

OCTOBER 1989

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OCTOBER 1989

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

Clinchfield Coal Company v. Secretary of Labor and UMWA, Docket No. VA 89-67-R. (Judge Broderick, August 30, 1989)

United Mine Workers of America, District 22 v. Utah Power & Light Company, Docket No. WEST 87-86-C. (Judge Morris, September 1, 1989)

Secretary of Labor, MSHA v. Ideal Cement Company, Docket No. WEST 88-202-M. (Judge Morris, September 21, 1989)

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

Secretary of Labor, MSHA v. Eastern Associated Coal Corp., Docket No. WEVA 89-192. (Judge Weisberger, Interlocutory Review of September 12, 1989 Order)

Secretary of Labor, MSHA v. Southern Ohio Coal Company, Docket No. WEVA 89-87. (Judge Broderick, September 21, 1989)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 10, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. PENN 88-227
 :
v. :
 :
PENNSYLVANIA ELECTRIC COMPANY :

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

DECISION

BY: Ford, Chairman; Backley and Lastowka, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), and involves two violations of a mandatory safety standard at Pennsylvania Electric Company's ("Penelec") Homer City Steam Electric Generating Station ("Generating Station" or "Station"). The question before us is whether the Secretary of Labor ("Secretary") properly issued Penelec citations under the Mine Act charging violations of mandatory mine safety standards. A Commission administrative law judge upheld the Secretary's action in proceeding against Penelec under the Mine Act. 10 FMSHRC 1780 (December 1980)(ALJ). Penelec petitioned for review asserting that the cited working conditions are subject to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., (1982), rather than the Mine Act. We granted Penelec's petition and heard oral argument. For the reasons that follow, we vacate the judge's decision and remand the matter for the taking of additional evidence on the important question presented and for the entry of a new decision.

The Generating Station is located at Homer City, Indiana County, Pennsylvania. The Station is operated by Penelec and owned by Penelec and the New York State Electric & Gas Corporation ("NYSEG"). At the Station electricity is generated by coal combustion. The Station burns approximately 4.5 million tons of coal each year. The coal purchased by Penelec enters the Station from three sources: from a conveyor running from an adjacent Helen Mining Company mine; from a conveyor running from an adjacent Helvetia Mining Company mine; and from a truck-dump facility receiving coal brought from various other mines in Pennsylvania.

The conveyors from the Helen and Helvetia mines deliver the coal to scales where it is weighed and sampled, and where title passes to Penelec and NYSEG. The coal from these mines is then transported by conveyor to a bin where it is combined and again sampled. The coal is then placed on conveyors 5A and 5B, which transport the coal to a second bin.

Because the Helen-Helvetia coal, when burned, generally yields sulfur dioxide emissions that do not comply with state and federal environmental standards, most of the coal travels from the second bin to an on-site coal cleaning plant. Some of the coal from the truck receiving facility also travels from the first to the second bin via conveyors 5A and 5B, and from the second bin to the coal cleaning plant. At the coal cleaning plant the coal is broken, crushed, sized, washed, cleaned, dried and blended. The plant, which is entirely located at the Station, is owned by Penelec and NYSEG, but is operated under contract by the Iselin Preparation Company ("Iselin"), a subsidiary of Rochester and Pittsburgh Coal Company. The coal cleaning plant has been inspected regularly by MSHA since becoming operational in 1977.

On January 7, 1988, John Kopsic, an inspector of the Department of Labor's Mine Safety and Health Administration (MSHA), issued two citations to Penelec for violations of 30 C.F.R. § 77.400(c), a mandatory mine safety standard requiring guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys. 1/ The citations alleged that the head drives of conveyors 5A and 5B were not adequately guarded to protect persons who might come in contact with the head rollers. 2/

It is this assertion by the Secretary of the applicability of Mine Act safety standards to the 5A and 5B conveyor head drives that is the subject of the dispute in this case. (The Secretary does not assert jurisdiction under the Mine Act with respect to working conditions inside the generating facilities at the Station. The Secretary instead asserts that working conditions inside the generating facilities are regulated by her under the Occupational Safety and Health Act of 1970, supra, ("OSHAct")).

The parties agree that in August 1977, Penelec reached an oral understanding with the Mining Enforcement and Safety Administration ("MESA") regarding MESA's and OSHA's jurisdiction over the coal cleaning and coal

1/ 30 C.F.R. § 77.400(c) states:

Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

2/ The "head" end of a belt conveyor is the ultimate delivery or discharge end. The "head drive" is the means by which mechanical power is transmitted to the head pulley of a belt conveyor. See U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms, 554, 555 (1968).

handling facilities at the Generating Station. Stip. 2. (MESA was an agency in the Department of Interior charged with enforcing the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977). MESA's enforcement function was transferred to the Department of Labor and MSHA by the 1977 Mine Act). Penelec's understanding of the agreement is represented by an inter-office memorandum, dated September 6, 1977, memorializing a meeting of representatives of MESA, Iselin and Penelec called "to establish definite lines of jurisdiction at the coal cleaning plant." Tr. 4-6; Jt. Exh. 1. The memorandum states in pertinent part:

At ... [the second bin] MESA will have jurisdiction on everything above the top of the bin except for the portions of #5A and #5B conveyors within the structure including the drive units and head pulleys. [3/]

Notwithstanding this agreement, MSHA, without Penelec's knowledge, inspected the head drives of the 5A and 5B conveyors on January 7, 1988. Stip. 4. Penelec's counsel stated that OSHA has inspected the area prior to that time and that no MSHA inspections had been made of the cited area. Tr. 9. Counsel for the Secretary stated that he did not know whether OSHA had inspected the area and that the Pittsburgh area OSHA office had no record of OSHA inspections. Tr. 10. Penelec's counsel further stated that Penelec was unaware that there had been any change from the 1977 agreement concerning whether MSHA or OSHA would inspect the head drives. Tr. 17.

In his decision, the judge held that the question of whether Penelec was properly cited for violations of the Mine Act was "to be determined by whether the head drives for the 5A and 5B conveyors ... are part of a facility that is a 'coal or other mine.'" 10 FMSHRC at 1781. The judge noted that the statutory definition of "coal mine" includes "all structures, facilities, machinery, tools, equipment ... and other property, ... used in, or to be used in ... the work of preparing the coal," and that the statutory definition of "work of preparing the coal" includes the "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of ... coal." 30 U.S.C. §§ 802(h)(2), 802(i); 10 FMSHRC at 1781. The judge stated that the definitions are to be given broad interpretations and doubts are to be resolved in favor of coverage. 10 FMSHRC at 1781.

Summarizing the general process of the transport of coal at the Generating Station (10 FMSHRC at 1781-82), the judge found:

[A]t least some raw coal is transported on the 5A and 5B conveyor belts which run over the 5A and 5B head drives on its way to the Iselin Preparation Plant.

3/ Counsel for the Secretary stated to the judge that the person who had represented MESA at the meeting "has no recollection of what transpired at the meeting, other than that the meeting took place and that ... they thought they had some kind of informal agreement regarding ... MSHA-OSHA jurisdiction." Tr. 7.

At the preparation plant the coal is broken, crushed, sized, washed, cleaned, dried and blended in preparation for consumption in the Penelec generating station. These activities are all within the scope of "work of preparing coal" within the meaning of section 3(1) of the Act. It is also clear that the head drives over which the raw coal passes on its way to such preparation are "structures", "equipment", and "machinery" that is "used in or to be used in" the "work of preparing the coal."

10 FMSHRC at 1782. The judge further found that this broad range of coal preparation activities was performed for "the particular purpose of consumption in the Penelec generating station." 10 FMSHRC at 1782. Therefore, the judge concluded that the head drives of the cited conveyor belts were subject to Mine Act jurisdiction. 10 FMSHRC at 1782-83. 4/

On review, the question before us is whether the cited working condition is governed by regulations enforced by the Secretary under the Mine Act, as argued by the Secretary, or by regulations enforced by the Secretary under the OSHAct, as argued by Penelec. As explained below, we conclude that the present record is unclear on this controlling question, preventing us from properly exercising our review function and making an informed decision on an important jurisdictional issue. Therefore, we exercise our statutory authority to remand the matter to the judge for the taking of additional evidence and argument concerning which safety and health agency within the Department of Labor exercises regulatory authority over the working condition in question. 30 U.S.C. § 823(d)(2)(C).

At the outset of our discussion, a brief overview of the statutory interplay between the Mine Act and the OSHAct is necessary to a proper analysis of the issue and an understanding of our disposition. (We note that the judge's analysis in his decision omits any discussion of this interplay). The OSHAct is the most broadly applicable statute regulating the safety and health aspects of the working conditions of American workers. Section 4(b)(1) of the OSHAct, however, provides:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1). Thus, OSHA standards apply to a workplace unless another Federal agency exercises statutory authority to regulate the safety and health of the workplace. See, e.g., Southern Pacific Transportation Co. v. Uesery, 539 F.2d 386, 389 (5th Cir. 1976), cert. denied,

4/ Penelec agreed that if the Secretary had jurisdiction over the head drives under the Act, that it had violated the cited mandatory standard by failing to adequately guard the head drives. The judge assessed civil penalties of \$54 for each of the cited violations. 10 FMSHRC at 1783.

