SEPTEMBER 1992

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

SEPTEMBER 1992

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

Asarco, Inc. v. Secretary of Labor, MSHA, DocketNo. WEST 92-624-RM. (Judge Morris, August 25, 1992)

Secretary of Labor, MSHA v. D J & M Coal Company, Inc., Docket No. KENT 91-1109. (Chief Judge Merlin, Default Decision, August 11, 1992)

Secretary of Labor, MSHA on behalf of Donald L. Gregory and Loy D. Peters v. Thunder Basin Coal Company, Docket Nos. WEST 92-279-D and WEST 92-280-D. (Judge Lasher, September 14, 1992)

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 91-1965. (Judge Weisberger, September 21, 1992)

There were no cases filed in which review was denied.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 2, 1992

ROY FARMER AND OTHERS	:	
	:	
v.	:	Docket No. VA 91-31-C
	:	
ISLAND CREEK COAL CO.	:	

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

DECISION

BY THE COMMISSION:

This complaint for compensation, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 et seq. (1988) ("Mine Act"), is before the Commission a second time. Respondent, Island Creek, seeks interlocutory review of Commission Administrative Law Judge Gary Melick's September 27, 1991, decision denying the operator's motion to dismiss the complaint for compensation as untimely filed. 13 FMSHRC 1564. Judge Melick's decision was issued pursuant to the Commission's May 9, 1991, decision (13 FMSHRC 1226)[1] vacating an earlier order of dismissal issued by Commission Administrative Law Judge James Broderick (12 FMSHRC 2641 (December 1990)) and remanding the matter to determine "whether appropriate circumstances exist to excuse the late filing of the compensation complaint and to allow this matter to go forward." 13 FMSHRC at 1233.[2] For the reasons that follow, we affirm the judge's denial of Island Creek's motion to dismiss.

I.

Factual and Procedural History

Island Creek operates the Virginia Pocahantas No.3 Mine in Southwest Virginia. On April 17, 1990, a representative of the Department of Labor's Mine Safety and Health Administration (MSHA) issued a section 107(a), 30 U.S.C. § 817(a), imminent danger order alleging excessive methane concentrations in the mine's bleeder system and also issued a section 104(a), 30 U.S.C. § 814(a), citation alleging a violation of the mine's ventilation plan. All miners were withdrawn from the mine until the order was terminated

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[1] The decision appears in the August 1991 Volume of Commission decisions.

[2] Following remand, the case was reassigned from Judge Broderick to Judge Melick.

on April 20, 1990. Under section 111 of the Act, 30 U.S.C. § 821, if miners are idled by a section 107(a) order issued for a failure to comply with a mandatory standard, they are entitled to compensation for the time they are idled, up to one week. [3]

Roy Farmer, a miners' representative, filed a "Request for Compensation per section 111 of the Coal Mine Safety and Health Act of 1977," by letter dated October 29, 1990, and received by the Commission on November 2, 1990. The request indicated the dates for which compensation was sought, stated that Island Creek had refused to provide the compensation, and included a list of approximately 275 miners alleged to have been idled by the imminent danger order.

Island Creek filed an answer on November 28, 1990, wherein it asserted two affirmative defenses: that the complaint was not filed within the time period (90 days) set forth in Commission Procedural Rule 35, 29 CFR § 2700.35 ("Rule 35") and that Island Creek did not violate any mandatory standard that would give rise to a claim for compensation. On November 30, Island Creek filed a motion to dismiss the complaint for compensation as untimely filed, which Judge Broderick granted by order of December 20. In his order of dismissal, the judge noted that the complaint was filed 198 days after the idlement and 108 days beyond the time allowed in Rule 35. He also noted that Farmer's November 2, 1990 filing lacked any explanation for the delay. 12 FMSHRC at 2641.

On January 4, 1991, Farmer, acting pro se, filed a petition for review of Judge Broderick's order of dismissal, in which he alleged that he had been told by an Island Creek representative that the miners would be compensated for their idlement once the contest of the citation was resolved and if the operator was found to have violated the ventilation plan. Farmer also asserted that he had been told by representatives of both MSHA and this Commission[4] that there was no time limit on filing such a complaint but that, even if there were a limit, it would not begin to run until the contest of the citation was resolved against Island Creek. Farmer asserted, additionally, that the local union's financial inability to retain counsel, coupled with Farmer's own lack of knowledge of procedural matters, justified the late filing of the complaint. [5]

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[3] Island Creek has contested the section 104(a) citation in a separate proceeding, Secretary v. Island Creek Coal Co., Docket No. VA 91-2, pending before Judge Broderick. By order issued October 10, 1991, Judge Melick stayed this compensation proceeding pending disposition of the contest proceeding.

[4] The record clearly establishes that Farmer did not speak with an attorney in this Commission as he once believed; rather, he spoke with an attorney in the Solicitor of Labor's Office. Tr. 118-120.

[5] The United Mine Workers of America ("UMWA") filed a "Supplement" to Farmer's petition, which asserted that Farmer appeared to have been misled by Island Creek and government officials. The UMWA argued that, under those circumstances, Farmer's late filing of the complaint for compensation and his

In vacating Judge Broderick's order and remanding the matter for further proceedings, the Commission noted that, unlike section 105(c) of the Act, 30 U.S.C.§ 815(c), section 111 does not specify a time period within which complaints for compensation must be brought. Rather, the 90-day limit is derived solely from Rule 35 of the Commission's Procedural Rules. 13 FMSHRC at 1229. The Commission further noted that the 60-day limit in section 105(c) is not jurisdictional and that Congress specified that the time limit could be extended in justifiable circumstances. Citing Loc. U. 5429, UMWA v. Consolidation Coal Co., 1 FMSHRC 1300 (September 1979) ("Consol"), the Commission concluded that the 90-day requirement in Rule 35 also could be waived in appropriate circumstances. 13 FMSHRC at 1230-31. [6]

The Commission recounted the assertions made by Farmer in his petition and concluded that "[i]f true, those allegations could possibly establish adequate explanation or justification for the late filing." 13 FMSHRC at 1232. However, since the Petition was unsworn and contained no details as to relevant dates and persons involved, the Commission remanded the matter to the judge to allow him to "assess the merits of [the] allegations". Id. The Commission indicated that, even if Farmer could establish an adequate excuse for the late filing, the complaint might nevertheless be dismissed if the delay resulted in material legal prejudice to Island Creek. Id.

On remand, Judge Melick first determined that good cause existed for Farmer's failure to respond to Island Creek's motion to dismiss. He based his conclusion on the fact that Farmer had made reasonable efforts to obtain copies of the Commission's procedural rules but without success. The judge also concluded that Farmer "testified credibly" that he thought there would be a hearing on the motion to dismiss, thus obviating the need for a written response. 6 FMSHRC at 1566.

The judge found that there was "adequate justification" for Farmer's late filing. The judge stated that there was "credible evidence" that Farmer was ignorant of the filing requirements. The judge also concluded that despite Farmer's undergraduate degree in business and his "reading the law" for the Virginia bar, "it cannot reasonably be inferred that he should have had or should even be expected to have such esoteric knowledge" (of the filing requirements of Rule 35). Id.

Additionally, the judge found "sufficient credible evidence" that Farmer had conversed with mine manager Eddie Ball about compensation and that, at the very least, Ball advised Farmer that nothing would be done about compensation until the contest of the underlying citation was resolved. The judge further

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subsequent failure to file a response to the motion to dismiss should be excused. The UMWA cited Commission precedent allowing for relief from judgements rendered below in default cases. See, e.g., Secretary v. J.R. Thompson, Inc., 12 FMSHRC 1194 (June 1990).

[6] In Consol, the Commission determined that Commission Interim Rule 29, the forerunner to Rule 35, which required complaints for compensation to be filed within 30 days of idlement, could be extended in appropriate circumstances.

found that Farmer had contacted MSHA officials on the compensation issue but was not provided sufficient information to file a timely complaint with the Commission. Id. Lastly, the judge found insufficient evidence of "'legal prejudice' to otherwise warrant dismissal of these proceedings". Accordingly, the judge denied the motion to dismiss and ordered the case to proceed on the merits. Id.

II.

Disposition of Issues

Island Creek argues that the judge's decision should be reversed on three general grounds: (1) that it is contrary to Commission precedent; (2) that it is not supported by substantial evidence; and (3) that it does not comply with Commission Procedural Rule 65(a), 29 CFR § 2700.65(a).

The operator contends that, in light of Farmer's experience and education, the judge was bound to dismiss Farmer's complaint by Commission precedent established in Hollis v. Consolidation Coal Co., 6 FMSHRC 21 (January 1984) aff'd mem., 750 F. 2d 1093 (D.C. Cir. 1984) (table). Island Creek notes that Farmer was both local union president and chairman of the union safety committee, that he has an undergraduate degree in business from the University of Virginia and is currently "reading the law" for the Virginia bar under the tutelage of an attorney specializing in workers' compensation cases.

In Hollis, the Commission affirmed the dismissal of a section 105(c) discrimination complaint filed four months after the 60-day deadline by a union safety committee chairman with two years of college education. Island Creek contends that the Commission "endorsed an ALJ's finding that the claimant 'should have known of his rights under the Act' in light of his education and experience as a local union official". Br. 6, quoting 6 FMSHRC at 25. Island Creek argues that Farmer should be held to the same or higher standard of knowledge as the complainant in Hollis, and his complaint must, accordingly, be dismissed. The operator further contends that Farmer's education and experience constitute, at least, constructive knowledge of the requirement to file a written response to a motion to dismiss.

Island Creek has inaccurately interpreted the Commission's holding in Hollis. In that case the judge simply did not believe the claimant's assertion that he was unaware of his rights under section 105(c) of the Act and, consequently, was unaware of the filing requirements therein. The fact that Hollis was an active safety committee chairman and had completed two years of college were considered by the judge as indicators of Hollis' ability both to understand his rights and to waive them in order to pursue alternative remedies outside the Mine Act. 6 FMSHRC at 24-25.

On review, the Commission upheld the judge's credibility determinations:

> When reviewing a judge's credibility resolutions, as here, our role is necessarily limited. The judge observed

> Hollis as a witness and did not believe his testimony of ignorance concerning his Mine Act rights. We discern nothing in the record that would justify our taking the extraordinary step of overturning this credibility resolution.

6 FMSHRC at 25.

While the Commission concluded that substantial evidence supported "the judge's inference that Hollis did know of his Mine Act rights during the 60-day time period", the Commission made no mention of Hollis' educational background as a factor in its determination that the judge's inferences supported his disbelief of the complainant's assertions that he was ignorant of the filing requirements of section 105(c). Thus, Island Creek's contention that the Commission in Hollis, "endorsed an ALJ's finding that the claimant 'should have known his rights under the [Mine] Act' in light of his education and experience as a local union official" (Br.6) is incorrect. We reject the operator's argument that Hollis dictates dismissal of Farmer's complaint for compensation. On the contrary, we are reluctant to disturb the judge's credibility determinations here as we were reluctant to disturb the same judge's credibility determinations in Hollis. The Commission has often stated "a judge's credibility resolutions cannot be overturned lightly." Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629 (November 1986).

In arguing that the judge's decision is not supported by substantial evidence, the operator first contends that the judge failed to address an issue remanded to him by the Commission. Island Creek notes that, at the start of the hearing Farmer withdrew his contention that the local union was financially unable to retain counsel to pursue the compensation claim. The operator argues that, since the local union's financial inability to retain counsel was a factor the Commission focused on in its decision to remand, it was incumbent on the judge to address the issue if only in terms of evaluating Farmer's credibility. Island Creek further contends that the judge erred in ignoring the fact that Farmer had access to local and international UMWA counsel.

Financial inability was only one of several allegations that, as we stated in our earlier decision, "could possibly establish adequate explanation or justification for the late filing." 13 FMSHRC at 1232. We conclude that the judge found sufficient additional justification to excuse the late filing. We further note that in its brief on review Island Creek concedes that Farmer's withdrawal of his assertion of financial inability to retain counsel "might only reflect his confusion about the financial status of his UMWA local." Br. 14.

As for Farmer's access to UMWA counsel, in its brief on review the UMWA argues that Farmer had no reason to think he needed legal advice since he had been "lulled" by mine manager Ball into believing that the miners would be paid. In a somewhat similar vein, the judge concluded that Farmer and Ball did discuss the compensation issue and that "Ball at the very least advised

Farmer that nothing would be done about compensation until the contest of the underlying citation was resolved." 13 FMSHRC at 1566. Given the judge's conclusion on that issue as well as his earlier conclusion that Farmer was ignorant of the filing requirements for compensation claims, we infer that the judge did not find it relevant that Farmer had not sought legal advice from sources within the UMWA.

Island Creek's other challenges to the judge's decision on substantial evidence grounds are, in large part, based upon its argument that Farmer, by reason of his education and experience, should have been charged with actual or, at least, constructive knowledge of the procedural requirements for filing complaints for compensation. This argument is, in essence, a reiteration of Island Creek's contention that Hollis compels dismissal of Farmer's complaint, an argument that we have rejected.

The relative rarity of compensation complaints in litigation before the Commission may have led the judge to characterize knowledge of the procedural requirements relating to such complaints as "esoteric" in nature. 13 FMSHRC at 1566. Further, unlike section 105(c) of the Act, which sets a 60-day deadline for filing discrimination complaints, section 111 is silent as to a filing deadline. That time constraint is set forth in the Commission's Procedural Rules, which are published in Title 29 of the Code of Federal Regulations. All other standards and regulations applicable to the Mine Act are in Title 30 of the Code.

Island Creek's third argument is that the judge failed to comply with the requirements of Commission Procedural Rule 65(a). The operator contends that the judge's "summary conclusions" lacked "reasons or bases... on all material issues of fact, law or discretion presented by the record." Br. 24. Essentially, Island Creek argues that, although the judge repeatedly refers to "credible evidence" supporting his decision, he does not address unrebutted evidence that contradicts Farmer's testimony.

It is important to focus on what the judge concluded on the basis of the evidence presented. Farmer's petition for discretionary review indicates that he believed he was misled, intentionally or otherwise, by officials of both Island Creek and MSHA. The judge found that mine manager Ball said that "nothing would be done about compensation until the contest of the underlying citation was resolved" (13 FMSHRC at 1566), a characterization of the Ball-Farmer conversation that both Ball and Island Creek share. Tr.193-194; Br. 19. The judge found that Farmer "was not provided sufficient information to file a timely complaint with this Commission." 13 FMSHRC at 1566. Our reading of the judge's decision with respect to Farmer's contacts with Island Creek and MSHA is that he concluded that Farmer could reasonably have believed, on the basis of those contacts, that no action on his part was necessary while resolution of the underlying citation was still pending. We find that substantial evidence supports the judge's conclusion.

As for the operator's additional contention, that the judge did not explain his conclusion that there was "insufficient evidence of 'legal prejudice' to otherwise warrant dismissal of these proceedings" (13 FMSHRC at 1566), we conclude that no explanation was necessary. At the close of the

hearing, the judge asked whether Island Creek had anything to say with regard to the legal prejudice issue. Counsel for the operator replied, "Just that we aren't going to present any evidence in that regard, your Honor." Tr. 203-204.

In response to the Commission's remand order the judge determined that Farmer produced "credible evidence" that he was ignorant of Commission procedures and that he had made reasonable efforts, after filing his complaint but before Island Creek filed its motion to dismiss, to secure a copy of the Commission's procedural rules.[7] The Commission's remand order noted that "a miner's genuine ignorance of applicable time limits may excuse a late filed discrimination complaint." 13 FMSHRC at 1231, citing Walter A. Schulte v. Lizza Indus. Inc., 6 FMSHRC 8,13 (January 1984). The Commission stated that this principle was "correspondingly valid in the compensation complaint context". 13 FMSHRC at 1231. Thus, we find that Farmer's reasons for his untimely filing, which were credited by the judge, meet the "genuine ignorance" requirement of Schulte, supra.

[7] Island Creek's own Exhibit 4 is a November 6, 1990, letter from Farmer to the Commission requesting party status in the contest proceeding on the underlying citation and requesting a copy of the Commission's Procedural Rules. The letter indicates that it was received by the Commission on November 14, 1990, eleven days prior to the date of Island Creek's motion to dismiss.

Accordingly, the judge's order denying Island Creek's motion to dismiss is affirmed and the matter is remanded to the judge for further proceedings pending disposition of the issues in Secretary v. Island Creek Coal Co., Docket No. VA 91-2.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 3, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ROBERT W. BUELKE	:	
v.	:	Docket No. WEST 92-544-DM
SANTA FE PACIFIC GOLD CORPORATION	:	

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("the Mine Act"), Santa Fe Pacific Gold Corporation ("Santa Fe") has filed a petition for review of Commission Administrative Law Judge August Cetti's August 19, 1992, order of temporary reinstatement issued under Commission Procedural Rule 44, 29 C.F.R. § 2700.44 (1986). We grant Santa Fe's petition for review and, for the reasons that follow, we affirm the judge's order.

Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), prohibits mine operators from discharging or otherwise discriminating against miners who exercise their safety rights under the Act. If a miner believes that he has been discriminated against in violation of section 105(c), he may file a complaint with the Secretary. If, after a preliminary investigation, the Secretary finds that the complaint is "not frivolously brought," she is authorized to apply to the Commission for an order of temporary reinstatement of the miner pending full resolution of the complaint. 30 U.S.C. § 815(c)(2). If the Commission finds that the complaint is "not frivolously brought," it must issue an order of reinstatement on an expedited basis. 29 C.F.R. § 2700.44(b).

Complainant Robert W. Buelke was employed as an electrician by Santa Fe at its Rabbit Creek Mine from June 6, 1990, until July 1, 1991, when he was discharged. Buelke filed a complaint of discrimination with the Secretary under section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). Following a preliminary investigation, the Secretary filed an application for temporary reinstatement with the Commission on February 7, 1991. Judge Cetti issued an

order of reinstatement on February 27, 1992, after hearing.[1] Buelke returned to work on March 9, but was discharged for a second time on April 13. It is this second discharge that is the subject of this proceeding.

The Secretary once again filed an application for temporary reinstatement. At the close of the ensuing hearing on August 5, Judge Cetti issued a bench order, granting temporary reinstatement. The bench order was reduced to writing and issued on August 19.[2]

The Secretary alleges that Buelke, on several occasions, made safety complaints relating to the installation, maintenance and repair of the Rabbit Creek Mine's electrical system and that Santa Fe retaliated for those complaints through harassment, intimidation and, ultimately, discharge. The Secretary further asserts that Buelke's second discharge on April 13, 1992, was motivated by the filing of his initial complaint of discrimination and that it was the result of disparate treatment.

Santa Fe responds that Buelke was discharged a second time for unexcused absences from April 4 through April 7, 1992. The operator further contends that it has a strict, evenhanded policy on absenteeism and that the record supports its arguments that Buelke's discharge was not the result of disparate treatment.

"The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." Secretary o.b.o. Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1305, 1306 (August 1987), aff'd, Jim Walter Resources Inc. v. FMSHRC, 920 F.2d 738 (11th Cir. 1990). In his decision below, Judge Cetti concluded, "I am satisfied from the present record ... that the evidence presented on behalf of Mr. Buelke made a strong showing and established for purposes of the present proceeding for temporary reinstatement only that Buelke engaged in protected activity and that a viable non-frivolous issue exists as to whether or not either or both discharges were motivated by Respondent's desire to retaliate against him for

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[1] This earlier complaint and temporary reinstatement are the subject of a separate Commission proceeding, Secretary on behalf of Robert W. Buelke v. Santa Fe Pacific Gold Corp., Docket No. WEST 92-243-DM.

[2] Santa Fe filed a petition for review of the judge's bench order on August 12, 1992, to which the Secretary filed opposition on August 19. After the judge's written order was issued, Santa Fe filed a second petition, which incorporated the initial petition by reference. The Secretary filed a supplemental response in opposition to the petition. Commission Procedural Rule 44(e), 29 C.F.R. § 2700.44(e), requires that a judge's order granting or denying an application for temporary reinstatement include "findings and conclusions supporting the [judge's] determination." Thus, the rule contemplates a written order. Accordingly, for purposes of the time periods set forth in Rule 44, we deem the judge's written order of August 19, 1992, to be the starting point of the review process. All documents, including those filed before August 19, have been considered on review.

his protected activity." Order pp. 4-5.

Having carefully reviewed the evidence and pleadings, we conclude that the judge's order is supported by the record and is consistent with applicable law. We intimate no view as to the ultimate merits of this case. The only issue before us is whether Buelke's complaint of discrimination was not frivolously brought.

Accordingly, the judge's order of temporary reinstatement is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 9, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of MICHAEL L. PRICE and JOE JOHN VACHA	:	
and	:	
UNITED MINE WORKERS OF AMERICA	:	
v.	:	Docket No. SE 87-128-D
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY: Backley, Doyle, Holen and Nelson, Commissioners

This matter involves the Secretary of Labor's discrimination complaint against Jim Walter Resources, Inc. ("JWR"), alleging that it discharged complainants Michael L. Price and Joe John Vacha in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), 30 U.S.C. § 815(c), after they failed to provide urine samples as required by JWR's Substance Abuse Rehabilitation and Control Program ("Drug Program"). This is the fourth time that this discrimination proceeding has been before the Commission on review. In its earlier decision on the merits, Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc., 12 FMSHRC 1521 (August 1990)("Price and Vacha I"), the Commission reversed Commission Administrative Law Judge Broderick's finding that the Drug Program was facially discriminatory in violation of section 105(c) of the Mine Act (10 FMSHRC 896 (July 1988)(ALJ)), and remanded the case to the judge to determine whether JWR's Drug Program had been discriminatorily applied against Price and Vacha.

On remand, Judge Broderick found that the Drug Program had been discriminatorily applied against Price and Vacha, and that JWR had not shown it would have discharged Price and Vacha for unprotected activity alone. 12 FMSHRC 2635, 2639 (December 1990)(ALJ) ("Decision on Remand"). The judge ordered the reinstatement of Price and Vacha. Id. Both JWR and intervenor United Mine Workers of America ("UMWA") filed petitions for discretionary review, which the Commission granted. For the following reasons, we affirm the judge's Decision on Remand.

I.

Factual and Procedural History

A. Factual Background

The factual background of this proceeding is set forth in Price and Vacha I, 12 FMSHRC at 1522-28, and is incorporated by reference. JWR operates five underground coal mines in Alabama, employing over 2,800 employees, including 2,200 hourly workers represented by the UMWA. Each JWR mine has a local union affiliated with District 20 of the UMWA. At all times relevant to this proceeding, the UMWA and JWR were signatories to a collective bargaining agreement governing labor relations in the JWR mines. 10 FMSHRC at 897-98; 12 FMSHRC at 1522. That bargaining agreement establishes a mine health and safety committee at each mine composed of miners selected by members of the local UMWA. Both Price and Vacha were members of such a committee.

At the time of the incidents, both Price and Vacha had worked for JWR's No. 4 Mine for approximately nine years. 12 FMSHRC at 1524. Price and Vacha and the safety committee had the reputation of being "safety activists." 10 FMSHRC at 903; 12 FMSHRC at 2636. In six years on the safety committee, Vacha had filed from 75 to 100 section 103(g) complaints and participated in 50 to 75 safety grievances against JWR. In his eight and one-half years on the committee, Price had annually filed approximately 25 section 103(g) complaints, and handled approximately 70 safety grievances against JWR management.

In 1987, JWR initiated its Drug Program. Most directly involved in this matter is section II.E. of the program, dealing with random drug testing, which states:

> Any employee whose duties, whether by job title or by reason of elected office, involve safety, shall be subject to random testing for substance abuse up to four times per calendar year. Physicals for hoistmen shall also include testing for substance abuse. All provisions of the program shall apply to employees in this category.

12 FMSHRC at 1523.

When Price and Vacha failed to provide the urine samples required for testing, they were suspended with intent to discharge and subsequently discharged. 12 FMSHRC at 1525. They were later reinstated by order of Judge Broderick.

B. Procedural Background

On May 14, 1987, pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), the Secretary filed an application for temporary reinstatement of Price and Vacha to their JWR positions. On June 29, 1987, a temporary reinstatement hearing was held before Judge Broderick. At the

outset of the hearing, the judge orally granted the UMWA's motion to intervene in this matter. JWR did not oppose the UMWA's participation as an intervenor. TRH 11-12.[1]

On July 7, 1987, the judge issued an order directing the temporary reinstatement of Price and Vacha. This unpublished order also confirmed the UMWA's right to intervene. JWR appealed the reinstatement order to the Commission. See 29 C.F.R. § 2700.44(e). The Commission affirmed the judge's order of temporary reinstatement. 9 FMSHRC 1305 (August 1987). JWR appealed the Commission's order to the United States Court of Appeals for the Eleventh Circuit (No. 87-7484, filed 8-7-87). The Eleventh Circuit subsequently affirmed the Commission's order requiring Price and Vacha's temporary reinstatement. Jim Walter Resources, Inc. v. FMSHRC, 920 F.2d 738 (11th Cir. 1990).

In March 1988, Judge Broderick heard the merits of the case. In his decision of July 13, 1988, the judge ordered the permanent reinstatement of Price and Vacha. 10 FMSHRC at 911. He determined that paragraph II.E. of the Drug Program was facially discriminatory under section 105(c) of the Mine Act because it targeted safety committeemen, but no other rank-and-file miners, for random testing and that the complainants' discharges pursuant to the Drug Program were discriminatory. 10 FMSHRC at 906-08. As to whether the Drug Program, assuming facial validity, had been discriminatorily applied to the complainants, the judge concluded that Price and Vacha had established a prima facie case of discrimination in that their discharges were motivated, in part, by their protected activity. 10 FMSHRC at 909-10. Nevertheless, the judge held that JWR had affirmatively defended against the discrimination claims in that it had discharged Price and Vacha for insubordination, i.e., violation of a valid "work order," the Drug Program. 10 FMSHRC at 910. The Commission granted JWR's petition for discretionary review, which challenged only the judge's determination that the Drug Program was facially discriminatory.

In its decision on the merits in Price and Vacha I, the Commission reversed the judge's conclusion that the Drug Program was facially discriminatory under section 105(c) of the Mine Act. 12 FMSHRC at 1531-33. Concerning the application of the Drug Program, the Commission affirmed the judge's determination that Price and Vacha had established a prima facie case of discriminatory discharge. 12 FMSHRC at 1533-34. However, the Commission remanded the case to the judge for reconsideration and further findings on the issue of whether JWR had established an affirmative defense, given certain of the judge's other findings. Those findings included the pre-testing supervisory harassment of Price and Vacha; the complainants' inability to urinate because of "genuine physical and psychological difficulties"; the different testing procedures at other JWR mines; and the evidence of accommodation of other miners who had experienced urination difficulties. 12 FMSHRC at 1534-35. The Commission held:

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[1] The Transcript of the Temporary Reinstatement Hearing of June 29, 1987, is referred to herein as "TRH."

> [A]n operator does not establish a Pasula-Robinette affirmative defense if a work rule or policy that the miner is alleged to have violated, was applied discriminatorily to the miner or in a manner deliberately calculated to render his compliance difficult or impossible. In such cases, the claimed "independent" basis for discipline is actually an extension of the operator's discriminatory conduct.

12 FMSHRC at 1534.

The Commission instructed the judge as follows:

> We find that the judge did not fully examine and explain, in the context of ruling on JWR's affirmative defense, the impact of the evidence summarized above. If, in fact, Price and Vacha were fired for failing to comply with discriminatorily applied drug testing procedures or if those procedures were deliberatively manipulated to contribute to such failure, a Pasula-Robinette affirmative defense based on those same procedures cannot stand. In other words, a discharge for failure to comply with a discriminatorily implemented work order would not satisfy the affirmative defense requirements of Commission precedent.

12 FMSHRC at 1535-36. Accordingly, the Commission remanded the case to the judge, with instructions that the parties should be permitted the opportunity to brief the merits of the remanded issues.[2]

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[2] In Price and Vacha I, only JWR filed a petition for review. JWR did not challenge the judge's "as applied" findings nor had the Commission sua sponte directed that issue for review. The UMWA raised the "as applied" issue in its response brief. JWR moved to strike that portion of the UMWA's brief as being outside the Commission's direction for review. A majority of the Commission denied that motion (Commissioners Backley, Doyle, and Nelson). See 12 FMSHRC at 1529 ("[W]e hold that ... the 'appellee' [in Commission review proceedings] may urge in support of the judgment below any matter or issue appearing in the record, even if it involves an objection to some aspect of the judge's reasoning or issue resolution, so long as the appellee does not seek to attack the judgment itself or to enlarge its rights thereunder, in which case it would be obliged to file a cross-petition for discretionary review." (Emphasis in original)). Chairman Ford voted to grant JWR's motion to strike. 12 FMSHRC at 1542-43. Commissioner Lastowka voted to grant the motion to strike, but would have remanded the matter to the judge for a "final, appealable order" concerning the "as applied" issue. 12 FMSHRC at 1538-41. JWR summarily repeats its argument that the UMWA's "as applied" contentions were outside the proper scope of Commission review. For the reasons set forth in Price and Vacha I, 12 FMSHRC at 1528-29, we again reject JWR's argument on this issue.

JWR unsuccessfully moved the Commission for reconsideration. 12 FMSHRC 2418 (November 1990). On December 20, 1990, Judge Broderick issued his Decision on Remand. He evaluated the evidence concerning "pre-testing supervisory joking directed at Price and Vacha, and the differences in procedures followed at other [JWR] mines." 12 FMSHRC at 2635. The judge found that:

> Price and Vacha were made to feel nervous and upset by the manner in which the testing was conducted. They did not refuse to submit the samples but were physically or psychologically unable to do so. I conclude that the fact that the procedure was supervised by those who often had an adversarial relation to them in safety disputes, contributed to their discomfort. I also conclude that the past safety activities of Price and Vacha were part of the motivation of these supervisors in their conduct of the drug testing program.

12 FMSHRC at 2637. Judge Broderick also found that:

> The procedures followed in testing Price and Vacha which differed from those followed in other mines contributed to their inability to comply with the request for urine samples. They were in part related to Price and Vacha's prior safety activities in that they were conducted by those who bore an adversarial relationship to Price and Vacha in mine safety matters.

12 FMSHRC at 2638-39.

The judge concluded that the drug testing program had been discriminatorily applied to the complainants and could not serve as an independent nondiscriminatory justification for their discharges. Accordingly, he held: "JWR has not established that it would have discharged Price and Vacha for unprotected activity alone, i.e., without reference to the implicated drug testing program. Therefore, their discharges were in violation of section 105(c) of the Mine Act." 12 FMSHRC at 2639. The judge directed the permanent reinstatement of Price and Vacha and ordered JWR to pay them back pay and benefits. Id.

