4, 1989, at approximately 7:40 a.m., Jones came back to take Cunningham out of the mine and gave him another direct order to stay at his work station through mandatory overtime. Cunningham again explained his rights as a safety representative, and indicated he wanted to leave to speak to Swift and a federal safety inspector.

18. Upon exiting the mine on October 4, 1989, Cunningham went to the safety office and told MSHA Inspector Rantovich, who was conducting an investigation on another matter, that he wanted to speak to him about a safety problem. Later on, Cunningham informed him about the problem of pushing cars with only one motor, and related the previous day's conversation with Koscho. Rantovich stated that in order to investigate a safeguard violation he needed a written 103(g) complaint.

19. Barletta terminated Complainant from his employment for failure to follow the orders of shift foreman Jones, on the midnight shift of October 4, 1989, that he remain in the mine through mandatory overtime. Barletta was aware that the reason Cunningham wanted to leave his worksite was to talk to an MSHA inspector or Swift.

20. Swift filed a Section 103(g) complaint over the October 3, 1989 incident on October 5, 1989, and a citation was eventually issued on October 12, 1989.

Discussion

A. Protected Activity

In order to prevail herein, Complainant must establish first of all, that he was engaged in a protected activity i.e., that he was exercising "any statutory right" afforded by the Act.

Essentially, it is Respondent's position that Cunningham's leaving his work station during mandatory overtime, and contrary to a direct work order, is not a protected activity. In support of this position, Respondent argues that on October 4, there was no hazard present, and that "Swift and MSHA already knew about the alleged violation and there is no reason why Cunningham had to come out of the mine early on October 4, since he could not provide any additional information that could not have been

obtained through other means, ..." (Respondent's Posthearing Brief, pg. 23). [2]

It is true that a violative action had occurred on October 3, and was brought to the attention of Koscho at that time. However, it would be unduly restrictive to conclude that, from Cunningham's point of view, there was no hazard on October 4 as argued by Respondent. Jones had clearly communicated to Cunningham his interpretation of the safeguard, as told to him by his foreman and supervisor, that pushing with a locomotive from switch to switch was not prohibited. Thus, Cunningham could reasonably have concluded on October 4, as he did, that another incident could occur on the day shift, of a similar use of a locomotive, which might be in violation of the safeguard. Further, as explained by Swift, if a locomotive is used to push wagons, presumably even from switch to switch, the vision of the miner operating the locomotive is obstructed, creating a hazard of hitting a trailing wire or a miner walking on the track. Further, Cunningham was asked by Koscho to find out if Goodwin in fact pushed a locomotive with a wagon. Koscho also told him he probably would return to the mine on October 4.

Furthermore, Respondent has not cited any Commission decisions which directly and specifically hold that, under the circumstances herein, Complainant was not engaged in the exercise of a statutory right, when he left his worksite to seek out Swift and/or Koscho. [3]

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[2] Respondent also asserts, at page 23 of its brief, supra, that Cunningham was most likely acting in bad faith i.e., seeking to avoid mandatory overtime or challenging Respondent's authority "rather than vindicating a legitimate safety interest which could not be adequately addressed at the end of his shift or by Swift, ..." However, Respondent does not advance any facts to support this latter assertion, and it is rejected as being unduly speculative.

[3] I find the following cases cited by Respondent not to be relevant to the case at bar. In Howard v. Martin Marietta Corp., 3 FMSHRC 1599 (1981), Judge Broderick held that a miner who left his work site to call MSHA to complain about a front-end loader being unsafe, was protected by Section 105(c) of the Act. In Howard, supra, at 1603. Judge Broderick concluded that a miner has an absolute right to leave the premises to call for an inspection when he believes that there exists a situation ". . . requiring an immediate safety and health inspection." This conclusion fits the facts presented in Howard, supra, but clearly does not attempt to limit the right to leave the premises to only those situations requiring an immediate inspection. Such an interpretation goes beyond the law of the case in Howard, supra.

In resolving the issues herein presented, I am guided in my decision by the Legislative History of the Act which embodies Congress' intent in enacting the Act. The Senate Report, on the Senate version of the bill that became the Act, (S. Rep. No. 95-181, 95th Cong. 2d Sess. 1977, reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 ("Legislative History")), contains the following language relating to the protection of miners against discrimination:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. * * *

---

fn. 3 (continued)

In UMWA on behalf of Wise v. Consolidation Coal Co., (6 FMSHRC 1447 (1984)), a safety committeeman ignored a safety board, placed by the operator, in order to observe work being performed to correct a hazardous condition. The Commission held that the miner did not have a right, protected by the Mine Act, to go beyond a dangered-off area contrary to the operators orders. The Commission reasoned that an operator may restrict access to hazardous areas to effectuate correction of a hazard. The Commission commented in Wise, supra, at 1432, that if a safety committeeman believes that abatement work presents a hazard, then the normal statutory procedures are available. These comments do not per se require a conclusion that the Complainant herein did not have a right to seek an inspector, Koscho, or Swift, the safety committee chairman.

In Ross v. Monterey Coal Co, 3 FMSHRC 1117 (1981), a miner, acting as a union safety committeeman, inspected areas other than the work area of his employer. The Commission found that the disciplinary letter given him by his employer was nondiscriminatory, and was issued to protect a legitimate interest in controlling the work force. The mere recognition of a legitimate managerial interest in the circumstances presented in Ross, supra, does not compel a finding of a legitimate managerial interest herein, which would have the effect of destroying Complainant's right to seek out an inspector.

I do not accord any weight to a decision denying Cunningham unemployment compensation, as that decision did not adjudicate any rights of Complainant under Section 105(c), supra, of the Act, which is the exclusive jurisdiction of the Commission to adjudicate.

Further instructive with regard to the construction to be accorded the scope of activities protected under Section 105(c), supra, is the following language from the Senate Report, supra, (Legislative History at 623).

> The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints seeking inspection under Section 104(f) or the participation in mine inspections under Section 104(e), but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

The Senate Report, supra, (Legislative History at 624) explicitly indicates that Section 105(c), supra, [4] was intended by the Committee:

> [T]o be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.

The Sixth Circuit Court of Appeals in Boich v. Federal Mine Safety and Health Review Commission, 704 F.2d 275, 283 (6th Cir. 1983), recognized the principle of broad construction to be accorded the Act in general, and referred to the Legislative History as follows:

> The Act is remedial in nature and should be broadly construed. Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974); see Marshall v. Whirlpool Corp., 593 F.2d 715, 721-22 (6th Cir. 1979), aff'd, 445 U.S. 1,100 S.Ct. 883, 63 L.Ed.2d 154 (1980). The Senate Report specifically provides that the section should be "broadly interpreted by the Secretary . . . ."

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[4] The Senate Report, supra, on the Senate version of the Act, (S. 717), refers to Section 106(c), which, essentially, contains the same language as section 105(c) of the Act.

I can not disregard the expression of legislative intent as referred to above. Based on these statements, I conclude that it would be violative of legislative intent to deny that, in the circumstances presented herein, Cunningham had a right on October 4 to seek out the inspector and/or the safety committee chairman. To do so would tend to discourage active participation in safety matters, and inhibit the exercise of the right to complain about safety matters, which would contravene the explicit, expressed, Congressional intent stated in the Senate Report, supra. For these reasons, I find that Complainant was engaged in protected activity on October 4, 1989, when he left his work station to seek out Swift and/or Koscho.

B. Motivation

Adverse action was taken against Cunningham by Barletta when he terminated the former's employment. Respondent maintains that, assuming Cunningham engaged in protected activity, he would have been discharged in any event, because he disobeyed a direct work order without cause. Inasmuch as I have found that the record here establishes that Cunningham had a protected statutory right to leave his work station, Respondent therefore had a duty to let him go, and thus did not have a right to order him to remain at his work station and continue working. Thus, in actuality, the action taken against Cunningham resulted solely from his exercising a statutory right which of necessity required him to violate a work order. Hence, he was terminated based on the exercise of a statutory right. As such, his rights under Section 105(c), supra, were violated.

I thus conclude that Cunningham was discriminated against in violation of Section 105(c), supra.