434 U.S. 874, 98 S.Ct. 221, 54 L.Ed. 2d 154 (1977); Southern Ry. Co. v. OSHRC, 539 F.2d 335, 336 (4th Cir. 1976), cert. denied, 429 U.S. 999, 97 S.Ct. 525, 50 L.Ed. 2d 609 (1976).

Therefore, OSHA standards pertaining to the guarding of the cited head drives would be applicable unless another Federal agency, with a proper grant of jurisdiction over such working condition, exercised its authority in a manner displacing OSHA coverage. The Secretary claims that MSHA has indeed properly exercised its statutory authority to regulate the cited working conditions and that MSHA's citation of Penelec for the violation of the mine safety standard at issue must be upheld.

Our analysis of the Secretary's claim must next consider the language of the Mine Act. Section 4 of the Mine Act provides that each "coal or other mine" that affects commerce is subject to the Act. 30 U.S.C. § 803. Section 3(h) of the Mine Act broadly defines the term "coal or other mine" as including the area of land from which minerals are extracted, roads appurtenant to such area, lands, facilities, equipment and machines used in the work of extraction, milling, or preparing coal, and custom coal preparation facilities. ^{5/} The Secretary argues that the 5A & 5B head drives are machinery or equipment used in the preparation of coal. Therefore, according to the Secretary, the violations at issue occurred in a "coal mine" and Penelec was properly cited for the violation pursuant to the Mine Act.

5/ Section 3(h), 30 U.S.C. § 802(h), states:

(1) "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. ...

(2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

The term "work of preparing the coal" is defined in section 3(i) of the Mine Act:

[1] "Work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal lignite, or anthracite, and [2] such other work of preparing such coal as is usually done by the operator of the coal mine.

30 U.S.C. § 802(i) (bracketed numbers added).

The stipulations establish, and the judge found, that raw, run-of-mine coal is transported on the 5A and 5B conveyor belts, over the cited head drives, to the second bin, and then to the coal cleaning plant where the coal is broken, crushed, sized, cleaned, washed, dried and blended in preparation for consumption in the Generating Station. Thus, measured against the Mine Act's definition of "work of preparing the coal," it is clear that the work activities associated with Penelec's processing of coal prior to its consumption squarely fall within the literal definition of coal preparation set forth in clause [1] of section 3(i). Thus, the head drives of the 5A and 5B conveyors, which drive the belts that transport the coal towards its destination in the the coal cleaning plant, are equipment or machinery "used in" the preparation of coal within the meaning of the Mine Act.

Penelec argues, however, that under clause [2] of the definition of "work of preparing the coal" considerations additional to mere performance of the listed work activities come into play in determining whether coal preparation is taking place. Indeed, in Oliver W. Elam, Jr. Co., 4 FMSHRC 5 (January 1982), the Commission recognized that the determination of whether a company engages in coal preparation under the Mine Act requires an inquiry "not only into whether the operation performs one or more of the listed work activities [in section 3(i)], but also into the nature of the operation performing such activities." 4 FMSHRC 6 at 7 (emphasis in original). Accord, Donovan v. Inland Terminals, 3 BNA MSHC 1893 (D. Ind. March 28, 1985). The Commission further recognized that "simply because [a company] in some manner handles coal does not mean that it automatically is a 'mine' subject to the Act." 4 FMSHRC at 7.

The Elam operation was a commercial dock facility at which coal was stored, broken, and crushed simply to facilitate the loading of the coal onto barges for shipment. Id. At the Elam facility, coal was not prepared to meet customer specifications or to render it fit for any particular use. 4 FMSHRC at 8. Unlike the processes performed on the coal at the Elam loading dock, the processes at Penelec's Generating Station are performed to prepare the coal to meet particular specifications and emissions requirements with which Penelec must comply in the burning of its coal. Thus, the activities performed on the coal at the Station are those usually performed "by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications." Id. Therefore, the work performed at the Station not only falls within clause [1] of section 3(i)'s listing of the types of work activities

comprising coal preparation, but also meets the criterion in clause [2] that it be the type of work "usually done by the operator of the coal mine."

Penelec further argues that it is exempt from Mine Act jurisdiction because it does not prepare the coal for resale but rather is the ultimate consumer of the coal. In Elam, the Commission noted that under the 1952 Coal Act businesses that engaged in processing coal to produce another product were specifically exempted from that statute's coverage. 30 U.S.C. § 471(a)(7)(1952)(repealed 1969); 4 FMSHRC at 7. ^{6/} This exemption for consumers, however, was not carried over into the 1969 Coal Act, nor was it reinstated in the 1977 Mine Act. Id. No explanation of the reasons behind the change in definitional language appears in the legislative histories. See 4 FMSHRC at 7 n.4. The question before us must therefore be answered by the governing terms of the 1977 Mine Act, not by a determination of whether utilities such as Penelec were exempted from the reach of the 1952 Act by virtue of that statute's "consumer exception." Under the Mine Act, coal consumers are not provided any per se exclusion from jurisdiction. Instead, Mine Act coverage turns on the two part definitional analysis set forth above, under which analysis the cited working condition meets the literal criteria permitting Mine Act coverage. ^{7/} See Donovan v. Inland Terminals, supra; Elam, supra.

^{6/} The 1952 Coal Act in part provided:

The term 'work of processing the coal' as used in this paragraph means the sizing, cleaning, drying, mixing and crushing of ... coal ..., and such other work of processing such coal as is usually done by the operator, and does not mean crushing, coking, or distillation of such coal or such other work of processing such coal as is usually done by a consumer or others in connection with the utilization of such coal.

30 U.S.C. § 471(a)(7)(repealed 1969)(emphasis added).

^{7/} In pressing its argument for Commission recognition of a consumer exemption to Mine Act jurisdiction, Penelec further refers us to cases decided under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. (1983). The Black Lung Benefits Act provides benefits for disabled coal miners and defines a miner as "any individual who worked or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. § 902(d). Compare, 30 U.S.C. § 802(g)(Mine Act definition of "miner" as "any individual working in a coal or other mine"). The Mine Act definitions of "coal mine" and "work of preparing the coal," apply to the Black Lung Benefits Act. 30 U.S.C. § 802(h)(2). In interpreting the phrase "work of preparing the coal" for Black Lung Benefits Act purposes, courts have generally held that once coal has been extracted and prepared for use and has left the preparation facility, the "work

(Footnote continued)

We also note that MSHA's regulation of the working conditions inside Penelec's on-site coal cleaning plant is not challenged and it is not disputed that MSHA properly regulates the mines adjacent to the Generating Station that deliver coal directly to the Station by means of conveyor systems. See Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984).

Thus, we conclude that MSHA possesses statutory authorization to regulate working conditions associated with Penelec's preparation of coal, and therefore that the Secretary of Labor properly could decide to make mine safety standards applicable to the disputed area. Whether she has done so, however, is another matter and one which we are unable to determine with any degree of assurance from the murky record presently before us.

As previously noted, the parties stipulated that Penelec and MESA met on August 25, 1977 and "reached a verbal understanding ... regarding MESA's and ... OSHA's ... jurisdiction over the coal cleaning and coal handling facilities at the Homer City Station." Stip. 2. Penelec claims that MESA agreed that OSHA would have jurisdiction over the cited conveyors. See Pen. Br. in Support of Motion to Dismiss 18; Pen. Br. 5. The government's representative at this meeting did not testify but it was represented that he thought "some kind of informal agreement" regarding MSHA/OSHA jurisdiction had been reached. See n.3, supra. Thus, relevant details of the genesis of the jurisdictional controversy before us are lacking.

footnote 7/ end

of preparing coal" ceases. See e.g., Epsilon v. Director, O.W.C.P., 794 F.2d 935, 937 (4th Cir. 1986). If further procedures associated with the work of preparing coal are performed by a consumer, they do not bring the consumer under the jurisdiction of the Act. See e.g., Foreman v. Director, O.W.C.P. 794 F.2d 569, 571 (11th Cir. 1986).

These cases, however, lack precedential value in resolving the Mine Act jurisdictional dispute before us. Black lung benefits are financed by a trust, funded by a tax on "coal sold by the producers," 26 U.S.C. § 4121(a), and the courts have reasoned that miners entitled to such benefits in some fashion must be connected with the producers of coal. See Wisor v. Director, O.W.C.P., 748 F.2d 176, 179 (3rd Cir. 1984). Individuals "who wor[k] in or around a ... coal preparation facility ... or [in] preparation of coal" are most closely connected with the producers of coal when coal preparation is considered as taking place prior to its entry into the stream of commerce. As one court has stated, the functions that the miners perform should be "integral to the ... preparation of coal, not ancillary to the delivery and commercial use of processed coal." Stroh v. Director, Office Of Workers' Compensation Programs, 810 F.2d 61, 64 (3rd Cir. 1987).