The Commission granted JWR's petition for review, which, essentially, attacks the judge's conclusions that Price and Vacha established a prima facie case and that JWR failed to defend affirmatively against that case. For the first time, JWR also challenges the standing of the UMWA to represent the individual claims of Price and Vacha. The Commission also granted the UMWA's petition, which asserts pro forma that the Drug Program is facially discriminatory.

II.

Disposition of Issues

The petitions raise four issues:

(A) Whether Price and Vacha established a prima facie case of discrimination; (B) Whether JWR established an affirmative defense to the discrimination claims; (C) Whether the UMWA has the standing to bring an individual claim of discrimination on behalf of Price and Vacha; and (D) Whether JWR's Drug Program is facially discriminatory under section 105(c)(1), 30 U.S.C. § 815(c)(1).

We dispose of issue D summarily. That issue was decided by the Commission in Price and Vacha I, and the UMWA has presented no new arguments with respect to that issue. In Price and Vacha I, the entire Commission determined that section II.E. was not facially discriminatory under the Act. 12 FMSHRC at 1531-33, 1538 (Lastowka opinion), 1542 (Ford opinion). The Commission reasoned that the Mine Act does not bar operators from adopting substance abuse programs and that "JWR advanced adequate and reasonable business justifications for including safety committeemen, along with other employees whose job duties involved safety matters, in the pool of miners subject to the drug testing provision of section II.E." 12 FMSHRC at 1532-33. The Commission concluded that safety committeemen were not "singled out" from all other miners, because JWR reasonably targeted all safety positions for drug testing. 12 FMSHRC at 1532. We reaffirm the Commission's holding that section II.E. of the Drug Program is not facially discriminatory under section 105(c) of the Mine Act.

A. Whether Price and Vacha established a prima facie case of discrimination

The Commission also considered issue A in Price and Vacha I. There, a majority of the Commission concluded that Price and Vacha established a prima facie case of discrimination. We reaffirm that determination here. In its petition, JWR raises additional arguments that we will briefly discuss.

To establish a prima facie case of discrimination, a complaining miner must prove that he engaged in protected activity and that the adverse action complained of was motivated in some part by that activity. Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). See also, e.g., Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Jim Walter Resources, 920 F.2d at 750, citing with approval Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

The judge found in his first decision on the merits that "the discharge of Price and Vacha was motivated in part because of protected activity, i.e., because of their activities as safety committeemen." 10 FMSHRC at 909-10. He based that holding on the following evidence: Price and Vacha had engaged in

considerable protected activity as safety committeemen; Kelly was "clearly aware" that Price and Vacha were "notorious" for filing safety complaints; the supervision of the urine collection at No. 4 Mine was delegated to Andrews and Hendricks, company safety inspectors, rather than remaining in the Industrial Relations Department, as in other mines; JWR offered no accommodation to Price and Vacha when they were unable to urinate, although some accommodation was given to others involved in the Drug Program; and, Price and Vacha did not refuse to provide samples but were unable to do so. 10 FMSHRC at 909.

The thrust of JWR's present argument is that Kelly's decision to discharge Price and Vacha was not connected to their safety activities.[3] JWR argues that neither direct nor circumstantial evidence demonstrates JWR's (i.e., Kelly's) discriminatory intent. On questions of a judge's fact finding, the focus of JWR's contentions on review, the issue before the Commission is whether substantial evidence on the record as a whole supports the judge's findings. Donovan on behalf of Chacon v. Phelps Dodge Corp., 709 F.2d 86, 92 (D.C. Cir. 1983). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." See, e.g., Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1137 (May 1984), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Applying the substantial evidence test, the foregoing evidence shows protected activity, company knowledge of protected activity, and sufficiently disparate treatment of Price and Vacha during the drug testing procedures to support the judge's inference of discriminatory motivation.

JWR contends, however, that discriminatory intent must be proven by direct evidence and that there is no such evidence in this case. The Commission has made clear that such direct evidence is rare and that discriminatory intent may be established by the kind of indirect evidence involved here. E.g., Secretary on behalf of Johnny Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (November 1981), rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983). We note further that much of the evidence of discriminatory application of the Drug Program, which we discuss below in the affirmative defense analysis, bolsters our conclusion that a prima facie case has been established by Price and Vacha.

JWR has added nothing on review that causes us to depart from the Commission's prior holding affirming Judge Broderick's finding that Price and Vacha established a prima facie case. Thus, we reaffirm the judge's determination that the complainants established a prima facie case that the Drug Program was discriminatorily applied to them.

B. Whether JWR established an affirmative defense

The issue here is whether JWR established an affirmative defense under the Pasula-Robinette analysis, which allows an operator to defend affirmatively against a prima facie case by showing that: (1) the adverse

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[3]JWR raised the same argument in challenging the judge's finding that JWR had not affirmatively defended. As discussed here and below, we reject JWR's argument on both counts.

action was also motivated by the miner's unprotected activity and, (2) the operator would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817; Stafford, 732 F.2d at 959. See also Jim Walter Resources, 920 F.2d at 750, citing Eastern Associated Coal, 813 F.2d at 642. An operator must prove this affirmative defense by a preponderance of the evidence. E.g., Eastern Associated Coal, 813 F.2d at 642.

JWR contends that it could legitimately discharge Price and Vacha solely on the unprotected basis of their refusal or failure to provide the required specimens. As noted, the Commission made clear in Price and Vacha I that if the Drug Program were discriminatorily applied to Price and Vacha, JWR could not legitimately raise the complainants' failure to comply with the Drug Program as justification for their discharges. We conclude that substantial evidence in the record as a whole supports the judge's conclusion that JWR applied the Drug Program in a discriminatory manner against Price and Vacha.

Rayford Kelly, the Industrial Relations supervisor at the No. 4 Mine, testified that Price and Vacha were "notorious" for filing safety complaints against JWR management. TRH 362, 411, 421-23; 10 FMSHRC at 903, 909; 12 FMSHRC at 2636. Price had been disciplined and discharged for performing his duties as a safety committeeman; the discharge was reversed by an arbitrator. TRH 155, 157; 10 FMSHRC at 903. JWR Deputy Mine Manager Donnelly allegedly told Vacha that the Drug Program was a way of getting rid of Price and him. TRH 64. Another safety committeemen, Thomas Wilson, testified that Price and Vacha were "constantly targets of discipline" and that the mine foremen stated that "they [were] after Mr. Price and after myself." TRH 222, 223. Mr. Wilson testified that he attended meetings where JWR upper management, "Bill Carr, Buck Piper, complained about myself, Mr. Price and Mr. Vacha as to filing 103 G's, filing safety grievances, the way we took care of business." TRH 222; see generally 10 FMSHRC at 903, 909; 12 FMSHRC at 2636.

Both Price and Vacha were subjected to joking by supervisors concerning their participation in the upcoming drug testing program. TRH 63-65, 68-75, 152-155, 162-165; 10 FMSHRC at 900; 12 FMSHRC at 2636. On several occasions both Price and Vacha were given "practice cups," such as Coke cans with the tops cut off. 10 FMSHRC at 900. A urine specimen bottle with "UMWA, Mike Price" written on it was displayed on the desk of Wyatt Andrews, head of the safety department at the No. 4 Mine, for two days before it was finally removed. TRH 63, 70; 10 FMSHRC at 900. Kelly was aware of the displayed specimen bottle. TRH at 399-400; 10 FMSHRC at 900; 12 FMSHRC at 2638. Andrews also handed Vacha an empty self-rescuer container and said, "Here, practice up. This is your practice p--s cup." TRH 63-64, 162-164; 10 FMSHRC at 900.

Kelly delegated the testing of Price and Vacha to Andrews and Hendricks, management safety officials. TRH 387-91; 10 FMSHRC at 901; 12 FMSHRC at 2638. At the No. 4 Mine, Kelly personally administered and observed the specimen collection of the management safety officials. TRH 385; see 12 FMSHRC at 2637. At all other JWR mines, the Industrial Relations Supervisors administered the testing of all miners. 10 FMSHRC at 901; 12 FMSHRC at 2637. When Hendricks accompanied Vacha to the bathroom, Hendricks stood next to him in the toilet stall, tapping on the divider, singing and humming. TRH 62,

129-30. See 10 FMSHRC at 901, 909; 12 FMSHRC at 2637.

Price and Vacha attempted to provide urine specimens every half hour, for four hours. TRH 61; 10 FMSHRC at 901. They asked Kelly if they could return in the morning to provide specimens. TRH 89, 181-83. Kelly refused. TRH 89, 181-83. Price testified that he offered to strip naked if he would be permitted to enter the restroom by himself. TRH 177-78. This request was rejected. TRH 177-78. Vacha testified that he was taking medication that could inhibit urinating. TRH 81. See 10 FMSHRC at 901, 909; 12 FMSHRC at 2637, 2638. The next morning, Price took a drug test at the company's medical facility, and Vacha did so at a local hospital. They submitted the results, which were negative, to JWR. TRH 111, 183-184, 88; 10 FMSHRC at 901.

In contrast, JWR accommodated other miners having difficulty urinating. See Tr. 730 (miner tested for cause permitted to return the next day to provide sample); Tr. 92 (miner who could not produce sample at beginning of his shift allowed to provide it at end of shift) 10 FMSHRC at 902, 909; 12 FMSHRC at 2637, 2638.

The foregoing constitutes substantial evidence to support the judge's conclusion that JWR applied its drug testing in a discriminatory manner against Price and Vacha. We regard as particularly important the evidence of the notoriety of Price and Vacha's safety efforts when combined with JWR's failure to accommodate them, while others were accommodated. We also find telling the delegation of testing of Price and Vacha to those same supervisors who had engaged in pre-testing joking, and who had often assumed an adversarial role in safety matters against Price and Vacha. However, the judge's Conclusion of Law II, which states that "[t]he evidence does not establish that the pre-testing joking and harassment directed toward Price and Vacha were related to their ... safety activities" (12 FMSHRC at 2638), is not supported by substantial evidence and, further, is inconsistent with the balance of the judge's decision. For example, the record is clear, and the judge so found, that a few months before the Drug Program began, a urine sample bottle labelled "Mike Price UMWA" was exhibited on supervisor Wyatt Andrews' desk in the safety office. 10 FMSHRC at 900; see also 12 FMSHRC at 1535. Thus, the reference to the UMWA on the urine bottle and its location in the safety office demonstrate that the pre-testing "humor" was linked, at least in part, to the complainants' safety activities on behalf of the UMWA.

JWR also contends that Kelly possessed no unlawful motive when he discharged Price and Vacha. JWR cannot escape liability by focusing on the motivation of supervisor Kelly while overlooking the actions of Hendricks and Andrews, the other supervisors involved. Even assuming that Kelly did not possess discriminatory motive, the record is clear that JWR's other supervisors applied the Drug Program in a discriminatory manner. Under such circumstances, the supervisors' discriminatory motive and behavior must be imputed to the company even though the officer who actually makes the firing decision may not share the animus. JMC Transport, Inc. v. NLRB, 776 F.2d 612, 619 (6th Cir. 1985); Allegheny Pepsi-Cola Bottling Co. v. NLRB, 312 F.2d 529, 531 (3d Cir. 1962).

In sum, the record supports Judge Broderick's holding that JWR applied the drug testing in a discriminatory manner, in violation of section 105(c), and that JWR failed to affirmatively defend against Price and Vacha's prima facie case.

C. Whether the UMWA has the standing to bring an individual claim of discrimination on behalf of Price and Vacha

JWR now asserts, for the first time in this proceeding, that the UMWA lacks standing to represent the complainants' individual claims. JWR's contention is based on principles of constitutional standing, drawn from Article III, Section 2 of the Constitution, which defines the scope of the federal judicial power. As the Commission has recognized, "the Article III 'case or controversy' requirement does not literally apply to federal administrative agencies like the Commission." Mid-Continent Resources, Inc., 12 FMSHRC 949, 955 (May 1990), citing Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 451 (10th Cir. 1983), affirming Climax Molybdenum Co., 2 FMSHRC 2748 (October 1980).

In any event, miners' representatives, such as the UMWA, have standing to participate in Mine Act proceedings on behalf of miners, because the Act expressly confers such standing upon them. The Supreme Court in Warth v. Seldin, 422 U.S. 490 (1975), pointed out:

> Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.... [P]ersons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others....

422 U.S. at 501. The Mine Act authorizes miners' representatives to participate in a number of proceedings under the Act and section 105(c)(1) protects them from discrimination in so participating. Indeed, the Act expressly permits miners' representatives to take part in Commission discrimination actions:

> The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section.

30 U.S.C. § 815(d). Commission Procedural Rules expressly authorize that "representatives of miners[4] may intervene and present additional evidence" in

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[4]29 C.F.R. § 2700.2 defines representatives of miners as follows:

> (a) Any person or organization that represents two or more miners at a coal or other mine for the purposes of

discrimination proceedings instituted by the Secretary. 29 C.F.R. § 2700.4(b)(2). The Rules also authorize representatives of miners to practice before the Commission. 29 C.F.R. § 2700.3. Moreover, 29 C.F.R. § 2700.1(c) provides: "These rules shall be construed to ... encourage the participation of miners and their representatives." (Emphasis added). See UMWA, District 31, v. Clinchfield Coal Co., 1 IBMA 31, 1 MSHA (BNA) 1010, 1015 (May 1971); Peabody Coal Co., 1 FMSHRC 1785, 1791 (November 1979)(UMWA as the representative of miners at the subject mine was authorized to bring compensation proceeding on behalf of individual miners under 30 U.S.C. § 821).

Furthermore, as pointed out by the UMWA and the Secretary on appeal, JWR's argument as to standing was not first raised to the judge below. Section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii), provides: "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." See also Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d). This statutory review limitation precludes JWR from raising the UMWA's standing at this late stage.

The UMWA moved to intervene on June 29, 1987, just prior to the temporary reinstatement hearing. The UMWA specifically requested intervention on behalf of Price and Vacha, individually, as well as on its own behalf as an organization. As noted earlier, that motion was not opposed by JWR. (At the temporary reinstatement hearing, JWR merely requested that the UMWA not be permitted, for purposes of that hearing, "to offer evidence beyond that and through individuals other than those identified as witnesses by the Secretary." TRH 11.) The judge granted the motion to intervene. TRH 12; Temporary Reinstatement Order, July 7, 1987, at 2. Since then, the UMWA has actively participated in every aspect of this case, without previous challenge from JWR.

Because JWR never provided the judge with an "opportunity to pass" on this issue, we dismiss JWR's challenge to the UMWA's standing in accordance with section 113(d)(2)(A)(iii) of the Mine Act.

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the Act; and
(b) Representatives authorized by the miners, miners or their representatives, authorized miner representative, and other similar terms as they appear in the Act.

The UMWA falls under this definition of a miner's representative.

III.

Conclusion

For the foregoing reasons, we reaffirm the Commission's prior ruling that section II.E. of the Drug Program was not facially discriminatory. We reaffirm the judge's finding of a prima facie case of discrimination and affirm his holding that JWR failed to establish an affirmative defense. Finally, we dismiss JWR's challenge to the UMWA's standing in this matter.

Accordingly, we affirm the judge's decision on remand.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Chairman Ford, concurring in part and dissenting in part:

I concur with the majority's reiteration of the prior ruling in Price and Vacha I, that section II. E. of Jim Walter Resources' (JWRs') Drug Program is not facially discriminatory. Furthermore, if this matter were properly before the Commission, I would agree to affirm the judge's finding of a prima facie case of discrimination and his rejection of the operator's affirmative defense. Notwithstanding my agreement with the majority's substantive conclusion that the Drug Program was discriminatorily applied, I continue to hold the view, first expressed in my earlier dissent (12 FMSHRC at 1542), that the "as applied" issue is not properly before the Commission.

In Price and Vacha I, the judge found that the Drug Program was facially discriminatory but went on to hold that it had not been discriminatorily applied to Price and Vacha. Only JWR filed a petition for discretionary review and that petition was limited to issues with respect to the judge's conclusion that the Drug Program was facially discriminatory. After the deadline for petitions for discretionary review had passed, the United Mineworkers of America (UMWA), in a reply brief, challenged the judge's conclusion that the Drug Program had not been discriminatorily applied. JWR filed a motion to strike that section of the UMWA's brief, arguing that since the "as applied" issue had not been raised in JWR's petition, it could not be raised by the UMWA except in a petition of its own.

A majority of the Commission denied JWR's motion to strike by "adopting the general federal rule of appeal...that...the 'appellee' may urge in support of the judgement below any matter or issue appearing in the record, even if it involves an objection to some aspect of the judge's reasoning or issue resolution, so long as the appellee does not seek to attack the judgement itself or to enlarge its rights thereunder, in which case it would be obliged to file a cross-petition for discretionary review." 12 FMSHRC at 1529. In relevant part, I dissented from that holding as follows:

> Although general federal appellate procedure may permit an appellee to offer alternative grounds to support an ultimate judgement- even those rejected by the judge below - the Mine Act by its clear terms constricts that option here. Section 113(d)(2) of the Act states that "review shall be limited to the questions raised by the petition" and that "the Commission shall not raise or consider additional issues in such review proceedings" unless it has complied with the procedures and criteria for granting sua sponte review. (Emphasis added). The issue of whether JWR's Drug Program was discriminatorily applied to Price and Vacha was not raised in JWR's petition for discretionary review, nor was it directed for review sua sponte. It arose solely as a component of the UMWA's reply brief filed well outside the 30 day time limit for filing petitions under the Act.

The UMWA and the Secretary argue that they were not "adversely affected or aggrieved by [the] decision" of the judge so that there was no reason for them to file a petition for discretionary review. There is, however, a distinction here between a "judgment", i.e., a favorable outcome for the appellees, and the "decision" itself, and it is the term "decision" to which section 113(d)(2) refers. In this instance the judge's decision is composed of two distinct parts, each involving separate allegations of discriminatory treatment, separate legal theories to support those allegations, and separate modes of analysis to resolve the issues raised. Indeed, one might argue that within the single docket the judge was deciding two discrete cases: one generic case brought in the names of Price and Vacha on behalf of all safety committeemen against the Drug Program as designed (the "facially discriminatory" case), and one brought exclusively by Price and Vacha and involving only their particular relationship to and interaction with JWR and its Drug Program (the "discriminatorily applied"case). In that context it cannot be said that the judge's decision with respect to the latter case was not adverse to Price and Vacha.

The two matters were even tried somewhat separately. Price and Vacha did not testify at the hearing on the merits. Testimony at that hearing on behalf of the Secretary and the UMWA was predominantly provided by safety committee members or potential members who were not disciplined but who testified to the inhibitive effects of the Drug Program generally and its impact upon their decisions to continue serving as committeemen or to run for committee office. That testimony went only to the "facially discriminatory" issue. The "discriminatorily applied" issue was tried in the June 29, 1987 hearing on temporary reinstatement wherein Price and Vacha testified to the specific circumstances under which they were subjected to random drug testing under the Drug Program, their history of activism as safety committeemen, and their perceptions of retaliatory link between the two. Secretary/Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1305 (August 1987).

Appellees also object on practical grounds to the filing of "protective" petitions for discretionary review by prevailing parties, characterizing such a requirement as "meaningless", "cumbersome," and "nonsensical." Given the time and treasure expended in this case, the odds of JWR's appealing the "facially discriminatory" issue so as to place the judge's

determination thereon at risk were extremely high. In such circumstances a protective petition for discretionary review would not have been meaningless but would have been prudent. Furthermore, the judge's decision was issued on August 26, 1988 and JWR's petition was filed on September 20, 1988, thus leaving the Secretary, the UMWA, or both, five days to file a pro forma petition on the "discriminatorily applied" issue. In any event, the procedural fault at issue lies with the restrictive review scheme devised by Congress and both the Commission and the parties are bound by it.

In summary, Part III of the UMWA's brief raises important issues and compelling arguments. Unfortunately, at this juncture, I find no means by which the Commission can resurrect the "discriminatorily applied" charge when the statute limits our consideration to those issues contained within the four corners of the only petition for discretionary review before us. Chaney Creek Coal Corp. v. FMSHRC, 866 F.2d 1424, 1429 (D.C. Cir. 1989).

As noted above, my views on the tightly circumscribed scope of review set forth in section 113(d)(2) of the Act have not changed,[1] and I am therefore again constrained to dissent.

Ford B Ford, Chairman

[1] For example, if this case were properly before the Commission, I would agree with the majority that section 113(d)(2) would preclude the Commission from entertaining JWR's challenge to the UMWA's standing on the grounds that the judge had not been given an "opportunity to pass" on that issue.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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September 16, 1992

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 91-1109
D J AND M COAL COMPANY, INC.	:	

BEFORE: Ford, Chairman; Backley, Doyle, and Holen, Commissioners[1]

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 August 11, 1992, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default, finding respondent D J and M Coal Company, Inc. ("DJ&M") in default for failure to answer the civil penalty proposal of the Secretary of Labor ("Secretary") and the judge's Order to Show Cause. The judge assessed the civil penalty of $1,000 proposed by the Secretary. The judge's jurisdiction over this case terminated when his decision was issued. 29 C.F.R. § 2700.65(c).

Dexter Music, president of DJ&M, filed a letter with Judge Merlin on August 28, 1992, seeking relief from the judge's default order. Mr. Music requests that "the default order be withdrawn and that I be allowed the opportunity to state my position in this matter." As grounds for relief, Mr. Music states that upon receipt of the "original notice of the proposed assessment from MSHA in June of 1991, I immediately returned the blue card and asked for a hearing." He states that DJ&M did not receive "an answer to this request nor a hearing" and did not receive the judge's Order to Show Cause.

[1] Commissioner Nelson did not participate in the consideration or disposition of this matter.

Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought within 30 days of its issuance by filing a petition for discretionary review with the Commission. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem DJ&M's letter to be a timely filed Petition for Discretionary review. 29 C.F.R. § 2700.70. We are unable to evaluate the merits of DJ&M's position on the basis of the present record. In the interest of justice, we will permit DJ&M to present its position to the judge, who shall determine whether relief from the default order is warranted.

Accordingly, we vacate the judge's default order and remand this matter for further proceedings.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

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September 22, 1992

RICKY HAYS	:	
	:	
v.	:	Docket No. KENT 90-59-D
	:	
LEECO, INC.	:	

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

ORDER

BY THE COMMISSION:

This discrimination case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"), is on remand to the Commission from the United States Court of Appeals for the District of Columbia Circuit. Leeco, Inc. v. Ricky Hays & FMSHRC, 965 F.2d 1081 (1992), aff'g, 13 FMSHRC 670 (April 1991)(ALJ). (The judge's decision became a final decision of the Commission through operation of the statute. 30 U.S.C. § 823(d)(1).) The Court remanded the case to the Commission "for reconsideration and, if appropriate, an explanation of how Hays' conduct qualifies as a protected activity under section 105(c) of the Mine Act." 965 F.2d at 1085. On July 27, 1992, the Commission received a certified copy of the judgment from the Court, in lieu of a formal mandate, remanding this proceeding to the Commission.

On August 3, 1992, counsel for complainant Ricky Hays filed a motion requesting that this proceeding on remand be dismissed on the basis that "Hays and Leeco have entered into a settlement agreement of this matter." Oversight of proposed settlements is an important aspect of the Commission's adjudicative responsibilities under the Mine Act and is, in general, committed to the Commission's sound discretion. Birchfield Mining Co., 11 FMSHRC 1428, 1430 (August 1989); UMWA v. Utah Power and Light Co., 12 FMSHRC 1548, 1554 (August 1990).

Accordingly, we remand this matter to Judge Koutras to consider Hays' Motion to Dismiss and, if necessary, for further proceedings consistent with the Court's opinion.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 1 1992

BRUCE A. WILLIAMS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 91-553-DM
v.	:	ASARCO Hadenplant
CIMETTA ENGINEERING CONTRACTORS, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On July 25, 1991, the complainant, Bruce A. Williams, filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. On July 25, 1991, a letter was sent to Mr. Williams directing him to provide information regarding his complaint. On January 17, 1992, my law clerk attempted to contact Mr. Williams by telephone to ascertain whether the information had been sent, but the phone had been disconnected. On January 24, 1992, an order was issued directing Mr. Williams to submit the information or show cause why the complaint should not be dismissed. The order was sent by certified mail, return receipt requested and was returned to the Commission marked unclaimed. Mr. Williams has failed to respond and comply with the show cause order. The Commission has no alternative but to dismiss his complaint.

Accordingly, this case is **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

SEP 3 1992

GARY HONAKER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. VA 92-108-D
v.	:	
	:	NORT CD 92-03
CLINCHFIELD COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Upon the request of Complainant, based upon a settlement, this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

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SEP 3 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION on behalf of WAYNE KIZZIAH AND ROGER KIZZIAH Complainants	:	DISCRIMINATION PROCEEDING DOCKET NO. SE 92-420-D BARB-CD-92-12 BARB-CD-92-13
v.	:	Poplar Springs Mine I.D. No. 01-02863
C & H MINING COMPANY, INC., Respondent	:	

ORDER OF DISMISSAL

Complainants, in essence, request approval to withdraw their complaint in the captioned case for the reason that the parties have reached a settlement agreement approved by the individual miners and full payment under the agreement has been made. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.).

Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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SEP 11 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	**CIVIL PENALTY PROCEEDINGS** Docket No. WEST 92-64 A.C. No. 42-01211-03582
v.	:	Docket No. WEST 92-317 A.C. No. 42-01211-03589
MOUNTAIN COAL COMPANY, Respondent	:	Trail Mountain Mine
MOUNTAIN COAL COMPANY, (Successor to BEAVER CREEK COAL COMPANY), Contestant	:	**CONTEST PROCEEDINGS** Docket No. WEST 91-489-R Citation No. 3582529; 6/20/91
v.	:	Docket No. WEST 91-490-R Withdrawal Order No. 3582466; 6/27/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Trail Mountain Mine Mine I.D. 42-01212

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner/Respondent;

David M. Arnolds, Esq., Scott W. Anderson, Esq., Denver, Colorado, for Respondent/Contestant.

Before: Judge Lasher

These consolidated contest/civil penalty proceedings came on for hearing in Salt Lake City, Utah, on March 3 and 4, 1992. Penalty Docket WEST 92-64 involves only the Citation (No. 3582529) involved in Contest Docket WEST 91-489-R.

The Section 104(d)(1) Withdrawal Order (No. 3582466) involved in Contest Docket WEST 91-490-R had not been the subject

of a penalty proposal issued by MSHA's Office of Penalty Assessments for a sufficient time before hearing to permit creation of a penalty docket therefor (T. 4). It is the subject of WEST 92-317 which docket was created after the hearing.

Stipulation

The parties entered on the record of hearing (T.12-14) the following general stipulations having applicability to both the citation and the withdrawal order (T. 289):

1. Mountain Coal Company (herein "MCC") is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. MCC is the owner and operator of Trail Mountain Mine, MSHA I.D. No. 4201211.

3. MCC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., referred to as the "Act" in the rest of the stipulations.

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation and order were properly served by a duly authorized representative of the Secretary (MSHA) upon an agent of MCC on the date and place stated therein, and they may be admitted into evidence for the purposes of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by MCC and MSHA are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect MCC's ability to continue in business.

8. MCC demonstrated good faith in abating the violations.

9. MCC is a mine operator with 501,306 tons of production in 1990. [1]

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[1] MCC is found to be a medium-sized coal mine operator. (T. 20).

10. The certified copy of the MSHA assessed violations history accurately reflects the history of the mine for two years prior to the date of the Citation and Order. [2]

11. The penalty (proposed by MSHA) for Order No. 3582466 is $700.00. [3]

The Standard

Both the Citation and Order which are the subject of these proceedings were issued pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (herein the "Act") and both allege an infraction of 30 C.F.R. § 75.400 [4] which provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Section 75.400-1, containing pertinent definitions, provides:

> **§ 75.400-1 Definitions.**
>
> (a) The term "coal dust" means particles of coal that can pass a No. 20 sieve.
>
> (b) The term "float coal dust" means the coal dust consisting of particles of coal that can pass a No. 200 sieve.

---

[2] Based on this information, it is concluded that MCC had a history of 18 prior violations in the pertinent two-year period prior to issuance of the Citation and 92 prior violations in the two-year period preceding issuance of the Withdrawal Order. (T. 17-20).

[3] MSHA's proposed penalty for the Citation was $2,000.00. (T. 4-5).

[4] Section 75.400 entitled "Accumulation of combustible materials" is contained in Subpart E entitled "Combustible Materials and Rock Dusting."

(c) The term "loose coal" means coal fragments larger in size than coal dust.

Issues and Contentions

MCC concedes the occurrence of both violations charged (T. 289-290) but as to the Citation contends that the accumulations were not as extensive as the Inspector described therein. MCC challenges both the "Significant and Substantial" designations on both the Citation and Order, and also contends that neither violation resulted from an "Unwarrantable Failure" to comply with the infracted regulation. (T. 289-291).

General Findings - Citation No. 3582529

MSHA Inspector Donald E. Gibson issued Section 104(d)(1) Citation No. 3582529 on June 20, 1991, charging a violation of 30 C.F.R. § 75.400 as follows:

> Accumulations of loose coal, coal pieces, and pulverized coal fine were permitted to accumulate on the 3d left working section. The accumulations were along the travel-road entry from the feeder breaker to the miner in the No. 4 entry and ranged from 3-10 inches deep x 11-12 feet wide x 400 feet long. There was accumulations in the outby entries and cross-cuts from cross-cut 31 to 33. These accumulations ranged when measured 3-10 inches deep x 11-12 feet wide x 700 feet long. The back entries were in the return air course.
>
> These accumulations ranged from damp to dry in the travelroad and in the return entries was dry and powdery. The accumulations in the travelroad were being run over by diesel and electric equipment. The accumulations in the return had been run over by mobile equipment as cables had been installed through the area. Also, isolation stoppings had been installed in the return entry to isolate the 4th left section from the 3d left section.
>
> Numerous discussions and violations have been issued for this condition. Management is aware of running over rib sloughage, coal spillings, and

clean-up of initial "first" cuttings. The section foreman was present on the section and had made examination of the section during this shift but failed to clean these accumulations. Spot sample taken in the return for rock dust content. In this condition, poses the hazard of adding to any force or a fire should an occurrence happen.

