

September 1983

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SEPTEMBER

The following cases were Directed for Review during the month of September:

Secretary of Labor, MSHA v. U.S. Steel Mining Co., Inc., Docket No. PENN 82-335.
(Judge Broderick, July 27, 1983)

Russell Collins & Virgil Kelley v. Secretary of Labor, MSHA, Docket No.
EAJ 83-1. (Judge Kennedy, July 27, 1983)

Secretary of Labor, MSHA v. Calvin Black Enterprises, Docket Nos. WEST 80-6-M,
WEST 80-81-M, WEST 80-82-M. (Judge Vail, August 16, 1983)

Review was Denied in the following case during the month of September:

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. PENN 82-221-R,
PENN 82-259. (Judge Steffey, July 28, 1983)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 29, 1983

UNITED MINE WORKERS OF AMERICA :
 :
 v. :
 : Docket No. LAKE 82-70-R
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA) :

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The issue presented is whether the United Mine Workers of America ("UMWA"), as a representative of the miners, has statutory authority under section 105(d) of the Mine Act, 30 U.S.C. § 815(d), to contest the Secretary of Labor's vacation of a section 104(d)(1) withdrawal order issued to the operator. 30 U.S.C. § 814(d)(1). For the reasons below, we hold that under section 105(d) miners and their representatives do not have such a statutory right.

The facts of the case are as follows. On March 15, 1982, a Department of Labor, Mine Safety and Health Administration ("MSHA") inspector issued an order of withdrawal under section 104(d)(1) of the Mine Act to the Saginaw Mining Company. The withdrawal order was terminated on the following day by a second MSHA inspector. On March 19, 1982, a third MSHA inspector (identified as an "Inspector Supervisor") vacated the section 104(d)(1) order on the ground that it had been erroneously issued.

On April 9, 1982, the UMWA (District 6), proceeding as the representative of the miners, filed a notice of contest with this independent Commission under section 105(d) challenging the Secretary's action of vacating the withdrawal order. The UMWA requested that the Commission reinstate the order. The Secretary, in turn, filed a motion to dismiss the UMWA's notice of contest on the ground that the UMWA did not have authority under the Mine Act to challenge the Secretary's action of vacating the withdrawal order. 1/

On May 21, 1982, the Chief Administrative Law Judge issued an order dismissing the UMWA's notice of contest. 4 FMSHRC 921 (May 1982)(ALJ). The judge concluded that the UMWA does not have a statutory right under the Mine Act to contest the vacation of the withdrawal order. We agree.

1/ The Saginaw Mining Company did not contest any of the Secretary's actions nor did it intervene in this case.

Section 105(d) of the Act sets forth the various rights that operators and miners have with respect to initiating Commission review of Secretarial enforcement actions. It provides, in part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification and the Commission shall afford an opportunity for a hearing....

30 U.S.C. § 815(d) (emphasis added).

Section 105(d) is clear and unambiguous in setting forth the extent to which miners and their representatives may initiate challenges to the Secretary's enforcement of the Mine Act. UMWA v. Secretary, 5 FMSHRC 807 (CENT 81-223-R, May 11, 1983), pet. for review filed, No. 83-1519, D.C. Cir., May 13, 1983 ("UMWA v. Secretary I"). ^{2/} Concerning withdrawal orders, section 105(d) grants miners the right to contest the "issuance, modification, or termination" of any order issued under section 104. It does not, however, grant miners the right to contest the Secretary's action of "vacating" a section 104 withdrawal order.

We find the omission of the term "vacating" in section 105(d) to be fatal to the UMWA's claim that it has the statutory right to initiate the present proceeding. The "vacation" of a citation or withdrawal order is a term of art under the Mine Act and Congress was fully aware of its discrete meaning. For example, in section 104(h) of the Act Congress provided that "[a]ny citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary, ... or modified,

^{2/} We stated in UMWA v. Secretary I that the language of section 105(d) was unambiguous in holding that miners do not have the statutory authority under the Mine Act to initiate review of citations issued by the Secretary through the filing of a notice of contest. We also noted that our finding section 105(d) to be ambiguous in Energy Fuels Corp., 1 FMSHRC 299 (May 1979) was inapposite to the question of miners' rights to contest under section 105(d), because our holding in Energy Fuels Corp. was directed to the unrelated question of whether an operator may contest a citation prior to the Secretary's proposing a penalty. 5 FMSHRC at 811, n.5.

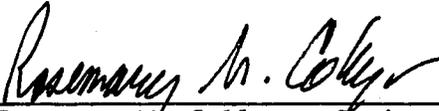
terminated or vacated by the Commission or the courts...." 30 U.S.C. § 814(h) (emphasis added). ^{3/} Furthermore, the latter portion of section 105(d) itself provides that "the Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order ... affirming, modifying, or vacating the Secretary's citation, order or proposed penalty...." 30 U.S.C. § 815(d) (emphasis added). Therefore, if Congress intended for miners to have the right to contest the Secretary's action of vacating a section 104 withdrawal order, that right would have been specifically provided for in section 105(d). In the face of Congress' evident recognition of the distinctions between the issuance, modification, termination and vacation of citations and orders, and its failure to provide a right to contest the vacation of an order, we do not have the prerogative to provide such a right. See UMWA v. Secretary I, 5 FMSHRC at 515. ^{4/}

We emphasize that the failure of Congress to provide for the right asserted here does not leave affected miners without a remedy in the situation presented. Under section 103(g)(1) of the Act miners can request an immediate inspection by MSHA if they have reasonable grounds to believe that a violation of the Act or a standard or an imminent danger exists. A "special inspection" is thereafter required "as soon as possible to determine if such violation or danger exists...." 30 U.S.C. § 813(g)(1). If upon reinspection the inspector determines that no violation exists, miners may seek further Secretarial review of that determination. 30 C.F.R. Part 43. See also, 30 U.S.C. § 813(g)(2).

^{3/} In light of the language of section 104(h) distinguishing between the issuance and the vacation of citations and orders, we reject the assertion that the vacation order should be contestable under section 105(d) because it is also "issued." This approach would render Congress' use of the terms "modification," "termination" and "vacation" surplusage and would ignore the commonly understood discrete meanings of the terms.

^{4/} We note that neither party has cited any legislative history directly bearing on the asserted right, nor have we discovered any.

Accordingly, we hold that under section 105(d) of the 1977 Mine Act miners and their representatives do not have statutory authority to contest the Secretary's action of vacating a section 104(d)(1) withdrawal order. ^{5/} The judge's order dismissing the UMWA's notice of contest in this case is, therefore, affirmed.


Rosemary M. Collyer, Chairman


Richard V. Backley, Commissioner


Frank R. J. Strab, Commissioner


L. Clair Nelson, Commissioner

^{5/} The present case involves the interpretation of section 105(d) of the 1977 Mine Act. The decision in Eastern Associated Coal Corp., 4 IBMA 298 (1975), addressed the Board of Mine Operations Appeals' interpretation of section 105(a)(1) of the 1969 Coal Act. The sections are not identical and the rights created by each are, quite simply, different. Therefore, the dissent's extensive reliance on the Board's decision in Eastern is misplaced. Furthermore, Eastern directly concerned the continued viability of an operator's challenge to a withdrawal order that subsequently had been vacated by the Secretary. The essential holding in Eastern was that under the 1969 Act the Secretary could not extinguish rights to review of an underlying order by the expedient of vacating the order. Eastern did not present any challenge to the vacation order itself and, therefore, the Board's comments as to the reviewability of vacation orders under the 1969 Act was dicta. Nor is any issue presented as to the reviewability of a unilateral attempt by the Secretary to vacate a citation or order after a proper notice of contest triggering Commission jurisdiction is filed. See, e.g., Climax Molybdenum Co., 2 FMSHRC 2748 (October 1980), aff'd, No. 80-2187, 10th Cir., March 21, 1983; Kocher Coal Co., 4 FMSHRC 2123 (December 1982).

Commissioner Lawson dissenting:

The reasoning of the majority in this case substantially parallels that of its opinion in UMWA v. Secretary, 5 FMSHRC 807 (May 11, 1983), pet. for review filed, No. 83-1519, D.C. Cir., May 13, 1983). I dissent here also, for reasons similar to those expressed by me in that case.

As the majority has conceded, the miner or his or her representative can contest "the issuance, modification, or termination of any order issued under section 104." Slip op. at 2. It does not follow that, under section 104(h) of the Act, which authorizes the Secretary, the Commission or the courts to modify, terminate or vacate a citation or order, that Congress must have intended to distinguish between "vacation" and "termination" of an order.

It is unquestioned that an adversely affected miner can initiate review of the vacation of any order by the Commission in the Court of Appeals. 1/ Since those Commission orders are subject to review, Congress could hardly have intended to provide insulation from review for the Secretary from his vacation of orders, nor does the language of the statute preclude such challenge.

Miners are affected no differently by a "terminated" or a "vacated" withdrawal order--the protection mandated by the Act vanishes with the issuance of such an order. In this case, the UMWA asserts that the Secretary's inspector(s) improperly conducted this mine roof inspection. Roof falls in underground mines are and have been the leading cause of mine deaths for many years. 2/ The majority would nevertheless deny review of vacated, but not terminated orders. For purposes of review, and more importantly, protection of the miner, I find no definitional distinction between termination and vacation of an order. Indeed, as the Board of Mine Operations Appeals held in Eastern Associated Coal Corp., 4 IBMA 298, 304 (1975):

Insofar as the right of review is concerned, vacating an order has no more implication than the termination of an order. For review purposes, a vacated order is a terminated order. Id at 306.

1/ "Any person adversely affected or aggrieved by an order of the Commission issued under this Act may obtain a review of such order in any United States Court of Appeals..." 30 U.S.C.A. 816(a).

2/ Indeed, fatalities as the result of roof falls between January 1 to June 4, 1982 had dramatically increased; twenty-nine miners died during that period, compared with nine deaths in 1981, and twelve deaths in 1980 for the same time period. Daily Fatality Report, U. S. Dept. of Labor, MSHA, June 4, 1982 and June 4, 1980.

An example makes clear that the majority's view fails to conform to either the language or the purpose of the Act. Under the Act a miner can rely upon the protection of a withdrawal or other protective order for thirty days, with no need to seek review thereof during that period. However, the reversal of Eastern (*supra*), will now permit the Secretary to vacate an order on the thirty-first day, and thus extinguish the right of the miner to seek review of the order. The Secretary's BMOA in Eastern, however, recognized the problem presented and protected this review for both the miner and the operator:

Section 105(a) of the Act grants both the operator and representative of the miners the right to seek review of any order or its modification or termination, issued pursuant to section 104. We hold that this right of review must be safeguarded and cannot be frustrated by unilateral action of MESA. In the instant case vacation of the Order, as defined by MESA, would deprive both the operator and the representative of miners of any opportunity to seek Secretarial review of the validity of a section 104 withdrawal order as and when issued or the validity of a subsequent order modifying or terminating such Order. We cannot be unmindful of the consequences which flow from the issuance of an order of withdrawal under section 104 of the Act, particularly as seen in the provisions of sections 104(c) and 110 of the Act, as well as the immediate loss of production to the operator, whether or not issuance of the order was improvident. We believe such action and any subsequent action by MESA with respect to that order, be it modification, termination, or vacation, is reviewable pursuant to section 105 of the Act, if such review is timely sought by the operator or representative of the miners. We do not hold that MESA has no authority to vacate an order, for in many instances this may be the most expeditious method of accomplishing a desired result and it may in many instances be the preferable remedy for the operator. What we do hold is that MESA by "vacating" an order may not thereby deny an operator or representative of miners the right of review of the basic order or any subsequent orders.

That a mistaken or improper vacation of a withdrawal order could be fatal or crippling to a miner is so evident as to need no embellishment. It is noteworthy that three different mine inspectors were involved in this case in issuing, terminating, and finally vacating the withdrawal order now under consideration. The suggestion that foreclosing review of "vacated" orders "does not leave affected miners without a remedy" (slip op. at 3) derives from sections 103(g)(1) & (2) of the Act. These statutory sections, unfortunately, merely provide for after-the-fact "informal" review by the Secretary of his own actions, with no appeal therefrom. This obviously fails to provide a meaningful, much less independent, adjudicatory hearing, since the Secretary will be reviewing his own decision, and reversal thereof is not realistically to be anticipated. Section 103(g)(1) & (g)(2). This internal administrative review

by the Secretary (apparently largely unutilized), thus fails to provide the due process so evidently required by the law and the balance of the Act. As this Commission noted in Sec. ex rel. Gooslin v. Kentucky Carbon, 3 FMSHRC 1707, 1712 (July 1981), in providing an operator with review and a hearing under section 105(c)(2) as a matter of due process, even though the statute was silent as to any right therefor:

Due process contemplates fundamental fairness. As the Supreme Court stated in Boddie v. Connecticut, 401 U.S. 371 (1971):

What the Constitution does require is 'an opportunity ... granted at a meaningful time and in a meaningful manner,' ... 'for [a] hearing appropriate to the nature of the case,' ... [401 U.S. at 378; Court's emphasis; citations omitted.]

See also, e.g., Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

Perhaps of even more importance, the majority's acceptance of the Secretary's views in this case permits him to frustrate the miners' challenges to section 104 withdrawal orders simply by vacating these-- or any other--orders rather than terminating or even modifying such, thus evading any challenge by the miners' under section 105(d). It can hardly be maintained that modification of an order, which obviously results in at least some remaining protection for the miner, is more review worthy than vacating of the order. That is nevertheless the consequence of the position adopted by the majority today.

Nor would allowing miners' representative to contest the vacation of a section 104(d)(1) order undermine the Secretary's prosecutorial discretion, since 105(d) already allows miners to challenge other Secretarial enforcement actions, (e.g., the "issuance, modification or termination" of section 104 withdrawal orders; see also section 107(e)(1)). Furthermore, the logical corollary to the miner's right to contest the issuance of a section 104 order, is the right to contest the vacating of that order. Perhaps the miners' representative in this case should have labeled its notice of April 9th as a contest of the termination of the challenged order, given the semantic analysis of the majority. Indeed, that is the reality of the situation presented. For, as stated in the dissent to UMWA v. Secretary I, (supra):

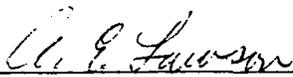
The adversary system is, in my view, entitled to at least the same measure of respect as reliance on "prosecutorial discretion" and indeed presents preferable possibilities for the parties to challenge either abusive enforcement or lack of enforcement. For that reason, too, permitting the miner or miner's representative to fully participate and litigate issues such as those presented in this case appears to be far more in accord with the purpose and intent of the Act, certainly as reflected in the legislative history, than the denial to the most affected parties, the miners, of the right to review Secretarial action or inaction even if limited to an abuse of discretion. Miners, too, must be assured that the Secretary is in compliance with the Act.

The Secretary here maintains that he erred in issuing the challenged withdrawal order, but that his order recognizing that "error" is beyond review. The vacation objected to by the petitioner herein was accomplished by the issuance of the Secretary's order of March 19, 1982, pursuant to the authority of section 104(h) of the Act. And, as is undisputed, a miner's representative can contest the issuance of any order issued under section 104. This construction is clearly supported by the language of the statute; indeed, neither the majority nor the Secretary contend to the contrary, and is further confirmed by the issuance of that vacating order on MSHA Form 7000-3a, designating the action taken as an "order."

This withdrawal order was issued on March 15th, terminated on March 16th and vacated on March 19th. The miners' notice of contest was filed on April 9th--timely as to the issuance, termination and vacation of the involved order under section 105(d). This Commission should therefore construe this notice of contest so "as to do substantial justice", allowing that contest notice as a challenge to the termination of the withdrawal order. 3/

Finally, since section 105(d) does not preclude a miner's contest of a vacation of an order, interpreting that section as providing that for review purposes a vacated order is a terminated order would be consistent with the remedial and participatory enforcement pattern of the Mine Act, which encourages miners to participate in safety and health matters. 4/

I would, therefore, for the reasons expressed both herein and in my dissent in UMWA v. Secretary I, reverse the decision below and remand for consideration on the merits of the issues presented by the Secretary's vacation of this withdrawal order.



A. E. Lawson, Commissioner

3/ Rule 8(f) of the Federal Rules of Civil Procedure provides:

CONSTRUCTION OF PLEADINGS. All Pleadings shall be so construed as to do substantial justice.

See the Commission's Rules of Procedure 29 C.F.R. 2700.1.

4/ There is substantial precedent construing the 1969 Act--a fortiori applicable to the 1977 Act--which holds that between two possible interpretations of the Act, the one that promotes safety must be preferred. See District 6, UMWA v. IBMA, 562 F.2d 1260, 1265 (D.C. Cir. 1977). Accord, UMWA v. Kleppe, 532 F.2d 1403, 1406 (D.C. Cir. (1976), cert. denied, 429 U.S. 858 (1976); Munsey v. Morton, 507 F.2d 735 (D.C. Cir. 1978); Phillips v. IBMA, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). It follows that the interpretation of section 105(d) that best promotes safety is one that permits miner participation.

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of connecting the discharged batteries to the charger when Parks informed him that the batteries connected to the scoop were on fire. Thacker threw the circuit breaker on the scoop and went to get Pratt, who was at the supply house.

Pratt approached the batteries, and when he came within approximately 35 feet of them, he saw flames coming from under the lid of the battery case. He then turned back to the supply house. Pratt also prevented from approaching the fire a miner who came out of the supply room with a fire extinguisher. Pratt testified that he feared the battery would explode and believed any attempt to extinguish the fire would be futile unless the lid to the battery case were unbolted and removed. Pratt had seen the results of the explosion of a car battery at his previous place of employment and feared this battery would explode and would throw shrapnel and acid over him. He thought an explosion would have killed him. Pratt said there was nothing available in the area to neutralize acid.

After the fire went out, Pratt took the lid off the battery casing and examined the batteries. He determined that the batteries themselves had not been on fire and concluded that hydrogen gas had been burning. Pratt stated that the "cat heads," or electrical connectors to the batteries, were not damaged but that the insulation on wires connected to the cat heads was damaged. Thacker exchanged the batteries involved in the fire for freshly charged batteries and informed the shift boss, E. C. Slone, of the fire. Thacker and Pratt went into the mine and completed the working shift.

Another employee of River Hurricane, Goody Deskins, testified that he helped James Slone, the chief electrician, repair the batteries. The receptacles were replaced, as well as part of the cable to them. Insulation had burned off one of the cables, but there was no evidence of a fire on top of the battery cells themselves. James Slone also testified that the fire was in the cables (or leads) and that the "leads and the female connector" were replaced.

When the shift was over the next morning, August 20, James Slone discussed the fire with Pratt. E.C. Slone (no relation to James Slone), the third shift foreman to whom Thacker reported the fire, was present during the conversation. This conversation is critical to the case and the persons present testified consistently on its content. James Slone asked Pratt why he had not attempted to put out the fire. Pratt explained that the batteries had just been charged and he was afraid they might explode. James Slone tried to tell Pratt how to put out such a fire, generally stating that he would have made some attempt to cut the bolts on the lid and use a fire extinguisher or rock dust. James Slone asked Pratt what he would do if such a fire happened again, and Pratt indicated he would respond in the same manner. James Slone then stated that if Pratt would make no attempt to extinguish such fires, then he had no use for Pratt, and the conversation ended. Pratt was discharged.

An expert on batteries, E. R. Eddins, testified at the hearing as to the dangers of fires such as the fire on August 19, and the preferred methods of extinguishing such fires. Eddins testified that because there is nothing combustible in the cable or receptacle, very hot temperatures are required before cables will burn or melt. He stated the odds against such an

occurrence are high. Eddins further testified that hydrogen, an explosive gas, is formed by charging and discharging batteries. Hydrogen explodes on the first spark that contacts it; generally it does not burn. After the initial explosion, if any, the hydrogen is gone and there can be no more explosions. If an explosion occurs, according to Eddins, the main danger is from acid splashing. He testified that with the concentrations of acid found in batteries some eye damage--not permanent--might result from acid splash, and splashed cotton clothing would "dissipate" when first washed. He further testified that, if the lid were on the batteries when hydrogen exploded, nothing would happen because the explosion would be contained under the lid. He characterized the hazards from lead acid batteries as "minimal." He also stated that explosions could be prevented by washing the batteries.

Eddins further stated that the witnesses appearing prior to him at the hearing, Pratt and James Slone, were "not totally up to date" on the problems in handling battery fires. He asserted that the best means of extinguishing such a fire is to throw an entire 50-pound bag of rock dust on the fire. He stated rock dust is better than a fire extinguisher because it smothers the fire, but an extinguisher could be used in order to get close enough to throw rock dust.

Dan Grace, an expert on fire suppression systems, also testified that a spark or fire will set off hydrogen gas immediately. He stated that the danger from such an explosion is greater where the gas has no place to go, as in a well-enclosed 12-24 volt automotive battery. He stated the trays in the scoop were intentionally not well-sealed, and allowed air movement.

Mine Safety and Health Administration Inspector Lycans testified that with cables arcing, and a battery short-circuiting, he "just can't see approaching it." He recommended letting the fire burn itself out, and explained that batteries are flame resistant and probably won't be ruined. Lycans further stated that he would object if he saw someone run up to a battery fire to put it out with an extinguisher, unless the person remained 10 to 15 feet away. He said he would consider opening the battery lid foolish, and serious enough for the issuance of an imminent danger withdrawal order. Lycans agreed with the expert witnesses that hydrogen explodes on the first spark and stated that if there are flames between the top of the battery and the underside of the battery tray lid, it is a "safe assumption" that there is not sufficient hydrogen for an explosion.

The record is replete with references to similar fires and battery problems at River Hurricane. Deskins reported he had stopped "arcing" and a "frying sound" before a fire started on a similar battery two or three weeks before the hearing. Thacker testified concerning two fires on scoops which extinguished themselves, and estimated that in the year before the hearing he had seen five fires, including the one in question and three in the face area. Vinton Adkins stated that in his 12 or 13 years as a miner, he had seen 30 or 40 fires like the one that occurred in August 1980 and had experience with fires "a couple or three times" after the one on August 19. Finally, Raleigh Hunt testified that he put out a fire 2 or 3 weeks before the fire on August 19, 1980.

Adkins, E.C. Slone, and Thacker, as well as Pratt, testified they had not been trained, prior to August 19, 1980, on how to extinguish battery fires. Thacker testified he was later taught to use the scoop's fire suppression system, to cover the fire with rock dust, or to use a fire extinguisher. The expert on the scoop's fire suppression system, Dan Grace, testified that the fire suppression system does not cover the battery trays.

The Commission judge found two instances of protected activity: Pratt's refusal to fight the fire on the evening of August 19 and his refusal the next morning to agree to attempt to extinguish future fires under similar circumstances. 3 FMSHRC at 2369 (Findings 21, 25). He found that Pratt had a reasonable, good faith fear as to his safety justifying his first refusal, and that his reasonable fears were not allayed by the operator's explanation to him as to how to proceed in the future. In particular, he found that Slone's explanation to Pratt the morning after the fire lacked factual and technical understanding of the hazards involved. Thus, he determined that River Hurricane discharged Pratt for activity protected by the Mine Act. Based on the parties' stipulations, the judge awarded Pratt \$3,348.00 in back pay. He also awarded interest and assessed a penalty against the operator for the violation of the Act. 3 FMSHRC at 2370. No issues are raised on review concerning the amount of the award to Pratt or the penalty. 2/

2/ We note that the judge issued a bench decision at the hearing on October 8, 1981, followed by his almost identical written decision on October 19, 1981. In his written decision, the judge stated, "Any deviations in verbiage [between the bench and written decisions] are due to the unavailability of the transcript and extemporaneous interpolations that are not reflected in retained notes." 3 FMSHRC at 2366 n.l. The judge's statement shows that he failed to comply with Commission Rule 65(a), which states in part:

If a decision is announced orally from the bench, it shall be reduced to writing after the filing of the transcript.

29 C.F.R. § 2700.65(a) (emphasis added). Issuing decisions before a transcript is available can hinder the parties in attempting to file a satisfactory petition for discretionary review. Section 113(d)(2)(A)(iii) of the Mine Act requires that issues raised in petitions for review "shall be supported by detailed citations to the record when assignments of error are based on the record" This is not possible if the 30-day statutory period for filing a petition for review expires before the transcript is available.

In this case, however, the transcript was available November 2, more than 2 weeks before the petition for review was due, and counsel for River Hurricane cited to it in his petition. Further, the operator did not object to the judge's premature issuance of his decision. Accordingly, although we disapprove the judge's issuance of a decision prior to the filing of the transcript, we find his error in this case to be harmless.

We address preliminarily two of River Hurricane's arguments. First, River Hurricane argues that any standard used to assess the legitimacy of a miner's work refusal must be an objective one supported by ascertainable evidence. Previously we have discussed the nature of the proof necessary to support a miner's perception of a danger. In Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803, 809-12 (April 1981), and Haro v. Magma Copper Co., 4 FMSHRC 1935, 1944 (November 1982), we "rejected a requirement that miners who have refused to work must objectively prove that hazards existed Rather, we adopted 'a simple requirement that the miner's honest perception be a reasonable one under the circumstances.'" Haro, 4 FMSHRC at 1843-44, quoting Robinette, 3 FMSHRC at 812. For the reasons stated in those decisions, we reject the operator's arguments for a more stringent standard in this case.

Second, the operator asserts that the Commission should articulate a standard as to how severe a hazard must be in order to trigger a miner's right to refuse to work, citing Consolidation Coal Co. v. Marshall, 663 F.2d 1211, 1226 (3d Cir. 1981) (Sloviter, J., dissenting). We have declined to articulate such a standard in the past and we decline again to do so here. We continue to believe that, insofar as this adjudicatory Commission is concerned, gradual development of the law in the cases contested before us is the appropriate vehicle for molding this important right. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2793-94 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, supra; Robinette, at 809 n.12, 816. We now turn to the central issue in this case.

River Hurricane does not contend that the judge erred in finding that Pratt's refusal to fight the battery fire on August 19, 1980 was protected activity. The focus of this case, therefore, is not on the actual fire, but on the conversation the next morning, and the nature of Pratt's refusal during that conversation to fight fires in the future.

The right to refuse to work has as a predicate a miner's good faith, reasonable belief in a hazardous condition. Pasula, supra; Robinette, supra. A good faith belief "simply means honest belief that a hazard exists." Robinette, at 810. This requirement's purpose is to "remove from the Act's protection work refusals involving frauds or other forms of deception." Id. The judge found that Pratt refused "to agree to attempt to extinguish a fire in or around lead acid batteries under circumstances similar to those that occurred on August 19" and that the refusal "was made in a good faith, reasonable belief that a serious risk of injury from an exploding battery existed." 3 FMSHRC at 2369 (Finding 25). The judge's description of Pratt's refusal is supported by substantial evidence. River Hurricane does not suggest that fraud or deception motivated Pratt. Rather, River Hurricane urges that the judge erred in finding Pratt's refusal reasonable both because the hazard was not serious enough to warrant a work refusal, and because Pratt continued to refuse to work after James Slone attempted to explain what should be done.

The perception of a hazard is viewed from the miner's perspective. Robinette, supra. Haro, 4 FMSHRC at 1943-44; Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983). Pratt

had reason to believe the battery could explode because he had seen the results of the explosion of a car battery. Pratt feared an explosion of the scoop batteries would throw shrapnel and acid over him and might kill him. The hazard Pratt feared was severe enough to warrant his work refusal. Thus, the judge's finding that Pratt reasonably believed in a serious risk of injury from an exploding battery is supported by substantial evidence. 3 FMSHRC at 2369 (Finding 25). Once a reasonable good faith fear in a hazard is expressed by a miner, the operator has an obligation to address the perceived danger. See Bush, 5 FMSHRC at 998.

In this case the operator's explanation or attempt to address Pratt's fears did not include specific information or support as to why fighting the battery fires may not have been as dangerous as Pratt believed. Rather, the record amply supports the judge's conclusion that James Sloan's "explanation and instructions to Mr. Pratt ... concerning how to cope with fires on battery trays was lacking in technical and factual understanding of the hazards and failed to allay Mr. Pratt's reasonable fears." 3 FMSHRC at 2269 (Finding 24). 3/ Slone did not know that an explosion was unlikely or that if an explosion did occur it would probably be contained within the battery casing. This technical information was only developed at the hearing. Slone did not present such information to Pratt. Rather, he simply attempted to tell Pratt how he thought Pratt should proceed to put out such a fire. Further, Slone's testimony as to his instructions was sorely lacking in detail and not entirely consistent with the safe practices testified to by Eddins at the hearing. Thus, we conclude that the judge's finding that Slone did not provide a response sufficient to allay the reasonable fears expressed by Pratt is supported by substantial evidence. 4/

3/ We agree with the judge's characterization of Slone's "instructions". At the hearing Slone testified as follows:

I tried to--I asked him why he didn't make some attempt to extinguish the fire. I asked him didn't, you know--or I tried to explain to him what he could do, you know, that he could--we have got bolt cutters and we have got fire extinguishers, anything, you know, to make an attempt to extinguish a fire, instead of, you know, letting the company loss--or damage the company property and so forth. Several different things he could have done.