The Mine Act has the entirely different purpose of assuring safe and healthful working conditions for the nation's miners. Under the Mine Act "coal mine" is defined in broad terms to better effectuate the salutary effects of this particular goal. There is no statutory financial scheme in the Mine Act requiring coal preparation to be closely tied with the coal producer, and hence no basis from which to extrapolate the exemption from coverage of the Mine Act argued for by Penelec.

The question of which safety and health agency actually asserted jurisdiction subsequent to the agreement and prior to issuance of the subject citations is similarly unclear. Before the judge, counsel for Penelec claimed that OSHA inspected the area in question. Tr. 9. The Secretary's counsel responded that he did not know whether or not OSHA inspected the area and that the Pittsburgh area OSHA office had no record of OSHA inspections. Tr. 10. The record contains no evidence of enforcement activity relating to the disputed area by either OSHA, MESA, or MSHA prior to issuance of the subject citations on January 7, 1988, when MSHA inspected the area unbeknownst to Penelec.

Likewise, the reasons for MSHA's decision to begin to assert inspection authority in the disputed area also are not explained. Rather, the first clear assertion of MSHA jurisdiction in the record is contained in an April 12, 1988 letter from former MSHA District Manager Donald W. Huntley to Penelec in which Huntley stated that MSHA was expanding its inspection authority at the Generating Station to include "all areas which are directly involved in the coal preparing process." Ex. 3. The letter reflected Huntley's concern over "gaps" in MSHA's coverage at the Station and that henceforth MSHA would include the "5A and 5B conveyors ... [and] the drive units and head pulleys" in its inspections. *Id.* Although the letter indicates that the OSHA Area Director was sent a copy, the record contains no response on the director's part acceding to or disputing MSHA's claim of authority. Importantly, the record contains no indication that the procedures specified in the formally published MSHA-OSHA Interagency Agreement for the resolution of jurisdictional conflicts between the two agencies were consulted or followed. 44 Fed. Reg. 22827 (1979).

The MSHA-OSHA Interagency Agreement provides a procedure for determining general jurisdictional questions between the two agencies. The Agreement states in pertinent part:

When any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA Regional Administrator or OSHA State Designee in those states with approved plans shall attempt to resolve it at the local level in accordance with this Memorandum and existing law and policy. Jurisdictional questions that can not be decided at the local level shall be promptly transmitted to the respective National Offices which will attempt to resolve the matter. If unresolved, the matter shall be referred to the Secretary of Labor for decision.

42 Fed. Reg. at 22828. The Agreement itself does not expressly address the question of MSHA-OSHA jurisdiction at coal handling power plants, nor has any supplement to the agreement been published addressing this not uncommon situation. Compare, Interagency Agreement; Revision Concerning Surface Retorting of Oil Shale, 48 Fed. Reg. 7521 (1983).

At oral argument before us, counsel for the Secretary asserted that the MSHA district manager's letter reflects MSHA's policy of inspecting those areas of a power plant that involve the handling and processing of run-of-mine coal and of leaving to OSHA the inspection of those areas that involve the handling of previously processed coal. O.A. Tr. 28, 29-30, 33. We note, however, that in a prior case involving a coal handling power plant, the Commission was advised, by different secretarial counsel, that:

MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite to a particular memorandum incorporating this policy, MSHA and its predecessors have consistently found the production of power to be outside the jurisdiction of the agency. MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal but has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the overall power plant process is more feasibly regulated by OSHA.

Utility Fuels, Inc., Docket No. CENT 85-59 (Sec. Motion to Dismiss (November 29, 1985)).

The importance of, and confusion concerning, the jurisdictional question presented in this case is further heightened by the fact that subsequent to the issuance of the citations in question, the Secretary through OSHA, proposed new, comprehensive safety standards applicable to the operation and maintenance of electrical power generation facilities. 54 Fed. Reg. 4974-5024 (1989). On their face and as explained in the accompanying explanatory materials, these regulations would appear to directly apply to operations such as Penelec's including the coal handling aspects of such operations. Proposed standard 29 C.F.R. § 1910.269(a)(1)(i) reads in part, "This section covers work practices, installations, and equipment associated with the operation and maintenance of electric power generation These provisions apply to ... (A) Power generation, transmission, and distribution installations ... and (B) ... (1) ... Fuel and ash handling and processing installations, such as coal conveyors and crushers." 54 Fed. Reg. at 5009. Of specific interest, the proposed standards for power generating plants contain detailed regulations pertaining to the protection of employees working in the area of coal carrying conveyor belts. See proposed 29 C.F.R. § 1910.269(v)(11), 54 Fed. Reg. at 5021-22.

On review, the Secretary argues that the proposed rules would apply only to those electric generating facilities using already processed coal, but that facilities and equipment at generating stations handling and transporting run-of-the-mine coal would be subject to Mine Act jurisdiction. Sec. Br. 21-22. We find no such distinction in the proposed standards. Far from recognizing a division of jurisdiction between OSHA and MSHA, the proposed regulations appear to be all-encompassing. As noted, section 1910.269 states that it is applicable to "fuel and ash handling and processing installations, such as coal conveyors and crushers." 29 C.F.R.

§ 1910.269(a)(1)(i)(B)(1)(emphasis added). In summarizing the proposed rules, the Assistant Secretary of Labor for Occupational Safety and Health explained that fuel handling operations within an electric power installation station would be covered by the proposed regulations. 54 Fed. Reg. at 4980. The OSHA Assistant Secretary's view of the effect of the proposed regulations compliments and coincides with the view of OSHA/MSHA jurisdiction propounded to the Commission in Utility Fuels, supra. Thus, the proposed rules suggest that the Secretary of Labor may still view Penelec's operation as subject to OSHA jurisdiction or, at least, that coverage by OSHA, rather than MSHA, may be more appropriate and effective.

These conflicting indications of Secretarial intent raise serious questions as to which agency in the Department of Labor exercises safety and health authority over power generating stations such as Penelec's. The answer is of great consequence to Penelec and its employees. It is also of importance to similarly situated operators of coal burning electric utilities who, along with Penelec, must know which safety and health standards must be complied with and which statute prescribes the rights and duties to which they and their employees must conform their conduct.

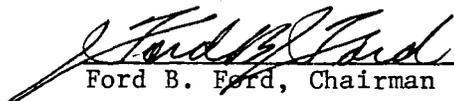
The fact that after 20 years of enforcement under the 1969 Coal Act and the 1977 Mine Act, this case of first impression arises could indicate that perhaps MSHA has embarked here upon a course at odds with consistent prior policy, and perhaps present and future policy, of regulating coal handling power plants under OSHA, rather than MSHA. Indeed, at oral argument counsel for the Secretary stated that the record reflected no specific reason why MSHA chose in 1988 to assert jurisdiction over the 5A and 5B conveyor head drives at the Penelec Generating Station. O.A. Tr. 26-27.

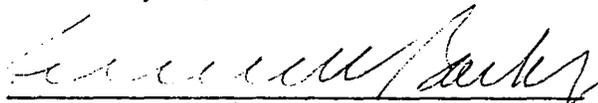
Section 113 of the Mine Act provides that "[i]f the Commission determines that further evidence is necessary on an issue of fact it shall remand the case for further proceedings before the administrative law judge." 30 U.S.C. § 823(d)(2)(C). Because of the pervasive ambiguity in the record on the question of whether the Secretary of Labor, through MSHA, has properly exercised her authority to regulate the cited working conditions at Penelec's Generating Station, and the importance of this question, we find it appropriate to order further proceedings. We encourage the Secretary to give serious consideration to the questions raised by this case and to follow the procedures in the OSHA-MSHA Inter-agency Agreement to resolve the conflicting positions taken on her behalf. To do otherwise would be to ignore the potential whipsaw effects to which an employer can be subjected when important jurisdictional issues appear to be resolved with no assurance that potentially competing agencies have reached a mutual and definitive determination as to their respective roles. 8/

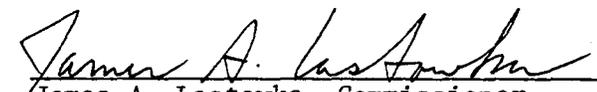
8/ In this regard, we note that in the Mine Act Congress directed the Secretary that:

(Footnote continued)

Accordingly, the judge's decision is vacated and the matter is remanded to the judge for further proceedings consistent with this opinion including the taking of further evidence on the jurisdictional question presented and the entry of a new decision. 9/


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


James A. Lastowka, Commissioner

footnote 8/ end

[i]n making a determination of what constitutes mineral milling..., the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 803(h)(i).