Accompanying Inspector Gibson on his inspection of the mine on June 20, 1991, were his immediate supervisor, William Ledford, other MSHA officials, and several management personnel of MCC including Maintenance Superintendent Steven D. Jewett who on the day in question was acting mine manager (T. 26-28, 85, 112, 124, 260) and George Perla, Mine Manager. (T. 27).

The accumulations in the Third Left working Section of the mine were in two general areas, along the travel road (roadway) from the feeder/breaker to the continuous miner, and in the outby entries and crosscuts from crosscuts 31 to 33. (T. 85-90, 122, 138-140, 145, 154, 250; Ex. G-4). Inspector Gibson, who had the responsibility to issue citations for any violations detected, and Ledford both observed accumulations of loose coal, coal fines, etc., in these outby entries, active roadways and travelways (T. 28, 36, 42, 60, 62, 87-93, 95, 113, 155; Ex. G-4). [5] Loose coal was being allowed to accumulate in the haulage roads after being spilled or mined (T. 35, 151) and there was rib sloughage (coal which has fallen off the ribs onto the roadway) which was being run over by shuttle cars. (T. 30-31, 59, 67, 95, 189, 268). In the roadway area where accumulations were observed (Ex. G-4; T. 34, 64), the roadway was "being run over and pulverized by shuttle cars" in the process of hauling coal. (Tr. 34-35, 36, 61-66, 68, 155).

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[5] Ledford did not personally observe all the areas cited by Gibson. (T. 37). In the area where he personally observed accumulations being run over by shuttle cars, he testified that it was "dry". (T. 36, 37). He indicated the travel road was "damp" in other areas. (T. 49).

Ledford felt Gibson's "evaluation" was correct in view of the amount of accumulations, the areas that were involved, the fact that mining was continuing and that "there was no evidence of any work being done to clean up the section." (T. 42).

As to the extent and amount of the accumulations observed on the travel way, there were substantial accumulations of coal, loose coal fines, and pulverized coal. The travel way is indicated in orange on the mine map. (Ex. G-4; T. 88, 90). At point A on the map, near the feeder breaker, there were three to ten inches of coal accumulations. (T. 90-91). Gibson measured the overall dimensions of the accumulations in the travel way and determined that they were 3 to 10 inches deep, 11 to 12 feet wide, and 700 feet long. (T. 91). The volume of these accumulations would be 38 tons (at 3-inches depth) and 127 tons (at 10-inch depth) of coal, filling up between 3 to 10 shuttle cars of coal. (T. 94-95). Gibson stated that this was a violation of section 75.400 because:

> ... the accumulations were excessive[;] I mean a person with normal mining background ought to recognize, and as many discussions as I have personally had with the company and citations that I've written for accumulations, this constitutes an excessive amount. It's on an active roadway. We had electrical equipment[;] we had diesel, mobile equipment running over these accumulations. (T. 95).

The second general area of accumulations was crosscuts 31-32 and the five outby entries. In crosscut 32, there were accumulations throughout the crosscut and into the No. 5 entry down to crosscut 31. According to Inspector Gibson "[t]he majority of the accumulations was in crosscut 31, but it was loose coal in 32, coal fines that had been left, some rib sloughage." (T. 113) Ledford confirmed that there were accumulations in piles and scattered all over the entries. This area was marked in yellow on the mine map [Government Exhibit 4]. (T. 36). The volume of the accumulations in the "yellow" area based on Gibson's measurements was 3 to 10 inches deep, 11 feet wide, and 400 feet long, totaling between 22 to 77 tons of coal accumulations. (T. 122, 123). These accumulations were "dry, powdery coal accumulations," i.e., fine, pulverized. There were coal pieces, but for the most part it was powdery, dry, black coal dust. (T. 124).

Significant and Substantial

Both enforcement documents (Citation and Order) were designated as "Significant and Substantial."

A violation is properly designated "Significant and Substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> 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.

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

The third element of the Mathies formula requires "that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-1002 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texasgulf, Inc., 10 FMSHRC 498, 500-501 (April 1988); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2011-2012 (December 1987). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

With respect to the violation described in the Citation, it is found that it was reasonably likely that if normal mining had continued in the areas cited that the hazard posed by the accumulations, i.e., fires or explosions, would have occurred resulting in fatalities or serious injuries to miners since the three elements for the propagation of such--oxygen, fuel (ignitable coal), and ignition sources--were all present. (T. 52-53, 54, 55, 59, 61-64, 95-97, 106-109, 115-119, 120, 126-129, 138-140, 159-163, 165, 178, 183, 189, 192, 231-232, 262, 286).

The ignition sources in the cited section were numerous, i.e, electric shuttle cars, 950-volt cables which could fault, roof bolters, a continuous miner, auxiliary fans, and diesel-powered equipment. (T. 53-55, 56, 64-66, 67, 73, 96, 110, 169, 178).

The electrical equipment operating on June 20 was in permissible condition (T. 244-245) and no "permissibility" violations were cited on that day. (T. 55, 57, 70, 265). Nevertheless, in the perspective of there being continued mining in the section, it was reasonably likely that an ignition or fire could occur since failures in cables do occur even though not planned, and all equipment is "not maintained permissible at all times." Also, failures occur in electrical equipment. (T. 57, 58, 64-66, 102-103, 170-178, 189, 268-269).

While MCC contended there was no actual cutting of coal from the face being carried on on the day of inspection, it conceded that the continuous miner and shuttle cars were being operated. Since Mr. Ledford crisply and credibly testified he personally observed active mining going on at the face, I choose to accept his version of the facts on this issue. (See T. 59).

In addition to the proliferation of ignition sources in the section, the likelihood of an ignition or fire was increased by the fact that shuttle cars were running over and pulverizing coal (rib slough) in the roadway. (T. 64, 95, 105). Since pulverizing the accumulation puts such into a powder form, it is made more volatile and easier to ignite. (T. 64-66, 95-97, 103-105). There were ignition sources in the area. (T. 104-106).

Inspector Gibson's explanation why it was likely that the coal dust in the area where the roof bolter was operating would ignite was highly detailed and persuasive. (T. 96-98). He pointed out that there were various ways a fault could occur

(T. 97) and that the area behind the roof bolter was "very dry, powdery, pulverized, etc." (T. 98) [6]

Likewise, he credibly explained how even the areas which were damp or wet could dry out (T. 98-101). He considered it "very likely" that a trailing could become damaged (T. 102) and pointed out that there were already splices in the trailing cable to the continuous miner. (T. 103). MCC, in many areas, was not cleaning up the accumulations. (T. 42, 50-51, 59, 71, 91, 120, 132-133, 141-142, 150, 151, 157, 232).

Had an ignition of coal dust or a fire caused by the accumulations occurred, it was likely that injuries would occur to miners working on the section. (T. 53, 108). Such miners, approximately eight in number, would be exposed to burns, smoke inhalation injuries, possible permanently disabling injuries, and fatal injuries. (T. 108-109, 136-137, 178, 189-191).

MCC introduced evidence that on June 19 and the morning of June 20 it did some cleanup, that the roadway, which had a coal bottom (T. 227), was wet and rutted, and that there were no accumulations in the roadway (T. 207-211, 212, 250). MCC's witness, then section foreman Brent Migliaccio, claimed that the material cited by Inspector Gibson in the roadway was material that had been turned up from the road itself, rather than material which had been spilled from ram cars. (T. 213). He conceded that the condition of the outby entries was "dry" and that there was a lot of "floor heave," i.e., floor that has buckled. (T. 213-214). He said the rib sloughage in the crosscuts was no worse than normal. [7] Based on his testimony, it is found that MCC has no history of fires resulting from coal accumulations. (Tr. 224). There was no methane in the section on the day of inspection. (T. 224).

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[6] See also, Testimony of MCC's acting mine manager, Steven D. Jewett, at T.262-263.

[7] On direct examination, it appears that this witness's testimony resulted from leading questions in some important areas. (T. 209, 210, 211, 213). This witness's testimony was not particularly persuasive in the areas contradictory to Petitioner's MSHA's witnesses (see T. 231-231, 241, 242, 247) and it is not credited as to the presence, nature, and extent of the accumulations observed and reliably described by Petitioner's witnesses.

John Perla, who was MCC's general mine foreman at pertinent times (T. 249) testified that in his "opinion" the accumulations observed by Inspector Gibson in the roadway was a mixture of fire clay, shale, and coal which was pushed up from the floor of the roadway by the tires of the ram cars traveling through, and was not actually coal spilled from the ram cars. (T. 251). He also stated his "opinion" that there were no first cuttings from mining in the area 11 months previously because, in his words, "We would clean the place." (T. 252). He felt that there were no ignition sources in the area because the equipment was in permissible condition and that such equipment has fire suppression devices and fire extinguishers. (T. 255; see also T. 266). He said that while there was a cable running to the continuous miner, he had never seen a fire started by a cable and that there was no methane in the section above 1/10th of 1 percent. (T. 254-256). He did not know all the places which had been cleaned on the day of the inspection. (T. 256-257). In other respects, he was unable to remember or did not know, and some of his testimony on factual matters was qualified by the statement that he was giving his "opinion." His testimony was not as certain or convincing as that of the MSHA witnesses.

While MCC's witnesses all felt that some areas of the section which were cited for accumulations were wet or damp, or muddy, one witness indicated that there were areas which were dry and powdery (T. 262-263) and there was evidence from MCC's own samples of the roadway material that "many of the samples" had combustible content above 50 percent. (T. 286).

I conclude that the testimony and description of violative conditions of MSHA's witnesses, Inspector Gibson and Mr. Ledford, are entitled to acceptance in this matter.

In terms of the Commission's formulae for determining whether violations are significant and substantial, the violation of the mandatory standard here has been conceded and also otherwise clearly established by the evidence of record. This violation contributed to the hazard of fire and/or explosion described hereinabove. The primary question raised is whether there was a reasonable likelihood that the hazard contributed would come to fruition and cause an injury, there being no question that if the hazard envisioned did occur that serious injuries and even fatalities would occur. This evaluation of "reasonable likelihood" is to be made in the perspective of the continuance of "normal mining operations." There was strong evidence that active mining including the cutting of coal from the face (T. 59) was actually ongoing at the time of inspection. See U.S. Steel Mining Co., Inc., supra.

There are presently at least two analytical processes for determining the "reasonable likelihood" question. The first is a general, broad system of setting forth the conditions or practices which might lead to the occurrence of the contemplated hazard and then a reaching of the conclusion whether or not the hazard is "reasonably likely" to come about. The second approach is one which first appeared in Secretary v. Texasgulf, Inc., 9 FMSHRC 748 (April 1987) where the concept of "substantial possibility" (9 FMSHRC at page 764) was first raised. This test was urged as a refinement of "reasonable likelihood" for the reasons stated in the decision, including avoidance of confusion with the "imminent danger" concept, and also because it appeared as a practical matter to be the test actually being used by both tribunals, judges, and laymen involved at the various levels of mining safety enforcement and administrative and judicial review. Its strength is in its being less mysterious since it can be compared to other understandable concepts such as "remote possibility," "strong possibility," "probability," etc.

Since understanding what a law means also is consistent with increased faith in American justice and fairplay, I adopt the "substantial possibility" test, although the end result in the instant matter would be the same whichever method of analysis were used. Judge William Fauver, in his Decision in Secretary v. Coal Mac Incorporated, 9 FMSHRC 1600 (September 25, 1991) succinctly states the test as follows:

> Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard" (§ 104(d)(1) of the Act; emphasis added). Also, the statute defines an "imminent danger" as any condition or practice ... which could reasonably be expected to cause death or serious physical harm before [it] can be abated," and expressly places S&S violations below imminent

> dangers. It follows that the Commission's use of the phrase "reasonably likely to occur" or reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

A remote possibility of the violation's resulting in injury (or disease) is not sufficient. On the other hand, to meet the "S&S" requirements, MSHA would not seem to be required to show a "strong" possibility, a probability, or a certainty of a resultant injury. If, for example, one of the various ignition sources present here had been in impermissible condition, the Inspector might well have been justified in finding an imminent danger existed.

In relating the "substantial possibility" test to the conditions present in the mine which constituted the violation and aggravated the potential of harm to miners, it is clear that the accumulations were extensive in terms of depth, distance, and areas involved, [8] oxygen was present, the volatile conditions were on an active roadway as well as other places, the accumulations (even limited to the areas conceded by MCC's witnesses) were combustible and ignitable and there was not just one--but numerous--potential ignition sources in the areas involved. The contribution of the violation cited to the cause and effect of the contemplated fire or explosion hazard was clearly significant and substantial. Had normal mining continued there existed a substantial possibility and reasonable likelihood that the hazard contributed to would result in an injury or injuries of a reasonably serious nature or fatalities. The "Significant and Substantial" designation on the Citation is **AFFIRMED**.

Unwarrantable Failure

"Unwarrantable Failure" means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC

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[8] These accumulations are found to be dangerous. The greater the concentration, the more likely it is to be put into suspension or propagate an explosion. See, Pittsburg and Midway Coal Mining Co., 6 FMSHRC 1347, 1349 (1984); Mettiki Coal Corporation, 11 FMSHRC 331, 343 (1989).

1997, 2004 (December 1987), Youghiogheny and Ohio Coal Company, supra. An operator's failure to correct a hazard about which it has knowledge, where its conduct constitutes more than ordinary negligence, can amount to unwarrantable failure. Secretary v. Quinland Coals, Inc., 10 FMSHRC 705 (June 1988). While negligence is conduct that is "thoughtless," "inadvertent," or "inattentive," conduct constituting an unwarrantable failure is "not justifiable" or is "inexcusable."

MSHA Supervisor Ledford said that MCC's conduct amounted to more than ordinary negligence and was aggravated conduct, stating:

A. What I seen was large amounts of accumulation with no effort to clean it up.

Q. How do you know there was no effort being made?

A. I seen that. I was looking.

Q. So there was none being made at the time?

A. There was none being made at the time, and they continued to mine coal at the face.

Q. Do you know that they were mining coal at the face?

A. Yes, sir. I watched them mine coal.

Q. They weren't cleaning up at the face?

A. No, sir. (T. 59).

As noted in prior findings, MCC had failed to clean up the accumulations. This was a repeated failure. Thus, Inspector Gibson testified:

A. Numerous occasions I've spoken to the president of the company, Richard Pick. At one time the mine manager was Dan Manners. On one particular occasion, I had the safety director, Dan Lucy, brought to the section ... to let him see firsthand what I was talking about as far as accumulation. I've spoken to section foreman Doug Cox, who at one time worked at the mine. Section foreman, Mr. Peacock ... I talked to John Perla. I've talked to Gary Curtis who was the maintenance foreman.

Q. What did you talk to them about in relation ...

A. Cleanup, running over of rib slough. We've discussed that numerous, numerous times. And I had just recently conducted an electrical inspection at the mine and issued violations for this same condition, running over rib sloughage. (T. 132-133).

Mr. Ledford testified that he "observed from the breaker itself all the way up to the face areas," and saw no evidence of any cleaning being done. (T. 71) [9]

There is no credible basis to conclude that any of the accumulations--which were observed and cited by Inspector Gibson--were being cleaned up by MCC. (T. 42, 54, 59, 61, 95, 149-151).

Neither Gibson nor Ledford saw any cleanup during the hour to hour and a half that they were present. (T. 42, 54, 59, 61-62, 71, 95, 132-133, 149, 151, 179-180).

The amount of the accumulations in the general areas cited demonstrates that they existed a considerable period of time, and constituted an obvious violation of which MCC's management should have been aware. (See T. 95). Inspector Gibson on the day of inspection did not see a scoop (used for cleanup) or shovels on the section. (T. 150-151, 180).

MCC should have known, indeed must have known, of the existence of the accumulations and failed to clean them up. In view of the obvious nature of this problem, the repeated warnings and effort of MSHA to bring about compliance in the past, and the tendency of MCC's responsible management to persist in allowing such conditions to exist, I find such conduct inexcusable, aggravated, and sufficient to justify the Inspector's conclusion that it constituted an unwarrantable failure to comply with the pertinent standard.

Withdrawal Order No. 3582466

MSHA Inspector John R. Turner issued Section 104(d)(1) Withdrawal Order No. 3582466 (originally issued on June 27, 1991 as a 104(a) Citation) alleging an infraction of 30 C.F.R. 75.400, to wit:

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[9] See also Transcript at pages 42, 54, 142-143, 149, 151, 179).

> Accumulation of float coal dust and loose coal and coal fine were found to exist on and around all of the electical compartments of the continuous mining machine in the 1st South working Section. There was coal arched in back of the tram motors and around other electrical compartments up to eight inches deep.

On June 28, 1991, Inspector Turner issued the modification changing the Citation to a Withdrawal Order basing it on underlying 104(d)(1) Citation No. 3582529, and showing that the Order affected the Continuous Mining Machine in the 1st South Working Section. This modification from Citation to Order was issued at 10 a.m. and was terminated at 3 p.m. on the same day, June 28, 1991. (T. 293).

As above noted, MCC concedes the occurrence of the violation, but contests the "Significant and Substantial" designation on the basis that the condition was neither "reasonably nor highly likely to cause injury," and also contends that the violation was not the result of an "unwarrantable failure" because the violative condition did not result from a high degree of negligence.

On June 20, 1991 (seven days prior to the issuance of this Withdrawal Order and on the inspection previously discussed in connection with the Citation), Mr. Ledford examined the mine's new continuous haulage system. The subject continuous miner was not in operation at the time, but Ledford observed that it was "quite dirty" (T. 297, 315) explaining that:

> ... there was accumulations on the machine. Some of the plates that have small holes, you can see excessive accumulations of float coal dust, coal fines, some grease and oil that need to be cleaned from the machine. (T. 297-298).

Mr. Ledford advised Mr. Jacobs, MCC's maintenance foreman, that "the machine should be cleaned up prior to putting it back into operation, any production." (T. 298). He also advised acting mine manager Steve Jewett later the same day that the machinery should be cleaned. (T. 310). After the Withdrawal Order was issued by Inspector Turner seven days later, Mr. Ledford felt that MCC had not complied with his instructions to clean the continuous miner. (T. 300-301, 335-336). Mr. Ledford indicated that some of the accumulations he observed on the miner on June 20 were both "on the exterior" and "under some compartments" (T. 302-304, 307),

contrary to MCC's allegations. (See MCC's Post-hearing Brief, p. 31). Mr. Ledford did not believe that the extent of accumulations found on June 27 could have reoccurred during the seven-day interim from the time he observed such had the miner been cleaned as he had instructed. (T. 304-306, 307, 308, 310, 311). He had advised Mr. Jacobs that coal fines were "under the covers" (T. 308). When the accumulations get "into the cracks and crevices and around the electrical compartments and motors and areas that just gather up loose coal and float coal dust and coal fines" it can cause the motors to overheat and if there is a failure in the electrical components, a "very serious fire hazard" is created. (T. 311, 312, 313, 315-316, 345).

Inspector Turner issued the Withdrawal Order (then a Citation) while on a regular inspection on June 27, 1991. He was accompanied on this inspection by LaVon L. Turpin, a safety adviser for MCC. (T. 320). He issued a Citation for a permissibility violation on the subject continuous miner during this same inspection. (T. 323-324; Ex. G-1). He also issued a Citation (No. 3582464) for a violation involving the same continuous miner for not having proper fire-fighting equipment, to wit:

> The fire-fighting equipment was not being maintained in a usable and operable condition on the continuous mining machine on the first south working section. The fire suppression water outlet above the left flange motor for the machine was inoperable. (Ex. G-2; T. 325-326).

Inspector Turner described the situation as follows:

> ... The top of the machine was pretty much clean. As I get into the other components of the machine, the machine was very, very filthy. I could not get to the back side of the tram motors, the control motors and other areas with my feeler gauge and tools that I work in my trade, because it was too dirty. So I informed Mr. Turpin that he had an S&S Citation, definitely that the machine was filthy, and he agreed, and we would have to agree on a time to abate. (T. 327).

Inspector Turner specifically described numerous electrical compartments on the miner, including in the operator's cab, on the main control box on the framework of the miner, the auxiliary lighting systems and light boxes, the tram motors on the sides of the miner and the pump motors. He said that numerous electrical

components had coal packed around them. (T. 327-328). The extent of such accumulations was up to "eight to ten inches of loose coal, float coal dust, coal fines and coal particles" which were packed around and on top of the compartments. (T. 328, 330).

He discussed the matter with Mr. Turpin who said it would take a significant amount of time to remove the accumulations because it would be necessary to pull off the covers and to "get somebody in here to clean it off." (T. 328-329). The accumulations were dry and were visible without removing the covers. (T. 329, 342-344).

While the continuous miner was not being operated at the time it was observed by Inspector Turner, it had been in operation earlier on the day of inspection. (T. 322).

Numerous sources of ignition were present (T. 331, 332, 333, 345, 346-347) including overheated motors, "blown up cable," "bits off of the machine," and from "rock spars or cutting of the coal" (T. 345) and sparks off a cutting head. (T. 346). The existence of so much potential ignition increased the likelihood that a fire would be started or that an ignition would occur. (T. 346-347).

After being cited for the violation, it took MCC over four hours to clean the continuous miner. (T. 329, 339).

The hazards posed by this violation, taking into consideration the background factors in which they occurred (including the fire suppression system inadequacy and the impermissibility violations) were fire and a coal dust ignition. (T. 331-334). Inspector Turner's analysis and rationale concerning the existence of these hazards, the reasonable likelihood that such would occur in the context of continued mining, and the serious injuries which would likely ensue had the hazards come to fruition were well-stated, credible, and convincing. (T. 331, 332, 332-334).

After pointing out that MCC's practice was not to remove the accumulations (T. 331) he said:

> Left in this state, the hazard involved there would be the heating scenario from the motors which are pulling 950 volts from this particular machine, which is the highest voltage that we have on any piece of equipment therein, and the amperage there and the current flow that can get out of those electrical motors, for example, the auxiliary lighting box, and if we

were to ignite the float coal dust and the amounts that we had there, and with the little effect that the fire suppression would have had over that particular tram motor, that thing would have went rapidly.

Q. Why wouldn't the fire suppression system have any effect on the motor?

A. The fire suppression couldn't have no effect over that one tram motor because it was inoperable. There was no water coming out of it when we activated it.

Q. Was there any connection between the gap that you found for the permissibility violation and the accumulations?

A. Just the fact that they were within four inches of one another. The permissibility violation that I found on the one auxiliary box was on top of the machine. This is the only permissibility that I completed on this machine because I could not get to the other compartments, they were too filthy. (Tr. 331).

Inspector Turner considered it highly likely that serious injuries (T. 334) would occur from the fire hazard:

> The contributing factor would have been the amount of accumulations that we had on the tram motors and things that existed at the time of my observation. The permissibility gap that we could expose an arc to the outside atmosphere and these accumulations, and the fact that the fire suppression system would not help you, in fact, if those things were to happen, and normal cutting procedures in there. We have rock bars in that mine, and all tied together, it would have made it very highly likely that it would occur. (T. 332).

It is noted that Inspector Turner on June 28, 1991, modified the Order to change the likelihood from "Reasonably Likely" to

"Highly Likely." At hearing he appeared to back off this modification (T. 351) and there is not sufficient explanation therefor to justify the "Highly Likely" determination. There is more than adequate support for a determination of "Reasonably Likely," however, and the Withdrawal Order will be subsequently modified to reflect this.

I conclude that it was reasonably likely that injuries such as severe burns, smoke inhalation, and possibly fatalities would have occurred had the contemplated hazard happened. (T. 334, 338).

There was also a reasonable likelihood of a coal dust ignition had mining continued. (T. 331, 334, 336-337, 345-347). As the Inspector explained:

> The coal dust ignition could occur from the normal mining cycle of the machine. The machine generates coal dust which it extracts from the coal from the faces. We have the water sprays, but if the other dust that is suppressed around the machine and the amount of float coal dust and stuff that was on the machine, if an arc were to come out of that control panel and ignite the coal dust, then it would ignite the whole area wherever the coal dust was to exist. (T. 334).

The violation occurred as a result of MCC's high degree of negligence and unwarrantable failure to comply with the infracted safety standard. (T. 336, 337, 339, 340). MCC's history of previous violations indicates a persistent pattern of violations of this standard. Inspector Turner pointed out that on June 20, Mr. Ledford had told MCC "that the machine needed cleaning" and that it was "obvious that all they did was sprayed off the top of the machine; they did not spray off the motors or get any integral components of the machine and make any effort to clean it." (T. 336). He also persuasively indicated that:

> From my mining experience, I know that the amount of accumulations that were on that machine, cannot accumulate in a day or two or three days. That amount of accumulations has

to occur over several shifts, days, possibly a week or better. (T. 336). [10]

Inspector Turner's basis for determining "unwarrantable failure" was because of the negligence involved, and "because of what the coal company has been made aware of in the past and six days prior by my supervisor, and on many occasions on pre-inspection and post-inspection on accumulations, and our concern for the accummulations on the working section and the equipment is the number one priority ... ." (T. 339).

Respondent's Evidence

Steven D. Jewett, MCC's maintenance superintendent, indicated that he accompanied Mr. Ledford on June 20 and that there aren't "openings" on the miner that one could see through to determine if there were accumulations under the covers. (T. 359). He said he was "not aware" that Mr. Ledford moved any of the hoses or peered down to look closely so as to be able to see holes and determine if there were accumulations. (T. 358-359). He denied that Ledford mentioned accumulations, other than some "oil spillage" (T. 358, 361). He indicated that the machine would be cleaned on the outside after each entry was cut, but that it would be cleaned under the covers on a weekly basis. (T. 361, 362, 372). Mr. Jewett's testimony was for the most part brief and general and it in no way approached the detail and specificity of MSHA's witnesses. He was not present on June 27 when Inspector Turner issued the withdrawal order. (T. 368). He did not know about the permissibility citation and the "fire suppression" citation "until this started" (T. 371), nor did he know when the last time the covers on the miner were removed for cleaning or if such were cleaned during the period from June 20 to June 27. (T. 372). [11]

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[10] See also T. 337, where the Inspector testified the negligence was high because... "Mr. Ledford's notifying six days before. They had a weekend there. So you're talking a minimum of three days or four days where there must not have (been) no effort to clean the machine. They cleaned the top of the machine."

[11] As to whose responsibility this was, there was some ambiguity in his testimony. (T. 369-370).

MCC's second witness, safety adviser LaVon Turpin, testified that the accumulations violation was discovered when he and Inspector Turner pulled one of the covers on the machine to see if a hose to the fire suppression system was broken. (T. 374). He felt it would be "very difficult" for a person to look through the "holes" and see the accumulations four to eight inches deep under the covers. (T. 381). He said the accumulations were "somewhat a damp compact condition" (T. 375) under the first cover pulled (T. 383) but did not know the condition of the accumulations under the covers subsequently pulled. (T. 383).

As with Mr. Jewett, Mr. Turpin's testimony was brief and not of a sufficiently probative nature to rebut the more positive, reliable testimony of MSHA's witnesses, whose accounts and opinions I credit in determining the issues of reasonable likelihood ("Significant and Substantial") and "Unwarrantable Failure."

In conclusion, the extent of the accumulations and the amount of time it took to achieve abatement (cleanup) are strong evidence in support of the expert opinions of MSHA's witnesses that they existed a considerable length of time and had not been cleaned up during the interim between June 20, 1991, and June 27, 1991. The lack of knowledge and generality of MCC's witnesses on this point certainly in no way weakened the prima facie presentation of MSHA that MCC's failure to clean up constituted inexcusable, aggravated conduct, particularly in view of its less than commendable history of violations of this standard, and the frequent (and proximate) warning it had received concerning such, and the fact that these accumulations were present in dangerous amounts for a long period of time with obvious ignition sources extant.

It is therefore concluded that MSHA has established that the violation resulted from MCC's unwarrantable failure to comply with the standard and from a high degree of negligence on the part of MCC.

The violation was both proven and conceded and, in addition, MSHA established that it contributed a measure of danger of safety by the hazards it posed and contributed to. It has previously been determined at some length that there was a reasonable likelihood and a substantial possibility that the envisioned hazards would occur in the event of continued mining and that such would, upon occurrence, result in serious injuries or fatalities. The contribution of the violation to the hazards of fire and or ignition was significant and substantial. The Commission's four prerequisites to the existence of a "Significant and Substantial" violation are found to have been established by MSHA and these special findings are here **AFFIRMED.** Mathies Coal Company, supra.

Penalty Assessment

Based on the parties' stipulations and information of record it is found that MCC is a medium-sized coal mine operator (T. 20) which proceeded in good faith to promptly achieve compliance with the standard in question after notification of the two violations. The penalties assessed will not affect MCC's ability to continue in business. During the pertinent two-year periods preceding the issuance of the Citation and Order, MCC had a history of 110 and 92 violations, respectively. (T. 17-19). MCC had committed numerous violations of the pertinent safety standard involved in this matter during the two-year period in question. Its history of violations is not commendable. The violations involved in both the Citation and the Order resulted from a high degree of negligence on MCC's part, were inexcusable and since aggravated conduct was involved were also found to have resulted from MCC's unwarrantable failure to comply with the standard. Further, both violations were very serious in nature, both in terms of the gravity of the hazards they created and contributed to and the likelihood of such hazards occurring and causing serious injuries or fatalities.

In Black Diamond Coal Company, 7 FMSHRC 1117, 1120 (August 1985), the Commission stated as follows:

> We have previously noted Congress's recognition that ignitions and explosions are major causes of death and injury to miners: 'Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards.' Old Ben Coal Co., 1 FMSHRC 1954, 1957 (December 1979). We have further stated [i]t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

Substantial penalties are warranted. Accordingly, a penalty of $3,000.00 is assessed for Citation No. 3582529 and penalty of $1,500.00 is assessed for Withdrawal Order No. 3582466.

ORDER

1. Withdrawal Order No. 3582466 is **MODIFIED** to change paragraph 10 A thereof from "Highly Likely" (as shown in Inspector Turner's modification thereof dated June 28, 1991) to "Reasonably Likely" and this Withdrawal Order including the special findings theron is otherwise **AFFIRMED.**

2. Citation No. 3582529 (Docket No. WEST 91-489-R and WEST 92-64) including the special findings thereon is **AFFIRMED.**

3. Contestant/Respondent MCC, within 40 days from the date of this decision **SHALL PAY** to the Secretary of Labor the total sum of $4,500.00 as and for the civil penalties assessed herein.

