

SEPTEMBER 1990

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September 1990

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

Secretary of Labor, MSHA v. Southern Ohio Coal Company, Docket No. WEVA 89-278.  
(Judge Koutras, August 3, 1990)

Wyoming Fuel Company v. Secretary of Labor, MSHA, Docket No. WEST 90-238-R.  
(Judge Morris, August 6, 1990)

Secretary of Labor, MSHA v. Lang Brothers, Inc., Docket No. WEVA 90-48.  
(Judge Broderick, August 16, 1990)

Secretary of Labor, MSHA v. Randy Coal Company, Docket No. PENN 90-80.  
(Default Decision of Chief Judge Merlin on July 18, 1990)

There were no cases filed in which review was denied.

COMMISSION DECISIONS

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 10, 1990

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. PENN 89-222  
 :  
BETHENERGY MINES, INC. :

BEFORE: Backley, Acting Chairman; Doyle and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this matter pending on review, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), counsel for the Secretary of Labor has filed a motion requesting vacation of the citation and its associated civil penalty assessment and dismissal of the proceeding. BethEnergy Mines, Inc. ("BethEnergy") has filed a response indicating that it has no objection to the granting of the Secretary's motion. For the following reasons, we grant the motion.

On March 14, 1989, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued BethEnergy two citations alleging violations of 30 C.F.R. §§ 75.301 and 75.316 in connection with a sudden release of methane at the face area of a longwall section. Section 75.301, in part, requires that a sufficient volume and velocity of air be ventilated in active working to dilute and render harmless dangerous or harmful gases, such as methane. 1/ Section

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1/ Section 75.301, which repeats the statutory standard at 30 U.S.C. § 863(b), provides in pertinent part:

All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry

75.316 requires mine operators to adopt ventilation system and methane and dust control plans approved by the Secretary. The citations alleged that the current of ventilating air at the face was insufficient to dilute the methane, in violation of section 75.301, and that BethEnergy was not complying with certain requirements of its ventilation plan. BethEnergy contested the citations, the Secretary proposed civil penalties for the alleged violations, and the matter proceeded to hearing before Commission Administrative Law Judge Avram Weisberger.

In his decision, the judge vacated the citation alleging a violation of section 75.316 (12 FMSHRC 975, 981-85 (May 1990)(ALJ)), and no issue pertaining to that aspect of the judge's decision is before us on review. With respect to the alleged violation of section 75.301 (n.1 supra), the judge noted BethEnergy's position that, at the time of the citations, it was meeting or exceeding the minimum air flow required at the last open crosscut by the second sentence of section 75.301, which requires an airflow of 9,000 cubic feet a minute ("C.F.M."). BethEnergy argued that it could not be cited under the first sentence of section 75.301 for failure to provide adequate ventilation to dilute the sudden release of methane if it were exceeding the airflow set forth in the second sentence. 12 FMSHRC at 979. The judge rejected this position, concluding that an airflow meeting or exceeding the 9,000 C.F.M. requirement does not comply with the first sentence of section 75.301 if it is nevertheless insufficient to dilute and render harmless dangerous or harmful gases. Id. We granted BethEnergy's subsequent petition for discretionary review.

After the submission of BethEnergy's brief on review, the Secretary filed with the Commission her present Motion to Vacate Citation and to Dismiss Proceeding ("Motion"). In this motion, the Secretary notes that she argued to the judge, and the judge held, that "Section 75.301 requires that harmful concentrations of methane not occur in the first instance [and] the second sentence of that section sets forth the minimum means which in all events must be followed in seeking to achieve this result...." Motion at 3 (emphasis in original). However, the Secretary states that, "upon further review," MSHA has determined that its position before the judge "is not its preferred interpretation in the circumstances present in this case, and is not consistent with its historic and ongoing enforcement position pertaining

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away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute. The minimum quantity of air in any coal mine reaching each working face shall be 3,000 cubic feet a minute. The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners.

to the liberation of unexpected quantities of methane in a working place." Motion at 4. The Secretary further notes her "recognition that the liberation of methane is a natural phenomenon which occurs when coal is cut from its natural deposit, and that such occurrences are not readily predictable." Id. Based on the foregoing considerations, the Secretary restates her legal position in this matter as follows:

It is, therefore, the Secretary's position that compliance with the ventilation quantity requirements of section 75.301, as implemented through an operator's approved ventilation plan, together with the remedial requirements of sections 75.308 and 75.313, [2/] constitute the appropriate enforcement mechanisms with respect to unexpected methane liberation in working places (i.e., areas inby the last open crosscut; see 30 C.F.R. 75.2(g)(2)). Thus, a violation of the first sentence of section 75.301, as cited ... below, does not occur when methane unexpectedly is encountered in excessive concentrations in working places. Applying this interpretation to the facts in this case, a violation of 30 C.F.R. 75.301 did not occur.

Id. (emphasis in original).

In light of this position, the Secretary now moves for vacation of the citation and dismissal of the proceeding. After receipt of the Secretary's motion, the Commission issued an order on August 8, 1990, directing BethEnergy to file a written response to the motion. On August 17, 1990, the Commission received BethEnergy's Response to Motion to Vacate ("Response"), indicating that it does not object to vacation of the citation and dismissal of the proceeding. BethEnergy notes in its response, however, that its position "does not, under any circumstances, constitute an admission by BethEnergy of the validity of the Secretary's assertions set forth in its Motion to Vacate." Response at 2.

As we have held, our "responsibility under the Mine Act is to ensure that a contested case is terminated, or continued, in accordance with the Act." Youghiogeny & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985). A motion by the Secretary to vacate a citation or withdrawal order and to dismiss a proceeding will be granted if "adequate reasons" to do so are present. Southern Ohio Coal Co., 10 FMSHRC 1669, 1670 (December 1988) ("SOCCO"), and authorities cited. Here, the Secretary has disclaimed reliance on the legal position that she advocated successfully before the judge. Instead, the Secretary states that, applying her "preferred interpretation in the circumstances present in this case," it now appears to her that the alleged violation

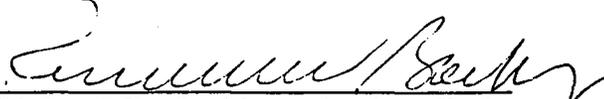
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2/ 30 C.F.R. § 75.308 specifies the remedial actions to be taken when excess concentrations of methane occur in working places, and 30 C.F.R. § 75.313 provides for the installation of approved methane monitors on specified kinds of mining equipment.

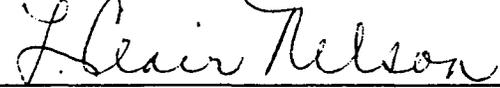
of section 75.301 did not occur. As the prosecutor responsible for enforcement of the Act, the Secretary has concluded that she should seek dismissal of this proceeding, and that prosecutory determination is entitled to special weight. Socco, 10 FMSHRC at 1670. The operator has not objected to the granting of the Secretary's motion and will not be prejudiced by the requested action. No reason otherwise appears on this record as to why the motion should not be granted.

The Commission expresses no view as to the merits of the judge's determination that BethEnergy violated section 75.301 or the Secretary's present interpretation of that standard as applied to the circumstances involved in this case.

Accordingly, upon consideration of the Secretary's motion and the operator's response, the Secretary's motion is granted. The citation and assessed civil penalty are vacated. The Commission's direction for review is vacated and this proceeding is dismissed. 3/

  
Richard V. Backley, Acting Chairman

  
Joyce A. Doyle, Commissioner

  
L. Clair Nelson, Commissioner

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3/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three Commissioners to exercise the powers of the Commission in this matter.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 19, 1990.

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

v.

SANGER ROCK AND SAND

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Docket Nos. WEST 88-275-M  
WEST 89-71-M

ORDER

BY: Backley, Acting Chairman; Doyle and Nelson, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"), Commission Administrative Law Judge John Morris, in a May 17, 1990 decision, vacated two citations issued to Sanger Rock and Sand ("Sanger") and dismissed the proceeding on the ground that the Secretary of Labor and the Department of Labor's Mine Safety and Health Administration ("MSHA") had failed to comply with section 552(a)(1)(A) of the Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(A) ("APA"). On June 11, 1990, the Secretary filed a combined petition for review and motion for summary reversal of Judge Morris' decision. By order issued June 25, 1990, the Commission directed review of the Secretary's petition but stayed briefing pending consideration of the Secretary's motion for summary reversal. Sanger has filed oppositions to both the Secretary's petition for review and motion for summary reversal.

On August 14, 1987, and April 13, 1988, MSHA Inspector Jaime Alvarez issued citations to Sanger for violations of 30 C.F.R. § 56.12028 and 30 C.F.R. 56.14007, respectively. Sanger contested both citations. At hearing and in its post-hearing brief, Sanger challenged the validity of the citations on the ground that the Secretary and MSHA had failed to comply with section 552(a)(1)(A) of the APA. That provision provides that each federal agency shall publish in the Federal Register "descriptions of its central and field organization and the established places at which, the employees ... from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions." Section 552(a) further provides that "[e]xcept to the extent that a person had actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a).

Finding no evidence that the Secretary or MSHA had published the required information, the judge concluded that Sanger had no notice of the inspector's duties and delegated authority or MSHA's central and field organizations. Citing Rowell v. Andrus, 631 F.2d 699 (10th Cir. 1980), United States v. Two Hundred Thousand Dollars (\$200,000) in United States Currency, 590 F. Supp. 866 (D. Fl. 1984), and Pinkus v. Reilly, 157 F. Supp. 548 (D.N.J. 1957), the judge determined that the Secretary's failure to comply with the APA warranted vacation of the citations as invalidly issued.

On review the Secretary has submitted an entry from the United States Government Manual 1989/1990 ("Manual") that refers to MSHA at pp. 406, 409 and 424-25. The Secretary argues that the entry in the Manual constitutes compliance with section 552(a)(1)(A) of the APA since the Manual is designated as a special edition of the Federal Register. See 1 C.F.R. 9.1. In response, Sanger argues that the Manual entry does not sufficiently provide the information required by section 552(a)(1)(A) of the APA.

The manual entry submitted on review was not presented below to Judge Morris, but the Secretary argues that the Commission can take judicial notice of the contents of the Federal Register, citing 44 U.S.C. 1507. However, section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), provides, *inter alia*, "Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass."

The legal issues presented on review are jurisdictional in nature and we are mindful of the Secretary's arguments relating to judicial notice of Federal Register contents. Nevertheless, since the Manual entry was not submitted to the judge and since the judge is more appropriately positioned to deal with any factual issues surrounding the sufficiency of the Manual entry vis-a-vis section 552(a)(1)(A) of the APA, we conclude that it is preferable to remand the matter to the judge. The judge shall determine whether the Manual publication satisfies applicable APA requirements. In his reconsideration of this matter, we also direct the judge to determine what effect, if any, section 507 of the Mine Act, 30 U.S.C. § 956, has on the issues presented. 1/

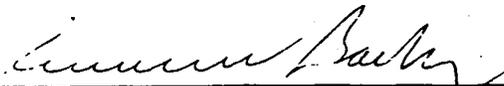
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1/ Section 507 of the Mine Act provides:

Except as otherwise provided in this Act, the provisions of sections 551-559 and section 701-706 of title 5 of the United States Code shall not apply to the making of any order, notice, or decision made pursuant to this Act, or to any proceeding for the review thereof.

30 U.S.C. § 956.

Accordingly, we remand the matter to the judge for further consideration of the issues set forth above. 2/

  
Richard V. Backley, Acting Chairman

  
Joyce A. Doyle, Commissioner

  
L. Clair Nelson, Commissioner

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2/ Pursuant to section 113(c) of the Mine Act, we have designated ourselves a panel of three Commissioners to exercise the powers of the Commission in this matter.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 20, 1990

GOLDEN OAK MINING COMPANY, L.P. :  
 :  
 v. : Docket No. KENT 90-185-R  
 :  
 SECRETARY OF LABOR, :  
 MINE SAFETY AND HEALTH :  
 ADMINISTRATION (MSHA) :

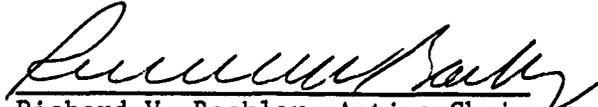
BEFORE: Backley, Acting Chairman; Doyle and Nelson, Commissioners

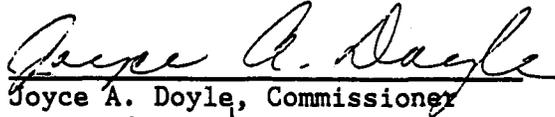
ORDER

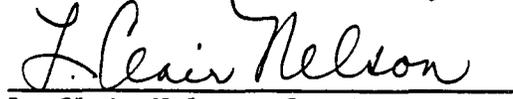
BY THE COMMISSION:

In this contest proceeding pending on review, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"), counsel for petitioner Golden Oak Mining Company, L.P. ("Golden Oak") has filed a Motion for Leave to Withdraw Petition for Discretionary Review. Counsel for the Secretary of Labor has filed a Response indicating that the Secretary "supports" Golden Oak's motion. In the proceeding below, Commission Administrative Law Judge James A. Broderick concluded that Golden Oak had violated 30 C.F.R. § 75.1712-1 by not providing a surface bathing facility at its underground coal mine, and that the Department of Labor's Mine Safety and Health Administration ("MSHA") had not abused its discretion in denying Golden Oak's request for a waiver of the standard's requirements. 12 FMSHRC 1360 (June 1990)(ALJ). In its present motion, Golden Oak states that MSHA has now granted it a waiver of the bathing facility requirements and that its contest is "moot." Upon consideration of Golden Oak's motion and the Secretary's response, we conclude that adequate reasons have been presented for dismissal of this proceeding and we grant the motion. See generally, e.g., Youghioghney & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985).

Accordingly, the Commission's direction for review is vacated and this proceeding is dismissed. \*/

  
Richard V. Backley, Acting Chairman

  
Joyce A. Doyle, Commissioner

  
L. Clair Nelson, Commissioner

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\*/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of the three Commissioners to exercise the powers of the Commission in this matter.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 27, 1990

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

v.

RANDY COAL COMPANY

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Docket No. PENN 90-80

BEFORE: Backley, Acting Chairman; Doyle and Nelson, Commissioners

ORDER

BY THE COMMISSION:

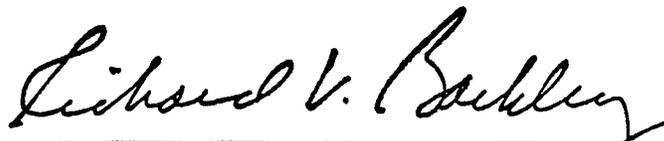
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). On July 18, 1990, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Randy Coal Company ("Randy Coal") in default for its failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. The judge assessed Randy Coal a civil penalty of \$98, as proposed by the Secretary. In an undated letter (postmarked September 20, 1990), addressed to Judge Merlin, which was received on September 24, 1990, Randy Coal states that it believed it had been "released" from the violation in question. For the reasons explained below, we deem Randy Coal's submission to be one seeking relief from a final Commission decision, reopen the proceeding, vacate the judge's default order, and remand for further proceedings.

On March 26, 1990, the Secretary filed with the Commission a petition for assessment of civil penalty in this matter, based on a citation issued by the Department of Labor's Mine Safety and Health Administration to Randy Coal at its Mine Hill Strip. When no answer to the penalty proposal was filed with the Commission, Judge Merlin, on May 15, 1990, issued a show cause order directing Randy Coal to file an answer within 30 days or show good reason for the failure to do so. The judge entered an Order of Default on July 18, 1990, after Randy Coal failed to file an answer. On September 24, 1990, the Commission received a letter from Randy Coal's owner, addressed to Judge Merlin, stating the owner's belief that Randy Coal had been "released" from the violation.

The judge's jurisdiction over the case terminated when his default order was issued on July 18, 1990. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Because the judge's decision has become final by operation of law, 30 U.S.C. § 823(d)(1), we can consider the merits of Randy Coal's submission only if we construe it as a request for relief from a final Commission decision incorporating a petition for discretionary review. See 29 C.F.R. § 2700.1(b) (applicability of Federal Rules of Civil Procedure to Commission proceedings); Fed. R. Civ. P. 60(b)(relief from judgment or order). Under the circumstances presented, we consider Randy Coal's request in that light. See J.R. Thompson, Inc., 12 FMSHRC 1194, 1195 (June 1990).

In compliance with the standards set forth in Fed. R. Civ. P. 60(b)(1), the Commission has previously afforded a party relief from final orders of the Commission where it appears the party's failure to respond to a judge's order and the party's subsequent default are due to inadvertance or mistake. See Kelley Trucking Co., 8 FMSHRC 1867, 1868 (December 1986); M.M. Sundt Construction Co., 8 FMSHRC 1269, 1270-71 (September 1986). The owner's letter to the judge contains allegations that may reflect confusion and misunderstanding as to the nature and appropriate procedures of this civil penalty proceeding and, additionally, may reflect problems in the legal representation provided Randy Coal by its attorney. We conclude that, in fairness, Randy Coal should be afforded the opportunity to submit its explanations to the judge, who shall determine whether final relief from default is, in fact, warranted.

For the foregoing reasons, we reopen the proceeding, vacate the judge's default order, and remand this matter for further proceedings. Randy Coal's attention is directed to the requirements that all further pleadings that it wishes to submit in this proceeding must be filed with the Commission and copies of all such documents served on the Secretary of Labor. 29 C.F.R. §§ 2700.5(b) & .7. 1/

  
Richard V. Backley, Acting Chairman

  
Joyce A. Doyle, Commissioner

  
L. Clair Nelson, Commissioner

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1/ Pursuant to section 113(c) of the Mine Act, we have designated ourselves a panel of three Commissioners to exercise the powers of the Commission in this matter.

ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
THE FEDERAL BUILDING  
ROOM 280, 1244 SPEER BOULEVARD  
DENVER, CO 80204

SEP 4 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 90-110-M  
Petitioner : A.C. No. 04-04663-05509  
: :  
v. : Evening Star Mine  
: :  
BOB SHERMAN, Employed by :  
BLACKHAWK, :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Morris

This is a civil penalty proceeding initiated by the petitioner against respondent, in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil penalty sought here is for the violation of a mandatory standard promulgated pursuant to the Act.

Prior to a hearing, the parties filed a motion seeking approval of a proposed settlement.

Citation 3462951 alleges a violation of 30 C.F.R. § 57,6250. An original assessment of \$250 was proposed. The parties now seek a decision affirming the citation and assessing a penalty of \$25.

In support of their motion to approve the settlement, the parties have submitted information relating to the statutory criteria required for assessing civil penalties as contained in 30 U.S.C. § 820(i).

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

Accordingly, I enter the following:

ORDER

1. Citation 3462951 and the amended civil penalty of \$25 are AFFIRMED.

2. Respondent is ordered to pay the sum of \$25 within 30 days of the date of this decision.

  
John J. Morris  
Administrative Law Judge

Distribution:

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Mr. Bob Sherman, Blackhawk, 4750 Kelso Creek, Weldon, CA 93283 (Certified Mail)

/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

SEP 10 1990

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 89-165-DM  
ON BEHALF OF : MD 88-99  
ROBERT BLACK, :  
Complainant : Mansfield Pit & Plant  
v. :  
WAYNE PULLIAM, TEXAS SAND :  
& GRAVEL, CO., INC., :  
Respondent :

ORDER DISMISSING PROCEEDING

Before: Judge Lasher

The settlement of the parties, providing for back wage payments in installments, has been consummated by Respondent's payment of the last installment. Such was confirmed by telephone by Complainant's counsel on August 21, 1990. The settlement was approved by my Decision Approving Settlement on April 5, 1990. Accordingly, the matter having been resolved, this proceeding is DISMISSED.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

SEP 12 1990

JOSEPH S. COLAMARTINO, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. PENN 89-271-D  
: :  
GATEWAY COAL COMPANY, :  
Respondent :

**DECISION**

**Appearances:** Paul H. Girdany, Esq., Pittsburgh, Pennsylvania,  
for the Complainant; R. Henry Moore, Esq.,  
Pittsburgh, Pennsylvania, for the Respondent.

**Before:** Judge Maurer

**STATEMENT OF THE CASE**

Complainant filed a complaint with the Commission under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) [hereinafter referred to as the Act], on September 1, 1989, alleging that he was assaulted by one of the Respondent's foremen, Pete Krosunger, because he wanted to rib pin an area that the foreman did not want pinned. The foreman, Krosunger, on the other hand, admits hitting Complainant, but contends that the incident occurred because of his pent-up frustration with supervising Colamartino. The Respondent (Gateway) maintains that the only adverse action taken against Complainant was taken by Mr. Krosunger and that they for their part, not only did not sanction his actions, but in fact, suspended him for 60 days without pay as a result.

Pursuant to notice, this case was heard in Pittsburgh, Pennsylvania, on March 19 and 20, 1990. Both parties have filed post-hearing proposed findings of fact and conclusions of law which I have considered along with the entire record in making this decision.

**STIPULATIONS**

The parties stipulated to the following at the hearing, which I accepted (Tr. 5-6):

1. The administrative law judge has jurisdiction in this proceeding.

2. The Gateway Coal Company operates coal mine facilities, and therefore, is an operator as defined under section 3(d) of the Act.

3. Complainant Joseph Colamartino has had a job classification of roof bolter, which at the time, under the collective bargaining agreement in effect between the parties, paid \$16.92 per hour or \$122.73 per day.

4. On May 17, 1989, he was assigned certain roof bolting duties with another employee named Sylvester Richards.

5. His supervisor that day was Gerald A. (Pete) Krosunger.

6. An altercation occurred on that day from which Mr. Colamartino suffered injuries.

7. Mr. Colamartino was absent from work from May 17 to August 14, 1989.

8. Complainant, Mr. Colamartino, received workers' compensation payments during this period of time in the amount of \$399 per week.

9. Aside from the actual physical assault, there was no formal disciplinary action taken against Mr. Colamartino; i.e., adverse action.

10. From on or about June 16, 1989 until July 17, 1989, the bargaining unit employees at the Gateway Coal Company, did not report for work.

11. Pete Krosunger was suspended without pay from May 18, 1989 until July 15, 1989.

#### FINDINGS OF FACT

1. Complainant first started to work for Gateway Coal Company (Gateway) in January of 1977. He worked until he got laid off in 1985 and was then recalled in 1988. He worked as a roof bolter for Pete Krosunger from May of 1988 until the incident involved herein, which occurred on May 17, 1989.

2. During this year-long period, Krosunger had some problems supervising Colamartino, including several incidents of insubordination, which are documented in two notebooks received into evidence as Respondent's Exhibit Nos. 7 and 8, and summarized in Respondent's Exhibit No. 6. More specifically, there are several instances documented by Krosunger where Colamartino complained about or refused to perform rib-pinning.

3. For example, on the very day of the incident, May 17, 1989, at the beginning of the shift, when told by Krosunger that he would have to rib-pin the No. 1 heading, Colamartino replied to the effect: "Why do we have to do it, nobody else on the other shifts is doing it?" He further testified at the hearing, by way of explanation, that he wanted to know why, if rib-pinning that entry was so important, the other two shifts were not helping with the task. He did not appreciate it that they had not done their share.

4. At the beginning of their shift on May 17, 1989, Krosunger had assigned Colamartino and his bolting partner, Richards, to rib-pin an area in the No. 1 entry. Two hours later, when Krosunger checked on their progress, he found that they had only installed about twenty rib pins despite the fact that it only takes 3 to 4 minutes to install each pin. Krosunger was upset about this and Colamartino knew it.

5. At this point in time, Colamartino informed Krosunger that they would not pin those areas of the rib where loose coal and sloughage had either fallen down or been taken down by their scaling the rib. Complainant opined that they could not safely install rib pins in that area because they could not secure safe footing. Mr. Virgili, a safety committeeman who inspected the area shortly after the incident giving rise to this case occurred, agrees that it would have been unsafe to install rib pins in that area. Krosunger believed that Colamartino had purposely scaled the rib in order to have some reason not to rib-pin it.

6. After some repartee between the two as to whether or not Colamartino did or did not want to rib-pin, Krosunger ordered Complainant and Richards to go to the No. 2 entry and bolt the roof where the continuous miner pulled out.

7. Krosunger specifically told Complainant and Richards not to rib pin in this one area of the No. 2 heading where the miner was going to begin a crosscut, perhaps on that same shift.

8. When Krosunger returned to the face of the No. 2 heading sometime later, he found Colamartino preparing to rib-pin. He testified at Tr. 279-281 and which testimony I find credible and do credit it here:

I went up on Lester's side, I said, "What are you doing, Lester?"

\* \* \* \*

Q. Lester is Mr. Richards?

A. Sylvester Richards, right.

"I told you, don't rib pin this." He went like this (indicating).

Q. He gestured with his hand?

A. Right.

\* \* \* \*

Q. Who was he motioning toward?

A. Joe, his buddy. [Colamartino]

\* \* \* \*

Q. What did you do then?

A. I went over and asked Joe, "Why are you rib pinning? I told you don't rib pin this. We are going to cut them out anyway."

Q. What did he say?

A. His response was, "The company wants these places rib pinned, they are going to get them rib pinned."

Q. What happened at that point?

A. He started to stretch out boards. I said, "Joe, don't rib pin this. We are going to cut them out anyway." This is what I said to him again, following him around the machine, because he is putting those boards down in the area they would be installed. I was picking them up and putting them back on.

Q. Do you recall how many times you went around the bolter like this?

A. I would say twice.

Q. And he was putting them down and you were picking them up?

A. Right.

Q. What happened after you did that?

A. I asked him, "What are you doing, Joe? I told you don't rib pin." . . . [A]nd he grabbed that drill and started walking to the face.

At that point Krosunger grabbed the drill to pull it away from him. Colamartino resisted and Krosunger began hitting him until Richards yelled for him to stop.

9. The purpose of rib-pinning in this mine is to prevent the ribs from spalling and depositing accumulations of combustible materials along the ribs, however, generally the areas which are to be cut out to create crosscuts are not pinned. Installation of rib pins before the crosscut is made would require the continuous mining machine to cut out those pins which could present a hazard to the miner operator, and/or damage the equipment.

10. There is no requirement for the entire mine to be rib-pinned, and it is not unusual to have areas of unpinned rib in this mine in addition to those areas where a crosscut is planned.

11. After the incident occurred, Mr. Rodavich, the mine superintendent, went underground to inspect the area, specifically the condition of the ribs in the No. 2 entry. They looked adequate to him. They looked like the rest of the section looked. He did not see any hazards present that would have mandated rib-pinning.

12. Neither Complainant nor Krosunger knew for sure when the turnout would be made from the No. 2 entry and thus Complainant's position is that his safety concern was for other miners who would have to travel through the No. 2 entry for some undetermined period of time and would therefore be subject to injury from possible rib falls if no rib pins were installed in this area for their protection. I find as a fact that this alleged safety concern for others was not in fact the Complainant's motivation for his behavior prior to the incident at bar on May 17, 1989.

13. The Complainant never raised a safety issue with Krosunger on behalf of himself or others nor sought to exercise his individual safety rights under the union contract with regard to rib-pinning this turnout area. He likewise did not seek to inform the safety committeeman, Mr. Virgili, who was on the section, of his concern over this area's ribs.

#### DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980),

rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also, e.g., Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Treating this as a work refusal case, it is also well settled that a miner has the right under section 105(c) of the Act to refuse to work if he has a good faith, reasonable belief that the work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982). Additionally, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-135 (February 1982); Dillard Smith v. Reco, Inc. 9 FMSHRC 992 (June 1987); Miller v. Consolidation Coal Company, 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement).

Although by insisting on pinning the ribs in the No. 2 entry Colamartino was seeking to perform work, rather than refusing to perform work, a framework for analyzing this incident based upon a refusal to perform hazardous work is useful here. In essence, Colamartino was refusing to comply with a work order, in that he was directed several times by Krosunger not to rib pin the No. 2 entry.

Complainant's actions herein could be held to be protected activity even though he did not feel personally endangered. It would be sufficient if he were acting to confront a threat to the health or safety of other miners. Secretary on behalf of Cameron v. Consolidation Coal Co., 7 FMSHRC 319 (1985), aff'd. sub nom. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364 (4th Cir. 1986).

If the Complainant in this case engaged in protected activity at all, it was on behalf of other miners, not himself. Complainant did not feel personally endangered. Rather, he

allegedly was concerned that if he did not rib-pin the area of the proposed turnout in the No. 2 entry, that it would remain unpinning for an unspecified period until it was cut-out. In the interim, others would be exposed to the dangers associated with rib falls or rolls.

The Complainant herein bears the burden of proof that such a hazard existed or at the very least that he had a good faith, reasonable belief in its existence. I do not believe he has carried that burden. I do not believe Colamartino had any safety-related concern whatsoever in the No. 2 entry. He only wanted to rib-pin the one exact area that his foreman specifically instructed him not to pin. There were many other areas that were unpinning, but he did not care to pin them, in fact, resisted rib-pinping in general. He only wanted to pin the one area where Krosunger told him repeatedly there was going to be a turn-out made. I find that his action in insisting on attempting to rib-pin the area in question in the No. 2 entry did not rise to the level of protected activity.

It is fairly obvious to me, or at least it is my decided impression from the totality of the record in this case, that Colamartino's purpose was to aggravate his supervisor, Krosunger. Historically, he complained about having to rib-pin. Earlier on that same shift, he refused to rib-pin an area he had been directed to, after he scaled down material in front of the rib. If insecure footing truly was the problem keeping him from the assigned rib-pinping, he could have shoveled the sloughage up and continued to pin the ribs that Krosunger wanted him to pin in the No. 1 entry.

It also appears to me from the record herein, that the ribs in the area he wanted to pin were no different than the ribs in the rest of the section. There was no particular hazard there. Additionally, there appears to be a legitimate reason why Krosunger did not want them pinned, i.e., they would only have to be cut out when the turnout was made. Furthermore, turnouts were not routinely rib-pinping and it was the usual practice for foremen to instruct the men not to pin those areas. Colamartino was apparently aware of this because on prior occasions he had asked about the locations of turnouts to avoid rib-pinping.

From Krosunger's point of view, it is apparent to me that he acted out of sheer personal animus towards Colamartino. There is no basis in this record to find that he struck the Complainant because he was reacting to any safety concerns that Colamartino may have had. First of all, Colamartino did not express any safety-related concerns to him; and in any event it is clear to me that Krosunger's actions were motivated by unprotected activity alone. Not only unprotected activity (shirking, insubordination, "mistakes", slowness to perform, etc.) that occurred on that same shift, but this same type of thing had been

troubling Krosunger for some time already before May 17, 1989. I believe he was severely provoked by all of this and unfortunately the assault on Mr. Colamartino of May 17, 1989, resulted.

Krosunger was thereupon suspended for sixty days without pay by the operator-respondent. Since Krosunger's personal assault on Colamartino is the only "adverse action" complained of in this case, even if I find that Complainant had engaged in protected activity, he would also necessarily have to impute the actions of Krosunger to Gateway. He would have to demonstrate that Krosunger was acting within the scope of his employment as the agent of Gateway. This proposition fails of proof as well. Not only did Gateway not condone or authorize Mr. Krosunger's actions, they took severe disciplinary measures against him for assaulting Colamartino. In my opinion, when Krosunger hit Colamartino, he acted on his own behalf, not on behalf of Gateway.

#### CONCLUSIONS OF LAW

1. Mr. Colamartino did not engage in protected activity in the No. 2 entry on May 17, 1989.
2. Mr. Colamartino's refusal to comply with Mr. Krosunger's directives not to rib-pin in the No. 2 entry was neither made in good faith nor reasonable.
3. In any event, Mr. Colamartino did not communicate to any representative of the operator, including Mr. Krosunger, his belief that a hazardous condition existed or would come into existence to endanger himself or others in the No. 2 entry.
4. The adverse action complained of in this case was taken against the Complainant by Mr. Krosunger personally, not Respondent herein. Mr. Colamartino received no discipline from Gateway.
5. Gateway did not violate section 105(c) of the Federal Mine Safety and Health Act of 1977.

#### ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that the Complainant has failed to establish a violation of section 105(c)

of the Act. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.

  
Roy J. Maurer  
Administrative Law Judge

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

SEP 17 1990

EMERY MINING CORPORATION  
AND/OR UTAH POWER & LIGHT  
COMPANY,

Contestants

v.

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

and

UNITED MINE WORKERS OF  
AMERICA, (UMWA),  
Intervenor

: CONTEST PROCEEDINGS  
:  
: Docket No. WEST 87-130-R  
: Citation No. 2844485; 3/24/87  
:  
: Docket No. WEST 87-131-R  
: Order No. 2844486; 3/24/87  
:  
: Docket No. WEST 87-132-R  
: Order No. 2844488; 3/24/87  
:  
: Docket No. WEST 87-133-R  
: Order No. 2844489; 3/24/87  
:  
: Docket No. WEST 87-144-R  
: Order No. 2844795; 3/24/87  
:  
: Docket No. WEST 87-145-R  
: Order No. 2844796; 3/24/87  
:  
: Docket No. WEST 87-146-R  
: Order No. 2844798; 3/24/87  
:  
: Docket No. WEST 87-147-R  
: Order No. 2844800; 3/24/87  
:  
: Docket No. WEST 87-150-R  
: Order No. 2844805; 3/24/87  
:  
: Docket No. WEST 87-152-R  
: Order No. 2844807; 3/24/87  
:  
: Docket No. WEST 87-153-R  
: Order No. 2844808; 3/24/87  
:  
: Docket No. WEST 87-156-R  
: Order No. 2844813; 3/24/87  
:  
: Docket No. WEST 87-157-R  
: Order No. 2844815; 3/24/87  
:  
: Docket No. WEST 87-160-R  
: Order No. 2844822; 3/24/87  
:  
: Docket No. WEST 87-161-R  
: Order No. 2844823; 3/24/87  
:  
: Docket No. WEST 87-248-R  
: Order No. 2844835; 8/13/87  
:  
: Wilberg Mine  
: Mine I.D. No. 42-00080

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 87-208
Petitioner	:	A.C. No. 42-00080-03578
	:	
v.	:	Docket No. WEST 87-209
	:	A.C. No. 42-00080-03579
EMERY MINING CORPORATION, and	:	
ITS SUCCESSOR-IN-INTEREST	:	Docket No. WEST 88-25
UTAH POWER & LIGHT COMPANY,	:	A.C. No. 42-00080-03584
MINING DIV.,	:	
Respondent	:	Wilberg Mine
	:	
and	:	Consolidated
	:	
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor	:	

DECISION APPROVING SETTLEMENT

Before: Judge Morris

These are contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

These cases arose from the Wilberg Mine Fire disaster, an underground coal mine fire that occurred in Orangeville, Emery County, Utah.

As a result of the fire, on March 24, 1987, the Secretary issued to Emery Mining Corporation ("Emery") and Utah Power and Light ("UP&L"), as Emery's alleged successor-in-interest, 34 citations and orders alleging violations of the Mine Act. UP&L challenged all 34 citations and orders. Emery filed notices of contest challenging 18 of the citations and orders, paid the penalties assessed for eight of the citations and orders and challenged eight other violations in the related penalty proceedings.

Subsequently, Emery paid the civil penalties assessed on three of the citations and orders for which it had previously filed notices of contest. UP&L's 34 and Emery's 23 challenges were consolidated in Docket Nos. WEST 87-130-R through WEST 87-163-R ("130-series dockets").

On August 13, 1987, the Secretary issued seven additional citations to Emery as the operator of Wilberg and UP&L as Emery's

successor-in-interest. UP&L again challenged all seven citations, while Emery filed a notice of contest in only one case, paying the assessed civil penalties in the remaining six. These notices of contest were assigned Docket Nos. WEST 87-243-R through WEST 87-249-R ("243-series dockets") and consolidated with the 130-series dockets.

Parallel penalty proceedings were also consolidated with the above contest cases (Docket Nos. WEST 87-208; WEST 87-209; WEST 88-25).

On March 9, 1988, 11 of the 130-series citations and orders and the related penalty cases were vacated as to UP&L. Emery Mining Corp., 10 FMSHRC 339 (1988). (Docket Nos. WEST 87-138-R; WEST 87-139-R; WEST 87-140-R; WEST 87-141-R; WEST 87-142-R; WEST 87-143-R; WEST 87-148-R; WEST 87-149-R; WEST 87-151-R; WEST 87-154-R; WEST 87-162-R.) These 11 cases were later dismissed as to Emery as well, by Order dated August 5, 1988, on the grounds that Emery had paid the assessed civil penalties. In a separate Order dated March 24, 1988, and amended March 25, 1988, the Presiding Judge noted that six of the seven 243-series cases could also be vacated as to UP&L on the basis of the March 9 Order. (Docket Nos. WEST 87-243-R; WEST 87-244-R; WEST 87-245-R; WEST 87-246-R; WEST 87-247-R; WEST 87-249-R.)

The Secretary sought to modify the 30 remaining citations and orders, including the 243-series cases, to which the March 9 ruling had not been applied. The modification sought to cite UP&L directly, as an operator of the Wilberg Mine.

On August 30, 1988, all 30 "modified" citations and orders were vacated as to UP&L. The Secretary sought review of the August 30 Order, but, at the joint request of the Secretary and UP&L, briefing and further proceedings at the Commission level were stayed pending the final disposition of the proceedings involving Emery (in the belief that resolution of the Emery cases might obviate the need for further Commission proceedings).