9/ Commissioner Nelson did not participate in the consideration or disposition of this matter.

Commissioner Doyle, dissenting:

The respondent, Pennsylvania Electric Company ("Penelec"), is the operator of an electric power generating station and has for some years been doing on-site processing of some of the coal used at of its generating station, in order to insure compliance with EPA emission standards, issued in 1977. The coal conveyor cited in this case transports coal received from the Helen and Helvetia Mines between bins on the generating station grounds, most of the coal eventually going to the cleaning plant. Trucked coal is transported on different conveyors with only the run-of-mine portion being diverted to the cleaning plant.

In January 1988, MSHA for the first time inspected the head drives of the 5A and 5B conveyors and sometime thereafter an MSHA district manager advised Penelec that MSHA was also asserting jurisdiction over additional areas of the power plant.

The case before us deals only with alleged violations with respect to the head drives and was submitted on stipulated facts. The administrative law judge found in favor of MSHA and Penelec petitioned for review, asserting that it was not subject to the Mine Act based on:

1. The plain language of the statute and its legislative history;
2. Its work not being that usually performed by an operator of a coal mine;
3. Its being the ultimate consumer of the coal.

The majority of the Commission finds that the processes performed at Penelec's plant "are performed to prepare the coal to meet particular specifications and emission requirements" and are thus "activities ... usually performed 'by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications.'" Slip op. at 6. The majority also finds Penelec's work to be "the type of work 'usually done by the operator of [a] 'coal mine.'" Slip op. at 7. They discount any exemption for the ultimate consumer of coal and, based on the language of the statute, conclude that the Secretary "properly could decide to make mine safety standards applicable to the disputed area." They are, however, unable to determine from the record whether the Secretary has made such a determination. Slip op. at 8. The majority cites numerous factors both within and outside of the record that show conflicting indications as to which agency in the Department of Labor exercises safety and health authority over operations such as Penelec's. Because of this ambiguity, they remand the matter to the administrative law judge for the taking of further evidence on the jurisdictional question and the entry of a new decision.

I disagree that the head drives of the 5A and 5B conveyors fall within the definition of a "coal mine" as set forth in the Mine Act or that they are subject to that jurisdiction simply because, in some instances, they convey run-of-mine coal to the preparation plant, as opposed to conveying processed coal. I further believe that the case should be decided on the record before us rather than being remanded for the taking of additional evidence.

Section 3(h), 30 U.S.C. §802(h), states:

(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

The "work of preparing coal" is defined in section 3(i), 30 U.S.C. §802(i), as follows:

[i] "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine.

A portion of the legislative history pertaining to these sections has been widely quoted in determining Mine Act coverage. That language states that the definition of a mine is to be given the broadest possible interpretation and that doubts should be resolved in favor of inclusion. However, examination of that entire passage of the legislative history indicates a context in which Congress was contemplating regulation of mines in a more traditional sense. The complete passage reads as follows:

Thus, for example, the definition of 'mine' is clarified to include the areas, both underground and on the surface, from which minerals are extracted (except minerals extracted in liquid form underground), and also, all private roads and areas appurtenant thereto. Also included in the definition of 'mine' are lands, excavations, shafts, slopes, and other property including impoundments, retention dams, and tailings ponds. These latter were not specifically enumerated in the definition of mine under the Coal Act. It has always been the Committee's express intention that these facilities be included in the definition of mine and subject to regulation under the Act, and the Committee here expressly enumerates these facilities within the definition of mine in order to clarify its intent. The collapse of an unstable dam at Buffalo Creek, West Virginia, in February of 1972 resulted in a large number of deaths, and untold hardship to downstream residents, and the Committee is greatly concerned that at that time, the scope of the authority of the Bureau of Mines to regulate such structures under the Coal Act was questioned. Finally, the structures on the surface or underground, which are used or are to be used in or resulting from the preparation of the extracted minerals are included in the definition of 'mine'. The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in U.S. Code Cong. & Admin. News 1977, 3401, 3414.

While that language is expansive, it is mine oriented, and it cannot be forgotten that the Act was intended to establish a "single mine safety

and health law, applicable to all mining activity." S. Rep. No. 461, 95th Cong., 1st Sess. 37 (1977) (emphasis added). "The statute is aimed at an industry with an acknowledged history of serious accidents." Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 594 (3d Cir. 1979). There is no indication of any intention to follow the coal wherever it might go and certainly no indication that Congress intended to regulate other industries such as electric utilities or steel mills as only recently asserted by the Secretary. ^{1/} Indeed, the courts have recognized that it is "clear that every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h)." Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1551 (D.C. Cir. 1984).

I recognize that, in addition to considering Congress' concerns as set forth in the legislative history, deference is generally to be accorded interpretations by the agency charged with enforcing the law. Here, however, the record contains no evidence that, since the Mine Act became effective in 1978, the Secretary has made any previous attempt, either by the issuance of regulations or otherwise, to include electric power plants within the Act's coverage or to put the operators of such facilities on notice of liability under the Mine Act. Nor does the record indicate that the efforts of a district manager to bring Pen-elec's facility within its coverage represents anything more than the district manager's own personal interpretation of the Mine Act.

It should be noted that the Secretary's counsel stated at oral argument that resolution of this case rests solely on the language of the Mine Act itself, which he asserted mandates coverage, and has nothing to do with deference to the Secretary's interpretation of the Mine Act. Tr. 32, Oral Argument, June 28, 1989. It is not surprising that the Secretary eschews deference to her interpretation of this portion of the Mine Act since the Secretary's policy with respect to whether electric utilities come within Mine Act coverage has been exhibited in a variety of ways as follows:

1. Her implied interpretation that coal handling at electric power generating stations does not come within the Mine Act, based on her failure to assert such jurisdiction for approximately ten years after passage of the Mine Act.

^{1/} This position was advanced by the Secretary during oral argument before the Commission in Westwood Energy Properties v. Secretary of Labor, MSHA, PENN 88-42R, Tr. 26, June 28, 1989.

2. Her position as set forth in an earlier Commission case that:

MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite to a particular memorandum incorporating this policy, MSHA and its predecessors have consistently found the production of power to be outside the jurisdiction of the agency.

MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal but has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the overall power plant process is more feasibly regulated by OSHA.

Utility Fuels Inc., Docket No. CENT 85-59 (Sec. Motion to Dismiss, November 29, 1985).

3. Her position that coal handling at electric utilities comes within coverage of the Mine Act, as asserted in this case.

4. Her position that coal handling at electric power generating facilities is governed by the OSHAct, as set forth in regulations recently proposed by OSHA for the operation and maintenance of electrical power generation facilities, which regulations include detailed provisions governing coal handling and processing at those facilities. 54 Fed. Reg. 4974-5024 (1989).

5. Her position that OSHA's proposed rules would apply only to electric generating facilities using already processed coal and that facilities using run-of-mine coal would be subject to Mine Act jurisdiction, as asserted by her counsel at oral argument before the Commission in this case. Tr. 24, 29, 33, Oral Argument, June 28, 1989. 2/

Because her interpretations have been neither longstanding nor consistent, any deference that would ordinarily be due to the Secretary in interpreting the Mine Act is not appropriate to this instance. See, e.g., I.N.S. v. Cardozo-Fonseca, 480 U.S. 421 (1987); American Mining Congress v. EPA, 824 F.2d 1177, 1182 (D.C. Cir. 1987); Sec. v. Beth-Energy Mines, 11 FMSHRC 1445, 1451 (August 1989); Sec. v. Florence Mining Co., 5 FMSHRC 189, 196 (February 1983).

2/ Since some conveyors in Penelec's operation transport coal that meets the emission standards without further processing, those conveyors would, under this theory, presumably remain subject to OSHA jurisdiction rather than MSHA jurisdiction, a position that seems to belie that any consideration was given "to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment," as required by Section 3(h) of the Mine Act, 30 U.S.C. §802(h)(1).

I also view the Commission's holding today as inconsistent with our precedent. The Commission previously found that a commercial dock in which coal was stored, broken and crushed did not fall within the coverage of the Mine Act because the coal preparation was not done to "meet customers' specifications nor to render the coal fit for any particular use." MSHA v. Oliver M. Elam, Jr., Co., 4 FMSHRC 5, 8 (January 7, 1982). After noting that the Commission had concluded in Elam that the Mine Act requires an inquiry "not only into whether the operation performs one or more of the listed work activities [in section 3(i)], but also into the nature of the operation performing such activities," the Commission today avoids an examination of the nature of Penelec's operation and finds that, because the station's coal must meet "particular specifications and emissions requirements," an electric power generating plant is really a coal mine. Slip op. at 6. (emphasis in original).