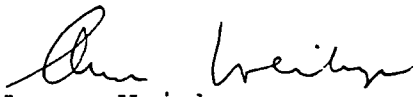
ORDER

It is hereby ORDERED that:

1. Respondent shall, within 15 days of the date of this Decision, post a copy of this Decision at its Dilworth Mine where notices to miners are normally placed, and shall keep it posted there for a period of 60 days.

2. Complainants shall file a statement, within 20 days of this Decision, indicating the specific relief requested. The statement shall be served on Respondent, who shall have 20 days from the date service is attempted, to reply thereto.

3. This Decision is not final until a further Order is issued with respect to Complainants' relief and the amount of Complainants' entitlement to back pay if any.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 13 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. WEVA 90-36 A.C. No. 46-05991-03547
BENTLEY COAL COMPANY, Respondent	:	Docket No. WEVA 90-52 A.C. No. 46-05991-03548
	:	Docket No. WEVA 90-159 A.C. No. 46-05991-03550
	:	Audra No. 1 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

These cases are before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Petitioner has filed a motion to approve a settlement agreement and to dismiss these cases. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in § 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalties of $2,500 within 30 days of this Decision. Upon such payment these proceedings are DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Ernest R. Mikles, Vice President of Operations, Bentley Coal Company, Star Route, Box 44-C, Coalton, WV 26257

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 17 1990

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 89-42
Petitioner	:	A.C. No. 01-00758-03732
v.	:	
	:	No. 3 Mine
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

SUPPLEMENTAL
DECISION APPROVING SETTLEMENT

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama for the Secretary of Labor.
H. Thomas Wells, Jr., Esq., Maynard, Cooper, Frierson, and Gale, P.C., Birmingham, Alabama for Jim Walter Resources, Inc.

Before: Judge Melick

This supplemental decision is issued pursuant to Commission Rule 65(c). The decision issued in these proceedings on June 27, 1990, failed to incorporate the settlement of the noted citations. At hearings on July 12, 1989, petitioner filed a motion to approve a settlement agreement as to Citations No. 9984616, 9984623, and 9984624. A reduction in penalty from $583 to $150 was proposed. I have considered the representations and documentation submitted, and conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $150 within 30 days of this order for the noted citations.

Gary Melick
Administrative Law Judge

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

JUL 20 1990

BEAVER CREEK COAL COMPANY Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEST 89-23-R Citation No. 3224857; 10/18/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 89-24-R Order No. 3224859; 10/18/88 Trail Mountain No. 9 Mine Mine ID 42-01211
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 89-182 A.C. No. 42-01211-03557
v.	:	Docket No. WEST 89-185 A.C. No. 42-01211-03556
BEAVER CREEK COAL COMPANY, Respondent	:	Trail Mountain No. 9 Mine

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent;
David M. Arnolds, Esq., ARCO, Denver, Colorado for Contestant.

Before: Judge Cetti

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 two citations and one imminent danger withdrawal order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") against the Beaver Creek Coal Company (Beaver Creek) and for review of civil penalties proposed by the Secretary for the related violations.

Pursuant to notice, these cases were heard in Salt Lake City, Utah. Both parties have filed post-hearing briefs which I have considered along with the entire record in making this decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. That Beaver Creek is engaged in mining and selling of coal in the United States and its mining operations affect interstate commerce.

2. That Beaver Creek is the owner and operator of Trail Mountain Number 9 Mine.

3. That Beaver Creek is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S. Code 801.

4. That the presiding Judge has jurisdiction in this matter.

5. That the proposed penalties will not affect Beaver Creek's ability to continue in business.

6. That Beaver Creek demonstrated good faith in abating the alleged violations.

7. That Beaver Creek is a medium-size operator with approximately 244,097 tons of production in 1988.

8. The certified copy of the Mine Safety and Health Administration's Assessed Violation History (Ex. J) accurately reflects the history of Beaver Creek's Trail Mountain No. 9 Mine for the past two years, prior to the date of the citations.

ISSUES

1. Whether there was a violation of 30 C.F.R. § 75.1704 as charged in Citation No. 3224857.

2. Whether there was a violation of 30 C.F.R. § 75.202(a) as charged in Citation No. 3224858.

3. Whether the violations were "significant and substantial."

4. Whether the violation of 30 C.F.R. § 75.1704 (Citation No. 3224857) resulted from "unwarrantable failure" on the part of Beaver Creek.

5. Whether the issuing inspector abused his discretion or authority in issuing the 107(a) closure Order No. 3224859.

6. The appropriate civil penalties, if any, to be assessed taking into consideration the statutory civil penalty criteria in Section 110(i) of the Act.

I

Beaver Creek owns and operates Trail Mountain No. 9 Mine (the "Mine"), an underground coal mine located near Price, Utah.

These contest and civil penalty proceedings arise out of MSHA's issuance to Beaver Creek of Section 107(a) imminent danger closure Order No. 3224859 and its underlying Citation No. 3224858, and a 104(d)(1) unwarrantable failure Citation No. 3224857. Beaver Creek timely contested the imminent danger closure order and the two citations. The proposal for penalties, WEST 89-185 (Citation No. 3224857) and WEST 89-182 (Citation No. 3224858) were served on Beaver Creek a few days before the hearing and were timely answered.

The two citations and the 107(a) closure order are so closely related factually, that all proceedings were consolidated and testimony from each witness on both citations and the order were taken at one time. There are, however, separate issues between Order No. 3224859, with its related Citation No. 3224858, and Citation No. 3224857.

Inspector Robert Huggins, accompanied by his supervisor, William Ponceroff, conducted the inspection of the mine. Supervisor Ponceroff was present, partly for the purpose of observing Mr. Huggins and evaluating his ability and training. It was, nevertheless, Mr. Huggins' inspection. Mr. Jeffrey Cooper, who at that time was the Safety and Health Supervisor for Beaver Creek, and Mr. Duane Gilbert, Shift Supervisor for Beaver Creek, joined the inspection team.

Mr. Cooper is a highly trained and experienced health and safety professional. (See transcript C. 203-206 for specifics on his training and experience). Mr. Gilbert is an experienced supervisor, holding fire boss and mine foreman certificates since 1978. Inspector Huggins and his Supervisor Ponceroff are also highly trained, experienced mine safety professionals.

The inspection party went underground to make the inspection at approximately 7 a.m. during a non-production shift. While

walking inby the No. 2 belt line, they heard the noise of rushing air. The usual belt line noise was absent since the belt was not running at the time the air noise was heard and investigated. The noise as described by Supervisor Ponceroff was "like driving in the car and you open a wing window . . . it was really noticeable." The noise was characterized by Inspector Huggins, as a wind speed of 45-60 miles per hour pouring through a car window. The noise was heard before its source was discovered. The wind noise source was located. It was identified as a hole in the coal rib on the off walkway side of the belt entry between crosscuts Nos. 5 and 6. The hole was approximately eight inches high, six inches wide, and seven inches thick.

Coal dust which was emitted from this rib opening resulted in the formation of a conical accumulation at the base of the rib, indicating to all concerned that the rib hole must have been there for quite some time.

The inspector and Mr. Cooper looked through the hole in the rib using their cap lamps but they could see very little in either direction. They did, however, see some deterioration of the roof with fallen debris about five feet high and at the far side saw some roof at an angle.

Although they did not realize it at the time, the inspection team, in looking through the hole in the rib, were looking into an old abandoned work out area that was located between the belt entry and the return entry.

Mr. Huggins and Mr. Cooper went through the man door at the No. 5 crosscut stopping between the belt entry and the return entry to try to see the hole from the return side. They could not find it even when Supervisor Ponceroff and Mr. Gilbert shone a light through the hole and put smoke through the hole in their attempts to locate the hole. The reason they could not find the hole from the return side was that the hole through the rib entered into the abandoned worked-out area that was located between the belt entry and the return, and this old worked-out abandoned area was closed off from the return by two stoppings on the return side.

The men left the mine and went to the mine office where Inspector Huggins and Mr. Cooper looked at the mine map and found the narrow area in the rib and determined that the hole was probably in that spot. At that point in time they still did not realize why they were unable to see the light or smoke which they put through the hole in the rib.