Michael A. Lasher, Jr.
Administrative Law Judge

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SEP 11 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-251 A.C. No. 42-01944-03586
v.	:	Docket No. WEST 91-256 A.C. No. 42-01944-03585
ENERGY WEST MINING COMPANY, Respondent	:	Cottonwood Mine

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Thomas C. Means, Esq., Claire Brier, Esq., CROWELL & MORING, Washington, D.C., for Respondent.

Before: Judge Lasher

In these two proceedings, the Secretary of Labor (MSHA) originally sought penalties for a total of eight alleged violations described in eight enforcement documents (Citations and Withdrawal Orders) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) 1977.

Prior to hearing, Citations numbered 3413895 (in Docket West 91-251) and 3413829 (in Docket WEST 91-256) were severed (T. 6-7) from the subject dockets, processing thereof was stayed, and these two Citations were placed in ancillary "A" dockets for separate processing (T. 7-8) since they involved so-called "excessive history" questions. After this administrative action, two Citations remained in Docket WEST 91-251 and four remained in Docket WEST 91-256. Of the four in this last docket, two were settled when the parties, prior to hearing, filed their written motion for approval of an amicable resolution concerning such. [1]

[1] This motion, which was approved on the record of hearing (T.5-6), indicated that the violative conditions described in the two Citations (3414063 and 3415064) were not "reasonably likely to cause serious injury or illness" that the "significant and substantial" designations thereon should be

Four enforcement documents remained and were litigated, numbers 3413898 and 3414071 in Docket No. 91-251, and numbers 3414062 and 3413883 in Docket No. 91-256.

Stipulation

At the commencement of the proceedings, the parties stipulated to the following:

1. Energy West is engaged in mining and selling of bituminous coal in the United States, and its mining operations affect interstate commerce.

2. Energy West is the owner and operator of the Cottonwood Mine, MSHA I.D. No. 42-01944.

3. Energy West is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject Citations were properly served by duly authorized representatives of the Secretary upon agents of Energy West on the dates and places stated therein, and may be admitted into evidence for the purposes of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits offered by Energy West and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance of the truth of the matters asserted therein.

7. The proposed penalties will not affect Energy West's ability to continue in business.

8. Energy West demonstrated good faith in abating the violations.

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removed, that the "gravity" designation of such should be modified to "unlikely," and that the proposed penalties therefor should in such circumstances be reduced to $20 each. My bench order approving this disposition is here **AFFIRMED** and appropriate execution of such appears in the "Order" at the end of this decision.

9. Energy West is a large mine operator with 3,317,397 tons of production in 1989.

10. The certified copy of the MSHA Assessed Violations History (Ex. G-1) accurately reflects the history of this mine for the two years prior to the dates of the citations. [2]

Docket No. WEST 91-256

Citation No. 3414062 (T. 12-90).

This Citation was issued by Inspector Marietti on October 16, 1990, and described the alleged violation as follows:

> The fire-fighting equipment at the No. 20 Crosscut in the 16 West Section belt return entry was not being maintained in a usable and operable condition. The fire hose nozzle for the two lengths of fire hose, located at this location, was missing and could not be located in the area.

MSHA seeks a $20 penalty for this alleged infraction of 30 C.F.R. § 75.1100-3 which provides:

> All fire-fighting equipment shall be maintained in a usable and operative condition. Chemical extinguishers shall be examined every six months and the date of the examination shall be written on a permanent tag attached to the extinguisher.

Although it concedes that there was no nozzle present with the cited fire equipment, Respondent questions the occurrence of

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[2] The computerized history shows 277 "Paid" violations during the two-year period from 10-18-88 to 10-17-90. The four citations were issued at different times during the period 10-3-90 through 11-8-90. I thus find and infer from this evidence and the stipulation that Energy West had a previous history of approximately 277 violations.

a violation with respect to this Citation, which was not characterized as "Significant and Substantial" by the Inspector. (T. 13-14). [3] Respondent contends that it has installed "two to three times" the amount of fire hose that MSHA required, that nozzles were available in other locations, that a nozzle is not required for every hose at a mine, and that a nozzle is not necessary for a hose to be "usable and operative." (T. 14-15).

Findings

Inspector Marietti spotted the alleged violation (hose without a nozzle) while on inspection accompanied by Energy West's safety representative Dixon Peacock. He was in the 2 Entry section and was walking the belt return when he examined a 30-gallon garbage can (where Energy West stores the fire hoses) and could not find the nozzle "in the storage area." (T. 24, 25). The nearest nozzle was 1000 feet away. (T. 25, 61).

The Inspector did not assert that the hose itself was faulty or damaged. It would have operated properly when attached to a hydrant or to another hose. (T. 38, 47, 58).

The regulations do not mention or specifically require fire hose nozzles. (T. 25, 36, 68).

The regulations require at least 500 feet of fire hose to be "stored at strategic locations along the belt conveyor." 30 C.F.R. § 75.1100-2(b) (T. 66). The regulations also specify that enough fire hose to reach the working face must be provided at each section loading point and 500 feet of fire hose must be stored within 300 feet of the belt drive. According to MSHA's interpretation of the regulations, this means that, altogether, Energy West was required to have a total of 600 feet of fire hose along the belt line and at the belt drive in the section in question. (T. 34, 66, 67). Since Energy West stored 500 feet of hose at the tailpiece and 500 at the belt drive, in addition to the 200 feet every tenth crosscut, Energy West actually had 2000 feet of hose (more than three times the amount required by the regulations) along the 16 WEST belt line on the date the citation was issued. (T. 53, 54, 69). [4]

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[3] Hearing was held on two days, March 5 and 6, 1992, and the two sections of transcript (one for each day) begin with page 1. Accordingly, the transcript references will be shown as "T. __" and II-T. __", respectively.

[4] Further, although the two lengths of hose at crosscut No. 20 did not have a nozzle stored with them there were eight nozzles stored along the belt line. (T. 51, 69).

Although Inspector Marietti conceded that there is no requirement in the regulations that a hose be at the location in question with the nozzle (T. 25), he explained that he issued the citation:

> Because 1100-3 says that all fire-fighting equipment at the mine will be maintained usable and operable. And it's just prudent that if it's not going to be maintained as such for people to rely on it in the event they need to use it would create a problem for the users and possibly a serious fire for the mine. (T. 26-27).

Although a fire hose could be used without a nozzle to fight a fire, it would generally be more effective if the hose had a nozzle. (T. 26, 27, 35-38, 46, 47). Without a nozzle, as much water would be supplied, but the water would shoot out from the hose 20-25 feet; with a nozzle, water would propel from the hose approximately 60-70 feet. (T. 45, 46). However, a hose without a nozzle could be used to fight a fire by flooding the area. (T. 35-36, 38).

While Inspector Marietti testified that he interprets 30 C.F.R. § 75.1100-3 as requiring each hose to have a nozzle stored with it (T. 51), the alleged violation was considered abated by providing a single nozzle in the can, even though two hose lengths were stored there. (T. 55-56). Moreover, in his view, if only one long hose were stored along the belt line or if several pieces of hose were connected together to form one long hose, then MSHA's regulations would be satisfied by only a single nozzle for all of the hoses along the entire belt line (T. 51, 56); and even though the fire hydrants, located at 300-foot intervals along the belt line, did not have fire hose stored with them, Inspector Marietti considered the hydrants to be fully usable and operative within the meaning of § 75.1100-3. (T. 54, 57).

Randy Tatton, Chief Safety Engineer for the Cottonwood Mine, testified that since the hose at crosscut 20 was extra hose that was intended to be used as a part of one long hose, he did not believe that nozzles were required by regulation to be stored with the hoses at all. (T. 69-70, 71, 87). Mr. Tatton testified that if a piece of hose from crosscut 20 had to be used alone to fight a fire, not only could the hose be used to fight a fire without a nozzle, but a nozzle could also be obtained from another nearby location along the belt line. (T. 70, 71, 73, 87).

The hose could be kinked to simulate the spray a nozzle would produce, or a miner could place his fingers or part of his hand over the mouth of a hose. (T. 70, 78, 87). Mr. Tatton conceded that the hose is usually more effective with a nozzle, but in some circumstances, such as if a small smoldering fire occurred, the hose would be more effective without a nozzle. (T. 70). Mr. Marietti agreed with this assessment. (T. 47).

Energy West's practice at the Cottonwood Mine was to store two 100-foot lengths of fire hose at every tenth crosscut along each of its belt lines. (T. 24, 25, 34, 68, 72).

Conclusion

Although not required by law to provide this hose or store it in these locations, Energy West adopted this practice so that miners would have extra lengths of hose available and readily accessible if needed and know where to find it, as part of a policy of supplying fire protection in excess of MSHA's requirements. (T. 25, 27, 38, 50, 51, 52, 53, 66-70, 80, 88). MSHA concedes that, by providing these hoses at every tenth crosscut, Energy West went "way beyond the requirements of the law." (T. 53).

When Energy West instituted this practice, it anticipated that these extra pieces of hose would be used as segments of a longer hose. (T. 70, 71, 80, 87). However, it is also possible that a piece of this hose could be used alone to fight a fire if the fire happened to break out near a cache of extra fire hose, although this was not Energy West's intention in storing the hose in these locations. (T. 70, 71, 87). Energy West also has adopted the practice of storing one fire hose nozzle with each of the caches of hoses. (T. 50, 52, 68). Cottonwood has never experienced a belt fire and thus has never had reason to use the hose or nozzles stored in these caches. (T. 48-50, 52, 68-72, 87).

The fire hose at issue here was extra fire hose, not required by the regulations, which Energy West stored in this location in order to provide additional firefighting equipment in readily accessible locations. The extra hose, because it was in good working order, was usable and operative even though a fire hose nozzle was not stored with it.

Because the hose itself was maintained in good working order, it was usable and operative. Energy West stored this extra hose at crosscut 20 so that it would be readily available to a miner if it were needed. (T. 50, 52, 53, 70, 80, 87, 88). It was intended for the extra pieces of hose to be attached to other pieces of hose to form one hose to fight a fire in the area or in another part of the mine. (T. 69-70, 80, 81, 88). The hose, being vastly in excess of what was required, was thus fully usable and operative even though a nozzle was not stored with it.

The regulations required Energy West to store 600 feet of hose along the belt line in 16 West. (T. 51, 54, 66, 67). In an exercise of caution and as a matter of safety policy, Energy West stored 2000 feet of fire hose along this belt line - 1400 feet more than required. (T. 53, 54, 69). As Energy West argues, it could have stored this extra 1400 feet of hose anywhere (for example, in a storage room or in one central location in the mine). (T. 86-87). Instead, it chose to spread out the 1400 feet of hose along the belt line in specific, evenly spaced locations so that a piece of hose could be located and obtained quickly if it were needed. (T. 50, 52, 53, 70, 80, 87, 88).

In this matter, Energy West, for the purpose of enhancing safety, stored extra hose (in good usable and operative condition) without nozzles in amounts beyond that required by the regulations. In such pursuit of safety, Energy West should not be penalized because it stored such extra hose along the belt line rather than in some remote area, such as (as Energy West points out) in a storage area. This is particularly true, where the regulations do not speak of any requirement for hose nozzles, where the extra hose potentially had beneficial purposes in the event of a fire, and where this hose was in excess of the regulation's requirements.

Accordingly, it is concluded that no violation occurred. It is noted in reaching this determination that no intimation was made or intended that as to required hose, i.e., that which is not in excess of the regulations' requirements, hose nozzles are not required. It may well be that in a given situation "required" hose, to be in "usable and operative condition," must be stored with a nozzle.

Docket No. West 91-251

Citation No. 3414071 (T. 95-196).

This Citation, issued by MSHA Inspector Fred L. Marietti on November 8, 1990, charges an infraction of 30 C.F.R. § 75.316, and describes the violative condition as follows:

> The approved ventilation and methane and dust control plan was not being complied with in the 2 North double-split miner sections. The belt was moved up to 42 crosscut on graveyard 11-8-90. The brattice installed between the belt and the 2 N.E. and the 2 N.W. designated intake escapeways was not installed in a workmanlike manner and maintained in the condition to serve the purpose for which they

were intended. The 41 crosscut, west side next to the roadway was open on the outby side six feet at the top and tapered down to one foot at the bottom for a distance of six-foot high. The 40 crosscut, west side, the brattice was gapped down from the roof four inches for 15 feet. The inby side was open at the top one foot and tapered out for three feet at the bottom for a distance of 6.5 foot high. The outby side was open 30 inches by 6 feet high. The 40 crosscut, east side, was gapped open at the top from 4 inches to 5 inches for 12 feet. The inby side was open 3 feet by 8 feet high. The outby side was open 4 feet by 8 feet high. There was coal running out on the belt and the section was mining. Refer to Citation Nos. 3414072 and 3414073.

The standard infracted, 30 C.F.R. § 75.316, provides:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plans shall be reviewed by the operator and the Secretary at least every 6 months.

The pertinent provisions (Par. E, Subparagraphs 1(a) and (b) of Respondent's plan (Ex. G-2) provide:

1. Ventilation Controls

   a. All ventilation controls such as stoppings, overcasts, undercasts, doors, regulators, shaft partitions, etc., shall be of substantial and incombustible construction; installed in a workmanlike manner and maintained in the condi-

tion to serve the purpose for which they were intended.

b. Permanent stoppings shall be erected between the intake and return air courses, a minimum of 8" thick, and shall be maintained to and including the third connecting crosscutoutby the faces of the entries. Whenever the third connecting crosscut is broken through, work shall be started on building the stopping as soon as possible and shall be continued in a reasonable and diligent manner until completed. Similarly, whenever a belt move is completed, curtains shall be installed immediately and work shall be started on building the permanent stoppings as soon as possible and shall be continued in a reasonable and diligent manner until completed.

Energy West concedes the occurrence of this violation but contends that it was not "Significant and Substantial." (T. 10). Violation of an approved ventilation plan is the same as a violation of a mandatory safety standard. Ziegler v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Jim Walter Resources, Inc., 9 FMSHRC 903 (1987).

On November 8, 1990, a belt move was conducted in the 2d North Section at the end of the graveyard shift which ended at 8 a.m. The temporary curtains in question were installed in crosscuts 40 and 41 east and west either at the end of the shift or between the graveyard and day shifts. Materials for the construction of permanent stoppings had been brought to each crosscut by the beginning of the day shift and a miner had begun work on the permanent stopping at crosscut 40 east. Miners were also working on constructing a permanent stopping across crosscut 41 east. All permanent stoppings would have been completed and in place by the end of the day shift. At this time, the faces were approximately 200 to 300 feet inby crosscut 41 and 40. (T. 141). Air was flowing north (inby) up the intakes, across the faces and then south (outby) down the returns and the belt entry. (Ex. R-4; T. 142). The ventilation at the faces was 25,967 cubic feet per minute ("cfm") and 13,000 cfm of air was entering the belt entry at the feeder breaker. (T. 143, 178). Because the volume and pressure of air traveling up the intakes was greater than that traveling outby in the belt, any air that escaped through the temporary curtains flowed from the intakes into the

belt entry. (Tr. 118-119, 120, 142, 146, 177-178). That air was then forced to flow south down the belt entry, outby the cited curtains, and away from the faces. (T. 142-143).

At approximately 9 a.m. on November 8, 1990, while coal was being produced, Inspector Marietti entered the 2d North section and found that the temporary brattices installed at crosscut 41 west, crosscut 40 west, and crosscut 40 east were not drawn up tight against the crosscut ribs, allowing some air to leak from the intake entries into the belt entry through the curtains. (T. 108-110). The Inspector did not measure the amount of air escaping through the curtains, but did a smoke test which showed some leakage from the intakes into the belt entry. (T. 118, 1199, 177-178). He then issued § 104(a) Citation 3414071 which, as noted, alleges a significant and substantial ("S&S") violation of the ventilation plan under 30 C.F.R. § 75.316. The violation was promptly abated when the gaps in the curtains were closed.

Inspector Marietti felt there were two hazards posed by this violation: (1) contaminated air entering the intakes through the gaps in the temporary curtains (brattices) should a fire have occurred in the belt entry, [5] and (2) "short-circuiting" of air, i.e., air escaping, which was intended for the face. (T. 119, 120). [6]

It appears that his primary concern was of a fire occurring in the belt entry (T. 120-121, 126) since the direction of the air coming through the curtains was away from the face and toward the belt entry (T. 119, 120):

> At the belt drive, <u>if</u> you had a fire there, for one thing, the air would be coming through those stoppings to feed the fire. And in all of the experiences that I've seen, which I've seen many mine fires and more than I want to see and have been at some of the investigations, and the fire has a tendency to follow the oxygen so it gravitates towards

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[5] This hazard was dependent on the happening of a separate hazard, a belt entry fire, to which it would have contributed and worsened. This is why the question narrows on whether there was sufficient proof that a belt entry fire was reasonably likely.

[6] The viability of this contemplated hazard was not dependent on the occurrence of some other separate hazard, and determination of the reasonable likelihood of its occurrence can be made without reference to some other independent hazard.

> the direction that the oxygen is--or the air is coming in. It'd have a very good tendency to pull right through there and burn right out into the intake escapeway. (T. 121) (Emphasis added).

As to the first hazard mentioned, the Inspector's basis for considering that there was a reasonable likelihood that the hazard contributed to would occur and result in an injury was general:

a. Belt entries are the number one cause of fires.

b. "Fires are expected in mines."

c. Potential ignition sources were present in the form of "friction," coal on the belt, a feeder breaker (electrical source), a pick breaker, and a conveyor.

d. The mine has had fires in the past. (T. 122-123). [7]

He said it was "possible" for the hazard to occur but he did not find specific conditions present which would raise the degree of likelihood, such as: "hot rollers" or accumulations. (T. 124). He thought that if there had been hot rollers present, the situation might have constituted an imminent danger. (T. 124). Although there were fire-detecting devices in the area and also fire-fighting equipment (T. 127), he did not consider the presence of these devices and equipment in determining whether the violation was "Significant and Substantial." (T. 127-128).

As to the Inspector's belief that air intended for the face could have been short-circuited, his testimony was speculative. He admitted that a door would have had to be opened outby for short-circuiting to occur. (T. 128-131).

Energy West's witnesses, Chief Safety Engineer Tatton and Mr. Steve Radmall, the Safety Engineer who accompanied Mr. Marietti on his inspection, both gave their general opinion that it was not reasonably likely that a serious injury or illness would have resulted from the violation. (T. 154, 180). As the

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[7] He testified that if a fire did occur, a serious injury would result, which would result in lost workdays or restricted duty for the injured miner(s) (T. 123) due to smoke inhalation.

smoke test by Mr. Marietti demonstrated and as Mr. Marietti admitted, the direction of the flow of air in the section was such that air flowed from the intakes into the belt entry through the curtains. (T. 118-119, 120, 142, 146, 177, 178; see Ex. R-4. Thus, it was unlikely that contaminated air from the belt entry would have entered the intakes through the curtains. Had the contaminated air somehow flowed in the opposite direction, it was not likely that a fire would have broken out on the belt line at the location of the curtains before the permanent stoppings were erected. (T. 145, 179). [8] The mine has never had a belt fire (T. 146) and it was not likely that one would have occurred here and certainly not before the permanent stoppings were completed. (T. 145-146).

Because the ventilation at the face was 25,967 cfm (T. 178), such indicates that adequate air was reaching the face and that intake air was not being short-circuited in any meaningful amount--in other words, the ventilation system was operating properly despite the air leaking through the curtains. Finally, it appears that the regulator in the section would not have allowed short-circuiting since it assured that a constant level of air circulated through the area. (T. 150). [9]

Significant and Substantial

The Commission's formula, as set forth below, is employed here to determine this question.

A violation is properly designated "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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[8] The temporary curtains would have been replaced with permanent stopping by the end of the day shift. (T. 138).

[9] Nor was it reasonably likely that inadequate ventilation would have caused a methane ignition since no methane had been detected in the area. (T. 179). Ignitable levels of methane have never been detected in the mine. (T. 145, 163, 172). This finding is based on the record relating to this Citation.

> 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.

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

The third element of the Mathies formula requires "that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1572, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-1002, July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. Texasgulf, Inc., 10 FMSHRC 498, 500-501 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2011-2012 (December 1987). It is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

This analytical process for determining the "reasonable likelihood" question is a general, broad system of setting forth the conditions or practices which might lead to the occurrence of the contemplated hazard and then proceeding to the conclusion whether or not the hazard is reasonably likely to come about and cause injury. A useful companion method is one which was utilized in Secretary v. Texasgulf, Inc., 9 FMSHRC 748 (April 1987), where the concept of "substantial possibility" (9 FMSHRC at page 764) was mentioned. This was used as an enhancement of "reasonable likelihood" for the reasons stated in the decision, including avoidance of confusion with the "imminent danger" concept, and also because it appeared as a practical matter to be the thinking actually being used by both tribunals, judges, and laymen involved at the various levels of mining safety enforce-

ment and administrative and judicial review. Its value is in its being less ambiguous and at least somewhat more comprehensible. Since understanding what a law means also is consistent with an increased faith in American justice and fairplay, I adopt here, as an aid to the general formula, the "substantial possibility" test. The end result would be the same whichever method of analysis were used.

Judge William Fauver, in his Decision in Secretary v. Coal Mac Inc., 13 FMSHRC 1600 (Sept. 25, 1991) succinctly states the "substantial possibility" concept as follows:

> Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the 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" (§ 104(d)(1) of the Act; emphasis added). Also, the statute defines and "imminent danger" as "any condition or practice ... which could reasonably be expected to cause death or serious physical harm before [it] can be abated," and expressly places S&S violations below imminent dangers. It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not. [10]

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[10] The observation is made that the phrase "more probable than not" has origins from the beginning attempts of the development of construction principles for the Act's "S&S" terminology. It would seem that substitution of the single word "probable" for the entire phrase "more probable than not" is a simpler, less

Utilizing the phrase "substantial possibility" for purposes of analysis seems consistent with the Commission's "reasonable likelihood" phraseology in Cement Division, supra, and Mathies, supra, and permits comparing and contrasting such with the commonly understood ideas (T. 97, 101-106) of "remote" possibility, "strong" possibility, and "probability." See Texasgulf, supra.

Turning to the first alleged hazard, that if a fire developed in the belt entry contaminated air could have entered the intakes through the curtains (T. 116, 126), the Inspector himself testified that the air was flowing in the direction from the intakes (the area of high pressure) to the belt entry (the area of low pressure) through the curtains. (T. 118, 119, 120). Energy West's witnesses agreed that this was the direction in which the air flowed through the curtains. (T. 142, 146, 177-178). There was no explanation how contaminated air would have been able to flow in the opposite direction--from the belt entry into the intakes.

The Inspector conceded that if a fire had occurred inby the curtains, the curtains would not have posed a contamination hazard at all since the contaminated air could not have entered the intakes through the curtains. (T. 120). And if a fire had occurred outby the curtains, he admitted that the curtains would not have caused a contamination hazard because the direction of the flow of air in the belt entry would have sent the air down the belt entry and "out" of the mine (away from the curtains and the faces). (T. 121). Nevertheless, he concluded that if a fire occurred at the belt drive (1700 to 1800 feet outby the curtains (T. 149), then the curtains would pose a hazard. He believed that the air coming through the curtains could feed a fire at the belt drive. He also said - without explanation - that if a fire had occurred at the belt drive, the fire itself would have entered the intakes through the curtains because fire has a tendency to follow oxygen. Even under Inspector Marietti's own theory, the only fire that could have affected the intakes would have been a fire at the belt drive.

However, there is no evidence to support a finding that there was a substantial possibility or reasonable likelihood that a fire would have broken out at the belt drive at any time, whether or not before the permanent stoppings were completed. Beyond the broad allegations that a belt entry is "the number one major cause of fires in mines," that "fires are expected to be in cola mines," and that there is "friction" and "coal on the belt, etc.," there is no basis to conclude that it was reasonably

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confusing way to express the same thought.

likely that a fire would occur. See Eastern Association Coal Corporation, 13 FMSHRC 178 (February 1991). No specific conditions were present to indicate that there was increased likelihood of a fire or that such was a substantial possibility. (T. 124).

To conclude otherwise would require a finding that normal mining in and of itself involved a substantial possibility of a fire occurring. It is found only a remote possibility existed that a fire could have occurred. Thus the mine has not previously experienced belt fires. Where it is merely "possible" that a fire hazard "could" occur, a violation is not S&S. Beaver Creek Coal Co., 12 FMSHRC 153, 157 (Jan. 1990) (ALJ Cetti) (violation of § 75.316 improperly designated S&S where fire was merely possible); Beth Energy Mines, Inc., 11 FMSHRC 1999, 2001 (Oct. 1989) (ALJ Weisberger). See Union Oil Co. of California, 11 FMSHRC 289, 298-299 (March 1989).

The second theoretical hazard was that the air leaking through the leaky curtains might have prevented an adequate level of air from reaching the face. The Inspector did not measure the amount of air that was leaking through the curtains, but he thought that it was enough to deprive the face area of ventilation. However, ventilation at the face measured 25,967 cfm. (T. 150-151, 178). This indicates that the air leaking through the curtains was not adversely affecting the ventilation at the face. Therefore, there is no basis to conclude it was likely that ventilation at the face would have become inadequate before the permanent stoppings were completed. [11] Unless the Secretary can prove that ventilation at the face has been affected or was likely to have been affected by a violation of 30 C.F.R. § 75.316, the violation is not S&S. See Cyprus Emerald Resources Corp., 12 FMSHRC 2107, 2110-2111 (Oct. 1990) (ALJ Weisberger); Cyprus Emerald Resources, Corp., 10 FMSHRC 1417, 1421 (Oct. 1988) (ALJ Melick); Jim Walters Resources, Inc., 7 FMSHRC 2187, 2216 (Dec. 1985) (ALJ Koutras).

Conclusion

It is concluded, in the terminology of the 3d prerequisite of Mathies, supra, [12] that there was not a"reasonable likelihood"

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[11] Inspector Marietti did state that if a door had been left open outby the curtains, that could have triggered short-circuiting. (T. 130). However, this was not shown to be likely.

[12] The first and second evidentiary prerequisites of Mathies, supra, are clear, the violation having been conceded and the violation's contributing a measure of danger to safety. These points are not in issue.

that the hazards contributed to (contaminated air from fire in the belt entry and short circuiting of air from the face) would result in injury to miners. [13] It was not established that it was certain, probable in some degree--or, minimally, that there was a substantial possibility--that the hazards envisioned and contributed to by the violation would have occurred. The "Significant and Substantial" designation on this citation will be stricken and the penalty adjusted to reflect such.

In connection with the two remaining penalty assessment criteria, it is determined that Energy West was negligent in the commission of the violation since it was obvious and flagrant, the gaps in the brattice were visible from 25 to 30 feet away and existed at least 1 hour and 15 minutes (T. 112, 125-126), and Inspector Marietti considered it "one of the worst cases" he had ever seen "of anyone installing brattices." (T. 111-115). (See also T. 123-124).

Although the violation did not meet the special "Significant and Substantial" prerequisites, it nevertheless is found to be serious since had the unlikely event of a fire in the belt entry actually occurred, the hazard of contaminated air entering the intakes could have occurred, and as Inspector Marietti indicated, the fire in the belt drive might have had the "tendency to pull" through the area "and burn right out into the intake escapeway." (T. 121). It is therefore found to be a moderately serious violation.

In consideration of these findings and the other four mandatory penalty assessment criteria set forth in the "stipulation" section, a penalty of $400 for this violation is found appropriate.

Docket No. WEST 91-256

Citation No. 3413883 (T. 196 - II-T. 112).

Inspector Donald E. Gibson issued this "Significant and Substantial" Citation on October 3, 1990, alleging an infraction of 30 C.F.R. § 75.1725(a), to wit:

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[13] There is insufficient evidence to determine that had an injury occurred that such would be of a reasonably serious nature. Thus, as to both hazards, I also conclude that as to the fourth prerequisite of Mathies, the burden of proof was not met.

> The speed reducer being used on the stage loader on the 11th East longwall working section was not maintained in safe operating condition. A seal in the speed reducer was damaged/burst allowing gear oil to leak from the reducer on to the surface of the tailpiece, the fluid coupling housing and the electric motor driving the speed reducer. The motor is supplied 950 VAC.
>
> Oil was observed dripping out of the fluid coupling housing onto the belt tailpiece. This oil was cleaned periodically but the leak persisted from the reducer.
>
> In this condition, the hazard of a fire is present due to the consistent leak and the power source (motor) in the area. The stage loader was removed from service immediately by management after being notified of the violation.

30 C.F.R. § 75.1725(a), pertaining to "Machinery and equipment; operation and maintenance," provides:

> 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.

Respondent Energy West, while acknowledging that there was a leak in the speed reducer, denies that such leak made it unsafe (T. 198) and further contends that this condition was not reasonably likely to result in serious injury or death and thus, assuming arguendo, there was a violation, the violation was not "Significant and Substantial."

A speed reducer is a device consisting of gears of different sizes and configurations that is used to slow down or speed up a given apparatus. In this case it was used to reduce the speed of the stage loader motor. Such equipment is used in long-wall mining. (T. 206-207).

Inspector Gibson said oil, which he believed was gear oil, was running down the shaft of the speed reducer into the coupling housing guard. He observed oil on the face of the electric motor of the stage loader. He indicated he was able, from experience,

to identify "gear" oil. (T. 208-209). [14] The Inspector also observed oil "that dripped down on the tail piece out of the fluid coupling housing" which he identified as gear oil. (T. 215-216, 249). [15]

As Inspector Gibson stated in the Citation, the leak was caused by a burst seal in the speed reducer of the stage loader. Energy West contends the leak could not have been fixed at the mine and that the entire loader would have had to have been taken to a fabrication shop to replace the seal. (T. 211; II-T. 80-81).

At the time of his inspection, Inspector Gibson was advised by the section foreman, Leonard Reid, that he (Reid) was aware of the leak and that it had been leaking for three days. (T. 210). Later on, Chief Safety Engineer Randy Tatton told the Inspector that he (Tatton) did not believe the condition was a violation and that it was not "Significant and Substantial." (T. 211). According to Inspector Gibson, Mr. Tatton made the following explanation to him:

> And he made me aware at that time that the mine superintendent and longwall coordinator, Mine Superintendent, Garth Neilson, and Longwall Coordinator, Bud Warrington, had approached him a week and a half to two weeks earlier about this condition - that they had an oil leak, in fact, on the stage loader and wanted to know if they should change the oil - change the speed reducer out or repair it or could they continue mining and wash the oil away until they finished or completed that panel, which was at that time 2- to 300-feet left in the panel then the long wall would have been removed off that particular face recovered this, we determined. And this stage loader or speed reducer would have been sent off for repair at that time. (T. 211-212).