On appeal, the Commission did not stay proceedings before the Presiding Judge. Accordingly, the Judge has jurisdiction to consider the proposed settlement. Further, it is necessary to formally dismiss the contest proceedings.

#### CONTEST PROCEEDINGS

The contest cases remaining pending herein should be dismissed for the reasons hereafter noted:

WEST 87-130-R (Citation No. 2844485):

UP&L's motion to vacate this citation was granted and Emery has withdrawn its contest.

WEST 87-131-R (Order No. 2844486):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-132-R (Order No. 2844488):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-133-R (Order No. 2844489):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-144-R (Order No. 2844795):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-145-R (Order No. 2844796):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-146-R (Order No. 2844798):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-147-R (Order No. 2844800):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-150-R (Order No. 2844805):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-152-R (Order No. 2844807):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-153-R (Order No. 2844808):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-156-R (Order No. 2844813):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-157-R (Order No. 2844815):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-160-R (Order No. 2844822):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-161-R (Order No. 2844823):

UP&L's motion to vacate this order was granted and Emery has withdrawn its contest.

WEST 87-248-R (Citation No. 2844835):

Vacated as to UP&L and pending as to Emery. The citation herein has been settled, as provided in the civil penalty proceedings.

#### CIVIL PENALTY PROCEEDINGS

The parties at this time have reached an amicable settlement of the three penalty proceedings (Docket Nos. WEST 87-208, WEST 87-209, WEST 88-25). These penalty cases involve 24 of the alleged violations that were initially challenged in the 130- series and 243-series. Emery is the sole respondent in these cases.

The outstanding civil penalties herein were originally assessed for a total amount of \$106,749. Emery has offered to settle these matters by the voluntary payment of \$95,000 with the specific amounts to be allocated by the Secretary.

The Secretary's allocation set forth in her motion is based on the statutory criteria for assessing civil penalties.

The proposed dispositions are as follows:

<u>Citation/ Order No.</u>	<u>30 C.F.R.</u>	<u>Proposed Assessment</u>	<u>Settlement Amount</u>
2844485	75.1725(a)	\$10,000	\$10,000
2844486	75.512	\$10,000	\$10,000
2844488	75.1101-23(a)	\$10,000	\$10,000
2844489	75.1704-2(d)	\$10,000	\$10,000
2844490	75.1714(b)	\$10,000	\$10,000
2844815	75.1704	\$10,000	\$10,000
2844491	75.1105	\$ 7,000	\$ 7,000
2844492	75.1107-1(a)(2)	\$ 5,000	\$ 5,000
2844493	75.1600-2(e)	\$ 5,000	\$ 5,000
2844816	75.103(j)	\$ 4,000	\$ 4,000
2844822	75.316	\$ 4,000	\$ 1,000
2844826	75.1704-2(a)	\$ 329	\$ 329
2844813	75.1702	\$ 1,600	\$ 250
2844817	75.508	\$ 20	\$ 20
2844823	75.1103-4(a)(1)	\$ 2,000	\$ 2,000
2844805	75.904	\$ 1,900	\$ 1,900
2844800	75.513	\$ 1,200	\$ 200
2844795	75.900	\$ 4,000	\$ 4,000
2844796	75.1101-5(b)	\$ 2,000	\$ 1,000
2844798	75.1101-5(2)	\$ 1,800	\$ 800
2844807	75.512	\$ 1,800	\$ 500
2844808	75.512	\$ 1,800	\$ 500
2844811	75.1103-4(e)	\$ 1,400	\$ 1,000
2844835	75.1704	\$ 2,000	\$ 501

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

For the foregoing reasons I enter the following:

ORDER

1. The following contest cases are DISMISSED:

WEST 87-130-R  
WEST 87-131-R  
WEST 87-132-R  
WEST 87-133-R  
WEST 87-144-R  
WEST 87-145-R  
WEST 87-146-R  
WEST 87-147-R  
WEST 87-150-R  
WEST 87-152-R  
WEST 87-153-R  
WEST 87-156-R  
WEST 87-157-R  
WEST 87-160-R  
WEST 87-161-R  
WEST 87-248-R

2. The Motion to Approve Settlement of the penalty cases (WEST 87-208, WEST 87-209, and WEST 88-25) is GRANTED.

3. Emery is ordered to pay to the Secretary the sum of \$95,000 within 10 days after this "Decision Approving Settlement" becomes a final Commission Decision.

  
John J. Morris  
Administrative Law Judge

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/ek

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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**SEP 18 1990**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 90-28
Petitioner	:	A. C. No. 44-00304-03618
v.	:	
	:	Bullitt Mine
WESTMORELAND COAL COMPANY,	:	
Respondent	:	
	:	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,  
U. S. Department of Labor, Arlington, Virginia,  
for the Secretary;  
F. Thomas Rubenstein, Esq., Assistant General  
Counsel, Westmoreland Coal Company, Big Stone Gap,  
Virginia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this proceeding, the Secretary (Petitioner) seeks a civil penalty for an alleged violation by the Operator (Respondent) of 30 C.F.R. § 75.1003. Pursuant to notice, the case was heard in Bristol, Virginia, on June 25, 1990. At the hearing, Gary Wayne Jessee testified for Petitioner, and John Yorke testified for Respondent. At the conclusion of Petitioner's case, Respondent made a Motion to have the citation vacated, and decision was reserved. Subsequent to hearing, Petitioner and Respondent filed Proposed Findings of Fact and Briefs on August 10 and August 7, respectively

Stipulations

At the hearing, Petitioner read into the record the following stipulations:

1. The Westmoreland Coal Company is the owner and operator of the Bullet Mine which is the subject of this proceeding.
2. That the operations of the above mentioned mine is subject to the Mine Safety and Health Act.

3. That the Administrative Law Judge has the jurisdiction to hear and decide this matter
4. That Inspector Gary Jessee was acting in an official capacity when he issued the citation in question today, Citation Number 3352277.
5. That a true copy of the citation was served on a mine operator or its agents as required by the Act.
6. That there is no question today of the authenticity of the citation.
7. That the proposed penalty of \$105 will not adversely affect the Respondent's ability to continue in business.
8. That the Respondent has a favorable ratio of inspections -- violations per inspection day pursuant to Part 100 where the purposes of the tables that we have used. (sic).
9. That the Parties' Joint Exhibit 1 is an accurate rendition of the scene that the inspector came upon in issuing the citation in question.
10. That should an individual contact the trolley wire in question today, such a contact would lead to an injury leading to at least a temporary disabling injury or illness to the miner.

### Findings of Fact and Discussion

#### I.

The West Main entry (also referred to as "West Mains" and "West Main's entry") at Respondent's Bullitt Mine contains a mine track and belt line. Vehicles traveling on the track are powered by poles in contact with a 300 volt wire that is suspended from the ceiling. At the intersection of the West Main entry, and the Four Left entry (mouth of the Four Left entry), a mine track and trolley wire branch off and run below the belt line to enter the Four Left entry. At the intersection of the West Main entry and the Four Left entry, the belt line is approximately 4 feet above the floor, and the trolley wire is suspended approximately 18 to 24 inches from the roof, and is also approximately 4 feet above the floor. The width of the belt line is approximately 48 inches, the distance between the tracks is approximately 44 inches, and, in a lateral direction, the wire is approximately 1 and 1/2 feet beyond the track. On February 12, 1990, Gary Wayne Jessee, while at the mine to perform an ABD Inspection, observed that the trolley wire that was under the belt line in

the mouth of the Four Left entry, (the intersection between the Four Left and West Main entries), was not guarded.<sup>1/</sup>

Jessee issued a Citation alleging a violation of 30 C.F.R. § 75.1003, which, as pertinent, provides that trolley wires ". . . shall be guarded adequately: (a) at all points where the men are required to work or pass regularly under the wires; . . . ."

Thus, in order for there to be found a violation herein it must be established that there existed an unguarded point at which men are either: 1. required to work;<sup>2/</sup> or 2. pass regularly under the wire.

At the time of the alleged violation, men were working in the Four Left entry approximately 300 feet outby the intersection with the West Main's track, dismantling the longwall equipment. Although there were three other entrances to that area, Jessee indicated, and essentially Yorke agreed, that the primary way from the Four Left longwall out of the mine was through the West Main entry, which necessitated going under the belt line. Yorke indicated that generally people travel from the West Main entry to the Four Left entry by a mantrip rather than on foot. Persons riding the mantrip sit on the floor of the mantrip. According to the uncontradicted testimony of Jessee, the mantrip extends more than 1 foot on either side beyond the tracks. Thus, inasmuch as

<sup>1/</sup> It was Jessee's testimony that the West Mains' side of the wire was not guarded, and the Four Left side had a guard that was partially attached. It was the testimony of John Yorke, Respondent's assistant general foreman, who accompanied Jessee, that the guard for the trolley wire in the area in question was attached on the West Main side, but was down on the Four Left entry side. It is not necessary to resolve this conflict in testimony, as either version supports a conclusion that the wire in the area in question was not adequately guarded.

<sup>2/</sup> Jessee indicated that a person making the weekly examination would be on foot in the area, and also the belt examiner and preshift examiner would be in the area in question. He also indicated that once the work in the longwall was completed, a date board would be placed in the area for an examiner to initial. Yorke, in this connection, indicated that approximately 2 to 3 times a year on his shift, he has assigned men to clean under the belt. However, he indicated that they clean from the West Main's side, and do not work under the belt in the area under the unguarded wire. I thus conclude that the evidence is insufficient to establish that persons are required to work at a point under the unguarded wires.

the trolley wire was 1 and 1/2 feet in a lateral direction beyond the tracks, there is support for the testimony of Jessee that a person sitting on the driver's side of the mantrip would be an inch from the unguarded energized wire. In this connection, he indicated that he observed a full mantrip in the area of the unguarded wire in question. I thus conclude that when riding a mantrip, on the way to and from the Four Left entry from the West Main entry, miners do regularly pass at a point where the trolley wire was unguarded, and as such, Respondent herein did violate Section 75.1003(a), supra.<sup>3/</sup> (See, U. S. Steel, 6 FMSHRC 1664 (1984) (Judge Koutras)). As such, Respondent's Motion to have the Citation vacated is presently DENIED.

## II.

Respondent did not rebut Jessee's conclusion that it would have been reasonably likely, if the condition herein was not corrected, for an injury to occur as a result of contact with the unguarded wire. Due to the fact that entry into the Four Left section is primarily by way of a mantrip from the West Main entry, persons riding the mantrip and sitting on the driver's side would be approximately 1 inch from the wire, which was energized at 300 volts. It certainly is clear that one coming in contact with the wire, which was energized at 300 volts, would be exposed to a hazard of being burned or electrocuted. (See,

<sup>3/</sup> I reject Respondent's arguments that, in essence, Section 75.1003, supra, is not violated when Miners in a mantrip pass under an unguarded wire. It is unduly restrictive to hold that Section 75.1003, supra, in requiring guarding on wires that men "pass regularly under," does not apply where men pass under the wires in a mantrip. Such an interpretation does violence to the clear wording of Section 75.1003, supra, which does not explicitly contain such a limitation. Moreover, an inference can not be logically drawn that in explicitly providing that wires be guarded at mantrip stations (30 C.F.R. § 75.1003(c)), it was intended that such stations are the only areas where miners riding in mantrips are to be protected from unguarded wires. To adopt such an interpretation would clearly not be consistent with the broad language of Section 75.1003(a), supra, requiring guarding "at all points" where men "pass regularly under." This language clearly does not limit the applicability of the phrase "pass regularly under," to only those areas where men pass under wires on foot, as opposed to riding in a mantrip. In addition, I note that, as defined in Webster's Third New International Dictionary (1986 ed.), the term "pass," as applied to travel, does not distinguish between the act of ambulating, or of being transported, as this term is defined as "1 . . . c: to proceed along a specified route: . . . "

U. S. Steel Mining Company, Inc., 6 FMSHRC 2305 (1984)). In this connection, Respondent did not rebut or contradict Jessee's testimony that one riding in a car, especially in the inby end, would come in contact with the wire by being jostled or thrown against it due to a sudden stop of the trolley caused by a wreck or irregularities in the track. I thus conclude that the violation herein was significant and substantial. (See, U. S. Steel, supra; see, also U. S. Steel Mining Company, Inc., 6 FMSHRC 1617 (1984) (Judge Broderick)).

### III.

In U. S. Steel Mining Company, Inc., 7 FMSHRC 865, 867 (1985), the Commission set forth its findings with regard to the purpose of the guarding requirement of 75.1003, supra, and the "strong" Congressional concern with the hazards associated with bare trolley wires as follows:

"The primary purpose of the guarding requirement in Section 75.1003 is to prevent miners from contacting bare trolley wires. As noted above, this standard repeats Section 310(d) of the Mine Act, 30 U.S.C. § 870(d), which, in turn, was carried over unchanged from Section 310(d) of the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976) (amended 1977). The legislative history of the 1969 Coal Act relevant to Section 75.1003 reveals a strong Congressional concern with the hazards associated with bare trolley wires:

This section requires that trolley wires and trolley feeder wires be insulated and guarded adequately at doors, stoppings, at mantrip stations, and at all points where men are required to work or pass regularly. . . . Also, this section would require temporary guards where trackmen or other persons work in proximity to trolley wires and trolley feeder wires. The Secretary or the inspector may designate other lengths of trolley wires or trolley feeder wires that shall be protected.

. . . The guarding of trolley wires and feeder wires at doors, stoppings, and where men work or pass regularly is to prevent shock hazards.

Because of the extreme hazards created by bare trolley wires and trolley feeder wires, the committee intends that the Secretary will make broad use of the authority to designate additional lengths of trolley wires and trolley feeder wires that shall be protected.

Thus I follow the Commission's decision in U. S. Steel, supra, and conclude that the violation herein was of a high level of gravity.

Jessee testified, and his testimony was not contradicted, that there were no obstructions preventing a person from observing the fact that the guard was not in place at the area in question. Yorke testified that if the guard had not been in place the night before he would have noticed it, and he subsequently testified "it was in place the night before" (Tr. 106). Jessee indicated that he did not have any idea how long the guard had been down. Based on this testimony, I conclude that the violation herein resulted from moderate negligence on the part of the Respondent. Taking into account the remaining statutory factors set forth in Section 110(i) of the Act, I conclude that a penalty of \$400 is appropriate for the violation found herein.

ORDER

It is ORDERED that Respondent shall pay \$400, within 30 days from the date of this Decision, as a civil penalty for the violation found herein.



Avram Weisberger  
Administrative Law Judge

Distribution:

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

SEP 18 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 90-18  
Petitioner : A.C. No. 46-01286-03713  
v. :  
WINDSOR COAL COMPANY, : Windsor Mine  
Respondent :

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Petitioner;  
David Cohen, Esq., Windsor Coal Company,  
Lancaster, Ohio, for Respondent.

Before: Judge Melick

This case is before me upon the petition for 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. § 801 et seq., the "Act," charging the Windsor Coal Company (Windsor) with two violations of mandatory standards and proposing civil penalties \$1,900 for the violations alleged therein. The general issue before me is whether Windsor violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

Order No. 3129208 issued pursuant to Section 104(d)(1) of the Act <sup>1/</sup> alleges a violation of the mandatory standard at 30 C.F.R. § 75.1704 and charges as follows:

1/Section 104(d)(1) provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to

The 3 south main intake escapeway is not being maintained in a safe condition for the evacuation of miners in the 2A, 3A, and 3 south faces sections. There are 7 locations where [sic] the roof is not adequately supported. These areas were shown to and marked by the company escort. (1) at 26 stopping top fell out around 3 roof bolts (2) Between 23 and 24 stopping top [sic] fell out around 8 roof bolts (3) 22 to 23 roof fell out around 2 roof bolts, (4) 21 to 22 roof fell out around 2 roof bolts (5) 18 to 19 stoppings roof has fell out around 18 roof bolts, (6) 17 to 18 stoppings roof fell out around 7 roof bolts (7) 17 stopping on out by corner top fell out around 5 roof bolts. Three of the seven areas were recorded in the approved book. The book was countersigned by Tom Moore mine foreman and Joe Matkovich superintendent. The areas recorded in the book were marked with tags where additional support is needed.

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

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

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continued fn. 1

comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. [emphasis added]

Inspector Thomas Doll of the Federal Mine Safety and Health Administration (MSHA) was performing an inspection at the Windsor Mine on August 9, 1989, when he allegedly observed the cited conditions in the 3 South Main intake escapeway. Doll noted that this was the primary escapeway for four active working areas. According to Doll, 45 bolts in an 800 foot area were not in safe condition because the top had fallen away leaving areas of unsupported roof. Doll observed that in one intersection alone 18 bolts were "destroyed" in this manner between the No. 18 and No. 19 stoppings. He subsequently explained that since the bolts were resin grouted there was no danger of the structural beam provided by the bolts failing but there nevertheless was a danger from the flaking of "golf ball" size to "basketball" size pieces of rock and falling and striking miners. He noted that the roof averaged 10 feet in height in the subject area and that a rock falling 8 feet to 10 feet could cause serious injuries.

The existence of the cited conditions does not appear to be in dispute. James Fodor, a safety assistant for Windsor, observed the cited conditions after the order had been issued and acknowledged that there was a lot of sloughage around the bolts. Donald Williams one of the timbermen who had been working to abate the cited conditions also acknowledged that there were "some gaps" above the bolts and Michael Roxby, the Windsor Safety Inspector, also agreed that there was a lot of sloughage in the cited area. While each of these Windsor witnesses claimed that these conditions were nevertheless not unsafe, I give these self-serving and unsupported conclusions but little weight. Clearly Inspector Doll's testimony is the more credible.

Under the circumstances it is clear that the violation is proven as charged and that it was "significant and substantial". It may reasonably be inferred from the credible evidence in conjunction with the fact that this area was the primary escapeway subject to inspections by Windsor employees and periodic inspections by government inspectors, that it was reasonably likely that reasonably serious injuries would be sustained as a result of the violation. See Mathies Coal Co., 6 FMSHRC 1 (1984).

I also conclude that the violation was the result of "unwarrantable failure" and high negligence. During his inspection on August 9, Inspector Doll examined the mine

books retained for reporting weekly examinations of the escapeways. He observed in those books, entries dated August 2, 1989, reporting conditions in the cited area that had not been completely corrected as of his inspection on August 9, 1989. Even more significantly however, Doll found yellow caution tags still hanging in the cited area three of which were within the areas cited in the order at bar. Robert Jester a Windsor Safety Assistant who accompanied Inspector Doll during his inspection, confirmed the existence on August 9, of at least two yellow caution tags dated August 2, 1989, hanging in the cited area. He also confirmed that the area around the plates where the tags were hung was indeed "bad".

Inspector Doll reasonably concluded from the existence of these remaining caution tags that indeed the corrective work had not been completed in the cited area. Doll also opined that the problem with the large number of bolts around which sloughage had occurred could not reasonably have occurred over the short period of time between the alleged corrective work a few shifts before his inspection and the time of his inspection.

Windsor Safety Assistant, James Fodor, also corroborated Doll's testimony in significant respects. Fodor testified that he had attached yellow caution tags to bolts in the cited area and reported in the weekly examination books that corrective action was needed. He also issued a request for corrective work on August 7.

According to outby foreman, Charles Slopek, timbermen Don Williams and Brian Mulby were sent on August 7, during the 4 to 12 shift, to correct the conditions that had been reported by Fodor. On August 8, he again sent Williams and Mulby to the area to verify that the corrective work had been completed. Slopek did not check the area himself but relied upon the report from Williams and Mulby that the work had been completed.

Timberman Williams testified that he checked the area on August 8th, pursuant to Fodor's instructions and found that the work had been completed. According to Williams the yellow caution tags would have been removed by him upon the completion of corrective work but he claimed that he did not see any such tags on August 8th.

Within this framework of evidence I conclude that indeed at least some of the conditions cited in the order at bar on August 9, 1989, had existed at least since August 2, 1989, and at least in the areas where yellow caution tags were posted. It may reasonably be inferred that at least some of the conditions reported as needing corrective action on August 2, 1989, and tagged with yellow caution tags had not

as of the date of the inspection on August 9, 1989, been corrected. The testimony of Timberman Donald Williams who was charged with the responsibility of correcting those conditions and verifying on August 8, that they were indeed corrected, is particularly significant. Although Williams reported that the conditions had been corrected after examining the area on August 8th, he saw no caution tags at that time. However both Inspector Doll and the company official accompanying Doll on the August 9, inspection, Robert Jester, found at least two yellow tags dated August 2nd, 1989, still hanging around plates within the cited area. It may be further inferred from this evidence that not only had the conditions reported on August 2nd, not been corrected as of August 9, but that it had been falsely reported that they had been corrected when they had not been. Under the circumstances I conclude that the violation herein was the result of such aggravated conduct, omissions and gross negligence that it was the result of "unwarrantable failure". See Emery Mining Co., 9 FMSHRC 1997 (1987).

Order No. 3129172, also issued pursuant to section 104(d)(1) alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 75.1105 and charges as follows:

The battery charging station for the 2A 3 South Scoop car located at survey station 53 + 50 where the scoop battery was on charge was not vented directly into the return. A chemical smoke cloud was dispersed over the batteries and the air current was directing the battery fumes up number three track entry into the face area. The same violation was issued on 8/8/89 on the charging station in the 3 South face section and management was made aware of the acceptable way to vent the charging stations.

The cited standard, 30 C.F.R. § 75.1105, provides in relevant part as follows:

Underground transformer stations, battery-charging stations, substations, compressor stations, shops and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return.

MSHA inspector Joseph Moffitt was inspecting the Windsor Mine on August 16, 1989, in the 2A 3 South area along with the Windsor Safety Inspector Robert Jester and a United Mine Workers representative when he noted that in the Number 3 Track Entry several hundred feet from the face area there was

a battery charging station extending out of the crosscut. According to Moffitt the station was ventilated through a hole created by the absence of one 8 inch by 16 inch cinder block. Releasing smoke from a smoke tube over a battery that was being charged he observed that most of the smoke proceeded down the Number 3 Track Entry into the working places. He did not see any of the smoke pass into the return.

According to Moffitt these conditions created a serious fire and smoke hazard. He noted that hydrogen gas emanated from the batteries while being charged, that unattended electrical equipment in itself has a potential for a fire hazard from shorting-out, that there was a 550 volt cable to the AC charger, and the battery itself is a fire hazard. He concluded under the circumstances that it was reasonably likely for the men working at the face to suffer from smoke inhalation which could result in asphyxiation and death.

Inspector Doll was also present during the smoke tube test and he confirmed that the smoke released over the batteries first swirled, then proceeded directly toward the working faces. Within this framework of evidence it is clear that the violation is proven as charged and was clearly "significantly and substantial". See Mathies Coal Co. supra. In reaching this conclusion I have not disregarded the testimony of Windsor's witnesses that a fire extinguisher and rock dust were immediately available to douse any fires and that dust from the sleeve of one of the persons present when released at a position adjacent to the ventilation hole proceeded through the hole. However this evidence is not sufficient to overcome the Secretary's case.

I do not, however, find that the violation was the result of "unwarrantable failure" or high negligence. It is not disputed that the ventilation at that charging station was checked around 8 that same morning by Michael Shreve a section foreman. According to Shreve, he checked the air movement at the ventilation hole by knocking dust off his sleeve and observed that the air did in fact proceed through the ventilation hole. Shreve followed a procedure he had seen inspectors use on prior inspections. Indeed, even Inspector Moffitt had, according to Shreve previously used this method to check ventilation.

The procedures followed by Shreve were verified by Robert Jester the Windsor Safety Inspector and by Safety Director Michael Roxby. They confirmed that before this inspection the MSHA inspectors had tested near the ventilation hole and not over the battery chargers.

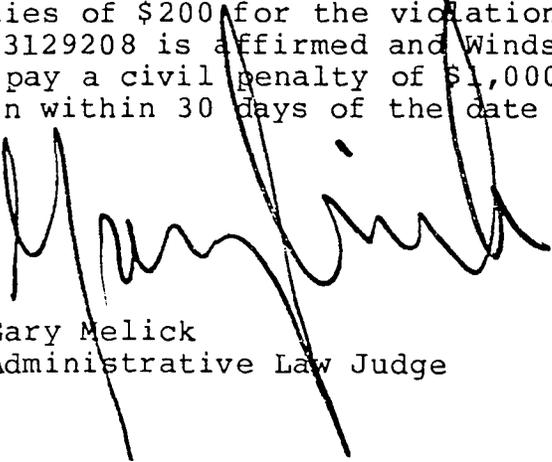
Within this framework of evidence I conclude Windsor personnel were following testing procedures that had been found acceptable and indeed had been previously followed by MSHA inspectors themselves in testing for the ventilation of battery charging stations. It is not disputed that when dust was released at the ventilation hole it proceeded into the return from the battery charging station.

The fact that smoke released from a smoke tube over the battery being charged in the station flowed mostly toward the working faces proves however the existence of a "significant and substantial" violation. However since Windsor was using a testing procedure consistent with that which had previously been approved I cannot conclude that Windsor is chargeable with a high degree of negligence or "unwarrantable failure". Inasmuch as the line curtain was indeed negligently hung and most of the ventilating air was proceeding to the working areas there was at least some negligence. Order No. 3129172 must accordingly be modified to a citation under section 104(a) of the Act.

Considering all of the criteria under Section 110(i) of the Act I find that civil penalties of \$1,000 and \$200 are appropriate respectively for the violations charged in Order No. 3129208 and Citation No. 3129172.

ORDER

Order No. 3129172 is hereby modified to a citation under section 104(a) of the Act and Windsor Coal Company is directed to pay civil penalties of \$200 for the violation charged therein. Order No. 3129208 is affirmed and Windsor Coal Company is directed to pay a civil penalty of \$1,000 for the violation charged therein within 30 days of the date of this decision.



Gary Melick  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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FALLS CHURCH, VIRGINIA 22041

**SEP 19 1990**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. VA 90-14  
Petitioner : A.C. No. 44-05415-03558-A  
v. :  
: No. 1 Mine  
ROGER DEEL, Employed by :  
BLACKFOOT COAL COMPANY, INC., :  
Respondent :

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
the Petitioner;  
Mr. Roger Deal, McClure, Virginia, pro se, for the  
Respondent.

Before: Judge Fauver

The Secretary brought this civil penalty action against a  
mine foreman, charging that he knowingly violated a safety  
standard, under the Federal Mine Safety and Health Act of 1977,  
30 U.S.C. § 801 et seq.

After a hearing on the merits, a bench decision was issued  
on August 16, 1990. This decision supplements and confirms the  
bench decision.

FINDINGS OF FACT

1. At all relevant times, Respondent, Roger Deel, was  
employed as a section foreman, on the second shift, at the No. 1  
Mine of Blackfoot Coal Company, Inc., in Dickenson County,  
Virginia.

2. Despite a requirement of the roof-control plan to mine  
from right to left in retreat mining, mine management had a  
policy of mining from left to right. This practice saved

production time, by avoiding the tramming of the continuous-mining machine back to the right side of the line of cuts when the left end was reached. However, it was a dangerous practice and violated the roof-control plan.

3. Mr. Deel and other foreman followed this violative practice knowing that it violated the roof-control plan. On November 14, 1988, the continuous-miner operator, Richard Turner, was acting foreman on the first shift. He followed the same practice of mining from left to right, in extracting pillars, instead of complying with the roof-control plan. He had prior experience as a full-time foreman, and knew that the plan required him to mine from right to left. While he was operating the continuous miner, at about 11:00 a.m., a roof fall began in the gob area and moved to his immediate site, covering his mining machine with fallen rock. He was trapped in the machine until rescuers could reach him, about 3:25 p.m. Mr. Turner suffered permanent back injuries.

4. Respondent Deel had followed the same violative practice on the production day previous to Mr. Turner's accident. Another foreman, Brock, also had followed the same violative practice previous to Mr. Turner's accident.

#### DISCUSSION WITH FURTHER FINDINGS

Mine management had a policy or practice of ignoring the roof-control plan requirement to mine from right to left in extracting pillars. The foremen and acting foreman Turner followed this practice, including the Respondent, Roger Deel.

Mr. Deel "knowingly" violated the roof-control standard (and therefore 30 C.F.R. § 75.220) within the meaning of section 110(c) of the Act, which provides:

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

It is no defense that Mr. Deel was following management policy or orders in violating the roof-control plan. The Act, in section 105(c), protects a miner, including supervisors, who refuse to carry out a work assignment or practice that is in

violation of a safety standard or is reasonably believed to be hazardous. The violation was serious, because it compromised roof control and increased the risk of a roof fall.

However, the government has singled out Mr. Deel, without charging other foremen who were following the same violative practice, and without charging mine management who were responsible for this violative practice and had a clear duty to prevent it. This approach to law enforcement does not meet the standard of fair and evenhanded justice that the public is entitled to expect from a government agency.

I find that Mr. Deel knowingly violated the cited safety standard, but that his penalty should be substantially reduced from the amount proposed by the Secretary (\$700), because the government has not shown evenhanded enforcement toward mine management and the other foremen.

Considering this factor and the criteria for civil penalties in section 110(i) of the Act, I find that a civil penalty of \$50 is appropriate for this violation.

#### CONCLUSION OF LAW

1. The judge has jurisdiction over this proceeding.
2. Respondent, Roger Deel, violated 30 C.F.R. § 75.220 as charged in the Petition for Proposed Assessment of Civil Penalty.

#### ORDER

WHEREFORE, IT IS ORDERED that Respondent, Roger Deel, shall pay a civil penalty of \$50 within 30 days of the date of this decision.

  
William Fauver  
Administrative Law Judge

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Mr. Roger Deel, P.O. Box 1, McClure, VA 24269 (Certified Mail)

/fb

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

SEP 21 1990

ZEIGLER COAL COMPANY, : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. LAKE 90-102-R  
: Citation No. 3035656; 5/17/90  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Murdock Mine  
ADMINISTRATION (MSHA), : Mine ID No. 11-00586  
Respondent :

## DECISION

Appearances: Timothy M. Biddle, Esq., Susan E. Chetlin, Esq.,  
Crowell & Moring, Washington, D.C., for the  
Contestant;  
Robert Cohen, Esq., Office of the Solicitor, U.S.  
Department of Labor, Arlington, Virginia, for the  
Respondent.

Before: Judge Koutras

## Statement of the Case

This proceeding concerns a Notice of Contest filed by the contestant pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the validity of a section 104(a) non-"S&S" Citation No. 3035656, issued on May 17, 1990, citing an alleged violation of mandatory safety standard 30 C.F.R. § 75.329-1(a). The contestant's request for an expedited hearing was granted, and a hearing was conducted in St. Louis, Missouri, on June 6 and 7, 1990. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

## Issues

The issues presented in this proceeding are (1) whether the cited mandatory safety standard is applicable to the cited abandoned area of the mine, and if so, (2) whether the evidence presented establishes a violation. Additional issues raised by the parties are discussed in the course of this decision.

### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Mandatory safety standard 30 C.F.R. § 75.329-1.
4. Commission Rules, 29 C.F.R. § 2700.1 et seq.

### Stipulations

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

1. The Murdock Mine is owned and operated by the contestant, and the mine and the contestant are subject to the jurisdiction of the Act.
2. The presiding judge has jurisdiction to hear and decide this matter.
3. The parties agree to the authenticity of the documents offered in evidence in this matter.
4. The citation was properly served on the contestant by an authorized representative of the Secretary, and all of the "paperwork" served on the contestant in this matter by the Secretary was properly served and may be admitted as procedurally correct, but not for the purpose of establishing the truthfulness of the matters asserted therein.

### Discussion

The Zeigler Mine in question employs approximately 170 miners, and produces approximately 1,200,000 tons of coal annually by the room and entry development method using continuous-mining machines. In order to preclude subsidence of the surface farmland, no pillaring or "second mining" is done. Room and entry mining is done in distinct panels which are not connected or ventilated by bleeder systems, and the mine liberates 350,000 cubic feet of methane over a 24-hour period. There have never been any methane ignitions at the mine, nor have any citations been issued for exceeding 1 percent methane.

The cited West panel was a distinct room and entry panel consisting of 21 entries driven off the 2d North submains. The development of the panel began in December, 1987, and all mining activity in that area ceased in July, 1989. From July, 1989 until December, 1989, the panel was ventilated by an air course which circumvented the perimeter of the panel. Return air

entered the section at the mouth, was coursed into the northern most entry around the perimeter of the panel, returned through the southern most entry, eventually flowing into the main return. Zeigler's testimony reflects that the return air course was maintained by a solid concrete block stopping line, and the return air course was examined on a weekly basis to meet the requirement of section 75.305 that at least one entry of each return air course be examined in its entirety.

Zeigler's testimony reflects that sometime during the middle of October or early November, 1989, it decided to abandon the panel and made plans to seal that area when the development of Main West was completed. Although Zeigler maintains that it was not required, the cited panel continued to be ventilated even after it was abandoned, and weekly examinations of the area were still conducted because they could be done safely. However, a roof fall occurred in December, 1989, at crosscut No. 13, and Zeigler determined that continued examinations of the entire panel return air course was unsafe. In view of its determination that it was no longer safe to walk the return air course around the perimeter of the panel, Zeigler instructed its mine examiners to preshift the panel approaches to check the amount of air, methane and carbon dioxide entering and returning from the panel.

MSHA Inspector John Stritzel, who had visited the mine periodically every 6 months for ventilation and spot inspections, was advised by a fellow inspector George Cerutti, that he had visited the cited panel in mid-April 1990, and did not believe the panel was being ventilated. Although Inspector Cerutti did not issue a violation at that time, Inspector Stritzel discussed the matter with MSHA ventilation specialist Mark Eslinger, his supervisor, at a staff meeting where the subject of abandoned areas at various mines was discussed, and concern was voiced at that meeting that abandoned mine areas in MSHA District 8 were not being ventilated or sealed and that violations for section 75.329-1(a), should be issued where that was the case.

In preparation for his ventilation inspection at the mine, which took 4 days, Inspector Stritzel reviewed the mine plans and mine map at his office on May 4, 1990, and made his initial visit to the mine on May 10, 1990. He spent 4 days underground, and completed his inspection after he had inspected the cited panel area on May 17, 1990. In view of the roof falls, the inspector could only travel as far as the No. 13 crosscut in the intake (northern most) entry of the panel, and after releasing some smoke tubes at that location, and at several other locations outby, he determined that the air in the panel contained at least 19.5 percent oxygen and less than 1 percent methane. However, because he could not physically inspect the panel beyond crosscut No. 13 to the point of deepest penetration, the inspector did not believe that he could determine whether the panel was ventilated. Further, since he believed that section 75.329-1(a), required

Zeigler to be able to determine the adequacy of the ventilation on the panel by physically walking and examining it to its point of deepest penetration inby or beyond crosscut No. 13, he issued the citation. The cited condition or practice states as follows:

An abandoned panel 02 working section was not being ventilated and could not be determined by the inspector as being adequately and completely ventilated due to massive roof falls. These roof falls were across the entire section at No. 13 room or crosscut. The section was driven 34 rooms deep. The head end of the section could not be accessed to determine if the 33 rooms and entries, and the last open crosscut of these rooms and entries, were being ventilated so as to continuously dilute, render harmless, and carry away methane and other explosive gases within the section. 2 West, 2 North, 1 West.

#### MSHA's Testimony and Evidence

MSHA Inspector John D. Stritzel, Vincennes district office, testified that he is a ventilation specialist, and his duties include the physical inspection of mines, the review of ventilation plans, and the making of recommendations for plan changes. He has served as a ventilation specialist since 1983, and has inspected the contestant's mine every 6 months since that time. His ventilation inspections normally take 4 to 5 days, 8 hours a day, and they include a review of the mine ventilation plan and physically walking the air courses to determine the quantity of air available for ventilation and whether or not the ventilation is adequate.

Mr. Stritzel stated that the mine consists of two shafts and one slope, and that it has three working sections. Mining is conducted during two production shifts a day. No pillar extraction or "second mining" is conducted, and coal is mined by continuous-mining machines by entry and room development. Methane liberation varies and it is less than one million CFM's. The mine employs approximately 90 miners, and only 50 percent of the available coal is mined in order to leave the pillars to prevent surface land subsidence.

Mr. Stritzel confirmed that he reviewed the mine ventilation plan on May 4, 1990, and went to the mine on May 10, 1990. He identified a copy of the mine map furnished by the contestant (exhibit R-2), and he identified and marked the mine areas where he traveled during the course of his inspection. He confirmed that he inspected the cited area on May 17, 1990, and issued the citation that day. He confirmed that the section has been mined out and abandoned and that all of the equipment and power has been moved out. He believed that active mining had ceased on the section on February 25, 1989.

Mr. Stritzel stated that prior to his inspection he was "on notice" that there was a ventilation problem on the section through conversations with MSHA Inspector George Cerutti who informed him that he had visited and entered the area less than a month prior to his inspection with the mine superintendent. Mr. Cerutti found that the top was bad and he did not believe the area was being ventilated.