After some discussions with Supervisor Ponceroff, Mr. Huggins stated that he thought the hole constituted an unwarrantable failure and the roof conditions constituted an imminent danger. Mr. Cooper disagreed.

After several phone calls between the inspectors and the Denver MSHA office, the inspectors proposed that Beaver Creek build a 50-foot longwall of solid concrete block. Beaver Creek objected because it believed the cost would have been prohibitive and Mr. Cooper did not believe there was any hazard. Finally, Mr. Gilbert suggested building a crib wall, which he believed was unnecessary but which he suggested in order to get the closure order lifted. The inspector approved.

Mr. Cooper then asked what areas of the mine were affected and the inspector told him the belt line and the return. Therefore, Mr. Cooper withdrew all of the men from the mine inby crosscuts 5 and 6. The crib wall was promptly constructed at a cost of about $3,600 in material and $35,000 in lost production. The closure order was lifted within one and one-half days of the inspection.

Because he believed there was no major roof problem, Mr. Cooper took a camera when he returned underground and took photographs of the area. Within the next two days, he took additional photographs, took measurements and observations, and documented his findings on a certified mine map, which was received into evidence as Beaver Creek's Exhibit 2.

The conditions that existed under which Mr. Huggins issued the closure order and the unwarrantable failure citation were as follows:

1. A six-inch by eight-inch hole was in the rib that separated the belt entry from old workings. Inspector Huggins could only guess at the length and thickness of that rib. Mr. Ponceroff did not check the thickness and therefore he did not know what it was.

2. Air slack or potting had occurred in the roof along the rib, the extent of which Supervisor Ponceroff did not measure. Inspector Huggins did not measure it either but estimated that it varied from 9 inches to 14 inches deep for the length of the rib. Mr. Cooper later measured it to be in two areas, 16 feet long and 4 feet long respectively, for a depth of generally 4 inches to a maximum of 7 inches.

3. Timbers in the belt entry next to the rib, which had been present at least ten years, showed no sign of taking weight.

4. Bolts in the belt entry were on four- to five-foot centers showed no weight stress.

5. There was no evidence of cutting or shearing of the rib into the roof.

6. There was fallen roof material in the worked-out area behind the rib; i.e., in this abandoned area between the rib and the return entry. The roof in that worked out area had been unsupported and the area had been mined out a long time ago, variously estimated at 10-15 or more years.

7. The six-inch by eight-inch hole that separated the belt entry from the old worked out area had existed a long time.

8. The air going through the hole in the rib entered the old workings, which were stoppinged off from the return entry.

9. All air in the mine was deliberately vented to the return entry. Belt air is vented to the return by the use of regulators which an operator can locate anywhere he desires. Beaver Creek had a regulator close to the portal, about six crosscuts outby the hole.

10. The return entry was the mine's alternate or secondary escapeway.

II

Docket Nos. WEST 89-23-R and WEST 89-185

Citation 3224857

Inspector Huggins issued Citation No. 3224857 under Section 104(d)(1) of the Act for a violation of 30 C.F.R. 75.1704. Section 8, "Condition or Practice" of the citation reads as follows:

> The designated return escapeway was not being maintained to ensure safe passage of persons including disabled persons. A hole has eroded from the belt entry into the return entry through the coal rib between #5 and #6 crosscuts on #2 beltline. The hole was measured to be 8 inches by 6 inches and the air was making a rushing noise and going into the return. The #6 and #7 stoppings used to separate the belt air from the return air designated escapeway are leaking and the air rushing into the return could be readily heard. These conditions have been there for awhile and it should have been observed by the preshift examiner.

The citation states that the risk of injury was highly likely, that the gravity was S&S and that Beaver Creek's negligence was high.

The cited regulation 30 C.F.R. § 75.1704 provides in relevant part as follows:

> Except as provided in Section 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to ensure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, . . . and shall be maintained in safe condition and properly marked.

Discussion and Conclusion

The main facts surrounding Citation No. 3224857, set out above, are well established and virtually undisputed. A hole six inches by eight inches was present in the coal rib between crosscuts 5 and 6 on the offside of the belt entry. The hole went into a worked out area between the belt entry and the return entry. The return entry was the alternate escapeway. The old workings were stoppinged off on the return side of the workings. Thus, the return escapeway was separate and distinct and was maintained in a safe condition. The return entry was separate from the belt entry by stoppings on the return side of the worked out area. There was no persuasive evidence of any significant air leakage at any of the mines stoppings. Cf. Rochester & Pittsburgh Coal Company, 10 FMSHRC 1576, 1577-1578. The rib, except for the six-inch by eight-inch hole, constituted a redundant separation. The preponderance of the evidence presented did not establish a violation of 30 C.F.R. § 75.1704. Citation No. 3224857 is vacated. Contest proceeding No. WEST 89-23-R is granted. Civil Penalty proceeding WEST 89-184 is dismissed.

III

Docket Nos. WEST 89-24-R and WEST 89-182

Citation No. 3224858

Citation No. 3224858 alleges a section 104(a}, S&S violation of 30 C.F.R. § 75.202(a). The citation reads as follows:

> The mine roof was not being supported adequately by a distance of 60 feet between the #5 and #6 crosscuts and the #2 belt entry. The roof has potted out

next to the rib and the rib is about 2 feet thick for a distance of about 50 feet next to old entry.

30 C.F.R. Section 75.202(a) reads as follows:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

IV

Imminent Danger Closure Order No. 3224859

The 107(a) imminent danger closure order issued to Beaver Creek reads as follows:

> The following condition constitutes an imminent danger which was observed between the #5 and #6 crosscuts in the #2 belt entry of the left rib going in the mine. The coal rib between the belt entry and the return entry is about 2-foot thick with a hole in the coal rib into the return. There is a lot of pressure on the rib because the main fan is about 1,000 feet from this area. The old entry behind this rib (return side). The roof has fallen and the two-foot rib is about 50 feet in length. The mine roof in the belt entry has potted out next to this two-foot coal rib. See Citation 3224858.

The Secretary, based upon the testimony of Inspector Huggins and Supervisor Ponceroff, contends that the area behind the six-inch by eight-inch hole in the rib, the old worked-out area adjacent to the belt entry, was in the process of rapid deterioration. The fallen roof debris in this worked-out area was approximately five (5) feet in height. Supervisor Ponceroff testified that the thickness of the rib between the belt entry and the old workings had "whittled down to two foot." He further testified that he "imagined" that Inspector Huggins assumed the 2 foot thickness of rib extended for a distance of 50 feet (Tr. 93). He also testified he observed sloughage on both sides of the rib line, "potting out" of the roof and fracture lines running from the "old workings to the belt line roof." Mr. Ponceroff stated that the "entire area from the return entry to the belt line entry was showing "signs of change."

When asked what signs of change the area was showing, he replied:

> A. The signs of change at the location of the post where the hole was -- occurred, had eroded through the rib. Sloughage was occurring. Lamination was occurring. The area was potting out. If you -- the area in the cracks had been -- were recent cracks; there was no rock dust in those cracks.

Huggins testified he did not measure the length of the thinned-out rib or its thickness but he "guessed" it was about 50 feet in length and averaged 2 feet in thickness.

Beaver Creek's Position

Beaver Creek submits that closure Order No. 3224859 and its underlying Citation No. 3224858 were without any basis in law or in fact and that Inspector Huggins' issuance of them was improper and abusive.

Beaver Creek outlines its position as follows:

1. Inspector Huggins did not believe that an imminent danger existed.

2. No danger with respect to the rib or roof existed.

3. If a danger existed, it was not imminent.

4. The order is defective on its face because it fails to state the area of the mine throughout which the alleged danger existed.

Section 107(a) requires that the authorized representative of the Secretary issue the order if he finds that an imminent danger exists. Beaver Creek contends that if the issuing inspector did not believe that an imminent danger existed, the order must fall.

Beaver Creek presented some evidence in support of its assertion that the issuing inspector, Huggins, did not believe an imminent danger of a roof fall existed. Mr. Cooper testified that on November 10, 1988, in Salt Lake City, Inspector Huggins, after his deposition, said to Mr. Cooper, "For your information, and completely off the record, I want you to know that the imminent danger was not mine; the unwarrantable was." Mr. Cooper testified that he documented this statement in his journal on that day.