Mr. Pratt told me that he had no intention of fighting any fire in such a manner as that, or-- and I told him I would have no further use for anybody like that in his position.

Tr. 171.

4/ River Hurricane also asserts that in the crucial conversation of August 20, Pratt not only refused to fight such fires, but also refused "to undertake schooling and training with regard to combating and extinguishing such electrical fires." The operator asserts that even if Pratt engaged

(Footnote continued)

In sum, we find that substantial evidence of record supports the judge's findings that Pratt had a good faith, reasonable belief that fighting the battery fire at issue was hazardous, that the operator failed to address adequately Pratt's reasonable fears of the perceived hazard, and that the operator violated section 105(c) of the Mine Act by discharging Pratt for his refusal to perform a task still reasonably believed by him to be dangerous. 5/

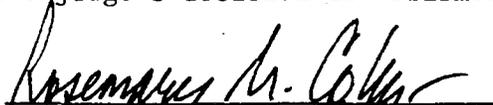
Finally, although we affirm the judge's finding as to the protected work refusal and illegal discharge, we find it necessary to strike two portions of the judge's decision as not supported by the record. First, in Finding 18 the judge stated that Slone's discharge of Pratt was "largely an overreaction to Mr. Pratt's provocative rejoinder and the long simmering personality conflict between the two men." We can find no record support for this characterization of the cause of the discharge and reject it as unsupported speculation. Second, in paragraph 4 of his enforcement order the judge ordered the operator to "cease and desist from any retaliation or other disciplinary action against miners who refuse to comply with the company policy that requires miners to assume the risk of injury in order to suppress electric fires that pose no hazard other than to equipment." 3 FMSHRC at 2370. Based on our review of the record, we conclude that the requisite support for this finding concerning an asserted company "policy" is lacking and that the cease and desist order is therefore unwarranted. Accordingly, we strike Finding 18 and paragraph 4 of the enforcement order in the judge's decision.

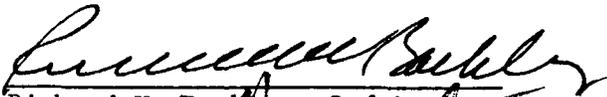
fn. 4/ continued

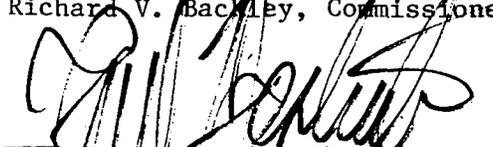
in protected activities, he was legally discharged for the unprotected activity of refusing to accept training. The operator's characterization of the pivotal conversation as including an offer and refusal of "schooling and training," in "combating" electrical fires is wide of the mark. Slone's vague instructions described above did not constitute such an offer and, therefore, the refusal alluded to did not occur.

5/ We emphasize that the fire that occurred was an equipment fire on the surface that posed no threat to the safety and health of other miners if allowed to run its course. We also emphasize that we believe the judge found, and the evidence supports, that Pratt's prospective refusal to fight fires was directed at similar fires in similar circumstances, i.e., surface fires posing no danger to other miners.

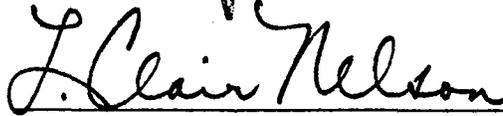
As modified by this decision, the judge's decision is affirmed.


Rosemary M. Collyer, Chairman


Richard V. Buckley, Commissioner


Frank P. Jastrab, Commissioner


A. E. Lawson, Commissioner


L. Clair Nelson, Commissioner

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SEP 2 1983

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

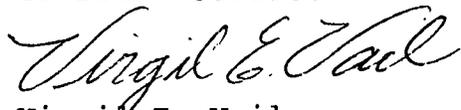
v.

CALVIN BLACK ENTERPRISES,
Respondent

: CIVIL PENALTY PROCEEDINGS
:
: Docket No. WEST 80-6-M
: A/C No. 42-00784-05001
: Docket No. WEST 80-81-M
: A/C No. 42-00550-05001 R
: Docket No. WEST 80-82-M
: A/C No. 42-00784-05002 R
:
: Blue Lizard and Markey Mines

CORRECTION TO DECISION
ISSUED AUGUST 16, 1983

On page 8, under paragraph titled "ORDER", the citation No. "336697" appearing in line 2 is corrected to read "336696."



Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 2 1983

EMERY MINING CORPORATION, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 82-200-R
: Order No. 2073785; 8/13/82
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Little Dove Mine
ADMINISTRATION (MSHA), :
Respondent :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 83-18
Petitioner : A.C. No. 42-01393-03504
v. :
: Little Dove Mine
EMERY MINING CORPORATION, :
Respondent :

DECISION AND ORDER

Before: Judge Broderick

On July 25, 1983, I issued an order consolidating the above proceedings. I also denied Emery's motion for summary decision and granted the cross motion of the Secretary for limited summary decision. I retained jurisdiction to determine whether the violation was significant and substantial, and to assess a civil penalty. I directed the parties to attempt to stipulate the facts necessary for me to make such determinations.

On August 29, 1983, the parties filed a stipulation of facts with a computer printout of Emery's history of previous violations.

Based on the stipulation of facts, I conclude that Respondent is a large operator (its annual production is approximately 4 million tons). Its history of previous violations is not such that a penalty otherwise appropriate should be increased because of it.

The stipulation states that on August 12, 1982, during the 4:00 p.m. to 12:00 midnight shift coal was being produced and the crew unknowingly came within approximately 1 foot of breaking through to the abandoned workings of an adjacent mine. On the next shift, a maintenance shift, a breakthrough occurred either because of natural forces or as a result of the cleanup operations. The breakthrough was approximately 10 to 12 inches and it released a quantity of carbon dioxide gas into the working section. This was discovered on the preshift examination prior to the 8:00 a.m. shift on August 13, 1981. No miners were injured or killed as a result of the breakthrough.

I have previously concluded that the facts do not show that the violation was the result of Emery's unwarrantable failure or negligence. I further conclude that the evidence does not show that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard. I further conclude, however, that the violation was moderately serious, since it could have resulted (though it was unlikely to have resulted) in injuries to miners.

Based upon the above findings and conclusions, I conclude that an appropriate penalty for the violation is \$75.00.

ORDER

Therefore, IT IS ORDERED that Emery Mining Company within 30 days of the date of this decision pay the sum of \$75 as a civil penalty for the violation found in my order of July 25, 1983, and, subject to such payment, the civil penalty proceeding is DISMISSED.

IT IS FURTHER ORDERED that in the notice of contest proceeding, the citation is AFFIRMED and the proceeding is DISMISSED.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SEP 6 1983

KENNETH A. WIGGINS : DISCRIMINATION PROCEEDING
Complainant :
: Docket No: WEVA 82-300-D
: HOPE CD 82-32
v. :
: Keystone No. 1 Mine
: :
EASTERN ASSOCIATED COAL CORP, :
Respondent :

DECISION ON THE MERITS

Appearances: William B. Talty, Esq., Talty and Carroll,
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the Claimant
Mark C. Russell, Esq., Jackson, Kelly, Holt
& O'Farrell, P.O.B. 553, Charleston, West
Virginia for the Respondent

Before: Judge Moore

On April 9, 1982, Kenneth A. Wiggins, an underground supervisor, was discharged by Eastern Associated Coal Corporation. According to Mr. Fraley, the superintendent, Wiggins was discharged because he lied about the progress his crew had made toward abatement of a citation that had been issued for coal accumulations along a beltline. Mr. Fraley also thought that Mr. Wiggins had lied about an earlier incident which will be discussed later.

Jacky Jackson may well have been a key witness in this case, had he been called. He was the assistant general mine foreman. He was directly under Mr. Fraley in the chain of command and he is the one with whom Mr. Wiggins had most of his problems. It was he who allegedly made statements to Mr. Wiggins that were critical of Mr. Wiggins because of activities which Mr. Wiggins took on behalf of safety.

Lying about the condition of a mine is not a protected activity and if that is the reason for the discharge of Mr. Wiggins he can not prevail. If, however, the "lying incident" was a trumped up charge and Mr. Wiggins was in fact fired for his earlier safety concerns then he has a legitimate case.

Respondents exhibit 5 contains excerpts from respondents discharge and discipline procedures. Insofar as salaried employees are concerned, for the first offense there should be a verbal reprimand and warning. For the second offense there should be a written warning in the presence of a witness and a written warning is to be signed by both the employee and the witness. The third offense can result in "discharge if the situation warrants." This procedure is known as the "progressive disciplinary steps". Some offenses are considered so serious that the progressive disciplinary steps are bypassed.

A list of the offenses which would require immediate discharge appears on Page 66 of the manual, but on the preceding page and also on Page 72 it is stated that the offenses which could result in immediate suspension are not limited to the 8 listed on page 66. Lying is not one of the reasons listed on page 66. Respondent argues that the words "not limited to" means there are other offenses which would justify immediate suspension. But if respondent can add any offense it desires to the list then there is no point in having the list in the first place. I find that respondent did not follow its published discharge procedures in firing Mr. Wiggins, but regardless of whether lying is sufficiently serious to justify an immediate discharge, failure to follow the published procedures is not an act of discrimination.

On March 26, 1982 Mr. Wiggins was working a shift that began at 3 P.M. and ended at 11 P.M. It was a production shift, meaning that he was expected to produce coal during that shift. According to Mr. Wiggins, and the testimony was undisputed, the belt broke about 9 P.M. and there was a large accumulation of spilled coal along the No. 1 belt. Because he knew that he would have to be gone for a considerable time repairing the belt, he made his ventilation checks at the faces (required every 2 hours) and found that all faces had insufficient air. Before he took half of his crew with him to repair the belt he instructed the roof bolters to repair the check curtain and to check the ventilation to make sure it was sufficient in the faces. They were then given some other assignments to do before beginning roof bolting.

It took until almost the end of the shift for Mr. Wiggins and half of his crew to repair the belt, and shovel the coal on to it. And when he got back to the face area he checked all the faces and found good roof and sufficient air. He then left the mine and filled out the form describing the accomplishments made during this shift. (Exhibit B.) 1/

1/ Complainants exhibits are marked with letters and respondents exhibits are marked with numbers.

When he next saw Jacky Jackson and was questioned about why he bolted only 1-1/2 places he explained the problems including the lack of ventilation and Jacky Jackson said "you're never to shut a roof drill down on a continuous mine section; that mine is usually waiting on the roof drill." (Tr. 83). As a result of the incident Mr. Wiggins received a notice of improper action (complainant's exhibit C) which complained because he "shut bolter down at 9 P.M." This is one of the incidents that Mr. Fraley said he thought that Mr. Wiggins was lying about. There were 8 men underground with Mr. Wiggins that night, and none were called to testify, nor was there any explanation as to why they could not be reached by subpoena. Jacky Jackson could have denied that he made the above-quoted statement, but as stated earlier he was not subpoenaed either. According to Mr. Fraley, Mr. Jackson had been his number one assistant but when Jackson decided to leave, Fraley did not ask why he was leaving or where he was going.

Respondents exhibit 3 is the "daily and on-shift report mine foreman or assistant". Among other things it shows the times when methane examinations were made in the faces of the 5 entries involved, as well as the methane content discovered. The exhibit shows no methane found but checks made at regular intervals, and it is obvious that if Mr. Wiggins had made the methane checks in the faces at the exact times indicated on the exhibit, Mr. Wiggins' statements concerning his activity on that shift could not be true. His testimony is that the times are approximate and that's the way all foremen fill out their on-shift reports. Mr. Larry, who makes up the State's mine foremen examinations and administers the test testified that the exact time should be used on the forms represented by respondent's exhibit 3. Two other witnesses, however, testified that at this mine all foremen used approximate times and all entries were in regular intervals such as is shown on Mr. Wiggins' report. With the work that a foreman has to do it would be impossible to examine the No. 1 room at exactly 4:05, examine it again at exactly at 6:05, again at exactly at 8:05 and again at exactly 10:05. The same sequence is shown for all 5 rooms or faces. And all of these reports have to be approved by the mine foreman or mine manager. Respondents exhibit 3 may indicate a violation of a safety standard but it does not destroy Mr. Wiggins' credibility. I find that Mr. Wiggins failure to live up to expectations insofar as roof bolting was concerned, was caused by his concerns for safety and that the notice of improper action issued because of this protected activity was an act of unlawful discrimination.

About 3 weeks prior to the above incident Mr. Wiggins had a discussion with Jacky Jackson concerning the safety of certain stoppings that had been constructed. The stoppings had been leaking and cinder blocks had been falling out. At one point a stopping collapsed and fell on the portobus that Mr. Wiggins' crew was in. The stoppings were made by piling cinderblock on top of each other with no cement or mortar in the joints. He later told Jacky Jackson that he had better rebuild the stopping in accordance with the law (substantial construction) and Jackson just looked at him and said nothing. The stopping was rebuilt the same way it had been constructed in the first place. While this incident illustrates a disagreement between Mr. Wiggins and management concerning matters of safety it does not in itself constitute an act of unlawful discrimination. After the incident involving the broken belt and lack of ventilation, Mr. Wiggins was transferred to the third shift which is a non-production shift. During the week of his discharge he was told to go to a certain section and bolt as many places as he could, service the equipment and supply the section so it would be ready for the day shift (a production shift). When he got to the area in question he found two mechanics working on the cable reel of the roof bolter, (sometimes referred to as the roof drill). The reel had "burned up" on an earlier shift so that it was no longer working. Mr. Wiggins explained that by "burned up" he did not mean that the cable burned but that the inner workings that drive the reel so that it automatically takes up cable when the drill is backing, had burned up. The roof bolter had been used by an earlier shift by bypassing the cable reel and attaching the cable through the sides of the connector case. "It is not permissible and if they happened to be operating that machine and ran into an accumulation of methane, it could easily be ignited." (Tr. 102).

Mr. Wiggins was unwilling to have his men operate the drill in that condition. The cable leads were there, and in his opinion there was an electrical shock hazard.

Mr. Wiggins and his crew did other maintenance work while the roof bolter was being repaired. It took about half the shift to repair the roof bolter and after that Mr. Wiggins and his crew bolted until quitting time. When he got on the surface Mr. Jackson questioned him about the fact that he had not finished the bolting he was supposed to do. Mr. Wiggins explained the condition of the roof bolter. Mr. Jackson's response was to shake his head and turn away and leave. While he did not specifically so state, Mr. Wiggins apparently interpreted this as a rejection of his explanation.

On the last shift that Mr. Wiggins worked for respondent before being discharged, Mr. Wiggins was told to take four men to a certain area of the mine and clean the area. A

citation had been issued by a federal mine inspector for accumulations of coal and dust, and the company had been given until 7 A.M. to abate the violation. It is unclear when the citation was actually issued or, which shift, or foreman was responsible for the condition that had developed in the designated area. When Mr. Wiggins and his crew saw the area there was no doubt in their minds as to why the citation had been issued. It was a clear violation of the clean-up regulations.

Before the end of their shift Mr. Wiggins and his crew had loaded 3-1/2 cars of coal and debris. In order to get the men out of the mine by 8:00 A.M. it was necessary to leave the section at 7:00 A.M. And at 6:00 A.M. or 6:05 A.M. Mr. Wiggins informed Mr. Jackson by phone that he would not be able to get the place ready. Mr. Harris, the shift foreman, had also informed Mr. Jackson at around 6:00 A.M. that the place would not be ready by the end of the shift. Mr. Dunavant overheard the 6:00 A.M. call from Mr. Wiggins to Mr. Jackson and said that Mr. Jackson did not ask Mr. Wiggins to stay over after the shift was over. Mr. Dunavant listened on the phone as he was required to do until at least 6:45 A.M. and he at no time heard Mr. Wiggins tell Mr. Jackson that the place was ready. Mr. Harris claims that at 6:25 A.M. he was listening on the phone and heard Mr. Wiggins say that the place was ready. Mr. Harris got confused about the difference between saying a place was ready, and it would be ready, and I am not sure which he meant. According to Mr. Fraley at 6:15 A.M. Mr. Jackson told him, Mr. Fraley, that the place would not be ready but also said that Mr. Wiggins told Jackson that the place was ready at 6:35 A.M. At 7:15 A.M. while he was on his way out of the mine, Mr. Wiggins again told Mr. Jackson that the place was not ready, that it needed spot-cleaning and rockdusting. I accept this testimony since no one bothered to call Mr. Jackson to refute it. And it does not make sense to me that any foreman, having a good record for working overtime and unexcused absences as Mr. Wiggins has would lie about the condition of the place when he knew the next foreman would be there within the hour, and when he could reasonably expect a federal mine inspector to be there within a short time. Mr. Wiggins was requested to seek to get the miners to work overtime into the next shift but Mr. Wiggins was unsuccessful in attempting to get them to stay.

I also find that he was not asked to stay over even if the miners refused. I also find that Mr. Harris was confused about a telephone call between Mr. Wiggins and Mr. Jackson at 6:25 A.M. He either overheard the 6 or 6:05 call, or the 7:15 call, and if he heard the 7:15 call he was mistaken about whether Mr. Wiggins said the place was ready, would be ready, or would not be ready. When Jackson asked Harris if the place was ready Harris replied "it's ready, Kenny said it's ready". But Mr. Harris was just repeating what he thought he heard Wiggins say to Jackson.

Mr. Harris contradicted himself numerous times during cross-examination; for example, his discussion of respondents exhibit V begins on page 378 of the transcript. 2/. Not only is the testimony contradictory but exhibit V itself which was handwritten by Mr. Harris, contains the following contradictory statement: "Jacky called back into mine and Kenny said belt would not be ready, and he told Kenny to stay over and work until dayshift got there. And Kenny said the belt would be ready."

I find with respect to the events that occurred on the morning of April 8, 1982, that the version of those events as described by Kenneth Wiggins, Fred Powers and Ronny Dunavant is the more reliable. I find that Mr. Wiggins did not report that the belt was ready for inspection. I further find that he and his crew did their best to clean the belt in time, and that the firing was totally unjustified.

Mr. Fraley was the one who made the decision to discharge Mr. Wiggins. Mr. Jackson had recommended a suspension. But Mr. Fraley decided that a discharge was proper. He was told, and I find that he believed, that Wiggins had lied about the condition of the belt. He thought Mr. Wiggins had lied about the ventilation problem of March 26, 1982 which resulted in Mr. Wiggins receiving a "notice of improper action" (plaintiff's exhibit C), and he was unaware, until the trial, of the other 2 events involving some improperly constructed stoppings and the cable reel of the roof bolter. While I have found that Mr. Wiggins was not lying, I also find that Mr. Fraley thought he was.

Although I believe Mr. Fraley's testimony, that he thought that Mr. Wiggins was lying and that he had no knowledge of the other safety related incidents, knowledge of those incidents is imputed to the company by reason of the fact that a foreman was aware of those events. A foreman is a part of "management" and if a company could escape liability by denying that it knew of a foreman's activities, the Act would not work. Mr. Fraley of course, was acting for the company when he discharged Mr. Wiggins and though he made the decision personally, it was nevertheless a company decision. Inasmuch as the notice of improper action issued on March 27, 1982 was in itself an act of illegal discrimination, and inasmuch as that notice, and the events that brought it about, were in part responsible for Mr. Wiggins' discharge, then under the Pasula test Mr. Wiggins established a prima facie case and it then became the burden of Eastern Associated Coal Corporation to show that it would have discharged Mr. Wiggins in any event, even if the events of March 26 and 27, 1982 had not occurred. The company has made no attempt to

2/ The transcript refers to plaintiff's exhibit B. The transcript is replete with such errors. And it is the worst transcript that I have been involved with.

carry this burden and consequently Wiggins must prevail.

All proposed findings inconsistent with the above are REJECTED.

PENDING A FINAL ORDER

The Complainant shall have 15 days from the date of this decision to submit a proposed order granting relief for the violation found above. Respondent shall have 15 days from receipt of the Secretary's proposal to reply.

Charles C. Moore, Jr.
Charles C. Moore, Jr.,
Administrative Law Judge

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Discussion of Required Corrections

The settlement amount given in the preceding paragraph is \$398.84 higher than the total of the settlement penalties which will be obtained by adding the columns of settlement penalties shown on pages 2 through 7 of the joint motion for approval of settlement. The reason that the actual settlement amount is \$398.84 larger than the total amount indicated in the motion is that there are about ten errors in the tabulations shown on pages 2 through 7 of the motion. I considered returning the joint motion to the parties so that they could correct the errors, but I found that all of them are either typographical or inadvertent errors of omission. Therefore, I have corrected the errors and have no reason to believe that the difference in the amounts I am approving in this decision will cause any real concern after the parties have had an opportunity to check the corrections which I have made.

I shall first explain the errors which were made in listing the penalties proposed by MSHA and thereafter I shall explain the errors resulting from the parties' application of a flat 10-percent reduction in all of the penalties proposed by MSHA.

As indicated in the first paragraph of this decision, if the total penalties proposed by MSHA in all 18 cases are added, the result is \$5,521.00, whereas the amount which will be obtained by adding the proposed penalties listed on pages 2 through 7 of the motion for approval of settlement is \$4,984.00 which is \$537.00 less than the actual proposed penalties. The difference of \$537.00 between the actual penalties and the listing in the motion is specifically explained in the following discussion.

On page 2 of the motion, under Docket No. LAKE 80-137-M, the parties overlooked the need to list Citation No. 366077 dated 8/29/79 citing a violation of section 55.14-6 with an associated proposed penalty of \$72.00. On page 3, the list of citations supporting the violations alleged in Docket No. LAKE 80-137-M continues. There are two additional errors under Docket No. LAKE 80-137-M on page 3. Citation No. 367465 shown on the first line of page 3 should be changed to Citation No. 366075 and the omitted alleged violation of section 55.12-30 associated with that citation should be inserted in column 3 on page 3. Also on line 2 of page 3, Citation No. 367465 should be changed to Citation No. 367464. The remaining facts given with respect to those two citations are correct and no changes in the amounts of the proposed penalties are required.

On page 3 of the motion, under Docket No. CENT 79-194-M, the parties failed to list Citation No. 189111 dated February 13, 1979, alleging a violation of section 55.9-2. The proposed penalty for the violation associated with that omitted citation is \$66.00.

On page 4 of the motion, under Docket No. LAKE 79-170-M, the parties failed to list Citation No. 366451 dated April 18, 1979, alleging a violation of section 55.12-32. The penalty proposed for that alleged violation is \$34.00. Also on page 4, under Docket No. LAKE 82-20-M, the proposed penalty shown in column 4 for the single violation alleged in that docket is \$60.00, but that penalty should be corrected to show \$160.00 in column 4.

On page 6 of the motion, the first case listed is Docket No. CENT 81-146-M. That reference to Docket No. CENT 81-146-M should be deleted in its entirety because the proposed assessment for that case is already listed in full on page 5 and should not be repeated on page 6. Also on page 6, under Docket No. LAKE 80-101-M, the parties overlooked the need to list Order No. 366088 dated August 29, 1979, alleging a violation of section 55.12-17 with an associated proposed penalty of \$305.00.

Addition of the amounts associated with the above-described errors equals the deficiency of \$537.00 referred to in the fourth paragraph of this decision. A summary of the corrections discussed above is given below:

LAKE 80-137-M (addition of proposed penalty associated with omission of Citation No. 366077)	\$ 72.00
CENT 79-194-M (addition of proposed penalty associated with omission of Citation No. 189111)	66.00
LAKE 79-170-M (addition of proposed penalty associated with omission of Citation No. 366451)	34.00
LAKE 82-20-M (addition of \$100 to increase incorrect proposed penalty of \$60 to \$160 for Citation No. 500519) .	100.00
CENT 81-146-M (reduction of proposed penalty associated with deletion of second listing of Docket No. CENT 81-146-M)	-40.00
LAKE 80-101-M (addition of proposed penalty associated with omission of Order No. 366088)	<u>305.00</u>
Total difference between actual proposed penalties and incorrect proposed penalties listed in joint motion	\$ 537.00

Since the parties' errors in deriving the total settlement penalties are different from those which caused the errors in listing the total penalties proposed by MSHA, a somewhat different explanation is necessary to account for the difference of \$398.84 between the total settlement amount of \$4,968.90 (which results from taking 90 percent of the corrected proposed penalties of \$5,521.00) and the amount of \$4,570.06 which results from adding the settlement penalties listed on pages 2 through 7 of the joint motion for approval of settlement. An explanation of the errors in listing the settlement penalties is given below:

On page 2 of the motion, under Docket No. LAKE 80-137-M, a settlement penalty of \$64.80 must be added in column 5 to reflect the omission of the proposed penalty of \$72.00 associated with Citation No. 366077.

On page 3 of the motion, under Docket No. CENT 79-194-M, a settlement penalty of \$59.40 must be added in column 5 to reflect the omission of the proposed penalty of \$66.00 associated with Citation No. 189111.

The listing for Docket No. CENT 81-270-M begins on the last line of page 3. Under that same docket on the first line of page 4, a settlement penalty of \$30.80 is shown in column 5 for Citation No. 544241 having a proposed penalty of \$34.00. That settlement penalty is 20 cents more than 10 percent of \$34.00 and should be reduced to \$30.60 to agree with all the other settlement penalties associated with proposed penalties in the amount of \$34.00 which have been correctly reduced by 10 percent to \$30.60.

Also on page 4 of the motion, under Docket No. LAKE 79-170-M, a settlement penalty in the amount of \$30.60 should be added in column 5 to correspond with the parties' failure to include Citation No. 366451 in that docket along with an associated proposed penalty of \$34.00.

It should additionally be noted on page 4, under Docket No. LAKE 82-20-M, that it is unnecessary to make an adjustment in the settlement penalties to reflect the fact that the proposed penalty for the single violation in that docket was incorrectly listed as \$100.00 less than MSHA had proposed. No adjustment is necessary because the parties had listed a settlement penalty of \$144.00 which is 10 percent of the corrected proposed penalty of \$160.00.

A somewhat complicated discussion is required for correcting the settlement penalty pertaining to the single violation alleged in Docket No. CENT 81-146-M. As previously indicated above, the entire listing for Docket No. CENT 81-146-M appears first on page 5 and then is repeated on page 6. The first

listing on page 5 incorrectly shows the settlement penalty as \$30.00 in column 5, and that amount should be corrected to reflect a correct settlement penalty of \$36.00. Of course, the repeated listing of Docket No. CENT 81-146-M should be deleted where it is shown on page 6, but on page 6, the correct settlement penalty of \$36.00 is shown in column 5. Nevertheless, to obtain a correct total for all settlement penalties, only \$30.00 should be deducted, when the second listing for Docket No. CENT 81-146-M is deleted, because the first listing for that docket reflected an incorrect settlement penalty of \$30.00 which has already been changed on page 5 to the correct amount of \$36.00.

On page 5 of the motion, under Docket No. LAKE 81-62-M, the settlement penalty shown for Citation No. 499968 should be changed from \$102.86 to \$102.60 because the amount of \$102.86 is not 10 percent of the proposed penalty of \$114.00. The afore-said correction requires that the settlement penalties be reduced by 26 cents.

On page 4 of the motion, under Docket No. LAKE 80-101-M, a settlement penalty of \$274.50 must be added to reflect insertion of a settlement penalty to correspond with the proposed penalty of \$305.00 associated with omission of Order No. 366088 from that docket.

As indicated above, the corrected total of the proposed penalties is \$5,521.00 so that the total settlement penalties, or 90 percent of \$5,521.00, are \$4,968.90. Also, as explained above, the motion, when filed, reflected total settlement penalties of \$4,570.06. The difference between the motion's incorrect settlement penalties in the amount of \$4,570.06 and the corrected total settlement penalties in the amount of \$4,968.90 is achieved by making the following adjustments which have been explained above:

LAKE 80-137-M (insertion to correspond with omission of Citation No. 366077)...	\$ 64.80
CENT 79-194-M (insertion to correspond with omission of Citation No. 189111)...	59.40
CENT 81-270-M (reduction of 20 cents to reflect correction of settlement penalty for Citation No. 544241)...	-.20
LAKE 79-170-M (insertion to correspond with omission of Citation No. 366451)...	30.60
CENT 81-146-M (reduction of \$30.00 to reflect deletion of Docket No. CENT 81-146-M which had been listed twice).	-30.00

LAKE 81-62-M (reduction of 26 cents to re-
flect correction of settlement
penalty for Citation No. 499968).....\$ -.26

LAKE 80-101-M (insertion to correspond with
omission of Order No. 366088)..... 274.50

Total Adjustments in Settlement Penalties\$ 398.84

The ordering paragraphs at the end of this decision list all the corrected proposed penalties along with the corrected settlement penalties. Therefore, if counsel 1/ for the parties become confused by the explanation of the corrections as they have been given above, they will be able to compare the listing of the proposed penalties and settlement penalties set forth on pages 2 through 7 of the joint motion with the tabulations at the end of this decision and find all of the corrections which have been explained above.