Mr. Stritzel confirmed that he discussed the matter with his ventilation specialist supervisor Mark Eslinger during a staff meeting. The discussions involved different mines, including the Murdock Mine, and it was noted that abandoned mine areas were not being examined and ventilated. He confirmed that most mine operators seal their abandoned mine areas, and that some mines in Southern Illinois have bleeders and bleeder evaluation points to check the adequacy of ventilation in abandoned mine areas, and that this is usually covered in the mine ventilation plans. However, the ventilation plan for the Murdock Mine does not cover what has to be done with the abandoned areas in the mine.

Mr. Stritzel stated that section 75.329-1 requires that all abandoned mine areas be ventilated or sealed. He stated that this section has no "grandfather" clause or cut-off date and that it is a continuing requirement applicable to all mines. He confirmed that there is no current MSHA policy explaining the application of this section (Tr. 10-30).

Mr. Stritzel confirmed that the citation which he issued was the first one that he has ever issued for a violation of section 75.329 or 75.329.1(a), because he has never encountered a mine condition that required it. He explained the "condition" as "a section not being ventilated properly where you could check to determine that it is being ventilated properly" (Tr. 27).

The inspector stated that the general mine manager (Carpenter), the safety manager (Colign), and the union safety walkaround representative (Cross), were with him during his inspection, and when they started at the mouth of the section, Mr. Carpenter informed him the section was preshifted by a mine examiner during each operational shift, but that weekly inspections were not being made. The inspector confirmed that he saw the date boards at the return entry with the mine examiner's initials and dates, indicating that the inspections had been made. However, he did not believe that these inspections satisfied the requirements for weekly inspections because someone has to physically be present in the idled or abandoned areas in order to conduct these inspections, and that person must walk the length of the abandoned area on both sides to the deepest depth that it has been driven in order to determine that the air is being coursed into the section to the deepest point and around the area, sweeping out anything that could buildup. It was his

understanding that this was not being done on a preshift or weekly basis, and that the only inspections being conducted were at the outby side at the mouth of the section where the date boards were located (Tr. 31-36).

The inspector explained the route of travel taken by the inspection party, and as they reached a massive fall area in the second entry, he activated a chemical smoke cloud 4 or 5 feet from the fall and stated that "it just went up and hung at the road." He activated another one and "it drifted very, very slowly up over the fall," and this indicated to him that very little air was going over the right fall (Tr. 38). He then proceeded to the first intake entry and stated that "the smoke did the same thing there. . . couldn't hardly get it to go over the fall . . . there was some movement up over the fall, but it was very, very small" (Tr. 39). He then proceeded across to the neutral side, and activated additional smoke clouds, and he detected no air movement at one location, and air movement toward the return side at another location. This indicated to him that the air coming up the track entry was going to the return side, but that this was not necessarily where it was supposed to go. He then proceeded to the return side, and encountered a rock fall on the other side of a man door, and Mr. Carpenter informed him that they could not go further because the area had fallen in solid across at room 13. They then proceeded out of the section, and he informed Mr. Carpenter that a citation would be issued, but did not tell him which standard he would cite (Tr. 42).

The inspector confirmed that his inspection took approximately 1 hour and 45 minutes, and that he based his determination that the abandoned area was not being ventilated on the fact that his smoke cloud tests indicated little or no air movement, and that he expected to see air movement. He stated that a minimal amount of air would have "carried the smoke cloud up" and that "you shouldn't have to wait on it" (Tr. 42). Even if he had seen air movement, he would still have issued the citation because the respondent could not demonstrate that the air was being coursed throughout the abandoned area and out of the return. In view of the rock falls, the air could have been short-circuiting and not ventilating the entire area properly, and the only way to determine if this was being done was to physically walk the abandoned areas to the deepest cut and inspect the areas. If this cannot be done, the area must be sealed (Tr. 44-45).

The inspector confirmed that there is no requirement that examiners walk the area if they are exposed to hazardous roof falls, and the alternatives would be to support the roof and establish a safe means of travel for inspections or to seal the area (Tr. 46). Another alternative would be to establish ventilation evaluation points, possibly at the outby side of the falls, but he had no way of knowing whether this could be done, and he indicated that the district manager would have to approve

of any evaluation locations (Tr. 47-48). The inspector believed that "the easiest way out" would be to seal the area, and he confirmed that this entails some amount of work, depending on the roof conditions. He would have sealed the area across the five entries when they were abandoned, but in view of the massive falls, it would now have to be cleaned up at great expense (Tr. 49). He estimated that it would take two people working 10 days on each of the entries to seal all five entries (Tr. 51).

The inspector confirmed that he made methane checks at the approximate locations where he made his smoke cloud tests, and found no high concentrations of methane. Although he found one-tenth of a percent of methane, the area at the upper end of the section beyond the No. 13 room was "an area of an unknown quantity of methane or CO<sub>2</sub>" (Tr. 54). Although the area outby was safe, he had no way of knowing what was inby because he could not inspect it because of the falls (Tr. 55). He confirmed that he considered the violation be no non-"S&S" because the conditions did not meet the "reasonably likely" standard required for an "S&S" violation (Tr. 56).

The inspector confirmed that he reviewed his district office records and found that 12 prior citations and orders have been issued in his district for violations of section 75.329 and section 75.329-1(a), and that two of them were issued at the Zeigler No. 5 Mine (Tr. 59). Respondent's counsel stipulated that two violations were issued at that mine in May and July, 1986, for violations of section 75.329-1(a), by another inspector (Tr. 60). The inspector confirmed that the superintendent at the No. 5 Mine was Roger Roper, the present superintendent at the Murdock Mine, and that the No. 5 Mine is 3 miles from the Murdock Mine and both mines are in the same coal seam (Tr. 61-62; Exhibits R-5 and R-6). The inspector was also aware of another 1984 citation for section 75.329-1(a), at the Murdock Mine, but he did not have a copy (Tr. 62).

On cross-examination, the inspector confirmed that there was no loading point or working faces in the cited abandoned section, and he found no evidence that anyone had "worked their way through the fall areas and were up there mining coal" (Tr. 63). He confirmed that the area was not a working section, and that the requirements for ventilating a working section did not apply on May 17, 1990. He further confirmed that his definition of an "abandoned area" comports with the definition found in section 75.2(h), and that the area did not have to be ventilated as a working place has to ventilated (Tr. 65). He conceded that the use of the term "working section" which appears on the face of the citation he issued was an oversight (Tr. 65).

The inspector confirmed that he did not use an anemometer during his inspection because "the velocity was so minute that an anemometer would have been useless" (Tr. 66). He conceded that

every crosscut and every entry in the cited section was not required to be ventilated, and that this is not required even on a working section. He confirmed that the language in his citation about "continuously diluting, render harmless, and carry away methane and other explosive gases within the section" came from his reading of section 75.329-1(a) (Tr. 68). He stated that Mr. Roper and Mr. Carpenter informed him that they could not seal the area within 30 days, and that he fixed the abatement time at 30 days "as a time element that I could see some work being accomplished in thirty days," and that it was possible that he told Mr. Carpenter that there would be no abatement time extension if no work had been performed to abate the citation (Tr. 69).

The inspector defined "ventilation" as "Air," but he believed that the air had to be moving in order to qualify as ventilation (Tr. 71). He confirmed that the inspector who told him about the "ventilation problem" in the cited area issued no citations for any violations in that area (Tr. 72). He further confirmed that the Murdock mine was mentioned during his discussions with his supervisor, but he was not sure that the subject of unventilated abandoned mine areas has had a lot of MSHA emphasis in the past 3 to 4 months. Staff meeting discussions were held with respect to which particular standard could be cited in such circumstances and that "two or three" were mentioned (Tr. 74). Conceding that "there's different ways that can be approached," he believed that section 75.329-1(a), was an appropriate standard to cite in this case (Tr. 75). He stated that sections 75.316 and 75.330, were discussed, but that section 75.316, which applies to ventilation plans, did not apply because the mine has no ventilation plan covering abandoned areas, and section 75.330, deals with mine design and mining methods, and is limited to sealing and not to ventilation or sealing. He also discounted the use of section 75.305, because that section deals with examinations of hazardous conditions and abandoned areas, and states that "a person shall go just as far as safety permits" (Tr. 76-77).

The inspector confirmed that the cited abandoned area is not considered a gob area because it is not "second mined," and there is no way for the respondent to ventilate it by use of bleeders. He confirmed that the only way to determine whether the cited area was being ventilated, and where the air is being coursed, is to physically walk and inspect the abandoned area, and this was the basis for the issuance of the citation (Tr. 79). He confirmed that even if his smoke tube tests had established that the smoke had gone directly into the fall area in an inby direction, he would still have issued the citation because he could not walk into those areas, and his use of the smoke tubes made no difference (Tr. 79-80). In his view, as long as no one can physically travel to the back of an abandoned section, it has to be sealed pursuant to section 75.329-1(a) (Tr. 81-82). He confirmed that

the areas which were being preshifted complied with section 75.305 (Tr. 84).

The inspector agreed that he wanted to insure that a pressure differential was maintained in the abandoned section, and that such a differential would indicate that the air is moving from high pressure to low pressure. He confirmed that each place which cannot be travelled must be sealed, and if the direction of air travel through the section cannot be determined, the respondent would be out of compliance with the cited section (Tr. 86-88). He confirmed that he took no air reading to determine the air quantity on the main return (Tr. 92).

In response to further questions, the inspector confirmed that there is nothing in the respondent's ventilation plan that requires it to ventilate abandoned mine areas. He stated that this omission is not typical of other mines that he inspects in his district, and that the ventilation plan was last approved approximately 6 months ago (Tr. 95).

Mark O. Eslinger, testified that he is employed as a mining engineer with MSHA's District No. 8 office, and that his duties include the supervision of inspectors in the ventilation department. He is a 1971 graduate in civil engineering from the Michigan Technological University, has worked 19 years for MSHA, and is a member of the committee currently rewriting the Subpart D ventilation regulations. He confirmed that he has reviewed section 75.329-1(a), and stated that this regulation will be clarified when the new regulations are promulgated, but that the basic provision found in that section will be retained. He explained the proposed changes, and also explained the ventilation method for abandoned and working mine areas (Tr. 97-103).

Mr. Eslinger agreed with the inspector's position that there is no way one can assure that an area is being properly ventilated without travelling the deepest point of penetration. He stated that the inspector could only travel one-third of the way into the cited abandoned panel and had no assurance as to what may have been occurring in the remaining areas. Even if he had some air flow from the smoke tubes, there was no way to assure that the air reached the end of the panel, and it may have been short circuiting across the panel, and the numerous falls may have destroyed the stopping line. Although it was not necessary to go into each entry, one needs to be able to go into "key locations" to insure that the rest of the panel is being ventilated (Tr. 105).

Mr. Eslinger stated that sections 75.329, 75.329-1, and 75.329-2, require the ventilation or sealing of abandoned areas. If a mine operator decides to ventilate the area, it must be able

to demonstrate that it is being ventilated by physically examining the area at key locations to determine that the air is moving, and taking methane and oxygen readings to assure movement of air and no accumulations of methane or carbon dioxide. If this cannot be done, the area must be sealed. If key locations cannot be reached because of falls, they must be cleaned up to provide a safe access way. If an operator decides to ventilate the area, it must advise MSHA how this will be done, and if it decides to seal an area, it must file a plan pursuant to section 75.330 (Tr. 105-108).

Mr. Eslinger did not believe that the contestant's preshift examinations were adequate to meet the requirement for weekly examinations of abandoned areas because the examinations were being made at the fronts of the abandoned area, and the examiners were not walking into or penetrating the panel. The examinations which were conducted would not fulfill the weekly examination, or section 75.305 requirements, because the weekly examination requires an examination for hazardous conditions "insofar as safety considerations permit," and weekly examinations have to be made as far as you can safely travel in an abandoned area. Since the examiners were only going to the fronts of the panel, rather than to the location described by the inspector where his inspection party went, the weekly examinations should have been made at that location if it was safe to travel there (Tr. 109). Mr. Eslinger stated that he had information that someone had gone halfway up the panel to take methane and air pressure drop locations, and that if this were true, the examiners who were conducting the preshift examinations as a substitute for weekly examinations should also have gone to these areas for their tests. He confirmed that if it were unsafe to go to these areas, section 75.305 would not require weekly inspections because it provides an exception based on safety considerations (Tr. 111).

Mr. Eslinger confirmed that mine operators generally include a provision in their ventilation plans that they will maintain safe access to the deepest point of penetration of mining or the area will be sealed. However, in the instant case, the contestant did not include such a provision in its plan, and if it were a part of the plan, the inspector would have cited a violation of the plan for not maintaining safe access to the deepest point of penetration, and the area would have to be sealed (Tr. 112). He confirmed that he initially reviews all ventilation plans in the district and is familiar with them, and he is not aware of any similar situations where the abandoned areas are not sealed or ventilated (Tr. 113). He agreed with the citation issued by the inspector, and believed that section 75.329-1(a), was an appropriate and available "tool" for the inspector to insure compliance. Mr. Eslinger considered this standard to be an "ongoing requirement" (Tr. 115).

On cross-examination, Mr. Eslinger identified exhibit C-1, as the contestant's ventilation and dust-control plan for the Murdock Mine, and he confirmed that he signed it and must have reviewed it (Tr. 123). Although he reviews such plans, the district manager approves them, and Mr. Eslinger did not believe that he made an initial review of the plan in question, even though he signed it (Tr. 124). He disagreed that the failure by the inspector to cite the contestant with a violation of section 75.305, implied that the inspector believed that the contestant was in compliance with this section. He believed that the inspector made a judgment that the deepest point of penetration could not be travelled and cited section 75.329-1(a), rather than "double barrelling" the contestant with an additional violation of section 75.305 (Tr. 127).

Mr. Eslinger conceded that although section 75.305, does not specifically mention travelling to the point of deepest penetration to conduct weekly inspections of abandoned areas, he believed the requirement for examining such areas "means you travel to the deepest penetration" (Tr. 129). He also believed that simply stepping one foot into an abandoned area to examine it would constitute an inadequate examination (Tr. 130).

Mr. Eslinger stated that the reference to the date December 30, 1970, in section 75.329-1(a), "meant something at a certain point in time," and that for those mines in existence prior to that time, "you had to do something by that date. From then on you have to have the area either ventilated or sealed" (Tr. 134, 135). He agreed that section 75.329-1(a) does not contain any date for the submission of ventilation plans, or for seeking MSHA approval to ventilate or seal such an area, other than the date December 30, 1970, and he was not familiar with MSHA's program policy manual with respect to this standard (Tr. 136). He agreed that there are no "bleeder entries" in the mine, and that according to the mine map there has been no "second mining" or any "pillar pulling or pillar size reduction." In the case of an MSHA approved second mining system, provisions are made to establish bleeder evaluation points to determine the sufficiency of the air ventilating the gob area, and such bleeder points are permitted only if they can be walked (Tr. 139). He agreed that a ventilation evaluation point could be established in the back end of the section, but if it were established outby an inaccessible area outby the point of deepest penetration, MSHA would not approve it because of its position that one cannot determine that the area is being adequately ventilated without travelling to the deepest point of penetration. If bleeder entries cannot be established, and they cannot be travelled, MSHA would require the sealing of the area (Tr. 140-143).

Mr. Eslinger confirmed that the proposed new regulations, which have not as yet been promulgated, will require that "worked

out areas" be ventilated or sealed (Tr. 144). He further confirmed that the argument advanced by the contestant in this case that the application of section 75.329-1(a), is limited to December 30, 1970, and does not apply subsequent to that date, has been discussed internally at MSHA, and that MSHA's position is that "it's an absolute rule and it can be used" and that it was used in this case. However, this standard has generally not been used in District No. 8, because "we try to put into the ventilation plan other measures to assure the same basic thing" (Tr. 146). He agreed that the contestant's approved plan is devoid of any requirement that requires the sealing or ventilation of abandoned mine areas (Tr. 148).

Mr. Eslinger agreed that the cited abandoned area has no pillars which have been "wholly or partially extracted," and that the inspector made a determination on May 17, 1990, that the area was an abandoned area. He further agreed that while there is no bleeder system or bleeder entries in the area, "equivalent means" of ventilation may be used. He conceded that the term "equivalent means" is not further defined, and it is not in the approved mine ventilation plan. He explained further as follows at (Tr. 153):

A. I can't find an exact definition of equivalent means. That doesn't mean it's not here. I still think it's here. I can give you a statement that we go by in approving equivalent means, and we go by providing the operator can satisfy the district manager of the results of the ventilation system and the dust control plan would provide no measure of protection to the miners.

Q. And what are you reading that from?

A. I'm reading from the criteria for the approval of ventilation plans, sir.

Q. So equivalent means then becomes a ventilation plan, as you understand it?

A. It becomes -- yes. Well, in this case if you wanted to submit it, it's a 329 plan or it's a 316 plan, whichever way you wish to submit it.

#### Contestant's Testimony and Evidence

Mine Superintendent Roger D. Roper testified that the contestant uses a room and pillar mining method using continuous miners to extract coal, but that pillars are not extracted. The mine is a relatively non-gassy mine liberating approximately 350,000 cubic feet of methane over a 24-hour period (Tr. 158).

He identified and explained the mine ventilation system by reference to the mine map (exhibit R-2), and he also identified a copy of the approved ventilation plan (exhibit C-1), and confirmed that the mine is ventilated in accordance with that plan (Tr. 160). He confirmed that he had no knowledge of any methane ignitions in the mine, and was not aware of any citations for more than 1 percent of methane (Tr. 160).

Mr. Roper stated that the cited 2nd West section was started or developed in December, 1987, and that it was mined by continuous miners on a 75 by 85 foot block system. The section was developed into seven entries, including intake and return stopping lines, and he explained the development which has taken place (Tr. 162-164). He confirmed that the mining of the panel was completed in July, 1989, and that all of the equipment was moved into the "east side of the main," and he identified this area as the 1st East off the 2d North. He explained how the mined out area was ventilated, and confirmed that the primary ventilation is provided by return air from the operating 1st East panel. He stated that in July, 1989, the area was being ventilated by approximately 8,000 cubic feet of air, and the decision to abandon the area was made in December, 1989 (Tr. 167). During the period July, 1989 to December, 1989, the 2nd West section was examined on a weekly basis by travelling to the point of deepest penetration, and since there was belt material in the mouth of the panel, the area was not actually abandoned until October or early November of 1989 (Tr. 168).

Mr. Roper stated that the abandoned area was being examined after production stopped because it was safe to examine and he was trying to comply with section 75.305. He could recall nothing in the ventilation plan which applied to the cited area. He confirmed that roof falls occurred in the area, which required additional stopping lines. At least one return entry could be examined to comply with section 75.305, but after additional falls occurred in December 1989 or January 1990, he determined that travelling into the back end of the section by any route would be too hazardous to allow. He explained how certain air changes were made, and confirmed that the air entering the section was approximately 15,000, and that the air quantity had dropped because of the roof falls. Further changes were made, and other stoppings were opened up, allowing 20,000 to 22,000 of return air to pass by the mouth of the panel. The approaches to the panel were preshifted on a daily basis, and examiner's date boards were erected at the number five entry leading into the panel (Tr. 173).

Mr. Roper identified the areas on the mine map where the examiners conducted their preshift examinations, and he explained that the examiners were to determine the air flow going into the abandoned panel. The examiners made methane checks where the air was going into the area, and also checked for methane and CO2 on

the return side of the panel. The examiners took no air measurements at the return, but did check to see that there was air movement coming out of the panel (Tr. 174). He believed that the area was being ventilated at the time of the inspection, and confirmed that he was not with the inspector on that day (Tr. 175).

Mr. Roper stated that he discussed the citation with the inspector, and disagreed with the citation for the following reasons (Tr. 176):

A. Yes. My contention was that the panel was being ventilated.

Q. All right.

A. My contention was also that there was nobody that was, you know, working in this area, that it was an abandoned area, that there had been no perceptible amount, and when I say perceptible amount, an amount of methane concentrations in excess of one percent returning from that panel, none of the preshift mine examiners had found any concentrations along with the air that was being intaked on the north side of the 2nd West panel. The methane readings there at those points of time whenever I've been underground and checked it would range from .0 to .1 of one percent methane entering the panel. On the return side of the panel what was coming -- what was being ventilated or bled out of this panel and being read out here on the front end was showing three tenths of one percent to four tenths of one percent.

Mr. Roper confirmed that the inspector informed him that he issued the citation because the cited section could not be examined in its entirety to the deepest point of penetration and the respondent could not determine that this area was being ventilated. Mr. Roper stated that the day following the issuance of the citation he and Mr. Carpenter went underground and took some air readings with an anemometer and five bottle samples in order to determine how much air was going in and out of the abandoned area and to determine the concentrations of methane and CO2 being liberated from the area. Based on those tests, he was satisfied that the area was being ventilated. Mr. Roper disagreed with the inspector's assertion that a ventilation determination could not be made unless one travelled to the deepest point of penetration because the outby areas had no methane concentration build up and the oxygen content was in excess of 19-1/2 percent (Tr. 178-179). In addition, the inspector found that air was going over the roof falls at one location and found no perceptible amount of methane at several other locations. The oxygen must have been sufficient since the inspector's oxygen

detector did not sound, and the amount of oxygen which he (Roper) found when he tested the area was in excess of what was required by the law (Tr. 179).

Mr. Roper stated that he took his bottle samples on May 18, 1990, and that Mr. Carpenter and Mr. Colign took three additional bottle samples on May 21, 1990. He identified exhibit C-2, as a map of the abandoned area noting the locations and results of the samples which were taken. He confirmed that the bottle samples were processed by the State of Illinois Department of Mines and Minerals, through the contestant's engineering department, and he believed that the results were accurate. There were no changes in the ventilation in the area since late December 1989, and there were no differences in the ventilation between the date the citation was issued and the dates the samples were taken. He explained the results of the methane and carbon dioxide sampling, and confirmed that none of the first five bottle samples showed less than 16 percent oxygen content, and the highest methane content of these samples was four-tenths of one percent (Tr. 181-187). Based on the results of these samples, Mr. Roper concluded that the area was being ventilated. He reached the same conclusion with respect to the samples taken on May 21 (Tr. 188).

Mr. Roper stated that he visited the abandoned area again on June 1, 1990, in the company of Mr. Don Mitchell, a professional engineer, and Mr. Larry Harp, a chief engineer employed by the contestant, for the purpose of conducting a further ventilation study. He confirmed that no ventilation changes occurred between May 17 and June 1, and referring to the mine map, he explained the route of travel made by his group on June 1 (Tr. 190). Although he believed that the area was hazardous, since he and the engineers were experienced, they could evaluate and avoid hazardous roof conditions, and did not walk the air courses. He confirmed that he would not allow an examiner to travel through the areas where he and the others travelled because there was no reason for them to go there. If the area was not being ventilated, he would have expected methane readings in excess of one percent (Tr. 196).

Mr. Roper stated that plans have been made to seal the cited area, and that cleanup and other work has been undertaken since the time the citation was issued. He estimated that the sealing work would take approximately 2-1/2 months, and that "at the present time we're sealing because we're under violation." He believed that sealing would eventually be a good mining practice (Tr. 201-202). He explained what would be done to seal the area (Tr. 203-206). He also explained the projected mining plans for another nearby panel (Tr. 207-208).

On cross-examination, Mr. Roper confirmed that he was aware of the two prior citations for violations of section 75.329-1(a),

issued at the contestant's No. 5 Mine, but was not aware of any 1984 citation mentioned by the inspector in this case (Tr. 209). He also confirmed that he had no notes which may have been made by Mr. Carpenter or Mr. Colign when they were underground with the inspector on the day the citation was issued (Tr. 212). Although he did not believe that the abandoned area is required to be ventilated pursuant to section 75.329-1(a), the bottle samples previously referred to indicate to him that it was being ventilated (Tr. 218-220). He could not recall how the prior citations were terminated or whether the cited areas were sealed (Tr. 221).

Mr. Roper stated that he activated a smoke tube, or took an air reading, at one of the same locations where the inspector sampled, and he could also feel the air going over the falls and could see minute dust particles in the area. He measured the volume of air going in and out of the panel, and found approximately 8,000 going in on the intake side of the panel at the mouth of the unit, and approximately 7,500 to 7,800 returning out of the number one entry near an old regulator (Tr. 224). While it was his opinion that the area was being ventilated on May 17, he had no information on that day to support this opinion, but that nothing had changed during the following 2 days when the air was sampled (Tr. 226).

David L. Stritzel, contestant's director of health and safety, testified that he has 21 years of mining experience, and has worked for the respondent for 8-1/2 years. He holds a B.S. degree in mining engineering, has received ventilation training, and his experience includes previous employment with MSHA as a supervisory mining engineer. He confirmed that he was familiar with the cited abandoned area, and has reviewed the mine maps and has discussed it on a daily basis with the miners. He identified exhibit R-2 as a ventilation mine map which is updated and submitted to MSHA annually, and he identified the air intake and return on the map (Tr. 235-239).

Mr. Stritzel disagreed with the citation and did not believe that section 75.329-1(a), is applicable in this case. He believed that sections 75.303, 75.305, 75.311, and 75.312 were applicable. These sections provide for weekly examinations of return air in abandoned areas, if it can be done safely, preshift examinations of the approaches to the area, and prohibitions against using air passing by or through the area to ventilate active working places (Tr. 241). He did not believe that the abandoned area was required to be ventilated, and he pointed out that it was impossible to ventilate every place in the mine. He was aware of other mines in MSHA District 8 with more extensive abandoned areas, and they are not sealed. He stated that the State of Pennsylvania and "some parts of West Virginia" prohibit mine sealing. He visited one mine which was not sealed, and learned that MSHA required evaluation points in outby areas far

from the deepest penetration of the gob areas, and would not permit sealing (Tr. 243-245).

Mr. Stritzel disagreed with the inspector's belief that one had to walk to the point of deepest penetration in order to determine whether the cited area was being ventilated. He explained that intake and return stopping lines are established around the perimeter of the panel, and if they are intact, "if you've got air going in, you've got air coming out." As long as the air is monitored, and there are no indications of any major breakdown or changes in the ventilation system, and the atmosphere is clear of any explosive gasses or carbon dioxide, the area is obviously being ventilated. The fact that there are falls in the area does not mean that it is not being ventilated and that the air is not going over the falls. In mines which extract pillars, there are massive roof falls, and the bleeders are used to pull air over the falls and to bleed off any explosive gasses (Tr. 247-248).

Mr. Stritzel confirmed that he was aware of the prior citations and orders issued at the No. 5 Mine, and he explained that the contestant was attempting to recover equipment out of the cited areas and that MSHA was trying to force the contestant to seal the areas. He stated that the previously cited areas were being ventilated, and that such a determination was made in the same manner as the instant case. He contested the violations and requested a hearing, and his objections to the citations were based on the same reasons raised in the instant case. However, the matter did not proceed further because of a lack of available and affordable counsel, and the matter was dropped and the civil penalty assessments were paid. Seals were eventually constructed, the mine was shutdown at the same time, and the violations were terminated (Tr. 250-254).

Mr. Stritzel stated that he constructed the Murdock Mine stoppings and that he was certain that they were intact, and that it's not very likely that a roof fall would damage them. He identified one of the mines which is not sealed, but he did not know the extent of the ventilation in that mine because MSHA has granted permission for evaluation points thousands of feet out by the deepest point of penetration and no one can get back into the area to determine whether the areas are ventilated (Tr. 257).

Mr. Stritzel believed that MSHA has seriously misapplied section 75.329-1(a) in this case, and was "picking on Zeigler." He explained that he discussed the matter with MSHA's district manager in an effort to determine why MSHA was permitting other mines to establish evaluation points at outby locations of abandoned areas, while at the same time denying Zeigler permission to do the same thing. The district manager informed him that the other mines in question have bleeder systems which are covered in

their ventilation plans, and that no exception would be made for Zeigler (Tr. 258-268).

Mr. Stritzel stated that the day before the inspector issued the citation, and when he found out that the citation would be issued, he asked Mr. Roper to prepare a letter to MSHA requesting bleeder evaluation points, and it was sent to the district manager. Although he has seen no written response, Mr. Stritzel stated that he was verbally informed that the request would not be granted. A copy of the letter was produced, marked for identification, but was withdrawn by the contestant's counsel (proposed exhibit P-7; Tr. 261-264). Mr. Stritzel stated that he discussed the request with MSHA assistant district manager Charles Rack on approximately May 30, 1990. He also discussed the citation which was issued in this case, including the ventilation tests results of May 18, but he did not give the information to Mr. Rack because "he didn't seem interested enough to want to see them." He did not discuss the abatement time with Mr. Rack, and their discussion focused on the legality of the violation, the evaluation points, and the application of the standards to other mine operators (Tr. 264-266).

Donald W. Mitchell, a registered professional engineer and consultant, was qualified as an expert in mine ventilation. He holds B.S. and M.S. Degrees in mining engineering from the Penn State University, and Columbia University. Exhibit C-3, is a copy of his resume detailing his 40 years of work experience, including membership in a number of mining and related professional associations and groups, and the authorship or co-authorship of 87 mining publications or papers, including ventilation and ventilation controls. His prior work experience includes employment with the U.S. Bureau of Mines and MSHA from April, 1951, to July, 1978, and his last government position was Principal Mining Engineer and special advisor to the Assistant Administrator, Technical Support (MSHA) (Tr. 277-279).

Mr. Mitchell defined the term "ventilation" as follows (Tr. 279):

A. I define ventilation as the imposing a pressure differential on a network, as a result of putting a pressure differential on a network.

Q. What do you mean by network, Mr. Mitchell?

A. Network being the passageways throughout the mine, the shafts, the slopes, the entries, the crosscuts we've heard testimony, this R-2 is a network. We impose a pressure differential by means of a fan and also by the elevation differential and the temperature differential between the surface and the underground workings. These pressures induce air movement; not

only air, it induces movement of all gases, air being among the gases.

Q. Would that also include methane?

A. Of course, it would include methane as well.

Mr. Mitchell identified exhibit C-4, as a transcript excerpt of his hearing testimony in a case now pending for decision before Commission Judge John Morris, in which the identical issue of the application of statutory section 75.329, and its associated regulatory sections were raised by a mine operator represented by the contestant's counsel in the instant proceeding (Wyoming Fuel Company v. Secretary of Labor, Docket Nos. WEST 90-112-R through 90-116-R). Mr. Mitchell confirmed that his prior testimony with respect to the appropriateness of the application of section 75.329-1(a), also applies in the instant case (Tr. 280).

Mr. Mitchell stated that section 75.328 deals strictly with the requirement that bleeder entries be used where pillars are being extracted. Section 75.329 and 75.330, were the result of section 303(z) of the Act, which was enacted out of congressional concern that mine explosions were being experienced and had worsened because of the existence of long continuous mine gob areas. In his view, as well as the view of the other individuals who were drafting the regulations, including the Director of the Bureau of Mines, John O'Leary, as expressed to the Congress, section 75.329 was intended to specifically apply to mines which were in existence and operating at the time this section was enacted, and section 75.330, was intended "to take care of future mining and future sections" (Tr. 285). The only application of section 75.329-1(a), to the cited abandoned area of the contestant's mine is that the type of explosion-proof seals required under that section were also the type required under section 75.330 (Tr. 285).

Mr. Mitchell defined an "abandoned area" as "an area that is neither ventilated nor examined as are active areas," and he stated that sections 75.303, 75.305, 75.311, 75.312, 75.314, and 75.330, are the appropriate regulations that may apply to abandoned areas. He believed that the requirement found in section 75.314, for the examination of an abandoned area for oxygen deficiency, methane concentration and other hazards, within 3 hours of persons entering such an area, is the only regulation relative to examination and ventilation within an abandoned area other than the weekly or preshift examination requirements found in section 75.303 and 75.304 (Tr. 286).

Mr. Mitchell confirmed that he visited the abandoned mine section in question on June 1, 1990, with Mr. Harp and Mr. Roper

to determine whether there were any conditions that would constitute a hazard to persons working in the mine. He confirmed that he made a ventilation pressure survey and a methane survey, and also considered the results of Mr. Roper's ventilation and methane sampling. He also considered the information which was available to the inspector during his inspection of May 17, as corroborated by his testimony in this case and which he heard (Tr. 287-290). He then conducted an analysis based on all of the information which was available to him, and concluded that the cited abandoned panel was ventilated and safe and did not create an explosion or fire hazard to persons working in the mine. He identified exhibit C-5, as a summary of his data analysis and findings in support of his conclusion, and he explained them (Tr. 290-293).

Mr. Mitchell explained that his data and analysis reflects no dangerous accumulations of methane anywhere within the areas he travelled during his survey, and that it provides strong evidence of the probability that the abandoned area was indeed ventilated and that the ventilation pressures and movement of air extended throughout the natural air flow paths within the area, and extended to the deepest point of penetration of the panel. He explained the basis for his conclusions (Tr. 294-296). Mr. Mitchell stated that he took steps to satisfy himself that the conditions in the abandoned area were the same on May 17 and June 1, and that this was an important part of his analysis. He did this by comparing the methane percentages recorded on May 18 and 21, with those found on June 1, and that "this is strong evidence that nothing important has changed within the area during that period." He also considered the fact that the inspector found no important methane concentrations on May 17 (Tr. 297).

Mr. Mitchell stated that proof that air was indeed flowing through the abandoned area is further evidenced by the fact that he found 0.1 percent methane at the northernmost fall on the right hand side of the panel, and 0.4 and 0.5 percent methane in the return, and that when one considers the stopping line, the probabilities are that either the stopping line or falls are maintaining a flow of air through the area because the only way for the air to have the increase in the return is for the air to be coursing through that area in by the fall line which extended across the width of the panel. This conclusion is further corroborated by the fact that the concentrations of carbon dioxide are similar to the methane concentrations, and this indicates that air movement must be occurring in order to flush out the carbon dioxide and to have a quantity of carbon dioxide in the return air flow greater than that in the intake air flow (Tr. 298).

Referring to an "airflow directions" chart, Mr. Mitchell explained the direction of the air flow in the panel which he

determined as part of his survey by means of two techniques, namely, "sweat of the brow" and "feel and sense of a strong flow of air." He explained that the "sweat of the brow" technique is used in areas where there is a weak flow of air and where there is no benefit in trying to measure such air with an anemometer or smoke tube. He stated that by using this technique "one senses these flows, either the flow is specific and definite because you can feel it and the best way you feel it is by the sweat on your brow. This is quite similar to a person wetting their finger to see the direction the air is--the wind is blowing." He confirmed that "all of us who do ventilation in mines for the government today" were instructed in the use of this technique (Tr. 300).

Mr. Mitchell further explained the direction of air travel as shown on the chart, and he confirmed that he perceived definite air flows in the intake right entry of the panel, that he could feel the flow of air in the middle of the entry before he got to the fall, and that there was no question that air was flowing to and through the fall because "it was flowing up to us standing there some 10, 20 feet outby the fall." When they travelled behind the fall, he found that the air flow through the top of the fall was much stronger. When he reached the northernmost fall line, he found a strong flow of air continuing in the intake entry going over the fall. He also indicated that air was also entering the panel, coming up the No. 2 entry, as depicted by the "tilting" arrow on the upper portion of the chart, and the air was flowing through a partially opened man-door across the fall at that point (Tr. 304). He further explained the locations where he detected air flows, and his recorded methane concentrations (Tr. 305-307). He confirmed that his conclusions concerning air flow were consistent with the conditions found on May 17 (Tr. 309).

Mr. Mitchell referred to a "pressure differentials" chart which is a part of his survey, and he concluded that the results show that there was a pressure differential sufficient to move air, and that air was moving across the falls inby crosscut 13, a definite flow of air over the fall at crosscut 23, and a flow of air through the falls into the return on the left side of the panel. He also concluded that there was a pressure differential between the intake and return sides of the panel, and that there was indeed a ventilation network present because the only way one would obtain the pressures noted is by the flow of air or other gases through the network (Tr. 311). He also believed that the bottle sample results taken by Mr. Roper establish the probability that air of some unknown quantity was sweeping behind crosscut 23 and coming back through the returns of the panel and that there was an established air intake and return despite the fall (Tr. 313).

Mr. Mitchell disagreed with the inspector's assertion that the only method to determine whether an area is ventilated is to

physically inspect it and take measurements. He stated that the industry and MSHA practice for determining the adequacy or inadequacy of ventilation is by pressure differential surveys. Such pressure differential measurements are made by the use of a number of anemometers, taking into account mine elevations through altimeter readings, dry and bulk temperatures, and the quality of the atmosphere. He confirmed that "there are problems with pressure readings where the air velocity exceed 400 feet per minute" (Tr. 314).

Mr. Mitchell disagreed with MSHA's position that section 75.329-1(a), presently requires that abandoned mine areas be ventilated. He stated that the only regulation that he is aware of that requires an abandoned area to be ventilated is section 75.314 which requires adequate ventilation if people are to enter the area to work (Tr. 322). He conceded that the general practice of leaving abandoned mine areas alone and unventilated "is a matter of great concern to all of us," and that if he had not found a strong flow of air on the cited panel in this case and had not found it to be safe, he would not be testifying in this case (Tr. 323). He disagreed with MSHA's position that section 75.329-1(a), is a viable standard for current application and stated that "I only disagree it cannot apply and cannot be intended to apply when written in 1970" (Tr. 324).