I am unable to find any basis in either the statute or the legislative history for the distinctions made by either the Secretary (if the conveyor belt moves processed coal, OSHA governs; if it moves run-of-mine coal, Mine Act governs) or the Commission majority (if coal processing is done other than to meet customer specifications, no Mine Act coverage; if coal is processed to meet "particular specifications," Mine Act coverage) nor do I see that these distinctions have anything to do with the Mine Act's overall aim, which is to regulate the safety and health of miners. Rather, I think these artificial distinctions have arisen as a result of various words and phrases of Mine Act definitions having been examined in isolation, with no consideration being given to Congress' overall aim, and with no consideration being given to the Commission's language in Elam, supra, that requires inquiry into "the nature of the operation" as well as examination of the particular operations being performed. ^{3/} Had Congress wanted to regulate not only mines but electric power generating stations, steel mills and other coal consumers, I think it would surely have given some indication of that intent.

^{3/} As noted by the United States Court of Appeals for the District of Columbia Circuit, statutes "must be interpreted in light of the spirit in which they were written and the reasons for their enactment." General Serv. Emp. U. Local No. 73 v. N.L.R.B., 578 F.2d 361, 366 (D.C. Cir. 1978). In the same vein, Judge Learned Hand observed that "the duty of ascertaining [the] meaning [of a statute] is difficult at best and one certain way of missing it is by reading it literally..." See Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841, 845 (2d Cir. 1963).

In determining what constitutes a "coal mine" as defined by the Mine Act, the majority also dismisses out of hand the precedential value of any cases decided under the Black Lung Benefits Act. 30 U.S.C. §901 et seq. (1982). I do not believe those cases can be so lightly dismissed. The majority has determined that these cases lack precedential value because "black lung benefits are financed by a trust, funded by a tax on 'coal sold by producers,'" whereas "the Mine Act's goal is to assure safe and healthful working conditions for the nation's miners." Slip op. at 8, n. 7. "Under the Mine Act 'coal mine' is defined in broad terms to better effectuate the salutary effects of that goal." Slip op. at 8, n. 7. In fact, the definition of "coal mine" set forth in section 3(i) of the Mine Act specifically applies not only to the Mine Act but also to the Black Lung Benefits Act. I find nothing in the Mine Act, the Black Lung Benefits Act or the legislative history that suggests the term is to be construed differently for purposes of determining Mine Act coverage than in determining Black Lung benefits coverage. And while the majority quotes the court in Stroh v. Director, Office of Workers' Compensation Programs, 810 F.2d 61 (3d Cir. 1987) to the effect that the function of a miner seeking black lung benefits should be "integral to the ... preparation of coal, not ancillary to the delivery and commercial use of processed coal" (slip op. at 8, n. 7) as additional evidence of the irrelevance of the Black Lung cases, I view the test developed by the Stroh court and other courts for eligibility for Black Lung benefits as quite relevant in determining when an operation falls within the definition of a "coal mine" as set forth in the Mine Act. ^{4/} In fact, the United States Court of Appeals for the Third Circuit, in deciding a black lung case, made specific reference to its earlier holding in Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), a Mine Act case, as authority for its construction of the terms "coal mine" and the "work of preparing coal." Dowd v. Director, OWCP, 846 F.2d 193, 195 (3d Cir. 1988).

^{4/} The test set forth is Stroh and earlier cases for determining eligibility for black lung benefits involves a two-prong test, the first being a "situs" test, which requires work in or around a coal mine or coal preparation facility and has required the courts to construe the terms "coal mine," and "work of preparing coal" as defined in section 3 of the Mine Act. The second prong is the "function" test referred to by the majority, which requires that the claimant's job be "integral to the extraction or preparation of coal, not ancillary to the delivery and commercial use of processed coal." It should be noted that, if one agrees with the Secretary and the majority that Penelec's operations include "coal preparation," those of Penelec's employees who work in such preparation would fall within the definition of "miner" set forth in the Black Lung Benefits Act, i.e., "... any individual who works or has worked in or around a ... coal preparation facility in the ... preparation of coal." 30 U.S.C. §902(d).

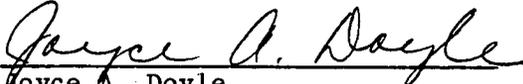
The Secretary also asserts that the Black Lung cases are of no avail to Penelec because they involve "the handling of coal that already had been prepared." Sec. br. at 14. I believe the Secretary misreads those cases. In the cases to which she refers, the courts have made the determination, as part of their construction of the terms "coal mine" and "the work of preparing coal," that once coal has entered the stream of commerce or reached the ultimate consumer, coal preparation has been completed and that, thus, the facilities at which those claimants worked did not fall within the definitions of "coal mine" or "work of preparing coal" set forth in sections 3(h) and 3(i) of the Mine Act. Based on their determination that the term "coal preparation" was much narrower in scope, the claimants were found ineligible for benefits. In Eplion v. Dir., OWCP, 794 F.2d 935 (4th Cir. 1986), cited by the Secretary, the mine operator washed coal for a second time because of dust complaints. Because the washing was "not necessary for processing of the coal into its marketable form," the court declined to extend the definition of a "coal mine" to include that facility. Eplion v. Director, OWCP, supra, at 937. (emphasis added). Likewise, the court in Southard found that the "preparation of coal occurs precedent to its retail distribution and consumption." Southard v. Director, OWCP, 732 F.2d 66, 69 (6th Cir. 1984). Accord Director, OWCP v. Ziegler Coal Co., 853 F.2d 529, 536 (7th Cir. 1988); Johnson v. Weinberger, 389 F. Supp. 1296 (S.D. W.VA. 1974).

Also, as noted by the Secretary, the Third Circuit in Dowd, found the claimant to be a miner, but in so doing stressed that "the claimant's employer ... does not consume the coal, and does not utilize coal to produce a product other than coal." Dowd, supra, at 195. As further noted by the Secretary, the court in Stroh found the claimant to be a miner but also emphasized that the "processing plant to which Stroh delivered was not an ultimate consumer..." Stroh, supra, at 64. Similarly, the Fourth Circuit in Roberts v. Weinberger found the claimant to be a miner, stating that coal is extracted and prepared when it is "in condition for delivery to distributors and consumers." Roberts v. Weinberger, 527 F.2d 600, 602 (4th Cir. 1975). These cases, while not affirmatively holding that coal consumers do not fall within the definition of "coal mine," expressly limit their holdings to facilities that are not coal consumers.

As noted above, I believe that, while the definition of "coal mine" as set forth in the Mine Act is to be broadly interpreted, the interpretation is not without limitations. I am of the opinion that the plain language of the statute does not bring Penelec's operation within coverage of the Mine Act, that the legislative history does not suggest the breadth of coverage asserted by the Secretary and that the

Secretary's interpretation, as set forth in this case, is not entitled to deference. In addition, I am not convinced that ultimate consumers, engaged in the production of a product other than coal, are subject to Mine Act jurisdiction.

For the foregoing reasons, I would reverse the judge and dismiss the case against Penelec.


Joyce A. Doyle
Commissioner

Distribution

John P. Proctor, Esq.
Bishop, Cook, Purcell & Reynolds
1400 L Street, N.W.
Washington, D.C. 20005

Carl C. Charneski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. PENN 86-262
OTIS ELEVATOR COMPANY :

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

DECISION

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

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), we are asked to decide whether Commission Administrative Law Judge Roy J. Maurer erred in concluding that Otis Elevator Company ("Otis") was the type of independent contractor that falls within the definition of "operator" as set forth in the Mine Act, and whether substantial evidence of record supports his determination that Otis violated 30 C.F.R. § 75.1725(a) by improperly installing a governor rope on a mine elevator. 9 FMSHRC 1933 (November 1987)(ALJ). 1/ We granted Otis' petition for discretionary review and its motion to consolidate this proceeding for purposes of briefing and oral argument with Otis Elevator Company, Docket Nos. PENN 87-25-R, 87-26-R, and 87-86. For the reasons set forth below, we affirm the judge's conclusions in the present proceeding as to both issues presented.

1/ 30 C.F.R. § 75.1725(a) 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.

Factual and Procedural Background

Otis is a company engaged in the business, among other things, of providing maintenance and repair services to all types of elevators. Elevators serviced by Otis are located in various establishments including office buildings, hospitals, factories, residential buildings, and mines. In the case at hand, Otis serviced two elevators located in the Greenwich No. 1 underground coal mine of the Pennsylvania Mines Corporation ("PMC").

The work relationship between PMC and Otis was governed by the terms of an elevator service and maintenance contract, which commenced January 1, 1986, and continued in force during all of 1986. The contract covered five elevators located in mines owned by PMC, including the North Portal elevator and the Main A elevator located in the Greenwich No. 1 Mine. Exh. G-1.