Discussion of the Six Criteria

Hearings in this consolidated proceeding were scheduled and then continued several times because counsel for the parties believed that the Federal Mine Safety and Health Act of 1977 was going to be amended by Congress so as to transfer inspection of respondent's mining operations from the jurisdiction of the Mine Safety and Health Administration to the jurisdiction of the Occupational Safety and Health Administration. That anticipated legislation never was passed by Congress and the parties have agreed to this settlement subject to respondent's right to contest MSHA's jurisdiction in the future if respondent should choose to do so.

Section 110(i) of the Act lists six criteria which are required to be used in determining civil penalties. The joint motion for approval of settlement (pp. 7-8) discusses the six criteria in very general terms. As to the criterion of whether the payment of penalties would cause respondent to discontinue in business, the joint motion states that "[t]he proposed settlement will not deter Southern Clay, Inc.'s ability to continue in business."

The criterion of the size of respondent's business is not discussed in specific terms in the joint motion. The 18 proposed assessments in the official files were prepared over a period of years beginning in 1978 and ending in 1981 and reflect that respondent's total business involves from 563,807 to 619,548 man hours per year. Therefore, the proposed assessment

1/ None of the attorneys who ultimately signed the joint motion participated in its original preparation.

sheets assign two penalty points for the size of respondent's total operations under the penalty formula set forth in 30 C.F.R. § 100.3 as that formula was constituted prior to its amendment on May 21, 1982. Respondent has four different sites where mining operations are conducted. The assessment sheets reflect the man hours for those specific mines to be from a low of 29,964 to a high of 218,500. All but one of the proposed assessment sheets have assigned five penalty points pursuant to section 100.3(b). Therefore, the proposed assessment sheets assign from two to six points under section 100.3(b)(1)(ii) for the size of respondent's individual mines under the penalty formula. Inasmuch as a maximum of 15 points may be assigned solely on the basis of the size of an operator's business, I find that respondent should be classified as operating a relatively small business because the assignment of points under the criterion of size ranges from a low of 4 points to a high of 8 points.

As to the criterion of respondent's history of previous violations, the joint motion states that respondent has no significant history of previous violations. The aforesaid statement as to respondent's history of previous violations is correct for the majority of the violations alleged in this proceeding, but the 76 violations alleged in all 18 dockets are spread over a 4-year period. The alleged violations, therefore, range from the very first inspections made of respondent's mines to those made in 1981. Consequently, the first proposed assessment sheets reflect assignment of zero penalty points under the criterion of respondent's history of previous violations, but in some of the most recent cases, such as the proposed assessment sheets in Docket Nos. LAKE 81-145-M and LAKE 82-20-M, the sheets reflect assignment of 16 and 15 penalty points, respectively, for respondent's history of previous violations under section 100.3(c). Inasmuch as a maximum of 20 penalty points can be assigned under the criterion of history of previous violations, it is obvious from MSHA's assignment of up to 16 penalty points under that criterion, that respondent, by 1981, had at least an average history of previous violations. Since all of the penalties proposed by MSHA reflect a gradual increase in assignment of penalty points under the criterion of history of previous violations as respondent continued to be cited for additional violations, the proposed penalties all reflect proper consideration of respondent's history of previous violations.

As to the criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance after the alleged violations were cited, the joint motion states that "Southern Clay, Inc. exercised good faith in abatement of the alleged violations." While the joint motion is correct as to the criterion of good-faith abatement, it understates respondent's excellent record in abating violations rapidly. Under section 100.3(f) of the formula in effect prior to May 21, 1982, an

operator is assigned zero penalty points if it merely abates a violation within the time given by an inspector in his citation, but is assigned negative penalty points if it makes "special efforts" to abate the violation. In almost every instance, MSHA assigned respondent from 2 to 8 negative penalty points under the criterion of good-faith abatement. Rarely was respondent assigned zero penalty points and, in no case, was respondent assigned additional points for failure to abate a violation within the time given by the inspector. Here, again, of course, all of MSHA's proposed penalties reflect a reduction of the penalty because of respondent's having demonstrated "special efforts" in abating the alleged violations.

With respect to the criterion of negligence, the joint motion avers that "[t]he above-stated alleged violations were the result of low to moderate negligence." The parties' statement as to negligence is overly broad and general. In Docket No. LAKE 80-101-M, for the violation of section 55.12-17 alleged in Order No. 366088, MSHA assigned 25 penalty points under the criterion of negligence pursuant to section 100.3(d) of the penalty formula. Section 100.3(d) provides for a maximum of 25 points to be assigned when there is existence of gross negligence. The violation involved was the alleged failure of an employee to block out the principal switch at a time when he was working on a 440-volt switch box. In Docket No. LAKE 81-83-M, a total of 16 penalty points were assigned under the criterion of negligence for the single violation alleged in that case.

Despite the fact that a few alleged violations were considered to have been associated with more than the "moderate" degree of negligence referred to in the joint motion, it is a fact that in the majority of cases, MSHA assigned in the neighborhood of from 10 to 12 "moderate" penalty points under the criterion of negligence. In each case, of course, the Assessment Office specifically considered the criterion of negligence and assigned an appropriate number of penalty points under that criterion.

Finally, as to the sixth criterion of gravity, the joint motion states that the "* * * alleged violations were only mildly serious". The joint motion understates the seriousness of the alleged violations because the vast majority of the violations pertained to failure to erect guards over moving machine parts or along walkways. Those were generally assigned at least 7 penalty points under section 100.3(e) of the penalty formula which means that the inspector thought the accidents which the standards were designed to prevent would "probably" occur and that they would result in at least lost work days for one person. Many of them were given 11 penalty points indicating that the inspector thought they would be associated with injuries of a permanently disabling nature. Of course, some of the violations were also electrical in nature and those were given penalty

assignments of 14 to 16 under the criterion of gravity. In each instance, however, MSHA assigned the number of penalty points under the criterion of gravity which the conditions described in the inspectors' citations and order seem to require.

In most settlement proceedings, the parties' motions for approval of settlement provide detailed facts as to unusual mitigating circumstances which were apparently not taken into consideration by MSHA when it derived the penalties which are being contested. In this proceeding, the parties have given no specific reason to justify a 10-percent reduction in all of the 76 penalties involved in this proceeding. If the proposed reduction were any more than 10 percent, I believe that the settlement would have to be returned for the parties to provide some specific reason for seeking a 10-percent reduction. It is a fact, however, that I have received detailed evidence in some proceedings pertaining to as many as 98 alleged violations. It is generally true that an operator is able to introduce mitigating circumstances in such proceedings so that, in most cases, I end up assessing slightly lower penalties than MSHA.

I have read the conditions described in all of the citations and order involved in this proceeding and I believe that in an evidentiary proceeding I would be inclined to reduce many of them below the amount proposed by MSHA. For example, many of the electrical violations pertain to failure to replace a cover on a switch box or control box. If that box should prove to be in a remote area which was dry and infrequently used, I would be inclined to assess a lower penalty than has been proposed by MSHA because I believe the likelihood of a serious injury from such a violation is remote. Also, in many of the alleged violations pertaining to failure to guard a walkway or moving machine parts, the testimony at a hearing generally shows that the openings for which guarding is being required are somewhat small or are located in an area of infrequent travel by personnel. The mitigating circumstances in such cases usually warrant a reduction of the penalties to amounts less than those proposed by MSHA.

As I indicated in the first paragraph of this decision, the total corrected proposed penalties amount to \$5,521.00 and respondent has agreed to pay corrected settlement penalties in the amount of \$4,968.90, or a reduction of \$552.10. In my opinion, if a hearing had been held as to the 76 alleged violations involved in this proceeding, it is more likely than not that I would have assessed penalties of no more than the settlement amount agreed upon by the parties. Therefore, I find that the joint motion for approval of settlement should be granted and that the corrected settlement agreement should be approved.

WHEREFORE, it is ordered:

(A) The joint motion for approval of settlement, as corrected in this decision, is granted and the corrected settlement agreement is approved.

(B) Pursuant to the corrected settlement agreement, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling \$4,968.90 which are allocated to the respective alleged violations as follows:

Southern Clay Pit and Plant, Stoddard County, Missouri

Docket No. DENV 79-97-PM

	<u>Proposed</u>	<u>Settlement</u>
	<u>Penalties</u>	<u>Penalties</u>
Citation No. 188803 4/25/78 §55.14-1	\$ 66.00	\$ 59.40
Total Penalties in Docket No. DENV 79-97-PM	\$ 66.00	\$ 59.40

Docket No. CENT 79-194-M

Citation No. 189105 2/13/79 §55.4-23	\$ 36.00	\$ 32.40
Citation No. 189106 2/13/79 §55.9-2	38.00	34.20
Citation No. 189107 2/13/79 §55.14-1	60.00	54.00
Citation No. 189110 2/13/79 §55.20-11	52.00	46.80
Citation No. 189111 2/13/79 §55.9-2	66.00	59.40
Citation No. 189112 2/13/79 §55.9-3	<u>60.00</u>	<u>54.00</u>
Total Penalties in Docket No. CENT 79-194-M	\$ 312.00	\$ 280.80

Docket No. CENT 80-67-M

Citation No. 191807 7/19/79 §55.4-2	\$ 52.00	\$ 46.80
Citation No. 191808 7/19/79 §55.14-29	<u>56.00</u>	<u>50.40</u>
Total Penalties in Docket No. CENT 80-67-M	\$ 108.00	\$ 97.20

Docket No. CENT 81-47-M

Citation No. 546219 8/21/80 §55.12-25	\$ 18.00	\$ 16.20
Total Penalties in Docket No. CENT 81-47-M	\$ 18.00	\$ 16.20

Southern Clay Plant, Scott County, Missouri

Docket No. CENT 81-146-M

Citation No. 544230 12/3/80 §56.14-1	\$ 40.00	\$ 36.00
Total Penalties in Docket No. CENT 81-146-M	\$ 40.00	\$ 36.00

Docket No. CENT 81-270-M

	<u>Proposed Penalties</u>	<u>Settlement Penalties</u>
Citation No. 544240 6/10/81 \$56.9-11	\$ 32.00	\$ 28.80
Citation No. 544241 6/10/81 \$56.9-2	<u>34.00</u>	<u>30.60</u>
Total Penalties in Docket No. CENT 81-270-M.	\$ 66.00	\$ 59.40

Southern Clay Mine, Henry County, Tennessee

Docket No. BARB 79-27-PM

Citation No. 101201 3/15/78 \$55.12-34	\$ 30.00	\$ 27.00
Citation No. 101202 3/15/78 \$55.12-8	40.00	36.00
Citation No. 101203 3/15/78 \$55.11-12	60.00	54.00
Citation No. 101204 3/15/78 \$55.11-2	72.00	64.80
Citation No. 101205 3/15/78 \$55.14-1	48.00	43.20
Citation No. 101208 3/16/78 \$55.11-12	90.00	81.00
Citation No. 101209 3/16/78 \$55.14-1	90.00	81.00
Citation No. 101210 3/16/78 \$55.17-1	60.00	54.00
Citation No. 101211 3/16/78 \$55.14-1	<u>98.00</u>	<u>88.20</u>
Total Penalties in Docket No. BARB 79-27-M .	\$ 588.00	\$ 529.20

Docket No. SE 81-104-M

Citation No. 110971 2/18/81 \$55.5 ² -5	\$ <u>36.00</u>	\$ <u>32.40</u>
Total Penalties in Docket No. SE 81-104-M ..	\$ 36.00	\$ 32.40

Southern Clay Pit and Mill, Pulaski County, Illinois

Docket No. LAKE 79-170-M

Citation No. 366449 4/18/79 \$55.12-32	\$ 44.00	\$ 39.60
Citation No. 366450 4/18/79 \$55.14-1	44.00	39.60
Citation No. 366451 4/18/79 \$55.12-32	34.00	30.60
Citation No. 366452 4/18/79 \$55.12-25	34.00	30.60
Citation No. 366454 4/18/79 \$55.20-11	<u>66.00</u>	<u>59.40</u>
Total Penalties in Docket No. LAKE 79-170-M.	\$ 222.00	\$ 199.80

Docket No. LAKE 80-101-M

Citation No. 366079 8/29/79 \$55.12-68	\$ 52.00	\$ 46.80
Order No. 366088 8/29/79 \$55.12-17	<u>305.00</u>	<u>274.50</u>
Total Penalties in Docket No. LAKE 80-101-M.	\$ 357.00	\$ 321.30

Docket No. LAKE 80-137-M

			<u>Proposed</u>	<u>Settlement</u>
			<u>Penalties</u>	<u>Penalties</u>
Citation No. 366483	4/18/79	\$55.5-5	\$ 48.00	\$ 43.20
Citation No. 366484	4/18/79	\$55.5-5	48.00	43.20
Citation No. 366485	4/18/79	\$55.5-5	48.00	43.20
Citation No. 366075	8/29/79	\$55.12-30	44.00	39.60
Citation No. 366077	8/29/79	\$55.14-6	72.00	64.80
Citation No. 366078	8/29/79	\$55.11-1	48.00	43.20
Citation No. 366081	8/29/79	\$55.12-32	44.00	39.60
Citation No. 366082	8/29/79	\$55.12-32	44.00	39.60
Citation No. 366083	8/29/79	\$55.14-1	52.00	46.80
Citation No. 366084	8/29/79	\$55.12-30	44.00	39.60
Citation No. 366086	8/29/79	\$55.12-32	44.00	39.60
Citation No. 366087	8/29/79	\$55.14-1	52.00	46.80
Citation No. 366089	8/29/79	\$55.12-8	30.00	27.00
Citation No. 366090	8/29/79	\$55.11-1	48.00	43.20
Citation No. 367461	8/29/79	\$55.12-32	44.00	39.60
Citation No. 367462	8/29/79	\$55.12-20	44.00	39.60
Citation No. 367463	8/29/79	\$55.12-20	44.00	39.60
Citation No. 367464	8/29/79	\$55.12-20	44.00	39.60
Citation No. 367465	8/29/79	\$55.12-25	44.00	39.60
Citation No. 367466	8/29/79	\$55.12-32	<u>44.00</u>	<u>39.60</u>
Total Penalties in Docket No. LAKE 80-137-M.			\$ 930.00	\$ 837.00

Docket No. LAKE 80-138-M

Citation No. 366091	8/30/79	\$55.14-1	\$ 72.00	\$ 64.80
Citation No. 366092	8/30/79	\$55.4-2	32.00	28.80
Citation No. 366093	8/30/79	\$55.11-2	32.00	28.80
Citation No. 366094	8/30/79	\$55.12-25	44.00	39.60
Citation No. 366095	8/30/79	\$55.11-1	48.00	43.20
Citation No. 367467	8/29/79	\$55.12-25	44.00	39.60
Citation No. 367468	8/29/79	\$55.12-32	44.00	39.60
Citation No. 367469	8/29/79	\$55.12-32	44.00	39.60
Citation No. 367470	8/30/79	\$55.12-18	44.00	39.60
Citation No. 367471	8/30/79	\$55.12-8	<u>44.00</u>	<u>39.60</u>
Total Penalties in Docket No. LAKE 80-138-M.			\$ 448.00	\$ 403.20

Docket No. LAKE 80-282-M

Citation No. 366486	4/18/79	\$55.5-5	\$ <u>36.00</u>	\$ <u>32.40</u>
Total Penalties in Docket No. LAKE 80-282-M.			\$ 36.00	\$ 32.40

Docket No. LAKE 81-62-M

	<u>Proposed Penalties</u>	<u>Settlement Penalties</u>
Citation No. 499967 9/16/80 \$55.12-25	\$ 140.00	\$ 126.00
Citation No. 499968 9/16/80 \$55.12-20	114.00	102.60
Citation No. 499969 9/16/80 \$55.14-1	180.00	162.00
Citation No. 499970 9/16/80 \$55.14-1	180.00	162.00
Citation No. 499971 9/16/80 \$55.14-6	<u>180.00</u>	<u>162.00</u>
Total Penalties in Docket No. LAKE 81-62-M.	\$ 794.00	\$ 714.60

Docket No. LAKE 81-83-M

Citation No. 499972 9/16/80 \$55.11-27	\$ <u>420.00</u>	\$ <u>378.00</u>
Total Penalties in Docket No. LAKE 81-83-M.	\$ 420.00	\$ 378.00

Docket No. LAKE 81-145-M

Citation No. 499973 9/16/80 \$55.5-50(b) ...	\$ <u>122.00</u>	\$ <u>109.80</u>
Total Penalties in Docket No. LAKE 81-145-M	\$ 122.00	\$ 109.80

Docket No. LAKE 81-172-M

Citation No. 500513 4/14/81 \$55.12-18	\$ 160.00	\$ 144.00
Citation No. 500514 4/14/81 \$55.12-25	160.00	144.00
Citation No. 500515 4/14/81 \$55.12-32	130.00	117.00
Citation No. 500516 4/14/81 \$55.4-24(c) ...	98.00	88.20
Citation No. 500517 4/14/81 \$55.11-26	106.00	95.40
Citation No. 500518 4/14/81 \$55.12-20	72.00	64.80
Citation No. 500520 4/14/81 \$55.12-30	<u>72.00</u>	<u>64.80</u>
Total Penalties in Docket No. LAKE 81-172-M	\$ 798.00	\$ 718.20

Docket No. LAKE 82-20-M

Citation No. 500519 4/14/81 \$55.15-1	\$ <u>160.00</u>	\$ <u>144.00</u>
Total Penalties in Docket No. LAKE 82-20-M.	\$ <u>160.00</u>	\$ <u>144.00</u>
Total Penalties in This Proceeding	\$5,521.00	\$4,968.90

Richard C. Steffey
Richard C. Steffey
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

SEP 12 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 82-321
Petitioner : A.C. No. 36-03425-03503
v. :
: Maple Creek No. 2 Mine
U.S. STEEL MINING CO., INC., :
Respondent :

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In the above proceeding, the Secretary seeks civil penalties for seven alleged violations of mandatory safety standards. The violations were charged in citations issued by the Secretary, each of which alleged that the violations charged were significant and substantial as that term is used in the Mine Act. Respondent admits that the violations occurred, but denies that they were significant and substantial, and contests the penalties proposed. Pursuant to notice, the case was heard in Uniontown, Pennsylvania, on April 28 and 29, 1983. Francis Wehr, Cleutas McConville, Wayne Schneider, and Joseph Baniak testified on behalf of Petitioner; David Coffman, Paul Shipley, and Gary Stevenson testified on behalf of Respondent. Each of the parties has filed a posthearing brief. Based on the entire record and considering the contentions of the parties, I make the following decision.

ISSUES

1. Are the violations cited of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard?

2. What is the appropriate penalty for each violation?

FINDINGS AND CONCLUSIONS COMMON TO ALL VIOLATIONS

1. At all times pertinent to this proceeding, Respondent was the owner and operator of an underground coal mine in Washington County, Pennsylvania, known as the Maple Creek No. 2 Mine.

2. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the Maple Creek No. 2 Mine, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. The subject mine has an annual production of 872,848 tons of coal. Respondent has an annual production of 15,046,082 tons. Respondent is a large operator.

4. The assessment of civil penalties in this proceeding will not affect Respondent's ability to continue in business.

5. Between June 21, 1980 and June 20, 1982, there were 538 paid violations at the subject mine. Of these, 42 were violations of 30 C.F.R. § 75.1403; 13 were violations of 30 C.F.R. § 75.605; and 56 were of 30 C.F.R. § 75.200. I conclude that this history is not such that penalties otherwise appropriate should be increased because of it.

6. In the case of each citation involved herein, the violation was abated promptly and in good faith.

7. Whether a cited violation is properly checked as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed. The penalties hereinafter assessed are based on the criteria in section 110(i) of the Act.

CITATION NOS. 1250086, 1250091, 1250093, 0829641, AND 0829647
ISSUED MAY 25, 1982, JUNE 1, 1982, JUNE 2, 1982, JUNE 4, 1982
AND JUNE 9, 1982

Each of the above citations was issued for violation of the same notice to provide safeguard. The safeguard notice was issued July 26, 1973, and required that "all track locomotives operated in this mine shall be equipped with a suitable lifting jack and bar." The purpose of a lifting jack and bar is to assist in putting a derailed locomotive back on the track. The requirement that a lifting jack and bar be available is designed to prevent or mitigate two hazards: (1) in the absence of such equipment, miners might use other and less safe means to slew the derailed locomotive back on track; (2) it may be more difficult to free a miner who is pinned or trapped by a haulage accident or derailment without such equipment. The locomotives involved herein all had "rerailers" but

in some circumstances these devices are not effective to rerail locomotives. Derailments are common at the subject mine. Injuries have occurred at the mine in attempting to rerail locomotives without a lifting jack and bar. Injuries have occurred at the subject mine due to derailments where a lifting jack and bar might have mitigated their severity. I conclude that all of the violations here were of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The violations were serious. There is no evidence that mine management was aware of the violations, but proper inspection would have revealed them. They resulted from Respondent's negligence. I conclude that an appropriate penalty for each violation is \$100. There is no support in the record for Petitioner's proposal to assess a higher penalty for the violation charged in Citation No. 1250086.

CITATION NO. 1250100 ISSUED JUNE 4, 1982

This citation was issued because a clamp was missing from the trailing cable of a shuttle car. The clamp is designed to protect the cable, to keep it from pulling off the reel. Should that occur, the possibility of a spark occurring when the cable leads come apart, or the possibility of the trailing cable energizing the shuttle car are very remote. I conclude that the violation was not significant and substantial. I conclude further that it was not serious and Petitioner has not shown that it was caused by Respondent's negligence. I conclude that an appropriate penalty for this violation is \$30.

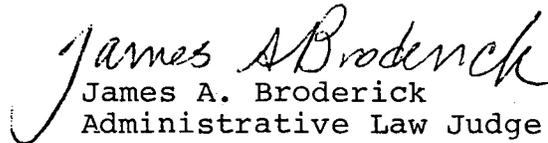
CITATION NO. 0829648 ISSUED JUNE 10, 1982

This citation charges a violation of the approved roof-control plan and therefore of 30 C.F.R. § 75.200, in that the diagonal distance in the intersection of a room was 34 feet. The approved plan provides that whenever the sum of the diagonals exceeds 62 feet or either diagonal exceeds 32 feet, additional supports shall be provided. There was a slip or fault in the roof. The roof bolting was on pattern. The roof in the area in question had a drummy sound. The excessive width causes a situation of unsupported roof and, because of the abnormal roof conditions, created a likelihood of a roof fall. The failure to comply with the roof control plan under these circumstances could result in a roof fall which could seriously injure or kill miners. I conclude that the violation was significant and substantial. It was serious and was known or should have been known to Respondent. Therefore, it resulted from Respondent's negligence. I conclude that an appropriate penalty for this violation is \$250.

ORDER

Based upon the above findings of fact and conclusions of law, Respondent is ORDERED to PAY within 30 days of the date of this decision the following penalties for the violations found herein to have occurred:

<u>CITATION</u>	<u>PENALTY</u>
1250086	\$ 100
1250091	100
1250093	100
0829641	100
0829647	100
1250100	30
0829648	250
Total	<u>\$ 780</u>


James A. Broderick
Administrative Law Judge

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Louise Q. Symons, Esq., 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 13 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 82-336
Petitioner : A.C. No. 36-00970-03504
v. :
U.S. STEEL MINING CO., INC., : Maple Creek No. 1 Mine
Respondent :

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This proceeding involves a single citation alleging a violation of the mandatory safety standard contained in 30 C.F.R. § 75.517. Respondent concedes that the violation occurred but denies that it was significant and substantial as the citation charges. Pursuant to notice, the case was called for hearing in Uniontown, Pennsylvania, on April 29, 1983. William P. Brown testified on behalf of Petitioner; Gary Stevenson and Samuel Curtis testified on behalf of Respondent. Both parties have filed post-hearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Respondent is the owner and operator of an underground coal mine in Washington County, Pennsylvania, known as the Maple Creek No. 1 Mine.

2. The subject mine has an annual production of 541,835 tons of coal, and Respondent has an annual production of 15 million tons. Respondent is a large operator.

3. The imposition of a penalty in this case will not affect Respondent's ability to continue in business.

4. In the 24 months prior to May 18, 1982, Respondent had 538 violations of mandatory health and safety standards, of which 28 were of 30 C.F.R. § 75.517. This is a moderate history of prior violations and penalties otherwise appropriate should not be increased because of it.

5. Citation No. 1146357 was issued to Respondent on May 18, 1982, because of damage to the outer jacket of a trailing cable to a continuous mining machine. The damage consisted of a 6 inch cut in the cable jacket, 2 inches of which were covered by tape. The ground wire was exposed. There was no visible damage to the insulation covering the three power wires.

6. The miner was cutting coal at the time the citation was issued.

7. The trailing cable is dragged along behind the miner on the mine floor as the miner moves from place to place, and is subject to damage upon such movement.

8. The violation was abated promptly and in good faith.

ISSUES

1. Was the violation of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard?

2. What is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and the undersigned administrative law judge has jurisdiction over the parties and subject matter of this proceeding.

2. The condition cited by the Federal Mine Inspector on May 18, 1982, described in Finding of Fact No. 5 was a violation of the mandatory standard contained in 30 C.F.R. § 75.517.

3. The violation found above was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

DISCUSSION

A continuous miner trailing cable is subject to extraordinary abuse in the harsh atmosphere of an underground coal mine. For this reason, it has extraordinary protection: a thick outer jacket of reinforced lead cured neoprene, inside of which is a bare ground wire and three conductor wires, each of which is insulated with ethylene-propylene rubber. From the standpoint of miner safety, both the outer jacket and the conductor wire insulation are important. The area of the mine where the continuous miner is operating is characteristically wet. Water can of course enter through a break in the outer jacket. If there is a pin hole in the inner insulation through which water seeps, this could result in cutting the power by tripping the ground fault. However, it also may cause electric shock to a miner handling the cable, particularly if he is standing in water. Following the test in the National Gypsum case, 3 FMSHRC 822 (1981), I conclude that the latter event is reasonably likely to occur. Should it occur, it would result in an injury of a reasonably serious nature.

Whether a violation is significant and substantial must be determined as of the time the citation is issued. It cannot be assumed either that it will be corrected or that it will not be corrected. The condition cited by the inspector in the context of continued normal mining operations, was of such nature as could contribute to the cause and effect of a mine safety hazard.

4. The violation was serious and since the cable damage was visible and should have been observed on examination, it resulted from Respondent's negligence.

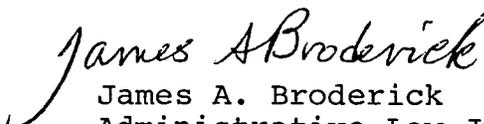
5. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is \$175.

ORDER

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

1. The citation No. 1146357 including its designation as significant and substantial is AFFIRMED.

2. Respondent shall within 30 days of the date of this decision pay the sum of \$175 for the violation found herein to have occurred.


James A. Broderick
Administrative Law Judge

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U.S. Department
of Labor, Room 14480 Gateway Building, 3535 Market Street,
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Louise Q. Symons, Esq., 600 Grant Street, Room 1580, Pittsburgh,
PA 15230 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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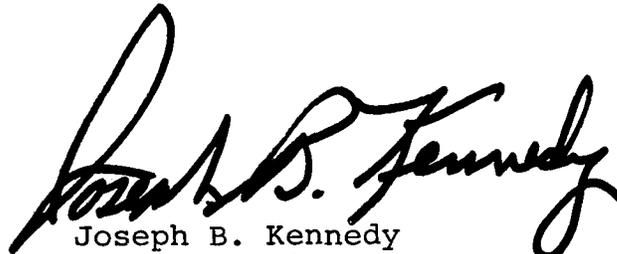
SEP 13 1983

U.S. STEEL MINING CO., INC., : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 82-219-R
: Citation No. 9914460; 3/3/82
: Gary No. 9 Mine
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

ORDER OF DISMISSAL

Before Judge Kennedy

The parties having moved to withdraw the captioned notice of contest and to dismiss this matter, it is ORDERED that the same be, and hereby is, GRANTED and the matter DISMISSED.



Joseph B. Kennedy
Administrative Law Judge.

Distribution:

Louise Q. Symonds, Esq., U.S. Steel Mining Co., Inc., 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

Agnes Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SEP 14 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 82-307
Petitioner : A.C. No. 46-06306-03005 F
v. :
: Stillhouse Run No. 1 Mine
ELK RIVER SEWELL COAL :
COMPANY, INC., :
Respondent :

DECISION

Appearances: Janine C. Gismondi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Charles A. Sinsel, Esq., Sinsel & Warder, Clarksburg, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq., the "Act" for one violation of the operator's roof control plan under the regulatory standard at 30 C.F.R. § 75.200. The general issue before me is whether the Elk River Sewell Coal Company (Elk River) has violated the cited regulatory standard and, if so, whether that violation was "significant and substantial" as defined in the Act as interpreted by the Commission in Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). If it is determined that a violation has occurred, it will also be necessary to determine the appropriate penalty to be assessed. Hearings on these issues were held in Morgantown, West Virginia, on August 3, 1983.