With respect to the application of section 75.316, and MSHA's argument that no one has argued that the language requiring a mine operator to adopt a ventilation plan "on or before June 28, 1970," limits the application of the standard to that date, Mr. Mitchell pointed out that the last sentence of section 75.316, requiring the review of ventilation plans "at least every six months" indicates the congressional intent that such plans be submitted every 6 months following June 28, 1970, and that this has been the basis for requiring the submission of such plans. In his view, this language distinguishes section 75.316 from section 75.329-1(a) (Tr. 325).

Mr. Mitchell stated that in the event section 75.329 were found not to apply in this case, MSHA would not be left in any enforcement "predicament" because it could require Zeigler to seal the abandoned area pursuant to section 75.330, or to adopt a ventilation plan pursuant to section 75.316 covering the abandoned area (Tr. 327-328).

Mr. Mitchell was of the opinion that it would not be safe for a mine examiner to travel the areas where he travelled during his survey, but that it would be safe to travel to crosscut 13 on the intake side of the panel to be assured of air flow up to that point, and to the return regulator to take a reading at the mouth of the panel (Tr. 330).

On cross-examination, Mr. Mitchell confirmed that he did not draft section 75.329-1(a), but was responsible for the committee that considered statutory section 303(z) of the Act, and then developed sections 75.329 and 75.330. The committee worked on the promulgation of the standards which followed, including section 75.329-1(a), among others. He confirmed that the committee was concerned with the problem of "these long contiguous gobs that we were having that were causing explosions to worsen," and that the intent of section 75.329-1(a), was to require areas of mines then in existence to be ventilated or sealed (Tr. 333).

Mr. Mitchell stated that section 75.329-1(a) is related to section 75.328, because it was the intent of Congress and the government to require bleeder panels to be constructed around mined-out or abandoned areas, and that this would constitute adequate ventilation if one could demonstrate a pressure differential. Section 75.329-1(a), was intended in part to allow an operator to comply by building a bleeder system around an existing mined-out area, and it is nothing more than an "add-on" to section 75.329 which addresses bleeders (Tr. 335).

When asked for his interpretation of the phrase "or equivalent means" found in section 75.329, Mr. Mitchell responded "that's a good question," and he agreed that it means "other ventilation systems other than bleeders as approved by MSHA" (Tr. 335). When asked why section 75.329-1(a), should not be applicable to present day mines, Mr. Mitchell stated that "it should be; it isn't" (Tr. 335).

Mr. Mitchell agreed that it would be desirable to be able to walk to the point of deepest penetration to determine whether the ventilation was adequate, but he did not believe that it was necessary to do so. It would be desirable because one would be dealing with facts rather than probabilities or possibilities, and he agreed that survey opinions are based on probabilities. He confirmed that he traveled close to the same place as the inspector at the No. 13 crosscut, and he believed it was safe to travel up to the fall and no further. The question of whether someone making an inspection pursuant to section 75.305 could safely travel to that area would be a management decision after discussion with MSHA (Tr. 339).

Mr. Mitchell stated that while it would be desirable to include a provision in a ventilation plan requiring one to travel to the point of deepest penetration in order to determine whether the ventilation was adequate, he did not believe it would be practical and it might create safety problems. He believed that MSHA should require a mine operator to demonstrate with reasonable engineering certainty that the area is being ventilated, and this could be done by making a ventilation survey or requiring the drilling of a bore hole in the back end of the area in shallow mines and injecting tracer gas (Tr. 352-353). He believed it

would be appropriate for Zeigler to conduct a weekly examination at the intake side of crosscut No. 13, and to maintain a safe access route to that location (Tr. 361). He also believed that methane readings should be required at the mouth of the intake and at the fall, and if the results are approximately the same, this would constitute an atmosphere that is being adequately ventilated (Tr. 362).

Mr. Eslinger was called in rebuttal by the petitioner, and stated that when he took courses at the Bureau of Mines in 1971, as well as subsequent courses, he was not taught the "sweat of the brow" technique referred to by Mr. Mitchell, and Mr. Eslinger believed that it was difficult to determine air flow without instrumentation (Tr. 368). Mr. Eslinger also expressed concern about the pressure differential results of Mr. Mitchell's survey, the integrity of the stoppings, and the existence of the falls. He also commented about the methane readings, the amount of air measured on the panel by the respondent, and he still believed that to assure oneself that the area is being ventilated it was necessary to travel to the point of deepest penetration (Tr. 372).

Mr. Eslinger agreed that it would be desirable for an inspector to travel to the point of deepest penetration to determine whether the ventilation was adequate, and that this is the best way to make such a determination. He agreed that the inspector in this case testified that he could not establish that the abandoned panel was being adequately ventilated because he could not travel to the point of deepest penetration, and could only go as far as crosscut No. 13 where he activated a smoke tube (Tr. 373). He stated that "we like and encourage people to put that into their ventilation plan" so that the operator and MSHA can satisfy themselves that an abandoned area is being adequately ventilated, and he agreed that in this case, such a provision was not in the contestant's plan (Tr. 374).

On cross-examination, Mr. Eslinger conceded that he had no actual knowledge of the integrity of the stoppings outby the No. 23 crosscut area, and although he has seen crushed stoppings at the Murdock Mine, this was in 1974 or 1975, and the mine was using a variety of concrete block stoppings at that time (Tr. 377). Mr. Eslinger agreed that if MSHA were to conduct a ventilation survey of the abandoned panel in question similar to the survey done by Mr. Mitchell, the methodology it would follow would be the same basic methodology followed by Mr. Mitchell (Tr. 378). However, rather than indulging in probabilities based on computerized analysis, he would prefer to clean up the falls and clear out entranceways so that one can travel all the way around to the four corners of the panel (Tr. 379).

## Zeigler's Arguments

### Application of Section 75.329-1(a)

Zeigler's arguments in support of its position in this case are set forth in its posthearing brief and reply brief, and in its motion for summary decision filed on June 1, 1990 (no ruling was made on this motion because the case proceeded to an expedited hearing on the merits pursuant to Zeigler's request). Zeigler's counsel in the instant case has raised the same issue, and has advanced an identical argument with respect to the applicability of section 75.329-1(a), in several pending contest proceedings heard by Commission Judge Morris on March 13, 1990, Wyoming Fuel Company v. Secretary of Labor (MSHA), Docket Nos. WEST 90-112-R through WEST 90-116-R. Zeigler's counsel furnished the presiding judge in the instant case, as well as MSHA's counsel, with copies of the posthearing briefs filed with Judge Morris, and has incorporated the arguments advanced in that proceeding as well as the summary decision motion, with the arguments advanced in the instant matter.

Relying on the language found in statutory standard section 75.329, (on or before December 30, 1970), and the language found in the cited regulatory standard section 75.329-1(a), (by December 30, 1970), Zeigler maintains that when read together, these standards, on their face, only apply to mine areas which were pillared or abandoned prior to December 30, 1970, and do not apply to mine areas established or opened subsequent to that date. Since the un rebutted evidence adduced by Zeigler in this case establishes that the cited 2nd west panel of the mine was initially developed on December 8, 1987, it takes the position that section 75.329-1(a), does not apply to the cited mine area.

Citing several court decisions dealing with statutory and regulatory construction, Zeigler asserts that the plain meaning of any statutory or regulatory language is conclusive unless a clear legislative intent to the contrary can be demonstrated, and it takes the position that section 75.329-1(a) must be analyzed in light of its plain meaning and congressional intent. In support of its argument that section 75.329-1(a), is applicable only to mine areas abandoned prior to December 30, 1970, Zeigler points out that according to its plain language, the application of this section was limited to areas which were pillared or abandoned prior to December 30, 1970, and that the congressional intent to limit the application of this section is evidenced by (1) the use of past tense ("have been . . . extracted" and "abandoned") in conjunction with the time limitation of "by December 30, 1970" and (2) the directive found in section 75.329-1(b). Zeigler concludes that congress's use of the past tense in section 303(z)(2) of the 1969 Coal Act, and the Secretary's use of it in the supplementary section 75.329-1, demonstrate an intent to extend those requirements only to areas

pillared or abandoned prior to December 30, 1970 and to require only those areas to be ventilated or sealed "by" that time.<sup>1</sup>

Citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 56 (1987), in support of its statutory construction argument with regard to the words "by December 30, 1970" found in section 75.329-1(a), Zeigler quotes the following from the Court's opinion: "Congress could have phrased its requirement in language that looks to the (future) . . . , but it did not choose this readily available option. Moreover, Congress has demonstrated in yet other statutory provisions that it knows how to avoid this (retro)spective implication by using language that targets wholly (prospective events)." As examples, Zeigler makes reference to 30 C.F.R. § 75.326 ("[i]n any coal mine opened after March 30, 1970); 30 C.F.R. § 75.330 ("[i]n the case of mines opened on or after March 30, 1970 or in the case of working sections opened on or after such date in mines open prior to such date"); 30 C.F.R. § 75.500 ("[o]n or after March 30, 1971"); 30 C.F.R. § 75.501 ("[o]n or after March 30, 1974").

Assuming that the plain language of section 75.329-1(a) is not sufficiently clear, Zeigler maintains that the directive of section 75.329-1(b) leaves no doubt that the intent of section 75.329-1(a) was to require that only areas of mines in existence when the 1969 Coal Act was passed be ventilated or sealed prior to December 30, 1970. Zeigler notes that section 75.329-1(a) provides that if an area of a mine existing in 1969 could be ventilated, MSHA had to be notified and approve. (The evidence in this case establishes that Zeigler has never sought approval from MSHA to ventilate the abandoned area in question, and Zeigler has apparently never been cited for its failure to do so). The timing for notification and approval is specified in section 75.329-1(b) as follows:

The request for permission to ventilate such areas must be submitted in time to allow consideration of the request, to obtain approval, and to permit the operator to install the ventilation system, or to install seals

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<sup>1</sup>Zeigler points out that the word "by" means "[b]efore a certain time; . . . not later than a certain time; on or before a certain time . . . ." Black's Law Dictionary 172 (5th ed. 1979). The dictionary is evidence of common usage, Puerto Rican Cement Co., 4 FMSHRC 997, 998 n. 1 (1982) (citing 2A Sutherland, Statutes & Statutory Construction § 46.02 at 52 (4th ed. 1973)), to which adjudicatory bodies often refer to deciding matter of statutory construction. See Phelps Dodge Corp., 681 F.2d at 1192; Jim Walter Resources, Inc., 7 FMSHRC at 496.

in the event the request to ventilate is denied, on or before December 30, 1970. (Emphasis added).

Zeigler concludes that the only interpretation of sections 75.329 and 75.329-1(a) consistent with the statutory scheme is that these regulations required only areas already pillared or abandoned prior to December 30, 1970 to be ventilated or sealed. Gwaltney of Smithfield, 484 U.S. at 59. It further concludes that any other reading would make section 75.329-1(a) incomprehensible, violating the rule of construction that regulations must be interpreted "as a whole, in light of the overall statutory and regulatory scheme," Campesinos Unidox v. United States Department of Labor, 803 F.2d 1063, 1069 (9th Cir. 1986), "to give them a harmonious, comprehensive meaning, giving effect . . . to all provisions." McCuin v. Secretary of Health & Human Services, 817 F.2d 161, 168 (1st Cir. 1987) (citing Weinberger v. Hynson, 412 U.S. 609, 631-32 (1973)).

Zeigler argues that in 1969, Congress was concerned with methane accumulations in areas of mines that (1) were being pillared, (2) had been pillared or abandoned, or (3) would be pillared or abandoned. H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 20-21, reprinted in HOUSE COMMITTEE ON EDUCATION AND LABOR, 91ST CONG., 2D SESS., LEGISLATIVE HISTORY OF THE COAL MINE HEALTH AND SAFETY ACT 578-79 (Comm. Print 1970) ("LEGISLATIVE HISTORY"). Zeigler asserts that Congress enacted section 303(z) of the 1969 Coal Act to deal with methane accumulations in the three situations described above:

1. Section 303(z)(1) requires operators to ventilate an area "[w]hile pillars are being extracted" from it. That section of the 1969 Act was incorporated without amendment in 30 C.F.R. § 75.328.

2. Section 303(z)(2) required operators "within nine months after the operative date of this subchapter" (by December 30, 1970) to ventilate or seal all areas in existing mines which had been pillared or abandoned. That section was incorporated without amendment in section 75.329, which was supplemented by section 75.329-1.

3. Section 303(z)(3) requires mines and sections of mines opened after the 1969 Act's effective date (March 30, 1970) to be designed so that abandoned sections can be sealed in accordance with an approved plan. That section became section 75.330 of the regulations.

Zeigler further argues that even assuming that this plain statutory scheme, "admitt(ed) a smidgen of ambiguity sufficient to allow a look at the legislative history, it provides no basis

for overturning . . . the clear meaning of [the regulation]," International Union, UMWA v. MSHA, 900 F.2d at 386 (D.C. Cir. 1990), because both the House Report and the Conference Report bolster the interpretation that section 75.329 (and the supplementary section 75.329-1) were intended to apply to sections of mines already in existence when the 1969 Coal Act became effective (giving the affected mines 9 months to ventilate or seal those areas), leaving section 75.330 to deal with sections of mines opened after the 1969 Act's effective date.

Zeigler points out that the House Report distinguishes the requirements for existing sections of mines from those for new sections of mines (and new mines) as follows:

Seals and bulkheads shall be used to isolate in an explosion-proof manner all abandoned areas in existing mines. [§ 303(z)(2) of the 1969 Act, §§ 75.329, 75.329-1]. In addition, wherever possible, new areas of existing mines will be "sectionalized" with explosive-proof sealing when abandoned, that is isolated from active sections. [§ 303(z)(3) of the 1969 Act, § 75.330]. In new mines, opened after the operative date of the act, it is intended that the mining system be such as to permit isolation by explosion-proof bulkheads of each section of a mine as it is abandoned. [§ 303(z)(3) of the 1969 Act, § 75.330].

H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 21, reprinted in LEGISLATIVE HISTORY at 579 (Emphasis added).

Zeigler asserts that the same tripartite statutory scheme for regulating active pillar sections, areas already pillared or abandoned, and finally, areas to be pillared or abandoned, is evident in the Conference Committee's explanation of how the three subparts of 303(z) of the Act work in tandem to regulate present, past, and future conditions:

The House amendment provided for the ventilation of areas of the mine while actively being pillared in a manner approved by the Secretary or his inspector. It also provided that, within 9 months after enactment, all mines which are or which have been abandoned must be sealed or ventilated, as determined by the Secretary or his inspector. The Secretary could permit a further time extension of 6 months. It described how adequate the ventilation should be and the method of sealing. In new mines and new working sections, a plan requiring sealing would be required.

\* \* \* \* \*

The conference substitute is adopted after the House amendment.

Under this substitute, paragraph (1) of section 303(z) [§ 75.328] requires that areas which are actively being pillared must be ventilated in the manner otherwise prescribed under section 303.

\* \* \* \* \*

Under the conference substitute paragraph (2) of section 303(z) [§ 75.329] provides that, within 12 months after enactment, all areas from which pillars have been wholly or partially extracted, and abandoned areas shall be ventilated by bleeder entries or by bleeder systems or by equivalent means or be sealed.

\* \* \* \* \*

Under the conference substitute, paragraph (3) of section 303(z) provides that, in the case of mines opened on or after the operative date of this title, or in the case of areas developed on or after such date in mines opened prior to such date, the mining system shall be designed, in accordance with a plan and revisions thereof approved by the Secretary and adopted by the operator, so that, as each set of cross entries, room entries, or panel entries of the mine are abandoned, they can be isolated from the active workings of the mine with explosion-proof bulkheads approved by the Secretary or his inspector.

H.R. Rep. No. 91-761, 91st Cong., 1st Sess. 81-82, reprinted in LEGISLATIVE HISTORY at 1043-44 (emphasis added).

Zeigler concludes that the statutory and regulatory language, the statutory scheme, and the legislative history lead to only one conclusion: Sections 75.329 and 75.329-1(a) apply only to sections which were pillared or abandoned prior to December 30, 1970. Because the development of the cited 2nd West panel of the Murdock Mine was not begun until 1987, Zeigler further concludes that sections 75.329 and 75.329-1(a) do not apply to it and that the contested citation must be vacated.

#### The Alleged Violation of Section 75.329-1(a)

Zeigler points out that Inspector Stritzel and his supervisor, Mark Eslinger, both testified that to show an abandoned area is ventilated in accordance with section 75.329 and 75.329-1(a)(1), the operator must be able to determine that the abandoned area is being ventilated and (2) it must make that determination by travelling the abandoned area to its point of

deepest penetration. However, Zeigler argues that these requirements are not in section 75.329 and 75.329-1(a), but are found in MSHA's proposed ventilation regulations which have not as yet been promulgated as mandatory standards. See: 53 Fed. Reg. 2382, January 27, 1988.

Reviewing MSHA's proposed new ventilation regulations, Zeigler argues that proposed ventilation regulation section 75.334(a), which is derived from current sections 75.329 and 75.316, would require that worked-out areas which have not been pillared "shall be ventilated so that gases from throughout the worked-out areas are routed into a return air course or to the surface of the mine, or they shall be sealed." 53 Fed. Reg. 2417. However, Zeigler points out that proposed section 75.334 would have to be read in conjunction with proposed section 75.364 (covering weekly examinations underground), which would apply to worked-out areas where no pillars have been recovered, and "would generally require weekly travel to the area of deepest penetration, and measurements and tests at locations where the effectiveness of the ventilation system can be determined." 53 Fed. Reg. 2394, 2417, 2420.

Zeigler concludes that the inspector applied the requirements of the proposed and unpromulgated ventilation regulations cited above to the cited abandoned panel in question in this case and that he issued the citation because he could not physically follow the flow of air "to the deepest depth" of the panel and therefore could not determine where the air was going on the panel. However, Zeigler points out that the words "deepest penetration" or "deepest depth" apply only in the proposed rules and that Mr. Eslinger was unable to identify any regulation in Part 75 which contained these words, and that only the proposed rules--not the existing ones--would impose mandatory requirements on operators to determine "the effectiveness of the ventilation system." Under these circumstances, Zeigler maintains that the inspector "jumped the gun" by engrafting proposed requirements onto existing section 75.329-1(a). Because the inspector applied these "homegrown" requirements drawn from tentative proposals in issuing the citation, Zeigler concludes that he held it to a standard not found in section 75.329-1(a), and for this reason, the citation must be vacated.

Zeigler further argues that MSHA's position that Zeigler must initially show that an abandoned area is ventilated to demonstrate compliance with section 75.329-1(a), and that MSHA need not show the opposite to prove a violation, cannot be sustained because the burden is on MSHA to prove a violation. Unlike proposed sections 75.334 and 75.364, which would require the operator to test ventilation of a worked-out area where it can determine its effectiveness, Zeigler points out that no similar requirements is found in section 75.329-1(a), and that

this section only requires that an abandoned area existing in a mine opened prior to December 30, 1970, be ventilated or sealed.

Zeigler concludes that assuming section 75.329-1(a) can be applied by MSHA in this case, in order to sustain a violation of that standard, the burden of proof is on MSHA to show that the cited panel was not ventilated or not sealed. Since the inspector admitted that he could not determine whether the cited panel was ventilated and informed mine management that he was issuing the citation because "we couldn't get to the head end of the section and determine if it was being ventilated or not," Zeigler concludes that MSHA has failed to prove a violation and that the citation must be vacated on that basis. Zeigler observes that even if there were a requirement that ventilation of an abandoned area be determined only by travelling to the point of deepest penetration, in a case such as the instant one, MSHA would never be able to prevail. If the inspector were unable to travel the section to its deepest point, then MSHA would never be able to prove by a preponderance of the evidence that the area was not ventilated.

Even assuming the application of section 75.329-1(a), to the cited panel, Zeigler maintains that the evidence in this case establishes that the cited panel was in fact ventilated when the citation was issued. Contrary to MSHA's position that the inspector cited a violation because he could not determine with absolute certainty that the cited panel was being effectively ventilated by walking the panel to the point of deepest penetration, Zeigler maintains that it has demonstrated with reasonable certainty that the panel was being effectively ventilated, that this is sufficient to establish compliance with the standard, and that its proof with reasonable certainty that the panel was being ventilated outweighs MSHA's allegations to the contrary.

Zeigler argues that its showing with reasonable certainty that the cited panel was in fact ventilated when the citation was issued is consistent with the preponderance-of-the-evidence standard applicable in Commission proceedings and that the concept of absolute certainty does not exist when it comes to proving violations of the Act; rather, the focus is on probabilities. Zeigler believes that to prove a violation, MSHA must show by a preponderance of the evidence, and not with absolute certainty, that a violation exists. Zeigler concludes that to prove a violation by a preponderance of the evidence, MSHA must show that it was more probable than not that the cited panel was not ventilated. And, assuming a prima facie showing by MSHA, Zeigler has to show that it was more probable than not that the panel was ventilated, and it believes that it has done so in this case.

In support of its assertion that MSHA has not established a violation by a preponderance of the evidence, Zeigler points out that other than the smoke tube tests performed by the inspector,

MSHA produced no evidence to show that methane and other gases were not rendered harmless and carried out of the cited panel. In contrast, Zeigler believes that through the testimony of its expert witness Don Mitchell, it has proved by a preponderance of the evidence that the cited panel was ventilated. In support of this conclusion, Zeigler relies on the testimony and facts presented by Mr. Mitchell with respect to analyses derived from his observations and data, which included a ventilation survey and computer analysis of the cited panel (exhibit C-5), methane readings, bottle samples reflecting concentrations of methane, carbon dioxide, and oxygen on the panel, airflows on the panel, and measured pressure differentials. (Zeigler's detailed discussion and conclusions concerning Mr. Mitchell's analyses and findings are set forth at pages 16 through 22 of its posthearing brief). Zeigler concludes that compared to MSHA's inconclusive smoke tube tests, Mr. Mitchell's irrefutable conclusions, based on undisputed accepted scientific principles and methodology, constitute the preponderance of evidence clearly supporting its position that the cited panel was in fact ventilated in compliance with the cited regulatory standard.

#### Reasonableness of the Abatement Time

Assuming a violation occurred, Zeigler argues that the time fixed by the inspector for abatement was unreasonable because he arbitrarily settled on a 30-day abatement period without considering the disruptive effect it would have on the operations of the mine. Zeigler suggests that the inspector set a 30-day abatement period with the idea that operations would be disrupted, and in support of this conclusion it cites the inspector's testimony that notwithstanding his belief that there was a lack of personnel to construct seals he "set thirty days as a time element so that he could see some work being accomplished in thirty days" (Tr. 52, 68).

Citing Freeman Coal Mining Corp., 1 IBMA 1, October 5, 1970, holding that the availability of equipment and the operator's difficulties in abating the cited conditions are relevant considerations in setting an abatement time, Id. at 25-27, Zeigler asserts that the inspector ignored the Board's admonition that "where a longer abatement period will vastly reduce the cost of abatement or the operational disruption, without exposing the miners to significant danger, we think an order fixing the longer period would be reasonable," Id. at 27. Zeigler points out that although the inspector testified that the existence of a hazard resulting from the alleged violation would be unlikely, he did not adjust the abatement time accordingly to avoid the complete disruption of mining operations and did not consider how long it would take to construct the seals because he had already decided that he would set 30 days as an abatement period even before he went underground to inspect the panel. In support of this conclusion, Zeigler cites the un rebutted testimony of superintendent

Roper that the inspector informed general mine foreman Carpenter on May 10, 1990, that the panel would have to be sealed within 30 days.

Zeigler asserts that the inspector's "calculation" and belief that 30 days was sufficient to permit rehabilitation work to be done and seals to be constructed bore no relation to Mr. Roper's estimate that the work would normally take more than 2-1/2 months. Zeigler states that the inspector never discussed with mine management how long it would take to construct the seals and told Mr. Roper that no extensions in abatement time would be granted. Zeigler points out that although the inspector claimed not to remember making this statement to Mr. Roper, he conceded that he might have told him that no abatement time extensions would be granted (Tr. 69). Under all of these circumstances, Zeigler concludes that the inspector acted improperly by "blindly" imposing a 30-day abatement period without considering the available manpower and the disruptive effect such an abatement period would have on its operations.

#### MSHA's Arguments

##### Application of Section 75.329-1(a)

MSHA takes the position that section 75.329-1(a), required Zeigler to either ventilate or seal the cited abandoned area, and that this was a continuing requirement which has not expired. MSHA also asserts that Zeigler could not demonstrate on May 17, 1990, that the cited panel was being adequately ventilated, and that the 30-day abatement time given by the inspector was reasonable considering the information he had on May 17, 1990.

In support of its argument that section 75.329-1(a), has current application, MSHA argues that the underlying statutory provision found in section 303(z)(2) of the 1969 Coal Act contains no specific expiration date, but merely states "within nine months . . . all areas . . . shall be ventilated . . . or be sealed." MSHA concludes that this statutory requirement for sealing or ventilated abandoned mine areas has current application to the cited abandoned mine panel and continues to be applicable to all coal mines. MSHA states that Zeigler's expert witness, Don Mitchell, acknowledged that the protections incorporated into section 75.329-1(a) should be applicable to present day mines, and it concludes that the reason for this is because the hazards of a methane build-up in abandoned mine areas must still be addressed in 1990.

MSHA asserts that it has not promulgated any new standards which supersede the requirements of section 303(z)(2) of the 1969 or 1977 Acts, and that the only difference between section 303(z)(2) and 30 C.F.R. § 75.329-1(a) is that a specific date (December 30, 1970) is mentioned in the standard. MSHA concludes

that since Congress has stated its position that abandoned mine areas must be properly ventilated or sealed on two separate occasions, 8 years apart, it is clear that it intended this standard to be an ongoing requirement for all underground coal mines.

MSHA argues that Zeigler's interpretation of section 75.329-(a), implies that section 303(z)(2) of the 1977 Act was superfluous when it was enacted. MSHA concludes that if Zeigler's interpretation that the requirements of section 303(z)(2) expired on December 30, 1970, is correct, then it would follow that there was no requirement for ventilation of abandoned mine areas until the passage of the 1977 Act, with the added implication that the 1977 Act required ventilation only for a 9-month period. MSHA views this interpretation as a "tortured" interpretation of the two statutes which would result in a standard being in effect for 9 months in 1970 and for 9 months in 1978, with no protection during the 8 years in between, nor for the time period since November 1978.

MSHA states that while many provisions of the 1969 Act became obsolete and were removed from the 1977 Act, the language of section 303(z)(2) was repeated word for word, and it concludes that it must be assumed that Congress knew what it was doing in 1977 when it repeated the language which Zeigler claims was obsolete 7 years earlier. By repeating this language from the 1969 Act in the 1977 Act, MSHA further concludes that Congress intended to continue the protections afforded by section 303(z)(2).

Referring to mandatory standard 30 C.F.R. § 75.316, which requires a mine operator to adopt a ventilation system and methane and dust-control plan, and which contains language ("on or before June 28, 1970"), which is similar to the language found in section 75.329-1(a) ("by December 30, 1970"), MSHA suggests that acceptance of Zeigler's "plain meaning" argument would lead to the conclusion that section 75.316 expired on June 28, 1970. Such a result, argues MSHA, would reduce the safety of every coal miner, and it points out that section 75.316 has never been enforced in such a restrictive manner. MSHA further concludes that the acceptance of Zeigler's argument would also be used to negate the applicability of a number of other important safety standards, and would result in some serious consequences affecting the safety of miners.

MSHA believes that the dispute in this case is the result of a fundamental difference in the meaning of the dates specified in section 303(z)(2) of the 1969 and 1977 Acts, and that Zeigler believes that these are expiration dates, while MSHA contends that these are effective dates. MSHA believes that Zeigler's interpretation makes no sense since Congress clearly could not have intended for these ventilation provisions to apply only to

certain mines for only two distinct 9-month periods, and that the only logical conclusion is that the language of section 303(z)(2) and 30 C.F.R. § 75.329-1(a) provided a grace period during which mine operators could prepare to comply with the ventilation requirements.

In MSHA's view, Zeigler's argument that section 303(z)(3) of the Act is the only appropriate standard for mines (or mine sections) opened after December 30, 1970, is totally without merit since section 303(z)(3) and 30 C.F.R. § 75.330 only require that mining systems be designed with a plan which will allow the sealing of abandoned areas, whereas section 303(z)(2) requires ventilation or sealing of such areas. MSHA asserts that following Zeigler's contentions to their logical conclusion means that mines opened after December 30, 1970, need only provide for the possibility of sealing abandoned areas, but not the requirement for ventilating or sealing such areas.

#### The Alleged Violation of Section 75.329-1(a)

MSHA takes the position that the citation was properly issued because the inspector could not determine, nor could Zeigler demonstrate to him, whether there was sufficient air movement in the abandoned panel to render harmless or carry away any concentrations of methane or other dangerous gases. MSHA points out that when the inspector traveled up the intake side of the panel to the No. 13 crosscut, he and the general mine foreman could travel no further because a massive roof fall had blocked the entry, and the return side of the panel at the No. 13 crosscut was also blocked. Through the use of two smoke clouds, the inspector confirmed that there was little, if any, air movement over the fall, inby where the inspector was standing.

MSHA points out that since the inspector could not travel beyond crosscut No. 13, he had no way of knowing how much air was ventilating the remaining two-thirds of the abandoned panel, and the inspector testified that the only method he had to determine if the panel was being adequately ventilated was to physically walk to the back corners of the panel (the point of deepest penetration) to make his checks for hazardous conditions. Even assuming that some air was moving over the fall at crosscut No. 13, MSHA concludes that there was no way of knowing how far the air was going beyond that point. Since it was likely that additional roof falls existed throughout the back area of the panel, MSHA suggests that air could be travelling up a few crosscuts, and then cutting across into the return, without ventilating most of the back portion of the panel. MSHA concludes that the inspector issued the citation and cited a violation of section 75.329-1(a), based on the information that he had on May 17, 1990, and because he found no evidence of adequate ventilation in the panel.

MSHA asserts that both of its witnesses indicated that if an operator decided to ventilate an abandoned panel, it has to clean up the roof falls and establish an air course so that mine examiners can physically travel to key locations to take air and methane readings. MSHA asserts that most mine operators decide to seal abandoned areas because reestablishing ventilation after a roof fall has occurred may be difficult or impossible. MSHA points out that Zeigler had the option of sealing the entire panel or sealing outby the fall area at the No. 13 crosscut, and if it did the latter, a weekly examination for hazardous conditions, pursuant to section 75.305, would have to be made up to that crosscut.

MSHA cites the testimony of mine superintendent Roper that weekly examinations for hazardous conditions were stopped in December 1989, after roof falls blocked the entries inby crosscut No. 13, and that instead of travelling up the entry to check for hazardous conditions, a preshift examination was performed at the mouth of the panel to check for methane and air flow going into the panel and coming out the return side. MSHA asserts that such a preshift examination is not an adequate substitute for the weekly examination which requires the abandoned entry to be traveled as far as it is safe to go. MSHA concludes that without physically walking the panel, Zeigler had no way of knowing if there were any hazardous conditions in the panel after December, 1989, and that it is inconsistent for Zeigler to argue that it was making a serious effort to ventilate the panel on May 17, 1990, without having qualified examiners checking for hazardous conditions on a regular basis.

MSHA maintains that the intent of 30 C.F.R. § 75.329-1(a) contemplates a process where a mine operator requests permission to ventilate an abandoned panel and gives the MSHA District Manager sufficient data for him to make a determination that the abandoned area is being adequately ventilated. This data, which can be submitted as a part of an operator's ventilation plan or by separate letter, must be submitted to the MSHA District Manager to allow him sufficient amount of time to act on the operator's request. MSHA asserts that an operator should not be allowed to wait until a citation is issued before collecting sufficient data in the abandoned area, to determine if it is being properly ventilated, and it suggests that this is what Zeigler is attempting to do in this case.

MSHA asserts that the methane and air readings collected in the cited panel on May 18 and June 20, 1990, do not in any way rebut the inspector's findings in the citation because low methane readings, taken by Zeigler in the front areas of the abandoned panel, are not a good indication of continued low methane levels for the entire panel. When there are roof falls similar to those present in the cited panel, methane can become trapped behind the falls and pockets of methane can be present.

MSHA concludes that without proper ventilation an operator cannot assume that methane accumulations will not migrate from the abandoned panel to active workings, nor can it protect against explosive levels of methane occurring in the abandoned areas.

MSHA views the testimony of Zeigler's safety director (David Stritzel), that he was sure the back area of the panel was being ventilated because he believed that the block stoppings constructed in the abandoned panel were still intact, as mere speculation because no one had recently observed these stoppings, and MSHA's expert witness (Eslinger) testified that he had observed solid block stoppings crushed out at the Murdock Mine on previous occasions.

In summary, MSHA submits that whether there is a violation of 30 C.F.R. § 75.329-1(a) depends on the adequacy of the ventilation in the entire abandoned panel, not on after-the-fact methane and CO readings taken at various outby locations. MSHA believes it is essential to know if ventilation can be maintained by directing the air flow throughout the abandoned panel, including the back corners. Relying on the testimony of its witnesses, MSHA concludes that the only way to determine if ventilation is being maintained is to actually travel up to the point of deepest penetration of the abandoned panel to take methane and air readings.

#### Reasonableness of the Abatement Time

MSHA takes the position that usually, the only time the issue of reasonable time for abatement is raised in a contest proceeding is after a section 104(b) order is issued for failure to abate a citation and a mine operator is contending that the citation should be further extended. MSHA points out that there is a lack of case law on what constitutes a reasonable abatement time of an original citation, and that the obvious reason for this is that once the citation abatement time is extended or the citation is abated, a determination of whether the original abatement time was reasonable becomes moot.

MSHA points out that the abatement time for the citation was June 18, 1990, and that it was extended to August 1, 1990, after the hearing. The citation was subsequently terminated on July 16, 1990, after the cited abandoned panel was sealed by Zeigler. Since Zeigler would be entitled to a determination of whether the original abatement time was reasonable only if a section 104(b) were issued, and since no such order was in fact issued, MSHA concludes that any ruling on this issue at this point of the proceeding would be a mere academic exercise since Zeigler has already received all of the abatement relief it needed.

## Findings and Conclusions

### The Application of Section 75.329-1(a)

Mandatory safety standard 30 C.F.R. § 75.329 mirrors section 303(z)(2) of the 1977 Mine Act, and it was carried over without amendment from the 1969 Coal Act. Section 75.329 states as follows:

#### § 75.329 Bleeder systems.

[Statutory Provision]

On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of such mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with explosion-proof bulkheads such areas from the active workings of the mine. (Emphasis added).

The cited mandatory section 75.329-1(a) in this case, is a supplementary regulation promulgated by the Secretary of the Interior on March 28, 1970, 35 Fed. Reg. 5236, and it provides as follows:

#### § 75.329-1 Sealing or ventilation of pillared or abandoned area.

(a) All areas of a coal mine from which the pillars have been wholly or partially extracted and abandoned areas shall be ventilated or sealed by December 30, 1970. For those coal mines in which ventilation can be maintained so as to continuously dilute, render harmless and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from hazards of such methane and other explosive gases, the operator shall

request permission from the Coal Mine Safety District Manager in whose district the mine is located to ventilate such areas. (Emphasis added).

Subsections (b) and (c) of section 75.329-1, provide as follows:

(b) The request for permission to ventilate such areas must be submitted in time to allow consideration of the request, to obtain approval, and to permit the operator to install the ventilation system, or to install seals in the event the request to ventilate is denied, on or before December 30, 1970.

(c) The determination of whether ventilation will be permitted will be made after taking into consideration the history of methane and other explosive gases in the mine, the size of the gob or abandoned areas, and if the areas can be ventilated adequately.

Subsections (d) (e) and (f) of section 75.329-1, concern the information required to be submitted by the mine operator for consideration by MSHA with respect to the request for permission to ventilate an abandoned mine area.

The parties have cited no Commission decisions construing the language "on or before December 30, 1970," found in section 75.329, or the language "by December 30, 1970," found in section 75.329-1(a), and I have found none. However, in two decisions construing the application of 30 C.F.R. § 75.326, the first sentence of which begins "In any coal mine opened after March 30, 1970," former Commission Judges Boltz and Cook followed the literal meaning of this phrase and concluded that the standard did not apply to mines opened before March 30, 1970. See: C.F. & I. Steel Corporation, 3 FMSHRC 99, 104 (January 1981); Rushton Mining Company, Docket No. PITT 73-371-P, slip op. at pg. 22, January 31, 1975.

In the Wyoming Fuel Company case pending before Judge Morris, supra, MSHA relied on three decisions affirming violations of section 75.329, in support of its conclusion that "the Commission has treated this section as a valid safety standard that is not obsolete when an abandoned area has not been sealed or ventilated after 1970." See: Christopher Coal Company, decided by Judge Cook on October 18, 1976, affirmed by the Commission on October 25, 1978, IBMA 77-7, 1 MSHC 1688 (1978); Itmann Coal Company, 2 FMSHRC 1986 (July 1980), Commission review denied, September 2, 1980, 2 FMSHRC (September 1980); Mettiki Coal Corporation, 6 FMSHRC 1507 (June 1984).

The statutory construction issue raised by Zeigler was not raised or addressed in the three aforementioned cases.

Christopher Coal involved an established bleeder ventilation system, and the issue presented concerned the proper location for testing return air from a bleeder to determine whether there was compliance with the methane concentration limit found in section 75.329.