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[14] Energy West contends that it was not gear oil, but hydraulic fluid mixed with coal dust, which was on the fluid coupling housing and the inside face plate of the motor. (II-T. 22-25).

[15] Energy West concedes that the oil on the tail piece was gear oil. (II-T. 24-25).

The leak was thus allowed to continue for approximately two weeks. (T. 212).

The vital question to be determined is whether the combustible gear oil leak from the burst seal constituted an unsafe operating condition mandating that the equipment be removed from service immediately,

A preliminary question is whether the oil observed by Inspector Gibson was indeed gear oil from the leak or hydraulic fluid mixed with coal dust.

Inspector Gibson was quite certain it was gear oil and Energy West did not question this determination on the day of inspection or at any time in proximity thereto. (T. 210, 222; II-T. 47, 104-105).

Frank Zmerzlikar, general maintenance foreman, nevertheless testified at the hearing that the oil on the fluid coupling housing and the face plate of the motor was hydraulic fluid and not gear oil. (II-T. 21-27; but see II-T. 46-47). Mr. Tatton first mentioned that the oil was hydraulic fluid some 6-7 weeks before the hearing in this matter. (II-T. 104). Thus, as MSHA contends in its brief (p. 12, fn 7):

> In August 1991, Energy West in responses to interrogatories failed to mention its belief that the oil was fluid coupling oil, however, in supplemental answers filed in January 1992, seven weeks prior to the hearing and 29 months after the citation was issued, it first offered its theory that the oil was fluid coupling and not gear oil. (II-T. 100-104).

I find the Inspector's determination that the oil was gear oil reliable and consistent,[16] with what he observed on the inspection day (T. 219) and it is credited.

Energy West established that, after learning of the leak, Garth Nielson, then the Longwall Superintendent, and Randy Tatton conferred and decided that it would be safer to finish the panel as long as the leaking oil was not allowed to accumulate. (II-T. 27, 64, 67, 84, 87-90).

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[16] Energy West's version is not so found. (II-T. 46-47, 48).

To prevent the leaking oil from accumulating, Energy West employed a program of adding gear oil and washing oil which had leaked on the tailpiece away with a hose at every pass of the longwall shear (approximately every 35 minutes) and appropriate personnel, foremen, and miners were instructed in this task. (II-T. 63-71).

It is noted that this program, however well-intended, did not alleviate the problem of the oil leak so as to keep oil from accumulating at the three places observed by Inspector Gibson on the day of Inspection.

Inspector Gibson described several hazards from the condition he observed as a fire hazard, stating: "The motor itself is a source of fire; the speed reducer itself is a source of fire; and the motor is subject to fail at any time ... ." He also said that, while the amount of the oil did not constitute an "accumulation," it could "create the fire" if there was a motor or cable failure and there was some "type of arc to ignite the oil." (T. 216-217, 234). Such an arc could be created by electrical component or failure of the motor or trailing cable. Such fires are not uncommon. (T. 217, 234).

The Inspector, in emphatic and convincing contradiction to Energy West's contention to the contrary, said the motor and the speed reducer were at the same level and were joined together by the fluid coupling, thus making it possible for the gear oil to leak from the speed reducer onto the electric motor. (T. 218, 269). Since Energy West's witness Mr. Tatton was not particularly clear with respect to the juxtaposition of the motor and the speed reducer (II-T. 100-104), and Inspector Gibson's testimony on this point and throughout was certain and reliable in tenor, the Inspector's testimony is credited. [17]

The Inspector pointed out that if the gear oil (a combustible material; T. 272) continued to leak from the speed reducer, the speed reducer itself was subject to having a bearing go out, creating another source of fire. (T. 220; see also II-T. 54). The tailpiece was another source of fire (T. 226) and two 950-volt longwall power cables from the section transformer to the master controller went through the area (T. 227) which could fail (T. 242-244, 272; II-t. 58-59) or be cut (T. 245) or damaged (II-T. 58-59).

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[17] As I have noted elsewhere in this decision, Energy West's position that the dripping fluid was not gear oil also seems to have dawned many months after the Citation was issued. (II-T. 100-104).

Inspector Gibson also pointed out that there was a smoke inhalation hazard because the air was traveling over the equipment (stage loader) in question headed inby to the face about 100 feet away. He testified:

> ... So the entire mining crew, consisting of 13 people this particular day, were inby that location as I observed them. So if you had a fire to occur the smoke would go long--or go inby or move inby across the people, which could lead to smoke inhalation of CO (Carbon Monoxide). (T. 226).

MSHA's evidence that the condition cited was unsafe is reliable and persuasive. Various hazards to the safety of miners were created by the oil dripping from the leak. Inspector Gibson measured the puddle of oil which had dripped down on the tailpiece out of the fluid coupling housing and it was 1/16th of an inch deep x 6- to 8-inches wide by 15- to 16-inches long. Oil was found in two other places. Various potential ignition sources were present. While the "washing and refilling" program employed by Energy West may have reduced the likelihood of a fire occurring, it didn't eliminate the hazard. It is concluded that the machinery in question had not been maintained in safe operating condition and that Energy West, by allowing such to remain in service, violated the safety standard as charged.

The analytical formula for determining "Significant and Substantial" issues has been set forth previously. I have found that a violation was established and that such created safety hazards in the foregoing analysis. The decisive issue, in terms of the four criteria set forth in Mathies, supra is whether a reasonable likelihood existed that the hazard contributed to by the violation would result in an injury.

Although the Inspector considered it "more than likely" that the possibility of the motor or trailing cable failure could happen (T. 242) he conceded that the shielding of the cables to prevent arcing or sparking did lessen the possibility of cable failure. At the same time he pointed out such would not prevent cable failure from happening. (T. 243-245). [18] Should the motor or cable fail, the voltage was high enough to "likely" ignite the oil. (T. 222-223, 243-244).

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[18] This distinction is one example of the line to be drawn between the condition being "unsafe" and its being "Significant and Substantial."

The question of likelihood thus turns on the initial link in the chain, i.e., whether the motor or cables would fail in the first place. As to this issue, the net effect of the Inspector's testimony is that the occurrence of such failure was merely possible, not that there was a substantial possibility, even though he summed up his opinion as being that the occurrence of motor or cable failure was "likely". [Compare T. 224, 242 with T. 228 (possibility) 229 and 234 (motor failure "could" happen); 243-245 (likelihood reduced by protective measures); 247-248, 262, 264, 270].

Energy West established, in diminution of the likelihood of the occurrence of the hazards that:

1. The speed reducer was regularly refilled on the graveyard shift (II-T. 29-30);

2. If the speed reducer started to heat up, a smell and a noise would be created which would alert miners working in the area (T. 241; II-T. 29-30);

3. The warmth of the speed reducer which was noticed by the Inspector was "normal" (II-T. 34);

4. The motor is checked a minimum of once a week for permissibility (II-T. 43);

5. It was not a common occurrence for electrical cables to be cut of damaged (II-T. 42, 73).

6. Had a fire occurred, it was likely that such would have been detected in its early stages and there were various types of fire-fighting equipment in the area, i.e., the washdown hose, fire hose, a fire hydrant, a foam eductor, and fire extinguishers. (II-T. 94-96).

In conclusion, the overall evidence of record indicates that the occurrence of the fire hazard created by the violation (and contributed to by it) was a possibility but that it was not reasonably likely (there was not a substantial possibility) that the hazard would come to fruition and result in an injury to miners. Accordingly, it is found that the third prerequisite of Mathies has not been established and that the "Significant and Substantial" designation on this Citation should be stricken.

The violative condition was known to Energy West's management personnel and was allowed to continue for a considerable period of time (II-T. 50) until the same was detected by Inspector Gibson and abated. As MSHA points out in its brief, Energy West's general maintenance foreman made a significant concession in his testimony:

> Q. ... and if this--if this seal had started leaking, say, when you just began work on the panel which--would you, as the maintenance foreman, wait until you completed the entire panel removal before you stopped production and fixed the seal or would you just keep adding oil?
>
> A. I would have fixed the seal or changed the reducer. (II-T. 56).

It is concluded that Energy West was negligent in the commission of this violation. [19]

Even though it has been found that this violation was not "Significant and Substantial," it did create the various hazards described by the Inspector and indicated heretofore in this decision. Since the hazards were not "reasonably likely" to occur, that is, there was only a remote possibility of the occurrence of the hazards, the violation is found to be only moderately serious. A penalty of $300 is assessed therefore.

Docket No. WEST 91-251

Citation No. 3413898 (II-T. 112-166).

This "Significant and Substantial" Citation was issued by MSHA Inspector Donald E. Gibson on October 24, 1990, charging an infraction of 30 C.F.R. § 75.503, and describing the following violation:

> The Joy Shear mining machine 2G-3675A-O, being used on the 16th West working section was not maintained in permissible condition. An opening in excess of .005 inch was observed between the cover lid and the plane flange joint on a light ballast box located at face shield #77. The ballast box is supplied 120 VAC. In this condition, poses the hazard of an ignition source.

30 C.F.R. § 75.503, pertaining to "Permissible electric face equipment; Maintenance," provides:

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[19] See also II-T. 48-50.

> The operator of each coal mine shall maintain in permissible condition all electric face equipment required by Sections 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

Respondent concedes the occurrence of this violation (II-T. 115) but challenges that the violation was "Significant and Substantial" (T. 10) and the propriety of MSHA's proposal of a $350 penalty.

The ballast box in question is approximately the size of an 8.5 by 11-inch sheet of paper, is 2 inches thick, and is used to provide power for the lighting system for the longwall section (II-T. 117, 143).

Inspector Gibson testified that the hazard posed by the opening was that it could "emit" [20] gases or coal dust inside the box or permit arcs to the outside atmosphere (II-T. 125). He pointed out that since the opening of the flange joint was in excess of .004 inches (the maximum clearance permitted by 30 C.F.R. § 18.31 for this plane flange joint), and since it was inby the last open crosscut and within 150 feet of pillar extraction, such created the "potential for an ignition source of either methane or (float) coal dust" (II-T. 125). He said the longwall shearing machine generates and puts into suspension coal dust and that permissibility requirements are the first line of defense in preventing ignitions of methane and/or coal dust. (II-T. 125-126, 138).

In support of his conclusion that it was reasonably likely that the violation could cause a serious injury if the ballast box were left in the condition he found it, the Inspector testified:

> During the normal mining operation methane is released from the coal. That's the process of coal mining. Methane is there and certain amounts are emitted as the coal is being extracted. A lot of dust is put in suspension sometimes on those long walls. So this poses the hazards of an ignition to either the methane and/or the coal dust that could be in suspension.

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[20] I interpret this to mean "admit."

Q. In other words, what you're saying is that this opening is large enough that either escaping methane from the coal being cut off or coal dust in the air could enter this opening and combine with the flame path to cause an explosion?

A. Yes. Sir.

Q. And that's why you labeled it S&S violation?

A. Yes, Sir.

Q. Are there any other factors that you considered?

A. Well, there have been instances where lighting packages or lighting systems and components of lighting systems have been involved with or have been determined by MSHA through investigations to be the causes of ignitions. One was in 1981 at Mid-Continent Resources in which 15 miners were killed. There was another one--I was trying to think where the other one is but it slips my mind right now where that one is. (II-T. 129-130).

This is a gassy mine and even though the mine had never experienced ignitable levels of methane (II-T. 133, 139, 140) methane is always present and the Inspector testified that (1) the "potential for ignitions is always there in coal mining." (II-T. 139) and since methane is always present, there could be an occurrence of an "ignitable amount at any time which the mine has had "even though the Inspector personally had never detected such (II-T. 139-140). (Emphasis added).

Energy West presented two witnesses, Maintenance Foreman Thomas Kerns and Chief Safety Engineer Tatton. Mr. Kerns indicated that for an ignition to occur inside the ballast box a combustible mixture, being 5 percent at least and that is 5 to 15 percent air and methane mixture, would have had to enter into the box and then an incendiary spark--that is a spark with enough energy to ignite the

mixture--would have had to occur within this box. (II-T. 144). [21]

Energy West established that the ballast box was "electrically sound" before and after the inspection (II-T. 145); that the methane level is checked frequently, i.e. at least twice each production shift by the foreman, and by the Joy Shear mining machine operators every 20 minutes while in operation. (II-T. 162-163).

Mr. Kerns who said that it was "highly unlikely" that the ballast box would have sparked or arced, also indicated that he carries a methane detector on his shift and he has never detected an ignitable level of methane (II-T. 145) and that he was not aware of there ever having been detected an ignitable level of methane at the Cottonwood Mine (II-T. 146). There is also a methane sensor detector system in the longwall itself. (II-T. 146-147).

Mr. Kerns also felt that the approximately 45,000 cfm of air on the face would have "diluted any methane below explosive levels" and carried it away. (II-T. 148). See also II-T. 163.

He also pointed out that there were permissibility checks on the ballast box - once every weekend - and that there was fire-fighting equipment in the area involved. (II-T. 149-152).

Mr. Tatton felt it unlikely that coal dust would get ignited unless in the presence of methane. (II-T. 163-164).

The Commission's analytical formula for determining whether the violation was "Significant and Substantial" has been previously set forth. The application of this formula must be made in the perspective of continued mining operations, not as Energy West seems at times to argue, at or in proximity to the time of inspection only. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984).

In terms of the Mathies prerequisites, the violation is conceded. Since the unargued hazard, however likely one party or the other views its occurrence, is of a methane and or coal dust explosion, it is concluded that a measure of danger to safety was

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[21] Mr. Tatton's version of what it would take for an ignition to occur inside the ballast box is, upon analysis, basically the same as Mr. Kerns'. See II-T. 161-162. On cross-examination Mr. Kerns retreated somewhat from his 5 percent methane level assertion and conceded that a 2 percent level of methane could ignite although this was "very marginal" or "very slightly." (II-T. 157-158).

contributed to by the violation. The record reveals that there would have been miners who worked nearby the area of the violation with some frequency (II-T. 125, 162-163) so, although the Petitioner's evidence did not directly address the fourth Mathies element, I infer and find that if an explosion of methane and/or coal dust had occurred there would have been serious injuries or fatalities ensuing from such event (II-T. 128-130, 139-140, 162-163).

In concluding that there was a reasonable likelihood that the ignition hazard contributed to would result in an injury, it is first noted that this is a gassy mine. While there was no specific evidence of prior high levels of methane having been detected, nevertheless the essence of the Inspector's testimony, which was credible and convincing, was that such could occur at any time. This must be considered in connection with the fact that the permissibility violation occurred within 150 feet of pillar extraction and the fact that the longwall shearing machine also generates and puts into suspension coal dust. The Inspector testified that the opening in the plane flange joint was large enough that either methane e escaping from the coal being cut or coal dust in the air could enter the opening and combine with the flame path to cause an explosion. (II-T. 129).

Summing up, there were two kinds of ignitable substances involved in this situation which could have been ignited. The Commission has previously recognized that one factor which increases the likelihood of the occurrence of an ignition hazard is the presence of a "more flammable substance," i.e., methane, and a mine's classification as "gassy." See Secretary v. Eastern Associated Coal Corporation, 13 FMSHRC 178, fn. 4 (Feb. 1992). In this case, where the combustible substance was hydraulic oil, the Commission contrasted the difference of such with methane:

> Methane is ignitable by a spark and is much more flammable and explosive than hydraulic oil. Further, the mines in both those proceedings (cited by the Secretary in urging an S&S finding) were gassy mines as defined by the Mine Act."

Inspector Gibson testified that the subject mine "has had" ignitable levels of methane in the past.

It is therefore determined that there existed a substantial possibility that the hazard contributed to by the violation would have resulted in an injury or fatality occurring, and that therefore the "reasonable likelihood" requirement of the third element of Mathies, supra, has been satisfied.

The Inspector testified that the gap in the plane flange joint occurred because of rust, which process would have taken a considerable length of time to develop. I therefore conclude, in the absence of rebuttal testimony, that Energy West was negligent in allowing such condition to develop. (II-T. 123-124). Because of the seriousness of the ignition hazard which was contributed to by the violation (II-T. 128-130) and the presence of miners inby the place of violation (II-T. 162-163), I find this to be a serious violation.

Considering various stipulations in connection with mandatory penalty assessment criteria and the above findings as to negligence and gravity, it is concluded that a penalty of $750 is appropriate and such is here **ASSESSED**.

ORDER

1. Citations numbered 3414063 and 3414064 (in Docket WEST 91-256) are **MODIFIED** to change the "Likelihood" characterization in the "Gravity" section (para. 10 A) from "Reasonably Likely" to "Unlikely" and to delete the "Significant and Substantial" designation thereon.

2. Citation No. 3413898 (Docket No. WEST 91-251), including the "Significant and Substantial" designation thereon is **AFFIRMED**.

3. Citation No. 3414071 (Docket WEST 91-251) is **MODIFIED** to delete the "Significant and Substantial" designation and is otherwise **AFFIRMED**.

4. Citation No. 3413883 (Docket No. WEST 91-256) is **MODIFIED** to delete the "significant and Substantial" designation and is otherwise **AFFIRMED**.

5. Citation No. 3414062 (Docket WEST 91-256) is **VACATED**.

6. Respondent, within 40 days from the date of issuance of this decision, **SHALL PAY** to the Secretary of Labor the total sum of $1490 as and for the civil penalties agreed to and/or assessed ($20 each for Citations numbered 3414063 and 3414064; $400 for Citation No. 3414071; $300 for Citation No. 3413883; and $750 for Citation No. 3413898).

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SEP 14 1992

ROGER VOGT, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 91-225-DM
v.	:	RM MD 92-02
N.A. DEGERSTROM, INC., and ZORTMAN MINING, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Morris

All parties herein reached an amicable settlement and a motion to dismiss these proceedings with prejudice was filed.

For good cause shown, the motion to dismiss is **GRANTED** and the case is **DISMISSED.**

John J. Morris
Administrative Law Judge

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SEP 17 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JOSEPH A. SMITH, Complainant	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. PENN 92-57-D
	:	PITT CD 91-04
v.	:	Docket No. PENN 92-58-D
	:	
HELEN MINING COMPANY, Respondent	:	PITT CD 91-11
	:	Homer City Mine

DECISION

Appearances: Gretchen Lucken, Esq., Tana M. Adde, Esq.,Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Complainant; J. Michael Klutch, Esq., Polito & Smock, P.C., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

The Secretary brings these cases on behalf of Joseph A. Smith and claims that Smith was twice unlawfully discriminated against and discharged (on December 20, 1990 and July 2, 1991) for engaging in protected safety-related activity. Smith filed a union grievance concerning the December 1990 discharge and an arbitrator reduced the discharge to a 60 working day suspension. He was reinstated to his former position on March 11, 1991. As regards the latter discharge on July 2, 1991, the Secretary of Labor applied for and I ordered the temporary reinstatement of Smith to his previous position on November 5, 1991, where he remains pending this decision. Secretary v. Helen Mining Co., 13 FMSHRC 1808 (November 1991) (ALJ ORDER OF TEMPORARY REINSTATEMENT).

Pursuant to notice, hearings were held on the merits of these cases on March 24, 25, 26, and 31, 1992, in Ebensburg, Pennsylvania, and the parties have filed posthearing arguments which I have considered in the course of my adjudication of this matter.

FINDINGS OF FACT

1. At all times relevant to this complaint, Smith was employed by respondent as a shearer operator on the longwall at the Homer City Mine; he has been employed at the Helen Mining Company for approximately 20 years; he is the UMWA Local Safety Committee Chairman; and he is also a certified mine examiner ("fireboss").

2. At all times relevant hereto, Helen Mining Company, a Pennsylvania corporation, was engaged in the production of bituminous coal at its underground mine, known as the Homer City Mine, and is, therefore, an "operator" as defined by section 3(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 802(d).

3. The Homer City Mine is located in Indiana County, Pennsylvania, and is an underground coal mine, the products of which enter commerce within the meaning of sections 3(b), 3(h), and 4 of the Act, 30 U.S.C. §§ 802(b), 802(h), and 803.

4. On October 25, 1990, some 2 months prior to his December 1990 discharge, Smith filed a section 105(c) Discrimination Complaint against Thomas Hofrichter, the Mine Superintendent, Jack Woody, the President, and Jim Slick, the Mine Foreman, for allegedly denying himself, in his capacity as the UMWA Safety Committee Chairman, access to the mine to investigate a safety complaint that men were working under an unsupported roof. MSHA declined to pursue that case and that was the end of the section 105(c) action. However, Smith also filed a grievance under the UMWA Contract, which was subsequently settled by an agreement stipulating that the Safety Committee has the right to inspect the mine and upon giving advance notice, will not be denied access. Smith and Hofrichter signed this Statement of Settlement on November 16, 1990.

5. On November 17, 1990, Smith confronted Superintendent Hofrichter concerning mine management's ability to require Smith and other UMWA firebosses to perform mine examiner work on an as-needed basis. Smith told Hofrichter that the Pennsylvania Department of Environmental Resources (DER) had advised him that his fireboss certification was his to use as he wished and that he would not have to perform fireboss duties if he did not want to. Smith allegedly challenged Hofrichter to issue a direct order to him to fireboss so that he could refuse and then Hofrichter could discharge him for insubordination. Hofrichter states that he declined Smith's invitation to discharge him inasmuch as Smith's services as a fireboss were not required on that particular shift. Hofrichter memorialized his discussion with Smith in handwritten notes that were made a part of Smith's personnel file. (Respondent's Exhibit No. 8).

6. Although firebossing is generally performed by managerial employees such as foremen, there is an established practice at the Homer City Mine which permits hourly rank and file employees, such as Smith, to perform firebossing work on an as-needed basis.

7. On December 18, 1990, prior to the commencement of his shift, Smith engaged Superintendent Hofrichter in a discussion about two then-pending grievances otherwise unrelated to this case. During this discussion, Superintendent Hofrichter told Smith that he did not intend to pay the grievances. According to Hofrichter, Smith then threatened to shut down the longwall on his shift in reprisal. Smith cited Hofrichter to ongoing problems with shearer water pressure and pull key malfunctions on the longwall as his intended reasons for shutting down the longwall that evening. Smith, on the other hand, characterizes their conversation as making safety complaints to mine management regarding defective emergency pull keys and inadequate water pressure on the longwall shearer. Proving, I suppose, that one man's safety complaints are another man's threat to disrupt production.

8. Pull keys are a series of emergency stop switches which are located along the longwall face. During the 2 weeks prior to December 18, 1990, two of these emergency stop switches were taken out of service, sent away for repair, and then subsequently reinstalled. Despite the repair of the pull keys, they continued to malfunction intermittently. It is also uncontroverted that problems in maintaining adequate water pressure on the longwall shearer persisted. These are legitimate reasons to stop operation of the longwall; at least that is the official position of all concerned. As a matter of practice, however, unless someone complains, the longwall shearer will operate.

9. Following Smith's aforementioned discussion with Superintendent Hofrichter, prior to his shift on December 18, 1990, Smith entered the mine and immediately complained to his foreman regarding the damaged pull keys and, somewhat later, about low water pressure on the shearer, which complaints together resulted in the idling of his longwall shearer that evening for the entire shift.

10. Respondent characterizes Smith's complaints regarding the defective pull keys and inadequate water pressure as being selfishly motivated by personal gain, but nevertheless has to agree that they were legitimate complaints. I concur that Smith's motives may not have been entirely pure, but I nonetheless find these complaints to be legitimate safety complaints and protected activity within the meaning of the Mine Act.

11. On December 19, 1990, Superintendent Hofrichter had a discussion with David Hallow, the UMWA Grievance Committee Chairman and coincidentally, Smith's friend. Hallow asked Hofrichter if management intended to produce coal during the coming weekend. Hofrichter replied in an angry tone that they would not load coal on the weekend because they could not even load coal during the week. Hofrichter also told Hallow that he was very upset with Smith for following through on his threat to stop longwall production during the preceding evening's shift ostensibly because management refused to pay him for his outstanding grievances. Hofrichter also threatened to fire Smith at this meeting — "your buddy won't be around much longer."

12. On December 19, 1990, Assistant Shift Foreman Stanley DeWitt met with Smith at approximately 3:50 p.m. and instructed him to perform firebossing duties that evening on the 4:01 p.m. shift. Smith told DeWitt that he did not want the responsibility of performing that work on that particular evening. DeWitt in turn advised Shift Foreman "Butch" Earnest that Smith did not want the responsibility of performing fireboss duties that evening. Earnest told DeWitt to instruct Smith that firebossing was the only work available for him on that shift. DeWitt passed this information along to Smith, who inquired as to whether DeWitt's instruction was a direct work order. DeWitt indicated that it was, and Smith replied, "no problem" and complied with the order.

13. After receiving his firebossing assignment, Smith confronted Superintendent Hofrichter in the hallway outside his office. Smith complained to Hofrichter that by virtue of having been forced to perform mine examiner's work that evening, he would lose the opportunity to receive 2 hours of overtime pay that he would have otherwise earned on the longwall as a shearer operator. Hofrichter assured him that upon completion of his firebossing work, he could rejoin his crew on the longwall and complete his anticipated 10-hour shift. Superintendent Hofrichter then turned and walked away from Smith, at which point Smith followed Hofrichter into his office. Smith told Hofrichter that he would be sorry for making him fireboss that evening. When Hofrichter replied that firebossing was the only work available for Smith on that shift, Smith reiterated that Hofrichter would be sorry since he, Smith, would be looking for imminent dangers in the mine during his firebossing run. To which I would only say, so what; that's what he's supposed to be looking for, amongst other things.

14. After Smith departed, Hofrichter spoke with Shift Foreman Earnest. Hofrichter warned Earnest that Smith was very displeased about having to perform the on-shift fireboss run that evening, and that Earnest should be sure to keep employees available to correct any problems which Smith might report during the shift.

15. Sometime after beginning his mine examination, he called Shift Foreman Earnest from the Number 6 Belt Drive and told him that the Number 6 Belt, where it meets the tailpiece of the Number 5 Belt, was gobbed out and that, as a result an automatic switch had deactivated the Number 6 Belt. Smith also reported that the coal build-up on the Number 6 Belt had covered the tailpiece of the adjacent Number 5 Belt and caused it to surge and lurch. Earnest told Smith to shut down the Number 5 Belt and to attempt to quickly determine what had caused the malfunction of the Number 6 Belt. Smith reported to Earnest that in his judgment the equipment malfunction was triggered by a stray piece of discarded belt that had clogged the dump chute at the juncture of the Number 5 and Number 6 Belts, although the Belt Foreman later reported that he didn't find anything in the chute. Respondent speculates that Smith sabotaged the belt, but there is no evidence of that in this record.

16. After shutting down the Number 5 Belt, Smith, following instructions from Earnest, continued with his fireboss run. At approximately 7:42 p.m., Smith called Earnest from the mine telephone at the Number 1 Main Belt, which is located at the outby terminus of the Northwest Passage. Smith told Earnest that due to the presence of a large amount of coal float dust at the air lock in that location, he would have to shut down the Number 1 Main Belt.

17. This is a drastic remedy because all of the belts in this coal mine operate in sequence. If the Number 1 Main Belt is deactivated, all of the other belts in the coal mine automatically disengage in sequence, including those which service the longwall. Ultimately, deactivation of the Number 1 Main Belt halts coal production in the entire coal mine since the belt system, the sole means of removing coal from the mine, is rendered inoperative.

18. Earnest was leery of doing this. He was mindful of Hofrichter's earlier warning to him that Smith's firebossing activity that evening would bear watching. Earnest disagreed that Smith should shut down the Number 1 Main Belt and told him not to. He told him to leave the belt running and go ahead with his examination. But Smith felt that the condition was too dangerous to leave the area unattended with the belt running. It is generally acknowledged that float coal dust is combustible when it is suspended in air and can contribute to an explosion if combined with an ignition source. Right after Smith hung up the phone with Earnest, he shut down the belt in order to remove the ignition source posed by the electrical components and also because he would be underneath and on the tight side of the belt shoveling the float dust. He then began shoveling and rock dusting to correct the situation which he believed to be a hazardous accumulation of coal float dust.

19. Assuming for the moment that Smith was truly concerned about these accumulations, respondent has raised several very good issues concerning Smith's lack of safe and/or effective technique in pursuing a cleanup of the float dust.

Although the Number 1 Main Belt had been turned off, the circuit breaker, which furnishes power to all electrical components servicing the Number 1 Main Belt, including nonpermissible Jabco systems, belt take-ups, and sequence timers, had not been tripped. Rather, the belt had been stopped merely by use of the "stop" button which controls only the belt itself. Therefore, although the Number 1 Main Belt had been turned off, all of the other electrical components servicing the Number 1 Main Belt, both permissible and nonpermissible, remained energized and constituted potential ignition sources for an explosion.

A rock dusting machine was located near the starter box, together with 25 to 30 bags of rock dust. Smith, an experienced miner who has held virtually every classified position in the coal industry, was certainly capable of operating this rock dusting equipment. A rock dusting machine emits crushed limestone with air pressurized to 40 or 50 psi. A rock duster's effective range is at least 30 feet and, therefore, Smith could have rock dusted the tight side of the Number 1 Main Belt from the walkway on the wide side of the belt had he used the rock duster located at the starter box near the slope bottom.

Furthermore, the primary remedy selected by Smith, i.e., shoveling the coal float dust onto the belt and alternately turning the power off and on to move the belt so as to allow for more room on the belt for additional float dust, in the opinion of many would only serve to exacerbate the coal float dust problem, if it existed, inasmuch as the air velocity in the air lock area is such that the coal float dust, even if it could be shoveled onto the belt (which some witnesses doubt), would be carried several hundred feet inby that location, and the renewed suspension of the coal float dust in the high velocity air, coupled with the sparks potentially created by alternately turning the belt on and off, could recreate and even worsen the hazard which Smith alleges he encountered in the first instance.

These all appear to be valid criticisms that make Smith's reaction to the assumed crisis appear amateurish. But, whether or not Smith took the most effective action to correct what he perceived to be a hazardous condition will not be determinative of whether he engaged in protected activity in this instance.