As amended at hearing, the citation at bar alleges a violation of page 15, paragraph 4 of the operator's roof control plan and reads in relevant part as follows:

The approved Roof Control Plan ... was not complied with in the active working place in No. 2 entry on the third left section ... in that only approximately 50% of the length of the 4 foot rods which [were]

permanent roof support [were] grouted and additional supports were not provided. The approved roof control plan requires that 80% of the length of each bolt be grouted ...

The roof control plan provides in relevant part as follows:

The minimum length of rods shall be 4 feet, and the proper quantity of resin specified for proper installation shall be used. When it is determined that less than 80% of each bolt is grouted, additional support shall be installed. All resin bolts shall be installed with approved bearing plates installed firmly against the roof. (Ex. G-3, p.4)

On December 3, 1981, at approximately 9:20 p.m., a 6 foot thick section of roof measuring 20 feet by 40 feet fell in the intersection of the No. 2 entry 3 left panel of the Elk River Stillhouse Run No. 1 Mine, resulting in the deaths of three miners and injuries to a fourth. The fall was attributed to undetected fractures in the roof several feet above previously installed 4 foot resin-grouted roof bolts.

MSHA Inspector Homer Grose was at the scene of the roof fall shortly after it occurred and participated in recovery operations. He observed that of the fifteen to twenty roof bolts that were exposed by the fall, none had been grouted as required by the roof control plan. The plan required that 80% of each bolt be grouted, whereas none of these bolts had been grouted more than 50% of their length. This evidence is not disputed. Moreover, it is conceded that in the area of the fall, the only additional roof support was that provided by temporary "turnposts" installed in accordance with a State approved roof control plan. These posts were admittedly not "additional supports" within the meaning of paragraph 4, page 15 of the MSHA approved plan.

Within this framework of undisputed evidence, it is apparent that there was in fact a violation of the roof control plan as alleged. Whether that violation was "significant and substantial", however, depends on whether, based on the particulars surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., supra. The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. MSHA readily acknowledges in this case that there was no direct causal relation between the roof fall on December 3rd and the inadequately grouted

roof bolts cited herein. Inspector Grose observed that the fracture in the roof that caused the fall in this case occurred some 2 feet beyond the reach of the required 4 foot roof bolts and opined that even if the bolts had been grouted to 80% of their length as required by the plan, the roof fall would not have been avoided. Grose did suggest, however, that if the insufficient grouting had been discovered by the operator and the operator had provided the additional roof support required by the roof control plan, then it "might have helped".

The violation in this case was, in any event, quite serious. Mine Foreman and Safety Director of Elk River, R. Nat Williams, admittedly knew that this mine had a "checkerboard" top fraught with vertical and horizontal hairline cracks. J.W. Post, Elk River's president, was also aware of the cracks and fissures in the roof and had experienced particular problems because of this in supporting the roof. Inspector Grose concluded that, particularly under these poor roof conditions, the insufficient grouting of the roof bolts without additional permanent support would reasonably likely contribute to a roof fall and thereby lead to serious injuries and death. The Inspector's conclusions are not disputed and, based upon my own independent appraisal of the circumstances, I conclude that this violation indeed was "significant and substantial". For the same reasons, I find that the violation reflected a high level of gravity.

In determining whether the operator was negligent, however, it is necessary to look at the history of the provision in the roof control plan calling for only 80% grouting of the roof bolts in this mine. It is not disputed that when the operator first submitted its plan to MSHA, it provided for 100% grouting of its four foot resin roof bolts. When 100% grouting is required, compliance may readily be determined by observing during the insertion of the bolt whether some of the resin oozes out around the head of the bolt. In recognition of the "checkerboard" fractured roof at the Stillhouse Run No. 1 Mine, into which much of the inserted resin would often dissipate, MSHA proposed the 80% grouting specification.

Unfortunately, no completely satisfactory or reliable method apparently exists to determine whether roof bolts have been grouted to less than 80% of their length. While MSHA maintained at hearing that a piece of coathanger or similar wire may in some limited situations be inserted around the bearing plate and roof-bolt head into the hole adjacent to the bolt in order to estimate the length of roof bolt that is not grouted, MSHA apparently failed to inform the mine operator of even this limited technique. The mine operator, on the other hand, agreed to the 80% grouting

provision in its roof control plan while apparently not knowing how to determine whether less than 80% of roof bolt was grouted.

According to Elk River's Mine Foreman and Safety Director Arnett Williams, they were using enough resin with their 4 foot bolts that was sufficient by manufacturer's specifications for five foot bolts. Williams nevertheless knew that even that amount of resin could "leak out" through the fissures. He had heard of the so-called "wire test" but had never seen it done. The president of Elk River, J. W. Post, had not even heard of the "wire test" before the citation herein and did not in any event believe the test was feasible. There was insufficient clearance to insert coat hanger wire into a roof bolt hole and, in most cases, the bearing plate would be flush against the roof, thereby preventing the insertion of any wire. He had tried to perform such tests but found it impossible.

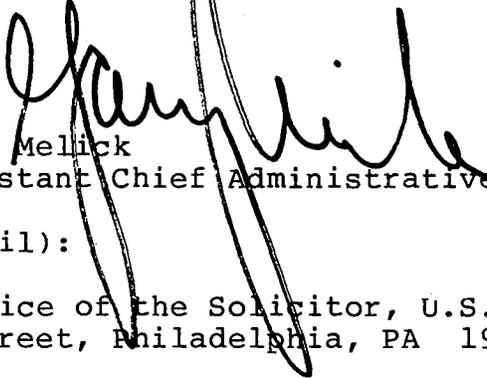
Mine Foreman John Cochran knew of no method to determine whether the 80% grouting requirement had been met, except through the use of a torque wrench. Cochran noted that if the bolt has been insufficiently grouted, you may get a "springy" sensation upon torque testing. There is no evidence in this case that Elk River had not been performing required torque tests on the roof bolts and there is similarly no evidence that any of the deficient roof bolts in the fall area had been detected during the torque tests. Cochran thought the "wire test" could, in any event, only rarely be used because, in most cases, the bearing plate is flush against the roof, leaving no room to insert anything adjacent to the roof bolt.

Within this framework, I conclude that the operator was not free from negligence. It was incumbent upon the operator in accepting a less than 100% grouting requirement in its roof control plan to have determined whether or not it could comply with that requirement. In this case, the operator admittedly believed there was no satisfactory or reliable way to determine whether it was complying with that requirement and apparently made little effort to determine whether there was in fact such a test.

In determining an appropriate civil penalty, I consider that the operator is relatively small in size, that it has a minimal history of violations and that the penalty here imposed would not affect its ability to stay in business. Within this framework, I find that a penalty of \$1,000 is appropriate.

ORDER

Citation No. 886891 is affirmed. A civil penalty of \$1,000 shall be paid by the Elk River Sewell Coal Company, Inc. within 30 days of the date of this decision.


Gary Mellick
Assistant Chief Administrative Law Judge

Distribution (by certified mail):

Janine C. Gismondi, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104

Charles A. Sinsel, Esq., Sinsel and Warder, Goff Building, P.O. Box 1206, Clarksburg, WV 26801

nsw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SEP 16 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 82-337
Petitioner : A.C. No. 36-03425-03505
v. :
U.S. STEEL MINING COMPANY, INC., : Maple Creek No. 2 Mine
Respondent :

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks penalties for two violations of mandatory safety standards. The violations were charged in citations which alleged that the violations were significant and substantial. During the hearing, the inspector conceded that the violation charged in Citation No. 1249719 was not significant and substantial. Respondent does not contest the fact that the violations occurred but denies that they were significant and substantial and contests the penalties proposed. Pursuant to notice, the case was heard in Uniontown, Pennsylvania on April 29, 1983. Francis Wehr and Alvin Shade testified on behalf of Petitioner; Samuel Cortis testified on behalf of Respondent. Each party has filed a posthearing brief. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Respondent is the owner and operator of an underground coal mine in Washington County, Pennsylvania, known as the Maple Creek No. 2 Mine.

2. The subject mine has an annual production of 872,848 tons of coal and Respondent has a total annual production of 15 million tons. Respondent is a large operator.

3. The assessment of civil penalties in this case will not affect Respondent's ability to continue in business.

4. Between June 3, 1980 and June 2, 1982, there were 656 paid violations in the subject mine. Of these, two were violations of 30 C.F.R. § 75.1105, and eleven were violations of 30 C.F.R. § 75.605. This is a moderate history of prior violations, and penalties otherwise appropriate will not be increased because of the history.

5. The imposition of penalties for the violations charged will not affect Respondent's ability to continue in business.

6. Each of the violations charged occurred except as otherwise found herein and in each case the violation was abated promptly and in good faith.

7. Citation No. 1249719 issued May 19, 1982, charged a violation of 30 C.F.R. § 75.605, consisting of a loose strain clamp on the trailing cable of a roof bolter.

8. Citation No. 1249387 issued May 7, 1982, charged a violation of 30 C.F.R. § 75.1105 because the air current used to ventilate the battery charging station was not coursed directly into the return. Coal was not being mined, but mechanics were present on the section.

9. The hazard presented by the latter violation was two-fold: (1) toxic fumes from the battery could be coursed to the working faces; (2) should a fire occur, the smoke would be coursed to the working faces.

10. The condition described in Citation No. 1249387 had been cited on prior occasions at the subject mine.

ISSUES

1. Was the violation charged in Citation No. 1249387 properly designated significant and substantial?

3. What is the appropriate penalty for the violations?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The violation of 30 C.F.R. § 75.605 charged in Citation No. 1249719 issued on May 19, 1982, occurred, but was not of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard. The violation was not serious. It was not known to Respondent and was not readily apparent. Respondent "might have been aware of it" on weekly examination of the equipment. Negligence was not shown.

3. Whether a cited violation is found to be significant and substantial is per se irrelevant to a determination of the appropriate penalty to be assessed. The Commission is not bound by the Secretary's regulations setting out how he proposes to assess penalties. Secretary v. U.S. Steel Mining Co., Inc. 5 FMSHRC 934 (1983) (ALJ).

4. Based on a consideration of the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation charged in Citation No. 1249719 is \$30.

5. Respondent argues in its brief that the condition cited in Citation No. 1249387 was not a violation of 30 C.F.R. § 75.1105. However, in its answer, in effect it admitted the violation, challenging only the significant and substantial designation. I conclude that a violation of the mandatory safety standard was shown. The battery charging station involved herein was "an area enclosing electrical installations" and air currents ventilating it are required to be coursed directly to the return.

6. The condition cited was reasonably likely to result in reasonably serious injuries, either from toxic fumes or smoke inhalation. The violation was serious.

7. The violation was known or should have been known to Respondent. It had been cited before. The violation therefore, was the result of Respondent's negligence.

8. Based on a consideration of the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation charged in Citation No. 1249387 is \$250.

ORDER

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

1. The violation of 30 C.F.R. § 75.605 described in Citation No. 1249717 was not significant and substantial.

2. Respondent shall within 30 days of the date of this decision pay the sum of \$30 for the violation of 30 C.F.R. § 75.605 found herein to have occurred.

3. The violation of 30 C.F.R. § 75.1105 was properly designated as significant and substantial.

4. Respondent shall within 30 days of the date of this decision pay the sum of \$250 for the violation of 30 C.F.R. § 75.1105 found herein to have occurred.


James A. Broderick
Administrative Law Judge

Distribution:

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Louise Q. Symons, Esq., 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 19 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 83-36
Petitioner : A.C. No. 33-00968-03513
v. :
: Nelms No. 2 Mine
YOUGHIOGHENY & OHIO COAL :
COMPANY, :
Respondent :

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio, for
Petitioner;
Robert C. Kota, Esq., St. Clairsville, Ohio,
for Respondent

Before: Judge Broderick

STATEMENT OF THE CASE

A Federal mine inspector issued an order of withdrawal under section 107(a) of the Mine Act for an imminent danger which alleged a violation of 30 C.F.R. § 75.308, because he found an accumulation of methane in a working place in the subject mine. Respondent does not challenge the finding of methane accumulation or the propriety of the imminent danger withdrawal order, but contends that no violation of the mandatory standard was shown. Petitioner's brief argues that the imminent danger order was properly issued, but this is conceded, and, in any case, is not an issue in a penalty proceeding.

Pursuant to notice, a hearing was held on June 27, 1983, in Wheeling, West Virginia. Federal Mine Inspector Charles J. Hall testified for Petitioner. John Repella and Nelson Cramblett testified for Respondent. Both parties have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Respondent is the operator of an underground coal mine in Harrison County, Ohio, known as the Helms No. 2 Mine.

2. Coal was produced by the subject mine and its operation affected interstate commerce.

3. Respondent is a moderate sized operator, employed 339 miners, and produced 820,000 tons of coal annually at the subject mine.

4. Respondent's history of prior violations shows only one previous violation of the safety standard in 30 C.F.R. § 75.308, and that violation was in 1973. The history is not such that a penalty otherwise appropriate should be increased because of it.

5. The subject mine is classified as a gassy mine and is on a 5-day inspection cycle under 103(i) of the Act because it liberates more than one million cubic feet of methane during a 24-hour period.

6. On July 19, 1982, Federal Mine Inspector Charles J. Hall conducted a roof control inspection of the subject mine, including the 4 North off the Main East Section where coal was being produced.

7. Inspector Hall issued a withdrawal order for an imminent danger when he found a concentration of methane in excess of 5 percent within 12 inches of the roof at the last row of roof supports in the E entry. The order alleged a violation of 30 C.F.R. § 75.308.

8. A sample of the atmosphere was taken at the time the order was issued and when tested at the MSHA laboratory in Mt. Hope, West Virginia, showed 6.34 percent methane.

9. The inspector took a ventilation reading at the last open crosscut which showed 10,208 cubic feet per minute which in the inspector's judgment was marginal under the circumstances. (30 C.F.R. § 75.301 requires a minimum of 9,000 cubic feet a minute at the last open crosscut).

10. There had been a roof fall in the E entry on the previous shift. The fall knocked out a jack and tore the curtain which was up in the fall area. Miners were installing breaker posts behind the fall when the order was issued.

11. The section foreman decided to abandon the E entry and cut coal in the crosscut. Tubing from the air dyne fan was extended into the crosscut. The continuous miner was cutting coal approximately 40 feet from where the methane concentration was found.

12. The section foreman checked the area of the fall at the beginning of the shift and again about 20 minutes before the inspector arrived and found approximately .2 percent methane.

13. Following the issuance of the order, the power was shut off, and the men were withdrawn except those engaged in abating the condition. The curtains were tightened and curtain was extended into the E entry to the fall area. The condition was abated in about 1 hour when the methane concentration was reduced to less than .1 percent.

14. Eleven miners were working in the section at the time the order was issued including 2 in the E entry installing posts, and 2 in the crosscut off the E entry cutting coal. A shuttle car was running in and out from the continuous miner.

15. The methane monitor on the continuous miner was operating properly at the time the order was issued. No permissibility violations were cited in the section. The section was adequately rock-dusted. The section was somewhat damp.

16. The methane concentration in the E entry was due in part to the fan pulling the air to the face being mined (the crosscut) and short circuiting the air to the E entry.

REGULATION

30 C.F.R. § 75.308 provides as follows:

If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of the Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane.

ISSUE

Whether a finding of a concentration of methane in the explosive range under the circumstances of this case constitutes a violation of 30 C.F.R. § 75.308?

CONCLUSIONS OF LAW

1. Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and the undersigned administrative law judge has jurisdiction of the parties and subject matter of this proceeding.

2. Although excessive accumulation of methane in a working place is not per se a violation of the mandatory safety standard in 30 C.F.R. § 75.308, the failure of an operator to take reasonable and necessary steps to control and dissipate methane concentrations before they reach the explosive range is a violation of the standard.

DISCUSSION

In a case under the 1969 Coal Act, the Board of Mine Operations Appeals held that a finding of methane in excess of six percent 6 feet from the working face did not in itself establish a violation of section 303(h)(2) of the Coal Act (this statutory provision is identical to 30 C.F.R. § 75.308). Eastern Associated Coal Corporation, 1 IBMA 233 (1972). The holding was reaffirmed in Mid-Continent Coal and Coke Company, 1 IBMA 250 (1972) where the Board said: "Neither the Act nor the Regulations provides that a mere presence of methane gas in excess of 1.0 volume per centum is per se a violation." 1 IBMA at 253. In 1977, the Board held that a 5 percent methane accumulation in the face did not establish a violation of 30 C.F.R. § 75.301 (requiring ventilation of active workings with air of sufficient volume and velocity to dilute, render harmless and carry away explosive gasses). "The Board is of the opinion that it would be patently inconsistent administration to hold that an excessive methane accumulation constitutes a violation under 30 C.F.R. § 75.301 when the provisions of 30 C.F.R. § 75.308 provide for specific actions to be taken when such an excessive accumulation is discovered." Mid-Continent Coal and Coke Company, 8 IBMA 204, 212 (1977).

It is a well known fact that the 1977 Mine Act was passed in part because of the Scotia mine disaster in March, 1976. The Senate Committee Report on S. 717 (which became the Mine Act) reads in part:

"At Scotia, in March, 1976, twenty three miners and three Federal inspectors died in two explosions of accumulated methane gas when the mine safety enforcement effort was unable to detect and address chronic conditions of inadequate ventilation in the mine.

* * * * *

The Scotia disasters demonstrated once again that until the Congress finally provides truly effective

mine health and safety laws and insists on responsive administration and enforcement of those laws, this problem will continue to occur."

S. Rep. 95-181, 95th Cong., 1st Sess. 4-5 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of The Federal Mine Safety and Health Act of 1977, at 592-3 (1978) ["Legis. Hist."].

The Committee Report further made it clear that the civil penalty provisions of the Act were intended to induce compliance with the Act and its standards, and the Scotia disaster was specifically related by the Committee to the failure of the civil penalty procedures under the 1969 Coal Act. See Legis. Hist. 597, 629.

Whatever the authority of the Board decisions under the Coal Act, it is clear that when it passed the 1977 Mine Act, Congress intended that methane buildups in underground mines be prevented by the imposition of civil penalties in appropriate circumstances. It is clearly not enough that a mine operator take steps to eliminate explosive concentrations of methane after they are found by an inspector and a withdrawal order is issued.

In the case of C F & I Steel Corporation v. Secretary, 3 FMSHRC 2819 (1981), Judge Boltz found that because the operator at once made necessary ventilation changes when served with an order alleging that 1.0 percent methane was contained in the air at the working face, no violation of 30 C.F.R. § 75.308 was established. However, in a later case, Consolidation Coal Company v. Secretary, 4 FMSHRC 1960 (1982), Judge Kennedy observed (dicta) "I believe a more precise reading of the law would show that while a 1% concentration is not a violation [of 75.308] an operator's failure to control and dissipate the concentration before it reaches 1.5% warrants a finding of violation." 4 FMSHRC at 1962, fn 4.

3. The following factors singly or in combination require a mine operator to take extra precautions to avoid permitting a methane buildup to reach the explosive range: (a) the mine liberates excessive methane and is classified as a gassy mine; (b) a recent roof fall; (c) an abandoned area or gob area near the working places.

4. In this case, the operator was aware of the three factors listed above. It knew or should have known that extending the fan tubing into the crosscut would short circuit the air going to the abandoned entry. Under the circumstances, it was required by 30 C.F.R. § 75.308 to take necessary and reasonable steps - including directing a greater quantity of air to the last open crosscut, and tightening and extending the curtains - to assure that there would not be a methane buildup in entry E.

5. Because the Respondent failed to take such steps, it was in violation of the mandatory standard in 30 C.F.R. § 75.308.

6. The violation was extremely serious. The methane concentration was in a working place. It could have resulted in an explosion and multiple fatalities.

7. The Respondent should have been aware of the violation. See conclusions of law 3, 4, and 5 above. The violation resulted from Respondent's negligence.

8. Respondent's history of prior violations is not such that a penalty otherwise appropriate should be increased because of the history.

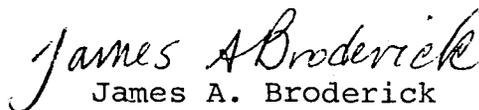
9. There is no evidence that the imposition of a penalty will have any effect on the operator's ability to continue in business.

10. The Respondent promptly and in good faith abated the violation after it was cited.

11. Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$2,500.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay within 30 days of the date of this decision the sum of \$2,500 for the violation found herein to have occurred.


James A. Broderick
Administrative Law Judge

Distribution:

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

Robert C. Kota, Esq., P.O. Box 1000, St. Clairsville, OH 43950 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 19 1983

RALPH YATES, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEVA 82-360-D
: MSHA Case No. HOPE CD 82-26
CEDAR COAL COMPANY, :
Respondent : Big John No. 4 Mine

DECISION

Appearances: John Boettner, Esq., Boettner and Crane, Charleston,
West Virginia, for Complainant;
Joseph M. Price, Esq., Robinson and McElwee,
Charleston, West Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant alleges that he was discharged from the position he held with Respondent as section foreman because he made complaints to his supervisor concerning improper ventilation in the subject mine and that these complaints constituted activity protected under the Mine Act. Complainant's employment was terminated on March 9, 1982. On March 11, 1982, he filed a complaint with MSHA. Following an investigation, MSHA notified Complainant by letter dated April 29, 1982, that it had determined that a violation of section 105(c) of the Act had not occurred. On August 22, 1982, Complainant filed a letter with the Commission which was accepted as a complaint. Following an order to show cause, Respondent's Answer was filed December 10, 1982. Respondent contends that the complaint was not timely filed, and that it failed to state a cause of action under the Mine Act. Further, it denied that Complainant's employment was terminated because of activity protected under the Act.

The case was heard in Charleston, West Virginia, on January 27, 1983, May 5 and May 6, 1983. The record was held open for depositions which were taken on May 18, 1983 and June 21, 1983. The record was closed July 22, 1983. Both parties were afforded an opportunity to file posthearing briefs with proposed findings of fact and conclusions of law. Respondent filed such a brief.

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

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent Cedar Coal Company was the operator of an underground coal mine in Keith, West Virginia, known as the Big John No. 4 Mine.

2. Complainant was employed as a section foreman by Respondent beginning November 4, 1980. He originally worked at Grace No. 2 Mine but in a short time he transferred to Big John No. 4 Mine as belt foreman. In approximately the fall of 1981, he became section foreman at Big John No. 4 Mine in the 3 South section. He continued working as section foreman through March 8, 1982. He signed a "quit slip" on March 9, 1982.

3. On November 5, 1981, State Mine Inspector Carl Val Hoffman inspected the subject mine and issued a notice of violation because in the No. 4 entry off the 3 South section, the designated escape-way was ventilated by return air and did not have reflective material at 25 feet intervals on the life line cord. On the same day, two other notices of violation were issued, one because the No. 4 entry was mined at an excessive width for a distance of 18 feet, and the other for another violation of the roof control plan in the No. 4 entry. The first violation was abated November 6, 1981, and the others by 9:30 p.m., November 5.

4. In approximately November, 1981, the evening shift mine foreman in the 3 South section of the subject mine, Gary Davita, relayed to Superintendent Forms complaints from the evening shift section foreman that the section had on occasion been left with insufficient air, had torn curtains, and was not properly cleaned and rock dusted. This continued for some weeks. Davita made a written report to Forms and participated in a meeting with Complainant and Forms, where the complaints were discussed.

5. Following that meeting, on November 6, 1981, Mine Superintendent David J. Forms wrote Complainant as follows:

"On . . . November 5, 1981, I called underground to inform you that we had a State Mine Inspector in the office. I instructed you to clean your section and ventilate it properly before you came outside. You failed to follow my instructions and your dereliction of duties resulted in a loss of two hours of production on the evening shift.

Your actions of gross negligence and failure to accept and respond to instructions will not be tolerated. This letter is to inform you that any future actions of this nature will be jeopardizing your position at Cedar Coal Company."

6. A similar letter was sent the same day to section foreman Shelby Burgess.

7. In late fall, 1981, Complainant called out of the mine to mine foreman Walter Kincaid and told him that there was insufficient air to ventilate his section, and that he had pulled his miners out of the face area. Kincaid replied that if Complainant had "hung (his) damn curtains, (he) would have air." In fact the curtains were properly hung. Finally, sufficient air was introduced in the section and the crew returned to work. Shortly thereafter, the air was again insufficient. Complainant called Kincaid and the condition was rectified.

8. In approximately December, 1981, a new section was opened in the subject mine, and Respondent attempted to ventilate it with the same split of air that was used to ventilate Complainant's section. This resulted in a decrease in the air coming into Complainant's section, and he complained to the mine foreman and superintendent.

9. On February 18, 1982, notices of violation were issued by a State mine inspector to the subject mine because of insufficient air at a last open crosscut and in the faces of entries 2 and 3 in the 2 South section. Three other notices were issued for violations on the 2 South section on the same day. Three additional notices were issued for violations on the Number 1, 3 and 4 belts.

10. On March 8, 1982, while Complainant was working the day shift, he complained to Kincaid that his section did not have enough air. Kincaid came to the section and agreed that the air was insufficient. Kincaid then "went back somewhere and it was not long before we had enough air." The section continued working until the end of the shift and the air was sufficient at that time.

11. On March 8, 1982, State Mine Inspector Harry T. Linville arrived at the subject mine at about 4:00 p.m., as the afternoon shift was beginning. The inspector arrived at the 3 South section about 5:00 p.m. and he took air readings at the last open crosscut between entries 1 and 2 and found only 3,094 cubic feet per minute. Readings at the last open crosscut between entries 2 and 3 showed only 4,900 cubic feet per minute of air. (The minimum quantity of air reaching the last open crosscut is supposed to be 9,000 cubic feet per minute). A notice of violation was written which required the condition to be abated by 5:30 p.m. the same day.

12. When the above condition was not abated by 5:30 p.m., on March 8, the Inspector issued an order of withdrawal from the last open crosscut to each of the working faces in No. 1, 2, 3 and 4 rooms in the 3 South section.

13. About 2 hours after the beginning of the day shift on March 9, the operator asked the inspector to check the air, after the curtains were rehung and the "back up flies" were tightened. Ten thousand seven hundred and ninety cubic feet of air was found at the last open crosscut between the No. 1 and 2 entries of the 3 South section and the order of withdrawal was terminated.

14. On March 9, 1982, Complainant arrived at the mine site prior to 7:30 a.m., and prepared to go underground. Mine Superintendent Forms asked him to come into the office. Forms told Complainant that the company "got fined" for not having air on the section the previous night. Complainant was told he would be fired unless he signed a termination slip indicating that he quit for personal reasons. Superintendent Forms noted on the slip that "Mr. Yates failed to conform with our program and had problems adapting to a different style of management."

15. On March 11, 1982, Complainant filed a complaint under section 105(c) of the Mine Act with MSHA. Following an investigation, MSHA informed Complainant by a letter dated April 29, 1982, that it had determined that a violation of section 105(c) had not occurred.

16. In April, 1982, mine foreman Kincaid and mine superintendent Forms were told that their employment with Respondent would be terminated. They last worked on April 28, although they were continued on the payroll until June 30, 1982.

17. In May, 1982, Complainant discussed the possibility of his being rehired with the new superintendent of the subject mine, Woody Goins. Although Goins did not promise to rehire him, Complainant was led to believe that he might be rehired. The position was in fact filled by another in about July, 1982.

DISCUSSION

The testimony of Complainant and that of Goins are sharply divergent on the question of whether a job offer was made or implied. I am accepting the testimony of Complainant on this issue since it is largely supported by the testimony of Roy French, President of the Local Union and a member of the Safety Committee at the subject mine.

18. Kincaid and Forms had certain written memoranda or notes present when they discussed Complainant's case with the MSHA investigator. They apparently retained such memoranda when they left Respondent's employ.

STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

(c)(1) 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 danger or safety or health violation in a coal or other mine . . . 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.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.

* * * * *

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing

(in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

ISSUES

1. Whether Complainant's case is barred because of failure to timely file his complaint?
2. Whether Complainant was discharged for activity protected under the Mine Act?
3. If Complainant was discharged for protected activity, what relief should be awarded?

CONCLUSIONS OF LAW

1. At all times pertinent to this proceeding, Complainant and Respondent were subject to the provisions of the Federal Mine Safety and Health Act of 1977, and the undersigned administrative law judge has jurisdiction over the parties and subject matter of this proceeding.
2. From November, 1980, until March 8, 1982, Complainant was employed by Respondent as a miner.
3. The complaint is not barred by the limitations for filing claims set out in section 105(c) of the Act or by laches.