Essentially, the terms of the contract required Otis to provide its own qualified personnel to maintain PMC's elevators in proper and safe operating condition. Specifically, the contract required Otis to "regularly and systematically examine, adjust, lubricate as required, and repair or replace if warranted" all electrical and mechanical parts and accessory equipment of the elevator apparatus; to renew all wire ropes and all travelling cables as necessary; to periodically examine all safety devices and governors; and to make a customary annual no-load safety test, a sixty-day test, and a five-year full-load safety test. The contract also included "emergency shutdown callback service" and "trouble between ... regular examinations service." Exh. G-1.

Ron Riva, chief electrician at PMC's No. 1 Mine for 13 years, testified that Otis employees "worked with [him]" in that they either reported to him when coming onto mine property or corrected elevator problems as indicated by Riva or any other foreman. Riva explained that the weekly maintenance by Otis included checking tips, brushes, ropes, switches, and "really anything that pertained to elevator maintenance," and that, under the 60-day safety test, Otis also "might" [measure] the ropes." Tr. 22-24. According to Riva, Otis also shortened or replaced hoist ropes and governor cables and, in general, performed "trouble-shooting" duties on an emergency "anytime" basis to restore elevator service when PMC employees were unable to do so. Tr. 24. Riva estimated that Otis' weekly inspections required about one and a half hours, if no special problems were involved. He stated that Otis was called for service more frequently during the winter when mine elevators experience more problems because of cold temperatures.

Otis employees were not supervised by PMC employees. They normally carried out their duties in the "penthouse" (the surface area housing the elevator controller and motor), the shaft (the area within which the elevator ascends and descends), and the underground pit area (the bottom of the shaft where the switches and controls are located). According to Riva, both elevators at the No. 1 Mine were used to transport the production crews into and out of the mine, an average of

200 people each day at the Main A elevator and 50 at the North Portal. Both elevators also served as mine escapeways required by regulations of the Department of Labor's Mine Safety and Health Administration ("MSHA").

On March 3, 1986, Leroy Niehenke, an MSHA electrical inspector with ten years experience in inspecting mine elevators, issued the section 104(a) citation in question, alleging a violation of 30 C.F.R. § 75.1725(a) in that two Otis employees had installed a new governor rope on the North Portal elevator in an unsafe manner, creating a hazard to the mine employees. The Secretary filed a petition for assessment of civil penalty and this matter proceeded to hearing before Judge Maurer.

Before the judge, Otis argued that it was not engaged in mine construction or extraction work, did not control any area of the mine, and did not maintain a continuing presence at the mine. On this basis, it contended that it was not an "operator" within the meaning of the Mine Act under what it viewed as the controlling legal precedents of National Indus. Sand Ass'n v. Marshall, 601 F.2d 289 (3rd Cir. 1979), and Old Dominion Power Company v. Secretary of Labor & FMSHRC, 772 F.2d 92 (4th Cir. 1985). Otis further argued that its activities were properly subject to regulation under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1982) (the "OSHAct"), not the Mine Act. As to the alleged violation of 30 C.F.R. § 75.1725(a), Otis contended that the mandatory standard was so vague as to be unenforceable and that, in any event, the inspector used improper criteria in determining that a violation occurred.

In finding Otis to be an operator within the meaning of the Mine Act, the judge rejected Otis' interpretations of National Sand and Old Dominion, supra. National Sand, the judge stated, held only that an independent contractor working on mine property is not an "operator" under the Act if its contact with the mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed. 9 FMSHRC at 1935-36. The judge also distinguished Old Dominion, involving an electric utility, in which the utility's only contact with the mine was inspection, maintenance and monthly reading of an electric meter for billing purposes. After finding that the employees of Old Dominion Power Company ("Old Dominion") rarely, if ever, went on mine property and hardly, if ever, came into contact with mining hazards, the Fourth Circuit found that the utility was not an operator. 9 FMSHRC at 1936-37. Contrasting the facts in this case with those involved in the court decisions, the judge concluded that Otis' contractual obligations and performance thereof constituted a continuing and substantial, as opposed to de minimis, presence at Greenwich No. 1 Mine. 9 FMSHRC at 1937. Although noting that the elevator was not used to transport coal and was not, therefore, a part of the coal extraction process per se, he nevertheless found that because the North Portal elevator transported approximately 20 percent of the work force into and out of the mine on a daily basis and was additionally a designated escapeway, it was an "essential ingredient involved in the coal extraction process." Id. Last, he determined that Otis was the party responsible for the cited violation and was also the one best suited to both correct it and prevent its recurrence. Id. Accordingly, the judge

determined that Otis was properly subjected to Mine Act jurisdiction.

As to the violation of the mandatory standard, the judge, citing Alabama By-Products Corporation, 4 FMSHRC 2128 (December 1982), involving a similar challenge to section 75.1725(a), concluded that the standard was not "so overbroad and/or so vague" as to be unenforceable. 9 FMSHRC at 1937-38. While agreeing that the inspector had relied in part on American National Standards Institute ("ANSI") standards not incorporated into the MSHA regulations, the judge found that the standards did provide some "guidance" as to the proper method for configuring the elevator's wire rope terminations. 9 FMSHRC 1940. He concluded that the elevator governor assembly and, therefore, the elevator, were in unsafe condition within the meaning of section 75.1725(a), and thus he upheld the inspector's finding as to a violation of the standard. 9 FMSHRC at 1940-42. The judge also affirmed the inspector's designation of the violation as being of a significant and substantial nature and assessed a civil penalty of \$750.

II.

Coverage of Otis under the Mine Act

We begin by considering whether Otis was an "operator" subject to the coverage of the Mine Act. Before us, Otis argues that it is a business entity subject to regulation by the Occupational Safety and Health Administration ("OSHA") under the OSHAct, rather than by MSHA, that it is not engaged in mine construction or extraction and that it does not maintain a "continuing presence" at the PMC mine. Therefore, Otis asserts that under the controlling precedent of Old Dominion, it is not an "operator" or "independent contractor" within the meaning of section 3(d) of the Mine Act. 2/ We disagree.

2/ The relevant sections of the Mine Act are:

Sec. 3. For the purposes of this [Act], the term --

* * *

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

* * *

(h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in non liquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools or other

Section 3(d) of the Mine Act expanded the definition of "operator" under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("1969 Coal Act"), to include "any independent contractor performing services or construction at such mine." This Commission has consistently recognized that the inclusion of independent contractors within the statutory definition of "operator" clearly reflects Congressional desire to subject such contractors to direct enforcement by MSHA under the Mine Act. See, e.g., Old Ben Coal Co., 1 FMSHRC 1480, 1481, 1486 (October 1979), aff'd, No. 79-2367 (D.C. Cir. December 9, 1980)(unpublished opinion); Calvin Black Enterprises, 8 FMSHRC 1151, 1155 (August 1985). We also recognize that not all independent contractors are operators under the Mine Act, and that "there may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be

property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this [Act], the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(h)(2) For purposes of [titles] II, III, and IV of this [Act], "coal mine" means an area of land and all structures, facilities, machinery, tools equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

* * *

Sec. 4. Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this [Act].

30 U.S.C. §§ 802(d) & (h)(1) & (2) & 803.

difficult to conclude that services were being performed." National Sand, supra, 601 F.2d at 701. See also Old Dominion, supra.

We have no difficulty in finding that Otis, from a practical and economic standpoint, is an independent contractor performing services at PMC mines. Plainly, Otis is an independent business entity that, by contract with PMC, has the sole responsibility for examining mine elevator equipment owned by PMC and maintaining it in safe operating condition. There is also no question that the elevators serviced by Otis fall within the definition of "coal mine" under section 3(h) of the Act (n.2, supra), as "structures, facilities, machinery, or equipment used in the work of extracting coal."

The legislative history of the Mine Act clearly shows that the goal of Congress, in expanding the definition of "operator" in the Mine Act to include "independent contractors," was to broaden the enforcement power of the Secretary so as to reach not only owners and lessees but a wide range of independent contractors as well. In explaining this amendment, the key Senate report on the bill enacted into the Mine Act referred not only to those independent contractors involved in mine construction but also to those "engaged in the extraction process." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978) ("Legis. Hist.") Similarly, the Conference Report referred to independent contractors "performing services or construction" and "who may have continuing presence at the mine." S. Conf. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977), reprinted in Legis. Hist. 1315.

Two important court decisions have addressed the meaning of and relationship between the terms "independent contractor" and "operator" in the Mine Act. In National Sand, the Third Circuit, construing the definition of "operator" in the Mine Act, concluded that "some, if not all, independent contractors are to be regarded as operators," with the understanding that there may be a point at which the services provided or the degree of involvement in mining activities is so remote or so infrequent that they cannot be considered as operators. National Sand, 601 F.2d at 701. The Fourth Circuit, in Old Dominion, held that Congress intended to include as operators, "only those independent contractors who are involved in mine construction or extraction and who have a continuing presence at the mine." 772 F.2d at 96 (emphasis added). Finding that the employees of Old Dominion, an electric utility, "rarely go upon mine property," that they "hardly if ever came into contact with the hazards of mining," and that their "only presence on the mine site was to read an electric meter once a month and to provide occasional equipment servicing, the Court concluded that the utility's contacts were "so rare and remote from the mine construction or extraction process, [it did] not meet this definition of 'operator.'" 772 F.2d at 96, 97 (emphasis added).