20. Respondent also raises an issue regarding the very existence of a hazardous accumulation of coal float dust in the first instance. There is certainly a factual conflict in the evidence on this threshold issue. Smith, of course, maintains that there was a hazardous accumulation of deep coal float dust

in the entire area of the air lock. Patrick Shirley, a general inside laborer at the time, who has since been laid off, testified that DeWitt took him to the air lock area to address the problem. When he got there, an hour or so after the belt had been shut off, he observed black float dust and coal spillage accumulated more or less all over the whole air lock area to a depth of 6 or 7 inches. He also observed Smith shoveling on the tight side of the belt at that time. On the other hand, DeWitt, the Assistant Shift Foreman, who arrived at the same time as Shirley, testified that he saw no coal float dust anywhere. He did see coal spillage, however, which measured approximately 3 1/2 inches deep, 2 1/2 to 3 feet wide and about 40 feet long in that area. He also estimated that Smith had already cleaned up about that same amount. He opined that Smith had about half of it cleaned up when he got there with Shirley. Shift Foreman Earnest was also of the opinion that there was no coal float dust found based on his understanding of DeWitt's report to him ---"he [DeWitt] said the area was gray." Yet his own handwritten notes admitted into the record as Respondent's Exhibit No. 1 reflect that DeWitt reported to him that there was float dust in the air lock area when he arrived to relieve Smith. In fact, on cross-examination that point was driven home [Tr. 107 (3/26/92]:

> Q. All right. And so your notes, in fact, say that you talked to Stanley DeWitt and he told you there was float dust; isn't that correct?
>
> A. Yes, ma'am.

An investigative Commission appointed by the State of Pennsylvania Department of Environmental Resources, Bureau of Deep Mine Safety, the certification authority for mine examiners in that state, conducted a special investigation into this incident as well. State Coal Mine Inspector Ellsworth Pauley, a member of the investigative Commission, testified that the Commission specifically addressed the allegation that Smith had lied about the amount of float dust that was present and they found that Smith's report was accurate, as indicated by witness statements they took, including Foreman DeWitt's telephone report confirming float dust in the area, plus the amount of clean-up subsequently required to abate the condition.

Ultimately, the investigative Commission and the Director of the Bureau of Deep Mine Safety concluded that Smith's action in stopping the belt was proper, based on the amount of float dust which he encountered and that he was required by law to take corrective action under those conditions.

In deciding this issue, I find that the preponderance of the admissible evidence is to the effect that Smith did find a substantial and dangerous accumulation of float coal dust as he

reported to his superiors that he had. Respondent's allegation that Smith exaggerated the extent of the float dust accumulation is accordingly rejected.

21. The preponderance of the evidence also establishes that it was a common practice for mine examiners to stop belts and that no other mine examiner has been disciplined for such conduct. Smith testified that he regularly stopped belts during mine examinations over the past 15 years, when he felt it was necessary to correct a hazardous condition, and had never before been disciplined for stopping a belt. Another certified mine examiner, Edward Williams, testified that he regularly stopped belts during mine examinations if he believed corrective action was required. Williams also testified that there was no policy requiring permission to stop a belt, and he knew of no other mine examiner who had been disciplined for stopping a belt. State Inspector Pauley also concurred that a mine examiner may stop a belt line, without permission and even has a responsibility to do so if a hazardous situation exists.

22. The Pennsylvania DER-Bureau of Deep Mine Safety Report (Complainant's Exhibit No. 4) stated that the mine examiner has an obligation to report dangerous conditions and take appropriate action to correct them. They found that Smith had acted appropriately in shutting down the belt in order to begin correcting a dangerous accumulation of float coal dust. Furthermore, the State investigative Commission found that Shift Foreman Earnest had interfered with Smith's performance of his mine examiner duties in violation of state law, by attempting to overrule Smith's decision to shut down the belt without first verifying the mine conditions reported to him. The investigative Commission opined that since Earnest had not seen the conditions, he could not have made a sound judgment as to severity. The Bureau further expressed concern about Earnest making such a decision without having first verified the presence or absence of the reported conditions.

23. On or about December 20, 1990, Helen Mining Company management discharged Smith for insubordination, to wit; disobeying or refusing a direct order from Foreman Earnest to leave the No. 1 Belt running. But this is problematical for the company because Foreman Earnest admits that he never gave Smith a direct order. He merely "told" him to leave the belt running and begin abating the condition. And there is a plethora of evidence in this record that in the union-management environment that exists in this mine, there is a very real distinction between a discussion over the proper course of action to take to abate a hazardous condition which results in an instruction to "leave the belt running and begin abating the condition" and a direct work order which utilizes those magic words. When the terminology

"this is a direct order" is used, an antenna goes up, the listener becomes focused and presumably obeys or not at his peril.

In any event, Smith filed a grievance concerning this discharge. The arbitrator on February 28, 1991, decided that the company had shown just cause for disciplining Smith, but believed discharge to be too harsh a penalty and ordered Helen Mining Company to reduce the penalty to a 60 working day suspension. Therefore, Smith returned to work on March 11, 1991, having served out the time.

Not wanting to put all his eggs in one basket, Smith also filed a parallel action, a section 105(c) complaint with MSHA, now docketed at PENN 92-57-D. He seeks an order directing back pay, interest and expungement of this adverse action from his personnel records. The Secretary asks for the imposition of a civil penalty.

24. Subsequent to his return to work in March of 1991, Smith had occasion to file another section 105(c) complaint with MSHA on May 7, 1991. This one was based on an incident in which Smith was reassigned from his job as a shearer operator on the longwall, allegedly for making safety complaints about defective equipment on the longwall. Smith alleged that he was assigned to work as a mechanic for several weeks and placed at the bottom of the shaft to wait for assignments. Smith testified that he sat there idle, with no mechanic work assigned, for several weeks. MSHA declined to pursue this case because he suffered no loss in pay, and that is all that was ever done with it. No findings were ever made regarding this situation and I don't intend to make any herein. As far as I am concerned, the only relevance this complaint has to the case at bar is by the very fact that a section 105(c) complaint was filed, Smith ipso facto engaged in protected activity.

25. In late June 1991, Smith filed three section 103(g) requests with MSHA for hazardous condition inspections.

On June 18, 1991, David Hallow, Chairman of the UMWA Mine Committee and Smith filed the first of the aforementioned three section 103(g) complaints or requests for inspection with MSHA at the local MSHA field office. It stated as follows:

> A 103(g) special investigation is requested this day 6-18-91. Circumstances surrounding this issue are that one J. C. Miller was instructed by maintenance foreman and belt foreman to hold line starters in with a cap piece and/or screwdriver (to keep belt operable). He followed instructions, burst belt in half thus

filling longwall section with smoke. Men evacuated with SCSRs. J. C. Miller was then off job 6-17-91. His training on keeping belt running is a dangerous situation.

MSHA Coal Mine Inspector William Sparvieri conducted an inspection in response to this request on June 19, 1991, and as a result issued the company six section 104(a) citations. Interestingly, Inspector Sparvieri testified that when he presented this complaint to mine management, Safety Director Lynn Harding stated to him that he (Harding) knew that Smith had filed the complaint, apparently from Smith himself.

On June 25, 1991, Smith filed the second of the three 103(g) requests.

On or before June 24, 1991, Smith had received complaints from miners that the longwall track entry which is an escapeway and a walkway, was unsafe due to obstructions blocking the shelter holes and water accumulations in the entry. Smith informed Assistant Safety Director David Turner of the hazardous condition while traveling in the area with Turner. The following day, June 25, 1991, Smith inquired of mine management whether action had been taken to correct the condition. When he learned that no action had been taken, Smith wrote a 103(g) complaint and served it to Inspector Sparvieri, who was present at the mine. A preinspection meeting was held in which mine management asked Smith why he filed the 103(g) complaint without first notifying them of the condition, and Smith responded that he had informed Turner the previous day. This inspection resulted in two section 104(a) citations being issued to the company.

The circumstances surrounding Smith's filing of the second 103(g) complaint on June 25, 1991, and mine management's statements during the preinspection meeting demonstrate that management was aware that Smith filed the complaint. Once Smith reported the condition to Assistant Safety Director David Turner, and then inquired about the condition just prior to filing the 103(g) complaint, it was obvious that Smith was the author of the complaint. In addition, Inspector Sparvieri testified that prior to going underground to inspect the area, he met with Smith and mine management. In the meeting, mine management asked Smith why he filed the complaint and there was discussion regarding Smith's having reported the condition to Turner the previous day. Accordingly, I find that the evidence clearly shows that mine management was aware that Smith filed the second 103(g) complaint.

On June 27, 1991, Smith and Hallow received safety complaints from miners who had worked the previous shift in an abandoned longwall section removing old longwall equipment. The miners indicated that they were working under unsupported roof

and were afraid of being seriously injured. The miners also indicated that they were reluctant to address their complaints directly to management for fear of retaliation. Smith and Hallow proceeded to discuss the miners' complaints with Safety Director Lynn Harding and Superintendent Thomas Hofrichter in the hallway outside the mine offices. Smith and Hallow informed Harding and Hofrichter of the serious nature of the complaints and requested permission to inspect the old longwall section to verify the conditions. Hofrichter denied the request. After Hofrichter denied the request, Smith stated that he would write a section 103(g) complaint to get the area inspected by MSHA if necessary, due to the serious nature of the complaints. Smith proceeded to write the 103(g) complaint while sitting on the stairs in the hallway in front of Harding and Hofrichter, and served it to MSHA inspectors who were at the mine to conduct a regular inspection.

The contents of that request, signed by Joseph A. Smith, were as follows:

> 103(g) request for special investigation on the old longwall set up. Men going under chocks that are not pressurized for 2 or 3 weeks, chocks not against roof, one shield pulled out at headgate without pressure, bad roof at headgate and down line, men working on face side of panline without additional roof support. And the approved roof control plan is not being complied with.

MSHA inspector Sparvieri closed the area based just on the contents of the 103(g) complaint, subsequently investigated the 103(g) complaint, and issued a section 107(a) Imminent Danger Withdrawal Order and several more citations due to unsupported roof in the old longwall section, including a section 104(d)(1) citation. The section 107(a) Withdrawal Order had the effect of stopping recovery operations in the old longwall area. To say the least, management strongly disagreed with MSHA's conclusions about the alleged danger posed by the recovery operation, and was particularly angry with the wording contained in the body of the withdrawal order.

26. I find that mine management was aware that Smith filed the three section 103(g) complaints, based on the surrounding circumstances and statements made to Smith and to MSHA Inspector William Sparvieri. Smith reported the hazardous conditions to mine management just prior to filing two of the three complaints, and he also told mine management that he had filed the three 103(g) complaints.

With regard to the 103(g) complaint filed by Smith on June 25, 1991, MSHA Inspector Sparvieri testified that during the preinspection meeting regarding obstructions in the longwall

track entry, someone in mine management, Joe Dunn, asked Smith why he wanted the longwall shut down. Inspector Sparvieri testified that Smith responded that he didn't, he just wanted the mine to be safe.

Superintendent Hofrichter and President Jack Woody both made statements during and after the 103(g) inspection on June 27, 1991, indicating that they were angry with Smith for filing the 103(g) complaints.

Smith and Hallow both testified that during this last 103(g) inspection Hofrichter stated in an angry tone that he was "sick and tired" of Smith filing 103(g) requests. At this time he was described as being red in the face and yelling. On June 28, 1991, the day after the third 103(g) inspection, President Jack Woody made a statement to Hallow threatening to discharge Smith. Hallow testified that Woody stated in a hostile manner that Smith was "wrapped up, packaged, and ready for delivery, and I am just the guy to push the button," after previously indicating during the meeting that he was furious with Smith for filing the last 103(g) complaint.

The testimony of both Hofrichter and Woody to the effect that they denied prior knowledge that Smith was responsible for filing the three section 103(g) complaints, that is, prior to his July 1991 discharge, is rejected as patently incredible. Rather, I find as a fact that mine management in the persons of Hofrichter and Woody, among others, were most definitely aware that Smith filed all three of these 103(g) requests, prior to his discharge.

27. Smith called off sick for the 12:01 a.m. shift on July 1, 1991, with the "flu." He was next scheduled to work the 12:01 a.m. shift on July 2, 1991. That day he claims to have been still feeling puny but decided to go to work anyway, believing that he could handle his regular job as a shearer operator. But, meanwhile back at the mine, Shift Foreman John Burda and Assistant Foreman David Hildebrand were engaged in scheduling work assignments for various UMWA employees for the shift that was scheduled to begin at 12:01 a.m., on July 2, 1991. Burda's shift was to be short three regularly scheduled foremen that evening due to vacations and illnesses. One of the foremen who was going to be off that evening was Gary Fertal, who regularly performs on-shift firebossing on Burda's shift.

So Burda, knowing that Smith was an experienced fireboss, told Assistant Foreman Hildebrand to instruct Smith to assume Fertal's firebossing duties that evening. At approximately 11:20 p.m., Hildebrand spoke with Smith, who was in the bathhouse dressing for work. Hildebrand told Smith that he was to fireboss that evening. Smith stated that he would rather not and was told to speak to Shift Foreman John Burda regarding his assignment.

Smith went to the foremen's office and spoke with Burda. He told Burda he didn't want to fireboss and asked if there was any other work available for him. Burda advised him that the only work available for him that night was to fireboss and that if Smith did not want the assignment to go home. Burda also told Smith that if he was still at the mine at 12:01 a.m., when the shift started, that the firebossing assignment would become a direct work order. Smith then in rapid succession stated to Burda that: (1) he was going home sick or taking a sick day; (2) he would fireboss if Burda would write out the assignment and finally (3) he would take an "illegal day," intending to get a medical excuse the next day, thus converting the unexcused absence to an unpaid sick day.

It should be noted that in requesting the sick day, Smith never did tell Burda that he was, in fact, sick.

A sick day is common mine parlance for a "sick/personal day" which is provided for by the National Bituminous Coal Wage Agreement. A sick/personal day is a contractual day off that can be taken for any reason which may, but does not necessarily, include sickness. Well-established practice at the Homer City Mine requires that management be informed that an employee wishes to take a sick day before the scheduled commencement of a shift. Requests for sick days are not granted to employees after the shift begins. Shift Foreman Burda, after Smith asked for a "sick Day," looked at the clock on the wall in his office, noted that the time was 11:49 p.m. (which was prior to the scheduled commencement of the midnight shift), and indicated that since the shift had not yet begun, he could and would grant Smith's request for a sick day and thus, if he did not wish to fireboss, he could go home. But, other than agreeing to grant Smith's request for a sick day, Burda never gave Smith permission to leave the mine.

The next question is was it necessary for Smith to have permission to leave the mine <u>before</u> the shift starts. I don't think so.

The National Bituminous Coal Wage Agreement requires that employees regularly attend work and that all of their absences be accounted for. "Illegal days" off, as the term itself suggests, are absences that occur without management's permission or authorization and do not stand on the same footing as contractually-authorized holidays, such as graduated and floating vacation days and sick days. Because illegal absences are not authorized or sanctioned by the collective bargaining agreement, employees can, and are, disciplined by Helen for being away from work for a period of two or more (2+) consecutive days without authorization, unless the absences are subsequently proven to be related to illness. This is exactly what Smith had in mind, and what he in fact did the following day.

The next day, Smith did in fact go to the hospital emergency room and was diagnosed as having "gastroenteritis" and advised to take a couple of days off by the treating physician. However, Smith was overtaken by events in this regard in that Superintendent Hofrichter called him at home on July 2, 1991, to advise that he was suspended with intent to discharge for insubordination because he refused the firebossing assignment.

Smith then filed yet another Complaint of Discrimination under section 105(c) of the Act which is now docketed at PENN 92-58-D as well as a grievance under the contract.

28. That grievance concerning Helen Mining Company's suspension of Smith subject to discharge resulted in an arbitration hearing conducted by Arbitrator Jack I. Lenavitt on July 11, 1991. Arbitrator Lenavitt, in a July 16, 1991 decision sustained Helen's discharge of Smith for insubordination and interference with the operation and management of the Homer City Mine, premised upon his refusal upon direction by his foreman to fireboss.

29. There is an established practice that miners at the Homer City Mine can and do decline assignments and go home so long as they leave the mine prior to the start of the shift. Several miner witnesses testified to that effect and that seems to be the consensus of the evidence. Foreman Burda likewise stated that if Smith had asked for a sick or personal day and left the premises prior to the start of the shift there would have been no "insubordination" and therefore no problem. No other miner, besides Smith, has been disciplined as a result of this practice.

FURTHER FINDINGS WITH CONCLUSIONS

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

Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator. Chacon, supra at 2510.

There can be no doubt that Smith engaged in a plethora of protected activity just prior to both discharges at issue in these cases. See Findings of Fact Nos. 4, 7, 9, 10, 16, 18, 24, and 25.

In addition to these specific instances wherein Smith engaged in protected activity under the Act, Smith also served as the UMWA Safety Committee Chairman in this mine throughout the period we are looking at. In this position, Smith was the primary safety advocate for the miners at the Homer City Mine. Smith persistently addressed safety complaints to management on behalf of the miners regarding conditions and equipment in the mine, and he served as the miners' representative during state and federal mine inspections, traveling with inspectors on a regular basis. Smith also regularly attended safety meetings

with mine management to address ongoing safety issues at the mine. Within just days prior to both discharges, Smith made safety complaints to management and MSHA regarding equipment and conditions at the mine based on complaints he received from other miners.

In a case under the 1969 Coal Act, the Commission recognized the special status of a union safety committee member in bringing safety complaints to the Secretary. Local 1110 UMWA and Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979).

If anything, the 1977 Mine Act was intended to broaden and strengthen the protection against discrimination afforded miners and their representatives. See S. Rep. No. 95-181, 95th Cong., 1st Sess. 35-36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623-624 (1978).

The members of the mine safety committee are given a special status and added responsibilities under the Union Contract (Article III(d)) and under the Act. They are the spokesmen for the miners in safety matters and are responsible for bringing safety concerns to management and to MSHA. Subject to the requirements that their actions be taken in good faith and be reasonable, I conclude that the actions of safety committeemen such as Smith in bringing safety complaints to MSHA or to the mine operator, are protected activity as well.

There also can be no doubt that mine management was well aware of Smith's safety activity in the mine generally and the aforementioned particular instances of protected activity specifically. See Findings of Fact Nos. 1, 4, 7, 9, 16, 18, 24, 25, and 26.

In addition to evidence of knowledge, the Commission's analysis in Chacon provides that evidence of management hostility toward the protected safety activity is further proof of discriminatory intent. With regard to both discharges, mine management made statements demonstrating open hostility toward Smith's safety complaints and threatened to fire him. See Findings of Fact Nos. 11 and 26.

The Chacon analysis also provides that a coincidence in time between the protected activity and the adverse action is further circumstantial evidence of discriminatory intent. There is a close coincidence in time with regard to both discharges of Smith. With regard to the December 1990 discharge, Smith made safety complaints about the longwall equipment on December 18, 2 days prior to his discharge on December 20. Additionally, Smith reported the hazardous accumulation of float dust and shut down the beltline on December 19, one day prior to his discharge.

With regard to the July 1991 discharge, Smith made the last of three 103(g) complaints on June 27, just 6 days prior to his discharge on July 2. Accordingly, the clear coincidence in time between Smith's safety complaints and his discharge on both occasions strongly suggests that the discharges were motivated by his protected activity.

Finally, the Chacon analysis also provides that evidence of disparate treatment is indicative of discriminatory intent. The evidence persuades me that Smith was subjected to disparate treatment for conduct which was otherwise somewhat routine at the Homer City Mine. See Findings of Fact Nos. 21, 22, and 29.

I therefore find that the respondent was motivated by Smith's protected activity in discharging him on both occasions at bar. Accordingly, it follows that I also find that the respondent has failed to rebut the government's prima facie case.

Respondent has also failed to prove as an affirmative defense that Smith would have been discharged in any event for unprotected conduct alone. In both of these cases, respondent has alleged that Smith was insubordinate and would have been discharged for that unprotected activity alone.

But with regard to the December 1990 discharge, the evidence does not support the allegation that Smith was insubordinate by disobeying a direct order to leave the belt running, because the person who allegedly gave that order admitted that no such order was issued. Rather, the evidence more reasonably establishes that Smith was discharged after he took what appears to me to be appropriate corrective action to abate a hazardous condition, consistent with the common practice of mine examiners at this mine.

Moreover, even if Earnest had issued a direct order to leave the No. 1 belt running, in spite of Smith's report of a dangerous accumulation of float coal dust, the State investigative Commission found that that would constitute illegal interference with the duties of a mine examiner, and refusal to obey such an order which potentially jeopardized the safety of himself and miners working inby the No. 1 airlock area would not justify Smith's discharge on the basis of insubordination. In fact, according to the investigators, Smith was required by law to take immediate corrective action, in light of the serious hazard of an explosion posed by the float coal dust, which included deenergizing the belt to remove the ignition source.

Furthermore, if respondent truly believed that Smith had made a false report of float coal dust conditions during the mine examination, Superintendent Hofrichter could and should have discharged Smith for that reason, rather than fabricating this insubordination offense out of whole cloth. Of course, there was

a small problem with that; Earnest's own notes reflected that a float dust accumulation in fact existed in the No. 1 airlock area as Foreman DeWitt reported, and the State investigative Commission found that Smith's report accurately described the conditions.

Respondent also failed to prove that Smith would have been disciplined for unprotected conduct alone with regard to the July 1991 discharge. Respondent alleged that Smith was discharged for refusing a direct order to serve as a substitute mine examiner for that shift. But, the evidence does not support respondent's claim that Smith disobeyed a direct work order to serve as a fireboss. To the contrary, Shift Foreman Burda admitted during cross-examination that he never stated to Smith that he was issuing a direct order, and his own notes reflect that he told Smith to leave prior to the start of the shift or his instructions to fireboss would become a direct work order.

The evidence shows that Smith was given an assignment that he felt he couldn't perform due to illness, or perhaps just an assignment he didn't want that night as respondent would have it. He then discussed the assignment with Burda, his foreman, declined it, and subsequently took the night off as an unexcused absence. He thereupon left the mine site prior to the start of the shift.

Article XXII of the National Bituminous Coal Wage Agreement of 1988, in effect at respondent's mine during the time relevant to this case, provides in part that if an employee accumulates 6 single days of unexcused absence in a 180-day period or 3 single days of absence in a 30-day period, he shall be designated an "irregular worker" and will be subject to discipline; or when an employee absents himself from work for 2 consecutive days without the consent of the employer, other than because of proven sickness, he may be discharged. Smith fits neither of these categories by taking a single unexcused day off. In fact, Smith and several other witnesses all testified that miners regularly arrived at the mine, declined an assignment for whatever reason, and left the mine prior to the start of the shift. These miners each testified that this is common practice at the mine, that they had declined assignments and left the mine prior to the start of the shift, and that they knew of no other miner, besides Smith, who had been disciplined as a result of doing so. It certainly seems clear that the union contract permits this rather strange practice, so long as a miner does not utilize two consecutive days of unauthorized absences.

Smith also testified that he believed that he could properly utilize an unexcused absence which management would later designate as excused, if and when he presented medical documentation upon his return to work. A memorandum (Complainant's Exhibit No. 11) issued by respondent to all employees regarding proper

documentation of medical absences also clearly states that absences due to illness can be later excused by bringing in a medical release. I find that Smith's decision to take an unexcused absence and return when he was no longer sick with a medical release was reasonably consistent with this company policy.

In summary, respondent has failed to prove that Smith would have been discharged in any event for his unprotected activity alone. Accordingly, the evidence supports a finding with regard to both discharges that respondent, Helen Mining Company, discharged Smith in retaliation for engaging in protected safety-related activity in violation of section 105(c) of the Mine Act.

Respondent attempts to characterize Smith as a selfish, greedy, vindictive and manipulative employee. I have no doubt that Smith regularly and often antagonizes the company with what might be characterized as "sharp practice," by which I mean using the union contract to his personal advantage whenever and wherever he gets a chance. But that is not sufficient grounds for the company to discriminate against Smith in violation of federal law.

Lastly, I am mindful that I have not discussed every episodic development that is contained in the lengthy record of trial of these cases, but I have considered everything that is in the record and discussed those portions which I felt were necessary to my determination. To a large extent, these cases turned on credibility choices. The major credibility choice was of course between Smith and Hofrichter. As between the two, Smith's version of events was clearly the better corroborated and also better fit the physical facts contained in the record.

Before I close this decision, a word on the weight or lack thereof I gave to the two arbitration decisions which were both very favorable to the respondent.

Congress created a unique statutory scheme under section 105(c) of the Mine Act to preserve a miner's right not to be discriminated against for engaging in protected activity. The issues and standards of proofs presented in arbitration proceedings pursuant to collective bargaining agreements are not the same as those presented in discrimination cases adjudicated pursuant to the Mine Act. An employee's rights pursuant to a collective bargaining agreement are different from the statutorily protected safety rights of miners. Accordingly, the weight to be accorded arbitrator's decisions is within the sound discretion of the Commission's trial judge, on a case-by-case basis. In these cases, I obviously made vastly different credibility findings than either of the two arbitrators who ruled

on Smith's grievances previously. Under these circumstances, therefore, I have given no weight to the arbitration decisions at issue herein.

CIVIL PENALTY

Because of the egregious discriminatory conduct committed in these cases, I find that Superintendent Hofrichter knew or should have known that he was violating section 105(c) of the Act when he discharged Smith on both occasions complained of herein.

Since Superintendent Hofrichter was an agent of the respondent, the violation was the result of operator negligence.

I find that the violation was also serious in that it could be expected to have had a chilling effect upon persons willing to act as union safety committeemen and mine examiners, thereby seriously diminishing the effectiveness of those personnel and regulatory enforcement under the Act in general. In assessing a penalty herein I have also considered that the mine operator is large in size and has a moderate history of violations. No evidence has been presented to indicate that Helen Mining Company has violated section 105(c) within the previous 2 year period under facts similar to those herein. The violative condition has not yet been abated since Mr. Smith has obviously not yet been paid for his lost wages. Under all the circumstances herein I find a penalty of $10,000 to be appropriate for the two violations found herein, $5,000 to be allocated to each.

ORDER

Respondent is **ORDERED:**

1. To pay Joseph A. Smith back pay which was stipulated to in the amount of $45,450.37, within 30 days of the date of this order.

2. To pay Joseph A. Smith interest on that amount from the date he would have been entitled to those monies until the date of payment, at the short-term federal rate used by the Internal Revenue Service for the underpayment and overpayment of taxes, plus 3 percentage points, as announced by the Commission in Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd, 895 F.2d 773 (D.C. Cir. 1990).

3. To reinstate complainant to the same position, pay, assignment, and with all other conditions and benefits of employment that he would have had if he had not been discharged from his previous position on July 2, 1991, with no break in service concerning any employment benefit or purpose.

4. To completely expunge the personnel records maintained on Joseph A. Smith of all information relating to the December 1990 and July 1991 discharges.

5. To pay to the Department of Labor a civil penalty of $10,000 within 30 days of the date of this decision.

This Decision constitutes my final disposition of this proceeding.

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 17 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-814
	:	A.C. No. 46-01453-03986-A
v.	:	
	:	Humphrey No. 7 Mine
RONALD WEAVER, employed by CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Clark Frame, Esq., Wilson, Frame and Metheney, Morgantown, West Virginia, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalties filed by the Secretary of Labor pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Ronald Weaver as an agent of a corporate mine operator, Consolidation Coal Company (Consol), with knowingly authorizing, ordering, or carrying out a violation by the named mine operator of the mandatory standard at 30 C.F.R. § 75.1001.[1]

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[1] Section 110(c) provides as follows:

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

Order No. 270847 charges as follows:

> Based on information gathered from workers and mgt. it has been determined that on the afternoon shift of May 18, 1990 and midnight shift on May 19, 1990 proper trolley overcurrent protection was not provided for the main haulage between the No. 7 set and the No. 10 set. Approximately block 332+00 to block 420+00. A distance of 88 blocks or 8,800 feet. The No. 8 set was out of service due to a shorted power cable. In order to continue hauling coal the ITE breaker at 365 block and the bacon dead block at 405+00 were jumpered by inserting a knife blade switch handle across the dead blocks. Voltage drop tests indicate a maximum short circuit current value of 1902, 2 amps, 75% setting = 1,427 maximum allowable setting. The No. 7 set borehole breaker was found to be set at 5,000 amps. The No. 10 set breaker was found to be set at 4,000 amps. Therefore short circuit protection was not provided while this condition existed from about 5:00 p.m. May 18 to 1:30 a.m. May 19, 1990. Coal trips were hauled during this time. Orders were given by mine management to set the power up so coal could be hauled. Order No. 2896774 was issued on 5-2-90 for a similar occurrence. A meeting was held on 5-9-90 with mine management to discuss the practice of jumpering dead blocks.
>
> Order to be terminated after all persons who work or travel the main haulage are instructed as to the hazards involved when dead blocks are jumpered.

The cited standard provides that "[t]rolley wires and trolley feeder wires shall be provided with overcurrent protection."

Ronald Weaver, Mine Superintendent of the Bowers Portal at the Humphrey No. 7 Mine, does not dispute that he was an agent of the cited corporate mine operator or that a violation of the cited standard did in fact occur as alleged in Order No. 270847. Indeed, at no point in his responsive pleadings has Mr. Weaver denied the Secretary's charges that he "knowingly authorized, ordered, or carried out" the cited violation of the mine operator. In the absence of such a denial the Secretary's allegations may be accepted as true. In any event, the Secretary at hearing produced ample credible evidence to sustain her burden of proving that Mr. Weaver "knowingly authorized" and, in fact, "ordered" the commission of the cited violation.

The Commission defined the term "knowingly," as used in the statutory predecessor to Section 110(c), in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (1981), aff'd 669 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983) as follows:

> 'Knowingly,' as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence ... . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC 16.

More recently, the Commission stated that in determining whether the corporate agent knowingly authorized or ordered the violation the Secretary need prove only that he knowingly acted, not that he knowingly violated the law. See Secretary of Labor v. Warren Steen, 14 FMSHRC 1125 (1992).

At hearing, Michael Kalich, an experienced coal mine electrical inspector for the Mine Safety and Health Administration, a graduate mining engineer, and a certified electrician, mine foreman and assistant mine foreman, explained the nature of the underlying violation. This highly qualified expert based his testimony upon facts established in the record and upon tests he conducted. He appeared at the Humphrey No. 7 Mine on May 29, 1990, as a result of an anonymous complaint that the trolley wires had been "jumpered" without short circuit protection. It appears that on May 18, 1990, the number eight set power cable had burned through thereby rendering a section of trolley without power. To return power to the trolley to allow continued coal haulage a switch was installed and the Nos. 365 and 405 block breakers were jumpered out thereby tying in other sets. When this occurred short circuit protection could not be provided in this section of trolley wire. According to Kalich, if there was an accident in that area and the trolley wire was broken, it could constitute a serious fire and electric shock hazard.