DISCUSSION

The statutory filing deadlines in the Mine Act, including the requirement that a Complainant file a complaint with the Review Commission within 30 days of the Secretary's negative determination, are not jurisdictional. Secretary/Bennett v. Kaiser Aluminum and Chemical Corporation, 3 FMSHRC 1539 (1981) (ALJ); Allen v. UNC Mining and Milling, 5 FMSHRC 30 (1983) (ALJ). See S. Rep. No. 95-181, 95th Cong., 1st Sess. at 36, reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, Senate Subcommittee on Labor, Committee on Human Resources, 624 (July 1978): "It should be emphasized, however, that these time frames [in 105(c)] are not intended to be jurisdictional." The filing deadlines are therefore to be treated as a statute of limitations, and it must be determined whether Complainant showed justifiable circumstances for his late filing, and whether the delay prejudiced Respondent. See Herman v. Imco Services, 4 FMSHRC 2135 (1983); Montoya v. Valley Camp of Utah, Inc., 5 FMSHRC 630 (1983) (ALJ).

I have found (Finding of Fact No. 17) that Complainant was led to believe that he might be rehired by Respondent. He continued to believe in this possibility until a replacement was hired in July. I conclude this constituted justifiable circumstances for his delay. Respondent argues that it was prejudiced because Complainant's supervisors, Kincaid and Forms, left its employ and took certain notes with them before the complaint was filed with the Review Commission. However, Respondent was aware of the complaint filed with MSHA and did not show that an attempt was made to preserve testimony or documents, or that Kincaid and Forms could not have been subpoenaed or deposed. I conclude that prejudice was not shown. See Allen v. UNC Mining and Milling, supra.

4. The complaints which Complainant made concerning inadequate ventilation described in Findings of Fact Nos. 7, 8 and 10 herein, constituted activity protected under the Mine Act. Any adverse action because of this protected activity would violate section 105 of the Act.

5. Complainant was constructively discharged although he signed a "quit slip" since he was required to sign the slip or be fired.

6. Complainant has failed to establish that his discharge was motivated in any part by activity protected under the Act.

DISCUSSION

To establish a prima facie case of discrimination under the Act, Complainant must show that he was engaged in activity protected by the Act and that his discharge was motivated in any part

by the protected activity. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Bush v. Union Carbide Corporation, 5 FMSHRC 993 (1983). There is no evidence here that Complainant was discharged because of his complaints of inadequate ventilation. Rather, the evidence clearly establishes that he was discharged for what was perceived to be his failure to keep adequate ventilation on his section and various other perceived inadequacies in his work as section foreman. There is substantial evidence that Complainant's supervisors were guilty of various deficiencies of their own in their supervision of the mine including a failure to provide adequate ventilation to Complainant's section. It may be that his supervisors attempted to make Complainant the scapegoat for these deficiencies and the resultant violations cited and closures ordered by the State mine inspector. The fact that Forms and Kincaid were discharged shortly after Complainant lends some support to this conclusion. Assuming that Forms and Kincaid fired Complainant because of their own inadequacies, it would still not establish a cause of action under the Mine Act. See Sizemore v. Dollar Branch Coal Company, 5 FMSHRC 1251 (1983) (ALJ). If Complainant was discharged because of the violation notices and closure orders issued by the State, and if he were only partly responsible or not at all responsible for such notices and orders, the discharge may have been unfair, but it did not result from protected activity under the Mine Act. Therefore, no violation of section 105(c) has been established.

ORDER

Based upon the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED for failure to establish a violation of section 105(c) of the Act.

James A. Broderick
James A. Broderick
Administrative Law Judge

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John Boettner, Jr., Esq., Boettner & Crane, 1115 Charleston National Plaza, Charleston, WV 25301 (Certified Mail)

Joseph M. Price, Esq., Robinson & McElwee, P.O. Box 1791, Charleston, WV 25326 (Certified Mail)

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and to be held in confidence to the extent that disclosure of such information would be likely to result in the identification of a source of information or the disclosure of confidential information.

001504

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 20, 1983

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 83-201
A.C. No. 15-12515-03502

v.

Mine No. 2

BEAR CREEK MINING COMPANY,
Respondent

Docket No. KENT 83-202
A.C. No. 15-12339-03505

Mine No. 1

DEFAULT DECISIONS

Before: Judge Melick

A Notice of Hearing was issued on August 22, 1983, for hearings to commence in these cases on September 22, 1983, in Knoxville, Tennessee. Said Notice was returned from the address provided by Respondent marked, presumably by the U.S. Postal Service, "Moved, left no address". Additional efforts were made to locate a representative for Respondent but without success.

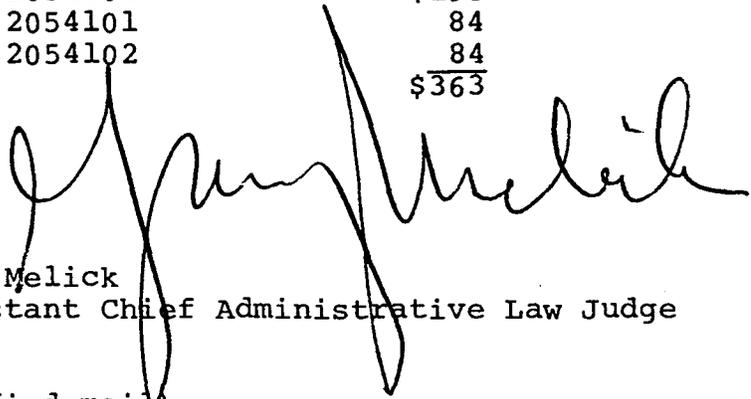
Commission Rule 5(c), 29 CFR § 2700.5(c), requires that the parties "promptly" give written notice of any change of address or business telephone number. It is apparent that Respondent has failed to comply with the requirements of said rule, thereby making it impossible to serve notice upon it and to grant its request for hearing. Issuance of a show cause order would obviously be futile under the circumstances. I accordingly find that Respondent has waived its right to a hearing in these cases and I hereby issue decisions by default granting the Secretary's requests for civil penalties.

ORDER

The Bear Creek Mining Company is Ordered to pay the following civil penalties within 30 days of the date of this decision:

0071

<u>Docket No.</u>	<u>Citation/Order No.</u>	<u>Amount</u>
KENT 83-202	2054104	\$195
KENT 83-201	2054101	84
	2054102	84
		<u>\$363</u>



Gary Melick
Assistant Chief Administrative Law Judge

Distribution: (by certified mail):

Mr. James Trosper, Safety Director, or Mr. Duane Bennett,
Partner, Bear Creek Mining Company, Pathfork, KY 40863

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department
of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN
37203

nsw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 21 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 83-139
Petitioner : A.C. No. 15-13339-03502
 :
v. : Pruden Mine
 :
RALPH BALL, INC., :
Respondent :

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Ralph Ball, pro se, Lafollette, Tennessee, for
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one violation of mandatory safety standard 30 C.F.R. 77.506, and one of 30 C.F.R. 75.200. Respondent contested the citations and requested a hearing. The case was heard in Knoxville, Tennessee, Wednesday, August 10, 1983.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing safety regulation as alleged in the proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act.

Stipulations

The parties stipulated that the respondent is subject to the Act, that I have jurisdiction to hear and decide the case, that the respondent is a small mine operator, and that the conditions cited by the inspector were timely abated. In addition, Mr. Ball testified that the subject mine is closed, that it was operated only for several months, and that at the time it was active he employed five miners, including himself. Mr. Ball also indicated that he is still in the mining business and operates a small mine elsewhere. This information was confirmed by MSHA Inspector Brock who was present at the hearing.

Discussion

Section 104(a) Citation No. 2057746, December 3, 1982, cites a violation of mandatory safety standard 30 C.F.R. 75.200, as follows:

The approved roof control plan was not being complied with in that temporary roof support (Roof Jacks) was not provided for the Willcox roof bolter.

Section 104(a) Citation No. 2057747, December 3, 1982, cites a violation of mandatory safety standard 30 C.F.R. 77.506, as follows:

Overload and hot circuit protection was not provided for the 220VAC electric drill. 1.4/3 cable and fuses were wired over.

Respondent has conceded the fact of violations in this case and he does not dispute the conditions or practices cited by the inspector on the face of the citations. His principal contention is that since the mine had not become fully operational at the time of the inspection and subsequently ceased operation, the violations were not significant and substantial. Inspector Brock confirmed that this was in fact the case. Given these circumstances, the parties agreed to settle the matter without

the need for a full hearing, and after giving both the respondent and the inspector an opportunity to be heard, I rendered a bench decision approving a proposed settlement of the matter.

Taking into account all of the statutory criteria found in section 110(i) of the Act, and the fact that the respondent closed the mine within several months after the inspection, petitioner recommended a reduction in the civil penalties assessed in this case. In addition, petitioner relies on the inspector's testimony that he does not at this time believe that the violations were "significant and substantial". Petitioner requested that I assess civil penalties in the amount of \$20 for each of the citations, and in support of this recommendation argued that under MSHA's regulations, all "non-S&S" citations are automatically assessed at \$20. This proposal was rejected, and my views of MSHA's regulations concerning civil penalty assessments for "non-S&S" citations were articulated on the record and need not be repeated here. Suffice it to say that counsel's motion that I accept a settlement of \$20 for each citation on the ground that Inspector Brock has now changed his mind and believes that the violations are not "significant and substantial" was rejected. However, the proposed settlement, based on my independent de novo consideration of all of the evidence adduced on the record, was approved, and the civil penalty assessments are allocated as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
2057746	12/3/82	75.200	\$25
2057747	12/3/82	77.506	15
			<u>\$40</u>

ORDER

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


 George A. Koutras
 Administrative Law Judge

Distribution:

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/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 22 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 83-43
Petitioner : A.C. No. 36-00970-03506
v. :
 : Maple Creek No. 1 Mine
UNITED STATES STEEL MINING :
CO., INC., :
Respondent :

DECISION

Appearances: Matthew J. Rieder, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This proceeding involves two citations alleging violations of mandatory safety standards contained in 30 C.F.R. § 75.503 and 30 C.F.R. § 75.200. Both violations were originally designated as "significant and substantial," but at the hearing counsel for Petitioner conceded that the violation of 30 C.F.R. § 75.503 was in fact not significant and substantial. In its answer and by a clear statement in open court, Respondent has admitted that the violations occurred but denies that there were significant and substantial and contests the penalties proposed. Pursuant to notice, the case was heard in Uniontown, Pennsylvania, on June 21, 1983. William R. Brown and Francis E. Wehr, Jr. testified on behalf of Petitioner; Ira Seaton, Jr. testified on behalf of Respondent. Each of the parties has filed a posthearing brief. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Respondent is the owner and operator of an underground coal mine in Washington County, Pennsylvania, known as the Maple Creek No. 1 Mine.

2. The subject mine is a large mine and the Respondent is a large operator.

3. The imposition of penalties in this proceeding will not affect Respondent's ability to continue in business.

4. Between August 17, 1980 and August 16, 1982, Respondent in all its mining operations had 4,245 paid violations of mandatory health and safety standards. Of these violations, 51 were of 30 C.F.R. § 75.503, and 55 were of 30 C.F.R. § 75.200. Considering the size of Respondent's operation, this is a moderate history of prior violations, and penalties otherwise appropriate should not be increased because of it.

5. Citation No. 1146360 was issued to Respondent on May 21, 1982, alleging a violation of 30 C.F.R. § 75.503 because a plug on a scoop was not padlocked to the receptacle.

6. The hazard caused by the violation cited was the possibility of an ignition if the plug was accidentally pulled from the receptacle. The scoop was in a section which had been idle for approximately 6 months and the occurrence of an ignition was remote.

7. Citation No. 2012243 was issued to Respondent on September 16, 1982, alleging a violation of 30 C.F.R. § 75.200 because the approved roof control plan was not being complied with in the 7 flat left section MMV006. Only five temporary supports had been installed in the 1 butt cut, 11 room 2 split, which cut was 12 feet deep. For such a cut, the plan required six temporary supports.

8. The citation was issued at 8:55 a.m., prior to any work being performed on the day shift. The five temporary supports had been set during the previous shift (12:00 m. to 8:00 a.m.).

9. The hazard caused by the violation was an area of unsupported roof.

10. There was a slip in the roof and the roof was loose and drummy sounding.

11. Both violations were abated promptly and in good faith.

ISSUES

1. Was the violation charged in Citation No. 2012243 properly designated significant and substantial?

2. What are the appropriate penalties for the violations?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and the undersigned administrative law judge has jurisdiction over the parties and subject matter of this proceeding.

2. The violation of 30 C.F.R. § 75.503 charged in Citation No. 1146360 was not of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

3. The violation was moderately serious because it could have resulted in serious injury if an ignition occurred.

4. There is no evidence that the violation was due to Respondent's negligence.

5. Whether a cited violation is properly designated as a significant and substantial violation is per se irrelevant to a determination of the appropriate penalty to be assessed.

6. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is \$100.

7. The violation of 30 C.F.R. § 75.200 charged in Citation No. 2012243 was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

DISCUSSION

Setting fewer supports than are called for in the approved minimum roof control plan results pro tanto in an area of unsupported roof. Unsupported roof can fall and result in serious injury to miners. Following the test in the National Gypsum case, 3 FMSHRC 822 (1981), I conclude that a roof fall and serious injury is reasonably likely to occur. Therefore, the violation was significant and substantial. Respondent argues that if no temporary supports had been set by the midnight shift, no violation would have been cited, since it would be assumed that the day shift would set the posts before beginning to bolt. However, the absence of a single support could easily be overlooked. In fact the absence of the support was not noted in the preshift examiner's book. The absence of all temporary supports would more likely result in a roof fall, but it would also be more evident, and miners would be much less likely to travel under the roof.

8. The condition was serious. It was known or should have been known to Respondent: The midnight shift foreman and the preshift examiner on the day shift should have noted it. Therefore, it resulted from Respondent's negligence.

9. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for this violation is \$250.

ORDER

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

1. The violation of 30 C.F.R. § 75.503 described in Citation No. 1146360 was not significant and substantial.

2. Respondent shall within 30 days of the date of this decision pay the sum of \$100 for the violation of 30 C.F.R. § 75.503 found herein to have occurred.

3. The violation of 30 C.F.R. § 75.200 described in Citation No. 2012243 was properly designated as significant and substantial.

4. Respondent shall within 30 days of the date of this decision pay the sum of \$250 for the violation of 30 C.F.R. § 75.200 found herein to have occurred.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Matthew J. Rieder, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Louise Q. Symons, Esq., 600 Grant Street, Room 1580, Pittsburgh, PA 15230 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 26 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 81-136
Petitioner : A.C. No. 15-02008-03036
: :
v. : No. 32 Mine
: :
UNITED STATES STEEL CORP., :
Respondent :

DECISION

Appearances: Carole Fernandez, Esq., U.S. Department of Labor,
Office of the Solicitor, Nashville, Tennessee,
for the petitioner;
Louise Q. Symons, Esq., Billy Tennant, Esq.,
U.S. Steel Corp., Pittsburgh, Pennsylvania,
for the respondent.

Before: Judge Koutras

Statement of the Case

This case concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on July 6, 1981, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment for an alleged violation of mandatory safety standard 30 CFR 77.1605(k), as detailed in a Section 104(a) citation no. 981185, served on the respondent by MSHA Inspector Alex R. Sarke, Jr., on January 23, 1981.

The cited standard states that "[b]erms or guards shall be provided on the outer bank of elevated roadways.". The inspector cited the alleged violation after concluding that the respondent had failed to provide appropriate berms or guards at three locations along an elevated roadway leading to the mine. At one location, the inspector observed an existing guardrail which had been dislodged for a distance of 29 feet. At a second location, he observed a berm 6 to 8 inches high for a distance of 22 feet in length, and at

the third location he observed a berm 16 inches high for a distance of 29 feet in length. Locations two and three were cited because the existing berms were less than 22 inches, the axle height of what the inspector believed was the largest vehicle using the roadway. The relevant MSHA inspector's manual contained a policy providing that under Section 77.1605(k) berms "shall be at least as high as the mid-axle height of the largest vehicle using the roadway". The first location, where the inspector found the guardrail to be dislodged, was cited because the inspector considered the dislodged guardrail to be tantamount to no guardrail at all.

By summary decision issued on February 24, 1982, 4 FMSHRC 563, I vacated the citation after concluding that the language of Section 77.1605(k) is so vague and ambiguous as to render the standard unenforceable. I also concluded that the inspector could not rely on an MSHA internal "mid-axle height" guideline to support his citation because the guideline was not in fact part of the cited mandatory standard.

On appeal, the Commission reversed and remanded the case to me for further proceedings consistent with its decision, 5 FMSHRC 3, January 27, 1983. At 5 FMSHRC 5, the Commission stated as follows:

We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by the standard. See Alabama By-Products, supra. See also Voegele Company, Inc. v. OSHRC, 625 F.2d 1075, 1077-79 (3rd Cir. 1980). The definition of berm in section 77.2(d) makes clear that the standard's protective purpose is the provision of berms and, by implication, guards that are "capable of restraining a vehicle." (Footnote omitted.)

The Commission agreed with my conclusion that the citation in this case was issued and litigated by MSHA largely, if not solely, on the basis of the inspector's manual mid-axle policy guideline, and observed as follows at 5 FMSHRC 6:

Reliance on the mid-axle guideline, without more, does not necessarily establish the berm or guard that a reasonably prudent person would have constructed under the circumstances. If the

Secretary believes that a berm of mid-axle height is indeed what a reasonable person would provide in a particular case, the Secretary must prove that by a preponderance of credible evidence.

With regard to the two locations where the existing berms were found by the inspector to be "inadequate" because they were less than 22 inches (the axle height of the largest vehicle using the roadway), the Commission held that in order to prove this allegation MSHA must present evidence as to what type of berm or guard a reasonably prudent person would install under the circumstances. With respect to the location where the guard was dislodged, the Commission observed that, while a prima facie case of violation may have been established, I should have made findings as to whether the guard was actually missing and whether the respondent established a valid defense in its claim that the guard was being replaced at the time of the inspection and issuance of the citation.

After remand and completion of discovery by the parties, a hearing was conducted in Pikeville, Kentucky, on May 17, 1983, and the parties filed proposed findings and conclusions, with supporting briefs. The arguments presented therein have been considered by me in the course of this decision.

MSHA's Testimony and Evidence

MSHA Inspector Alex Sarke testified as to his background and experience, and he confirmed that he issued Citation No. 981185 on January 23, 1981, during a regular inspection of the mine. However, he confirmed that he was aware of a vehicular accident which had occurred when an automobile went through a berm, but indicated that the incident did not meet MSHA's Part 50 regulatory definition of a "reportable accident" (Tr. 14-17). Because of the heavy fog and slick roads, the so-called "accident" was not investigated until the day after it occurred, and based on his observations, he concluded that the car left the roadway without leaving any indications that the driver ever attempted to stop. In addition, he was of the view that the automobile was travelling in excess of the posted 20-mile speed limit. He issued the citation because of his belief that the berms at the three locations detailed in his citation were inadequate (Tr. 20).

Mr. Sarke indicated that the normal traffic on the roadway in question consisted of passenger cars used by the miners coming and going from work, half-ton equipment and supply trucks, and large "semi" trucks used to haul equipment and supplies. The roadway in question is the only main access road into

and out of the mine (Tr. 22). The roadway is not used for coal haulage, and coal haulage trucks would not be part of the normal traffic (Tr. 22). He also indicated that some heavy equipment such as graders and "high-lifts" also use the roadway, but that they would be travelling at very slow speeds because they would be performing work on the roadway (Tr. 23).

Mr. Sarke described the roadway in question as having an average width of about 20 feet along its entire route, and an angle of incline of about 10%. In his opinion, the roadway is "a very steep roadway" (Tr. 24). He also believed that the entire roadway was an "elevated" roadway, and he defined the term "elevated" as "any roadway that is above normal levels. And I'm talking normal highway level. Once you leave the normal highway level and you start up -- when you start an incline, you have started an elevated roadway" (Tr. 25).

Mr. Sarke stated that the berms on the roadway "were in as good a condition as you could expect them to be" and he agreed that the respondent "does an outstanding job of taking care of the roads -- as a matter of fact, they do the best job of anybody I have. And they do a good job on the berms". He expressed his concern over the cited conditions as follows (Tr. 25-26):

And these particular areas, I don't know what happened to cause the berms to be -- other than the guardrail, I know why the guardrail was up, cause they had had a slip. But in the two areas where the berms were down a little lower than -- I don't know if it was just a mistake or if they had fallen off and they had put them back and hadn't gotten them up to, you know, par, or what.

Q. In other words, were the berms and the guards that you observed on the roadway, were they higher than were present at the three locations where you cited?

A. The berms had -- I started measuring those berms at the foot of the mountain as we started up. And at that particular time, I could find no berms that were -- the average ran two foot and above. These locations that I cited were the only locations that I could find that were lower, you know, than the rest of the berms on the roadway.

Q. Was there anything that you could point to such as, perhaps, the fact that the road wasn't

as steep there or any other condition that would be a reasonable basis for reducing the height of the berms at those locations?

A. No, ma'am. I couldn't see reducing the height of the berms at these locations because even though those berms -- in an interrogatory I believe that the company stated that that was sufficient to stop a car, and I would agree, a 16-inch berm at one of the locations would stop a car. But the fact is we have so much other equipment on the highway besides passenger cars that it would not stop.

Mr. Sarke described the composition of the roadway as a mixture of "red dog" and gravel, or general "road-composition material". Guardrails were at three locations along the roadway, and guardrails, rather than berms, were at those locations because "you're looking straight down", and the company installed the guardrails there out of recognition of the fact that the steep locations were hazardous. In his view, the location of the guardrails were at a place where a reasonable person familiar with mining circumstances would have placed them (Tr. 28).

With regard to cited location No. 1 directly across from the bathhouse where a 29 foot area had no berm or guardrail, Mr. Sarke confirmed that at one time a guardrail had been there, but that it slipped off and was lying under the hill and "was no benefit whatsoever". He did not know how long it had been dislodged, and in his opinion it became dislodged when the dirt ran off and slipped at the corner of the bathhouse, thereby causing the guardrail to "just sagged down" and collapsed. He discussed the condition with a company official, and no one advised him that repairs were being made, and he saw no evidence that the guardrail was in the process of being repaired (Tr. 29). The roadway drops off approximately 10 to 12 feet "straight over the edge" at that location, and cars, trucks, and a soft-drink vending truck used the roadway at that location (Tr. 30).

With regard to the second location mentioned in his citation, Mr. Sarke confirmed its location as "three-tenths of a mile from the bathhouse and an area of twenty-two feet, having a berm of six to eight inches". In his opinion, the existing berm was not the height that a reasonably prudent person familiar with the mining industry at this mine would have installed at that location, and he believed that a reasonable berm there would have to be the height of the biggest part of the berms on the roadway which ranged from 24 to 36 inches. In that area, passenger cars, trucks, graders, and supply trucks used the roadway (Tr. 31).

As for the third location, identified as the site of the accident, Mr. Sarke agreed that it was 1.6 miles from the bathhouse, and that the height of the berm which was provided was 16 inches for a distance of 29 feet. He described that area of the roadway as slightly inclined, as well as curved, with a width of about 21 to 22 feet and a straight drop of 30 feet off the edge. When asked if the existing berm was of a height a reasonably prudent person familiar with mining conditions, general and local, would have installed, he replied in the negative. He believed that judging from the types of vehicles traveling on the roadway, a berm two feet in height, such as those the respondent had elsewhere, would be appropriate. He admitted that even a two foot tall berm would not restrain a vehicle traveling at an excessive speed, but insisted that even if the axle-height standard never came to his attention, he would still have required a berm two feet high as well as a guardrail at that location (Tr. 32-35).

On cross examination, Mr. Sarke confirmed that he began the mine inspection in January 1981, but did not know whether he had been there in December 1980, or whether the inspection in question was the first one he had made at that mine. He had no idea how many times he had driven up and down the mine access road in question before issuing the citation. He confirmed that he had not felt endangered traveling on the road and had considered all the berms adequate except those which were only six to eight inches high. When asked why he made no determination as to the adequacy of the berms until January 1981, he replied that inspection procedures entail examining underground first, and leaving the surface area for last (Tr. 36-37).

Inspector Sarke believed the berm at the location of the accident to be adequate for cars and trucks, but not for the heavy equipment. He considered the roadway to be a haulage road, but was unaware of any official definition of "haulage road" in the MSHA regulations. Also, he confirmed that he did issue the citation under the regulatory section entitled "Loading and Haulage" (Tr. 38).

When asked if he knew of a definition of "elevated roadway" in the standard, Mr. Sarke replied in the negative. He denied stating that a road became an "elevated road" when it left the public road on mine property, but agreed that an "elevated roadway" could be one running across a plateau, or a route along a mountainside where there is a possibility of falling off on one side. Mr. Sarke did confirm that the road to Mine 32 was about the same as most public roads in Harlan County. More specifically, he remembered driving on Black Mountain and recalled guardrails posted along the roadside. But he agreed

that in most cases there were no rails or berms. He disclaimed knowledge of public road standards for the purpose of comparing to those he applied to the cited mine access road (Tr. 47).

Inspector Sarke agreed that it was impossible to build sufficient barriers to keep cars from overtraveling on many stretches of Kentucky mountain roads. However, with regard to the access road in question, he did not believe it was impossible to build such barriers because there were existing guardrails and berms everywhere along that route. He confirmed that the first instance where guardrails were located on the road was on a bridge crossing a stream, but he did not know how those rails were mounted. He did recall that the rails consisted of metal posts joined by a steel rope, but did not know how effective they would be in preventing a car from falling into the stream. He guessed they could restrain an average car traveling at ten miles an hour (Tr. 50).

Mr. Sarke stated that at location #1 where he observed the dislodged guardrail, the foreman's parking lot connects with the lot used by other employees. He estimated that 20 automobiles would be passing through that location at any given time, and that these were automobiles driven by the men during shift changes. He agreed that this part of the roadway was level and was approximately 15 feet wide, but that two cars would not be able to pass each other at that location. He confirmed that one could observe any traffic coming from one parking lot to the other. He also confirmed that there had been problems with the ground washing away at this location, but denied any knowledge of a timber being fitted along the outer edge of the roadway. He did not know how deep the guardrail holes were, and assuming that they were in place, he could not state how much protection they would have provided for passing vehicles. He could not recall how the guardrails were installed to achieve abatement of the citation (Tr. 56-59).

Mr. Sarke conceded that due to the road conditions, the installation of guardrails directly adjacent to the roadway where the guardrail was dislodged was not possible. While he believed that there was a danger of cars going off the hill because of the dislodged guardrail, he could not state whether the guardrail prior to being dislodged because of ground erosion would have restrained a vehicle (Tr. 60).

Mr. Sarke testified that he considered the road in question to be a haulage road upon which people, trucks, and supplies

moved. As for the abatement, it was his recollection that the guardrail was reinstalled so that it appeared to be capable of adequately preventing an automobile from going over the drop-off. Since he approximated the drop-off as 12 feet, he estimated that the depth of the holes in which the guardrail was installed would be deeper, but he could not recall what the guardrail was constructed of 16-foot posts (Tr. 66-68). He denied any knowledge of the welding of guardrail plates going on at the time the citation issued, and he believed that any such activity would have taken place at the shop located some 250 feet from the bathhouse. He confirmed that he did not visit the shop during the inspection (Tr. 70).

With regard to the citation at location #2, Mr. Sarke described the road as being level, approximately 20 feet wide, with an additional 15 foot wide level area extending along the outer edge. He confirmed that he considered the existing berm as inadequate, and expressed an opinion that a 24 inch berm would be acceptable, but conceded that an automobile could still overtravel such a 24-inch berm and turn over. He also agreed that in determining what is reasonable, he might consider the amount of room a driver would have to maneuver in before reaching the berm, and he believed that at other locations along the road where the berms were adjacent to the roadway, 24 inches would be acceptable. Although he first indicated that a driver would have to travel an additional 15 to 20 feet to reach the berm, he then indicated that the berm was actually located on the road and not on the outer bank (Tr. 72). He explained further that the road was straight, and while the law only required the respondent to place berms on the outer bank, the respondent exceeded this requirement at location #2 by constructing the berm immediately on the road. However, the problem was that it was only six to eight inches high (Tr. 73-75).

Mr. Sarke testified that he had interviewed the individuals involved in the accident, but did not ascertain how long they had worked at the mine, how many times they had ridden on the road, or if they understood what the speed limit was. He confirmed that the men told him they were not speeding, and he believed they understood the speed limit to apply to the entire road. He reported that he had no idea how fast the men were driving, but in his opinion they had to have been speeding (Tr. 79).

He described the stretch of road where the accident had taken place to be curved, about 20 feet wide, with an area of ground on the right hand side before the drop-off, and afterwards, also on the left-hand side. In addition, he

intimated that there might be a few feet of apron between the roadside and the drop-off point. Mr. Sarke confirmed that while he regarded a 16 inch berm at this location to be unreasonable, a two foot berm would be reasonable. The car involved in the accident, however, probably would have traveled over a two foot berm due to its excessive speed. He admitted telling respondent's chief safety Inspector Albert Wagers that absent the inspector's manual instructions, he considered these berms adequate to restrain a car traveling at its normal speed (Tr. 84). While 16 inches might be acceptable for ordinary traffic, it was his view that the passage of heavy vehicles necessitated a 24 inch berm. These vehicles, he stated, weighed thousands of pounds and crawled along at less than 5 mph in low gear. He conceded that it was unlikely that the drivers of these vehicles would lose control and drive off the mountainside (Tr. 85-86).