Inspector Huggins adopted practically all of Supervisor Ponceroff's testimony at the hearing.

Beaver Creek also points out that Inspector Huggins by his own admission did not remember looking at the condition of the timbers or bolts to see if they were taking weight. He testified he did not look over his head.

While the evidence presented by Beaver Creek on this issue has some plausibility, I credit the testimony of Inspector Huggins and Supervisor Ponceroff that Mr. Huggins did in fact determine that an imminent danger existed.

Roof Fall Danger

With respect to the issuance of the imminent danger order, Mr. Huggins testified on direct examination as follows:

> Q. Okay. And, could you tell us the circumstances that led to the issuance of that particular citation (sic)?
>
> A. All the things that was involved in this area right here, like I said, not knowing what is overhead, and in the interest of safety, and so forth, that's why it was issued.

On cross-examination Inspector Huggins' reasons for issuing the imminent danger closure order were summarized as follows:

> Q. I understand your testimony, then, that you issued the emminent danger (sic) danger order out of fear of a roof fall, because the roof had fallen and (sic) the old workings that was unsupported, and because there was potting along the rib that you estimated or guessed at being 2 feet thick, like couldn't really determine.
>
> A. And, also, that I could not see straight up. I did not know what was above.
>
> Q. Sure, you didn't know what was above --
>
> A. Right. That's true.
>
> Q. -- because you can't see through the roof?

A. And in the interest of safety, you know --

Q. Uh-huh.

A. -- and it was to save somebody's life, the way I look at it.

(Tr. 179 - 180)

Beaver Creek in support of its position points to the uncontroverted fact that the roof bolts and timbers in the belt entry, which had been in place for at least 10 years, showed no stress or signs of taking weight; that Inspector Huggins seemingly ignored the mine map and only guessed at the length and thickness of the rib in question.

Inspector Huggins testified that he did not consider whether the timbers or the bolts showed signs of stress because he was concerned about the "potting," which he asserted was a real indication of a roof fall. Inspector Huggins estimated the potting to be 9 inches to 14 inches deep and ran most of the length of the rib, but he took no measurements. There was conflicting opinion as to whether this condition was due to air slack or potting. Supervisor Ponceroff described air slack to be an eroding of the mine due to moisture, and he described potting to be the falling away of large pieces in the shape of a kitchen pot. Supervisor Ponceroff testified that there can be air slack without a risk of a roof fall and also there can be potting without the risk of a roof fall. Mr. Cooper testified that what existed was air slack, not potting, and that air slack is a normal occurrence in mines. Mr. Cooper measured the air slack to be generally 4 inches in depth to 7 inches maximum and in two stretches, 16 feet and 4 feet long, respectively. The photographs of the area (B.C. Ex. 4.6, 4.8 and 4.9) show the condition that existed. It was undisputed that the rib was not cutting or shearing up into the roof. Mr. Cooper testified that the rib was not crushing out.

Inspector Huggins' primary concern, in addition to the potting, apparently was based on the 6 inch by 8 inch hole in the rib that existed for a long time and his guess that the rib was only 2 feet thick for 50 feet, therefore insufficient to support the roof.

Inspector Huggins also expressed concern about the fallen roof in the old workings. However, the old workings were very old and were unsupported, while the roof in the belt entry was supported by timbers and closely spaced bolts which appeared to

be in good shape. Mr. Cooper testified the roof in the belt entry along the rib was in good condition (Tr. 250, BC Ex. 4.12, 4.13, and 4.14).

Supervisor Ponceroff asserted that Beaver Creek was using the rib as a primary support and therefore it should have been 50 to 60 feet thick, and that the rib provided little or no support, creating a 40-foot span which would result in sag that would finally break. Inspector Ponceroff, like Mr. Huggins, puts little weight on the facts that the rib had been there many years and that the timbers and bolts show no weight, even though those bolts and timbers were at least 10 years old. Beaver Creek contends that, if there was going to be any sag, it would have shown on the timbers in those 10 years.

Supervisor Ponceroff argued that he could see vertical cracks in Beaver Creek's pictures received in evidence that could result in a roof fall. Beaver Creek contends that Supervisor Ponceroff never explained in any intelligible manner how those cracks, if they existed, could create a danger when the adjacent timbers and bolts showed no stress. Beaver Creek also points out that Supervisor Ponceroff's testimony about the risk resulting from the cracks and from the fallen roof in the worked-out area and the air slack was that the roof could fall, not that a fall was likely or imminent. This is evident in the following excerpt from his testimony:

> So, the what can happen in a case like this, the reason why you can have a massive roof fall there, is the fact that it may be -- the fracture may be going at an angle, and it'll stay there until something else breaks, and that hole (sic) thing can come at once. (Emphasis added).

Mr. Cooper, on the contrary, testified that the cracks were not vertical or on an angle, but were mere horizontal laminations. It is undisputed Mr. Cooper did one thing the inspectors failed to do. After the inspectors left, he tested the area in question with a scaling bar and found it to be solid. Mr. Cooper testified that "I banged on that thing, and banged on it, and it was just as solid as ever. You couldn't hear anything there." Supervisor Ponceroff testified that it is common to do this "sound and vibration" test but that he did not do it and it is clear from the record that Inspector Huggins did not do it.

Supervisor Ponceroff also made much of the report of unintentional roof falls in the mine. Beaver Creek, however, presented evidence that all five prior unintentional falls were in areas where there was either no roof support or only some partial

bolting and all five prior falls were in different areas of the mine that were quite a ways away from the area in question.

Mr. Robert J. Marshall, a certified mining engineer, was the last witness to testify. He is the engineering supervisor for Beaver Creek. He is a licensed engineer in Utah and Colorado. After the inspection, Mr. Marshall conducted an extraction ratio study of the percentage of the coal that had been removed versus the percentage of coal that remained in place. Mr. Marshall's analysis showed that the coal in place provided approximately two times as much support as was required by the roof. The thinned out stretch of the rib, as perceived by Supervisor Ponceroff and Inspector Huggins, provided negligible support. However, that support was unnecessary. The thinned-out stretch could have been completely removed without creating a risk of a roof fall.

His testimony was offered as an expert witness with respect to coal mine roof control issues.

Discussion

Section 107(a) of the Act provides in part as follows:

> If upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused the imminent danger no longer exist.

Section 3(j) of the Mine Act, 30 U.S.C. 802(j), defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." This definition is unchanged from the definition contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) (the "1969 Coal Act"). The Senate report on the Mine Act explains

that the Secretary's authority to issue imminent danger orders "should be construed expansively by inspectors and the Commission." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Legis. Hist. Mine Act 626.

In discussing the concept of imminent danger, the Commission has recently stated:

> In analyzing [the] definition [of imminent danger], the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. See, e.g. Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F. 2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that it will result in an injury before it can be abated. Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The court stated that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." 491 F.2d at 278 (emphasis in original}. The Seventh Circuit adopted this reasoning in Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 33 (7th Cir. 1975).

Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989).

The Seventh Circuit has further recognized the importance of the inspector's judgment in issuing an imminent danger order:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb .... We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (emphasis added)

Old Ben, supra, 523 F.2d at 31; Rochester & Pittsburgh, 11 FMSHRC at 2164.

The Commission has taken note of the fact that mine roofs are inherently dangerous and that even good roof can fall without warning. Consolidation Coal Company, 6 FMSHRC 34, 37 (January 1984). It has also stressed the fact that roof falls remain the leading cause of death in underground mines, Eastover Mining Co., 4 FMSHRC 1207, 1211 and n. 8 (July 1982); Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986); Consolidation Coal Company, supra.

The Commission recently stated in upholding the issuance of an imminent danger withdrawal order in Rochester & Pittsburgh Coal Co. v. Secretary of Labor, supra at 2164; [The operator's] focus on the relative likelihood of [miners] being injured ... ignores the admonition in the Senate Committee Report for the Mine Act that an imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Session, Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978). Instead, the focus is on the "potential of the risk to cause serious physical harm at any time." Id. The Committee stated its intention to give inspectors "the necessary authority for the taking of action to remove miners from risk." Id.