Kalich testified that he reenacted these conditions in the No. 10 set by placing a jumper in at the 365 and 405 blocks and performed a voltage drop test. He found only 1700 amps and since the breaker was set at 5,000 amps the breaker could not be triggered. He noted that by jumpering-out, the mine operator could continue to haul coal through the area. The evidence shows that 20 trips of coal were actually hauled during the time the breakers were jumpered-out.

Kalich noted that only eight days before this incident, on May 9, 1990, he conducted a meeting for Humphrey No. 7 mine officials at which the Respondent, Ronald Weaver, was present. A withdrawal order issued on May 2 for a jumpering violation was discussed at this meeting, along with the specific hazards of jumpering out. Kalich testified that in this regard he told the mine officials, including Weaver, that the fingers would have to be removed from the dead blocks throughout the mine to prevent the illegal practice of jumpering. The primary purpose of the meeting, according to Kalich, was to remind mine officials of the dangers of the impermissible practice of jumpering dead blocks and not providing short circuit protection.

Dwight Jeffrey, a maintenance mechanic for Consol since April 1977, generally performed electrical work on the main line during relevant times. He has an "electrical card" from the State of West Virginia and is a member of the United Mine Workers of America. On May 19, 1990, Jeffrey was the main line mechanic on the afternoon (4:00 p.m.- 12 midnight) shift. His foreman at the time was Carroll Tingler. At the beginning of the shift Tingler told Jeffrey that the power was off the number eight set. Jeffrey was able to restart the power but later, about 6:00 or 6:30 p.m., it tripped again. Jeffrey was then unable to reset the power and observed a cable lying at the bottom of the borehole. Apparently the cable had burned through preventing power from reaching the set. Jeffrey testified that he notified management of this problem by way of the dispatcher. At this time he was underground at the number eight set calling on the mine phone to the dispatcher outside.

Foreman Tingler, along with Maintenance Foreman Curtis Mayo, then met underground with Jeffrey. They also talked on a phone line set up through the borehole at the number eight set to the surface with Doug Strausser and Ron Weaver. Strausser was in the management hierarchy superior to Maintenance Foremen Mayo. According to Jeffrey, at one point Ron Weaver was on the phone and ordered Jeffrey to "put a blade in at 365 and have Curt Mayo put one in at the bacon ground." Jeffrey testified that he then inserted the copper blade and jumpered the points. Jeffrey also conveyed Weaver's orders to Mayo to "jumper" at the 450 block and those orders were also carried out. By inserting the blades and jumpering the points the power was returned and coal could be hauled.

Respondent, Ronald Weaver, testified in his own defense. He is a graduate mining engineer with a masters degree in business administration. During relevant times he was mine superintendent in charge of the Bowers Portal of the Humphrey No. 7 Mine. He recalled the problems regarding borehole number eight on May 18. He told Doug Strausser, the maintenance superintendent, to meet him at the borehole. According to Weaver he relied on Strausser to provide advice on the electrical system and was present with Strausser when he was talking on the mine phone to the men underground. At around 6:30 p.m., according to Weaver, he explained over the phone to Jeffrey to set the power up and at the same time told the dispatcher to reduce the load as necessary. He maintains that he also told Jeffrey that Strausser found the problem and that he (Jeffrey) could go ahead and set up the power the way Strausser told him to do it. According to Weaver he would not know the setup of the breakers and maintains that he did not in fact order Jeffrey to close the switch. He maintains that he did not know what Jeffrey would do and did not know what the settings were that would be appropriate.

On cross-examination Weaver admitted that the dispatcher advised him that 20 trips were taken while the problem existed. Weaver maintains that he relied upon his maintenance people, Mayo and Strausser, regarding electrical matters. According to Weaver, however, Jeffrey made the ultimate decision and Strausser was the one who gave the instructions. He denied knowledge of the mine electrical system claiming that since he was not a certified electrician he only followed the advice of his electricians.

I find the testimony of Michael Kalich and Dwight Jeffrey to be entirely credible and that, accordingly, the Secretary has sustained her burden of proving that Weaver knowingly acted within the meaning of section 110(c). With respect to Jeffrey, no motive has been shown for him to testify other than truthfully. He was a reluctant witness, did not initiate contacts with the Mine Safety and Health Administration and appeared at trial under subpoena. It is highly unlikely, moreover, for a rank and file employee to accuse the highest official of the Bowers Portal, the person having the ultimate authority to hire, fire and discipline, of, in essence, lying. Nor would such a rank and file employee be expected to lightly accuse anyone in such a high position of giving the orders alleged, absent certainty that it was indeed the mine superintendent who directed him on the phone to perform these acts.

I also have difficulty accepting Weaver's testimony. According to the undisputed testimony of Inspector Kalich he warned Humphrey No. 7 Mine officials, including Weaver, only eight days before the instant violation, of the specific dangers

of jumpering out and of using the knife blades to do so. Indeed, because of this illegal practice in the past, Kalich warned mine officials, including Weaver, to have all of the blades in the mine removed or the mine would be cited. Under these circumstances, where Weaver was himself told of the illegality of the specific practice of jumpering out with the knife blades only a few days before the instant violation, his claims of ignorance regarding mine electrical systems are essentially irrelevant. In any event, while Weaver attempted to deny virtually any knowledge of the mine electrical systems, it is noted that he has had at least one related college level course in obtaining his degree in mining engineering and showed, through detailed testimony, that he indeed does have sufficient knowledge of the mine electrical system to have given the alleged orders to Jeffrey in the May 18 phone call and to have known that those orders could result in violative conditions. (See, e.g., Tr. 129 and 132).

Finally, I note the failure of Respondent to have called a material witness, Doug Strausser, in his defense. Strausser was present with Respondent while the latter was purportedly giving the critical orders over the mine telephone to Jeffrey, and would be expected to corroborate Weaver's testimony if truthful. It is well-established that an adverse inference may be drawn against a party toward whom the missing witness would be favorably disposed or against the party who fails to produce a material witness who is peculiarly available to that party. See U.S. v. Ariz-Ibarra, 651 F.2d 2 (1st Cir.) cert denied, 454, U.S. 895 (1981); U.S. v. Nahoom, 791 F.2d 841 (11th Cir. 1986); 2 Wigmore Evidence § 851 (Chadbourn rev. 1979). According to Weaver himself Strausser still worked for him at the subject mine and there is no evidence that he could not have been available to testify. While the adverse inference to be drawn from Respondent's failure to have called Strausser is clearly significant, I find, in any event, that there is ample credible evidence to sustain the Secretary's case, even without this evidence.

Under the circumstances the Secretary has sustained her burden of proving that Respondent Ronald Weaver knowingly authorized and ordered the cited violation. Considering the relevant criteria under Section 110(i) of the Act, I find that the Secretary's proposed penalty of $1,500 is appropriate.

ORDER

Respondent Ronald Weaver is hereby directed to pay a civil penalty of $1,500 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261

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SEP 2 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-743
	:	A.C. No. 46-07522-03544
v.	:	
	:	Mine No. 1
MEADOR ENERGY, INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; H. Gerard Kelley, Esq., Shuman, Annand and Poe, Charleston, West Virginia, for the Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $2,208 to $1,908 was proposed. I have considered the representations and documentation submitted in this case, including the testimony of MSHA Inspector Douglas Smith, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $1,908 within 30 days of this order.

Gary Melick
Administrative Law Judge

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SEP 23 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BILLY B. TAYLOR Complainant	:	DISCRIMINATION PROCEEDING Docket No. LAKE 92-131-D Mine No. 24
v.	:	
OLD BEN COAL COMPANY, Respondent	:	

DECISION

Appearances: Miquel J. Carmona, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for Petitioner;
Gregory S. Keltner, Esq., Old Ben Coal Company, Fairview Heights, Illinois, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

This case involves a discrimination complaint filed by the Secretary of Labor ("Secretary") on behalf of Billy B. Taylor under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("Act" or "Mine Act"). The complaint alleges that Old Ben Coal Co. ("Old Ben") violated Section 105(c)(1) of the Act when it suspended Taylor from employment for four days in retaliation for Taylor's protected safety complaints. [1] The Secretary seeks by way of restitution a

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

"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to the [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to

(continued...)

finding that Old Ben's suspension of Taylor was the result of unlawful discrimination, back pay plus interest, benefits lost due to the suspension, and the expunging of all disciplinary letters located in Taylor's employment records that relate to the suspension. Finally, the Secretary proposes a civil penalty of $1,250 for the alleged violation of Section 105(c)(1). Old Ben admits that it suspended Taylor but denies the disciplinary action was motivated by Taylor's protected activity.

A hearing on the merits of the Secretary's complaint was held in Evansville, Indiana. Post-hearing briefs were filed by counsel for both parties.

STIPULATIONS

At the commencement of the hearing counsel for Old Ben read the following stipulations into the record.

1. The Administrative Law Judge has jurisdiction over the proceeding.

2. Mine 24 is an underground bituminous coal mine.

3. During the calendar year preceding the alleged violation of Section 105(c) of the Mine Safety and Health Act, Mine Number 24 had a production of 1,250,636 tons of coal and the controlling entity had a production of 14,918,109 tons of coal.

4. Payment of a penalty as provided by the Mine Safety and Health Act, if a violation were found in this case, would not affect the operator's abilities to remain in business.

5. During the twenty-four month period preceding the alleged violation, Respondent had the following history of violations: (a) number of violations assessed, one hundred ninety-five; (b) number of inspection days, two hundred and three; (c) violations per inspection day point nine-six . . .; number of previous Section 105(c) violations, zero.

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[1](...continued)
Section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise of such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act]."

30 U.S.C. § 815(c)(1).

6. On June 20, 1991, Respondent issued a Notice of Suspension suspending Billy B. Taylor from his employment without pay on June 18 through June 21, 1991.

7. On June 21, 1991, Billy B. Taylor filed a discrimination complaint with the Mine Safety and Health Administration subdistrict in Benton, Illinois.

Tr. 10-11.

COMPLAINANT'S CASE

Billy B. Taylor and Terry Koonce were called to testify.[2]

BILLY B. TAYLOR

Taylor testified that he began working for Old Ben in 1975 and since has continued in Old Ben's employ.[3] At all times pertinent to this case, Taylor stated that he worked at Mine No. 24 as a longwall prop man. Tr. 56-57. On June 18, 1991, Taylor was working on the 4:00 p.m. to 12:00 a.m. shift (the "afternoon shift"). At the start of the shift, Taylor was sent to an area of the mine where the work of setting up a longwall was in progress. Taylor's immediate responsibility was to assist in assembling a longwall stage loader. However, when it was discovered that all of the tools necessary for the job were not on the unit, Taylor was instructed by his immediate supervisor to drive in the manbus to another unit and there to get the needed tools. Sheer operator Dennis Parkhill was told to accompany Taylor. The unit where the men were instructed to go was one where a longwall was being disassembled and moved (a "recovery unit"). Tr. 58.

Upon reaching the mouth of the recovery unit, Taylor and Parkhill encountered what Taylor described as a "massive blockage" of the entry. Tr. 59. According to Taylor, "[T]here was . . . trucks, scoops and diesel scoops and everything. We couldn't go any further. We were stuck there." Id. At this point, Parkhill got out of the manbus and walked the main travelway. When he returned to the manbus he told Taylor that the entry was blocked, that up ahead men were trying to transfer

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[2] Koonce, the superintendent of Mine No. 24 at the time of the alleged discrimination, was subpoenaed to testify by the Complainant.

[3] Old Ben became a subsidiary of Zeigler Holding Co. on July 20, 1990, when Zeigler purchased all of Old Ben's properties. Tr. 142. The acquisition resulted in some changes in management personnel at Old Ben's mines, including the transfer to Mine No. 24 of section foreman Ronald Smart, the foreman involved in this case. Smart previously had worked for Ziegler.

a longwall shield from a dolly onto a scoop and that he and Taylor could not proceed further. Tr. 60.

Taylor stated that he and Parkhill sat in the manbus approximately 20 minutes, at the end of which time they were approached by Ronald Smart, the section boss of the recovery unit. Taylor asked Parkhill if he had observed any vehicles that could be used for transportation outby in case of an emergency, and Parkhill indicated he had not. Taylor then asked Smart, "Hey Ron, did [sic] you have any kind of transportation outby this mess[?]" Tr. 61. Taylor testified that Smart did not answer and that he again asked Smart the same question. Taylor stated that once again Smart did not respond but rather walked around the corner of a rib where Taylor could not see him. According to Taylor, he got out of the manbus and walked to where he could see Smart, and he asked Smart, this time in a louder voice, "Have you got any transportation outby?" Id. Smart turned and came toward Taylor, and Taylor said again, "[H]ave you any transportation outby?" Id. According to Taylor, Smart pulled out a notebook and said, "I'm telling you to work, are you refusing to work, if you are I'm going to stop your time and send you out of the mine." Tr. 62. Taylor replied that he was not refusing to work, that everything was blocked and he could not do anything. Taylor also stated that he may have again asked about transportation outby, and that Smart replied in a louder tone for Taylor to get in the manbus and to leave the area. Tr. 62.[4]

Shortly thereafter the travelway was opened and Taylor testified that he stepped into the manbus and told Smart, "This is not over . . . We'll settle it on top if I have to get the Union, Federal, and State involved." Tr. 63, See also Tr. 76.[5] Smart then came toward Taylor and told him to get off the manbus, that Smart was stopping Taylor's time and was sending Taylor out of the mine. Id.

Taylor testified that he then asked Parkhill to take him back to the unit from whence they had come so that Taylor could retrieve his dinner bucket. Smart told Taylor to stay put, and Smart sent for the acting mine manager, Joe Ronchetto.

When Ronchetto arrived, Taylor stated that Smart explained that he had stopped Taylor's time and that Taylor had threatened

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[4] Taylor believed that he could have asked Smart about outby transportation up to five times. Tr. 97. In any event, however many times he asked, he maintained that Smart never answered his questions.

[5] On cross examination Taylor admitted that subsequent to his conversation with Smart, he never spoke with the union safety committeeman about the situation, nor to a state mine inspector and that he contacted MSHA only after he had been handed a notice of suspension. Tr. 86-87.

him. Taylor claimed he responded, "I said, what [?]," and Smart repeated that Taylor had threatened him. Tr. 65. Ronchetto then took Taylor out the mine.[6]

Taylor maintained that during the June 18 incident he never refused a direct work order from Smart, that his work at that time involved being in the manbus and that he was right where he should have been. Tr. 66. Further, Taylor maintained that during the incident he did not direct abusive language at Smart, although, at some point during the exchange, he may have placed his hands in a prayer-like position and said, "Please, please send me out of the mine." He explained that if he had said it, to Smart it was "in a situation in the mine where . . . Smart was very belligerent toward me and trying to make me feel that I didn't have the right to ask any of the questions, and it was just my way of saying . . . you don't have to badger me." Tr. 67.

Taylor claimed that when he inquired of Smart whether there was transportation outby he did so out of concern for the safety of himself and his fellow miners. As a former union safety committeeman he was aware that past practice at the mine was to have such transportation available when heavy equipment -- such as longwall shields -- was being moved. The transportation was on the scene because of the possibility that the transporting equipment could break down. Tr. 68-69. He explained that outby transportation was needed because if someone was injured and the travelway was obstructed by broken down equipment, the injured person could be placed on the outby transportation and be quickly removed from the mine. Tr. 84-86.

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[6] On cross-examination, Taylor stated categorically that during the incident of June 18, he never threatened Smart. Tr. 99. However, during his direct testimony, Taylor indicated that he and Smart had a prior run-in. According to Taylor, on June 17, in his regular working section and while in the process of setting up a longwall, he had observed Smart "screaming and hollering" at the section foreman about the way the work was proceeding. Taylor claimed that he said to his helper, "These people [meaning the former Zeigler bosses] never saw a longwall ... until ... a few weeks ago, and now all of a sudden they are experts on how to set a longwall up." Tr.73. Smart, who overheard Taylor, responded that he did not have to take Taylor's "abusive language" and that he would "write up" Taylor for the incident. Tr. 73-74. Taylor claimed that Smart continued to holler at the section boss. Taylor, who was sitting in a scoop, with his back to the where Smart was standing, energized the scoop. Taylor claimed he did not know that Smart had moved between the rib and the scoop. The scoop lurched toward the rib and pinned Smart. Smart, who was not hurt, told Taylor's section foreman that Taylor had tried to run over him. Tr.74. Taylor denied he had tried to hit Smart or that he knew Smart was in a position where he could have been endangered by the scoop. Taylor stated that he was not reprimanded for the incident but that he found out later Smart had been reprimanded for the manner in which he had addressed the foreman. Id. This was confirmed by Smart. Tr. 168.

In addition, Taylor stated that prior to and at the beginning of the afternoon shift on June 18, the underground telephone system had been working only intermittently. When he and Parkhill left their section, the phones were not working. When they arrived in the vicinity of the blockage, they saw a man repairing a telephone, and he told them he thought the phones now had been fixed. Tr. 66. Taylor stated that the unreliability of the telephone system on June 18 added to his safety concerns and made it even more important to have transportation outby, since if someone were hurt, a telephone call to the top for assistance could not be assured. Tr. 84, 101-102.

Once Taylor was on the surface, he stated that he was told by the union safety committeeman at the mine to go home and that the committeeman would see if he could find out "what's going on." Tr. 78. When Taylor did not hear from the safety committeeman, Taylor returned to the mine on June 19 and the committeeman told Taylor that Taylor had to talk to Mine Superintendent Koonce before Taylor could return to work. Taylor stated that this lead to a brief discussion between himself and Koonce in which Koonce stated that there were serious charges against Taylor (Taylor thought Koonce said "You threatened your boss." Tr. 79.) and that Koonce would have to further investigate the charges. Tr. 79.

The following day, according to Taylor, he met with Koonce and others at the mine. Taylor stated that he did not remember everything that was said because the meeting went "on and on" but as best he could recall, Koonce said that Taylor had been charged with abusive language, threats to Smart and his family and refusing a direct work order. Tr. 81-82. Koonce also told Taylor that the charges were "founded." Tr. 81. At the close of the meeting, Koonce handed Taylor a letter advising Taylor he was suspended from June 18 to June 21.[7]

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[7] The letter states in part:

An investigation reveals that on June 18, 1991, while working the 4:00 P.M. to 12 midnight shift you were insubordinate and refused a direct order to return to your assigned work after having been instructed to do so by your supervisor on at least 2 occasions.

The investigation also reveals that in violation of Company Rules and Regulations you used abusive and threatening language toward a supervisor and his family.

Old Ben can not and will not condone such action, therefore, you are hereby suspended for a period of four (4) working days without pay (June 18, 19, 20, 21, 1991).

Exh. C-1

DENNIS PARKHILL

Parkhill essentially corroborated Taylor's testimony. He stated that subsequent to being assigned to assemble a stageloader for a longwall section, he and Taylor were asked to take the manbus and to go to the longwall recovery unit to get some missing tools. Tr. 111. Parkhill testified that he and Taylor proceed to the mouth of the recovery unit where Parkhill found miners in the process of taking a shield off the shield dolly and loading it onto a scoop and where the route they had to travel was blocked. Therefore, he and Taylor were forced to wait until the roadway cleared. Tr. 113-114.

Parkhill stated that after he found that the roadway was blocked, Taylor several times asked Smart if transportation was available on the outby side, and that Smart ignored the questions. Parkhill also stated that Smart directed Taylor to get into the manbus and to leave, which Taylor and Parkhill could not do because the roadway was blocked, and that ultimately Smart told Taylor that his time was being stopped and that he was being sent out of the mine. Tr. 114.

After the roadway opened, Smart directed Parkhill to get the tools, which Parkhill did. Tr. 123.

TERRY N. KOONCE

Mine Superintendent Koonce stated that he was not present at the June 18 incident but that he investigated it by discussing the matter with Taylor and Smart. Koonce said that he did not interview Parkhill because Parkhill stayed on the manbus and did not come into the area where the conversation between Taylor and Smart took place. Tr. 24, 28. According to Koonce, the conversation between Taylor and Smart concerned whether or not the telephones were operational and Taylor's concern that the travelway may have been blocked. Koonce believed that Smart told Taylor that the travelway was not blocked and to go back to the manbus and to his work assignment. Koonce stated that this conversation was repeated several times. Tr. 18.

Koonce maintained that by continuing questioning about the roadway after having been told it was not blocked, Taylor was insubordinate. Tr. 19. Koonce also maintained that Taylor told Smart he would go back to the manbus "whenever he got good and G-D ready." Tr. 21. Koonce further stated that during the conversation Taylor held his hands in a praying fashion in front of Smart's face and said, "[P]lease take me our of the mine, please take me our of mine." Tr. 19. Koonce termed this "threatening or abusive" language and stated that the use of such language was a violation of Old Ben's work rules. Id.

Finally, according to Koonce, after Taylor was told by Smart that his time had been stopped, Taylor made statements to Smart in which he threatened Smart's family and said he would damage Smart's personal vehicle. Koonce agreed however that Taylor denied making these statements. Tr. 26.

In Koonce's view, the fact that Taylor got "in the section foreman's face with his hands in a praying motion during [the] heated conversation [and said], [']Please take me out of the mine, please take me out of the mine[']," was an action sufficiently abusive to warrant Taylor's suspension. Tr. 31. Koonce further explained that Taylor was disciplined for the way in which he spoke to Smart and for his motions, "I just don't think that it's right that an employee or an employer has to get up in someone's face, nose to nose, and act in that kind of manner. It's just not professional." Tr. 50. He further stated that he believed that Taylor had no reason to start the conversation because Taylor was not even in his own work area at the time. Id. Taylor was not discharged because "he hadn't had that much [prior] discipline." Tr. 36.

Koonce stated that, in general, if there is one way in and out of an area and the way is blocked, then transportation must be provided on the outby side, regardless of whether or not telephones are working. Koonce further acknowledged that at Mine No. 24, once or twice a month, a rockfall would block a travelway and that two or three times a week a piece of equipment would break down and block the travelway. Tr. 51. However, Koonce maintained that in this particular instance, outby transportation was not required because the equipment in the travelway was operational and energized, and it would have taken but "a matter of minutes" to move it out of the way. Tr. 36, 39-40.

With regard to Taylor's safety concerns, Koonce agreed that Taylor was questioning whether the type of transportation required by Section (0)(4) of the Bituminous Wage Agreement of 1988 was available. Tr. 43.[8]

Finally, regarding the incident of June 17, Koonce stated that Taylor's scoop could have inadvertently pinned Smart and that no separate internal investigation was taken by Old Ben in response to the incident. Tr. 49.

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[8] Section (0)(4) states in part:

"The Employer shall provide quick and efficient means of transporting injured or sick Employees from the mine to the surface."

Joint Exh. 1 at 34-35.

RESPONDENT'S CASE

Joe Ronchetto, David Stritzel, Mark Cavinder, and Ronald Smart were called to testify.

JOE RONCHETTO

Ronchetto stated that on June 18, 1991, he was the Acting Mine Manager in charge of production at Mine No. 24. He also stated that at approximately 9:00 p.m., while underground, he received a call from Smart requesting that he, Ronchetto, come to the mouth of the recovery area. When he reached the area, Smart told him that Taylor and Smart had gotten into a dispute and that Smart had stopped Taylor's time because Taylor had refused two or three direct orders to return to work. Ronchetto added that Taylor denied he had refused to return to work. Tr. 138. Ronchetto also stated that he asked Taylor if any equipment had broken down, that Taylor said he did not know, and that Ronchetto responded, "If we don't have anything broken down we're not required to have a ride outby." Tr. 138-139, see also Tr. 140. Ronchetto added that if shields were being moved, outby transportation was not required. Tr. 140.

Ronchetto described Taylor as a good worker who usually followed orders "very well." Tr. 141.

DAVID STRITZEL

Stritzel, the Director of Health and Safety for Ziegler Coal Company, stated that he is involved in the majority of direct contacts between MSHA, the state inspection agency and the company. He testified that he was not contacted by anyone from MSHA or the state regarding the issue of whether transportation is required outby while shields are being loaded. Tr. 143.

MARK CAVINDER

Cavinder, the manager of three Old Ben mines, including Mine No. 24, stated that he has the "final say" on whether discipline will be implemented at the mines. In that capacity he reviewed Taylor's case and agreed that a four day suspension was appropriate. Cavinder stated that Taylor was disciplined because of the manner in which he approached Smart, specifically for failing to comply with a direct work order to return to work and for intimidating-type remarks. Tr. 149-150. He further stated that although a supervisor typically is required to respond to a question concerning safety, in this instance he would not second-guess Smart, who, he believed, was trying to defuse a hostile situation. Tr. 157. He added that to comply with the work order all Taylor would have had to do was to return to the manbus. Tr. 160.

Further, he stated that in the usual situation, transportation is not required outby when longwall shields are being moved, and that the momentary 5 to 10 minute interruptions in the use of a travelway when moving shields are not considered blockages requiring outby transportation. Tr. 151, 160.

RONALD SMART

Smart first testified about the incident on June 17. Smart stated that on June 17 he had concerns about how shields were being unloaded, and he discussed his concerns with Taylor's foreman. Smart believed that the process was taking too long. According to Smart, Taylor, who was there and who was running a scoop, became belligerent and cursed the company and Smart. Smart remembers that Taylor insulted him three times before Smart approached Taylor's scoop and asked Taylor what he had said. Smart said to Taylor, "What did you say?" and Taylor responded, "You heard me Goddamnit." Tr. 168. At that point, Taylor started the scoop and pinned Smart's legs. Smart stated that as a result he became irate and had words with Smart's foreman over the foreman's lack of control of his workers. Smart also stated that he was reprimanded later for his conduct toward the foreman. Tr. 168.

Smart also described the loading of the shields on June 18. Smart stated that two large diesel scoops were transporting the shields from the old panel, down the travelway, to the point where the shields were transferred to dollies. (The dollies were being pulled by two smaller scoops.) The distance from the old panel to the transfer point was approximately 1,000 to 1,500 feet. Also, there was a battery powered scoop in the vicinity that would load the shields onto the dollies. If the dollies were not at the transfer point when the diesel scoops arrived, the scoops would drop the shields off in the roadway and leave. Tr. 169. The shields are steel and are approximately 5 to 6 feet wide and 20 feet long. Tr. 171.

At the time of the incident with Taylor, the crew was loading shields in the travelway. One of the smaller scoops was loaded and ready to go, but the scoop operator was eating dinner. One of the diesel power powered scoops arrived, and the crew commenced to load the second dolly rather than put the shield on the ground. Smart told the small scoop operator to pull the dolly out of the travelway. Smart stated that at this time the travelway had been blocked "maybe fifteen minutes," Tr. 172, but that if the travelway had to have been cleared this could have been done in five minutes. Tr. 182.[9] Smart then observed Taylor

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[9] Smart also stated that at the mouth of the longwall section there was a crosscut that, in conjunction with an adjacent entry, served as a "runaround" (continued...)

coming toward him down the travelway. Tr. 172, 180. According to Smart, when he first saw Taylor, Taylor was out of the manbus. Smart claimed he did not know why Taylor and Parkhill had stopped the bus. Tr. 206.

Taylor was no closer to 25 feet from Smart when he asked Smart in a very loud voice, "Do we have a bus or truck outby where we're loading these shields?" Tr. 180. Smart explained, "[W]ith what happened the night before and the travelway no longer blocked I said, ["]Now Bill, go on, I don't want to argue with you, go on back to your bus, got to work.["] Tr. 181-182. According to Smart, Taylor responded, "I want to know if there's a goddamn truck or a bus outby when you're loading shields? ", and Smart replied, "Bill, I'm telling you, go back to work. The travelway is no longer blocked, I want you to go back to the bus and go on about your job." Tr. 182, See also Tr. 184. [10] Taylor responded that he would go when he got "a goddamned answer," and Smart stated that he again told Taylor to go back to the bus and to work. Id. It was at this point, according to Smart, that Taylor clasped his hands about a foot from Smart's face and stated "Please stop my time, I'll have your goddamn job." Tr. 183. After this statement, Smart stopped Taylor's time.

Smart testified that Taylor returned to the manbus and asked Parkhill to take him back to the setup section to get his dinner bucket. Smart told Taylor to remain in the area, and he told Parkhill to leave and get the needed parts. Taylor responded that since he was no longer on Old Ben's time, Smart could not tell him what to do. Smart then called Ronchetto. Tr. 185.

After Parkhill left, and before Ronchetto arrived, a scoop passed through the travelway, Smart stated he said to Taylor, "Is that scoop broken down, isn't it going in the travelway, would you consider [the travelway] blocked[?]". . . "Couldn't [the scoop] get out of the way if something come up on it[?]" Tr. 188-189. Taylor replied, "Yeah, I guess," and Smart asked, "Why do you think I have to have a scoop or transportation outby when I'm loading shields[?]" Smart testified that Taylor responded that "It could mean his goddamn life or something." Tr. 189.

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[9](...continued)
in the area where the shields were being loaded, and that the runaround allowed the loading area to be by-passed if the main travelway was blocked. See Tr. 177-178.

[10] Smart stated that he did not respond to Taylor's inquire about outby transportation because Taylor would not accept his answer that there was no transportation outby. Taylor, in Smart's opinion, was putting on a show for Parkhill and was looking for trouble. Tr. 200.

Smart stated that at this point he decided he could not reason with Taylor, and he walked away from Taylor. Taylor followed him and Smart began taking notes about what was said, as Taylor orally confronted Smart saying, "Go ahead and write, you dumb son-of-a-bitch, I can say what I want, I'm no longer on your time and I ought to just knock your ass off right now." Tr. 189. Smart testified that because he wished to "defuse the situation," he tried to walk away, but Taylor followed and said, "Smart, you're in this mine like the rest of us, and things can happen down here to you . . . or . . . at home to your family." Tr. 190.

Smart testified that at this point Parkhill returned, and Taylor told Smart he was going to ride with Parkhill and retrieve his dinner bucket. Taylor got into the manbus. Smart replied that Taylor was to stay. Taylor again said, "You can't tell me what to do, goddamnit, I'm no longer on your time." Tr. 191. Smart told Taylor that he would "ask about that when Joe [Ronchetto] gets here." Id. When Ronchetto arrived, Smart explained to him that Taylor had threatened Smart and his family, had cursed Smart and that Smart had stopped Taylor's time and wanted Taylor removed from the mine. Tr. 192.