In response to further questions, Mr. Sarke testified that he knew of no tests conducted on the berms, and he confirmed that he interpreted the berm standards based on his experience as a miner and as an inspector. He did not know how long the cited guardrail had been dislodged (Tr. 89). He confirmed that all types of vehicles used the roadway cited at locations #2 and #3, but that at the location of the dislodged guardrail only automobiles and an occasional private soft drink vending truck would use the road (Tr. 89). He also confirmed that it was not likely that a truck would go off the roadway at that location, but that the possibility did exist (Tr. 90). When asked his interpretation of the cited berm standard, Mr. Sarke responded as follows (Tr. 93-95):

Q. And is it your testimony as an MSHA inspector that a mine operator must base the height of his berms upon the largest vehicles using the road or the type most commonly found on the road?

A. No, I would -- in my -- you know, my summation of it, he has got to do what is necessary to prevent cars from traveling over it.

Even though I mentioned in my citation, you know, I mentioned the axle height of the Petibones, I believe it was. Even though I mentioned that, that was just for informational purposes telling, you know, that we do have a piece of equipment with a high axle on this roadway that is using this roadway. And we need to make our berms to where it's going to support that piece of equipment as well as others.

Q. Well, is it your testimony, Mr. Sarke, that a reasonably prudent mine operator can base the height of his berms upon merely the cars using the road?

A. I wouldn't think he would be using very good reason if he just based it solely on the cars if he had other vehicles that used it besides cars.

Q. Mr. Sarke, could a reasonably prudent mine operator take into consideration the possibility or likelihood that bigger vehicles would be going slowly and less likely to run off the road in determining the height of a berm he thought was necessary?

A. I think so, yes.

Q. Could a reasonably prudent mine operator assume on the basis of his past history that large vehicles were not likely to go over the side of the road and base his decision as to the height of the berm upon that information?

A. He would probably take that into consideration.

Q. If it's true that no large vehicles have ever gone off the road at No. 32 Mine, why should the operator base his berm height upon a possibility that one might?

A. To me, that's the intent of the law. What might happen, that is the intent of the law. It might be that one may never go off, if there never was a berm on the road. But to me that's why the law was written, because they have had it in cases where things have gone over, and things that moved at slow speeds, too. Not just things that move at high speeds. And we're talking heavy equipment. We've had lots of heavy-equipment accidents where they just go right over to the edge and go right over. A lot of them without reason, that we never could find the reason why.

Q. And Mr. Sarke, isn't it true that if one of these heavy pieces of equipment got loose and went over the side of that road, no berm could restrain them?

A. If we're talking about a truck coming down that mountain, and its brakes went out, I don't know if there is anything short of a solid steel wall that would stop them from going over.

Mr. Sarke confirmed that the berms on the roadway in question are constructed by road grading materials to form berms along the entire length of the roadway, except at three locations which have guardrails (Tr. 102). The accident of January 22, 1981, is the only such incident he was aware of on the road, and while he had previously inspected the road, he never issued prior citations for any violations of the berm standards (Tr. 104). In response to certain bench questions, Mr. Sarke explained his application of the berm standard as follows (Tr. 105, 110):

Q. -- what do you consider when you decide whether or not a particular mine operator's elevated roadway is in compliance with this standard?

A. Okay. I have to consider all the traffic that travels that roadway, the different types of equipment that are using the roadway, and what would be sufficient to take care of the equipment that does travel that roadway.

Q. Now, how do you generally communicate this to a mine operator?

A. Okay --

Q. Have you ever had occasion -- just let me ask you a follow-up question -- have there ever been occasions where you have gone to a mine and you've determined that the berm is inadequate? And if so, how have you communicated this other than issuing a citation?

Q. Okay. If I found the berms to be inadequate, I issued the citation, okay? I have talked to operators about their berms where there were instances where, you know, it might be a borderline case, that they needed to do a little extra something other than what they've got already. I have talked to them. And I have got them to do it.

* * * *

Q. Do you have any suggestions as to how a mine operator -- what he should use as a guideline?

A. What he should use maybe reflects back to what I use. Just take the situations of what travels the road, you know; how many times a day it goes; the size of it; the amount of times they're there a day, a week, a month. If he's reasonable in his thinking of what would protect that when it goes up and down there --

And, at Tr. 115-117:

Q. But do you believe that under the test the Commission has set up an operator is supposed to build his berms to take care of the situation when a truck is out of control coming down the mountain?

A. No. I believe what he's supposed to do is take into consideration that truck coming off of that mountain and try and design them in a way that it could give him some protection. That's what they're there for, is for some. We know that if he gets going 50 miles an hour, you're not going to stop that truck coming off that mountain.

Q. Well, isn't it true that at 20 miles an hour those two-foot and three-foot berms that you saw wouldn't stop him coming off the mountain?

A. Possibly they wouldn't. I don't know; I've never had one going into that situation on that particular --

Q. But isn't it true that when you issued the citation you saw approximately 50 feet of an area of a 7.1 mile road that you considered to be inadequate?

A. You're talking about what I wrote up. Yes.

Q. And you considered the rest of it to be adequate?

A. Yes, ma'am.

Q. And yet it is your testimony that most of that wasn't adequate to hold a truck coming off the mountain?

A. I said I didn't know whether it would or not. I said we can't go into those given situations. I don't know whether it would or whether it wouldn't until after it happens. I considered what they had, other than the areas that I mentioned, to be adequate at that time. Yes.

Respondent's testimony and Evidence

Albert Wagers, chief inspector for respondent's Lynch District, and former superintendent of the No. 32 Mine, testified that the road in question was constructed in 1962, and that it was built by the construction superintendent Mr. Vicini, and it did not originally have berms. Mr. Wagers confirmed that he was mine superintendent from 1970 through 1972, and that during this time there were some berms, but they were not located along the entire length of the road (Tr. 131-133). He confirmed that the respondent and MSHA agreed that the road was an access road, and not a haulage road, and that in 1973 a federal inspector told him that he was going to start citing violations for the lack of berms. Mr. Wagers stated that the inspector had cited another mine operator's haulage road and that the operator complained that he was required to have berms while the respondent did not. Mr. Wagers recalled telling his supervisor that the law did not cover access roads, only haulage roads, and that he wanted to test the law. However, when his supervisor raised the issue of cost, he pointed out that under normal conditions there were graders on the road which could create berms at no additional expense and that berm construction, rather than litigation, was preferred (Tr. 131-135).

Mr. Wagers testified that the road graders began constructing berms beginning in November 1973, but that no determination was made as to how much material had to be graded to form an adequate berm. Because of constant grading, the berms generally grew in height, and there were places along the road where the shoulder had eroded to such a degree that berms could not be maintained without widening the road, a task requiring more effort than could be expended at the time. He stated that in such locations the respondent tried to publicize road narrowness with horizontally laid telephone poles and other warnings (Tr. 136).

Mr. Wagers recalled building the bathhouse in 1971, and he confirmed that he was responsible for building the two parking lots and the connecting road. He agreed with Mr. Sarke that

the road was about 15 feet wide, and that part of the bathhouse was situated in fill, and after five years or ordinary drainage part of the fill turned into mud (Tr. 137). He also confirmed that he decided to erect a guardrail made up of railroad ties laid end on end, and this was intended to warn people that the road was narrow. He did not think it necessary to warn of the bank because he felt it was plainly visible, and the guardrail installation took place after the MSHA citation (Tr. 139).

Mr. Wagers stated that no experiment had been conducted to test the effectiveness of the poles for stopping cars, nor was he familiar with any means of testing. He confirmed that, judging from its construction, the cited guardrail would be incapable of restraining a vehicle. He insisted that they were only intended as warning signals, and he confirmed that there was not enough room to build anything sturdy enough to restrain automobiles because of space limitations, and because of the deterioration of the fill (Tr. 141).

With regard to cited location #2, Mr. Wagers agreed with Mr. Sarke as to the dimensions of the roadway, and the depth of the drop-off. He stated that because he had no way of testing what type of construction would stop a vehicle, he could not state how high a berm should be to provide such protection. He further stated that because miners leaving by the road tended to travel quickly, the company tried to keep all traffic off the road in question at the time, and speed limits were posted above and below the hill, and safety meetings were held every week (Tr. 142-143).

Mr. Wagers described the road in question as an extension of a county road beginning at a bridge where the asphalt ended. Three of the 7.1 road miles were designed in a "zig-zag fashion", with a steep curve at each leg, and a shallow grade between each curve. The remaining four miles was generally level, and if one were coming to work one would generally be on the bank side, and going home, on the hill side. The speed limit varied on different parts of the road, and at location #1 it was 10 mph (Tr. 143-145).

When asked about location #3, Mr. Wagers stated that as one approached the bathhouse one would be on the bank side, but beyond that point one would be on the hill side. The road had a sharp left hand curve going toward the bathhouse and was about twenty seven feet wide with a drop-off of about thirty five feet (Tr. 146). He guessed that the car involved in the accident, assuming that it hit the berm, was being driven at 35 to 40 mph, and he did not believe that there was any way

to determine how much force a berm could withstand. In view of this uncertainty, it was his opinion that a berm could not be built for such a purpose, but should be intended to guide traffic. Assuming that access roads were governed by the berm requirements of the cited regulation, he believed that the road needed berms along its entire length, with the degree of elevation not important in calculating berm height. He admitted that the amount of berms was related to the degree of curve in the road, and stated that they might be necessary to help a driver on the sharp turns. Furthermore, he believed that any inside curves would not need the same type of berms as would an outside curve (Tr. 147-151).

In reference to location #2, Mr. Wagers said that it was coming out of an inside curve, and since outside curves received most of the berm material, he regarded the 10 or 12 inches present at location #2 sufficient to stop a car on the inside curve (Tr. 152). He believed that the guard at location #1 was no less effective dislodged as it was erect. He described it as a light power pole, eight to 14 inches in diameter, round, fixed on top of other poles, supported by dirt and topped by a fence (Tr. 152). He doubted that it would even stop a motorcycle, as it was constructed only as a warning apparatus. He believed it was possible to build a wall capable of restraining trucks at the curve by piling up dirt thirty to fifty feet high at the turns, but he did not think protection could be provided on the road segment between these turns. He concluded that more protection existed on the access road than on the public highway over Black Mountain, and on the county highway which connects up to the access road there were neither berms nor guardrails (Tr. 155).

On cross examination, Mr. Wagers agreed that he had not wanted to construct berms because he considered the road an access road rather than a haulage road. He said that the guardrail had been displaced in the past and that each time it had been restored. He conceded that at this location it would be reasonable to have some kind of protection, and in general berms did improve safety conditions. He reiterated that MSHA had issued citations in 1972 because of the lack of berms. He further stated that there were many rocky areas without much in the way of berms (Tr. 156-160).

In response to bench questions regarding Exhibit R-4, depicting Location 1, Mr. Wagers estimated the drop-off shown in the right side of the photograph to be about seventy feet on an angle. He confirmed that one driving past the guardrail could be killed, but denied that the rail was any more than a warning post or a curb feeler. He believed that the regulation

in 77.1605(k) applied to an elevated roadway to prevent heavy equipment and large trucks from falling off of the hill, and he disputed its application to Location 1, a parking area. He believed that in order to build a restraining device there with a drop of seventy feet at an angle of seventy five degrees, he claimed, one would have to build retaining walls and a fifty foot wide base on the bottom to compensate for the fill foundation (Tr. 177).

When asked to compare the guardrails as depicted in Exhibit R-4 to those in Exhibit R-5, Mr. Wagers admitted that the former represented what MSHA regarded as compliance, but claimed that no less protection was offered by the unrepaired guardrails in R-5. MSHA, he indicated, issued citations when the rails became unsightly. He regarded it as impractical to build a restraining wall at the location in R-5, and said that it had been his idea to mount railroad ties on the bank so that cars could be warned by scraping against them. Later, the company received a citation instructing it to put berms or guardrails along the entire length of road, a citation the company accepted by not contesting (Tr. 180-181).

With regard to Exhibits R-2 and R-3 representing cited location 3, Mr. Wagers confirmed that the four foot berm shown in R-2 would do a better job of keeping a vehicle on the road than the sixteen inch berm depicted in R-3 as it existed the day after the accident. He agreed that it was no engineering problem to provide a four foot berm. He also said that because of the curved nature of the road, there would be reason to worry about drivers going over the side everywhere on it. However, he claimed it was physically impossible to have a continuous four foot berm along the entire 7.1 miles of road (Tr. 184-186). When asked if he believed the access road to be in compliance with section 77.1605(k) at present, Mr. Wagers replied positively, explaining that there was no place on the road where some sort of protection was not provided. He did not think one could draft a safety standard to fit all situations, and preferred to negotiate with MSHA on safety questions (Tr. 187).

Robert Wilkerson, superintendent of No. 32 Mine at the time the citation in question was issued, testified that in his opinion the berms at locations 2 and 3 were adequate. He regarded reasonable speed and the speed limit to be his main determining factors. He stated that he had participated in the construction of the guardrail in 1973, and was aware of its state of disrepair in 1981. He further stated that he and his construction foreman had discussed repairing it, but had not yet done so at the time the citation issued. He

confirmed that two new posts were completed and two more were being prepared. He described each post as consisting of a four inch pipe with a plate welding on the bottom, and two railroad spikes driven through two holes to hold it upright. Two new posts were added near the employee parking lot, and a post was rolled back over and the ropes drawn taut with a truck before Mr. Sarke would abate the citation (Tr. 197-201).

Mr. Wilkerson denied that the guardrail fence was designed to prevent vehicles from going off the road, and he stated that it was only to warn people, especially during foul weather when visibility diminished. He also explained that when one traveled up to the mine there was about a half mile in which the drop-off was on one's left, and for the rest of the journey it was on one's right. He agreed that except for this one half mile, on the downward trip, one always drove on the high-wall side. When asked what he would do if he had brake problems while driving a truck down the road, he said he would drop his wheels into a ditch which followed along the highwall side, and he was certain that this action would slow a truck down, and probably stop it (Tr. 202-203).

On cross examination, Mr. Wilkerson confirmed that since Mr. Vicini accompanied the inspector, he was not aware if Mr. Vicini had told the inspector of work being done on the guardrails. Mr. Wilkerson confirmed that the respondent had never considered closing off the parking lot, and he agreed that the two new posts were installed after the citation was issued, and estimated that the guardrail had been dislodged a week to two weeks prior to the issuance of the citation (Tr. 207). Mr. Wilkerson also confirmed that Mr. Vicini was in charge of road maintenance, and that the grader operator reported to him. He further stated that the grader did not spend much time on the road during the summer, but during the winter he was assigned there twenty-four hours a day (Tr. 208).

Inspector Sarke was recalled and testified that he did not remember seeing any speed limits posted other than the 20 mph speed limit sign. He agreed that the guardrail represented in Exhibit R-4 was as it appeared when repaired, but he disagreed that Exhibit R-5 depicted what the unrepaired guardrail looked like. Except for two posts at the end, the rest were lying down under the bank, and not on the road (Tr. 209).

Mr. Sarke confirmed that Exhibit R-3 corresponded to his recollection of location 3's appearance at the time of the citation and he speculated that the place that the car went off the road was shown in the lower left hand corner of the photograph, but was not sure because he did not know at what angle the picture was taken. With respect to the width of the roadway, he testified that, depending on how it was measured, the figure could vary. Although he admitted that Exhibit R-3 showed a portion of a berm which was three to four feet high, he asserted that if the camera had been swung more to the right, the view of the cited area would be more accurate (Tr. 211-213).

In response to further questions, Mr. Sarke repeated his contention that with normal safe 20 mph driving, a sixteen inch berm would be adequate for passenger cars. Under certain conditions he said, it was possible that a ten inch berm would be acceptable, but not for cars traveling at 20 mph. He did not remember a 10 mph sign posted in the road at the conveyor belt, and stated that he assumed it said 20 mph (Tr. 219). Mr. Sarke disagreed with Mr. Wager's view that the guardrail was to be used as a "curb feeler". He pointed out that Mr. Wilkerson said that the wire ropes were tightened, as though to give them strength to hold something back. When he used the axle-height test, he had understood that the intent of the section 77.1605(k) standard was to prevent overtraveling of the road, and did agree that a berm would not stop a runaway truck (Tr. 221).

Mr. Sarke did not believe that a six or eight inch berm would keep somebody from going over the drop-off at Location 2, where the berm was at the edge of the road. Even if the six to eight inches had been on the outside, he would still consider it inadequate. He asserted that he was unfamiliar with the view that the purpose of berms was to give somebody a signal so he could jump out of the truck, or to alert people that they were getting to close to the edge (Tr. 223).

Mr. Sarke denied that he disapproved of the sixteen inch berm at Location 3 merely because that was where the accident took place. Had the car in that situation been driven under normal circumstances, it probably would not have gone off the edge. He believed that the mere fact that the car did not go off at Location 2 did not mean that the six to eight inch berm there was acceptable, even if the car was traveling at the speed limit. He indicated that his concept of the "reasonable-man test" basically reflected his personal intuition with regard to specific circumstances, and he confirmed he had not conducted the actual investigation of the accident. Finally, when asked if whether, in retrospect, using the reasonable-man test to the available facts, including the fact that the vehicle was speeding, he would have issued a citation in regard to this one location, he replied that he probably would not (Tr. 226).

Mr. Wilkerson was recalled in rebuttal and testified that before the citation was issued there were five to seven posts in the fence at cited location 1. Two of the end posts were laying on the bottom and the others were leaning. When he reset the posts, two poles were added, wires were threaded through the other two posts, and this wire was pulled to straighten out the structure, but there was not much tension on the wires. Afterwards, Mr. Wilkerson explained, the ropes were

anchored by pulling an anchor plate, nailing or sticking it to the telephone pole, and tying the rope to it. He also pointed out a 10 mph speed sign visible in Exhibit R-5. He confirmed that he tightened the guardrail wires with a truck, but emphasized that this was only to straighten out the rope (Tr. 228).

Respondent's arguments

In its posthearing brief, respondent, for the first time, argues that the road in question is an access road and not a haulage road, and that section 77.1605(k) does not apply. In support of its argument, respondent asserts that while the term "haulage road" is not defined by the regulations, the subtitle for subpart Q of the regulations, "Loading and Haulage", deals only with surface areas of mines where coal or ore are hauled. Citing sections 77.1600, 77.1604, and subsections (i) (j), and (l), all of which deal with haulage road vehicles, ramp and dumping locations, respondent concludes that section 77.1605(k) obviously is not designed to cover the mine access road.

Assuming arguendo that the access road is covered by section 77.1605(k), respondent maintains that the Commission's "reasonable person" test gives no guidance in this case. Respondent points out that beginning in 1973 it was first cited by MSHA for lack of berms on its access road, and that this resulted from complaints filed by another mine operator who had been cited by MSHA for lack of berms on its haulage roads. Following this, the berms along the roadway in question have been constructed by the grader operator piling materials scraped from the road to the side to form a berm, and no road construction or engineering guidelines have ever been agreed upon by the parties for the construction and maintenance of berms. As a matter of fact, respondent points out that no such evidence was introduced at the hearing, and that the only evidence of record is that the public authorities who construct roads in the Commonwealth of Kentucky that are traveled by cars, trucks and semis do not feel berms or guardrails are necessary at most locations. The public road on the same mountain where the access road to No. 32 mine is located has few berms or guardrails (Tr. 47).

The respondent maintains that the Commission's "reasonable person" test has no relevance to the areas cited by Inspector Sarke. In support of this conclusion, the respondent states that cited location #1 simply connects the two parking lots used by cars, pickup trucks, and a soft drink vending truck. Since there

is a steep drop off, there is no way to construct a berm, and the respondent has provided guardrails which consist of pipes attached to a power pole which lays by the side of the road. Conceding that this arrangement is not strong enough to physically restrain a vehicle, respondent points out that Inspector Sarke abated the citation after the pipes in the middle of the guardrail were placed back in an upright position. Respondent maintains that the only reason for the guardrail was to warn drivers of the drop-off, and that since it served only as a warning, it was effective as long as some of the poles could be seen. Respondent also suggests that it seems logical that the foremen who drove this area day after day know the width of the road and used the side of the building as a guide rather than the poles.

At cited location #2, the respondent points out that Inspector Sarke was of the view that a berm of 6 to 8 inches was not sufficient despite the fact that the vehicle had an additional 15 feet to gain control before reaching the drop off. Respondent contends that 6 to 8 inches is sufficient to guide vehicles on a flat piece of road, and that a berm of higher dimensions might serve to turn a vehicle over.

Respondent maintains that MSHA now seems to agree that the location of the accident should not have been cited and that the berm was adequate. Part of the problem, states the respondent, is the fact that there is no agreement concerning what the berms are to protect and how. Respondent says that since the heavy trucks barely crawl up the steep grades at the mine there is little danger of them going off the side of the road on the trip up the mountain. When coming down the hill when empty, the respondent recognizes the fact that the trucks could attain higher speeds, but points out that most truck drivers would gear down if they totally lost their brakes and would steer into the ditch by the hill. However, if the driver crashed into a berm constructed substantially enough to stop a runaway truck, respondent concludes that the driver probably would not survive the impact.

Finally, the respondent concludes that in this case the only evidence presented by the petitioner that the berms on the roadway were not adequate was Inspector Sarke's opinion that in 2 of the 3 cited locations he thought the berms were inadequate. However, the respondent maintains that Mr. Sarke used none of the guidelines established by the Commission to arrive at his conclusions. Respondent finds it difficult to determine why Mr. Sarke's opinion is any more valid than that of the respondent's, particularly in a case where the mine operator has spent 10 years dealing with the roadway in question

on a constant basis with no accidents resulting in injuries to people, and where Mr. Sarke did not even realize that the guardrails were not designed to restrain a vehicle. Further, respondent concludes that Mr. Sarke's experience as an MSHA inspector does not seem to give him any more authority to judge the sufficiency of a berm with an additional fifteen feet of road than anyone else, and that the question as to why a vehicle would need a 2 foot berm, which might cause it to flip over, to realize it was getting too close to the edge when it had an additional 15 feet to stop was never explained.

Petitioner's arguments

In its posthearing brief, petitioner states that the roadway in question is a mine access road where men, equipment and supplies are transported to and from the mine. In response to the respondent's argument that an access road does not come under the cited section 77.1605(k) mandatory standard, petitioner cites several Commission Judge's decisions to the contrary, including one of mine, Peabody Coal Company, VINC 77-102-P, December 13, 1977. In addition, the petitioner cites cases interpreting the terms "haulage roads" and "elevated roadways", and petitioner concludes that on the facts presented in this case, it has met its burden in establishing the fact that at all three cited locations, respondent's berms failed to comply with the requirements of section 77.1605(k).

With regard to cited location #1, the petitioner argues that the respondent had provided a guardrail which had fallen down and had not been replaced at the time the citation was issued. Citing Secretary v. Allied Products Co., 2 FMSHRC 2517, 2523 (1980), aff'd in relevant part, 666 F.2d 890, 893 (5th Cir. 1982), petitioner argues that the failure to provide any berm or guard at a location along an elevated roadway is a violation of section 77.1605(k).

With respect to the argument that the respondent may have taken initial steps to repair the guardrail, petitioner takes the position that this is not an absolute defense to the citation. On the evidence presented here, petitioner suggests that it is clear that at the time the citation was issued, respondent had taken no visible actions to correct the conditions as they were observed and cited by Inspector Sarke.

In response to the respondent's suggestion that the condition of the cited guardrail was sufficient enough to serve as a "warning", petitioner takes the position that the broken down guardrail would not be adequate. Petitioner takes the position that the guardrail had been displaced on more than one occasion and replaced (Tr. 156). Petitioner asserts

that it is ludicrous to consider that any reasonable person would not replace the fallen down guardrail if it were reasonable to put the guardrail up in the first place. Although the two posts which remained standing may have constituted some form of warning, even respondent's witness Mr. Wagers did not consider that a warning sign would have been adequate at this location (Tr. 174). A warning sign would provide a visual warning, which would be of limited use under some conditions such as heavy rain, fog, or darkness. Whereas, a guardrail, even an inadequate guardrail, might provide some warning on the full length of the section of elevated roadway concerned. Although it is not the petitioner's position that a warning was sufficient or that the respondent intended the guardrail to constitute merely a warning, petitioner believes it is clear that there is a violation in this case even under the very limited standard which respondent asserts as reasonable at location No. 1.

With regard to cited location #2, petitioner concedes that there was a berm of 6 to 8 inches in height. Petitioner also concedes that the roadway was very level and straight, and that there was a fifteen foot or more distance between the edge of the road and the drop-off. However, petitioner points out that both the inspector and the respondent considered that there was some danger of a vehicle running off the road at this point and going off the drop-off, and that all types of vehicles used the roadway.

Petitioner points out that the Commission had indicated that the reasonable prudent person should consider the circumstances present and that the type and size of traffic using the roadway is a factor to consider. Relying on Inspector Sarke's testimony that a six to eight inch berm is "just a bump in the road", petitioner asserts that it is obvious that such a berm would provide for some of the vehicles using the roadway an insignificant amount of control and guidance of motion tantamount to no berm at all.

In response to the respondent's argument concerning the distance between the edge of the roadway and the drop-off, petitioner suggests that while this may be relevant to the issue of whether or not the roadway was elevated, Inspector Sarke considered that there was some danger of a vehicle going over the edge of the drop-off. Conceding that it is not clear from the evidence exactly how great the distance was between the edge of the roadway and the drop-off, petitioner maintains that the respondent has provided no evidence that would support a finding that a vehicle of the size of those using the roadway, traveling within the speed limit, would be able to stop before it had traveled the distance between the edge of the road and the drop-off. Under these circumstances, petitioner concludes that a berm or guardrail that would provide at least some control and guidance, should be required.

With regard to cited location #3, petitioner concedes that the parties are in agreement that the automobile involved in the accident was exceeding the posted speed limit and that Inspector Sarke was of the opinion that the 16 inch berm provided at this location was reasonable for a passenger car traveling within the posted speed limit. However, petitioner maintains that passenger cars are not the only type of vehicle using the roadway at this location and that the traffic on the roadway is a factor to be considered by the "reasonable man". In this regard, the petitioner argues that Inspector Sarke testified that based on the traffic on the roadway a two-foot berm would have been reasonable (Tr. 35). The Inspector also testified that he had measured the berms along the roadway, that the berms he measured averaged two feet in height or higher, and that the locations which he cited were the only locations where he could find berms which were of a lower height than the rest of the berms on the roadway (Tr. 26). A two-foot berm apparently was the standard size berm which the respondent had adopted for use along the roadway. Considering the conditions present at location No. 3 - an incline, a curve in the road, and a steep drop-off of approximately 30 feet (Tr. 32), petitioner concludes that it appears that a reasonable person would have provided at least the standard sized berm in use on the roadway at this location.

Petitioner concedes that there was some distance between the edge of the roadway and the drop-off at location #2, but states that it is not clear from the testimony exactly what the distance was since the distance depends on the point from which a measurement is taken. In any event, petitioner argues that there is no showing that the distance was significantly greater at this point than at other points where the respondent had provided 2 foot berms, nor is there any showing that a vehicle leaving the roadway would be able to stop in the distance between the roadway and the drop-off.

Petitioner takes the position that the respondent has set its own general standards along the roadway in question and has failed to comply with them. Further, the petitioner maintains that in applying the standards set forth by the Commission in its decision of January 27, 1983, in this case, it should be concluded that at location #1 there was a violation of § 77.1605(k) in that no berm or guardrail was provided at that location. Although the respondent may have taken some initial steps toward repairing the guardrail which had been used at the location, petitioner maintains that the respondent has not established that it was in the process of repairing the guardrail at the time the citation was issued. At location #2 petitioner asserts that the height of the berm

was so low that it would have provided an almost insignificant amount of control and guidance of motion for some of the vehicles using the roadway. At location #3, the circumstances were such that a reasonably prudent person would have installed at least the average size berm in use along the roadway. At this location respondent may be said to have acted unreasonably in light of its own standards.

Findings and Conclusions

Application of section 77.1605(k)

Respondent's argument that section 77.1605(k) is inapplicable to the cited roadway because it is a mine access road rather than a haulage road IS REJECTED. This same issue was raised and rejected by me in Peabody Coal Company, VINC 77-102-P, decided December 13, 1977. At page 10 of that decision, I made the following ruling which I incorporate by reference as my ruling in the instant case:

* * * The regulation does not distinguish between access roads and haulage roads, but simply states "roadways". The Dictionary of Mining, Mineral and Related Terms, 1968, at page 931, defines a "roadway" as "an underground passage, whether used for haulage purposes or for men to travel to and from their work". It also defines "access road" (page 5) as "a route constructed to enable plant, supplies, and vehicles to reach a mine, quarry, or opencast pit." While we are dealing in the instant case with a surface roadway, I find the definitions equally applicable even though the dictionary definition refers to underground. Respondent's assertion that for purposes of the regulation there is a distinction between an access road and a haulage road is rejected. I conclude that section 77.1605(k) makes no such distinctions and is applicable to all roadways on mine property used to transport coal, equipment, or men, regardless of the size, location, or characterization of the road being used. The purpose of the safety regulation is to protect the miner and to eliminate or prevent death or injury to men traveling the roadways during the course of their mining duties.