"[Such] argument also fails to recognize the role played by MSHA inspectors in eliminating imminently dangerous conditions. Since he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists." Applying this rationale to the case at bar, the question, in my opinion, is whether Inspector Huggins abused his discretion or authority when he determined, on the basis of his observations and the information he had at the time he issued the order, that an imminent danger existed. Upon review of the evidence I am unable to find that he abused his discretion or authority. I therefore uphold the validity of the imminent danger order.

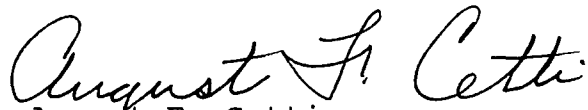
The Commission has recently noted that an imminent danger order need not be based upon a violation of a mandatory standard in order to be valid. See S. Rep. No. 461, 95th Cong., 1st Sess. 39 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1317 (1978) ("Legis. Hist."); Freeman Coal Mining Co., 1 IBMA 197, 207-08 (1973), aff'd, Freeman Coal Mining Co. v. IBMA, 504 F.2d 741 (7th Cir. 1974). Accordingly, despite upholding the validity of the imminent danger order, the question of whether a preponderance of the evidence establishes a violation of 30 C.F.R. § 75.202(a) as alleged in Citation No. 3224858 remains.

After the inspector completed his inspection and left, Mr. Cooper made further observations, photographs, measurements, and tests. He used a scaling bar and found the belt entry roof in question to be solid. Mr. Marshall, a certified mining engineer, conducted an extraction ratio study. He testified that the coal in place in the area in question provided approximately two times as much support as was required to support the roof. This expert testimony was credible and was not rebutted. I credit the testimony of Messrs. Marshall and Cooper. On the basis of their testimony and my evaluation of all the evidence in the record, I find that the preponderance of evidence presented is insufficient to establish a violation of 30 C.F.R. § 75.202(a). Citation No. 3224858 is therefore vacated.

ORDER

1. Citations Nos. 3224857 and 3224858 are vacated and the related proposed penalties are set aside.

2. The Section 107(a) imminent danger Order No. 3224859 is affirmed.



August F. Cetti
Administrative Law Judge

Distribution:

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/ek

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

JUL 20 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 89-440
	:	A.C. No. 05-03771-03518
v.	:	Raton Creek Mine No. 1
ENERGY FUELS MINING COMPANY, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Robert S. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner.
Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a petition for assessment of penalties by the Secretary of Labor pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820 (1977) (herein the Act).

This matter was consolidated and scheduled for hearing with two other penalty dockets, WEST 90-25 and WEST 90-52. At the commencement of the hearing on June 12, 1990, a settlement had been concluded and was announced (T. 2-6) covering all six citations involved. Such settlement agreement was considered and approved from the bench and is here affirmed.

Pursuant to their agreement, Respondent is to pay the penalties originally assessed by Petitioner in full for five of the six citations (as reflected in the Order below), and as to the remaining Citation No. 2931276, the "Significant and Substantial" designation thereon is to be deleted and the penalty reduced from $63 to $50.

ORDER

1. Respondent, if it has not previously done so, shall pay the Secretary within 30 days from the date of this decision the total sum of $324 as and for civil penalties as reflected below:

Citation Number	Penalty
2930776	$ 74
2931275	74
2931277	42
3077194	42
3077196	42
2931276	50
Total	$324

2. Citation No. 2931276 is MODIFIED to delete the "Significant and Substantial" designation thereon and is otherwise affirmed.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 24 1990

JOSEPH WIETHOLTER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 90-17-DM
QUALITY READY MIX, INC., Respondent	:	MD 89-69 Quality Pit & Mill

DECISION

Appearances: Joseph Wietholter, Celina, Ohio, pro se, Robert J. Brown, Esq., Thompson, Hine and Flory, Dayton, Ohio for Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Joseph Wietholter under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging discharge by Quality Ready Mix, Inc., (Ready Mix) in violation of section 105(c)(1) of the Act.[1] More particularly the Complainant alleges that he was unlawfully discharged on July 10, 1989, for the following reasons:

> I was fired on July 10, 1989, as the result of an accident involving a Euclid haul truck that had no brakes. I had been informed by another employee at the mine that the truck had no brakes and that the trucks [sic] transmission was to be used to control it. While operating the truck on July 10, 1989, the engine stalled on a ramp and the truck started rolling. The trucks [sic] starter was inoperative and could not be started. From within the trucks

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[1] Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged

[sic] cab I jumped from the truck and the truck came to rest at the bottom of the steep ditch. I subtained [sic] injures [sic] to my neck and I'm under medical care. A previous incident also contributed to my firing. On July 8, 1989 I was instructed to operate a dragline. After observing water bleeding from the ground where I had been instructed to move the dragling [sic] to, I protested to Robert Hirchfeld [sic], supervisor, that the ground was unstable. He replied that it was stable ground, and ordered [sic] me to operate the dragline from that site. After moving the dragline, the ground beneath it failed and the crain [sic] fail [sic] forward. (Complaint of Joseph Wietholter filed July 18, 1989 with the Federal Mine Safety and Health Administration).

Joseph Wietholter testified at hearing that on July 8, 1989, while he was operating the dragline at the Ready Mix mine, Superintendent Hirschfield directed him to pull the dragline into a waterlogged area which Wietholter considered to be unsafe. According to Wietholter, Hirschfield directed him to either get into the dragline and follow instructions or leave. As he proceeded to move the dragline into the area it leaned forward and sunk approximately 3-feet on one side. Wietholter later met Hirschfield on the job site and Hirschfield "started yelling, screaming and threw his hat up in the air". Wietholter acknowledges that he was not disciplined for the incident and, indeed, following the meeting did not feel that Hirschfield blamed him for the dragline sinking.

On July 10, 1989, Wietholter was operating the Euclid truck hauling gravel. According to Wietholter the union shop steward, Mark Marshall, showed him how to drive it and warned him that if it stalled to jump out. Wietholter observed that the truck had no seat belts, no windshield and no brakes. He did not

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1/cont'd fn.1

danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings 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, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

complain however about these alleged safety defects nor did he refuse to drive the truck. Later that day the truck stalled on a hill and he could not restart it. Apparently Wietholter could not stop it without power and, as the truck began to roll he jumped off. The truck went out of control and into a ditch. When Hirschfield arrived at the scene he refused to hear Wietholter's explanation and told him he was fired. It was then, upon the shop steward's advice, that Wietholter called the Federal Mine Safety and Health Administration and reported what he considered to be a number of safety violations at the mine site and filed his complaint under section 105(c) of the Act.

Robert Hirschfield, owner and President of Ready Mix, testified that he hired Wietholter on June 6th or 7th and that Wietholter worked only about a month before he fired him. He purportedly fired Wietholter because of Wietholter's inability to operate the dragline. Hirschfield testified that Wietholter destroyed 3-lift and 2-pull cables on the dragline, damaged a fuel tank, and proved that he was not capable of operating the machine. According to Hirschfield he gave general instructions to Wietholter on July 8, 1989, to remove overburden in an area 150 feet to 200 feet long and about 50 feet wide. At about 12:00 or 1:00 that afternoon he observed that Wietholter had removed an area 70 feet long by 50 feet wide and had moved the machine into an area where the machine was not level. Hirschfield maintains that he then directed Wietholter to stop working that area even though Wietholter was willing to continue operating the dragline in that position. Hirschfield denied that Wietholter had previously complained about the ground conditions. Hirschfield was not aware of any safety complaints by Wietholter either to MSHA or to himself but acknowledged that Wietholter did make routine requests for repairs on the dragline.

According to Hirschfield, about mid-day on July 10 he asked Wietholter to haul sand in a truck. Wietholter performed this for about 3 1/2 hours before the accident. Hirschfield did not see the accident but in light of all of the problems he felt Wietholter was "not the man for the job" and fired him.

In order to establish a prima facie violation of section 105(c)(1) of the Act Mr. Wietholter must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary

on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (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 (1981).

In this regard, in reference to the July 10, 1989, accident on the Euclid haul truck which Wietholter maintains was the precipitating incident leading to his discharge, there is no evidence of any protected activity. Before the accident Weitholter admittedly never complained of any safety defect on the truck nor did he refuse to work on it.