To adopt in this case the restrictive interpretation of Old Dominion urged by Otis would, we believe, frustrate Congress' clear intent, when it expanded the definition of "operator" in the Mine Act,

to broaden and facilitate direct regulation of independent contractors on mine property.

Obviously, "mine construction" and the "extraction process" include a myriad of specialized services essential to those activities. It would have been difficult, in our view, for Congress to have envisioned that myriad and enumerated them under section 3(d) of the Act. Rather than being in conflict with National Sand, we read the Fourth Circuit's Old Dominion decision as examining the independent contractor's proximity to the extraction process and the extent of its presence at the mine to determine whether the independent contractor is an operator under the Mine Act. Considering the factual basis relied on by the Fourth Circuit in Old Dominion, we find that the services performed by Otis and the continuity of its presence at the mine site are entirely different qualitatively and in magnitude.

In Old Dominion, as noted, the Court found that the power company employees' sole contact with the mine was the inspection, maintenance and monthly reading of the power company's meter, for billing purposes, and that its employees rarely went upon mine property and hardly, if ever, came into contact with mining hazards. The substation in which the meter was located was in a remote area of mine property and was isolated by a locked chain link fence. 772 F.2d at 93, 96. In contrast, Otis employees worked in areas of the PMC mine property that were clearly working areas of a mine, totally regulated by MSHA. Otis employees worked both on the surface and in underground sections of the mine elevator system, in areas where miners normally worked and travelled, and they were exposed to many of the same hazards as the PMC miners. Otis' contacts with the PMC mine were certainly more frequent and of a longer duration than the contacts involved in Old Dominion.

Moreover, the mine elevator was used to transport some 20 percent of the mine's work force into and out of the mine on a daily basis and was also a designated escapeway -- a work setting far different from the isolated, remote electric substation involved in Old Dominion. The Fourth Circuit spoke in terms of involvement in or proximity to the extraction process. We are satisfied that a mine elevator used for daily transport of the work force into and out of the mine has a sufficient proximity in nature and purpose to the extraction process to be fairly considered, in the judge's words, "an essential ingredient involved in [that] process." 9 FMSHRC at 1937. Since Otis' employees were working in the center of mining activities while servicing equipment essential to the mining process, were exposed to mining hazards, and had a direct effect on the safety of others because of their exclusive control over the safety of the mine elevators, we likewise conclude that their work was sufficiently related to the overall extraction process to bring Otis within the Mine Act's ambit.

Finally, Otis urges that its presence on the PMC mine ought to be regulated under the OSHAct rather than under the Mine Act. The Secretary of Labor enforces both the OSHAct and the Mine Act, and exercises administrative discretion in determining which of her two enforcement agencies, OSHA or MSHA, should exercise jurisdiction under potentially conflicting circumstances. Court precedent makes clear that

the Secretary is entitled to great deference in interpreting and enforcing the Mine Act. See e.g., Brock v. Cathedral Bluff Shale Oil Co., 796 F.2d 533, 537 (D.C. Cir. 1986). As the Court made clear in Cathedral Bluffs, that deference is particularly due with respect to the Secretary's "view of the effect of [her] own actions taken under the Act...." Id. See also Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1552 & n.9 (D.C. Cir. 1984).

In addition, section 4(b)(1) of the OSHAct, 29 U.S.C. 653(b)(1), states in pertinent part:

Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Addressing the question of overlapping jurisdiction under the OSHAct, the Fourth Circuit, in Southern Railway Company v. Occupational Health Review Commission, 539 F.2d 335 (1976), concluded that exemption from the OSHAct applies whenever another federal agency has actually exercised its statutory authority to regulate employee safety. 539 F.2d at 339. The Court stated that when the facts show that a federal agency has not exercised its statutory authority to regulate employee safety, the OSHAct applies, but where another federal agency has exercised its statutory authority over standards affecting safety or health in the area in which the employee goes about his daily tasks, the authority of OSHA is foreclosed. Id. See also Taylor v. Moore McCormack Lines, Inc., 621 F.2d 88, 91 (4th Cir. 1980). There is no indication in this record that OSHA had ever attempted to regulate Otis activities on mine property. See Exh. G-1, G-9.

As we have already noted, the record in this case demonstrates that the areas in which Otis employees worked were areas of the mine completely regulated by MSHA. Otis employees worked both on the surface and underground in areas where miners normally worked and travelled and were exposed to many of the same hazards. We also note that Otis had earlier registered with MSHA as an independent contractor pursuant to 30 C.F.R. Part 45 and paid civil penalties for previous violations under the Mine Act.

Accordingly, we affirm the finding of the judge that Otis, by virtue of the services provided and its continuing presence at the mine site, as required by the contract between it and PMC falls within the definition of "operator" set forth in the Mine Act and is, therefore, subject to its jurisdiction.

III.

The violation of 30 C.F.R. § 75.1725(a)

We address the question of the violation of section 75.1725(a). The citation issued by Inspector Niehenke with respect to the elevator's governor stated:

The smelter socket termination and Crosby Clamp termination were not properly made because the basket was not poured with smelter to the top of the small end of this basket and holes in the smelter existed on the wide end of this basket. The Crosby Clamp termination was made with the (2) $\frac{1}{2}$ " saddles on the dead end of this wire rope and there should be (3) three Crosby Clamps used on this $\frac{1}{2}$ " wire rope termination.

In general, a governor is a device for regulating or controlling the speed of the engine or motor. See Bureau of Mines, U.S. Dep't of Interior, Dictionary of Mining, Mineral, and Related Terms 501 (1968) ("DMMRT"). The governor rope, a one-half-inch diameter steel rope, is attached at the top of the elevator car to a lever and to the bottom of the car by bolt clamps. At the top of the shaft, the rope passes through a sheave wheel (a grooved wheel that guides or supports a cable or rope between the load and the hoisting engine (DMMRT 997)), which is located directly underneath the governor mechanism. At the bottom of the shaft, the rope runs over a second sheave wheel. These wheels turn as the rope moves, causing the flyballs on the governor mechanism to rise as the speed of the rope increases. The governor mechanism senses the speed of the elevator through the governor rope, and if the elevator speed exceeds 125 percent of its rated speed, centrifugal force applied to the flyballs raises them to the point where two metal jaws in the governor mechanism clamp down on the governor rope. In turn, the governor pulls up the lever at the top of the car, activating the safeties and stopping the descent of the elevator car. (The actual raising and lowering of the elevator during normal operation is controlled by other ropes attached to the top of the elevator car.)

The alleged violation involved the manner in which the governor rope had been attached at both the top and bottom of the elevator car. At the top of the car the rope is attached to the safety lever by means of a socket, a tapered metal basket about $2\frac{1}{2}$ inches in length. The rope is passed through an opening in the smaller end, about five inches of the rope's end is unraveled, and the separated strands are then twisted into a "rosette" shape so as to make the end of the rope larger than the opening through which it had passed. The rosette is then pulled back into the socket, and "babbitt" (a molten alloy of tin, copper and antimony (see DMMRT 69; Tr. 105)) is poured over the rosette, filling up the socket. When the babbitt hardens, it produces a secure connection between the rope and the socket.

Inspector Niehenke testified that the babbitt had not adhered to and covered the wire rope, an indication that insufficient babbitt had been poured into the socket to provide a secure connection of sufficient strength. Niehenke believed that in an emergency, this problem would have caused the governor rope, in a free fall, to come out of the socket, thus failing to activate the lever and the safeties and allowing the elevator to continue in an uncontrolled fall.

Niehenke also testified that the governor rope should be attached to the bottom of the car by three "U" bolts, called Crosby clamps, but

that in the cited instance only two bolts had been used. Further, he stated that they had been installed with the "U" end of the bolt placed over the "live" end of the rope (the end of the rope attached to the equipment) rather than over the "dead" end (the end of the rope that is looped around and cut off). In the inspector's opinion, the "U" bolts should have been placed over the "dead" end of the rope because, as installed, the rope wires could be crushed, resulting in the failure of the connection.

Niehenke's criteria for inspecting elevator ropes and the methods for properly attaching a governor rope were essentially based on the directions and specifications set out in the ANSI publication "Wire Ropes for Mines," and on the MSHA "Inspector's Manual" for elevators. Tr. 58, 60, 63-68, 70, Exh. G-5, G-7. MSHA regulations themselves do not set requirements for proper elevator wire rope terminations, nor are the ANSI standards incorporated by reference into the MSHA regulations. Tr. 103-06.