In Itmann Coal, former commission Judge Laurenson affirmed an imminent danger order issued by an inspector in September, 1979, citing a violation of section 75.329, for the failure by the operator to adequately maintain the ventilation in an abandoned area to continuously dilute, render harmless, and carry away methane and explosive gases. The cited area had previously been closed by an imminent danger order issued in October, 1969. Rather than attempting to abate the conditions which prompted the issuance of that order, the operator opted to abandon the affected area. Given the choice of sealing or ventilating the abandoned area by bleeder entries or bleeder systems pursuant to section 75.329, the operator chose to ventilate it, and a bleeder system ventilation plan was adopted and approved by MSHA. The plan included a provision requiring the operator to travel the bleeder system "if safe."

In Mettiki Coal, Chief Judge Merlin affirmed a violation of section 75.329, because of the failure by the operator to establish a bleeder system to ventilate a gob area. The air coursing through the gob area was not directed through the bleeder entries, and the misdirected air was the result of a roof fall which blew out a metal stopping. The violation was abated by the installation of permanent concrete stoppings, and Judge Merlin took note of the fact that there was some confusion by the operator as to whether a bleeder system plan had ever been approved for the mine area in question.

In Secretary of Labor v. Gateway Coal Company, 10 FMSHRC 1189 (September 1988), Judge Broderick affirmed a violation of section 75.329, because of the failure by the operator to ventilate a travelable portion of its bleeder system so as to dilute, render harmless and carry away methane within such areas. Citing Judge Laurenson's decision in Itmann Coal Company, *supra*, Judge Broderick concluded that section 75.329, has two distinct mandates: (1) ventilation in bleeder entries required where pillars have been extracted shall be maintained so as to dilute, render harmless and carry away methane within such areas and to protect the active workings of the mine; (2) air from such areas which enters another split of air shall not contain more than 2 percent methane, 10 FMSHRC 1192).

In Beckley Coal Mining Company, 3 FMSHRC 2593 (November 1981), Judge Melick vacated an alleged violation of section 75.329, which was issued because of the failure by the operator to reduce the methane concentration to below 2 percent in a bleeder system crosscut on an abandoned gob panel from which

pillars had been wholly or partially extracted. Judge Melick concluded that the question of whether a violation of section 75.329 exists depends on the adequacy of the ventilation system, and not solely upon the levels of methane found in any particular crosscut. The operator took issue with the inspector's methodology for evaluating the air movement in the cited area, and in vacating the violation, Judge Melick concluded that the only evidence to suggest the inadequacy of the ventilation system was the one time series of methane readings showing a non-explosive 2 percent to 3 percent methane concentration and the inspector's opinion that there was no perceptible movement of air. He gave greater weight to the operator's smoke tube tests, taken the day following the issuance of the violation, and which simulated the same conditions found by the inspector. Those tests showed that the released smoke moved out of the crosscut and into the bleeder. The inspector had relied on his opinion that the air movement was minimal, and he did not use an anemometer or smoke tube to measure the air movement.

In Greenwich Collieries, Division of Pennsylvania Mines Corporation, 8 FMSHRC 1390 (September 1986), I vacated an alleged violation of section 75.329, issued by an inspector in the course of a mine ventilation survey. The inspector issued the violation after finding a 3.3 percent methane accumulation at a bleeder evaluation point which had been approved by MSHA as part of the mine ventilation plan. I found no credible evidence to support any conclusion that the approved plan required all bleeder evaluation points to have methane readings below 2 percent, or that bleeder evaluation points were the only acceptable locations for conducting methane tests to insure compliance with the requirement found in section 75.329, that air leaving a gob area and entering another air split contain less than 2 percent methane. I found credible the operator's evidence that its methane readings indicated decreased levels of methane outby the bleeder evaluation points up to and including the mixing point before the air entered the return air split. Coupled with the fact that the operator's methane tests at a point before the air off the bleeder joined with the air off the return showed 1.3 percent methane, I concluded and found that the ventilation system was being maintained so as to continuously dilute, render harmless and carry away any explosive levels of methane.

In the Greenwich Collieries case, MSHA presented the testimony of Mr. John Kuzar, a ventilation specialist and field office supervisor. Mr. Kuzar confirmed that the mine ventilation plan permitted 2 percent methane at a bleeder evaluation point. He testified that the purpose of section 75.329, is to insure positive air pressure over a gob area to dilute and render harmless any noxious gases so that "you are showing it to the return," 8 FMSHRC 1398. Mr. Kuzar agreed that it was possible for air ventilation to go over a caved crosscut, depending on how tight it was, because "it's trying to get to the return," that the

distance travelled by any methane would result in diluting it as it is moving, and that any decreased levels of methane at locations where readings are taken would indicate that the air is diluting the methane and that it is being coursed out of the area, 8 FMSHRC 1410, 1411.

In commenting on a mine operator's application to MSHA for the establishment of bleeder evaluation points pursuant to section 75.329, Mr. Kuzar alluded to the fact that bleeder evaluation points were critical in mines developed "prior to the effective date of the law" because "in those days" "good bleeders" were not required and that mines were "normally pillared from the solid to the solid." Mr. Kuzar stated that "since 1969," most mine ventilation plans require "a bleeder system that goes around the entire perimeter of that gob" (8 FMSHRC 1399-1400). Mr. Kuzar's testimony lends support to Mr. Mitchell's testimony that the primary intent of Congress with respect to section 75.329, as well as section 75.329-1(a), which he viewed as an "add-on" regulation, was to address bleeders, and to require the construction of a bleeder system around mined-out areas of a mine which were in existence at the time these statutory and regulatory standards were promulgated and adopted.

As noted earlier, the statutory construction issue raised by Zeigler in the instant proceeding was not raised in Christopher Coal, Itmann Coal, or Mettiki Coal. Neither was it raised in any of the other aforementioned cases in which alleged violations of section 75.329, were cited (none of the cases involved citations of section 75.329-1(a)). In each of these cases, the mine operator had established bleeder systems which were incorporated as part of its MSHA approved ventilation plan for ventilating abandoned areas of the mine. In the instant case, the Zeigler mine has no bleeder entries or bleeder systems, and no pillar extraction has taken place in the cited area. Further, the applicable mine ventilation plan, as reviewed and approved by MSHA, does not cover abandoned mine areas, and contains no provisions requiring the ventilation of these areas. The only reference to the "deepest point of penetration," appears at paragraph 4, page 2, of the plan, but it refers to the "deepest point of face penetration, where coal is being cut, mined, or loaded" (Exhibit C-1).

Mr. Eslinger stated that section 75.329-1(a) has generally not been cited in his district because compliance is attempted through the use of a ventilation plan provision to assure "the same basic thing" required by the standard. He confirmed that the question of whether or not section 75.329-1(a), is limited to December 30, 1970, has been discussed within MSHA, and MSHA has taken the position that it is an absolute ongoing rule. However, Mr. Eslinger was unaware of any MSHA policy discussing the interpretation and application of this standard, and I have found none.

MSHA's proposed revisions of the Part 75 standards for underground coal mine ventilation, as published in the Federal Register on January 27, 1988, 53 Fed. Reg. 2382, as reported in the BNA Mine Safety & Health Reporter, pgs. 500-542, February 5, 1988, contain no commentary on existing standard sections 75.329 or 75.329-1(a). The proposed revisions contain a new definition of "worked out area," whether pillared or nonpillared, and it will include all areas within the existing definition of abandoned areas. A proposed new section 75.334, which is derived from existing section 75.329, would revise the requirements for bleeder systems and will establish ventilation standards for worked-out mine areas where no pillars have been recovered and areas where pillars are being mined. Sealing would be permitted in lieu of ventilating worked-out areas, and sealing would be required if the results of air measurements indicate that the ventilation system is not effectively moving gases out of a worked-out area. Proposed section 75.364, would require weekly travel to the area of deepest penetration, and measurements and tests to determine the effectiveness of the ventilation system.

Zeigler's evidence reflects that prior to its abandonment in November or December, 1987, the cited panel was being ventilated by an air course which circumvented the perimeter of the panel. After it was abandoned, Zeigler made plans to eventually seal the area after completion of development in another area, but continued to ventilate it. However, there is no evidence that Zeigler ever sought or received permission from MSHA pursuant to section 75.329-1, to continue ventilating the abandoned area and it has never been cited for failing to do so. The applicable ventilation plan contains no provisions or requirements for ventilating the area, and no explanation was forthcoming from MSHA as to why the ventilation plan was approved without such a requirement.

Although MSHA's conclusion that it must be assumed that Congress knew what it was doing when it repeated the language found in section 75.329 of the 1969 Act word for word in the 1977 Act and intended to continue the application of this section as an ongoing requirement for all underground mines is inviting, I find it less than persuasive. I agree with Zeigler's argument that the legislative history shows that Congress intended to leave the interim mandatory standards of Title III of the 1969 Act intact, leaving the business of promulgating new or revised standards to MSHA. I also agree with Zeigler's assertion that since Congress did not change Title III, the legislative history of the 1969 Act still serves as an interpretive statutory guide, and that the relevant legislative history is that which relates to sections 303(z)(1), (z)(2) and (z)(3) of the 1969 Act.

MSHA has not promulgated any new standards which supercede sections 75.329 and 75.329-1(a), and only recently engaged in rule-making proposing revisions of its Part 75 requirements for

underground coal mine ventilation. As noted earlier, MSHA's proposed revisions contain no commentary on existing standard sections 75.329 or 75.329-1(a), and MSHA has not published any definitive policy guidelines dealing with the interpretation and application of section 75.329-1(a). With respect to section 75.329, which is directed to bleeder systems (which are not used in Zeigler's mine), MSHA's current Program Policy Manual, July 1, 1988, discusses abandoned mine areas ventilated by bleeder systems and bleeder entries. The policy requires a mine operator to submit ventilation plans covering the use of bleeder entries, bleeder systems, "or equivalent means" to MSHA's district manager for approval. The term "or equivalent means" is not further explained. The policy further mandates the sealing of an abandoned area should the bleeder system prove inadequate, or in the event the methane concentrations exceed 2.0. However, if an operator can show that such conditions can be corrected by modification of the mine ventilation or bleeder system, it must apply to MSHA for approval.

MSHA's assertion that Mr. Mitchell acknowledged that section 75.329-1(a), should be applicable to present day mines must be taken in context. The record reflects that Mr. Mitchell qualified his statement. When asked on cross-examination "If the intent of 329-1(a) was . . . to require in abandoned areas to ventilate or seal, . . . shouldn't (that requirement) also be applicable to present day mines," Mr. Mitchell replied "It should be; it isn't" (Tr. 335) (emphasis added). Mr. Mitchell further testified as follows at (Tr. 323-324):

ADMINISTRATIVE LAW JUDGE KOUTRAS: \* \* \* [A]re you telling me that assuming that the general rule is that you leave abandoned areas alone and that's a matter of concern, then shouldn't MSHA have some clear standard or at least clarified or amended or gone through rule making to specifically and clearly require abandoned mine areas in all of the mines, that they be ventilated?

THE WITNESS: And the manner by which they enter -- define what they mean by ventilation.

ADMINISTRATIVE LAW JUDGE KOUTRAS: You think they should do that?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS: That hasn't been done. It's their judgment it's already on the books, 75.329-1?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS: You understand that?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS: You disagree?

THE WITNESS: I only disagree it cannot apply and cannot be intended to apply when written in 1970.

After careful consideration of the arguments advanced by Zeigler, I conclude and find that the legislative history of the 1969 Act, as cited and discussed by Zeigler in its brief, and the credible testimony of Mr. Mitchell, supports Zeigler's conclusion that Congress intended that section 75.329 apply only to abandoned mine areas already in existence when the 1969 Coal Act became effective. I find persuasive Zeigler's arguments that Congress's use of the past tense in the legislative history of section 75.329 demonstrates an intent to apply those requirements only to mine areas abandoned prior to December 30, 1970, and to require only those areas to be ventilated. I agree with Zeigler's assertion that if Congress had intended future application of section 75.329, it would have incorporated language mandating future compliance as it did in numerous other mandatory statutory provisions found in Part 75 (e.g. "in any coal mine opened after March 30, 1970," 30 C.F.R. § 75.226; "in the case of mines opened on or after March 30, 1970 or in the case of working sections opened on or after such date in mines open prior to such date," 30 C.F.R. § 75.330; "on or after March 30, 1971," 30 C.F.R. § 75.500; and "on or after March 30, 1974," 30 C.F.R. § 75.501).

I agree with Zeigler's assertion that section 75.329-1 was an "add on" to section 75.329, which addresses bleeder systems, and was intended to allow a mine operator to comply by building a bleeder system around an existing abandoned area. My interpretation of this section is that if an operator could not comply with section 75.329, by erecting a bleeder system by December 30, 1970, it had to seal the abandoned area or request approval from MSHA if it wished to continue ventilating the area by a ventilation method other than a bleeder system. Subsection (e) of section 75.329-1, required an operator to include a description of the alternative ventilation system proposed for the abandoned area. However, pursuant to subsection (b) of section 75.329-1, the request had to be submitted "in time to allow consideration of the request, to obtain approval, and to permit the operator to install the ventilation system, or to install seals in the event the request to ventilate is denied, on or before December 30, 1970." I construe these date references to be expiration dates, rather than effective dates, and I conclude that an operator would have been required to seal the abandoned area if its request to continue to ventilate the area were not approved, or the ventilation was not in place, on December 30, 1970. Sealing

would be accomplished pursuant to the requirements found in section 75.330.

MSHA's belief that acceptance of Zeigler's interpretation of sections 75.329 75.329-1, would result in serious safety consequences and would affect the application of other mandatory safety standards is not well taken. It seems to me that MSHA has other means available to require ventilation of an abandoned mine area to insure against buildup of unsafe levels of methane and other gases in such an area. The most obvious method is the ventilation plan approval process found in section 75.316. MSHA's suggestion that acceptance of Zeigler's argument with respect to the application of section 75.329-1(a), would lead to the conclusion that section 75.316 expired on June 28, 1970, is rejected. As correctly pointed out by Mr. Mitchell, the last sentence of this standard requires a mine operator and MSHA to review such plans at least every 6 months, and that Congress intended that such plans be submitted every 6 months following June 28, 1970. Mr. Eslinger confirmed that the phrase "or equivalent means" language found in section 75.329, for a ventilation system other than bleeder entries or bleeder systems contemplates a ventilation plan approved pursuant to section 75.316. Mr. Mitchell agreed, and confirmed that the phrase "or equivalent means" encompasses a ventilation system other than bleeders and that such a ventilation system must have MSHA's approval (Tr. 335).

Zeigler correctly points out that section 75.316, when read together with sections 75.316-1 and 75.315-2, clearly establishes that the ventilation plan provisions found in section 75.316, were intended by MSHA to currently apply to all underground coal mines. Under all of these circumstances, I conclude and find that the ventilation plan requirements found in section 75.316, are of current application and that compliance for insuring adequate ventilation of an abandoned mine area can be achieved through that procedure. However, for some unexplained reason, Zeigler's ventilation plan, which was last approved by MSHA on December 28, 1988 (Exhibit C-1), some 5 months before the issuance of the citation, contains no provisions for ventilating or sealing Zeigler's abandoned mine areas.

In addition to the use of section 75.316, I believe that mandatory safety standard sections 75.303, 75.305, 75.311, 75.312, 75.314, and 75.330, are viable and appropriate standards for dealing with any perceived or potential methane and gas hazards associated with abandoned mine areas, and may be applied if the circumstances warrant it. Zeigler's witnesses, Mr. Mitchell, and safety and health director David Stritzel, a former MSHA supervisory mining engineer, agreed that this was the case. Mr. Mitchell testified credibly that section 75.330 was intended to apply to sealing of abandoned areas after December 30, 1970, and that absent section 75.329, MSHA can still

require the sealing or ventilation of abandoned mine areas by exercising its authority under sections 75.316 and 75.330 to require ventilation or sealing of abandoned mine areas where appropriate. Further, promulgation of the revised regulations should provide MSHA with a direct and unambiguous means of insuring ventilation of abandoned mine areas.

Even if I were to conclude that sections 75.329 and 75.329-1(a), are viable and currently applicable standards, I would further find that in the absence of sealing, a mine operator would be required to ventilate an abandoned area by bleeder entries or bleeder systems. If bleeders cannot be used, an operator would have to adopt an MSHA approved ventilation plan pursuant to the requirements found in section 75.316, in order to insure that the "equivalent means" of ventilation referred to in section 75.329, is as effective as bleeders. In the absence of such a plan, the operator would have to seal the abandoned areas pursuant to section 75.330.

Since the evidence in this case establishes that the cited abandoned area in question was developed in December, 1987, I conclude and find that the cited mandatory standard section 75.329-1(a), does not apply to that area and that Zeigler was not required to ventilate the area pursuant to that standard. Under the circumstances, I further conclude and find that MSHA has not established a violation and the contested citation IS VACATED.

Even if I were to conclude that section 75.329-1(a), applied to the cited abandoned area, I would still vacate the citation based on a preponderance of the evidence which in my view establishes that the area was in fact being ventilated. My reasons for such a finding follow below. (In view of my findings and conclusions vacating the citation, I find it unnecessary to address the abatement issue raised by Zeigler).

The inspector charged Zeigler with a violation of section 75.329-1(a), for failing to ventilate the cited abandoned area, and the burden is on MSHA to establish that fact. However, the citation, on its face, states that the inspector could not determine whether the area was being adequately and completed ventilation because of the existence of massive roof falls. The falls prevented access by the inspector to the "head end of the section," and precluded any determination on his part as to whether or not the last open crosscuts of the rooms and entries were being ventilated so as to continuously dilute, render harmless, and carry away methane and other explosive gases within the section. The inspector believed that the only way to determine whether the abandoned area was being ventilated and where the air was being coursed is to physically walk and inspect the area.

According to the inspector's interpretation of section 75.329-1(a), if the deepest point of penetration on an abandoned

section cannot be readily traveled or inspected to determine whether the entire section is being ventilated properly, a violation of section 75.329-1(a), is established. In this case, the inspector made a determination that since no one could travel to the back of the abandoned section to determine whether the section was being ventilated, section 75.329-1(a) required that it be sealed. Although the inspector did not cite Zeigler with a violation for failing to seal the section, he believed that each place on the section which could not be travelled had to be sealed, and that if the direction of air travel through the section could not be determined, because of the inability to travel to these places, Zeigler would be out of compliance with the cited standard. He confirmed that Zeigler's approved ventilation plan contains no requirement that the deepest point of penetration be walked and inspected, and he conceded that the plan does not cover or require the ventilation of abandoned mine areas.

I find nothing in any of MSHA's mandatory ventilation standards which require a mine operator to walk to the deepest point of penetration to determine whether an abandoned mine area is adequately ventilated. Although this may be a desirable method for determining whether an abandoned area is adequately ventilated, I cannot conclude that it is the only method. Further, although such a requirement is found in MSHA's proposed ventilation regulations, they have yet to be promulgated and do not apply in this case.

The only evidence produced by MSHA in support of its conclusion that the abandoned area was not adequately ventilated so as to render harmless and carry away methane and other gases out of the cited abandoned panel is the smoke tube tests performed by the inspector at crosscut No. 13 and other outby locations. One smoke tube activated 4 or 5 feet outby the fall indicated that the air "went up and hung." A second smoke tube indicated air movement over the fall, but "slowly," and other smoke tubes reflected slow air movement over another fall, and air movement toward the return at another location. The inspector confirmed that even if his smoke tube tests had established that the smoke travelled in an inby direction directly over the fall area, the use of the smoke tubes would have made no difference, and he would have issued the citation anyway because he could not travel beyond the fall area at crosscut No. 13. He believed that section 75.329-1(a), required physical travel to the back of the abandoned panel to determine the adequacy of the ventilation.

In contrast to the evidence presented by the inspector, the credible, probative, and un rebutted testimony of Zeigler's ventilation expert Mitchell, including his ventilation survey and analyses conducted under accepted scientific principles and methodology which are not rebutted by MSHA, supports a reasonable conclusion that the cited abandoned panel was ventilated so as to

carry away and render harmless methane and other gases which may have existed on the panel, and that the air was being coursed through the panel and out of the return.

The survey and analyses conducted by Mr. Mitchell with respect to the area was accomplished under conditions substantially similar to those which existed at the time the citation was issued. MSHA's ventilation specialist Eslinger agreed that if MSHA were to conduct a ventilation survey similar to the one conducted by Mr. Mitchell, it would follow the same basic methodology used by Mr. Mitchell. Although Mr. Eslinger expressed some concern about the pressure differential results of Mr. Mitchell's survey and the integrity of the stoppings, I cannot conclude that these "concerns" rebut Mr. Mitchell's findings. Although Mr. Eslinger testified that he has observed crushed stoppings in the Murdock Mine, his observations were made "years and years ago, in the early seventies" when a variety of stopping-materials were used in the mine (Tr. 377). With regard to Mr. Mitchell's pressure differential study, Mr. Eslinger agreed that the method used by Mr. Mitchell, which included altimeter readings, pressure differences, flow of air, and methane concentrations, would be similar to any such study conducted by MSHA. Inspector Stritzel agreed that if a pressure differential were being maintained on the panel, it would indicate that the air was moving from high pressure to low pressure.

Mr. Mitchell concluded that the pressure differential on the panel was sufficient to establish air movement across the falls inby crosscut No. 13, a definite flow of air over the fall at crosscut No. 23, and a flow of air through the falls into the return side of the panel. He also concluded that the bottle samples taken by Mr. Roper established the probability of air sweeping behind crosscut No. 23 through the panel returns and that there was an established air intake and return despite the fall. Mr. Mitchell's testimony that the industry and MSHA practice for determining the adequacy or inadequacy of ventilation is by pressure differential studies stands unrebutted. His credible and unrebutted testimony regarding decreased concentrations of methane and carbon dioxide as the air moved through the panel from the intake to the return also supports his conclusion that the panel was being adequately ventilated.

In view of the foregoing, I would conclude that the preponderance of the evidence adduced by Zeigler supports its conclusion that the abandoned area was being ventilated and rebuts MSHA's conclusion to the contrary. In short, I would find that MSHA has failed to establish a violation and I would vacate the citation.

ORDER

In view of the foregoing findings and conclusions, Zeigler's contest IS GRANTED, and the contested citation IS VACATED.

  
George A. Koutras  
Administrative Law Judge

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/fb

# 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 1990

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 89-141  
Petitioner : A.C. No. 40-02017-03531  
v. :  
: Old Energy No. 1  
OLD ENERGY INCORPORATED, :  
Respondent :

## DEFAULT DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor,  
Office of the Solicitor, Nashville, Tennessee  
for Petitioner;  
No appearance on behalf of Respondent.

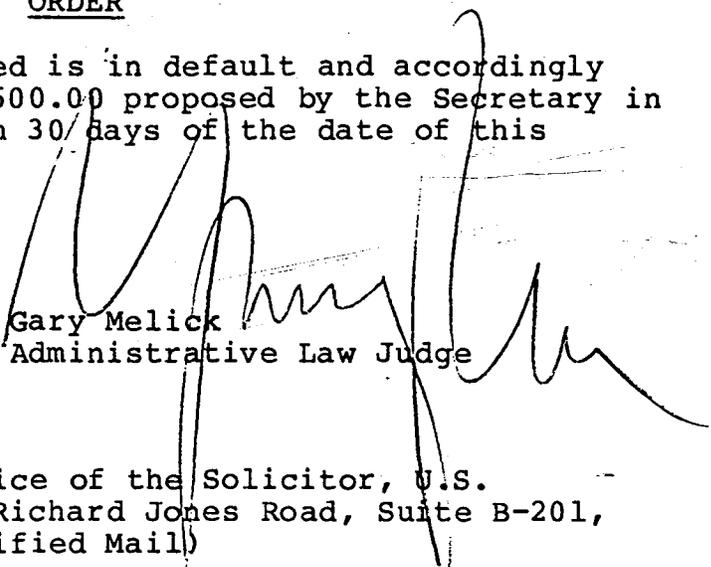
Before: Judge Melick

At hearings scheduled to commence on August 15, 1990 at 9:00 a.m., in Clinton, Tennessee no representative of Old Energy Incorporated (Old Energy) appeared. By telephone conference call on August 13, 1990, the operator's representative, James Lowe, stated that because of personal real estate business he would not appear at the scheduled hearing. Mr. Lowe was then advised that his purported excuse for non-appearance was not acceptable and that if no one authorized to represent the operator appeared at the hearing a default decision would be issued.

While a custodian of company records, Ms. Gail Ray, appeared and produced a company "Balance Sheet" as of April 30, 1990, and an "Affidavit" of James Lowe relating to an order not at issue in these proceedings, she stated that she was not representing Old Energy for purposes of this litigation. The unaudited balance sheet is in any event inadequate for purposes of establishing the effect of the penalty on the operator's ability to remain in business -- a criterion that may be considered in determining the amount of penalty to be assessed under Section 110(i) of the Federal Mine Safety and Health Act of 1977. In any event Ms. Ray stated that Old Energy is no longer in business and does not intend to resume business.

ORDER

Old Energy Incorporated is in default and accordingly the civil penalties of \$2,600.00 proposed by the Secretary in this case must be paid with 30 days of the date of this decision.

  
Gary Melick  
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S.  
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Mr. James Lowe, Superintendent, Old Energy Inc., Route #1,  
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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 28 1990

RICKY HAYS, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 90-59-D  
: MSHA Case No. BARB CD 89-32  
LEECO, INC., :  
Respondent : No. 62 Mine

DECISION

Appearances: Tony Opegard, Esq., Stephen A. Sanders, Esq.,  
Appalachian Research & Defense Fund of Kentucky,  
Inc., Hazard, Kentucky, for the Complainant;  
Timothy Joe Walker, Esq., Reece, Lang & Breeding,  
London, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant, Ricky Hays, against the respondent Leeco Inc., pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The complainant filed his initial complaint with the Mine Safety and Health Administration (MSHA), and after completion of an investigation of the complaint, MSHA advised the complainant by letter dated November 7, 1989, that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, on December 18, 1989, the complainant filed a complaint with the Commission.

The complainant, who was employed by the respondent as an electrician, alleges that he was discharged by the respondent's electrical maintenance foreman Clayton Hacker, on September 7, 1989, because of his failure to service (grease and oil) a mobile bridge carrier speed reducer grease fitting. The bridge carrier in question was a component part of the continuous haulage system used on the section. The complainant further alleges that the respondent required all of its electricians to service the

haulage system while it was in operation, that this is in violation of Federal law, and that his failure to service the part in question was based on his reasonable good faith belief that it was unsafe to service the system while it was in operation.

The respondent denies that the respondent's discharge was discriminatory, and it takes the position that the complainant was discharged not only for failing to service the component part in question, but also because of his failure to generally service the equipment as he was expected to do during his shift.

A hearing was held in Pikeville, Kentucky, and the parties filed posthearing briefs. I have considered their respective arguments in the course of my adjudication of this matter.

#### Issues

1. Whether the complainant's belief that the servicing of the continuous haulage system in question while it was in operation would be unsafe and hazardous, and would expose him to serious or fatal injuries, was reasonable and made in good faith.

2. Whether the complainant's failure to service the system in question because of his reasonable and good faith belief that to do so while it was in operation would be unsafe and hazardous and would place him at risk of serious injuries or death constituted protected activity.

3. Whether the complainant communicated his reasons for failing to service the system to mine management, and whether the respondent's discharge of the complainant in spite of his communicated safety concerns was justified or otherwise nondiscriminatory.

4. Additional issues raised by the parties are identified and disposed of in the course of this decision.

#### Applicable Statutory and Regulatory Provisions

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

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

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

#### Stipulations

The parties stipulated to the following (Tr. 8-10):

1. The mine where Mr. Hays was employed is a nonunion mine, and it is subject to the Act.
2. At the time of the discharge, the first and second shifts were production shifts, and the third shift was a non-production maintenance shift.
3. At the time of the discharge, Mr. Hays' hourly rate of regular pay was \$15.65, and his hourly overtime pay rate was \$23.47.
4. At the time of the discharge, the continuous haulage system in question was comprised of four bridges and three mobile bridge carriers which are referred to as "carriers."
5. Complainant's Exhibit C-8, is a Long-Airdox brochure regarding the continuous haulage system, and the circled portion in the listed specifications is the particular Model No. MBC-30C involved in this case.
6. The complainant's personal notebook or work log, received as evidence in this case, is an authentic document.
7. Respondent's "downtime records," provided to the complainant's counsel during discovery, are authentic business records.
8. Photographic Exhibits C-2 through C-7, taken during the complainant's discovery inspection of the mine are authentic and are what they purport to be.
9. The presiding judge has jurisdiction to hear and decide this matter.

#### Complainant's Testimony and Evidence

Ricky Hays testified that he is currently employed by the Golden Oak Mining Company in Knott County, Kentucky, as an electrician, and that he has been so employed since October 7, 1989. He previously worked for the respondent as an electrician for 2 years until his discharge on September 7, 1989. At the time of his discharge he was working the day shift at the No. 62 Mine, and was responsible for servicing the four bridges and three carriers on the continuous haulage system, including the digging arms of the mining machine, and the servicing entailed the greasing and oiling of the equipment. He also serviced two scoops and two roof bolters. He confirmed that the continuous haulage system was approximately 250 feet long, and as the miner

advanced, the bridge and bridge carriers also advanced by tramming on tracks (Tr. 15-23).

Mr. Hays stated that he had to grease the system "from the miner back to the bridge or belt line," and that there were approximately 100 grease fittings on the system. Each bridge and carrier had six grease fittings which he greased with a cartridge fed grease gun which he had to put on the ground so that he could have leverage to hold the hose from the ground and place it over the fitting to pump the grease. The equipment was oiled by means of a suction-type gun approximately 18 to 20 inches long, and the oil was sucked into the gun from an oil bucket by vacuum. He had to oil two speed reducers on the bridge and carrier conveyor, and an inner and outer carrier drop box which used gear oil (Tr. 25).

Mr. Hays stated that on the day of his discharge,--he was working on the day shift (7:00 a.m. to 3:30 p.m.), on the No. 2 section. A "pulling star," which is an axle gear on a conveyor shaft that pulls the conveyor chain used for coal loading, broke at 12:30 p.m., and he called outside for a replacement part and to report the downtime. Outside foreman Clyde Collins came to the area with the parts, and after looking around, he found a grease or dust cap that attaches to the end of the shaft on the offside of the speed reducer on the No. 1 bridge, and it had a broken grease fitting on it. Mr. Collins asked Mr. Hays how long the fitting had been broken off, and Mr. Hays told him that he was not sure, but that it could not have been long because he had serviced the equipment that morning and did not notice that the fitting was broken. Mr. Hays told Mr. Collins that he had last serviced the dust cap itself 5 days earlier, and when Mr. Collins asked him why he had not recently serviced it, Mr. Hays told him that it was too dangerous to do so while coal was being run because it was offset on the shaft, and that there was no way to connect a grease hose to the fitting while it turned, and "that it would get you against the rib or something" (Tr. 28).

Mr. Hays explained the differences between a grease fitting which is "offset" and one which is "centered." He confirmed that there are eight offset fittings on the haulage system, two on each bridge, and he indicated that these fittings turn with the shaft when the machine is operating and that it is impossible to attach a grease hose to the fitting when it is turning with the equipment running. However, he can attach a grease hose to a fitting which is centered, even though the machine may be running, but he must watch and stay out of the way of the machine (Tr. 31-36; Exhibits C-2 through C-5, C-7). He believed that servicing a centered fitting while the equipment was running is not safe because he could be run over, pinned against the rib, or "various things could happen," if he were unaware that the bridge carrier operator was moving the equipment (Tr. 40).

Mr. Hays believed that the width of the entries at the time of his discharge was 18 feet, and that the distance between the equipment and the ribs would vary depending on the width of the cuts. He stated that the equipment "rakes" or rubs the ribs most of the time, except in a break. He stated that injuries ranging from a "mashed finger to being killed" may result by trying to grease the system while it is in operation, and that the severity of any injury would depend "on what situation you was in." He explained the dangers involved in attempting to service the fittings while the equipment is running, and he confirmed that none of the grease fittings on the system in question had extended fittings (Tr. 40-44).

Mr. Hays stated that he completed the repair of the pulling star at approximately 3:00 p.m. Mr. Collins did not ask him about any other fittings or whether he had serviced any other equipment. Mr. Collins told him to gather up his tools and that "we were going outside," and did not inform him at that time that he had been fired. Mr. Hays stated that the broken grease fitting on the pulling star, or the fact that it had not been serviced that day, or the past 5 days, had nothing to do with the breakdown of the equipment (Tr. 46).

After reaching the surface of the mine, Mr. Hays was informed by the "light lady," Mabel, that there was a note for him to meet with his supervisor, maintenance foreman Clayton Hacker, in his office. Mr. Hays met with Mr. Hacker. The second shift electrician, Jerry Caudill, also known as "blockhead," was also summoned to the office and was present when he arrived. After Mr. Hacker arrived, he picked up the dust cap which had come off the bridge, and asked them when they last serviced it. Mr. Caudill stated that he had serviced it 2 days before, and Mr. Hays said that he had serviced it 5 days earlier than that. When asked for an explanation, Mr. Hays informed Mr. Hacker that he could not service it while the equipment was running because it was too dangerous and that there was no way to attach the grease hose while it was running, and Mr. Caudill "told him pretty much the same thing" (Tr. 48). Mr. Hays informed Mr. Hacker that "the only way you can do it is shut it down," and Mr. Hacker stated "we can't shut it down, . . . we can't stop running coal just to grease that" (Tr. 48).

Mr. Hays stated that he informed Mr. Hacker that he could stay between shifts to service the system, but that there was no way he could service the offset fittings while the equipment was running, and he explained his reasons to Mr. Hacker. Mr. Hacker informed him that "there wasn't no excuse" and that he (Hacker) had serviced the system while it was running and said "he knowed we could" (Tr. 49). Mr. Hays confirmed that on a previous occasion, Mr. Hacker had informed him that servicing the system while it was running would allow the grease to reach the bearing "real

good," and that if it were serviced while it was shutdown, the grease will come out (Tr. 50).

Mr. Hays stated that he and Mr. Caudill informed Mr. Hacker that they had been "riding the machine to service what we could on it, because there wasn't no room on the sides" between the equipment and the rib when it was cutting in a belt entry, and that he had to position himself on top of the machine to ride it. Mr. Hacker then discussed his maintenance program and informed them "we had to work together" and that "if one of us didn't do our part, then he couldn't have another one coming in and filling in for the one that couldn't do their part," and he then informed both of them that they were fired (Tr. 52).

Mr. Hays stated that Mr. Hacker mentioned no other grease fitting other than the grease cap he was referring to,--and that this was the same cap which he (Hays) had discussed with Mr. Collins underground. Mr. Hacker mentioned no other broken grease fittings, said nothing about his (Hays) failing to service any other equipment on the section, and said nothing about notifying him if he believed he could not service that particular fitting (Tr. 53).

Mr. Hays confirmed that he had previously discussed the servicing of the system with Mr. Hacker, and asked him if it was being serviced while it was running in the same way it was done at the No. 49 Mine where he (Hays) was assigned prior to his transfer to the No. 62 Mine, and that Mr. Hacker told him that it was. Mr. Hays confirmed that 2 or 3-days prior to his discharge, he asked Mr. Hacker if he could stay late to service the system. Mr. Hays stated that the maintenance system at the No. 49 and No. 62 Mines were the same, and he acknowledged that although he serviced the system at the No. 49 Mine while it was running, he complained to Mr. Hacker that he could not do it because it was dangerous. Mr. Hacker informed him "you do it" or "he would replace us" (Tr. 54-56).

Mr. Hays stated that he regularly greased and oiled the system while it was running on a daily basis while he was employed on the day shift at the No. 62 Mine. However, he only serviced the grease fittings which were centered, and not the ones which were offset, while the system was running (Tr. 57). Mr. Hays stated that he was able to service the grease fitting which was discussed with Mr. Hacker when he was fired 5 days earlier because the power and equipment was down and "I had a chance to get them" (Tr. 58).

Mr. Hays explained how he serviced the system by "riding it" while it was in operation and trammed. He stated that because of the location of some of the grease fittings, he had to lay on top of the machine in order to reach them, and that he would have to position himself between the equipment and the coal rib to reach

others. In order to reach the carrier bridge grease block which has five grease fittings, he would have to lay on the machine and reach down, and that there was a danger of "just getting you against the top" (Tr. 60-65, exhibit C-6).

Mr. Hays confirmed that he knew it was illegal and unsafe to service the system while it was in operation, but did it because "I was told to either do it or be replaced" (Tr. 66). He stated that the system had never been intentionally shutdown and locked out on any production shift so that he could service it, but he did not know whether this was ever done during the third or idle shift (Tr. 67).

Mr. Hays stated that if the system were deenergized and locked out so that he could service it, it would take him 45 to 75 minutes to grease all of the fittings. It would take approximately 45 minutes to 1 hour to check the oil and oil the system, and to do both together, or to completely service the entire system, it would take approximately 1 hour and 45 minutes to 2 hours and 15 minutes (Tr. 71). If an equipment breakdown occurred during the shift, he would be responsible for making the repairs rather than servicing the system while it was down (Tr. 72). He confirmed that during the last week of his employment, he was responsible for servicing all of the equipment on the section, except the scoops. During the changing of the continuous miner bits in the last week of his employment, he would grease the miner digging arms, and would sometimes have 2 or 3 minutes to check the bits and lugs or call out to report anything that required repairing (Tr. 74).