With respect to the dragline sinking incident on July 8, 1989, Wietholter maintains that he forewarned superintendent Hirschfield about operating the dragline in the waterlogged area before it sank. While this warning might be construed as a safety complaint Wietholter not only did not refuse to operate the dragline in the waterlogged area but indeed went ahead and moved the dragline into that area. It is not reasonable to infer therefore that any anti-safety animus would have resulted from this activity. Under the circumstances, Wietholter has failed to sustain his burden of proving that Hirschfield retaliated against him for his alleged prior warnings about operating the dragline in the waterlogged area.

Under the circumstances the Complainant herein has failed to sustain his burden of proving that he was discharged in violation of Section 105(c)(1) of the Act and accordingly his Complaint herein must be dismissed.

ORDER

Discrimination case Docket No. LAKE 90-17-DM is hereby DISMISSED.

Gary Melick
Administrative Law Judge

Distribution:

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Robert J. Brown, Esq., Thompson, Hine and Flory, 2000 Courthouse Plaza, N.E., P.O. Box 8801, Dayton, OH 45401-8801 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 27 1990

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 90-37-R Order No. 3324186; 2/1/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Meigs No. 31 Mine Mine I.D. # 33-01172

DECISION

Appearances: David M. Cohen, Esq., Lancaster, Ohio, for Contestant;
Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio for Respondent.

Before: Judge Melick

This case is before me under section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge an imminent danger withdrawal order issued by the Secretary of Labor against the Southern Ohio Coal Company (Southern Ohio) on February 1, 1990, pursuant to section 107(a) of the Act. The order reads as follows:

> A serious accident has occurred in which a miner was injured due to the practice of moving equipment using a wire rope without a guard or barrier or without persons being in a safety zone of 1 1/2 times the length of exposed wire rope. Safety contacts will be made of all personnel who work underground to assure the policy of moving equipment with the use of wire rope is adhered to.

Section 107(a) of the Act provides in part as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons except those referred to in section 104(c), to be withdrawn from, and to be prohibited

from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused the imminent danger no longer exist.

Section 3(j) of the Act defines "imminent danger" as the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. In this case it is charged that a "practice" rather than a "condition" existed i.e. "the practice of moving equipment using a wire rope without a guard or barrier or without persons being in a safety zone of 1 1/2 times the length of exposed wire rope."

In Rochester and Pittsburgh Coal Co. v. Secretary of Labor, 11 FMSHRC 2159 (1989), the Commission considered two methods for determining the validity of an imminent danger withdrawal order issued under section 107(a) of the Act. First the Commission agreed that substantial evidence existed to support the judge's findings that an "imminent danger" existed at the time the order was issued. The Commission also concluded in that decision that apparently even if an imminent danger had not existed, the findings and the decisions of the inspector in issuing the order should nevertheless be upheld "unless there is evidence that he has abused his discretion or authority". Rochester and Pittsburgh, supra 2164 quoting from Old Ben Coal Corp. v. Interior Board of Mine Operation Appeals, 523 F.2d 25 at 31 (7th Cir. 1975).

For the reasons that follow I do not find in this case that an "imminent danger" existed at the time the order was issued. Furthermore, I find that the issuing inspector did indeed abuse his discretion and authority in issuing the order under the circumstances herein.

The issuing MSHA inspector, Donald Osborne, was conducting an electrical inspection on February 1, 1990, in the subject Meigs No. 31 Mine when he learned that an accident had occurred the day before, injuring miner Bill Yoho. The facts surrounding the accident are not in dispute. The evidence shows that on January 31, 1990, at about 1:30 p.m., at the 6 Right off the 6 East Mains area at the No. 15 crosscut several miners were in the process of removing an air compressor with a 15 ton track mounted locomotive. They had rigged a sheave block attached to the track to pull the compressor at a right angle to the direction of the locomotive. As they were pulling the compressor toward the track it became stuck, a chain link failed and the wire rope snapped back striking Mr. Yoho in the face and head. The wire rope was 40 feet long and Yoho was admittedly standing within 1 1/2 lengths of the rope.

Inspector Osborne testified that while no regulatory violation existed in this case, the use of a wire rope within a safety zone of 1 1/2 times the length of the rope constituted an "imminent danger". In support of his view Osborne cited a memorandum issued by the corresponding MSHA district manager on September 3, 1987, setting forth the safety requirements to be followed when wire ropes are used to move equipment i.e. a safety zone 1 1/2 times the length of the wire rope or the use of a cage or barrier. Osborne testified that the memo was in fact discussed with Southern Ohio officials, including officials at the Meigs No. 31 Mine, on January 9, 1988.

Osborne testified that the "practice" about which he was concerned was of not protecting employees when using wire ropes. He acknowledged that since he was citing a "practice" and not a "condition" he noted in the order that "no area [was] affected". Osborne conceded however that he did not know whether the procedure followed in this instance was indeed a "practice" at the subject mine. When asked how he determined that the cited procedure was a "practice", Osborne stated only that "I didn't know that it was [a practice]; however I did not know that it wasn't" (Tr .47).

The threshold issue in this case is whether the cited procedures constituted a "practice" within the meaning of section 3(j) of the Act.

The word "practice" is defined, as relevant hereto, in Webster's New Collegiate Dictionary, G & C Merriam Company, 1979, as "a repeated or customary action" or "the usual way of doing something". The issuing inspector clearly did not have any direct evidence that the cited event was a "repeated or customary action" or was "the usual way of doing something" within this meaning. Nor could such findings be made by inference i.e. an inference could not be drawn from the observation of one incident that there was a "practice" of performing the cited procedure. See Mid-Continent Resources 6 FMSHRC 1132 (1984); Garden Creek Pocahontas 11 FMSHRC 2148 (1989). Accordingly the Secretary has failed to sustain her burden of proving that a "practice" existed at the time the order was issued. There was therefore no "imminent danger" within the meaning of section 3(j) of the Act.

Moreover by the failure of the issuing inspector to have conducted further investigation to determine whether the cited procedures were indeed sufficiently repetitive to constitute a "practice" I conclude that the inspector abused his discretion and authority in issuing the order at bar. It is clearly improper for the inspector to infer that the cited events were a "practice" from the absence of evidence that

they were not a practice. The Secretary has the burden of proving each and every element supporting its withdrawal order and she cannot shift that burden. For this additional reason the imminent danger withdrawal order must be vacated.

ORDER

Withdrawal Order No. 3324186 is vacated.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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DENVER, CO 80204

JUL 27 1990

FMC WYOMING CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEST 86-43-RM Citation No. 2647693; 11/23/8
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 86-45-RM Order No. 2647695; 11/23/85
and	:	FMC Trona Mine Mine ID 48-00152
UNITED STEELWORKERS OF AMERICA, DISTRICT 33, Intervenor	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-110-M A.C. No. 48-00152-05535
and	:	FMC Trona Mine
UNITED STEELWORKERS OF AMERICA, DISTRICT 33, Intervenor	:	
v.	:	
FMC WYOMING CORPORATION, Respondent	:	

DECISION AFTER REMAND

Appearances: James H. Barkley, Esq., Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner; James Holtcamp, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Contestant/Respondent; Stan Loader, Staff Representative, United Steelworkers of America, Rock Springs, Wyoming, Intervenor.

Before: Judge Cetti

The Commission's remand involves two (2) violations, one of 30 C.F.R. § 57.5002 and one of 30 C.F.R. § 57.18002. The issues which remained after remand are whether the violation of 30 C.F.R. § 57.5002 by FMC Wyoming Corporation (FMC) was significant and substantial and the appropriate penalty for each of the two violations.

I

PROPOSED SETTLEMENT

Prior to this decision on remand, the Secretary of Labor (Secretary) and the operator, FMC Wyoming Corporation (FMC), agreed to a settlement resolving all issues remaining before me after the Commission's remand Decision. This settlement agreement included a withdrawal of FMC's notice of contest to both citations and a reduction of the penalties sought by the Secretary.