Although it is true that coal is not hauled on the roadway at the No. 32 Mine, the record establishes that the roadway is used to facilitate the movement of men, equipment, and

supplies at the mine, and that these activities are directly related to the mining process. Accordingly, my prior ruling and decision in Peabody Coal Company applies in the instant case.

Fact of Violation

Inspector Sarke conceded that out of a total distance of 7.1 miles along the roadway in question, the distance of inadequate berms comprised only the locations cited in his citation, namely, 29 feet at one location, and 22 feet at another, for a total of approximately 50 feet. The berms on the remaining portions of the roadway were adequate (Tr. 12). He confirmed that the automobile incident of January 1981, was the first that he was aware of, and in his opinion the respondent's berm program is outstanding (Tr. 26).

It seems clear to me from the record in this case that the incident concerning the automobile traveling through the berm and over the drop-off caught Mr. Sarke's attention and prompted the issuance of the citation. This is not an unusual occurrence, and it is not the first time that MSHA has been prompted to act after the fact. However, even though Mr. Sarke characterizes the incident as an "accident" on the face of the citation, his testimony is that it was not technically a reportable "accident" because no one was injured. He testified that unless there is an injury, the regulatory definition of "accident" does not apply, and no formal investigation was conducted. The fact that a speeding occupied automobile went through a berm and became airborne before dropping over the embankment obviously caused Mr. Sarke to reflect on the possible inadequacy of the berms and guardrails along the remaining portions of the roadway.

It is also clear from the record in this case that Mr. Sarke issued the citation because he found that the berms at two of the cited locations were less than 22 inches, the mid axle-height of the largest vehicle which he believed used the roadway at any given time. He mechanically applied the 22 inch "mid axle-height" standard when he issued the citation, and he abated the citation after the berms were constructed to at least that height. Now, the Commission has directed that I apply a "reasonable prudent man" test to determine whether the citation is supportable. In my view, prior to the Commission's remand, Mr. Sarke never heard of such an individual, and MSHA's promulgation of such "mid axle-height" guidelines are apparently communicated to the inspectors so as to preclude interference from any such being.

As previously noted, respondent is charged with one violation of section 77.1605(k), even though the inspector cited three separate locations where he believed the berms or guards were inadequate and in violation of the standard. Findings and conclusions as to each of the cited locations follow below.

Location No. 3

Mr. Sarke confirmed that the automobile which went through the existing berm at location #3 was exceeding the posted speed limit and that the existing berm obviously did not prevent it from going over the embankment. However, with regard to the adequacy of the existing 16 inch berm at this location, Mr. Sarke's testimony is somewhat contradictory. When asked on direct whether the existing 16 inch berm was of a height a reasonably prudent person would have installed, he replied "no" (Tr. 33). He explained that based on the types of vehicles using the roadway at that location, he would recommend a 24 inch berm similar to those provided by the respondent along other portions of the roadway, even though the application of the "axle-height" guideline would call for a 22 inch berm (Tr. 33). He then conceded that a 24 inch berm would not restrain an automobile traveling at excessive speed.

On cross-examination, Mr. Sarke stated that the existing 16 inch berm at the accident location was adequate for cars and trucks, but not for heavy equipment such as "petibones, semis, and supply trucks" (Tr. 38). He also indicated that he did not feel he was putting his own personal safety in danger while traveling up and down the road, and that the existing berm at the accident location was adequate to keep his pick-up truck from going off the road (Tr. 37). Mr. Sarke candidly admitted that he told Mr. Wagers that absent the "axle height" MSHA guidelines, the 16 inch berm was adequate to restrain an automobile using the road. Mr. Sarke also conceded that any heavy equipment using the roadway "crawled along at less than 5 mph in low gear", and he conceded that it was unlikely that the drivers would lose control and drive over the edge (Tr. 85-86).

I reject the petitioner's argument that since the respondent's berms along other portions of the roadway were determined to be at least two feet high that this somehow became a reasonable standard for the respondent to follow at all locations where berms were required, and that if the respondent failed to follow this standard a violation of section 77.1605(k) would result. While the petitioner's argument suggests that the respondent accepted the 22 inch "mid-axle" height guideline and therefore constructed its berms to exceed that height to insure compliance,

there is no evidence to support such a conclusion. In my view, if the respondent had constructed all of its berms to a height of 20 feet, Inspector Sarke would still have issued the citation because of the "mid-axle height" guideline he was following, and petitioner would obviously not argue that respondent was following its own standard.

Petitioner's evidence that the 16 inch berm at location #3 was inadequate for vehicles other than automobiles and trucks consists entirely of the opinions of Inspector Sarke based on his experience as an inspector. However, there is no showing that Mr. Sarke has any particular expertise on road and berm construction, and his conclusion that a 16 inch berm is inadequate for "petibones, semis, and supply trucks" is unsupported by any credible evidence of record. Quite the contrary, Mr. Sarkes conceded that any heavy equipment using the roadway would travel at a "crawl" in low gear at less than 5 mph. Further, he also admitted that the existing berm was adequate for his pick-up truck, that he felt safe on the roadway with the existing berm, and that it was unlikely that drivers of heavy equipment would lose control of their vehicles. Mr. Sarke conceded that a reasonable prudent mine operator could take into consideration the possibility or likelihood that larger vehicles would be going slowly and were less likely to run off the road in determining the height of a berm he thought was necessary (Tr. 94). He also conceded that such an operator could also assume on the basis of his post accident-free history that large vehicles were not likely to go over the side of the road (Tr. 94).

After careful consideration of all of the credible testimony and evidence adduced in this case, I conclude and find that the petitioner has failed to establish by a preponderance of the evidence that the existing berm of 16 inches cited by Inspector Sarke was inadequate and in violation of the cited standard. I concluded and find further that the petitioner has failed to establish that the respondent failed to act in a reasonable and prudent manner to insure the safety of the miners using the roadway in question. Accordingly, that portion of the citation which alleges a violation of section 77.1605(k), at location #3 IS VACATED.

Location No. 1

Exhibit ALJ-1 is a rough sketch of cited location No. 1, adjacent to the bathhouse. The roadway is approximately 15 feet wide at the point between the edge of the bathhouse and the drop-off opposite the bathhouse. Photographic exhibit R-4 depicts the guardrail as it is supposed to look, with all poles or pipes in an upright position anchored by cables (Tr. 170).

Photographic exhibit R-5 depicts the guardrail as it appeared when it was in disrepair, and the parties agreed that the photograph generally approximates the condition of the guardrail at the time Inspector Sarke issued the citation (Tr. 170).

Inspector Sarke's narrative description of location No. 1 on the face of the citation states that no guardrail was present for the 29 feet adjacent to the drop-off. It then states that the guardrail had been dislodged. It now seems clear to me that the inspector treated the dislodged poles and cables which made up the guardrail as if no guardrail existed. In short, since the poles or pipes were not upright and the cables were not drawn taut to support them, the inspector obviously believed that the guardrail in that condition was inadequate.

As pointed out in my previous summary decision in this case, the term "guardrail" is not defined by MSHA's regulations. However, in its decision of January 27, 1983, the Commission stated that the protective purpose of section 77.1605(k), insofar as berms and guardrails are concerned, is that they are "capable of restraining a vehicle". In a footnote, the Commission explained the phrase "restraining a vehicle" to mean "reasonable control and guidance of vehicular motion". Thus, given the facts of this case, the question presented is whether the existing guardrail at the time the citation was issued was in compliance with the requirements of section 77.1605(k).

Respondent's assertion that it was in the process of repairing the collapsed guardrail at the time of the inspection IS REJECTED as an absolute defense to the citation. Even if the respondent could establish this was the case, I would consider this fact in mitigation of the penalty as an indication of respondent's good faith compliance efforts. However, I cannot conclude that the respondent has established through any credible evidence that it was in the process of repairing the guardrail. I accept the inspector's credible testimony that he saw no such activity going on at the time of his inspection, and my finding is that no such activity was taking place at the time of the inspection and the issuance of the citation.

With regard to the actual condition of the guardrail at the time the inspector issued his citation, the parties are in agreement that it was not as originally installed. That is, it generally looked like it appears in photographic exhibit R-5. Further, Inspector Sarke indicated that the drop-off over the edge of the roadway where the guardrail was located was a "straight over-the-edge drop" of some 10 to 12 feet. He confirmed that the guardrail had apparently become dislodged because of erosion, and he could not state whether the corrected guardrail was capable of restraining a vehicle.

Respondent's witness Albert Wagers took the position that the cited guardrail was only intended to warn anyone travelling along that portion of the roadway that the roadway was narrow, and he conceded that given the way it was constructed, the guardrail would be incapable of restraining a vehicle. He believed the purpose of the guardrail was to serve only as a "warning signal" or "curb feeler" to alert a driver that he was getting close to the edge of the drop-off. However, he conceded that if one were to drive over the edge, the result could be fatal. Superintendent Wilkerson generally agreed with Mr. Wagers' conclusions.

I conclude and find that the condition of the guardrail at the time the citation was issued was inadequate and that it did not comply with the requirements and intent of section 77.1605(k). The record here establishes that the day of the inspection in question was not the first time the guardrail was allowed to be in disrepair, and that on each such occasion the respondent made the repairs so as to insure that the posts and cable were upright and taut so as to be effective. Under these circumstances, I conclude that the petitioner is correct in its assertion that any reasonable person would not replace or repair the guardrail if it were not reasonable to put it up in the first place. I reject the notion that the guardrail was installed merely to serve as a warning, and I conclude and find that the condition that it was in when the inspector observed it would not restrain a vehicle from over-travelling and falling over the edge. Accordingly, the portion of the citation citing a violation at location No. 1 IS AFFIRMED.

Location No. 2

Exhibit ALJ-2 is a rough sketch of cited location No. 2. The parties are in agreement that at this location the roadway is level and straight and, that it is approximately twenty feet wide. Also, while there is some dispute as to the actual distance, there is an additional fifteen foot wide shoulder between the edge of the roadway where the 6 or 8 inch berm was located and the drop off. Under these circumstances, a vehicle using the roadway would first encounter the berm and then would travel another 15 feet before reaching the edge of the drop-off.

Inspector Sarke believed that a reasonably prudent person would construct a berm 24 to 36 inches high at the cited location, and he stated that cars, trucks, graders, and supply trucks used that portion of the roadway. However, he conceded that an automobile could still overtravel a 24 inch berm and turn over, and while he believed that the respondent exceeded the requirements of section 77.1605(k) by locating the berm immediately at the edge of the roadway rather than at edge of the drop-off, he was of the view that the 6 to 8 inch berm was "just a bump in the road" and was inadequate.

The question here is whether or not the existing berm of six to eight inches would provide "reasonable control and guidance of vehicular motion" for the vehicle traffic using the cited portion of the roadway. Given the fact that any heavy equipment on the roadway would be travelling at a slow speed, and given the fact that the berm was at the edge of the roadway with another 15 feet of shoulder to the drop-off, one could possibly conclude that the existing berm was adequate for "controlling and guiding" heavy equipment. Petitioner's post-hearing argument that the existing berm provided an insignificant amount of control and guidance of motion for some of the vehicles using the roadway suggests that this is not true for all of the vehicles using it. However, petitioner has presented no credible testimony to support its case and relies only on the opinion of Inspector Sarke. Since he obviously applied the "axle height" theory, his "hindsight" opinions applied retroactively to a cited condition which existed over two and one-half years ago is of no value. Under the circumstances, I cannot conclude that the petitioner has established a violation at location #2, and that portion of the citation IS VACATED.

Size of Business and the Effect of the Civil Penalty on the Respondent's Ability to Remain in Business.

The parties have stipulated that the respondent is a large operator and that the payment of the civil penalty will not affect its ability to continue in business. I adopt this stipulation as my finding and conclusion on this question.

Good Faith Compliance

The record establishes that the respondent acted in good faith in abating the cited condition and I have considered this in the civil penalty assessed for the violation in question.

Negligence

I conclude and find that with respect to that portion of the citation citing the guardrail location respondent failed to exercise reasonable care to maintain the guardrail in a condition that would provide reasonably adequate protection for vehicles passing by the area. Under the circumstances, I conclude that the cited condition resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence.

Gravity

Given the general disrepair of the guardrail at the time of the citation I believe it is reasonable to conclude that it would not restrain a vehicle from going over the edge of the

drop off. As a matter of fact, Mr. Wagers admitted as much, even though he believed that the guardrail was only there to provide a warning. In any event, I conclude that the cited condition was serious.

History of Prior Violations

Petitioner has submitted a computer print-out which indicates that no violations of section 77.1605(k) were issued at the mine in question during the two-year period prior to the issuance of the citation in issue in this case. However, the history report does show that the respondent has been cited four times during this same two-year period for violations of section 77.1605(k) but that these violations occurred at other mines. Under the circumstances, and taking into account the inspector's testimony that the respondent's berm program is one of the best that he has encountered in his district, I conclude that any additional increase in the penalty assessed because of respondent's history of prior violations is not warranted.

Penalty Assessment

Petitioner has recommended a civil penalty in the amount of \$295, an increase of \$125 over the penalty assessment proposed when this case was originally filed on July 6, 1981. That proposal took into account the fact that the citation cited three separate locations where the petitioner believed a violation of section 77.1605(k) had occurred. Given the fact that I have sustained the citation for the one guarding location and have vacated it for the other two berm locations, petitioner's recommendation is rejected. I believe that a civil penalty assessment in the amount of \$125 is appropriate for the violation which has been affirmed.

ORDER

Respondent IS ORDERED to pay a civil penalty assessment in the amount of \$125 within thirty (30) days of the date of this decision in satisfaction of Citation No. 981185, January 23, 1981, 30 CFR 77.1605(k), and upon receipt of payment by the petitioner, this case is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Carole Fernandez, Esq., U.S. Department of Labor, Office of the Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Louise Q. Symons, Esq., U.S. Steel Corp., 600 Grant St., Rm. 1580, Pittsburgh, PA 15230 (Certified Mail)

/slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

SEP 26 1983

PATRICIA SWENSEN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 82-105-D
v.	:	DENV CD 82-9
	:	
EMERY MINING CORPORATION,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Vail

This proceeding involves a complaint of discrimination by Patricia Swensen (hereinafter "Swensen") against Emery Mining Corporation (hereinafter "Emery") pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. The complainant alleges that Emery is guilty of discrimination in not disciplining an employee accused of sexually harassing her and requests payment of six days of lost pay and travel expenses for 600 miles incurred as a consequence of this occurrence. Emery filed an answer denying any acts of discrimination against Swensen. This case was scheduled by proper notice for hearing, in conjunction with another case, on August 23, 1983, in Price Utah.

At the commencement of the hearing, James T. Jensen entered formal appearance as counsel for Emery and advised me that Swensen had retained W. Brent Wilcox of Salt Lake City, Utah as her counsel. Neither Swensen nor her attorney appeared at the hearing. Jensen stated that he had received a letter dated June 17, 1983 (Ex. R-2) from Wilcox advising him that Wilcox represented Swensen and requesting Emery compensate Swensen for five days lost wages. Jensen wrote a letter to Wilcox dated August 19, 1983 (Ex. R-1) agreeing to pay the five days of compensation in full settlement of the compensation claim. Jensen reported that he received a telephone call in the evening of August 22, 1983, the day prior to the date of the hearing, advising him that Swensen had agreed to accept the proposal set forth in Jensen's letter of August 19.

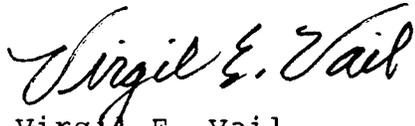
At the hearing, in view of the fact that neither attorney had entered a prior appearance in the record in this case, nor was Swensen present in the courtroom to confirm the agreement, I continued the matter and advised the parties to submit a settlement agreement for my approval.

On September 14, 1983, I received a joint motion by the parties for an order of dismissal with prejudice of this case supported by a release and settlement agreement dated August 31, 1983. The settlement amount is in the sum of \$469.84.

WHEREFORE, for the reasons herein before given it is ordered:

(A) The parties settlement agreement is approved.

(B) The complaint of discrimination in this case is hereby dismissed with prejudice.



Virgil E. Vail
Administrative Law Judge

Distribution:

Ms. Patricia Swensen, (Certified Mail), P.O. Box 459, Moroni, Utah 8464

James T. Jensen, Esq., (Certified Mail), 190 North Carbon Avenue
Price, Utah 84501

W. Brent Wilcox, Esq., (Certified Mail), 500 Kearns Building, 136 S. Main
Salt Lake City, Utah 84101

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 28 1983

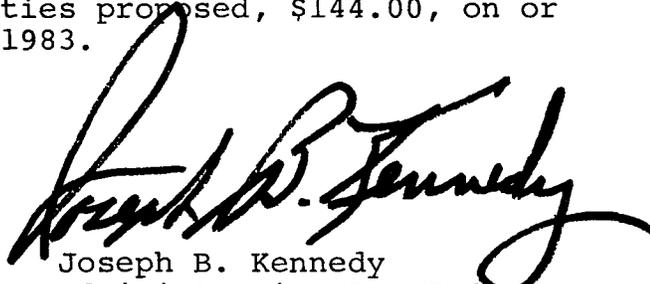
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 82-117-M
Petitioner : A.C. No. 42-01150-05018
v. :
: Lucky Strike Mine
PLATEAU RESOURCES LIMITED, :
Respondent :

DECISION

Appearances: Phyllis Caldwell, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
James A. Holtkamp, Esq., Van Cott, Bagley
Cornwall & McCarthy, Salt Lake City, Utah, for
Respondent.

Before: Judge Kennedy

The operator having failed to renew its contest of the penalties proposed for the two noise violations cited in the captioned matter as provided in the Order of March 28, 1983, it is ORDERED that said notice of contest be, and hereby is DISMISSED with prejudice and that the operator pay the amount of the penalties proposed, \$144.00, on or before Friday, October 14, 1983.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Bldg., 1961 Stout Street, Denver, CO 80294 (Certified Mail)

James A. Holtkamp, Esq., Van Cott, Bagley, Cornwall & McCarthy, Suite 1600, 50 South Main St., Salt Lake City, UT 84144 (Certified Mail)

ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 28, 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 83-79-M
Petitioner : A.C. No. 02-02126-05501
v. :
 : Portable Crusher No. 1
ASPHALT MINING & CONCRETE :
COMPANY, :

DENIAL OF MOTION TO DISMISS

ORDER TO SUBMIT INFORMATION

In a Motion to Dismiss filed on September 12, 1983, the Solicitor advises that subsequent to filing his penalty petition Respondent paid the full amount of the proposed assessment for the six citations involved in this matter. The proposed assessments were \$20 apiece for a total of \$120.

The Solicitor's motion to dismiss represents that this is a small mine with no prior history. The Solicitor does not discuss any of the citations individually but rather represents generally that gravity is estimated as moderate and that an accident could have occurred resulting in an injury causing lost work days or a disablement. In addition, negligence is generally estimated as moderate and the employer should have known of the existence of the violative condition.

I am unable to approve the motion to dismiss on the basis of the present record. Although the operator is small and without a prior history, \$20 is in my opinion a nominal penalty which indicates a lack of gravity. I have read all of the citations and on their face I must agree with the Solicitor that they appear to present the danger of a moderate to serious accident. Under such circumstances the purposes of the Act simply are not effectuated by rubber-stamping the Assessment Office's \$20 penalties.

Although the Solicitor does not mention the MSHA penalty assessment regulations, it appears from the assessment sheet that all six penalties were assessed pursuant to the so-called "single penalty assessment" formula. Section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4, provides for the assessment of a \$20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and indeed, is not even relevant once the Commission's jurisdiction attaches. The Act makes very clear that penalty petitions before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). The Solicitor's motion to dismiss does not give me enough data upon which to make a reasoned and informed de novo determination of appropriate penalty amounts. The Solicitor must discuss each citation separately and not make blanket assertions about each of the statutory criteria. Moreover, in this instance even the blanket assertions regarding gravity and negligence do not support \$20 penalties.

In light of the foregoing, it is Ordered that the Solicitor's motion to dismiss be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine appropriate penalty amounts sufficient to justify settlement. Otherwise, this case will be assigned and set down for hearing on the merits.



Paul Merlin
Chief Administrative Law Judge

/ln

Distribution:

Marshall P. Salzman, Esq., Office of the Solicitor, U. S.
Department of Labor, 11071 Federal Building, 450 Golden
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(Certified Mail)

Ms. Theresa Sanders, President, Asphalt Mining and Concrete
Company, P. O. Box 1106, Mesa, AR 85201 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 28, 1983

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-93
Petitioner	:	A.C. No. 45-02150-03502
v.	:	
	:	Section 12 - McKay
PALMER COKING COAL COMPANY,	:	Surface Mine
Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlement of the one violation involved in this proceeding for the original assessment of \$20. I cannot approve the proposed settlement on the basis of the information submitted to date.

The citation was issued because the automatic warning device on a dozer was inoperative. The Solicitor advises that the operator is small in size with a small history of violations. She further reports that the condition was abated in good faith and that payment will not impair the operator's ability to continue in business. However, the Solicitor provides no information about negligence or gravity. She merely refers to the inspector's statement and the fact that the inspector would testify the hazard was immediately abated. Abatement is one thing and gravity is another. A proposed settlement of \$20 would appear to denote a lack of gravity. Based upon the record as it now stands I could not find a lack of gravity.

I recently approved a settlement motion from this Regional Solicitor's office, but I had difficulty in doing so because all the requisite information was not furnished. My approval was based on my own reading and evaluation of the citation. See United States Antimony Corp., WEST 83-98-M (August 29, 1983). Other Regional Solicitor's routinely provide the necessary information. I cannot approve the settlement in this case without an explanation from the Solicitor regarding negligence and gravity sufficient to justify the penalty amount she proposes.

Accordingly, the settlement motion is Denied and the Solicitor is Ordered to submit the necessary information within 30 days from the date of this order. If the information is not forthcoming, the case will be assigned for hearing.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Faye von Wrangel, Esq., Office of the Solicitor, U. S.
Department of Labor, 8003 Federal Office Building, Seattle,
WA 98174 (Certified Mail)

Mr. Carl G. Folk, Manager, Palmer Coking Coal Company,
31407 - 3rd Avenue, Black Diamond, WA 98010 (Certified
Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 28, 1983

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-111-M
Petitioner	:	A.C. No. 35-00540-05501
v.	:	
	:	Ross Island Plant
ROSS ISLAND SAND & GRAVEL	:	
COMPANY,	:	
Respondent	:	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlement for the two violations involved in this matter. The proposed settlements are for \$20 apiece.

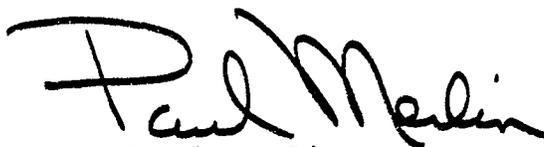
The Solicitor advises that the operator is small, has no prior history, abatement was in good faith, and payment of proposed penalties will not affect the ability to continue in business. However, the Solicitor does not furnish sufficient information with respect to gravity and negligence. She merely attaches the citations. One violation involved a work deck area littered with wood and other debris and the second violation involved an unsecured acetylene bottle located in the welding area. The inspector said nothing about gravity or negligence and neither does the Solicitor. There is therefore, insufficient basis for me to determine whether \$20 penalties are appropriate.

In discussing the operator's prior history the Solicitor states that this is a single penalty assessment situation. The fact that the Mine Safety and Health Administration treated these violations as "single penalty assessments" under section 100.4 of its regulations, 30 C.F.R. § 100.4, is not binding upon this Commission. Indeed, the single penalty assessment regulation is not even relevant in these proceedings. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather

that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary. Regardless of the Secretary's regulations once this Commission's jurisdiction attaches we have our own statutory responsibility to fulfill and discharge. This can only be done on the basis of an adequate record. The Solicitor has furnished information regarding four of the six statutory criteria. She must furnish information regarding the remaining two which are negligence and gravity.

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise this case will be assigned and set down for hearing on the merits.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Rochelle Kleinberg, Esq.; Office of the Solicitor, U. S. Department of Labor, 8003 Federal Office Building, Seattle, WA 98174 (Certified Mail)

Mr. R. G. Tuttle, Corporate Director, Ross Island Sand & Gravel Company, 4315 South East McLoughlin Blvd., P. O. Box 02219, Portland, OR 97202 (Certified Mail)

/ln

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 29 1983

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No: WEST 82-31-M
Petitioner : A/O No: 42-01660-05002
: :
v. : Ore Haulage Plant
: :
KENNECOTT MINERALS COMPANY, :
Respondent :

DECISION

Appearances: James Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, 911 Walnut Street,
Kansas City, Missouri, 64106, for the Petitioner;
Mr. Vaughan Baird, Kennecott, Utah Copper
Division, Magna, Utah 84044, for the Respondent

Before: Judge Moore

At the outset of the hearing, attorney Kent Winterholler announced that he had been instructed by the client not to represent it in these proceedings. He said that Mr. Vaughan Baird would represent Kennecott. I approved the withdrawal of counsel and the substitution of Mr. Baird. At the time I did not realize that Mr. Baird was not an attorney but in any event he gave his client adequate representation.

Government counsel then announced that with respect to Citation No: 0579407 the government had agreed to modify the citation so as to eliminate the "significant and substantial" finding and Kennecott had agreed to withdraw its notice of contest. When I asked the amount of the agreed penalty, I was told that they had not discussed any penalty. Mr. Baird expressed the belief that there was a standard penalty for a non-S&S violation. He also expressed his belief that the violation would not count as prior history if it was not S&S. I explained to the parties that the Commission and its judges are not bound by Part 100 of 30 C.F.R. MSHA is of course, bound by its own regulations and if a citation is not marked as "significant and substantial", and if it is abated in the time set by the inspector it would be considered a single penalty and the assessment would be \$20. If the \$20 is paid in a timely manner it will not be counted as a part of the respondent's previous history of violation. Once the notice of contest is filed, however, the rules change. The Commission and its judges are then bound to assess a civil

penalty in accordance with the six statutory criteria if a violation is proved or admitted. 30 C.F.R. §100.4 does not take all of the criteria into consideration and a number of the Commission judges have refused to be guided by that section.

Mr. Baird then agreed to pay the proposed penalty of \$106. I accepted that agreement.

Citation No: 579403 initially alleged a violation of 30 C.F.R. 55.9-2. At the trial, it was amended, without objection, to alternatively allege a violation of 30 C.F.R. 55.16-14(a).

The subject of the citation is an overhead crane referred to by the witnesses as a bridge crane. The crane is used in a metal building where respondent builds and repairs ore cars. The building is 400 feet in length and 50 feet in width. The crane runs on rails placed near the ceiling that are 40 feet apart and run nearly the length of the building. The operator of the crane sits in a cab halfway between the two long rails and moves with the crane as it travels east or west along the 400 foot distance. The operator does not move with the lifting device as it is moved towards one or the other of the two rails. The rails run east and west and the crane can move something from almost anywhere in the building to almost anywhere else.

The crane lifts ore cars and parts of ore cars or material for use in their repair. 30 C.F.R. 55.9-2 appears under the heading "Loading, hauling, dumping." I need not decide whether the operation of this overhead bridge crane constitutes loading, hauling or dumping, because of the amendment to allege a violation of 30 C.F.R. 55.16-14(a). The latter standard requires:

"operator-carrying overhead cranes shall be provided with:

(a) Bumpers at each end of the rail.;"

The rails supporting this bridge crane did have bumpers at the ends but they were not placed properly and the crane could come in contact with the wall of the building if the wheels went all the way to the bumpers. The inspector measured the distance between the extension of the cab and the wall as 2". The distance between the wheels and the bumpers was 24".

The bumper blocks had once been in a safe position but the cab of the crane was modified in such a way as to make it bigger than it had been and thus necessitate moving the bumper blocks away from the wall, and this had not been done after the modification. There is some question as to when the modification was completed, but the admittedly hearsay evidence given by the inspector is more persuasive than the direct but unprecise evidence given on behalf of the company. The inspector was told that the

modification had been completed for 30 days and that a complaint had been filed with management concerning the lack of proper bumpers. Mr. Strong, a supervisor of crane operators, realized that the crane could hit the wall but did not think it would go through. He made no measurements. He thought that 3 or 4 days before the inspectors came in, he had sent in the order to move the bumpers. He does not think that the modification had been completed for 30 days. He said the mechanics showed up on July 22 at 8:00 A.M. to make measurements in preparation for moving the bumpers. It was the same day that Inspector Palmer had shown up. He could not say, however, exactly when he placed the order nor did the company attempt to produce any records or any other witnesses to show when the work had been completed on the cab and when the order had been placed to move the blocks.