Mr. Hays identified a notebook which he maintained on a daily basis during his working shift (exhibit C-1; Tr. 76). He confirmed that his section foreman was aware of the fact that he was servicing the system while it was in operation because he observed him doing it all of the time. The foreman never told him not to service the system while it was running, never took any disciplinary action against him for doing so, and never deenergized the system before he serviced it (Tr. 78). Mr. Hacker was aware that the system was being serviced while it was running because "he is the one that instructed us to do so" (Tr. 78).

Mr. Hays stated that prior to his discharge, he had never been disciplined or "written up" for any improper servicing of equipment, and was never told that he was not servicing the equipment properly at the No. 62 Mine. He confirmed that he was out of work for 1 month after his discharge, and that his next job after his discharge was his present employment (Tr. 78).

On cross-examination, Mr. Hays testified as to certain entries made in his notebook. He confirmed that the equipment was supposed to be serviced every day, and that if he could not

service it, he was not required to tell anyone, and he "just let it go" if he could not service it (Tr. 79-83). He confirmed that he had previously serviced the offset speed reducer grease fitting while working at the No. 49 Mine, and he stated that "most of them stayed tore up. They didn't serve no purpose. No one really worried about it" (Tr. 86). However, he could not service it while it was running, and only did so "when it was off. When you got a chance." He stated that the haulage system in question is approximately 2-1/2 feet high, and that the grease gun hose that he uses is 18 inches to 2 feet long (Tr. 88).

Mr. Hays stated that depending on the cut and the individual operating the equipment, the system would advance or tram approximately 8 inches or a foot every 2 or 3 seconds (Tr. 89). He described how the system advanced while coal was being mined, and he explained how he would attach his grease gun hose to the fittings (Tr. 89-98).

Mr. Hays stated that the first time he complained to Mr. Hacker about his belief that it was unsafe to service the system while it was running was when he worked on the second shift at the No. 49 Mine. Mr. Hays believed that there were no bridge parts which could be safely greased while the system is running (Tr. 101). He confirmed that there were times during his shift when he observed the changing of the miner bits once, but he did not recall more than one change except for bit changes on the third or idle shift when overcasts were being cut. He would not record such bits changes in his notebook unless he helped change them, and he could recall no bits being changed more than once on any of his day shifts (Tr. 104-107).

Mr. Hays confirmed that the system was shutdown when belt setups were made, and that there were no belt setups made on his shift during his last week on the job, or during the 2 or 3 weeks when he worked at the No. 62 Mine. He stated that the system advanced 270 to 300 feet before a belt setup was made (Tr. 107).

Mr. Hays acknowledged that he was given a 3-day suspension by Mr. Hacker on July 27, 1989 for "unsatisfactory performance" for not servicing the brakes on a shuttle car. He explained that he had repaired the brakes, but when they went out 6 hours later, Mr. Hacker told him he had not "fixed them good enough where they lasted, you know, forever" and suspended him. He also acknowledged that he received prior written reprimands from other supervisors, for not installing a spillboard on a face drive on January 13, 1989, and for not hooking up a battery charger on December 7, 1988 (Tr. 111-112).

Mr. Hays confirmed that Mr. Hacker instructed him to service the system and that he pointed out the importance of servicing all of the speed reducers while the bearings were turning so that they could be serviced sufficiently. He agreed with Mr. Hacker

that it was best to grease the bearings while they were turning in order to draw the grease freely from the grease gun (Tr. 113). Mr. Hays acknowledged that even though he was an electrician, he was required to repair brakes and spillboards, and to do "whatever they told you to do" (Tr. 114).

Mr. Hays confirmed that he knows the respondent's mine safety director and some of his staff and has seen him at safety meetings. He also knew that there was a suggestion box at the mine for anonymous safety suggestions by miners, has taken advantage of it, but never in regard to grease fittings on a speed reducer because he "confronted" Mr. Hacker about that matter "face-to-face" at the No. 49 Mine (Tr. 116).

In response to further questions, Mr. Hays confirmed that he did not sign any of the prior three "disciplinary slips" because he did not agree with them (Tr. 117-118). Counsel Opegard agreed that two of the disciplinary actions were 3-day suspensions, and the other one was a warning (Tr. 119). Mr. Hays explained the system for deenergizing and locking out the equipment and the haulage system, and he stated that the amount of time required to deenergize the equipment would depend on its location at any given time and the location of the power center (Tr. 120-125). He also explained his notebook notations in reference to greasing the system bridge and bridge carriers (Tr. 126-128).

Mr. Hays stated that Mr. Collins did not blame him for the broken star piece gear mechanism and did not indicate to him that it had broken because he did not service it properly. Mr. Hays stated that it broke because "they were running rock and it wouldn't carry rock good" (Tr. 131). He stated that on the day of his discharge Mr. Hacker mentioned his prior disciplinary actions, as well as those of Mr. Caudill "right before he fired us" (Tr. 131). He confirmed that he tried to get his job back after he was fired, spoke to the safety department, and tried to get an appointment with the company president, but that "they called me back and more or less made fun of me" (Tr. 133).

Mr. Hays stated that he never complained to the safety department about being required to service the equipment while it was being operated, but did complain to Mr. Hacker, his immediate boss. Mr. Hays acknowledged that he has observed federal and state inspectors at the mine, but never mentioned that he had to service the equipment while it was running, and he was certain that the respondent had never been cited for servicing the equipment while it was running, and if it had "it would have warned us about it, you know, not to do it, while they was there" (Tr. 135). He confirmed that he was not aware of any miner safety representative or safety committee at the mine, and that if he had any safety problem he would go to his boss "through the chain

of command." He acknowledged that he could have gone to the safety department, but never did (Tr. 137).

Jerry M. Caudill testified that he is employed by the Blue Diamond Coal Company, and previously worked for the respondent. He confirmed that he was fired on September 7, 1989, with Mr. Hays, but that his discharge was changed to a 3-day suspension and he was assigned to the No. 29 Mine where he worked for a week and a half before going to work at his present job. He confirmed that he worked as a second shift electrician for the respondent, and that he is a certified mine foreman. His electrician duties entailed the repair of all of the equipment, including the continuous haulage system, bolters, scoops, and miner digging arms (Tr. 141).

Mr. Caudill explained what transpired on the day that he and Mr. Hays were fired, including their discussions with Mr. Hacker. He confirmed that Mr. Hays told Mr. Hacker that he could not grease the grease cup fitting which Mr. Hacker had referred to while the system was running because it was offset on the shaft. Mr. Caudill stated that he told Mr. Hacker the same thing, and that it was too dangerous to grease it while it was running. Mr. Hacker replied that "he wasn't going to hear no excuses. It had to be done during our shift" (Tr. 143). Mr. Hays asked Mr. Hacker if the system could be shutdown for service, and Mr. Hacker "said we had to find time to do it. But it had to be done during our shift, but they would not shut it down to grease it" (Tr. 144).

Mr. Caudill stated that when he worked as a second shift electrician he was expected to service and oil the haulage system while it was running and "that this is the only way to do it" (Tr. 145-146). If the system were down it would take someone 2-1/2 to 3 hours to do "a real good job" greasing and oiling the entire system, and 1 hour or 1-1/2 hours to grease only the fittings. It was not possible to grease the system every shift while it was running (Tr. 147).

Mr. Caudill identified photographic exhibit C-6, as a bridge carrier, and he explained that he could grease part of the carrier by walking next to it with a grease gun, but would grease the top fittings while seated on top of the carrier start box while the machine was moving and while coal was being cut. If he were servicing the fittings from the side, the distance between the machine and the rib would sometimes be a foot and a half, "hardly no more than that," and this presented a danger in that "if they move nary a bit, they'll drag you into the rib. You can't get away from it" (Tr. 149). He has never been injured trying to service the system, but stated that "I've been lucky, I've went under through it before to get away from it" and that he has had close calls more than once (Tr. 149).

Mr. Caudill stated that he never saw the system deenergized specifically for the purpose of greasing it, and he confirmed that Mr. Hacker knew that he was servicing it while it was moving because he observed him doing it. Mr. Hacker never warned him not to do it, never disciplined him for doing it, and never told him to deenergize the system before servicing it. His section foremen were also aware of the fact that he was servicing the equipment while it was running because they too observed him doing it (Tr. 151). Mr. Caudill stated that he complained to his section foreman and outside foreman about servicing the system while it was running, and that the section foreman would say nothing about it, and the outside foreman did not want to talk to Mr. Hacker about the matter. Mr. Caudill stated that he complained to Mr. Hacker that it was dangerous to service the system while it was operating on at least four occasions, and that Mr. Hacker told him he "wasn't going to hear no excuses," and that "we would do it during our production shift if we stayed there" (Tr. 153). Mr. Caudill also asked to stay over on overtime to service the system on the third shift, but Mr. Hacker "said no" (Tr. 153).

Mr. Caudill did not believe it was safe to service any of the fittings on the system when it was running, regardless of the fact that they were offset or on the center of the shaft, because "they go to the face and come back so rapid that you can't get away from the equipment." The system is so long that if he is on the corner and the equipment is on a break, "the whole thing comes over all at once and you ain't got nowhere to run unless you go over top of it or through it" (Tr. 154). He believed that he could be injured while trying to grease the system "on the run," and that "it could be drug plumb over top of you or get caught in a conveyor chain or slide pan. You could get caught in them" and be killed "real easy" (Tr. 154).

Mr. Caudill stated that on the day of the discharge Mr. Hacker said nothing to him or to Mr. Hays about any other grease fittings other than the one that he had in his hand. Mr. Hacker said nothing about their failure to service any other equipment on the section other than that one grease fitting, and he did not mention their failure to service the bolters or miner digging arms. Mr. Hacker did not tell them that they should have contacted or notified him if they could not service the fitting in question (Tr. 156). The only reason he could think of for his discharge was the grease cap that Mr. Hacker was holding (Tr. 157). His discharge was changed to a suspension after he spoke with another official at the company's London office (Tr. 157). That individual made Mr. Hacker put him back to work, but Mr. Hacker said some bad things about him and humiliated him and he left later because "I didn't feel right working for the company" and quit. He did not know why Mr. Hays did not get his job back (Tr. 159-160). Mr. Caudill confirmed that he had received prior disciplinary warnings or suspensions before his discharge

at the No. 3 Mine 3-years ago, but they were not related to his work (Tr. 160).

On cross-examination, Mr. Caudill explained that his prior disciplinary actions were not related to his work and that he had a "habit of bad language" and had personal differences with a supervisor. He admitted that when he and Mr. Hays were called to Mr. Hacker's office he told Mr. Hacker "that he knew that Hays was going to get him fired" (Tr. 162). He explained that he made that statement because approximately a month earlier he would find three bridge speed reducers "bone dry" on his shift after he had serviced them and he believed that he was going to be fired by Mr. Hacker because of this (Tr. 162-163).

In response to further questions, Mr. Caudill stated that he informed a second shift mechanic foreman about the dry reducers and took him into the mine and showed him how he was greasing them and that the foreman stated that "he didn't see how we could do it, oil that stuff, and keep it up" (Tr. 168). Mr. Caudill also confirmed that he wrote up and reported the conditions of the reducers. He stated that he and Mr. Hays were both fired "over the grease cap" and that Mr. Hacker blamed them for it, and stated "I can't fire one of you without letting you both go because both of you were supposed to be doing that job," and that "he wouldn't listen to nothing," even after he told him that he needed his job. Mr. Hacker told him "it ain't my damn problem" (Tr. 170).

Mr. Caudill stated that he did not know whether the respondent had ever been cited for servicing the system while it was running, and that he contacted a federal inspector after his discharge, and the inspector told him he couldn't be fired. He also complained to a federal inspector who inspected the mine before his discharge but nothing came of it. Mr. Caudill confirmed that he never complained to the safety department (Tr. 171).

Mr. Caudill explained that his complaint to Federal Inspector Franklin Nahew was about greasing the system while it was running, and that he complained during the "middle of 1988." His complaint concerned the Leeco No. 22 Mine, where the same system of servicing the equipment while it is operating is used. He stated that "they do it the same way at all their mines" (Tr. 173). He confirmed that he knew some of the training instructors in the safety department, and that there was a suggestion box available for anonymous safety complaints and that he used it to complain about greasing the haulage system. He signed the complaint, but a foreman cut the lock off the box and took out his complaint. The foreman was disciplined for doing this and was nearly fired, and he (Caudill) "got in trouble over it" (Tr. 170). He also confirmed that the dried up condition of the reducers which he thought he was going to be fired over, and

which caused him to make the statement that Mr. Hays was going to get him fired, was caused by the equipment which had been reported by him two or three times during the week he was fired, and not by Mr. Hays (Tr. 180).

William Craft testified as to his mining background and experience, and he confirmed that he formerly served as the MSHA District Manager in Madisonville, Kentucky. He taught classes at the federal mine academy, and served on a committee which recommended the promulgation of mandatory safety standards, and was familiar with the standards. He has been self employed as a mining consultant since 1981, when he retired from MSHA because of a back disability. He has testified in many proceedings before the Commission's judges and has been qualified as an expert on mine safety matters (Tr. 180-184). Mr. Craft was accepted as an expert witness, over the objection of the respondent (Tr. 185-186).

Mr. Craft confirmed that he toured the No. 002 section of the No. 26 Mine on April 24, 1989, and inspected the continuous haulage system in question. He also confirmed that he has reviewed the depositions of Mr. Collins and Mr. Hacker, as well as others, and has heard the testimony of Mr. Hays and Mr. Caudill. He has also reviewed the manufacturer's manual concerning the haulage system (exhibit C-8), and he explained the respondent's mining method used on the section in question (Tr. 186-192).

Mr. Craft stated that the system is greased and oiled manually, and he explained that when a grease hose is attached to a speed reducer with a fitting which is centered, the hose will stay still while the shaft turns, and if it is attached to a fitting which is offset, "the whole thing goes around" (Tr. 198). He believed that servicing the system while it is in operation presented a "dangerous situation" (Tr. 200). In addition to his opinion that it was dangerous, Mr. Craft cited mandatory safety standard sections 75.509 and 75.1725(d), which he believed prohibited the lubrication, servicing, or greasing of the system while it is in operation (Tr. 201-205).

Mr. Craft explained why he believed it was dangerous to grease an offset speed reducer fitting with the equipment energized, and he believed that the system could not legally be greased and oiled without deenergizing the power and locking out the system (Tr. 206-207). He did not believe that the grease fittings can be safely serviced without first locking out the system at the power center, and he stated that "You've heard them testify they were hanging on the sides of it and on the top of it, that, in itself, would be enough to tell you that it wasn't safe" (Tr. 208).

On cross-examination, Mr. Craft stated that the words "work" and "equipment" found in section 75.509, cover greasing or lubrication on the haulage system in question, and that the system must be deenergized before this work is done (Tr. 208-209). He also believed that the use of a grease gun and the oiling of the system constituted "work" within the meaning of the standard (Tr. 210-211). If he were still employed by MSHA, he would either cite a violation, or issue instructions to cite a violation, for the lubrication of a bridge system without deenergizing it (Tr. 212). He would cite a violation of section 75.509, and 75.1725(c) or (d) (Tr. 213-215). Mr. Craft confirmed that when he visited the mine, he found no right angle crosscuts, but did find some crosscuts cut at 60 degree angles (Tr. 217).

Terry Richardson, third-shift electrician and foreman, testified that he was working as a "floater" on the second shift on the day Mr. Hays was discharged. He confirmed that he has worked with Mr. Hays on the third shift at the No. 62 Mine, and that he considered Mr. Hays to be a hard worker. Mr. Richardson was familiar with the haulage system, and stated that he was responsible for servicing it on the second shift. He confirmed that he has serviced the system while it was operating and not deenergized or locked out and that "in some ways" it was dangerous. He stated that "about the only thing you've got to watch--any piece of equipment that is moving, you've got to watch it. There is always a possibility that you could get mashed. You've got to be careful" (Tr. 223). He believed that it would be possible for an electrician to be injured or killed while attempting to service the system while it was in operation (Tr. 224).

Mr. Richardson believed that it would take 2-1/2 hours to service the entire system, and he doubted that there was that much available "down time" during a production shift to completely service the system. He stated that when he serviced the system while it was operating he tried to position himself "in the safest place you could" so that he could not be "caught" (Tr. 225). He would position himself on top of the equipment when it was in low coal, and that "most of the time you're beside of it" and that there is always a danger of getting mashed into the rib (Tr. 226). He confirmed that after Mr. Hays was discharged, his foreman Bobby Strunk commented to him (Richardson) that he believed Mr. Hays was a good worker (Tr. 226).

On cross-examination, Mr. Richardson stated that he has worked at other mines and believed that the respondent's mine is "as safe as any mine that I've worked in" (Tr. 229). He confirmed that he has serviced shafts on the system while the conveyor was off and "while they were backing out of a cut." In those instances, he would be walking alongside the miner if the coal were high enough, but "most of the time you would probably be on your knees. You try to get it as they back up." He

believed that he would be exposed to a danger while doing this at certain times when the equipment is running and the operator may not see him, but that he tries to let the operator know where he is "most of the time" (Tr. 230). He confirmed that he was never specifically told to walk alongside the equipment to service it, but that "you've got to do what you need to do to service it" (Tr. 230).

Mr. Richardson confirmed that he has serviced the speed reducer grease fitting which is offset on the shaft, that it cannot be serviced when the conveyor is running, and that "you try to service it when you get a chance, when this equipment -- if it's stopped or if they're backing up" (Tr. 231). If the system conveyor chain is running, "there is no way you can grease it." He can keep up with the system while it is moving if he were walking, but if he were crawling, he cannot. He can service some of the system fittings if it is not advancing, and "you have to get what you can. Try to get them all, if you can" (Tr. 232). He also stated that "it's pretty much left up to the repairman. You just got to get it done" (Tr. 233). He makes an attempt to grease all fittings, and if he cannot, he tries to tell the oncoming shift repairman about the ones that he has not serviced (Tr. 235).

Mr. Richardson stated that he has not discussed the servicing of the system while it was running with his foreman or with Mr. Hacker, and he could not recall discussing this with Mr. Hays (Tr. 236). Mr. Richardson believed that it would be illegal to service a piece of equipment while it was energized, and that "just your general mine law" would prohibit this (Tr. 240). He confirmed that this particular question has never been discussed by the foreman and the crew.

Marty Lewis, roof bolter operator, testified that he worked with Mr. Hays, and that Mr. Hays was responsible for servicing, or greasing and oiling his machine every day. He had no complaints about Mr. Hays' servicing his machine, and prior to his discharge had no problems or breakdowns because the machine had not been properly serviced by Mr. Hays. He confirmed that Mr. Hays serviced the bolter during the shift, and he has also observed him servicing the haulage system during the shift. The system was not deenergized when Mr. Hays was greasing it, but if electrical repair work were required, the system would be locked out. Mr. Lewis believed that Mr. Hays was a good worker, and he heard foreman Bobby Strunk state that Mr. Hays was a good worker but "wasn't a good enough electrician to be on the section" (Tr. 241-247).

On cross-examination, Mr. Lewis stated that he could not recall helping Mr. Hays grease his machine, but he has helped other repairman with the greasing. He confirmed that he has never been required to work under dangerous conditions, and he

believed that the respondent was "a lot safer than any coal company I've ever worked for" (Tr. 248).

Ricky Eversole, roof bolter operator, confirmed that he has worked with Mr. Hays and considered him to be a good worker. He had no problems with Mr. Hays' servicing of his machine, and stated that Mr. Hays serviced it regularly (Tr. 249-252).

On cross-examination, Mr. Eversole could not recall specifically helping Mr. Hays to grease his bolter, but that he would have done so if he asked (Tr. 252). He would also have helped other repairman if they had asked him to.

Dewey Eldridge, miner operator, testified that Mr. Hays was responsible for greasing and oiling the gathering arms of his machine while he (Eldridge) was "setting bits." He had no complaints about the manner in which Mr. Hays serviced his machine, and had no problems with any broken grease fittings that were not being replaced. He confirmed that Mr. Hays serviced the haulage system while it was in operation, and he never knew the system to be locked out while Mr. Hays was servicing it (Tr. 253-256).

On cross-examination, Mr. Eldridge stated that there were shifts when he changed the miner bits more than once, but that the electrician did not grease them everytime he changed the bits, and only greased them once. After this was done, the electrician could do something else. He had no knowledge about any instructions to an electrician as to when he was to grease the haulage system, and he believed that the respondent's mines are "as safe as the other mines" he has worked in (Tr. 257).

David Combs, mobile bridge carrier operator, explained his duties, and he confirmed that he has observed Mr. Hays greasing and oiling the system. He stated that he had no complaints or problems with Mr. Hays' servicing of the mobile bridge carrier, but he did not know whether Mr. Hays ever serviced it while it was in operation. He confirmed that the power was on while Mr. Hays serviced the system, and he never saw the system shut-down or locked out at the power center while it was being serviced (Tr. 258-262).

On cross-examination, Mr. Combs stated that he worked 1 week with Mr. Hays on the same shift, and he could not recall whether he ever saw Mr. Hays greasing the equipment while it was not in operation. He confirmed that there is a block of grease fittings in front of the control station on the bridge carrier where several hoses come together from different parts of the carrier, and that he can see them while he is operating the carrier. If a repairman was greasing those fittings, he could observe him and would not start up and possibly injure him (Tr. 263).

In response to further questions, Mr. Combs confirmed that there are other operators for the other mobile bridge carriers on the system. During the week that he worked with Mr. Hays, there was an average of two bridge carriers on the system, and he identified a photograph of a bridge carrier similar to the one that he operated. He confirmed that he would be seated at his control compartment looking forward, and that he could see a serviceman such as Mr. Hays at all times while working on that part of the system, if he were "standing erect or hunched over." However, if he were kneeling down to grease something, he could not see him (Tr. 265). He confirmed that Mr. Hays serviced the system while it was being trammed, and that he has observed Mr. Hays around the machine while it was standing still "for a matter of minutes," but it was still operating with the rest of the system, and that he could see him if he were not lying down. If Mr. Hays was at the rear of the machine, he could not see him unless he turned around to look (Tr. 268).

Mr. Combs stated that while seated on the "onside" of his machine, he could not see Mr. Hays if he were servicing the other side, or "offside" of the machine and was kneeling or crouched down (Tr. 268). He confirmed that the bridge carrier and the entire haulage system, continues to move forward as the miner is cutting coal, and the system "follows the miner" (Tr. 268). He confirmed that he has an emergency stop control on his carrier that can keep the entire system from advancing and that he can stop the system to prevent someone from getting hurt. However, he could not deenergize the miner machine using this control. Although he could shutdown the miner, he cannot start it up again (Tr. 270).

Clifton Lewis, Jr., testified that he was working with Mr. Hays as a scoop operator at the time of his discharge. He did not believe that Mr. Hays was responsible for servicing the scoops, but he did observe him "help grease it every now and then" (Tr. 273). He has observed Mr. Hays service the haulage system while it was in operation, and he never saw the system deenergized or locked out while Mr. Hays was performing this service (Tr. 274).

On cross-examination, Mr. Lewis stated that he was present with Mr. Hays prior to his discharge at a meeting which took place with Mr. Collins and Mr. Hacker, and the scoop operators were informed at that time that they would have to grease the scoops. He stated that he has worked at other mines, and compared to these mines, the respondent's mine, in terms of safety, was "A-1, excellent, good" (Tr. 276).

Mr. Lewis confirmed that he had no problems with Mr. Hays' job performance when he worked with him (Tr. 278). He believed that the scoop operators were assigned the task of servicing the scoops so that the repairman could have more time to do what they

were supposed to do (Tr. 280). He confirmed that he shuts down his battery powered scoop to grease it, and that he can grease it anytime during the shift (Tr. 282).

Gary R. Caudill, scoop operator, testified that he worked with Mr. Hays, and although Mr. Hays has helped him grease and service the scoop, Mr. Caudill greased his own scoop and was responsible for servicing it. He stated that no one was ever specifically assigned this service work, but that a meeting was held prior to Mr. Hays' discharge, and the scoop operators were given this responsibility. He had no complaints about Mr. Hays when he serviced his scoop, and he has observed Mr. Hays servicing the haulage system while it was in operation (Tr. 286). In terms of safety, and compared to other mines he has worked in, he believed that the respondent's mine was "pretty good" (Tr. 286).

#### Respondent's Testimony and Evidence

Richard Garcia, respondent's general manager, testified that he is responsible for the operation of five underground mines operated by the respondent, and that his responsibilities include production, safety, personnel, and equipment. Prior to his employment with the respondent, he worked for MSHA as the assistant district manager, District No. 7, Barbourville, Kentucky. Mr. Garcia identified Exhibit R-1, as a copy of a form that he uses for the reporting of downtime on each of the respondent's mine sections, and he explained how the information is reported to him and recorded on the form (Tr. 7-15).

Mr. Garcia stated that he became aware of the discharge of Mr. Caudill and Mr. Hays after receiving a telephone call from Mr. Collins or Mr. Ron Helton, the mine superintendent, and that it was normal policy to inform him of any discharges. He then met with Mr. Jerry Elliott, the respondent's personnel manager, and they reviewed the personnel file of the two employees. Based on the information in their files, they decided to let Mr. Hays' discharge stand, and that Mr. Caudill would be suspended for 3 days and transferred to another mine. Mr. Caudill's suspension, rather than discharge, was based on the fact that he had no recent disciplinary actions against him justifying a discharge (Tr. 17).

On cross-examination, Mr. Garcia confirmed that Exhibit C-12, is a copy of the same downtime form that he previously referred to, and he confirmed that he had no personal knowledge of the accuracy of the information recorded on the forms, and that he simply records what is reported to him from the superintendent, and that the superintendent would obtain the information from a section foreman. He conceded that the information could be inaccurate (Tr. 20).

Mr. Garcia confirmed that he could recall no conversations with Mr. Collins or Mr. Helton at the time he was informed about Mr. Hays' discharge indicating that Mr. Hays told mine management that he believed it would be unsafe to grease the haulage system while it was in operation. He also could not recall being told that Mr. Hays was discharged for any reason other than his failure to lubricate the system, and that "it was basically a failure to perform the job as he was assigned is generally the way it was put to me" (Tr. 21). He further confirmed that the respondent has no "hard and fast rule" as to when an employee should be discharged, and that it would depend on the circumstances. The fact that an employee may have been suspended does not mean that he will automatically be discharged (Tr. 21-22).

Mr. Garcia confirmed that he was involved in the transfer of Mr. Collins as superintendent from the No. 47 Mine to the No. 62 Mine, but he could not recall whether he was involved in the decision to rehire Mr. Collins, but that he would have been involved in any recommendation to do so. He was aware of the fact that Mr. Collins had been discharged for smoking underground, and confirmed that he was involved in that discharge. He was also aware of the fact that Mr. Collins had been previously discharged for leaving a mine area unbolted without gobbing it off, but that this occurred prior to his employment with the respondent. Although he was concerned about these discharges, Mr. Garcia explained that the respondent needed qualified foremen, and that Mr. Collins was told "to clean up his act" and was informed that the respondent would not tolerate future acts of this kind. Mr. Collins' good reputation for producing coal was a part of the decision to rehire him (Tr. 25).

Mr. Garcia could not recall the details of what was in Mr. Hays' personnel file when he reviewed it at the time of his discharge, and he confirmed that he does not generally determine the merits of any prior disciplinary actions. He has had an occasion to meet with employees to discuss such matters, but could recall no further discussion in the case of Mr. Hays (Tr. 28). He confirmed that Mr. Hays never contacted him about his discharge, and he could recall no further information from Mr. Hacker concerning the matter. If an employee believes that he is wrongfully discharged, he can seek an appointment with someone "in the main office" to discuss the matter, and Mr. Hays made no attempts to contact him about the matter, but may have done it with someone else, in which case "I would have been involved in any discussion at that point" (Tr. 31). He believed that Mr. Hays could have discussed his case with someone "higher in management than his supervisor" or with the safety department, and that all employees have an opportunity to express safety concerns if they are required to do an unsafe job (Tr. 32).

Mr. Garcia confirmed that he had no knowledge of any company policy regarding the servicing of the haulage system, and that he

knew of no policy requiring anyone to lubricate a machine while it is in motion or while it was being trammed from place to place. He believed that Mr. Hays should have complained earlier to someone higher in management than his supervisor if he believed that he was in danger or at risk of getting caught between the machine and the rib or being run over while servicing the machine. Suggestion boxes are available for employees to use and they are encouraged to report safety problems to the safety department. He could not recall any other personnel problems with Mr. Hays other than the prior disciplinaries which were in his file, and he made no further inquiries concerning Mr. Hays' work record (Tr. 35-38).

Mr. Garcia stated that servicing the haulage system while it is in operation would be a violation of section 75.1725, but not section 75.509, which deals only with electrical work. Section 75.1725 only requires that the power be off at the equipment itself when it is being serviced, but it need not be tagged and locked out. Section 75.509, would require the equipment to be locked out and tagged only when electrical work is being done (Tr. 38-40).

With regard to some of the downtime entries made on Exhibit R-1, Mr. Garcia confirmed that the haulage system would be in use when rock was being cut, and that it was very likely that an electrician such as Mr. Hays would have performed some or all of the work connected with the tightening of the chains, and helped out in the cleaning and setting of bits (Tr. 42).

Mr. Garcia conceded that he may not have known about Mr. Hays' contact with Mr. Elliott after he was discharged, and that he (Garcia) did not contact Mr. Hays prior to his discharge "to get his side of it," and he did not speak with Mr. Hacker (Tr. 44). He first learned that Mr. Hays had raised a safety concern as part of his discharge when he saw a copy of his complaint filed with MSHA (Tr. 49).

Mr. Garcia had no knowledge of whether the servicing of the system was ever done on the third shift, and he would not approve of shutting down for an hour or an hour and a half during a production shift in order to service the system. He would also avoid shutting down the system for 30 or 45 minutes for servicing during a production shift. He confirmed that pursuant to section 75.1725(c), maintenance could not be performed on the system unless the power was off and the system blocked against motion. However, the power would only have to be off at the machine, and it would not be required to be locked and tagged out for lubrication. He believed that "repairs" would include lubrication under subsection (c), and he assumed that lubrication is treated separately in subsection (d) because MSHA did not require tagging and locking out when equipment is lubricated (Tr. 52).

Clyde Collins testified that he was the mine superintendent when Mr. Hays was discharged, and that he came to the No. 62 Mine from the No. 47 Mine in July, 1989. Mr. Collins confirmed that he had been fired by the respondent on three occasions, and that his last discharge was 6 or 7 years ago (Tr. 57). He was fired for smoking and having smoking articles in his possession, driving deep cuts, and refusing an assignment to another mine section (Tr. 58).

Mr. Collins stated that he went underground on the day Mr. Hays was discharged to check on a bridge sprocket which had been reported out on a prior shift and to check another bridge sprocket which had been reported out by the immediate night shift. He found that the speed reducer shaft had a broken fitting and that it had not been greased. He checked the rest of the system and found several fittings broken off, and that "a lot of it hadn't been serviced. It had just been neglected" (Tr. 64). He spoke with Mr. Hays and asked him if he had serviced the system within the past 2 days, and Mr. Hays replied that he had not, and did not know the last time he serviced it. Mr. Collins then called Mr. Hacker, the maintenance foreman, to come inside and check out the system. Mr. Collins confirmed that he is the immediate supervisor of Mr. Hacker, and that Mr. Hacker is Mr. Hays' supervisor. After checking the system for an hour, Mr. Hacker called Mr. Collins and asked him to come out and to bring Mr. Hays and his tool box with him. Mr. Hays went to Mr. Hacker's office, but Mr. Collins did not go with him, and did not speak with Mr. Hays again (Tr. 67).

Mr. Collins confirmed that it was within Mr. Hacker's discretion to discharge Mr. Hays. He also confirmed that Mr. Hays had never complained to him about any unsafe mine conditions, but that during a meeting a week or two prior to his discharge, he believed that Mr. Hays brought up the matter of servicing the system while it was running, and that he (Collins) informed the people at the meeting to service the equipment "while it was belting up" or when bits were changed, and if it could not be serviced during the shift it was to be reported (Tr. 68). Mr. Collins denied that he ever observed any repairmen servicing the system while it was moving, and that no one ever informed him that this was being done (Tr. 70).

On cross-examination, Mr. Collins confirmed that at the time he was last discharged by the respondent he admitted that he was smoking underground, and that most of his crew was also fired that time, including Mr. Hacker. He confirmed that he knew it was illegal to smoke underground, but allowed his crew to do it (Tr. 75). He also confirmed that he was fired for driving cuts deeper than permitted by the roof-control plan, and that he knew it was illegal, but did it anyway (Tr. 76).

Mr. Collins confirmed that he did not know Mr. Hays prior to July or August, 1989, when he became the superintendent at the No. 62 Mine, and was only familiar with his work at this mine. Prior to Mr. Hays' discharge, he had no concern about Mr. Hays' job performance other than his servicing of the system on the day of his discharge (Tr. 77). The meeting held prior to Mr. Hays' discharge concerned personnel on both of the mine sections, and he had no particular concern about Mr. Hays' job performance at that time, and no complaints were made to him about Mr. Hays prior to his discharge on September 7, 1989 (Tr. 78). He identified the particular piece of machinery that he was looking at on the day of the discharge as a broken sprocket on a bridge of the haulage system, and confirmed that Mr. Hays was in the process of repairing it when he arrived underground and called Mr. Hacker "to come in and check the equipment" (Tr. 70).

Mr. Collins stated that when he spoke with the MSHA special investigator who investigated Mr. Hays' complaint, he stated that he had asked Mr. Hacker to come underground to "Look at the bridge" because it had not been serviced. Mr. Collins stated that he also told Mr. Hacker to "check his equipment" because he had checked the entire system prior to calling Mr. Hacker and found other fittings which were broken and not serviced (Tr. 82). He could not recall whether or not he told the investigator about looking at the other equipment or about the other broken grease fittings, and stated that he told Mr. Hacker to "come in and look at the bridge" (Tr. 83).

Mr. Collins stated that he was not involved in the decision to discharge Mr. Hays, and that Mr. Hacker did not discuss his decision with him. He further confirmed that after Mr. Hacker came to the mine on the day of the discharge, he did not speak with him about Mr. Hays' job performance (Tr. 83). He stated that when the third shift mechanic told him on the day of the discharge that there was a problem with the servicing of the equipment, he did not tell him that he believed that Mr. Hays was not doing his job, nor did he mention anyone in particular who he believed was at fault (Tr. 84). Mr. Collins confirmed that after Mr. Hays informed him that he did not know when he had last serviced the system, he could have fired him, but did not do so. He also did not suggest to Mr. Hacker that some disciplinary action needed to be taken against Mr. Hays (Tr. 91).

Mr. Collins believed that while some of the haulage system could be legally serviced while it was in operation, the remaining portion did not have to be deenergized at the power center and locked out (Tr. 92). Mr. Collins conceded that in his pre-trial deposition he stated that the system had to be deenergized and blocked against motion in order to service fittings that could not be safely serviced while the system was in operation. He further conceded that he had previously stated that in order to service and oil the fittings, the equipment had to be locked

out at the power center. Mr. Collins stated that he misunderstood the questions asked of him during his deposition, and confirmed that the equipment must be locked out if electrical work is being performed. He explained that while servicing the system "all you would have to do is kick the breaker on the start box." After speaking with the respondent's safety department, he formed a different opinion about the need to lock the power out at the power center before servicing the system (Tr. 95).

Mr. Collins conceded that servicing the system while it is in operation would expose the serviceman to danger, and that it could result in his being caught between the equipment and the rib, or being run over, and that this could result in serious injury or death (Tr. 95-96). He confirmed that prior to the discharge Mr. Hacker never told him that Mr. Hays was not reporting to him that equipment needed servicing or repairing, and that neither he (Collins) or anyone else in management ever disciplined any employee for servicing the system while it was in operation (Tr. 97). He confirmed that at least five people on different shifts were responsible for servicing the haulage system, and when the prior shift mechanic told him that the system was not being serviced, Mr. Collins did not conclude that this was Mr. Hays' fault, and he simply concluded that "it wasn't being serviced" (Tr. 114). He also concluded that "Hays and Caudill, neither one, wasn't servicing it," and that they were the only two individuals on the first and second production shifts on the section who were responsible for servicing the system (Tr. 114-116). He confirmed that it is not legal to service a moving part of the system while it was in operation (Tr. 117).

Mr. Collins confirmed that after Mr. Hays was discharged, Mr. Hacker informed him that he had fired him for "not servicing equipment," but he did not blame Mr. Hays for the broken sprocket. The sprocket in question has a grease fitting which is "off-center," and it turns. There was no way it can be serviced while it is moving, and if the system were running all of the time, it could not be serviced. However, if this occurred and there was no time to service it, it is supposed to be reported to him or to Mr. Hacker. At no time has any serviceman ever informed him at the end of his shift that there was servicing left to do. If it is not reported, he assumes that the system has been serviced, and no one would know any different unless it broke down or someone visually inspected it (Tr. 121). He confirmed that he does not ask his people to service the system while it is in operation, and had no knowledge that Mr. Hays was doing this (Tr. 122).