Pursuant to this settlement agreement with FMC, the Secretary filed a Motion to Approve Settlement and Order Payment. The intervenor, United Steelworkers of America, District 33 (USWA), which has party status pursuant to its request and my prehearing Order granting party status, was neither a negotiator nor a participant in the negotiations of the settlement. USWA objected to approval of the settlement and by my Order dated April 10, 1990. I disapproved the proposed settlement on the basis of Commission Procedural Rule 30 (29 C.F.R. § 2700.30(a). 1/

Thereafter, the Secretary filed a motion, which I now have before me, requesting I reconsider my Order Disapproving Settlement. The Secretary states in part, "While it is true that the Secretary did not seek the concurrence of or consult the union intervenor in this case in reaching a settlement with the operator, the Secretary believes that concurrence of the intervenor is not a requirement" to an agreed settlement of the case.

1/ § 2700.30 Penalty settlements.

(a) General. No proposed penalty that has been contested before the Commission shall be compromised, mitigated, or settled except with the approval of the Commission after agreement by all parties to the proceeding. (Emphasis added)

Both the Secretary and USWA submitted points and authorities in support of their position. Having reconsidered the matter, I find the position of USWA to be meritorious. Under the facts and circumstances of this case, Commission Procedural Rule 30 unequivocally requires that the miner's representative (USWA) be an agreeing party to the settlement before it can be approved. Absent Commission precedent changing the impact of this rule, I am obliged to follow the same, and accordingly my Order Disapproving Settlement is here AFFIRMED.

II

SIGNIFICANT AND SUBSTANTIAL VIOLATIONS

The main issue before me at this time is whether FMC's unwarrantable failure to comply with the mandate of 30 C.F.R. § 57.5002 constitutes a significant and substantial violation.

A "significant and substantial" violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard," 30 C.F.R. § 814(d))1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

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

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

In Consolidation Coal Company v. Secretary of Labor, Mine Safety and Health Administration, 8 FMSHRC 890, 897-98 (June 1982), aff'd, 824 F.2d 1071 (D.C. Cir. 1987), the Commission adapted the Mathies formula to a health standard as follows:

> Adapting this test to a violation of a mandatory health standard, such as section 70.100(a), results in the following formulation of the necessary elements to support a significant and substantial finding: (1) the underlying violation of a mandatory health standard; (2) a discrete health hazard -- a measure of danger to health -- contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

In applying the Mathies/Consol test to this case, I find, as I did in my the initial decision, that FMC clearly violated the provisions of the mandatory health standard 30 C.F.R. § 57.5002 2/ by its failure to take dust surveys while the maintenance crew removed insulation containing asbestos from its No. 3 turbine. This failure eliminated the possibility of an accurate determination of whether or not maintenance crew employees were overexposed to airborne asbestos. Exposing employees to

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2/ 30 C.F.R. § 57.5002 provides:

> Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures.

airborne asbestos in an unknown concentration is a discrete hazard. Thus, the first and second elements of the Mathies/Consol formula have been established. Skipping the third element for a moment, I find there is no significant dispute as to the fourth element, since the evidence overwhelmingly showed that, if an illness resulted from the exposure, the illness in question would be an illness of a reasonably serious nature.

The third element the Secretary must prove is a reasonable likelihood that the health hazard contributed to will result in an illness. It is generally recognized that the development and progress of respiratory disease is due to the cumulative dosage of dust a miner inhales which, in turn, depends upon the concentration and duration of each exposure, and that proof of a single incident of overexposure does not, in and of itself, conclusively establish a reasonable likelihood that respirable disease will result. The exposure in this case was for a relatively short period of time to an unknown concentration of airborne asbestos. For this reason, I initially believed that the Secretary had not proven the violation was S & S. Now, however, it has been established by the Commission's finding that FMC's failure to take a dust survey was not due to simple negligence, but was a result of its unwarranted failure to comply with the mandatory health standard. This fact, plus my review of the evidence which indicates a reasonable likelihood that there was an overexposure, leads me to conclude that FMC's violation of the mandatory health standard was significant and substantial under the policy, law, and rationale the Commission set forth in the Consolidation Coal Company case, supra. Furthermore, it is believed that FMC should not be allowed to defend on the basis of its unwarrantable failure to comply with the mandatory health standard, i.e., the failure to take the mandated dust surveys. FMC's violation of the mandatory health standard under the facts and circumstances of this case, is a significant and substantial violation.

III

PENALTY

The only remaining issue is the assessment of the appropriate civil penalties for FMC's violation of 30 C.F.R. § 57.5002 and 30 C.F.R. § 57.18002. With respect to the latter, the Commission found that FMC violated that portion of the mandatory safety standard that requires the person making daily workplace examinations to be a competent person. In making this finding, the Commission stated that the person FMC designated "cannot be said to have had the ability and experience fully qualifying him to examine the workplace around the turbine for conditions which might adversely affect safety and health."

It is undisputed that FMC is a large operator, and appropriate penalties will not impair FMC's ability to continue in business. The parties stipulated that the operator's history of prior violations is average for an operator of its size, and that the violations were abated within the time period prescribed. The negligence of FMC and the gravity of the violations are both high. Taking into consideration the six statutory criteria in Section 110(i) of the Mine Act, I find that the appropriate civil penalty for FMC's violation of 30 C.F.R. § 57.5002 is $2,000 and the appropriate penalty for its violation of 30 C.F.R. § 57.18002 is $800. These assessments are considerably higher than MSHA's initial proposed penalty of $500 for each of the violations, but these higher penalties are justified and fully supported by the record.

ORDER

1. Citation No. 2647693 alleging a significant and substantial violation of 30 C.F.R. § 57.5002 caused by FMC's unwarrantable failure to comply with the mandatory safety standard is AFFIRMED and a civil penalty of $2000 is assessed.

2. Order No. 2647695 alleging a violation of 30 C.F.R. § 57.18002 is AFFIRMED and a civil penalty of $800 is assessed.

3. FMC Wyoming Corporation is directed to pay the Secretary of Labor the above-assessed civil penlaties in the sum of $2800 within 30 days of the date of this Decision.

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 1990

ENERGY FUELS MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 90-211-R
v.	:	Citation No. 3240559; 12/11/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Raton Creek No. 2
	:	Mine ID 05-3817

ORDER OF DISMISSAL

Before: Judge Merlin

On June 22, 1990, I issued an order stating that it was not clear from the pleadings then of record whether the operator was filing a notice of contest challenging the issuance of the subject withdrawal order or was contesting the penalty assessment. The parties were directed to submit further information and to set forth their positions with respect to the timeliness of the operator's filings.

From the statements now filed by the parties, it appears that the notice of contest filed on May 24, 1990, was directed to the penalty assessment.[1] The Solicitor advises that the penalty proposal was sent to the operator on March 7, 1990, and according to the return receipt card was received on March 15, 1990. The Solicitor claims the filing is untimely and must be dismissed. The operator argues the filing should be accepted.

Section 105(a) of the Mine Act, 30 U.S.C. § 815(a), provides in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the

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[1] The notice of contest was filed with Commission's Office of Administrative Law Judges in Falls Church, Virginia. It should have been filed at Commission headquarters in Washington, D.C. 29 C.F.R. § 2700.5.

violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, * * * the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. * * * *

Section 2700.25 of Commission regulations, 29 C.F.R. § 2700.25, states as follows:

> The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of: (a) The violation alleged; (b) the amount of the penalty proposed; and (c) that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty. If within 30 days from the receipt of the Secretary's notification of proposed assessment of penalty, the operator or other person fails to notify the Secretary that he intends to contest the proposed penalty, the Secretary's proposed penalty shall be deemed to be a final order of the Commission and shall not be subject to review by the Commission or a court.

And Section 100.7(b) of the Secretary of Labor's regulations, 30 C.F.R. § 100.7(b) reads in relevant portion:

> Upon receipt of the notice of proposed penalty, the party charged shall have 30 days to: (1) Pay the proposed assessment (acceptance by MSHA of payment tendered by the party charged will close the case); or, (2) notify MSHA in writing of the intention to contest the proposed penalty. The Office of Assessments shall provide a return mailing card with each notice of proposed penalty to be used by the party charged to request a hearing before the Federal Mine Safety and Health Review Commission under Section 105 of the Act. Such a request must be sent to the address listed on such notification. When MSHA receives the notice of contest, it shall immediately advise the Commission of such notice, and shall promptly forward the case to the Office of the Solicitor. No proposed penalty which has been contested before the Commission, shall be compromised, mitigated or settled except with the approval of the Commission.