APPLICABLE CASE LAW

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish, (1) that he engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal 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., 709 F.2d 86 (D.C. Cir. 1982). 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 the protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miners' unprotected activity 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. 1982); Donovan v. Stafford Construction Company, 732 F.2d 954 (D.C.

Cir. 1984) (specifically approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 397-413 (1983), (where the Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act).

Under this legal framework Taylor's asserted protected activity must be analyzed in the context of the ongoing circumstances in the mine as they appeared to Taylor at the time, provided always that his perception of those circumstances was reasonable.

PROTECTED ACTIVITY

Taylor's safety complaint allegedly arose out of his belief that the travelway was blocked and thus that outby transportation was required to facilitate the removal from the mine of any miner who might have been injured. I fully credit Taylor's testimony that he and Parkhill stopped the manbus at the mouth of the recovery unit because of a reasonable belief that the entry was blocked. Taylor's testimony is corroborated by Parkhill's uncontested statement that Parkhill got out of the manbus, surveyed the situation, and returned to report to Taylor that the entry was blocked. Although Smart testified that he first saw Taylor approaching him, his statement is not necessarily inconsistent with Taylor and Parkhill's testimony that Parkhill left the manbus first to reconnoiter the entry. Smart himself testified that prior to seeing Taylor, the travelway had been blocked, possibly for 15 minutes, and although Smart also testified that he did not know why Parkhill and Taylor had stopped the manbus, Taylor's testimony that he believed he and Parkhill could not proceed further is credible in light of the work that was taking place in the entry.

Further, not knowing the length of time the blockage had existed and would continue to exist, I conclude that Taylor's concern about the presence of outby transportation was reasonable. As a general rule, a miner's safety inquiry, like a miner's work refusal, must adequately apprise the operator of the nature of the feared hazard and must be reasonable under the circumstances of the case. It must also be made in good faith. See e.g., Secretary on behalf of Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529, 1533-34 (September, 1983).

Taylor's inquiry regarding outby transportation was direct and understandable, as witnessed by the fact that at no time did Smart maintain that he was confused about what Taylor was asking or uncertain as to what Taylor meant. Further, and as noted above, the fact that Taylor reasonably believed the entry was blocked leads me to credit Taylor's testimony that he was concerned that if a miner was injured, transportation would not

be available to quickly remove an injured miner from the mine. Taylor's history as a former mine safety committeeman and his unrefuted testimony regarding the unreliability of the mine's underground telephones on June 18, in my view, makes it logical that Taylor would have been concerned about assuring as swift an exit from the mine as possible for an injured miner. Thus, I conclude that Taylor, in good faith, inquired of Smart regarding the presence of outby transportation, and that when he did so, he engaged in protected activity.[11]

ADVERSE ACTION AND MOTIVATION

Taylor was suspended for four days and was so advised formally by letter on June 20, 1991. Koonce and Smart maintained that Taylor was suspended both for refusing a direct order to return to work and for abusing and threatening Smart. Tr. 23, 25, 28, 30, 32, 35, 49-50, 182-183, 192. These reasons were also given in the formal Notice of Suspension. Exh. C-1. The testimony of Taylor and Smart is in agreement that this adverse action, although confirmed on June 20, was instituted on June 18, when Smart stopped Taylor's time.

At issue is whether the suspension was motivated in any part by Taylor's protected behavior? To answer the question it is necessary to view in total the events surrounding the incident of June 18. On that date neither Taylor nor Smart met as strangers. They had come to know one another on June 17. I credit Koonce's opinion that Taylor was concerned about the Zeigler buy-out of Old Ben and about Smart's knowledge of mining operations at Mine No. 24. Tr. 19-20. I also believe it true that Taylor's low regard for the Ziegler management personnel lead directly to his comments on June 17 regarding Smart's direction of the longwall set up and to the subsequent oral exchange between the two of them. Whether Taylor purposefully pinned Smart between the rib and the scoop, or whether it was inadvertent -- Smart admitted he had put himself in a bad position -- it seems certain that Taylor and Smart regarded one another with some degree of hostility when they next met on June 18.

Thus, it may well be that on June 18, when Taylor inquired about outby transportation, in addition to being concerned about his safety and that of his fellow miners, he was also trying to aggravate Smart. However, and this is the essential point, even

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[11] Counsel for the Secretary argues that Taylor engaged in additional protected activity when he told Smart that the discussion regarding outby transportation was not over and that it would be settled "on top" even if he had to involve the union, the state inspectors and MSHA. Because the record lacks even a hint that Taylor's suspension was motivated in any part by his statement, its protected nature need not be assayed.

if Taylor had an ulterior motive, he also had a good faith, reasonable belief that the situation in which he found himself presented a possible danger to his and to others' safety. Thus, his questions regarding outby transportation were, under the circumstances in which he found himself, perfectly proper, and it was Smart's duty to meaningfully respond to the specific concerns expressed by Taylor.

Communication of safety hazards and responses thereto are a means by which the Mine Act's purposes are attained, and once a reasonable, good faith concern is expressed by a miner, an operator, usually acting through its on-the-scene management personnel, has an obligation to address the perceived danger. Boswell v. National Cement Co., 14 FMSHRC 253, 258 (February 1992); Secretary on behalf of Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529, 1534 (September 1983); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985). Moreover, the operator must address the miner's concern in such a way that the miner's fears reasonably should be quelled. Gilbert v. FMSHRC, 866 F.2d 1433, 1441 (D.C. Cir. 1989). If the operator does not address the perceived danger and disciplines the miner, "it does so at its own legal risk." Metric Constructors, 6 FMSHRC at 230.

Smart did not meet his obligation to meaningfully respond to Taylor's inquiry. Both Taylor and Parkhill creditably testified that Smart did not respond to Taylor's questions regarding outby transportation. Even under Smart's version of the exchange -- that he ordered Taylor back to work and told Taylor that the travelway was no longer blocked -- Smart's response was patently inadequate. A statement that, "The travelway is no longer blocked." (Tr. 182) or that, "The road's clear now." (Tr. 183), cannot be equated to the kind of communicative response envisioned under the Act. Moreover, Smart's statements appear to have been made after the travelway was opened and after the factual basis for Taylor's concern had ceased to exist.

While it is conceivable that there are circumstances that could mitigate an operator's duty to meaningfully respond; for example, instances in which adverse mine conditions preclude an immediate safety-related discussion or in which an operator may reasonably fear his response will trigger a overtly adverse reaction on the part of his questioner, the obligation to respond to reasonable, good faith safety concerns is -- at least in my view -- so important to the goals and purposes of the Mine Act that I can envision recognizing its mitigation only in the most extraordinary of circumstances -- circumstances that do not exist here. I conclude that Taylor has established that he was suspended because he engaged in protected activity.

AFFIRMATIVE DEFENSE

Old Ben argues that even if Taylor's inquiry about the availability of outby transportation constituted protected activity he was not disciplined for asking questions but for refusing an order to return to work, insubordination and using threatening language and that Old Ben established an affirmative defense by proving that it was motivated entirely by this unprotected conduct. I do not agree.

As I have found, Smart's response to Taylor's inquiries was insufficient under the Act. Moreover, it colored all that followed, for subsequent to Smart's failure to meaningfully respond, the situation deteriorated. Koonce maintained that Taylor told Smart he would go to the manbus "whenever he felt good and G-D ready". Tr. 21, See also Tr. 28. Smart's version is that Taylor said he would go back to the manbus when he got "a goddamn answer." Tr. 183. Taylor asserted that he did not refuse a direct order to return to work because his work assignment required him to proceed inby on the manbus, and the entry being blocked, he could not do so.

Smart's testimony in this regard is more detailed than Taylor's and is, in my opinion, more believable.[12] Thus, I find that Taylor did, in fact, refuse to return to the manbus until he got "a Goddamn answer" and even after being told that the entry had been cleared. I also credit Smart's testimony that Taylor held his hands up in Smart's face in a prayer-like fashion and asked, in effect, that he be suspended from work. I further find that after Parkhill left, the conversation became more heated, with Taylor telling Smart the lack of transportation outby could "mean his [meaning Taylor's] goddamn life" and that Smart "had f__ked with the wrong person," and Taylor ought to "knock [Smart's] ass off." Tr. 189.[13] I do not, however, credit Smart's testimony that Taylor told him, "You're in this mine like the rest of us, and things can happen down here to you . . . or it can happen at home to your family." Tr. 190. Taylor denied making such threats and Smart's version was not corroborated by Ronchetto, the first person from management with whom Smart spoke after the "threats." In recounting his conversation with Smart, Ronchetto could recall being told only that Smart had stopped

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[12] For example, Taylor, who had no trouble recalling the events immediately surrounding his safety complaint, could not recall clasping his hands in a prayer-like manner and as much as daring Smart to send him out of the mine. At most, Taylor would acknowledge the "possibility" that he might have done it. Tr. 67, See also Tr. 96.

[13] Although the language is rough, I do not find it unusual. To understate the matter considerably, mining is not an ice cream social, and blunt speech, laced with Anglo Saxon epithets, frequently is the norm.

Taylor's time because the two had gotten into a dispute and Taylor had refused Smart's orders to return to work. Tr. 138. It is reasonable to assume that had the acting mine manager been told that Taylor had in this manner threatened his foreman and the foreman's family, Ronchetto would have remembered it and have recounted it. Further, while it is true that Koonce stated Smart told him Taylor threatened Smart and his family, the "abusive and threatening language" (Exh. C-1) for which Taylor was disciplined was, according to Koonce, in the nature of Taylor holding his hands up to Smart in a praying fashion and pleaded with Smart to stop his time and send him out of the mine. Koonce also stated that the objectionable nature of the language lay not so much in what Smart said but in "the way in which it was said and the motions." Tr. 50.[14]

The following colloquy between counsel for the Secretary and Koonce reveals Koonce's thoughts:

> Q. So what was the reason for the suspension?
>
> A. The reason for the suspension: Refusing a direct work order and using threatening and abusive language.
>
> Q. How do you know there was abusive language?
>
> A. Mr. Taylor admitted to doing exactly what he was accused of.
>
> Q. What is it exactly Mr. Taylor told you that he said to Mr. Smart?
>
> A. During the conversation he admitted the conversation was a heated conversation. He admitted to getting into Mr. Smart's face, with his hands in a praying motion, saying, ["]Please send me out, please send me out.["]
>
> Q. Is this the only thing he said to Mr. Smart?
>
> A. There were some other things that, that was said that Billy didn't admit to. Mr. Smart advised me that Mr. Taylor had threatened his kids, to do damage to his personal vehicle, and -- but Mr. Taylor didn't admit to that.

Tr. 25-26, See also Tr. 19.

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[14] Had Old Ben's management personnel really believed Taylor credibly threatened harm to Smart and to his family, it is hard for me to believe Taylor's discipline would have been restricted to a limited suspension.

Thus, while I credit Smart's testimony that Taylor refused an order to return to the manbus and spoke to Smart in a heated and at times profane manner, I view Taylor's refusal and his comments as a direct result of Smart's failure to address in a meaningful way the danger Taylor perceived. As such, they could not form a valid basis for Taylor's suspension, and I conclude that in disciplining Taylor, Old Ben acted "at its own legal risk." Metric Constructors, 6 FMSHRC at 230.

Nor does Taylor's oral response to Smart's failure to meaningfully respond strip protection from Taylors' safety inquiry. Taylor's "praying" to be suspended and his telling Smart that he (Taylor) should "knock [Smart's] ass off," were entwined with and the result of his protected activity. Just as in the collective bargaining context, where the courts have been reluctant to find language to be so opprobrious as to carry the speaker "beyond the pale" of statutory protection, I do not believe that the interest of the Act in promoting safety-related dialogue between miner and management is served by the external imposition of a rigid standard of proper and civilized behavior. See Lee Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 729-730 (5th Cir. 1970). Threatening harm to Smart and his family might well be another matter, but, as noted, I do not credit Smart's testimony in this regard.

CONCLUSION

ACCORDINGLY, I conclude and find that Taylor engaged in activity protected under the Act when he inquired of Smart whether there was transportation outby and that Old Ben suspended Taylor for this activity. I further conclude and find that Taylor's subsequent refusal to return to the manbus and his "abusive and threatening language" toward Smart does not provide Old Ben with a valid basis for adverse action nor remove from Taylor the protection of the Act. Therefore, I hold that in suspending Taylor, Old Ben violated Section 105(c)(1) of the Act.

ORDER

1. Old Ben is ORDERED to pay Taylor within thirty (30) days of the date of this Decision all back wages and benefits from June 18, 1991 through June 21, 1991, with interest thereon in accordance with the Commission's Decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (October 1988) calculated proximate to the time payment is actually made.

2. Old Ben is ORDERED to expunge from Taylor's personnel records all reference to the incident of June 18, 1991, and Taylor's subsequent suspension.

3. Old Ben is ORDERED to pay to the Secretary within thirty (30) days of the date of this Decision a civil penalty of $500.[15]

David F. Barbour
Administrative Law Judge

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/epy

[15] The Secretary proposed a civil penalty of $1250 for the violation of Section 105(c) of the Act. I find the proposal excessive. I note particularly that Old Ben had no prior violations of Section 105(c) in the 24 months prior to this violation. I further conclude that Smart, although negligent in failing to respond to Taylor's inquiry, did not deliberately act in derogation of Taylor's Section 105(c) rights.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SEP 8 1992

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS) Master Docket No. 91-1

ORDER

On August 24, 1992, the Secretary of Labor filed a motion for reconsideration and clarification of my order issued August 13, 1992. She also seeks an extension of time for completion of expert discovery. On August 27, 1992, Contestant KTK Mining and Construction, Inc., filed a response to the Secretary's motion. On September 3, 1992, Contestants represented by Jackson & Kelly, Crowell & Moring, Buchanan Ingersoll, and Smith, Heenan & Althen, filed a response to the motion.

I. MOTION FOR RECONSIDERATION

The motion for reconsideration asks that I reconsider and reverse the conclusion in my order that an accidental, unintentional altering the weight of a filter cassette while the cassette is in the custody of the mine operator is not a violation of 30 C.F.R. 70.209(b), 71.209(b), or 90.209(b). The Secretary asserts that the plain wording of the standard supports her position that she need not prove intent in order to establish a violation, and that in any event her interpretation of the standard is entitled to deference. She further argues that requiring the Secretary to prove intent is contrary to the strict liability provisions of the Mine Act. She suggests that "while the terms 'open' and 'tamper' [in the standard] arguably may seem to suggest an intentional act, the term alter, within its context, does not."

A. Plain Wording

The mandatory standard in Section 209(b) prohibits ("shall not") the mine operator from doing something, namely opening or tampering with the seal of a cassette, or altering its weight: an action rather than a condition is proscribed. The contested citations allege that the mine operator did something to the filter cassette, rather than that something happened to it. Unlike other uses of the negative terminology "shall not" in other mine safety and health standards which typically proscribe conditions, Section 209(b) proscribes action by the operator. The fact that the standard prohibits opening or tampering with the seal of a filter cassette as well as altering its weight does

not in any way show that by the use of the word "alter", "the Secretary meant something other than an intentional act." The Secretary's position stated in her motion "that a violation of Sections 70.209(b), 71.209(b) and 90.209(b) occurs whenever there is a change, or alteration, of the weight of the dust filter" is plainly not supported or supportable by the words of the standard. On reconsideration, I repeat my holding that as a matter of law the accidental, unintentional altering (changing, reducing) the weight of a filter cassette while the cassette is in the custody of the mine operator is not a violation of 30 C.F.R. 70.209(b), 71.209(b), or 90.209(b).

B. Deference

A reviewing court is obliged to defer to the reasonable interpretations of the Secretary of Labor when they conflict with the reasonable interpretations of the Occupational Safety and Health Review Commission (and therefore the Commission must defer to the Secretary). Martin v. OSHRC, _____ U.S. _____, 113 L.Ed. 2d 117 (1991). Whether the same rule applies to the Mine Safety Review Commission is not clear. Compare Secretary of Labor v. Cannelton Industries, Inc., 867 F.2d 1432, 1433 (D.C. Cir. 1989) (the Secretary's interpretation of ambiguous provision of the Mine Act is entitled to deference) with Drummond Company, Inc., 14 FMSHRC 661, 675 (1992) (the Commission may review questions of law and policy in cases brought by the Secretary).

In any event, the language of Section 209(b) is not ambiguous, but explicit and precise. It tells the mine operator: thou shalt not alter the weight of a filter cassette. In my judgement it is not reasonable to interpret this prohibition to include an accidental change of the filter cassette weight. Therefore, insofar as this is the Secretary's interpretation of the standard, it is not reasonable and therefore not entitled to deference.

C. Strict Liability

There is no dispute that the Mine Act provides strict liability for violations of mandatory standards. If an operator is shown to have violated a standard, the operator is liable. Most of the Mine Act mandatory standards prescribe certain conduct. Part 70, for example, enjoins the operator to maintain respirable dust levels, to take certain dust samples with approved sampling devices maintained and calibrated by a certified person, to transmit the samples to MSHA, to make approved respiratory equipment available, to control dust from drilling rock, etc. If the operator fails to do any of these things, he is in violation of the standard, and his intent is irrelevant. Section 209(b) is different: it prohibits what only can be interpreted as deliberate acts, and no violation can be established if a deliberate act is not shown. Unless a violation

is established, any discussion of strict liability for a violation begs the question. One cannot prove that a violation occurred by arguing that violations result in strict liability.

II. MOTION FOR CLARIFICATION

It has been the Secretary's position that a cited AWC can only have resulted from a deliberate act by which the weight of the filter cassette was altered. The purpose of the common issues trial is to receive evidence concerning this allegation that I may determine whether or not the AWCs on the cited filters can only have resulted from such deliberate acts. There is nothing in my order of August 13, 1992, which would require or even permit the Secretary to prove the state of mind of a particular mine operator. The intent of a particular mine operator or group of operators is not an issue in the common issues trial and the Secretary "need not identify the specific individuals who altered the weight, when such alteration occurred ... or the manner in which the weight alteration was accomplished." (Secretary's motion, p. 13). These are matters for case-specific trials.

The issue is whether an AWC on a cited filter cassette establishes that the operator intentionally altered the weight of the filter. The ultimate paragraph of my August 13 order indicated some of the kinds of evidence that might be relevant to the resolution of that issue. Other evidence may include the criteria the Secretary followed to determine which AWC filters should be cited.

III. MOTION FOR EXTENSION OF TIME

The Secretary seeks an extension of time for the completion of expert witness discovery from October 2 to October 30, 1992. The Secretary states that she will be unable to provide supplemental or additional expert reports before September 25, 1992, and that the extension should not delay the trial date.

Contestants oppose the request for extension of time on the ground that the Secretary's need for additional time resulted from her failure to direct her expert witness in a timely fashion to conduct additional testing. They state that to extend expert witness depositions to October 30 will interfere with other prehearing requirements, e.g., exchanges of witness and exhibit lists by October 30 and offering stipulations and trial procedure agreements by November 13. Contestants further state that the Secretary designated a new expert witness on September 2, which "raises additional issues which the Contestants ... intend to address in a separate motion to be filed on or about September 9." Contestants request that I withhold ruling on the Secretary's request for an extension until that time.

I have considered the motion and the response. I accept the Secretary's representation that an October 2 date will create problems for her to complete her expert witness preparation. I agree with Contestants that an extension to October 30 will compress the prehearing requirements and may result in attempts to postpone the trial date. I intend to hold to the December 1 date for the commencement of the trial.

Delaying a ruling on the Secretary's motion until Contestants file a motion concerning the addition of a new expert witness will further complicate and delay the completion of discovery. Therefore, without indicating how I may rule on that matter when and if a motion is filed, I hereby extend the time for completion of expert witness discovery to October 16, 1992.

James A. Broderick
Administrative Law Judge

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SEP 16 1992

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS) Master Docket No. 91-1

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL DISCOVERY

On August 19, 1992, in compliance with the Commission remand of June 29, 1992, I ordered the Secretary to submit for my in camera inspection documents 17, 119, 142, 160, the December notes of document 407, 476, and 481. The documents were submitted by the Secretary on September 11, 1992. For the reasons which follow, I grant in part and deny in part the Contestants' motion for disclosure.

Document 17 is a memorandum to the file from an Assistant U. S. Attorney dated February 21, 1990, regarding a telephone conversation he had with an attorney for a coal mine operator. The Secretary claims the protection of the work produce doctrine. Clearly the document was prepared by an attorney in anticipation of possible future litigation. It comes within the work product rule. Since it records a conversation with an attorney for a Contestant, it can hardly be argued that Contestants have a substantial need for it and are unable to obtain its substantial equivalent by other means. I will deny its disclosure.

Document 119 is an MSHA internal memorandum dated February 4, 1991, concerning the coal dust sampling investigation. I have previously upheld the Secretary's assertion of the deliberative process privilege. Nothing in the document indicates that it is necessary for Contestants' defense. I will deny disclosure.

Document 142 is a memorandum to the Associate Solicitor and the MSHA Coal Mine Safety and Health Administrator from the Counsel for Trial Litigation and the Chief, Office of Technical Compliance and Investigation dated August 28, 1989. I previously upheld the Secretary's assertion that the document is protected by the work product doctrine. The memorandum concerns in large part the criminal investigation. It proposes alternative strategies for future investigations and legal action. It includes mental impressions, conclusions, and opinions of the Secretary's attorneys. I will deny disclosure.

Document 160 is an undated memorandum from Assistant Secretary Tattersall to the Secretary concerning the AWC investigation. I upheld the Secretary's assertion of the deliberative process privilege. The document refers to the criminal investigation, and contains proposals for civil enforcement. There is nothing in the document which indicates that it is necessary for the Contestants' defense. I will deny disclosure.

Document 407 (notes for the last week in November 1990 only. My order of August 19 refers to them as December notes) contains calendar entries of Robert Thaxton, a portion of which were excised. The excised notes include the record of a discussion with other MSHA officials concerning potential citations and what further information may be needed. I conclude that the excised portion of the notes is protected by the deliberative process privilege. There is no indication that the notes are necessary for Contestants' defense. I will deny disclosure.

Document 476 includes the excised notes of Robert E. Nesbit dated October 30, 1989, November 7, 1989, November 30, 1989, January 11, 1990, and February 1, 1990. The notes of October 30, 1989 (called pages 5 and 6 by the Solicitor), are contained in two pages and record a meeting between Edward Clair of the Solicitor's Office and eight MSHA officials including Nesbit. Page 5 (called Section 1 by the Solicitor) records Edward Clair's report of a meeting with Department of Justice officials and contains directions for future proceedings. I conclude this page is protected by the attorney-client privilege. Page 6 (Section 2) records what MSHA officials proposed to do regarding future investigations. I conclude that it is protected by the investigative privilege. The notes of November 7, 1989 (page 4), contain suggested investigative steps and procedures. It is protected by the investigative privilege. The notes of November 30, 1989 (page 3), contain names of potential targets of the investigation. It is protected by the investigative privilege. The notes of January 11, 1990 (page 2), contain directions for further investigation. It is protected by the investigative privilege. Nothing in the documents indicates that the excisions are necessary for Contestants' defense. I will deny disclosure.

Document 481 comprises the excised notes of Glenn Tinney introduced at Tinney's deposition. They are contained in ten pages including the cover sheet entitled "AWC - Glenn Tinney Notes." Seventeen excisions were made by reason of claims of privilege and are described and numbered in the letter of November 26, 1991, from Carl Charneski to Henry Chajet. Excision 1 is part of a note dated January 30, 1990. It refers to a plan for investigation of inspector samples following a meeting with MSHA and OIG officials. The Secretary asserts the attorney-client and investigative privileges. I conclude that the excision is protected by the investigative privilege but not by

the attorney-client privilege. Excision 2 records a telephone call from Thaxton concerning a communication from the U.S. Attorney. The Secretary asserts the attorney-client privilege. I conclude that the excision is protected by the attorney-client privilege. It is a sharing by client representatives (MSHA is the client) of the advice of their attorney. Excision 3 records what a Secretary's attorney did. It does not include any proposals, conclusions, mental impressions, or legal theories. The Secretary asserts the deliberative process and work produce privileges. Neither privilege properly fits the excised sentence. I deny the claim of privilege and will order the excised portion of the document disclosed. Excision 4 concerns a request from the Inspector General about inspector samples, and direction from Tinney's superior. It is protected by the investigative and deliberative process privileges. Excision 5 records a discussion among MSHA officials about the processing of AWC samples. It is protected by the deliberative process privilege. Excision 6 contains the names and social security numbers of MSHA inspectors being investigated. It is protected by the investigative privilege. Excision 7 records the advice of the Secretary's attorneys to Tinney concerning the investigation. It is protected by the attorney-client and work product privileges. Excision 8 concerns directions from the Solicitor's Office and Ed Hugler concerning the AWC investigation. It is protected by the attorney-client and work product privileges. Excision 9 records advice from the Solicitor's Office to Tinney. It is protected by the attorney-client privilege. Excision 10 contains further advice from the Solicitor's Office to Tinney. It is protected by the attorney-client privilege. Excision 11 records a communication from Tinney to an OIG official concerning inspector samples. It is protected by the investigative privilege. Excision 12 records a discussion between Tinney and an attorney from the Solicitor's Office concerning the investigation. It is protected by the attorney-client privilege. Excision 13 records a discussion between Tinney and Dr. Myers of West Virginia University concerning Dr. Myers' report. It is protected by the deliberative process and work product privileges. However, for the same reasons that I directed the production of documents 376, 365, 3, and 366 in my order of August 19, 1992, I will direct the disclosure of the material in excision 13. It contains comments on the draft report of Dr. Myers. Excision 14 records advice from the Secretary's attorney and an Assistant U.S. Attorney. It is protected by the attorney-client privilege. Excision 15 records a discussion among MSHA officials concerning the processing of AWC samples. The excision is protected by the deliberative process privilege. Excision 16 records advice from the Secretary's attorneys and discussion of future action. It is protected by the attorney-client privilege. Excision 17 contains a description of options for further AWC activity. It is protected by the deliberative process privilege. I have rejected the claim of privilege for excision 3, and conclude that the information in excision 13 is necessary for

Contestants' defense. With respect to all the other excisions in document 481, disclosure will be denied.

ORDER

Accordingly, IT IS ORDERED that Contestants' motion for production of documents is GRANTED with respect to excision 3 and excision 13 in document 481. The motion is DENIED with respect to the remainder of document 481 and with respect to documents 17, 119, 142, 160, 407 and 476.

James A. Broderick

James A. Broderick
Administrative Law Judge

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SEP 18 1992

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS) Master Docket No. 91-1

ORDER DENYING MOTION TO COMPEL

In response to a subpoena duces tecum issued at the request of Contestants represented by Jackson & Kelly (Contestants), the United States Department of Labor, Office of Inspector General (OIG) produced certain documents and withheld others based on claims of privilege. Contestants filed a motion to compel. On August 25, 1992, I issued an order granting in part and denying in part the motion to compel, and directing OIG to submit six documents for my in camera inspection. The documents were all found to come within the deliberative process privilege, and I directed that they be submitted so that I could determine whether Contestants' need for the documents in their defense outweighs OIG's interest in confidentiality. The documents were submitted on September 15, 1992, for my in camera review. For the reasons which follow, I deny the motion to compel with respect to the six documents.

The deliberative process privilege is intended to protect the decision making process of Government agencies against disclosure in order not to discourage open discussion of prospective Governmental policies. Jordan v. U.S. Dept. of Justice, 591 F.2d 753 (D.C. Cir. 1978); Contests of Respirable Dust Sample Alteration Citations, 14 FMSHRC 987 (1992). It applies to materials which are truly deliberative and does not protect purely factual material. Id. at 993. Material protected by the deliberative process privilege may be ordered disclosed if the Contestants' need for the documents to fairly defend their position outweighs the Government's interest in confidentiality. I have been assigned to these cases for more than a year and am in a position to understand the issues and the evidentiary needs of the parties. I believe this provides a basis to make a determination after in camera review whether Contestants' need

for disclosure of the documents outweighs OIG's interest in confidentiality, regardless of any showing of need in Contestants' motion. See Contests, 14 FMSHRC at 995.

Document 1 is an undated draft memorandum from I. A. Bassett, Jr., Assistant Inspector General for Investigations to the Administrator for Coal Mine Safety and Health. It was apparently prepared by Raymond J. Carroll, Regional Inspector General for Investigations. It contains handwritten remarks apparently inserted by Bassett. The memorandum was not sent to MSHA. Document 2 is a fax memorandum from Carroll to Bassett attached to draft document 1 and commenting on the draft. Document 3 is a memorandum from Carroll to Bassett dated March 17, 1992, commenting on and criticizing the memorandum sent by OIG to MSHA. These documents were identified in my August 25 Order as being included in paragraph 10 of the IG's Declaration. There is no indication in the documents that Contestants' need for disclosure outweighs OIG's interest in confidentiality. The motion to compel will be denied.

Document 4 (referred to in paragraph 14 of the IG's Declaration) is a portion of a letter from C. E. Elliott for Raymond J. Carroll, OIG, to an Assistant U.S. Attorney. I upheld the claim of the deliberative process privilege for the deleted portion of the letter. Nothing in the excision indicates that Contestants' need for the deleted portion of the document outweighs the OIG's interest in confidentiality. The motion to compel will be denied.

Document 5 (referred to in paragraph 16 of the IG's Declaration) is the deleted portion of a memorandum of January 10, 1990, from Carroll to the Acting Assistant IG for Investigations and two other Regional IGs. Nothing in the excision indicates that the Contestants' need for the excised words outweighs the OIG's interest in confidentiality. The motion to compel will be denied.

Document 6 (referred to in paragraph 18 of the IG's Declaration) is a draft memorandum entitled "Interim Report" from I. A. Bassett, Jr., of OIG to Jerry L. Spicer, Administrator, Coal Mine Safety and Health. The memorandum was prepared by Carroll and forwarded to OIG headquarters, but was never sent to Spicer. The document refers to investigative action which has taken place and proposes further action. It contains the names of inspectors who have been interviewed. There is no indication in the document that it is necessary for Contestants' defense so as to outweigh OIG's interest in confidentiality. The motion to compel will be denied.

ORDER

Therefore, IT IS ORDERED that the Contestants' motion to compel disclosure of documents 1 through 6 (referred to in paragraphs 10, 14, 16, and 18 of the Inspector General's Declaration) is DENIED.

James A. Broderick
James A. Broderick
Administrative Law Judge

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