Mr. Collins confirmed that there is no company policy or written instructions advising employees to stop the equipment before servicing it, and he did not know why this is not covered by the company safety rules booklet (Tr. 123-124). Respondent's

counsel stated that the safety rule booklet was published at a time when the haulage system was not in use and that it may be outdated (Tr. 125, exhibit C-16).

Mr. Collins believed that Mr. Hays was fired for not servicing the entire haulage system, rather than the one bridge sprocket which was broken, because "we checked the entire haulage system and there was lots of fittings on it that hadn't been greased. There was fitting on it that were broke" (Tr. 126). He confirmed that a broken fitting cannot be greased, and that no broken fittings had been reported. He did not believe Mr. Hays' assertion that the system was running all of the time and that he did not want to service it while it was running. He believed that Mr. Hays could have serviced the system when it was down, as reflected by the downtime reports, but conceded that he did not know what happened on September 6, other than what is reflected on the form (Tr. 129).

Mr. Collins stated that he has never observed Mr. Caudill or Mr. Hays use a grease gun to service the system, and that Mr. Caudill worked a different shift than Mr. Hays. Prior to the date of the discharge, he never checked on Mr. Hays' work. He would have expected Mr. Hays or Mr. Hacker to check the system and report any broken fittings. He had no reason to question Mr. Hays' work prior to his discharge, and Mr. Hacker never reported any problems with Mr. Hays' work. He confirmed that Mr. Hacker only told him that Mr. Caudill and Mr. Hays told him that they "didn't have time or something other," to service the system, and that Mr. Hacker did not mention Mr. Hays stating that he did not believe it was safe to service the system while it was running (Tr. 133). He believed that Mr. Hays should have asked for help if he did not have time to service the system, and that help would have been made available. In the alternative, Mr. Hays should have reported that he had not serviced the system (Tr. 134).

Clayton Hacker testified that he has served as a maintenance foreman for the respondent for 5 years, and has been the maintenance foreman at the No. 62 and No. 63 Mines since May 19, 1989. He confirmed that Mr. Hays worked under his supervision as an electrician, and also worked for him at the No. 49 Mine. He confirmed that he fired Mr. Hays (Tr. 143-145). He stated that on the day Mr. Hays was fired, he received a call from Mr. Collins to come underground to look at the equipment. Mr. Hays was working on a broken bridge discharge sprocket shaft, and Mr. Collins "mentioned about the servicing." Mr. Hacker then proceeded to look over the system, which consisted of three carriers and four bridges, and he also looked at the roof-bolting machines and one of the scoops. He looked at the lubrication points on all of this equipment and found "a lack of servicing." He explained that he found six or more grease fittings which were broken off on major components of the haulage system, identified

the components, and indicated that there was no way they could have been greased with a grease gun because of the broken fittings (Tr. 149-150).

Mr. Hacker stated that after looking at the equipment, he retrieved the cap from the broken sprocket grease fitting, left the mine, and then called Mr. Collins and asked him to inform Mr. Hays to come out and to bring his tools with him. He then spoke with Mr. Hays and Mr. Caudill in his office, and asked them why they had not serviced the equipment. Mr. Caudill informed him that he had no time to service it, and Mr. Hays informed him that he could not service it while it was running. Mr. Collins stated that he told Mr. Hays that he was not instructed to service it while it was in motion, and he explained further as follows at (Tr. 153):

A. He was instructed to do his servicing within his shift. He was not told to do all the servicing at one time, in a complete thirty minutes, forty minutes, whatever. He was told to do it within the shift, itself. This could consist of ten minutes at a time during intervals; I mean, at anytime it was down for a period of time, which you could maybe get one bridge, one side of one bridge.

Almost all repairmen will go up and do one side at a time. They won't do everything. You know, it's never -- you know, hardly -- seldom done that all the machinery is serviced at one time. The only time this is ever done is in case a belt drive is down for a long period of time or a stacker is down outside, something that is going to be a long period of time.

Most all the service is done by just a little bit at a time. Repairmen keep their grease gun close to them so they can do this. They don't -- you know, their tools. They're not always having breakdowns to be working on the breakdown, so it's within theirself, when they find the time to do this.

Mr. Hacker denied that he ever suggested or instructed his servicemen to service the equipment while it was running (Tr. 154). At the time that he discharged Mr. Caudill and Mr. Hays, he was familiar with Mr. Caudill's work record through another individual who did not work for the respondent, and he had not previously reprimanded Mr. Caudill. He had previously reprimanded Mr. Hays and suspended him for 3 days for not fixing the brakes on a shuttle car. He also supervised Mr. Hays' work at the No. 49 Mine, and received a complaint from another repairmen in 1989 who asked him to replace Mr. Hays with another repairmen because Mr. Hays "wasn't going to make it" (Tr. 159). Mr. Hacker stated that when Mr. Hays previously worked for him he "was young

at his job and I wanted to give him the benefit of the doubt," and that "as far as his work is concerned, he would patch things up, but as far as really passing on and getting the things fixed correct, he was never really interested in anything like that" (Tr. 159-160).

Mr. Hacker stated that he has never observed anyone servicing the haulage system while it was in operation (Tr. 167). He stated that it was illegal to service a piece of equipment while it is moving unless it has an extended grease fitting or cup. He confirmed that each mobile bridge carrier has nine different locations which have extended grease fitting, but no grease caps. It would still be illegal to grease these fittings while the system was running because "the way it moves, you know, if it would be there by the belt structure not outby the belt structure, you would be in a dangerous position to pin someone" (Tr. 168). Mr. Hacker confirmed that he has worked as an electrician on a continuous haulage system, and that in his experience, it has never operated for a full 8-hour production shift. Both he and Mr. Collins instructed the servicemen to report the fact that they were unable to service the equipment during their shift (Tr. 172).

On cross-examination, Mr. Hacker confirmed that he knew the miners who testified that they observed Mr. Hays servicing the haulage system while it was in operation, and that he had no reason to believe that these individuals were not honest or were lying (Tr. 175, 177). He confirmed that he did not consider Mr. Hays to be very good at his job, and that he was not very good at overall maintenance or mechanical work (Tr. 178). He confirmed that Mr. Hays had worked for him for a year at the No. 49 Mine, and that when he learned that he was being transferred to the No. 62 Mine, he (Hacker) did not object (Tr. 179).

Mr. Hacker confirmed that at the time he gave a statement to the MSHA investigator investigating Mr. Hays' complaint, he told the investigator that Mr. Hays was fired for not servicing the mobile bridge carrier the way he was instructed and that the bearings, grease caps and speed reducers had not been serviced within the past week. He stated that the investigator did not ask him about any of the other equipment, and that he told the investigator that he had fired Mr. Hays over the mobile bridge carrier and mentioned no other equipment (Tr. 185-186). He confirmed that when the investigator took his statement, a representative of the safety department, Pat Graham, was present, but he denied that he discussed what he would tell the investigator with Mr. Graham (Tr. 188). Mr. Hacker further confirmed that in his deposition he testified that he found that "most" of the grease fittings on the system were broken off, but that he does not now believe that six broken fittings was "most" of them (Tr. 189).

Mr. Hacker stated that when he spoke to Mr. Hays and Mr. Caudill at the time he fired them, he was showing them the speed reducer grease cap with a broken fitting, and that Mr. Hays told him that he could not service the system while it was operating and that it was unsafe to service it while it was operating (Tr. 190). Mr. Hacker stated "I know it's unsafe to do so, but why would an individual wait up to this time to complain about something to you" (Tr. 191). He confirmed that he had no reason to believe that what Mr. Hays was telling him was not true (Tr. 192).

Mr. Hacker confirmed that he knew at the time of the discharge of Mr. Hays that it was illegal to service the system while it was in operation, and that this included all of the fittings. He stated that the system has extended fittings on the manifolds, and blocks on each side of the mobile carriers, but that he did not mention this during his prior deposition and stated at that time that there were no extended fittings, and that this was what he believed at the time he fired Mr. Hays. He subsequently learned of the existence of extended fittings when he examined the system (Tr. 193-194). He also confirmed that he previously stated during his deposition that any time the system was greased, it had to be deenergized and blocked against motion, but that he was confused about the question because he had previously talked about electrical or maintenance work (Tr. 195-197). He denied that he thought the haulage system had to be deenergized and locked out at the time he fired Mr. Hays, and conceded that his present testimony was different from his prior deposition testimony "on that specific thing" (Tr. 198).

Mr. Hacker agreed that if an electrician were greasing the system with the breaker off on the machine, and if someone were to turn the breaker on and the machine was not locked out, the electrician could be injured (Tr. 199). He stated that electrical work must be locked out and tagged, and that the term "maintenance" found in section 75.1725, includes greasing and oiling. He confirmed that when one is greasing the system, machinery motion is not required in order to make adjustments, and that it is his understanding that if any greasing is performed on the system, the power must be off and it must be blocked against motion (Tr. 201).

Mr. Hacker confirmed that he never informed Mr. Hays or any of his electricians that the machine had to be deenergized and locked out while they were greasing it. He believed that the particular grease fitting which he showed Mr. Hays at the time he fired him could be safely greased while the system was in operation, and he saw no danger in doing this, and did not believe there was any way that an injury would occur while greasing the system while it was in operation. He confirmed that even though he thought it was illegal to grease the system while it was in operation, and thought that half of the fittings on the whole

system could be safely greased while it was in operation, he was not going to let his men do it (Tr. 203-204). He confirmed that he had never disciplined any employee for greasing the system while it was in operation, and stated that "I only know the safety department said it was against policy" (Tr. 205).

Mr. Hacker confirmed that the grease cap with the broken fitting which he showed to Mr. Hays at the time of his discharge had nothing to do with the equipment breakdown which Mr. Hays was working on at that time (Tr. 211). Mr. Hacker acknowledged that he did not ask Mr. Hays about his work that day and had no knowledge as to what he was doing. Mr. Hacker confirmed that servicing the system while it was in operation could result in serious or fatal injuries to a miner and this is why it is illegal to grease or oil the system while it is in operation. Mr. Hacker further confirmed that 2 days before the discharge he conducted an electrical inspection of the system and did not observe any broken grease fittings (Tr. 212-213). Prior to the discharge, no one ever reported any broken grease fittings, including the equipment operators who are responsible for the pre-operational inspection of their equipment and the reporting of any broken fittings (Tr. 214-215).

Mr. Hacker stated that prior to the discharge of Mr. Hays, he never told him that he was not complying with the maintenance "card system," and no one from management ever complained that Mr. Hays was not complying with this system. Mr. Collins has never "written up" Mr. Hays for failing to notify management about any needed equipment repairs or servicing, and many times Mr. Hays would have been responsible for repairing equipment, and when he finished, the system would begin operating immediately (Tr. 218). During the 2 or 3-weeks prior to the discharge, Mr. Hacker was not aware of any time that he or the section foreman suggested that the system be shutdown so that Mr. Hays could grease it, and that this would be an unusual procedure because he tries to get the least amount of downtime on a production shift (Tr. 221). He confirmed that the electricians did not always contact him personally to report work that needed to be done, and they would frequently call "Mabel in the light house" and she would write down what was needed (Tr. 222).

Mr. Hacker confirmed that on the day of the discharge, Mr. Hays informed him that it would be unsafe to grease the system while it was in operation. Prior to firing Mr. Hays, Mr. Hacker made no inquiries to determine whether Mr. Hays was in fact greasing the system while it was in operation (Tr. 225). He confirmed that the 3 hour and 15 minute downtime shown on one of the reports resulted from two broken sprockets, but he did not attribute this to Mr. Hays' failure to service the system properly. The broken sprockets were not the result of any lack of oil or grease, but were caused by cutting rock, and there was

nothing Mr. Hays could have done to prevent the sprockets from breaking (Tr. 229).

Mr. Hacker stated that his visit underground on the day of the discharge was prompted by the two broken sprockets and the grease cap that Mr. Collins and Mr. Hays found while working on the equipment which was down (Tr. 230). He showed the cap to Mr. Caudill and Mr. Hays "because that was a topic to get started on the servicing of the equipment," and the lack of grease on the cap raised an inference that Mr. Caudill and Mr. Hays were not doing their job (Tr. 231). Commenting on some of the entries made by Mr. Hays in his daily notebook, exhibit C-1, Mr. Hacker stated "That is the best I've ever saw" and "That is very impressive." He confirmed that Mr. Hays never showed him the book, and if he had, it would have changed his mind because the notations reflect "a very hard working individual right there" (Tr. 233). However, based on what he knew of Mr. Hays, Mr. Hacker did not believe him to be a very hard worker (Tr. 234).

Mr. Hays was recalled by the Court, and he stated that on the day of his discharge he was not aware of any broken fittings on the system except for the one which had broken that day. He confirmed that when he could not grease the offset fittings, they were left ungreased and he did not report this (Tr. 240). He stated that Mr. Hacker instructed him to grease the system while it was in operation and told him that this was the way he preferred it (Tr. 241). Mr. Hays stated that prior to his discharge he told Mr. Hacker that he had a problem with greasing the system while it was moving, and that he greased it while it was moving because he believed he was expected to and wanted to keep his job, and no one told him that he was not supposed to grease the system while it was moving (Tr. 244).

#### Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the

prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, \_\_\_ U.S. \_\_\_, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

### Protected Activity

A miner has the right under section 105(c) of the Act to refuse to work if he has a good faith, reasonable belief that his continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-30 (February 1984), aff'd sub nom. Brock v. Metric Constructors Inc., 766 F.2d 469, 472-73 (11th Cir. 1985). However, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that hazardous conditions exists. In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate his safety concerns to mine management in order to afford the operator with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedgmer et al. v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Simpson v. Kenta Energy, Inc. & Roy Dan Jackson, 8 FMSHRC 1034, 1038-40 (July 1986); Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 9 FMSHRC 992 (June 1987); Miller v. FMSHRC 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097.

In Gilbert v. Sandy Fork Mining Company, 12 FMSHRC 177 (February 1990), on remand from Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), rev'd Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987), it was held that a violation of section 105(c) is established when a miner has a reasonable, good faith belief that certain work conditions are hazardous, communicates that belief to mine management, and management does not address his safety concerns in a manner sufficient to reasonably quell his fears.

The complainant views this case as a "work refusal" case, and takes the position that Mr. Hays' refusal to fully grease the continuous haulage system was both reasonable and made in good faith.

The respondent argues that in order to demonstrate "good faith," Mr. Hays must show that he timely informed the respondent of his belief in the safety hazard so that the respondent would have an opportunity to correct the situation. Respondent takes the position that a work "refusal" requires communication of a miner's intention not to perform work, and that the purpose of the Act is not served when a miner keeps his "refusal" to do unsafe work to himself. Respondent concludes that Mr. Hays' surreptitious failure to service the grease fitting on the speed reducer shaft for 5 consecutive days did not constitute a valid work "refusal" protected by the Act.

Although Mr. Hays' discrimination complaint may not directly involve a "work refusal" in the traditional sense, I conclude and find that the principles enunciated in the aforementioned case law apply in this case, and that Mr. Hays' reluctance or failure to service the haulage system or any of its component parts in question while it was in operation because of his belief that to do so would be unsafe and hazardous and would expose him to serious injuries would be protected activity within the intent and scope of section 105(c) of the Act. Mr. Hays has the burden of establishing that he was required or expected to service the system while it was in operation, that servicing it while it was in operation was unsafe and hazardous, that his safety concerns with respect to the servicing of that equipment were reasonable and made in good faith, and that he timely communicated these concerns to mine management.

#### The Safety Issue

MSHA's mandatory safety standards, which are applicable to the respondent's mine, provide in relevant part as follows:

§ 75.509 Electric power circuit and electric equipment; deenergization.

[STATUTORY PROVISIONS]

All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing.

§ 75.1725 Machinery and equipment; operation and maintenance.

(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

(b) Machinery and equipment shall be operated only by persons authorized to operate such machinery or equipment.

(c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

(d) Machinery shall not be lubricated manually while in motion, unless equipped with extended fittings or cups.

The respondent argues that it never required or instructed Mr. Hays to service the system while it was in operation and that the testimony of Mr. Garcia, Mr. Collins, and Mr. Hacker establishes that Mr. Hays was not instructed to grease equipment while it was running, but was instead instructed to work safely in general and specifically to perform his greasing duties during "those scattered occasions throughout the shift when there were pauses in production for various reasons." Respondent believes that such idle times did occur during the shift, and that if they did not, or if Mr. Hays found them too short or too infrequent to allow for complete servicing of the equipment, he should have made this fact known to somebody in charge. Assuming that Mr. Hays did not have sufficient down time to service the equipment, the respondent concludes that he apparently worked on the equipment in an unsafe manner and/or left the work undone and failed to advise management that the work was not being done.

Respondent's General Mine Manager Garcia had no knowledge of any company policy regarding the servicing of the haulage system, and he was unaware of any policy requiring anyone to lubricate the equipment while it was in motion or being trammed. However, he confirmed that he would not approve of, and would avoid, the shutting down of the haulage system during a production shift for the purpose of servicing it. He conceded that servicing the equipment while it was in operation would be a violation of section 75.1725. He further conceded that subsection (c) of section 75.1725, would require the equipment to be deenergized and blocked against motion while it is serviced, but that it was not required to be tagged or locked out. He also considered "repairs," as that word is used in subsection (c), to include

lubrication of the equipment, and assumed that any lubrication is covered separately by subsection (d) of section 75.1725.

Mine Superintendent Collins denied that he ever observed anyone servicing the haulage system while it was in operation, and he confirmed that no one ever informed him that this was being done. Although Mr. Collins believed that a portion of the haulage system could legally be serviced while it was in operation, and that the remaining portion was not required to be deenergized at the power center and locked out, he conceded that the electrical breaker on the "start box" had to be "kicked" while the system was being serviced. When asked to reconcile his testimony with his prior deposition testimony that the system had to be locked out at the power center before servicing and oiling the fittings, Mr. Collins stated that he misunderstood the questions asked of him during his deposition and that his present opinion is that the equipment has to be locked out only if electrical work is being performed.

I have reviewed Mr. Collins' pretrial deposition of April 25, 1990, and I cannot conclude that the questions asked and answered at pages 26 through 31 are confusing. The questions pertained to the greasing and oiling of the system fittings, and not to any electrical work. Mr. Collins' deposition testimony reflects his belief that two or three fittings, or those fittings located together at the front of the bridge carrier operator's control station, could be safety greased while the equipment was running because they are stationary and have no turning shafts and "there's nothing you can get hung into" (Q212 answer, pgs. 27-28). He further clarified his answer when he stated that the carriers are equipped with some, but not all, fittings which are extended or have cups, but that none of these fittings have anything extending out from the grease fitting itself (Q231-233 answers, pgs. 30-31). Mr. Collins doubted that it would be legal to oil the system while it was running and stated "I don't even see how you can put oil in it with it running" (Q218 answer, pg. 28). He also confirmed that in order to service the system fittings which were not otherwise safe to service, the system power had to be deenergized and the system had to be blocked against motion and he stated that "that's the only way you could service it" (Q228-229 answers, pg. 30).

During his hearing testimony, Mr. Collins confirmed that servicing a moving part of the system while it was operating is illegal, and he conceded that servicing the system while it is in operation would expose the serviceman to danger, and could result in his being caught between the equipment and the rib, or being run over, and that this could result in serious injury or death. This testimony is consistent with his deposition testimony that servicing the equipment while it is running would expose an electrician to serious hazards and injuries (deposition, pgs. 31-32). Mr. Collins also conceded during his trial testimony

that a fitting which is "off-center" and is turning while the system is operating cannot be serviced because it is impossible to grease them while the system is in operation. He also conceded that a broken fitting cannot be greased.

Maintenance foreman Hacker denied that he ever suggested or instructed his service personnel to service the system while it was in operation, or that he ever observed anyone servicing the system while it was in operation. He confirmed that he expected each serviceman to service the system "when they find the time to do it." He was unaware of any time that the section foreman suggested that the system be shutdown so that Mr. Hays could grease it, and he confirmed that this would be an unusual procedure during a production shift because he tries to have the least amount of "downtime."

Mr. Hacker conceded that it was illegal to service the haulage system while it was in operation, and that it would be illegal to service any equipment while it was moving unless it was equipped with an extended grease fitting or cup. Although he confirmed that each bridge carrier has some extended grease fitting at different locations, he confirmed that these fittings have no grease caps and that it would still be illegal to grease these fittings while the system was in operation because it would expose the serviceman to a hazard of being pinned if it were operating near a belt structure. Although Mr. Hacker claimed some confusion about his prior deposition testimony that the system had to be deenergized and blocked against motion when it was being greased, he agreed that if an electrician were greasing the system with the circuit breaker off, if someone were to turn the breaker back on, and the equipment was not locked out, the electrician could be injured.

Mr. Hacker agreed that the term "maintenance" as found in section 75.1725, includes greasing and oiling, and that when the system is being greased, machinery motion is not required in order to make any adjustments. He confirmed that it was his understanding that if any greasing is being performed on the system, the power must be off and the system must be blocked against motion.

Mr. Hacker conceded that at the time he discharged Mr. Hays, even though he knew that it was illegal and unsafe to service the system while it was running, he had never informed Mr. Hays or any of his electricians that the system had to be deenergized before it was serviced. Mr. Hacker further conceded that during his discussion with Mr. Hays on the day of his discharge, and immediately prior to discharging him, Mr. Hays told him that he could not service the system while it was in operation because he believed it was unsafe. Mr. Hacker acknowledged that he had no reason to believe that Mr. Hays was not telling the truth about his safety concerns, and that he had no reason to question the

honesty of the miner witnesses who testified about their servicing of the system while it was running, or their safety concerns and the hazards of servicing the system while it was in operation.

Former MSHA official William Craft testified credibly that pursuant to mandatory safety standard 30 C.F.R. § 75.509, the greasing and lubrication of the haulage system in question encompasses "work" and "equipment" within the meaning of this section, and the system must be deenergized before this kind of work is performed. He also confirmed that lubricating the system without deenergizing it would be unsafe and would constitute a violation of mandatory safety standard 30 C.F.R. § 75.1725(c) or (d).

Mr. Hays testified that Mr. Hacker was aware of the fact that the system was being serviced while it was in operation because Mr. Hacker had instructed the servicemen to do so. Mr. Hays also testified credibly that when he previously informed Mr. Hacker that he could not grease the fittings while the system was in operation, Mr. Hacker informed him that the system could not be shutdown for greasing, and instructed him to grease the speed reducers while the bearings were turning and informed him that the system could be greased while it was in operation because he had done so himself and knew that it could be done. Mr. Hays stated that he knew it was illegal and unsafe to service the system while it was in operation but did it anyway because he was told that he would be replaced if he didn't, and he confirmed that he asked Mr. Hacker to permit him to stay over his shift to service the system while it was not in operation, but was refused.

Mr. Jerry Caudill testified that when he worked as a second shift electrician, he was expected to service and oil the system while it was in operation, and that Mr. Hacker and his section foremen knew that he was servicing the system while it was in operation because they observed him doing it. Mr. Caudill further testified that he complained to his foremen about servicing the equipment while it was running, but they did nothing about it. He also informed Mr. Hacker on at least four different occasions that it was dangerous, but that Mr. Hacker "wasn't going to hear no excuses."

Shift foreman and electrician Terry Richardson testified that he had serviced the system while it was in operation and not deenergized. Roof bolter Marty Lewis, who worked with Mr. Hays, confirmed that he observed Mr. Hays greasing the system when it was not deenergized. Miner operator Dewey Eldridge observed Mr. Hays servicing the system while it was in operation and not locked out. Bridge carrier operator David Combs testified that while he observed Mr. Hays greasing and oiling the system, he never observed him doing this while the system was in operation.

However, he confirmed that the system power was on while Mr. Hays serviced it, and he never saw the system shutdown or locked out at the power center while this work was being done. Scoop operator Clifton Lewis, who also worked with Mr. Hays at the time of his discharge, testified that he observed Mr. Hays servicing the system while it was in operation, and that it was never deenergized or locked out while he was doing this work. Scoop operator Gary Caudill also worked with Mr. Hays and he confirmed that he observed Mr. Hays servicing the equipment while it was in operation.

The credible testimony of Mr. Hays and Mr. Jerry Caudill, as corroborated by the credible testimony of the other equipment and system operators, establishes that Mr. Hays serviced the system while it was in operation. Although Mr. Hacker denied that he ever observed anyone servicing the system while it was in operation, I credit the testimony of Mr. Hays and Mr. Caudill that Mr. Hacker and other foremen had observed them servicing the system while it was in operation. I also credit the testimony of electrician foreman Richardson who confirmed that he serviced the system while it was in operation and not deenergized, and Mr. Hays' testimony that Mr. Hacker would not allow the system to be shutdown for greasing because he had greased it himself while it was in operation and believed that it could be done.

The credible and unrebutted testimony of Mr. Hays and Mr. Jerry Caudill reflects that the servicing of the haulage systems at all of the respondent's mines where they had worked was done while it was in operation and that this was a standard practice or procedure. Although management was aware of the fact that servicing the system while it was in operation was contrary to the law and exposed its service personnel to potential hazards and injuries, there is no evidence that management ever issued any instructions or adopted any safety rules prohibiting this practice, and it never disciplined anyone for doing this.

Notwithstanding the lack of any written or published company policy requiring the system to be serviced while it was in operation, the testimony of respondent's management personnel in this case reflects that short of a mechanical breakdown in the system, they would not approve of routinely shutting down the system or scheduling a shutdown to allow its service personnel ample time to grease, oil, or perform other normal and routine servicing of the system while it was not in operation. Management expected Mr. Hays to find the time during his shift to service the system, preferably during the "belting up" and changing of the miner bits, would not allow him to stay over and service the system while it not operating, would accept no excuses or explanations from him if he failed to service the system during his shift, and apparently simply expected him to report the fact that he could not service the system during his shift. Under all of these circumstances, I conclude and find that management condoned and

tacitly approved of Mr. Hays' practice of servicing the system while it was in operation. I further conclude and find that it was not unreasonable for Mr. Hays to conclude that he was expected and required to service the system while it was in operation.

Mr. Jerry Caudill testified that greasing some of the fittings on the carrier, including the speed reducers, regardless of whether they were centered or off-centered on the shaft, while he was "riding" it or "on the run" between the machine and coal rib would place him at risk of being caught against the rib or in the conveyor chain or slide pan, and that he has had "close calls" on more than one occasion while attempting to service the system under these conditions. Electrician and foreman Richardson believed that it was possible for someone to be injured or killed while attempting to service the system while it was in operation.

Although bridge carrier Combs testified that he can engage an emergency stop control to stop the carrier from advancing and stop the miner machine, and that he could observe Mr. Hays at all times if he were servicing the system while it was moving if Mr. Hays were standing erect or hunched over, he could not see if he were lying down or on his knees greasing the fittings, and could not see him if he were at the rear of the machine unless he (Combs) turned around to look.

Mr. Collins conceded that servicing the system while it was in operation could result in the individual doing the work being caught between the machine and the rib, or being run over, and that this could result in serious injury or death. He also conceded that it would be impossible to service a fitting which is off-centered while the system is in operation.

Mr. Hacker conceded that servicing the system while it was in operation was illegal and unsafe. Although he alluded to several carrier fittings which have extended fittings, he confirmed that they were not equipped with grease caps and that it would still be illegal to grease these fittings while the system was running because he could be pinned against a belt structure. He agreed that an electrician greasing the system while the system power was off but not locked out, could be injured if the power breaker was turned on.

Having viewed Mr. Hays during the course of the hearing, I find him to be a credible witness, and I take note of the fact that Mr. Hacker had no reason to disbelieve his assertions that the servicing of the system while it was in operation exposed him to hazards and potentially serious or fatal injuries. Mr. Hays believed that it was physically impossible to attach a grease hose to an off-centered carrier speed reducer fitting while it was turning on the shaft and while the system was in operation,

and Mr. Collins agreed that this was true. Although Mr. Hays indicated that he could physically attach a grease hose to a fitting which was centered and not turning on the shaft, he believed it was unsafe to do so and had to watch and stay out of the way of the moving equipment while doing this, and that he could be run over or pinned against the rib by the machine, particularly if he were unaware that the bridge carrier operator would move the machine.

Mr. Hays also believed that he could be seriously injured while servicing the system while it was in operation, and that none of the system fittings he was required to service had extended fittings. He stated that he had to "ride" or lie on top of the machine to grease the fittings when there was no room for him to stand between the machine and the coal rib when the miner was cutting coal in a belt entry. Because of the location of some of the fittings he had to lay on top of the machine while it was moving in order to reach them, and would have to position his body between the coal rib and the machine to reach other fittings. With regard to the five grease fittings located at the bridge carrier block, he had to lay on the machine to reach them and this exposed him to a hazard of coming in contact with the mine roof.

Given all of the aforementioned circumstances, I conclude and find that Mr. Hays had a reasonable and good faith belief that greasing, oiling, or servicing the haulage system in question, including its component parts and bridge carrier speed reducer with off-centered fittings which turned on a shaft, while the equipment was energized and in operation or moving, would expose him to dangerous safety hazards and possible serious or fatal injuries. Although Mr. Hays may not have directly refused to service the system while it was in operation, and he acknowledged that he had previously serviced it while it was in operation, I accept as credible his assertion that he was instructed to do so by Mr. Hacker, that he reasonably believed that he would be replaced if he did not follow these instructions, and that he had reasonable grounds for believing that management expected or required him to service the system while it was in operation, regardless of any resulting hazard or injury exposure.

I conclude and find that the respondent required or expected Mr. Hays to service the haulage system, including its component parts, while it was in operation, and that his failure to do so was tantamount to a work refusal. I further conclude and find that this work refusal was reasonable and made in good faith, and that it constitutes protected activity within the scope and intent of section 105(c) of the Act.

## Mr. Hays' Communication of His Safety Concerns to Mine Management

Mr. Garcia's suggestion that Mr. Hays should have discussed his safety concerns with someone "higher up" in management is rejected. The credible testimony establishes that Mr. Hays specifically informed maintenance foreman Hacker of his safety reasons for not servicing the haulage system immediately before Mr. Hacker discharged him, and Mr. Hacker himself acknowledged that this was true and that he had no reason to disbelieve Mr. Hays. Rather than addressing Mr. Hays' concerns, or taking them into consideration, Mr. Hacker summarily discharged him, and he did so without any further inquiry as to the work which Mr. Hays may have performed on the system prior to the discharge. The credible and unrebutted testimony of Mr. Hays and Mr. Caudill establishes that Mr. Hacker would accept no excuses for what he believed was a failure by Mr. Hays to service the equipment.

The credible testimony of Mr. Hays reflects that during a meeting held a week or two prior to his discharge, and in the presence of Mr. Hacker and Mr. Collins, he raised his safety concerns about servicing the system while it was in operation, and Mr. Collins acknowledged and believed that this was true. Further, Mr. Hays' testified credibly that he had previously voiced his safety concerns about servicing the system while it was in operation with Mr. Hacker and complained to Mr. Hacker about the matter when he worked at the No. 49 Mine, and that he had "confronted" Mr. Hacker "face to face" about greasing the speed reducers while the system was in operation.

Under all of the aforementioned circumstances, I conclude and find that Mr. Hays' concern and belief that the greasing and servicing of the system while it was in operation was unsafe and hazardous and exposed him to potential injuries was communicated to mine management prior to his discharge, and that management had a reasonable opportunity to address his safety concerns, but did nothing about it. I further conclude and find that Mr. Hays' communications were timely made and that they met the requirements enunciated by the Commission in Secretary of behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982), Secretary on behalf of John Cooley v. Ottawa Silica Company, 6 FMSHRC 516 (March 1984); and Gilbert v. Sandy Fork Mining Company, supra.

### The Respondent's Defense

The respondent takes the position that the complainant has not established that he engaged in any protected activity and has not established a prima facie case of discrimination. The respondent argues that Mr. Hays' termination was not motivated in any part by any protected activity, and that he was discharged for not servicing other equipment which was found to be dry and dusty and ungreased when it was examined by his supervisors

(Collins and Hacker). The respondent points out that prior to the inspection of this equipment by the supervisors, they were unaware that Mr. Hays and Mr. Caudill were not lubricating those parts properly, and until they discovered that grease fittings were missing or broken, they had no knowledge that the work was not being performed. After meeting with both miners, Mr. Hacker questioned them and fired them both.

The respondent argues further that at the time of the discharge of Mr. Hays, Mr. Hacker knew about his "record of previous misconduct," and attempted to find a niche for him at the mine in spite of his feelings that he was the best of workers. Although Mr. Hacker believed that Mr. Caudill had a poor work record, when Mr. Hacker's superiors reviewed the dismissals and discovered that Mr. Caudill had never been disciplined before, they offered him reinstatement. Respondent concludes that this "is the most compelling evidence of the respondent's true motive," and that if the respondent had wanted to punish miners for exercising their rights to safe working conditions it would not have brought Mr. Caudill back to work.

The respondent's termination notice of September 7, 1989, reflects that Mr. Hays was terminated for "unsatisfactory performance," and the explanation for this action is shown as "Improper Servicing of Equipment." In its answer to the complaint, respondent states that Mr. Hays was discharged "in part" because he "had not serviced a grease fitting for the speed reducer on the No. 1 bridge" (emphasis added). During his opening statement at the hearing, the respondent's counsel stated that Mr. Hays was discharged because of his failure "to service a large number of the components that were within his responsibility" and that "the single grease fitting on the speed reducer shaft was merely the means by which his failure to do his job was discovered" (Tr. 12). Counsel further stated that when the speed reducer broke down, Mr. Hacker examined it and found that it had not been greased. At the same time, he found other pieces of equipment that had not been maintained and summoned Mr. Hays to his office and interviewed him regarding his failure to service "the equipment." Counsel concluded that Mr. Hays' previous disciplinary record, coupled with his "egregious failure to service any equipment on the day . . . or during the week preceding his discharge" led to his termination (emphasis added, Tr. 13).

The complainant asserts that he was discharged because of his refusal to grease the No. 1 bridge carrier speed reducer grease fitting. Complainant argues that it is undisputed that when Mr. Hacker met with him and Mr. Caudill immediately prior to his discharge he showed them the offset grease fitting that Mr. Collins had discussed with him earlier that afternoon, and asked them when they had last serviced it. Complainant maintains that at no time during his conversation with Mr. Hacker did

Mr. Hacker claim that he had found other broken grease fittings on the section, nor did he accuse him or Mr. Caudill of failing to service other equipment on the section. Complainant points out that during his extensive trial testimony Mr. Hacker did not claim that he had discussed other broken grease fittings and/or the failure to service other equipment with him or Mr. Caudill, and that Mr. Caudill unequivocally testified that they were both fired "over that grease cap." Complainant further points out that the respondent's general manager Garcia testified that he was discharged for failing to lubricate the continuous haulage system and that Mr. Garcia was not told that management had found numerous broken grease fittings, or that the complainant had also failed to service other equipment on the section.

The complainant states that Mr. Hacker admitted that prior to the day of the discharge, there had not been any reports of broken grease fittings on the section despite the fact that the individual equipment operators were required to inspect their equipment each shift prior to its operation. Complainant points out that Mr. Hacker also admitted that he had been on the section every other day prior to the discharge and never saw any of the several broken grease fittings that he claimed to have found that day. Complainant asserts that Mr. Hacker attempted to avoid this inconsistency by stating that the grease fittings could not have been broken for long (when he allegedly discovered them on the day of the discharge) because otherwise breakdowns of the haulage system would have occurred. Complainant concludes that this explanation contradicts the respondent's argument that he had not serviced any of the equipment on the section during the week preceding his discharge.

Complainant further concludes that had he failed to service all of the equipment, it is clear that equipment breakdowns would have occurred. However, there were no such breakdowns, and the respondent admitted that the broken conveyor sprocket which malfunctioned on the day of the discharge did not break because of the failure to grease the offset fitting in question. Complainant emphasizes the fact that although Mr. Hacker claimed at his deposition that "most" of the grease fittings on the haulage system were broken when he inspected the system, at trial, he alleged that he had only found about six broken fittings.

The complainant points out that the respondent failed to call any day shift or second shift foremen to testify to his alleged failure to service the haulage system and other equipment on the section, and failed to elicit testimony from any supervisory or hourly employees regarding his otherwise allegedly poor job performance. On the other hand, complainant states that he called six former coworkers and equipment operators who testified credibly that he was a good worker, and that Mr. Collins admitted that he had not received any complaints from Mr. Hacker, or

anyone else, regarding his job performance prior to discovering the broken grease fitting on the day of his discharge.

The complainant asserts that the respondent's allegations that he had not serviced any of the equipment on the section during the week prior to his discharge and that he admitted this to Mr. Collins on the day of the discharge are refuted by the daily notes which he kept in order to keep track of the repair work that needed to be done. Complainant points out that after reviewing these notes during the hearing, Mr. Hacker stated that the amount of work reflected by these notes was "very impressive" and revealed a "hard working individual" who had put in a "very rough day."