(c) The failure to pay or to contest the proposed penalty within 30 days of receipt of notice thereof shall result in the proposed penalty being deemed a final order of the Commission and not subject to review by any court or agency.

As set forth above, the operator received notice of the proposed penalty by March 15, 1990. It took no action within 30 days. Indeed, it has never sent back the return mailing card (commonly called the "blue card") provided by MSHA to request a hearing. The notice of contest which was not filed until May 24, 1990, was 40 days late.

Since the operator failed to file within the statutorily prescribed time period, this case must be dismissed. The Act specifically mandates that a penalty not contested within the allotted period the proposed assessment shall be deemed a final order of the Commission not subject to review by any court or agency. Northern Aggregates Inc., 2 FMSHRC 1062 (May 1980) (Administrative Law Judge Melick). Cf. J. P. Burroughs and Sons, Inc., 3 FMSHRC 854 (April 1981); Old Ben Coal Company, 7 FMSHRC 205 (February 1985); Local Union 2333, District 29, UMWA v. Ranger Fuel Corporation, 10 FMSHRC 612, 618 (May 1988); Peabody Coal Company, 11 FMSHRC 2068, 2092, 2093 (October 1989) (Administrative Law Judge Koutras).

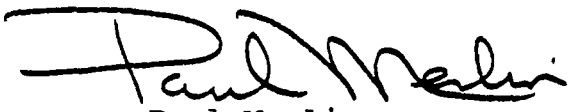
In this connection it must also be noted that a long line of cases going back to the Interior Board of Mine Operation Appeals have held that cases contesting the issuance of a citation must be brought within the statutory prescribed 30 days or be dismissed. Freeman Coal Mining Corporation, 1 MSHC 1001 (1970); Consolidation Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 2143 (1979), aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982) (Administrative Law Judge Steffey); Rivco Dredging Corp., 10 FMSHRC 889 (July 1988) (Administrative Law Judge Maurer); See Also, Peabody Coal Co., supra; and Big Horn Calcium, 12 FMSHRC 463 (March 1990) (Administrative Law Judge Cetti). Accordingly, the time requirements for contesting the issuance of a citation and for contesting the penalty assessment which appear together in section 105(a), must be viewed as jurisdictional. It is well settled that jurisdiction cannot be waived and can be raised by the court sua sponte at any stage of the proceedings. Insurance Corporation of Ireland, LTD, et al. v. Compagnie des Bauxites, 456 U.S. 694, 701-702 (1982); Athens Community Hospital, Inc. v. Schweiker, 686 F.2d 989 (D.C. Cir. 1982).

The only case cited by the operator, Humphrey v. Samples, 1 MSHC 1723 (1979), is distinguishable. It involved a complaint of discrimination filed under Section 105(c) of the Act. 30 U.S.C. § 815(c). The legislative history of 105(c) expressly

provides that the time allowed for filing a discrimination case should not be construed strictly where the filing of the complaint is delayed under justifiable circumstances. S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, p. 624 (1978). Bryant v. Dingess Mine Service, et al., 9 FMSHRC 336 (February 1987) (Administrative Law Judge Broderick); McIntosh v. Flaget Fuels, 12 FMSHRC 1151 (May 1990) (Administrative Law Judge Koutras).

The foregoing is dispositive. But it is noted that this operator has appeared before the Commission in many other proceedings, is represented by counsel and offers no excuses for its tardiness.

In light of the foregoing, this case is **DISMISSED.**



Paul Merlin
Chief Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

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

July 6, 1990

UNITED MINE WORKERS OF AMERICA, ON BEHALF OF GILBERT ROYBAL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 90-118-D DENV CD 90-01
v.	:	Golden Eagle Mine
WYOMING FUEL COMPANY, Respondent	:	

ORDER

On July 5, 1990, the United Mine Workers of America on behalf of Filbert Roybal, Complainant, filed a motion for my recusal, stating that Wyoming Fuel Company attorney Lawrence J. Corte would be a witness in the case and that the credibility of this local (Denver) attorney "will constitute a crucial issue" in this case.

Recusal of a Mine Safety and Health Review Commission Judge is governed by Commissioner Procedural Rule 81 (29 C.F.R. § 2700.81, which provides as follows:

> § 2700.81 Disqualification
>
> (a) Withdrawal generally. A Commissioner or Judge may withdraw from a proceeding whenever he deems himself disqualified.
>
> (b) Request to withdraw. Any party may request a Commissioner, or the Judge (at any time following his designation and before the filing of his decision), to withdraw on grounds of personal bias or disqualification, by filing promptly upon discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.
>
> (c) Procedure if Judge does not withdraw. If the Judge does not disqualify himself and withraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling and shall proceed with the hearing, or, if the hearing has been completed he shall proceed with the issuance of his decision, unless the Commission stays the hearing or further proceedings by granting a petition for interlocutory review.

After consideration of the matter, upon my own motion, pursuant to the Commission Procedural Rule 81 (29 C.F.R. § 2700.81, I hereby disqualify myself and withdraw from this proceeding.

August F. Cetti
Administrative Law Judge

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

July 23, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 90-165-DM MD 89-24
v.	:	Soledad Canyon Mine
CANYON COUNTRY ENTERPRISES, d/b/a CURTIS SAND & GRAVEL, CORPORATION, Respondent	:	

ORDER DIRECTING RESPONDENT TO FULLY ANSWER DISCOVERY REQUESTS

On or about June 12, 1990, Complainant served on Respondent certain Interrogatories and a Request for Production of Documents.

On July 9, 1990, Complainant filed its Motion for Order Compelling Responses To Discovery Requests, attaching Respondent's answers thereto, pointing out accurately that Respondent "has provided no information whatsoever in response to those requests, opting instead to object on general and spurious grounds."

Respondent's counsel may not be familiar with Commission practice which is traditionally liberal on these matters. As to the request for production of documents, Respondent, in its "General Objections," misconstrued the provisions of Commission procedural Rule 57 (2900 C.F.R. § 2700.57). 1/ Respondent also complains that the Complainant's discovery request was 9 days over the 60-day period provided in Rule 55. Complainant has shown that Respondent's answer to its Complaint was not received by it until approximately one month after it was due. Whether or not this delay was attributable to any tardiness on Respondent's part, it constitutes good cause for Complainant's very nominal delay in initiating discovery and, accordingly, pursuant to the authority provided in Rule 55, discovery time is extended - to be completed by September 28, 1990.

1/ I find no "good cause" for excusing Respondent from answering the discovery requests of Complainant. There is no claim of prejudice from Respondent from the delay and I would certainly infer none from the short period involved.

Respondent has also raised various "Special Objections" to the requests for document production and interrogatories, for the most part, that such are "overbroad," "burdensome," protected by the attorney-client privilege, and irrelevant. I have studied both the requests and objections, and find such objections are either the result of a misunderstanding of the issues in a mine safety discrimination case, or are simply contentious. Such objections are couched in broad language. The information sought by Complainant is clearly within the scope of that permitted by Procedural Rule 55(c) which provides:

> (c) Scope of discovery. Parties may obtain discovery of any relevant matter, not privileged, that is admissible evidence or appears reasonably calculated to lead to the discovery of admissible evidence.

Accordingly, all such objections are denied and Respondent is directed to fully, and in good faith, answer such on or before August 17, 1990. Counsel are requested to attempt to cooperate in discovery and procedural matters so that this matter can be brought to focus on major issues. Counsel are also requested to further explore the amicable resolution of this matter.

The presence of legal counsel in an administrative proceeding--and before this Commission--will be expected to bring with it a higher degree of professionalism and responsibility to the tribunal and its purpose. Pro forma objections and obstructions are not encouraged or countenanced.

The attention of counsel to Commission Procedural Rule 63 (2700 C.F.R. § 63) is invited.

Michael A. Lasher Jr.
Administrative Law Judge

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