The portion of the cab which would have come in contact with the wall contained electrical circuits connected with the control of the bridge crane. As stated earlier Inspector Palmer took measurements which indicated that this portion of the cab would have gone through the metal walls if the wheels had come in contact with the bumper blocks. Safety Engineer Klobchar took measurements after the blocks had been moved which showed that the addition to the cab would have penetrated the wall only 1-1/2". His measurements were made after the blocks had been moved. Measuring from the old holes to the new holes, and measuring the distance between the wall and the cab with the wheels up against the newly located blocks and subtracting, was his method of determining how far the extension of the cab would penetrate the wall. The method he used assumes that the same blocks were used with the holes in the same place and that no changes in configuration of the blocks were made. There is no testimony to support these assumptions. The witnesses did refer to moving the blocks, but it could just as easily have meant moving the location of the blocks with different blocks being installed. I credit the inspector's method of measurement.

Furthermore, I think it was incumbent upon management knowing, as several witnesses knew, that the extension would hit the wall, to measure and find out beforehand, how much of a hazard was involved. Instead, they just told the crane operator to be careful and move slowly as she approached the blocks.

There were people working on the floor of the building and under the objects being moved by the crane. Inasmuch as the portion of the cab that would have contacted the wall contained electrical circuits which control the operation of the crane, contact with the wall, whether it went 1-1/2" into the wall or through the wall, could have caused the operator to lose control and perhaps drop whatever load was being carried. I consider it a serious hazard.

Kennecott is a large operation but it is in serious financial condition. Its owner, however, SOHIO is financially sound. There was good faith abatement and a moderate history of prior violations. If I were absolutely sure that the modifications had been completed 30 days before the inspection, I would find gross negligence. No one from management testified that the order to move the blocks was placed when the modification was completed. The blocks should have been moved before the modification was completed, so that there would have been no overlap in operating the modified crane and having the blocks in a safe position. I find a fairly high degree of negligence but not gross negligence. The citation is AFFIRMED.

A penalty of \$300 is assessed.

Respondent is accordingly ORDERED to pay to MSHA, within 30 days, a civil penalty in the total amount of \$406.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 30 1983

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 83-38-D
on behalf of :
SHELBY EPERSON, : Jolene No. 1 Mine
Complainant :
v. :
JOLENE, INC., :
Respondent :

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Complainant;
Bernard Pafunda, Esq., Deskins and Pafunda,
Pikeville, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the complaint of the Secretary of Labor, on behalf of Shelby Eperson under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", alleging that Jolene, Inc., (Jolene) discharged Mr. Eperson on September 4, 1982, in violation of section 105(c)(1) of the Act.¹ Evidentiary hearings were held on the complaint in Prestonsburg, Kentucky.

¹Section 105(c)(1) of the Act provides in part as follows:

No person shall discharge *** or cause to be discharged or otherwise interfere with the exercise of the statutory rights of any miner *** in any *** mine subject to this Act because such miner *** has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent *** of an alleged danger or health violation in a *** mine *** or because of the exercise by such miner *** on behalf of himself or others of any statutory right afforded by this Act.

In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that Mr. Eperson engaged in an activity protected by that section and that the discharge of him was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom, Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd. Cir. 1981). See also NLRB v. Transportation Management Corp., _____ U.S. _____, 76 L. Ed. 2d 667, 103 S. Ct. _____ (1983), affirming burden of proof allocations similar to those in the Pasula case.

In this case, Mr. Eperson asserts that he refused to work at the Jolene No. 1 Mine on the morning of September 4, 1982, because the supervisory official who was expected to perform the required preshift safety examination and to direct the work of the miners appeared that morning in an intoxicated condition. Eperson alleges that it would have been unsafe to have relied upon a person in such condition to properly perform the preshift examination and to work with, and under the direction of, a man in such condition. A miner's exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith, reasonable belief that to work under the conditions presented would be hazardous. Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981).

The operator does not dispute that a refusal to work for an intoxicated supervisor may be a protected activity but argues that since Shelby Eperson himself was supposed to be the foreman in charge on September 4th and indeed was the only certified foreman present, it was Eperson's responsibility to preshift the mine and to direct the work force that day. Eperson's failure to do so and his encouragement by example to other miners to leave the job that day was, according to the operator, non-protected grounds for discharge. There is accordingly no dispute that Eperson was discharged for his refusal to work on September 4th. The limited question before me is whether that work refusal was protected under section 105(c)(1) of the Act. Resolution of this issue depends on whether Eperson was responsible for preshifting the mine and was in charge of the workforce on the morning of September 4th. If Eperson indeed had those responsibilities, then his refusal to work that morning was not protected. If, on the other hand, an individual named Steve Bridgeman had those responsibilities, as it is alleged by the Complainant, and Bridgeman was in fact unable to safely fulfill those responsibilities because of intoxication and fatigue, then Eperson's work refusal may very well have been protected under the Act.

Shelby Eperson was initially hired by Jolene president Theodore Parker in June 1982 to be foreman for a new second shift at

the No. 1 Mine. Eperson then possessed state certification papers qualifying him to be employed as a foreman and/or electrician. The second shift was cancelled after a few weeks, however, for lack of work and Eperson was moved to the first shift but not as a foreman. According to Eperson, he then took orders from Steve Bridgeman who was acting as section foreman, though without state certification, and from mine superintendent James Comer. Eperson never performed any preshift examinations on the first shift and was never specifically asked to do so. This function was performed by Comer and/or Bridgeman. Moreover, although Jolene's president, Theodore Parker, claims that he once told Eperson that he would be in charge in Comer's absence, until September 4, 1982, Comer had never been absent and Eperson had in fact never acted as foreman on the first shift.

According to Eperson, on Friday, September 3, 1982, mine superintendent Comer told the work crew that he would be absent the next day. Bridgeman then purportedly told the crew they would start work the next day at 6:00 a.m.² Eperson reported to the mine office at 5:45 the next morning. By 6:00 a.m., seven or eight men had arrived and were ready for work but the purported section foreman, Steve Bridgeman, had not shown up. A miner named Duffy apparently expressed doubts that Bridgeman and another miner, Chris Kukle, would show up at all. They had been drinking the night before and were so intoxicated, they had fallen off Duffy's porch as they left around 4:00 that morning.³ Some time after 6:00 a.m., one of the miners called Bridgeman, who reportedly said that he would show up later. Bridgeman still did not show up so at least six of the waiting miners then left, including Duffy, Cecil, Kukle, the belt drive man, and the shot fireman. By 7:10 a.m., Bridgeman had still not arrived so Eperson and the remaining miners also prepared to leave. Eperson had already removed his work clothes when Bridgeman finally arrived, followed by some of the other miners.

²In his statement dated September 29, 1982 (Complainant's Ex. No. 6), Jolene's witness, Dana Boyd, confirms that the miners were to begin work at 6:00 a.m. I find that the work was indeed to commence at that time.

³Bridgeman admits that he had been out drinking beer until early in the morning, that he could not remember how many beers he had had, and that he did in fact stumble on Duffy's porch. He showed up late for work because he "overslept". He concedes, moreover, that "he just half remembers what happened the next day." Under the circumstances, I find that Bridgeman was indeed under the influence of alcohol on the morning of September 4th and that Eperson's perceptions of Bridgeman's condition and the events that morning are entitled to the greater weight.

Eperson detected alcohol on Bridgeman's breath and saw that he had bloodshot eyes. He suggested to Bridgeman that he should not take the men into the mine in his condition and told him that if anyone got hurt working for him in that condition, somebody would go to jail. Eperson then refused to work, explaining to Dana Boyd that the mine had not been preshifted and he was afraid for the men's safety with Bridgeman in his apparently intoxicated condition. The remaining miners also refused to work for Bridgeman but Bridgeman nevertheless proceeded to order Eperson to operate the "G.D." loader. Eperson persisted in his refusal to work and during a heated exchange that followed, Bridgeman told Eperson that he did not like him, citing an incident a few weeks before in which Eperson had complained about Bridgeman's improper spacing of roof bolts.

Bridgeman testified that shortly after the men began leaving, he got a telephone call from Comer. He told Comer that "they were refusing to work with me because they said I was drunk."⁴ Comer, without speaking to Eperson, then told Bridgeman to send the men home. Bridgeman, too, then left the mine site and went to see Parker to explain why the men were not working that day.

On the following day, Sunday, ^{September (see 10/6/83 Corrective Order)} ~~February~~ 5, Eperson went to Parker's houseboat to pick up his paycheck. Parker was absent, but Comer gave him his check and told him that Parker was letting him go "due to the cutbacks." According to Eperson, there had in fact been no cutbacks at the mine and, shortly after he was discharged, another certified electrician was hired to replace him.

According to Jolene President Parker, Eperson was fired because on Saturday, September 4th, he failed to preshift the mine and took the men off the job. Parker claims that he had planned in any event to discharge Eperson the following Tuesday because of an alleged 25 percent cut back in coal demand and that Eperson's acts only accelerated that decision.⁵ Parker maintains that Eperson had been told when he was first transferred to the

⁴It may reasonably be inferred from this admission that the other miners were also refusing to work for Bridgeman because they also thought he was too intoxicated. This evidence further demonstrates that Eperson's work refusal on these grounds was shared by the other miners and was accordingly reasonable and made in good faith. Robinette, supra.

⁵This allegation is far from credible. Eperson was the only certified electrician at the mine and without him, important electrical repairs and inspections could not legally be made. The record shows, moreover, that another certified electrician was hired by Jolene within the month and that in fact there was no production cutback.

day shift that he would be the substitute foreman in Comer's absence and that, accordingly, when Comer was absent on September 4th, Eperson should have conducted the preshift inspection and taken the miners underground. In spite of this, Comer acknowledged that he did not place Eperson in charge on September 4th. Respondent also suggests that Steve Bridgeman could not legally have performed these functions because he was not then a certified foreman and asserts that Parker, Comer, and Bridgeman, as well as miners Dana Boyd and Bobby Dotson, all denied that Bridgeman was a foreman.

I find from the credible evidence, however, that Bridgeman in fact had been regularly acting as a foreman and had been regularly performing the preshift and on-shift examinations at the Jolene No. 1 mine even though he was not certified as a foreman and was not therefore legally authorized to do so.

Significantly, entries were made by Bridgeman in the preshift and on-shift report books for periods before September 4th and were signed by Bridgeman as "Preshift Mine Examiner", "Assistant Foreman", and "Assistant Mine Foreman". MSHA senior special investigator Charles Webb observed that only Bridgeman's signature appeared on the left hand pages when he first examined the preshift books on September 8, 1982, (thus indicating that Bridgeman alone had been conducting the foreman's job of preshifting the mine) and that superintendent Comer's signature had been subsequently added to the books as presented at hearing. I find the disinterested testimony of Webb to be especially worthy of reliance and conclude that indeed in many instances the mine superintendent had co-signed the preshift/on-shift books long after the inspections had been performed by Bridgeman to cover up the fact that Bridgeman in fact had been regularly performing the functions of a foreman.

It is also observed that, unlike non-management personnel at the mine, Bridgeman was paid a fixed salary with no extra pay for overtime work. In addition, it is significant that when Bridgeman finally showed up for work on the morning of September 4th, the men who had previously left the job site presumably because of his absence turned around and came back to the mine with him, obviously looking to him as the person in charge. One of Respondent's witnesses, Dana Boyd, also referred to Bridgeman as "the boss" and observed that Bridgeman had indeed on prior occasions preshifted the mine himself (Complainant's Ex. No. 6). Boyd also stated that when mine superintendent Comer called on the morning of September 4th questioning whether the men were going to work that day, he asked to speak to Bridgeman and not Eperson. In addition, it was Bridgeman and not Eperson who later that day went to Jolene President Parker to explain why the men had not worked that morning. Finally, Comer himself conceded that he did not direct Eperson to act as foreman on the day he refused to work.

Under the circumstances, it may reasonably be inferred that Bridgeman in fact had been regularly acting as a foreman prior to September 4 and in that capacity was regularly performing the pre-shift examinations. It may also be inferred, just as alleged by the Complainant, that Bridgeman and not Eperson was expected to perform the preshift inspection and to direct the miners as the supervisor in charge on September 4th. The self serving denials of this fact in the face of the convincing evidence to the contrary, lead me to conclude that the testimony of Respondent's witnesses (Parker, Comer, Bridgeman, Dotson, and Boyd) is less than credible not only with respect to this issue but also in all essential respects. The significant contradictions between the testimony of Jolene witness Dana Boyd and the admissions he made in his September 1982 statement to MSHA investigators very well illustrates the lack of credibility of these witnesses. It may reasonably be inferred that Boyd altered his testimony because of legitimate concerns for retaining his job with Jolene.

Under the circumstances, I find the Complainant's allegations entirely credible and I find that Mr. Eperson did indeed entertain a bona fide reasonable belief that Bridgeman was in charge of the work force on September 4th, that Bridgeman's functional capacities were then sufficiently diminished by alcohol and fatigue so that it would have been hazardous for the miners to have relied upon a preshift examination performed by him that day and that it would have been hazardous to have worked underground under his supervision. Robinette, supra.; supra, footnotes 3 and 4. Moreover, since Eperson admittedly told Bridgeman (who I have found was the acting foreman that day) of his belief in the safety hazard at issue and since this information was admittedly further communicated to Mine Superintendent Comer, the "communication" requirement stated in Secretary ex rel. Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982), has clearly been met. Accordingly, I find that the Complainant has met his burden of proving that his discharge was motivated by a work refusal that was protected under the Act.

DAMAGES AND COSTS

It was stipulated at hearing that Mr. Eperson has already received the appropriate wages for the period November 19, 1982, through January 25, 1983, pursuant to an Order of Temporary Reinstatement. On January 25, 1983, Jolene ceased to operate the No. 1 Mine in Johnson County and moved to a new location with the same equipment and four miners (but not Eperson) to develop a new mine. Production of coal began on May 1, 1983, and at the time of hearing, fourteen miners (but not Eperson) were employed at the new mine. At hearing, Jolene agreed, pursuant to the Order

of Temporary Reinstatement, to again reinstate Mr. Eperson effective May 19, 1983, and to pay him \$1,000 toward prior lost wages. Damages for back wages must therefore be computed for the periods, September 6, 1983, through November 18, 1982, and January 26, 1983, through May 18, 1983.

82 (see corrective order dtd 10/6/83)

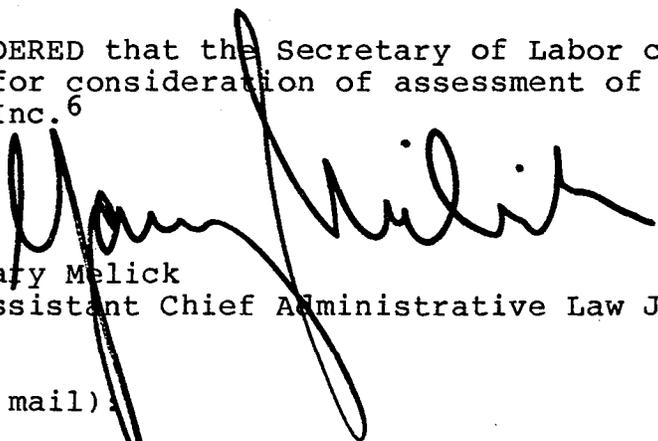
Since it has also been stipulated that Mr. Eperson had been, prior to his discharge, working 40 hours per week at \$13 per hour, and 14 hours per week at \$19.50 per hour, his weekly gross wages during this period would have been \$793. It is reasonable to infer from the type of work performed in setting up electrical equipment in the new mine that Eperson would have continued to work during the development of the mine as the only certified electrician previously employed by Jolene, and that his wages would accordingly have continued at the same rate for the period January 26, 1983, through May 1, 1983, when coal production began. He is of course also entitled to continuing wages from May 1 through May 28, 1983, the day before his second reinstatement by Jolene. Accordingly, based on the information stipulated at hearing (and not upon unverified statements in the Secretary's brief), I find that Eperson is due gross back wages for 26 1/2 weeks of \$21,014.50, less \$1,000 already paid by Jolene and \$810 earned from interim part time employment. Mr. Eperson is also entitled to interest on the back wages computed at the rate of 12 percent per annum from the date such wages would ordinarily have been paid to the date those wages are actually paid. Jolene does not dispute that Mr. Eperson is also entitled to \$20 in expenses.

See 10/6/83
corrective
order

ORDER

Jolene, Inc. is hereby ordered: (1) if it has not already done so, to immediately reinstate Shelby Eperson to the same (or comparable) position he held at the time of his discharge on September 4, 1983; (2) to pay Shelby Eperson back wages of \$21,014.50; (3) to pay interest on the said back wages to be computed at the rate of 12 percent per annum from the date these amounts were due to the date actually paid; and (4) to pay Mr. Eperson's expenses of \$20. Prepaid back wages of \$1,000 and \$810 Eperson earned in alternative employment may be deducted from the total amount to

be paid. It is further ORDERED that the Secretary of Labor commence review of this case for consideration of assessment of civil penalties against Jolene, Inc.⁶



Gary Melick
Assistant Chief Administrative Law Judge

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nw

⁶I cannot at this time accept the amount of civil penalty proffered as settlement at hearing. Information necessary for review of the proposal under section 110(i) of the Act is not before me. In particular, before any such proposal can be considered, information concerning the operator's good faith abatement of the violation found in this case must be developed, including information about Mr. Eperson's reinstatement and the payment of amounts ordered due in this case. In any event, if the operator herein agrees to waive the Secretary's procedures under 30 CFR Part 100 as it appears it does, then the Secretary should file a separate Civil Penalty Proceeding with the Commission.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

September 30, 1983

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 82-1-M
Petitioner : MSHA Case No. 42-01689-05003 X02
: :
v. : LaSal No. 2 Mine
: :
AMERICAN MINE SERVICES, INC., :
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
United States Department of Labor, Denver,
Colorado,
for Petitioner;
Mr. Morris E. Friberg, Pro Se, American Mine
Services, Inc., Denver, Colorado
Respondent.

Before: Judge Carlson

This civil penalty proceeding arises out of an inspection of American Mine Services, Inc.'s (AMS) LaSal No. 2 Mine by one of the Secretary's representatives. The Secretary charges AMS with the violation of two mandatory safety regulations promulgated under the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). After notice to the parties a hearing was held on July 27, 1983, in Denver, Colorado. Both parties waived post-hearing briefs in favor of oral arguments presented at the close of the hearing.

During the hearing the parties agreed to the settlement of citation No. 584206 as follows: AMS would withdraw its notice of contest and pay the proposed penalty of \$24 and the Secretary would amend citation No. 584206 to reflect that the violation was not significant and substantial. Because citation No. 584206 concerns a rather minor violation, one unlikely to result in serious injury, the settlement was accepted and approved at trial. That approval is reaffirmed here.

The only remaining citation is No. 583964 which alleges a violation of mandatory safety standard 30 C.F.R. § 57.12-65.^{1/}

Issues

The issues are:

(1) Did AMS violate the cited standard, and, if so, was the violation significant and substantial?

(2) If a violation occurred, what is the appropriate civil penalty?

Stipulations

At the outset of the hearing the parties entered into the following stipulations:

1. AMS was the operator of the LaSal No. 2 mine at the time these citations were issued.

2. The operations and products of the LaSal No. 2 Mine affect commerce.

3. At the time of the citations the LaSal No. 2 mine was under development and there were approximately four underground employees (three scheduled and occasionally others) and three surface employees.

4. AMS has no record of prior violations.

5. Payment of the proposed penalty will not affect the ability of AMS to remain in business.

Background Facts

Little dispute exists as to the essential facts surrounding the alleged violation. Respondent's LaSal No. 2 mine is supplied with electricity by Utah Power & Light (Utah). Utah's transmission lines carry 13,200 volts. This transmission line terminates at AMS's transformer which steps down the current to 480 volts. Beyond the transformer, AMS's own lines take over to bring the 480 volt current into the mine. Utah had provided their primary lines with lightning arrestors. The secondary system provided by AMS was an above-ground cable of approximately 500 feet in length, suspended

^{1/} § 57.12-65 Mandatory. Powerlines, including trolley wires, and telephone circuits shall be protected against short circuits and lightning.

from poles. It consisted of three power conductors spun around a steel messenger cable that was grounded at five poles. The three power conductors were encased in insulation rated to 600 volts, but were not connected to this grounding network. All of AMS's electrical equipment is frame grounded. The secondary system was not provided with lightning arrestors or a static line. The primary lines are located on higher ground than the secondary lines.

Discussion

The thrust of the Secretary's case is that AMS's secondary transmission line lacks adequate protection from lightning strikes and therefore violates 30 C.F.R. § 57.12-65. Section 57.12-65 requires powerlines to "be protected against ... lightning." MSHA inspector Hunt, who has more than three years experience as an electrical inspector and forty five years experience as an electrician, maintained that the miners in the shop and office areas were endangered because AMS's line lacked either lightning arrestors or a static line. Lightning arrestors are circuit disrupters which are designed to accept a lightning discharge and bleed off the charge to a grounding system. After the lightning charge is bled off, the arrestor restores itself to normal operation and allows the transfer of power through the cable. A static line is a bare conductor hung some distance above a transmission line and provided with grounding wires. Such a line operates to draw the lightning charge and dissipate it down through one of the grounding lines. In the opinion of the inspector, the absence of these devices, or some functionally similar system, meant that adequate lightning protection was not being provided.

In response, AMS insists that it provided adequate lightning protection by a variety of means, notwithstanding the absence of lightning arrestors or a static line.

Section 57.12-65 does not define the type or degree of lightning protection which is required. The Commission has consistently recognized the Secretary's wide latitude in promulgating broad or simple regulations in order to cover a large range of situations. E.g., United States Steel Co., 5 FMSHRC 3,5 (1983); Alabama By-Products Corp., 4 FMSHRC 2128, 2130 (1982); Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (1981).

Where the standard does not specify the type of protection required, the adequacy of the protection is measured against the objective reasonable prudent person standard. United States Steel Corp., 5 FMSHRC at 5. The question thus becomes whether a reasonably prudent person "familiar with all the facts, including those peculiar to the mining industry" would find the lightning protection to be adequate in the "context of the preventive purpose of the statute." Id.

AMS places much emphasis on the fact that Utah provides a static line and lightning arrestors on their primary transmission line. AMS reasons that since Utah's primary line had a higher elevation it would be hit before the secondary line and would dissipate the lightning charge before it reached the secondary line.

Inspector Hunt, however, testified that the protection on the primary circuit offers only partial protection for the secondary circuitry because there is a significant chance that the lightning would strike the 500-foot-long secondary line where the Utah's arrestors and static line provided no protection.

AMS's expert, John Vickery, also has extensive electrical experience. Vickery has a degree in electrical engineering, is senior electrical engineer for AMS, and has nearly forty years experience in the field. Vickery's own testimony corroborates Hunt's concern that lightning could directly strike the secondary line. Vickery said that lightning "diverts from patterns from time to time, and you're never sure when it happens" (Tr. at 162). Vickery also stated that:

[T]he [secondary] line was not supposed to go up over the brow of the hill as it did later. It was to stay down on the level more, and when I realized he had put it up that way, it occurred to me that that high spot might be a potential spot for lightning to strike. (Tr. at 162)(Emphasis added).

Hunt gave uncontradicted testimony that lightning strikes can reach 200,000 volts (Tr. at 40, 77).

Hunt also testified that a strike on the primary line could surge past the transformer onto the secondary line. He maintained that Utah's static line might not be able to bleed off all of the current from a powerful lightning surge before it traveled to the secondary. His chief concern, however, was the potential for the lightning to hit the secondary circuitry, rendering protection on the primary circuitry valueless.

AMS insists that further protection for its secondary circuitry is provided by the messenger wire on the triple cable. Vickery felt that if lightning hit the secondary circuitry it would be dissipated by the messenger cable to the grounding poles and would not flow along the power conductors.

Inspector Hunt did not agree. In his opinion lightning could strike the power conductors directly and burn through the neoprene

insulation which is only rated to 600 volts. Enormous current would then travel on the ungrounded power conductors. Even if the lightning did strike the messenger cable, he believed there is a real possibility that the 200,000 volt current from the strike would travel from the messenger cable to the phase conductors after burning the insulation. Finally, assuming that the current only flowed on the messenger cable, electrocution could still result to miners working with or near electrical equipment. The messenger is grounded by five poles, each of which can only dissipate a finite amount of charge and might not bleed off the entire charge generated by a heavy lightning strike. Therefore, according to Hunt, the messenger cable provides insufficient protection.

I find the testimony of both Mr. Vickery and Inspector Hunt to be credible. Both men were knowledgeable in the field and helpful in understanding the technical issues. I especially appreciate Mr. Vickery's candor on cross-examination. He did not dispute the fact that lightning's behavior may be unpredictable.

Taken as a whole, the evidence presented by AMS convinces me that its existing system of protection significantly lessened the danger that a lightning strike in the area would kill or injure a miner. I accept, for example, the argument that a discharge would be more likely to strike Utah's primary line on high ground than AMS's secondary line. I further accept the possibility that strikes of less than maximum voltage could be safely conducted away by the bare messenger line or the frame grounding on the electrical equipment in the shop. Inspector Hunt made no serious effort to prove otherwise.

Nevertheless, I must conclude that the inspector is correct when he insists that a heavy strike on the AMS line was possible, and that such a strike would carry with it a real potential for injury or death to miners at the site. In reaching this conclusion I find it noteworthy that all three forms of protection which AMS relied upon do not have lightning protection on the mine site as their primary purpose. The purpose of the arrestors and static lines on Utah's line was to protect its equipment, not mine employees working near the secondary lines or circuitry, which had no lightning protection per se (Tr. at 28, 74, 76). The primary purpose of the messenger wire was to physically support the power conductors (Tr. at 79). The primary purpose of the frame grounding was to provide fault protection for an ordinary 480 working voltage, not the heavy surges which could result from lightning. I am reluctant to believe that a reasonable and prudent person, having expertise in electrical phenomena, would regard AMS's measures, designed as they were for other purposes, as adequate protection for miners against lightning hazards. Furthermore, inspector Hunt effectively showed where each of the systems in place was deficient to neutralize the hazardous effects of the megavoltages generated by lightning.

Beyond that, I give weight to inspector Hunt's assertion that of those mines in the area which had pole-suspended power lines, an overwhelming majority had arrestors, static lines, or similar devices designed to deal with lightning (Tr. 210). This gives some indication that the industry regards such specific protection as reasonable and prudent. That Utah Power and Light saw fit to use arrestors and a static line strengthens this inference.

In summary, I must construe the standard to require either lightning arrestors, static lines, or some device providing equivalent protection. Since AMS had none of these, the level of protection demanded by the standard was not met, and the alleged violation must be affirmed.

In considering whether the violation was significant and substantial within the meaning of the Act, I would note again that the devices in place at the time of inspection afforded some protection against some lightning strikes. Nevertheless, I must conclude that the evidence shows that the level of protection was such that there was a reasonable likelihood that a lightning strike on AMS's power line would cause injuries of a reasonably serious nature to miners working with electrical equipment. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981).

Penalty

The Secretary seeks a civil penalty of \$87.00. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the size of the operator's business, its negligence, its ability to continue in business, the gravity of the violation, and the operator's good faith in seeking rapid compliance. The size of the mine is small. The parties stipulate that imposition of the proposed penalty would not affect the operator's ability to continue in business. AMS was negligent, but the negligence was in part attributable to an honest misapprehension of the requirements of the standard. The gravity of the violation was moderate. A lightning strike was reasonably possible, but the likelihood was not great. If one occurred, however, the resulting injury could well be severe. The number of miners exposed to potential injury, on the other hand, was small. The evidence as to good faith abatement is equivocal, and I make no finding on that element. Overall, the facts do not favor a heavy penalty. The Secretary apparently made due allowance for the mitigating factors, and proposed a low figure. I conclude that \$87.00 is the appropriate penalty for the violation.

CONCLUSIONS OF LAW

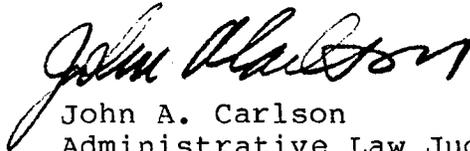
Based upon the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are made:

1. The Commission has jurisdiction to decide this case.
2. Respondent AMS violated the mandatory standard published at 30 C.F.R. § 57.12-65.
3. The violation was significant and substantial.
4. The appropriate civil penalty for the violation is \$87.00.

ORDER

Accordingly, it is ORDERED that citation 583964 is affirmed; and that AMS, within 30 days of this order, shall pay to the Secretary a civil penalty of \$87.00 in connection therewith.

It is further ORDERED that the settlement of citation 584206 made at the hearing is approved; that the violation alleged therein is affirmed but shall not be classified as significant and substantial; and that AMS, within 30 days of the date of this order, shall pay to the Secretary a civil penalty of \$24.00 in connection therewith.


John A. Carlson
Administrative Law Judge

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