The complainant argues that the hearing testimony of Mr. Collins and Mr. Hacker is inconsistent with their prior statements made to the MSHA special investigator during the investigation of his complaint. Complainant points out that Mr. Collins did not tell the investigator that he had examined other equipment on the section after observing the broken grease fitting on the day of the discharge, or that he had found other broken fittings. Complainant states that Mr. Collins' statement indicates that after he saw the broken grease fitting on the No. 1 bridge, he told Mr. Hacker to "come underground and look at the bridge," and does not reflect that he asked Mr. Hacker to examine the entire haulage system and the other equipment on the section. With regard to Mr. Hacker, complainant argues that he did not tell the investigator that the complainant had been discharged for failing to service equipment other than the mobile bridge carrier.

Complainant asserts that Mr. Collins' testimony that the complainant did not complain that it was unsafe to service the haulage system while it was in operation at the time he asked about the broken grease fitting is not credible in light of Mr. Hacker's admission that the complainant raised this issue immediately after being sent out of the mine. Complainant notes that Mr. Collins, who testified in a previous safety discrimination case, was found by Judge Melick not to be a credible witness. Tolbert v. Chaney Creek Coal Corporation, 9 FMSHRC 580 at 583-584, 589 (March 1987).

The complainant asserts that Mr. Hacker's lack of credibility is plainly evidenced by his testimony regarding the complainant's reassignment to the day shift electrician's job. Complainant points out that although Mr. Hacker testified that he considered the complainant to be an inept electrician who was not interested in doing a good job, and claimed that the complainant's previous foreman had told him that the complainant would have to be replaced, Mr. Hacker transferred the complainant to a production shift a couple of weeks before his discharge. The complainant finds incredible Mr. Hacker's testimony that he does

not usually try to put good electricians on his production shifts and assigns his worst electricians to those shifts.

The complainant also concludes that Mr. Hacker's testimony that he told the complainant that he was not instructed to service the haulage system while it was in motion is likewise clearly not credible. In support of this conclusion, the complainant points out that had Mr. Hacker just learned for the first time that his electricians were servicing the haulage system while it was in operation, and had he been concerned enough to tell them they were not supposed to do this, he would certainly have investigated the situation further. However, Mr. Hacker made no further inquiry to determine whether the system was being greased while it was in operation, and when the complainant complained to him about the dangers of servicing the system while it was in operation, he was precipitately discharged. Complainant concludes that his abrupt discharge clearly indicates that Mr. Hacker knew that the haulage system was regularly being serviced while it was in operation, and that his refusal to service the fitting in question was the reason for his discharge.

With regard to the three prior disciplinary actions taken against him, the complainant takes the position that they are irrelevant to the issue presented in this case, and he points out that in each case he refused to sign the disciplinary slips because he disagreed with the reasons for the stated discipline. Complainant also points out that Mr. Hacker confirmed that he was never disciplined by the respondent for failing to notify management of repairs that needed to be made. The complainant points out that if he were discharged for his protected refusal to service the offset grease fitting in question, then his discharge clearly was in violation of the Act. If, on the other hand, he was discharged for the unprotected failure to service any of the equipment on the section during the week preceding his discharge, as claimed by the respondent, his discharge did not contravene the Act. However, even assuming that this was a mixed motivation case, complainant concludes that his prior disciplinary record, i.e., his unprotected activities, would not be at issue, Secretary of Labor on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2800 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981).

Complainant asserts that the respondent failed to introduce any concrete evidence to support its attempts to establish that he may have had time during the final week of his employment in which he could have serviced the eight offset grease fittings that he refused to grease while the haulage system was in operation, and that its trial testimony in this regard was mere conjecture. The complainant believes that the respondent's defense in this case is misplaced and that the gravamen of this case is

that the respondent required him to spend 1-1/4 hours or more every shift performing an unsafe and unlawful act, namely, servicing the continuous haulage system while it was in operation.

The complainant concludes that the fact that he regularly acceded to the respondent's unlawful requirement by servicing most of the system while it was in operation does not absolve the respondent of liability for his unlawful discharge for refusing to service the offset grease fitting on the No. 1 bridge. Complainant further concludes that the fact that there theoretically may have been 5 minutes available to him during which the haulage system could have been deenergized and the fitting in question serviced, is irrelevant, and that the respondent cannot dissolve its unlawful conduct by surmising that there may have been time when its illegal requirement could have been lawfully performed.

With respect to the respondent's assertion that he should have reported to management each day that he had not greased the offset fitting on the haulage system, complainant points out that there is no precedent or legal justification for requiring a miner to daily report his refusal to perform a hazardous job assignment which his employer requires as a condition of employment. The complainant points out that he had complained about the respondent's illegal requirement prior to his discharge but his complaints were ignored. He was then given the Hobson's choice of his safety or his job, an action which the complainant concludes was prohibited by the Act.

The evidence in this case establishes that Mr. Hays was expected or required by management to service the continuous haulage system while it was in operation. In addition to these duties, Mr. Hays was responsible for the daily servicing of a roof-bolting machine and the gathering arms of the continuous-mining machine. He was also assigned other duties on the section. In the event of any haulage equipment breakdown, Mr. Hays was responsible for making the repairs. Contrary to Mr. Hacker's belief that Mr. Hays was not a good electrician, Mr. Hacker himself conceded that such repairs were accomplished by Mr. Hays as required, and the system would be placed back into operation immediately. Further, after reviewing Mr. Hays' notebook entries reflecting the work he performed during the time period prior to his discharge, Mr. Hacker agreed that it appeared that Mr. Hays was a hard working individual. Although the respondent asserted that these work entries were self-serving, and suggested that they may have been fabricated, it nonetheless stipulated that the notebook was authentic, and I find it to be credible and probative. In addition, the credible and un rebutted testimony of several of the equipment operators reflects that Mr. Hays was doing a good job in servicing their equipment, and they had no complaints about his job performance. Mr. Collins

confirmed that he was not concerned about Mr. Hays' job performance prior to his discharge, and had received no complaints about Mr. Hays prior to this time.

Contrary to the respondent's assertion that Mr. Hays failed to service any equipment on the section during the week prior to his discharge, the credible un rebutted testimony of Mr. Hays and the daily work log which he maintained establishes that he greased and serviced several bridge carrier components, a roof bolter, a continuous-mining machine, conveyor chains, scoops, and made necessary repairs. Except for 2 days when he noted that he was off on September 3 and 4, 1989, because of labor day, all of this work was accomplished during the period August 29, 1989 through September 6, 1989, the day before his discharge. In response to several bench questions concerning these work entries, Mr. Hacker conceded that some of the work performed was on the continuous haulage system, and that it was obvious to him that the equipment was being serviced while it was in operation (Tr. 209-210). He also confirmed that he had no knowledge of the work performed by Mr. Hays on the section on the day of his discharge and did not ask him about his work that day (Tr. 212).

General mine manager Garcia testified that he learned of Mr. Hays discharge through a telephone call, and he could not recall any conversations with Mr. Collins about the discharge, nor could he recall receiving any information from Mr. Hacker about the matter. Mr. Garcia further testified that he could not recall being told that Mr. Hays was discharged for any reason other than his failure to lubricate the haulage system. He confirmed that the discharge "was basically a failure to perform the job as he was assigned is generally the way it was put to me."

Mine Superintendent Collins testified that he believed that Mr. Hays was fired for not servicing the entire haulage system, rather than the one offset grease fitting on the No. 1 bridge. Mr. Collins further testified that when he checked the haulage system on the day of the discharge he found other broken fittings which had not been greased, and that after Mr. Hays was fired Mr. Hacker informed him that he had fired Mr. Hays for "not servicing equipment." However, Mr. Collins confirmed that he was not involved in the decision to fire Mr. Hays, did not discuss Mr. Hacker's decision to fire Mr. Hays with Mr. Hacker, did not speak with Mr. Hacker about Mr. Hays' job performance, and did not suggest to Mr. Hacker that any disciplinary action needed to be taken against Mr. Hays.

Mr. Hacker testified that when he inspected the equipment on the section after Mr. Collins summoned him underground on September 7, 1989, he did not speak with Mr. Hays about the servicing of the equipment. Mr. Hacker stated that upon inspection of the haulage system, the roof-bolting machines, and one of

the scoops he found "a lack of servicing," and found six or more broken grease fittings on all of the bridge carriers. He then retrieved the No. 1 bridge carrier broken sprocket grease fitting and cap which needed repair and took it with him to his office. He then met with Mr. Caudill and Mr. Hays in his office and showed the fitting to Mr. Caudill and Mr. Hays and asked for an explanation as to why "they had not serviced," and Mr. Caudill informed him that he did not have time "to service," and Mr. Hays informed him that he could not "service that while it is running" (Tr. 152). Mr. Hacker confirmed that Mr. Hays also informed him that it was unsafe to service the haulage system while it was operating (Tr. 190).

Mr. Hacker testified that he discharged Mr. Hays for "improper servicing of equipment" because "he had not serviced it the way he was instructed to" (Tr. 184-185). He admitted that he informed the MSHA special investigator that he fired Mr. Hays because he had not serviced the mobile bridge carrier, and that the bearings, grease caps and speed reducers had not been serviced within the past week (Tr. 185). He confirmed that he told the investigator that he fired Mr. Hays "over the MBC," and did not mention the roof-bolting machine, continuous miner and the other equipment on the section (Tr. 186).

In response to several bench questions, Mr. Hacker stated that he concluded that the broken No. 1 bridge carrier speed reducer sprocket fitting had not been serviced because it showed the lack of any greasing when he removed the cap. Mr. Hacker further stated that when he showed that part to Mr. Caudill and Mr. Hays, he asked them why they had not reported that it was broken, and that he showed them the part "because that was a topic to get started on the servicing of the equipment" (Tr. 231). I find no evidence or credible testimony from Mr. Hacker supporting any reasonable conclusion that he discussed any equipment, other than the offset broken speed reducer fitting in question with Mr. Hays or Mr. Caudill at the time of their discharge. I conclude and find that it was reasonable for Mr. Hays to believe that he was being discharged for his failure to grease or service the broken speed reducer which Mr. Hacker displayed during their meeting, and all of the testimony regarding this issue leads me to conclude that this was in fact the case.

I find no credible or probative evidence to support the respondent's assertion that Mr. Hays was discharged because of his failure to service any of the equipment on the section during the week immediately preceding his discharge, or because of his failure to service other parts on the continuous haulage system. The "other parts" of the haulage system which the respondent has alluded to as not being properly serviced or greased by Mr. Hays appear to be the six additional broken and ungreased fittings which Mr. Hacker claimed he found during his inspection of the system on the day he discharged Mr. Hays. However, Mr. Hacker

confirmed that none of these fittings could have been serviced or greased because they were broken off.

Although Mr. Hacker testified that each mobile carrier has nine different locations which have extended fittings, but no grease cups, there is no evidence that the six fittings alluded to by Mr. Hacker were equipped with extended fittings. Even if they were, Mr. Hacker conceded that it would be illegal to service those fittings while the system was in operation because it would be dangerous (Tr. 168). I also take note of the fact that in his deposition, Mr. Hacker stated that the haulage system had no extended fittings, and he believed that this was the case at the time he discharged Mr. Hays. He also reconfirmed the fact that he knew it was illegal to service any of those fittings while the equipment was in operation, and that the system had to be deenergized and blocked against motion when it was being greased (Tr. 194, 196-197, 201). I also take note of Mr. Hacker's prior statement to the MSHA investigator that "the bearings, grease caps and speed reducers had not been serviced within the past week," but I find no evidence to establish that these components included extended grease fittings. The extended fittings mentioned by Mr. Hacker had no grease cups, and the evidence establishes that the speed reducers have offset fittings which are hazardous to service while the equipment is in motion.

Although Mr. Collins and Mr. Hacker testified that they expected Mr. Hays to report any problems or lack of available time to service the system and the equipment, I find no evidence to support any conclusion that Mr. Hays was discharged for failing to report his inability to service the system during his regular work shift. Mr. Hays' note book notations, which I find credible, reflect that he periodically reported equipment malfunctions and other problems. The record also reflects that Mr. Hays made necessary repairs on the section during the period prior to his discharge.

Mr. Hacker acknowledged that no one from management ever complained about Mr. Hays' failure to comply with the maintenance "card system," and that he had never "written up" Mr. Hays for not informing management about any needed equipment and repairs. He also confirmed that the electricians did not always personally report to him work which was needed to be done and that they frequently called a lady in the light house and that she would take their reports. The respondent's suggestion that Mr. Hays may have waived any protected rights under the Act by continuing to service the haulage system knowing that it was unsafe is rejected. I believe Mr. Hays' testimony that Mr. Hacker gave him no choice and would have replaced him if he failed to service the system while it was in a production mode, and the record establishes that management did not address Mr. Hays' complaints in this regard.

General manager Garcia testified that there is no specific company rule dictating when an employee should be discharged, and that the fact that an employee has been previously suspended does not necessarily or automatically provide grounds for a discharge. He indicated that any decision to discharge an employee would "depend on the circumstances." He confirmed that in Mr. Hays' case, he and company personnel manager Richard Elliott reviewed the personnel files of Mr. Hays and Mr. Caudill subsequent to their discharge by Mr. Hacker. He confirmed that on the basis of this review, Mr. Hacker's decision to discharge Mr. Hays was allowed to stand, but Mr. Caudill's discharge was changed to a 3-day suspension because his file did not contain any recent prior disciplinary actions.

With regard to Mr. Hays' prior disciplinary actions, although Mr. Hacker may have known about them at the time he made the decision to discharge Mr. Hays, and may have mentioned them, I find no evidence that he discussed these prior actions with Mr. Hays in any detail, or informed him that they impacted on his discharge. The termination notice given to Mr. Hays does not mention these prior disciplinary actions. I agree with the complainant's arguments that these prior actions are irrelevant to the issue presented in this case. Mr. Hays was not discharged for being a poor electrician, and I conclude and find that but for his refusal or failure to service the No. 1 bridge offset grease fitting which he reasonably believed was hazardous, the respondent would not have fired him.

On the basis of the foregoing findings and conclusions, which I find are supported by a preponderance of all of the credible and probative evidence adduced in this case, I conclude and find that Mr. Hays has established a prima facie case of discrimination, and the respondent's arguments and defense to the contrary are rejected. I conclude and find that Mr. Hays was unlawfully discriminated against and discharged by the respondent on September 7, 1989, for engaging in activity protected under section 105(c) of the Act, and his complaint of discrimination IS SUSTAINED.

#### Relief and Remedies

The remedial aspects of this case were held in abeyance pending my adjudication of the merits of the complaint. The record reflects that subsequent to his discharge on September 7, 1989, Mr. Hays was out of work for approximately one month, and since that time he has been employed by another coal mine operator as an electrician. In his complaint, Mr. Hays requested the following relief:

- (1) A finding that the respondent discriminated against him in violation of section 105(c)(1) of the Act by discharging him on September 7, 1989.

- (2) An order requiring his reinstatement with full backpay and benefits, plus interest, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully discharged.
- (3) An order requiring that all references to his unlawful discharge be expunged from his personnel file and/or from any and all records maintained by the respondent.
- (4) An order requiring him to be reimbursed for all expenses incurred in the institution and prosecution of this proceeding, including attorneys fees.
- (5) An order requiring the posting of the decision in this proceeding at the mine where he is reinstated and at all of the respondent's other underground mines in eastern Kentucky, said postings to be in conspicuous, unobstructed places where notices to employee are customarily posted, each for a period of 60 consecutive days.
- (6) The imposition of a civil penalty against the respondent for unlawfully discharging him.
- (7) Any additional relief as is deemed just and proper to make him whole.

#### ORDER

1. Respondent IS ORDERED to reinstate Mr. Hays to his former position with full backpay and benefits, with interest, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully discharged.

2. Respondent IS ORDERED to expunge from Mr. Hays' personnel file and/or any company records any reference to his discharge of September 7, 1989.

3. Respondent IS ORDERED to reimburse Mr. Hays for all reasonable expenses incurred by him in the institution and prosecution of his discrimination complaint, including reasonable attorneys fees.

The parties ARE ORDERED to confirm with each other during the next thirty (30) days with respect to the aforesaid remedies due the complainant, and they are encouraged to reach a mutually agreeable resolution of these matters. Any stipulations or agreements in this regard shall be filed with me within the next

30 days. In the event the parties cannot reach an agreement, they ARE FURTHER ORDERED to file their respective positions with me in writing, with any relevant documentation and supporting arguments, within the next 30 days. If the parties believe that a further hearing may be required on the remedial aspects of this matter, they should so state.

I retain jurisdiction in this matter until the remedies due the complainant are finalized. Until those determinations are made, and pending a finalized dispositive order by the undersigned presiding judge, my decision in this matter is not final.

  
George A. Koutras  
Administrative Law Judge

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/fb

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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**SEP 28 1990**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. WEST 90-108  
v. : A.C. No. 05-03505-03572  
: Deserado Mine  
WESTERN FUELS-UTAH, :  
INCORPORATED, :  
Respondent :  
:

DECISION

Appearances: James B. Crawford, Esq., Office of the Solicitor,  
U. S. Department of Labor, Arlington, Virginia, for  
the Secretary;  
Karl F. Anuta, Esq., Law Offices of Karl F. Anuta,  
Bolder, Colorado, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this case, the Secretary (Petitioner) seeks a civil penalty for the alleged violation by the Operator (Respondent) of 30 C.F.R. § 75.400. Pursuant to notice, the case was heard in Glenwood Spring, Colorado, on June 14, 1990. Ernesto L. Montoya and Clete R. Stephan testified for Petitioner. David Glenn Casey, Carl O'Neal, and Robert Newell Hanson testified for Respondent. Post hearing Proposed Findings of Fact and Brief were filed by Respondent on July 26, 1990, and by Petitioner on August 10, 1990.

Stipulations

1. The Administrative Law Judge does have jurisdiction to hear this Notice of Contest and Civil Penalty Proceeding under the Federal Mine Safety and Health Act of 1977.

2. The penalty proposed will not affect Western Fuels-Utah's ability to continue in business.

3. The operation -- the mine operator of Western Fuels-Utah -- is a medium to large-size mine operator producing approximately one million tons of coal per year at this mine.

4. Western Fuels-Utah showed good faith in correcting this cited condition that is in dispute.

5. It has been agreed that Government Exhibit No. 1 is an authentic document, an official government record of the previous history, the previous violation history of Western Fuels-Utah under the Mine Act.

### Findings of Fact and Discussion

#### I.

On August 17, 1989, in connection with an AAA Inspection (regular inspection of entire mine), MSHA Inspector Ernesto L. Montoya issued an order, under Section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 (the Act), alleging a violation of Section 75.400, supra. In addition to contesting the alleged violation of 75.400, supra, Respondent argues that the Section 104(d)(2) Order was not properly issued, as there were intervening clean inspections between the underlying Section 104(d)(1) Withdrawal Order issued on June 5, 1989, and the subject 104(d)(2) Order issued on August 17, 1989. Specifically, as argued at the hearing, Respondent's position that there was an intervening cleaning inspection of the entire mine, is predicated upon reference to a combination of clean inspections.

According to the uncontradicted testimony of Montoya, that I accept, he checked the MSHA Records and did not find any evidence of clean inspections between the date of the underlying 104(d)(1) Order, and the date Order 104(d)(2) in question was issued. He indicated that the last complete inspection of the subject mine, prior to the date the 104(d)(2) Order in question was issued, was on May 15, 1989. Montoya indicated that he spoke to another MSHA Inspector, Ervin St. Louis, who informed him that between the underlying 104(d)(1) Order and the Order in question, there were only Section 103(i) Inspections. He concurred, on cross-examination, that these inspections occurred on June 12, 22, 26, July 18, 26, and August 3, and 10. Montoya indicated that in connection with the 103(i) Inspections that he made in the period in question, at different times he went from both portals to the face at the one longwall and three development sections. He indicated that he walked through the mine in this period once or twice and was able to observe ". . . conditions in the entry, the roadway that we go into, . . ." (Tr. 45). He indicated that although he did not

conduct an inspection on these occasions, he did not ignore violations and wrote what he found. According to Montoya each 103(i) Inspection in the period in question covered the same area and was intended to check for methane. According to Montoya, a 103(i) Inspection does not include belts, drives, belt entries, and electrical equipment unless the inspector walks by. In contrast, an AAA or regular inspection includes these items as well as escapeways and equipment at the face. Also, in a regular inspection, an inspector checks coal accumulations.

The Commission, in United States Steel Corporation 6 FMSHRC 1908 at 1911, (August 1984), set forth the requirements for the issuance of a Section 104(d)(2) Order as follows:

"The plain language of section 104(d)(2) of the Mine Act (n. 2 supra) establishes three general prerequisites for the issuance of an initial section 104(d)(2) withdrawal order: (1) a valid underlying section 104(d)(1) withdrawal order; (2) a violation of a mandatory safety or health standard "similar to [the violation] that resulted in the issuance of the withdrawal order under [section 104(d)(1)];" and (3) the absence of an intervening "inspection of such mine disclos[ing] no similar violations."

In Kitt Energy Corporation 6 FMSHRC 1596 (1984), the Commission rejected the argument of the Secretary that only a complete regular inspection is sufficient to satisfy the requirements of Section 104(d)(2). The Commission held that inspections other than "regular" inspections can be taken into account under Section 104(d)(2). In this connection, the Commission noted that it was the burden of the Secretary to establish that an intervening cleaning inspection has not occurred, and this burden could be met by demonstrating that when the Section 104(d)(2) Order was issued portions of the mine remained to be inspected. In this connection, the Commission interpreted Section 104(d)(2), supra, as requiring the inspection of a mine "in its entirety" (Kitt Energy Corporation, supra, at 1599).

In U. S. Steel Corporation, supra, the Commission reiterated its holding in Kitt, supra, at 1914, that ". . . any combination of regular or other inspections that covers the entire mine can constitute an intervening clean inspection."

In the instant case, I find that the Secretary has presented a prima facie case of the absence of an intervening clean inspection of the entire mine. The only inspections of the subject mine in the period in question were those made pursuant to Section 103(i) of the Act. I find that these inspections,

according to the testimony of the inspector, took place over one day only, and were for all the same areas, i.e., the faces of the longwall and development sections and the return and intake entries. As explained by Montoya, these 103(i) Inspections do not cover the belt drives, belt entries, or electrical equipment. ". . . unless we happen to walk by" (Tr. 110). As such, I conclude that the Section 103(i) inspections, in combination, did not cover the entire mine. Therefore, I conclude that the Secretary has established its prima facie case that there has not been a clean inspection of the entire mine during the period in question.<sup>1/</sup> I find that Respondent did not rebut Petitioner's prima facie case.

## II.

In essence, Montoya testified that at approximately 10:30 a.m., on August 17, 1989, he observed black coal dust in the second left entry of Third East between crosscuts 33 and 5.<sup>2/</sup>

<sup>1/</sup> (c.f., C F & I Steel Corporation, 2 FMSHRC 3459 (1980), (The Commission affirmed the finding of the trial judge that an intervening clean inspection of the entire mine had not been established by the Secretary where the record indicated, inter alia, that 30 inspection days, which were part of two regular inspections, took place in the period between the underline order and the Section 104(2)(d) Order.); c.f. U. S. Steel, supra, (The Commission found that testimony of the inspector, inter alia, that in the intervening period "I have covered the entire facility, yes. . . . the entire ID Number 820, yes," and "well, that's possible I went through there.", did not afford substantial evidentiary support to the finding of the trial judge that there was an absence of an intervening clean inspection.) (U. S. Steel, supra, at 1914).

<sup>2/</sup> In essence, Respondent in its Brief argues that Petitioner has not established that the cited area, i.e, the Second Left entry Third East is within the purview of Section 75.400, supra. I do not find merit to Respondent's position. Section 75.400 is violated if there is an accumulation of coal in "active workings." 30 C.F.R. § 75.2(g)(4) defines this term as ". . . any place in a coal mine where miners are normally required to work or travel." It appears from the map of the subject mine (Operator's Exhibit 1) that, aside from the belt entry, the First Left or Second Left entries are the only pathways for miners to travel from the portals to work at the longwall face. I note in this connection that David Glenn Casey, a fire-boss employed by Respondent, testified that on August 14, 1989, he walked up the First Left and Second Left entries.

He indicated that the coal dust was on the floor, ribs, crib timber, rocks, and timbers. He scraped the coal at various points with gloves, his fingers, a pen, and his ID card in order to get to a level area. He indicated that the flow coal dust was in a layer on top of rock dust, and was "thick as a sheet of writing paper" (Tr. 57). He testified that he did not have any doubt as to the color of the coal, nor did he doubt that the material he observed was indeed coal dust. I found Montoya to be a credible witness. Further, Respondent did not offer the testimony of any witness to contradict, based upon their observations, the extent of the coal dust observed by Montoya on August 17, 1989.<sup>3/</sup> Thus, I accept Montoya's testimony in this regard. Hence, I conclude, based on Montoya's testimony with regard to the various locations in the entry, aside from the floor, where coal dust was observed, the fact that it was observed over 28 crosscuts,<sup>4/</sup> and due to the fact that it existed in a layer on top of the rock dust, I conclude that Respondent herein did violate 30 C.F.R. § 75.400, as alleged in the order issued by Montoya, in that coal dust was ". . . permitted to accumulate . . . ."

### III.

Montoya had indicated in the Order at issue that the violation herein was significant and substantial.

<sup>3/</sup> I find that the opinion of O'Neal that, based on his observations, the entry in question did not have to be rock dusted on August 14, 1989, is not sufficient to rebut the testimony of Montoya, as to his observations 3 days later on August 17. Further, due to the expertise and experience of Clete R. Stepan, I place considerable weight upon his testimony that, in evaluating the hazard of coal dust, its color is not important, but rather the critical criteria is whether there is dust on the surface. In this connection, he testified that dust in a layer as thin as a piece of paper does present an explosion hazard. As such, I conclude that a determination of the color of the accumulation is not critical to a disposition of this case. Accordingly, I do not place much weight on the testimony of Carl O'Neil (Respondent's safety trainer, who was with Montoya during the inspection) that the dust in question was grey, and not black, as testified to by Montoya.

<sup>4/</sup> Inasmuch as the distance between the center of each crosscut was approximately 120 feet, the coal dust thus extended over a distance of more than 3000 feet.

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission set forth the elements of a "significant and substantial" violation as follows:

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

In essence, Montoya opined that the accumulation of coal dust he observed contributed to the hazard of an explosion. In this connection, he concluded that there was a great potential for an explosion based upon the extent of the coal dust accumulation in combination with the presence of methane in the gob area.<sup>5/</sup> Montoya further noted that coal dust was found only five crosscuts from the face, a distance of approximately 600 feet, and that there were various energized electrical equipment in the face areas, such as electric motors, a shear, and a lighting system which could short circuit, thus causing sparks. On cross-examination it was elicited from Montoya that he did not observe any coal dust suspended in the air, and at the time he issued the order in question the longwall production had been shut down, and there were no diesel equipment present. Further, he conceded that the lighting at the face was explosion-proof and the shear motor has to be explosion-proof.

Montoya indicated that a roof fall could very possibly cause sparks, and that the panel in question had a roof fall next to the tailgate, but he did not know when this occurred relative to the date the order was issued. In this connection, Glenn Casey indicated that the entry did not have any history of sudden roof falls outby the face line. However, he indicated that on the date in question the tailgate had required additional cribbing.

<sup>5/</sup> In this connection, I accept the uncontradicted testimony of Montoya that the mine in question was found to be liberating more than a million cubic feet of methane per 24 hours, and as such is subject to special inspections for methane pursuant to Section 103(i) of the Act).

David Glenn Casey, a fire boss employed by Respondent, indicated that when he observed the area in question on August 16, he did not feel that the area needed rock dusting, nor was he of the opinion that there was any hazard due to the presence of coal dust. In this connection, he indicated that the floor was wet. It was the testimony of Carl O'Neal, Respondent's safety trainer, that on August 17, the full length of the Second Left entry, alongside the coal seam, contained water that was approximately 6 to 12 inches wide and 2 to 3 inches deep. He said that approximately a third of the floor was wet. Also, although Casey indicated that he did not know the amount of methane present on August 17, he also indicated that "in the days around" August 17 (Tr. 275) in the area in question, there was "very minimal methane," which he indicated as .01, .02, and "occasionally" .03 (Tr. 276).

Despite Montoya's admissions on cross-examination, and the testimony of Casey and O'Neal referred to above, I conclude, for the reasons that follow, that it has been established that the violation herein was significant and substantial. In resolving the issues presented herein, I place considerable weight upon the testimony of Clete R. Stephan, a senior mining engineer employed by MSHA, due to his expertise and the fact that his testimony was largely un rebutted or contradicted by Respondent. Stephan testified, and elaborated upon in Government Exhibit 9, that without coal dust, which he termed fuel in suspension, an explosion would not occur. Although Montoya did not observe any coal dust in suspension, he nonetheless observed coal on the ribs. As explained by Stephan, because coal dust on the ribs is positioned above the floor level, it is easy for it to go into suspension when hit by a blast of air resulting from a roof fall or occurring as a consequence of machinery being involved in an accident. The coal dust from the ribs would also be placed in suspension if a vehicle would knock out a rib. In addition, Stephan noted that the coal at the subject mine is considered to be in the high range of volatile bituminous coal, and in general, bituminous coal is considered explosive. Further, I find, based on the uncontradicted testimony of Montoya, that the coal dust existed in layers on top of the rock dust.<sup>6/</sup>

<sup>6/</sup> Casey testified that the material in question in the area cited by Montoya was grey. He indicated that in general, rock dust is darker if wet, and that the stak rock above the seam in question is gray. He also indicated that Montoya had said that the material in crosscuts 1 to 27 was getting darker and was grey at crosscut 27. I find this testimony inadequate to rebut Montoya's testimony, based upon his personal observation, that the specific material in question consisted of coal dust in a layer on top of the rock dust. I observed the witness' demeanor and I conclude that Montoya was more credible in his testimony that he had no doubts that the material in question was coal dust.

According to Stephan, an ignition at the face would cause pressure waves which would place into suspension dust that had accumulated. In this connection, he noted that if the coal dust was in a layer on top of the rock dust, then most of the suspension would be coal dust. It is significant to note, as commented upon by Stephan, that an ignition at the face would have to travel only 600 feet<sup>7/</sup> in order to propagate an explosion of the coal dust located at crosscut 33, only 5 crosscuts outby the face. In such an event, according to Stephan, a flame would continue to propagate as it pushes forward any dust that is in suspension. Also, to be considered is the fact that, according to Montoya and not contradicted by Respondent's witnesses, the mine in question liberates a million cubic feet of methane per 24 hours. In this context, Stephan provided a foundation for Montoya's conclusion that there was a great potential for an explosion, based on the extent of the coal dust and the fact that methane was being liberated from the gob. Stephan, in this connection, indicated that coal dust, even in small amounts, has the effect of making methane explosive where it exists in concentrations below the range normally considered explosive. Hence, as explained by Stephan, the larger the amount of coal dust present the greater the resultant hazard. Here, it is noted, that the coal dust had accumulated in the entry in question between crosscuts 5 and 33, a distance of over 3000 feet. As testified to by O'Neal, there was water on the floor of the entry on the date in question. However, according to Stephan, the amount of moisture must "increase to pretty significant levels before they really affect the explosion itself" (sic) (Tr. 155). According to O'Neal, there was water on the floor of the entry in question. He testified that the water was 2 to 3 inches deep, 6 to 12 inches wide. (The floor was 18 feet wide.) I accept this specific testimony from O'Neal as to the extent of the water, rather than his general comment that a third of the floor was wet. Inasmuch as coal dust had accumulated on the timbers and ribs, as well as the floor, and Stephan had indicated that the dust from the ribs could easily be placed in suspension, I conclude that the extent of water herein in the entry was not significant enough to effect an explosion.

Based on all of the above, in combination, I conclude that not only has it been established that a hazard of an explosion was contributed to by the accumulation of dust, but that it has been established that there was a "reasonable likelihood that the

<sup>7/</sup> It is significant that Stephan indicated that 600 feet is only a very short distance for an explosion to be propagated, as an explosion travels at a rate of 1,000 feet per second.

hazard contributed to will result in an event in which there is an injury." (U. S. Steel Mining Company, Inc., 6 FMSHRC 1834 at 1836 (1984)). Further, it was the uncontradicted testimony of Montoya that, should an explosion occur, persons present in the section would be expected to be hurt, some fatally. I thus conclude that it has been established by Petitioner that the violation herein was significant and substantial. (See, Mathies, supra; U. S. Steel, supra).

#### IV.

In order to sustain the Section 104(d)(2) Order, Petitioner must establish that the violation herein was as a result of the Respondent's unwarrantable failure, which has been defined by the Commission as aggravated conduct, more than mere negligence. (Emery Mining Corp. 9 FMSHRC 1997 (1987)). In this connection, Montoya testified that the day prior to the issuance of the Order in question, he had been to the same entry in connection with a 103(i) Inspection, and cited Respondent for having an accumulation of black coal dust on the timbers, floor, and ribs, between crosscuts 32 and 38. According to Montoya, on April 16, he informed O'Neal and Robert Hanson, Respondent's safety director, that the return entry (Two Left) had to be entirely dusted and they both agreed. O'Neal did not specifically contradict Montoya's version, as he indicated that sometimes he does not hear what Montoya says. He also stated that he did not recall if Montoya had said, on August 16, that crosscuts 5 to 33 needed dusting. Thus, his testimony is insufficient to rebut Montoya's testimony that in fact he had told O'Neal, and O'Neal had agreed that the entire entry had to be dusted. In the same fashion, Hanson indicated that he did not recall any discussion with Montoya on August 16, with regard to the Citation. Hence, his testimony does not rebut Montoya's version. Accordingly, I accept the version testified to by Montoya.

Montoya also indicated that O'Neal, in his presence, had told David Prosser, the longwall foreman, that the entire entry had to be rock dusted. O'Neal, on the other hand, testified that Montoya had told him that crosscuts 32 to 38 needed dusting, as he was going to cite those areas, but that he (O'Neal) did not tell Prosser to dust. O'Neal testified he called the section foreman, Brad Jones, and told him the crosscuts that were cited, i.e. 32 to 38 needed to be dusted. He also testified that he told Prosser that the areas specified by Montoya i.e. crosscuts 38 to 32 needed to be rock dusted, but did not tell him to get it dusted.

Inasmuch as I have accepted Montoya's version, that O'Neal had agreed with him that the entire second Left entry had to be rock dusted, I thus find more credible Montoya's testimony that O'Neal did tell Prosser to dust the entire entry. The critical point, however, is that Montoya did tell both O'Neal and Hanson, on August 16, that the entire Left entry had to be rock dusted. Given that specific knowledge by O'Neal and Hanson, I conclude that the cited violation of an accumulation, observed by Montoya on the next day, August 17, in crosscuts 5 to 33, was as the result of Respondent's unwarrantable failure. In this connection, I note that according to Montoya, on August 17, Hanson was upset and he stated that he did not understand why only a specific area of the second Left entry was rock dusted, and the rest of the entry was not rock dusted. Hanson's testimony that he did not recall saying anything on August 17, when he received an order from Montoya, is not sufficient to contradict the specific testimony of Montoya, as to what Hanson did say.

Based on the statutory factors set forth in 110(i) of the Act, and considering the degree of Respondent's negligence, for the reason essentially set forth above, (infra, IV), and considering the high gravity of the violation herein, based on the extent and location of the coal dust, and the fact that it was layered on top of the rock dust, I conclude that a penalty herein of \$950 is proper.

ORDER

Respondent shall, within 30 days of this Decision, pay \$950 as civil penalty for the violation found herein.



Avram Weisberger  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 28 1990

CYNTHIA RAY, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEVA 90-40-D  
: :  
SOUTHERN OHIO COAL COMPANY, : MORG-CD 87-1  
Respondent :  
: Martinka No. 1 Mine  
:

ORDER OF DISMISSAL

On July 18, 1990, Respondent filed an Answer in the above captioned proceeding. In its Answer, Respondent made a Motion to Dismiss. In a Certificate of Service, attached to the Answer, Counsel for Respondent indicated that the Answer and Affirmative Defenses were served to Complainant on July 16, 1990. To date Complainant has not responded to the Motion to Dismiss.

On August 3, 1990, a Show Cause Order was issued as follows: "Complainant (Cynthia Ray) is ORDERED to file a reply to Respondent's Motion to Dismiss within 10 days of the date of this Order. Failure by Complainant to file such a reply shall result in this case being dismissed."

On August 28, 1990, Complainant called the Commission and spoke to the undersigned's secretary, and asked for a continuance. A telephone conference call was held on August 29, 1990, between Complainant, Counsel for Respondent, and the undersigned. The Complainant indicated she had received the Respondent's Motion to Dismiss, and was considering obtaining counsel. Complainant was allowed an extension until September 10, 1990, to file an Answer to the Motion to Dismiss. On September 11, 1990, Respondent filed a statement requesting an immediate ruling on its Motion. Neither Complainant, nor any Counsel on her behalf, filed a Response to the Motion to Dismiss.

Accordingly, inasmuch as no Reply has been filed by Complainant to either the Show Cause Order or Respondent's Motion to Dismiss, I find the Complainant has defaulted by not complying with the Order to Show Cause.

It is ORDERED that this case be DISMISSED.



Avram Weisberger  
Administrative Law Judge