Ronald Gossard, an MSHA electrical engineer, testified that the conditions described by the inspector indicated unsafe terminations on the governor rope. Given these conditions, Gossard believed that the elevator would operate safely until the governor mechanism was activated, at which time the terminations and the safety mechanisms would fail. Gossard added that failure to fill the basket with babbitt would also allow moisture, consisting of acidic mine water, to accumulate in the basket and quickly corrode the rope in that location.

James Beattie, District Maintenance Supervisor for Otis, stated that even without any babbitt in the socket, the "rosetted" rope end could not possibly be pulled through the small end of the basket and the connection would not fail. Tr. 185-88. In support of his opinion, Beattie showed a videotape of a laboratory test performed by Otis on a one-half inch wire rope, with an unbabbited socket at one end, and one "U" bolt correctly installed at the other. When a force of 3,200 pounds was applied, there was no slippage at either connection. Exh. R-7, Tr. 189-200. Beattie also stated that three "U" bolts were unnecessary and, while he would have changed the rope attachments had he seen them, he did not consider them to be unsafe.

Before the judge, Otis contended that section 75.1725(a) is unconstitutionally vague because it fails to specify the standard of conduct required in order to comply with its terms, and because MSHA has improperly cited ANSI standards as mandatory regulations in alleging a violation under the Mine Act.

On review, Otis contends that section 75.1725(a) is vague as applied, to the extent that the judge used the ANSI standards to determine what a "reasonably prudent person" would do with respect to the equipment in question pursuant to the test set forth in Alabama By-Products, supra. Otis also relies on Jim Walter Resources, Inc., 3 FMSHRC 2488, 2490 (November 1981), in which the Commission held that the ANSI wire rope criteria imposed no mandatory requirements under MSHA regulations.

In Jim Walter Resources, the Commission held that the wording of former standard 30 C.F.R. § 77.1903(b), which provided that ANSI standards "shall be used as a guide," was too ambiguous to impose a mandatory duty upon operators since it employed both mandatory and advisory language. 3 FMSHRC at 2490. The Commission agreed, however, that, in the absence of applicable mandatory standards, "an operator's consultation with recognized authorities on safe work practices is desirable." 3 FMSHRC at 2490 n. 4. In Alabama By-Products, construing the same standard involved here, the Commission held that analysis of an alleged violation under the general language used in this regulation "is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." 4 FMSHRC at 2129. We find the judge's decision consistent with these decisions.

The judge's decision carefully explains that the ANSI standards were referred to only as guidelines in determining the condition of the rope terminations, not as mandatory safety standards by which the violation was established. He expressly stated that the ANSI standards "provide some guidance to the inspector and myself" in determining whether the rope assembly was unsafe, and that non-compliance with those standards was not per se determinative of a violation -- but rather was merely "a single piece of the equation." 9 FMSHRC at 1740. The judge, with equal clarity, applied the Alabama By-Products reasonably prudent person test in finding the existence of a violative condition. 9 FMSHRC at 1937-42. We therefore conclude that the judge correctly applied Commission precedent set out in Alabama By-Products and Jim Walter Resources, supra, and that, to the extent he relied on testimony concerning ANSI standards, he correctly considered them only as guidelines, not as mandatory standards, for purposes of a proper application of the reasonably prudent person test.

Finally, we consider Otis' argument that the finding of a violation is not supported by substantial evidence of record. That standard of review requires a weighing of all probative record evidence and an examination of the fact finder's rationale in arriving at the decision. See, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Arnold v. Secretary of HEW, 567 F.2d 258, 259 (4th Cir. 1977). In order to satisfy that standard, this Commission has consistently held that a judge must sufficiently summarize, analyze and weigh the relevant testimony of record, and explain his reasons for arriving at his decision, thereby affording the Commission a sufficient basis for review on substantial evidence grounds.

In this instance, the judge has carefully summarized the testimony of the inspector and the two expert witnesses in detail. We agree, as the judge found, that the factual testimony of the inspector concerning the condition of the governor rope terminations was essentially un rebutted by Otis. The judge's decision weighs the opinion testimony of the expert witnesses and, in our view, adequately states the judge's rationale in accepting the testimony of MSHA's witness that the babbitted termination would likely fail in an emergency situation. Our

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reading of the record also supports the judge's conclusion that this testimony was basically unrebutted by Otis. The decision further describes the contents of the video taped laboratory experiment conducted by Otis and sets forth the judge's reasons for finding the test unpersuasive (the absence of those environmental conditions in which the equipment must operate and failure to account for the effect that an initial shock load would have on the inadequately babbitted termination). The Commission has consistently stated that a judge's findings of fact and credibility resolutions will not be overturned lightly, and we find no basis in the record of this proceeding that would justify our taking that extraordinary step. See e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629 (November 1986). 3/

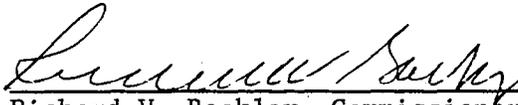
IV.

Conclusion

Accordingly, we affirm the judge's decision.



Ford B. Ford, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

3/ In its petition for discretionary review, Otis challenged the judge's finding that the violation was of a significant and substantial nature but did not discuss the issue in its briefs or at oral argument. Notwithstanding this virtual waiver of the issue, we have also examined the record with respect to that finding. We are mindful, as was the judge, of the consequences of any serious elevator failure. We conclude that the judge's findings in this regard are supported by substantial evidence and are consistent with applicable Commission precedent.

Commissioner Lastowka, dissenting:

The issue before us appears relatively straightforward: does the periodic maintenance and repair work performed by Otis Elevator Company on elevators at an underground mine site render Otis a mine "operator" within the meaning of the Mine Act. Because of the Mine Act's expansive definitions of the terms "mine" and "operator", the Secretary of Labor's assertion that Otis is an "operator" does have a certain surface appeal. I believe, however, that a deeper inquiry is required and that when the roots of the definitional debate before us are traced with exactitude, including a careful analysis of applicable judicial precedent, the conclusion that Otis Elevator Company is not a mine operator is compelled.

To be sure, if the definition of "operator" set forth in the Mine Act is given a purely literal reading, Otis loses. Otis is an "independent contractor performing services ... at [a] mine." 30 U.S.C. §802(d). The fact is, however, that the definition does not come before us as a *tabula rasa*, and in order to undertake a proper analysis the extensive legislative and judicial writings directly bearing on its meaning must be considered. 2A Sutherland Statutory Construction §48.01 (4th ed. 1984).

The appropriate starting point for analysis of the meaning of the Mine Act's definition of "operator" is the definition that was set forth in the Mine Act's predecessor statute, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(the "Coal Act"). Section 3(d) of the Coal Act defined "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal mine." Thus, the Coal Act made no specific reference as to the Act's application to independent contractors performing work at a mine site. Consequently, soon after the start of enforcement of the Coal Act litigation arose over how the Act was to be applied to the work activities of such independent contractors.

In Laurel Shaft Construction Co., 1 IBMA 217 (1972), the Department of Interior's Board of Mine Operations Appeals held that an independent contractor retained to construct a ventilation shaft at a mine was an "operator" of a "mine" within the meaning of the Coal Act's definitions and subject to the Act's requirements. Subsequently, however, in a suit for declaratory judgment filed in federal district court it was held that coal mine construction companies that performed construction work at mine sites on behalf of mine operators were not "operators." Associated Bituminous Contractors v. Morton, No. 1058-74 (D.D.C., May 23, 1975). In accordance with this decision, the Secretary of Interior adopted a policy requiring that mine operators be charged for all violations of the Coal Act committed by independent contractors.

Following the Secretary's change in enforcement policy, the Bituminous Coal Operators' Association ("BCOA") in turn filed another action in federal district court seeking a declaratory judgment that mine operators are not responsible for violations committed by independent construction companies. The district court held that although construction contractors were not "operators" under the Coal Act, they were "agents" of the mine operator. On this basis, the court concluded that mine operators could be held liable for violations of the Coal

Act committed by their "agent" contractors. BCOA v. Hathaway, 400 F. Supp. 371 (W.D. Va. 1975). The appeal of this decision led to the Fourth Circuit's landmark decision in BCOA v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977).

At the outset of its decision in BCOA v. Secretary, the Fourth Circuit summarized the types of work usually performed at mine sites by the contractors claiming to be outside the Coal Act's jurisdiction:

Mining companies frequently employ independent, general contractors for both surface and subsurface construction work. These construction companies build coal preparation plants, tipples, conveyor equipment, storage silos, bath houses, office buildings, power lines, roads, drag lines, and shovels. They also construct underground facilities, such as shafts, slopes, and tunnels. Their work may be done before or after the mine is in operation. The construction companies, however, do not process the coal that they remove.

547 F.2d at 243.

The court rejected the argument that such activities fell outside the Coal Act's definition of "mine." The court stated: "When a contractor sinks a mine shaft, excavates a tunnel, or builds a coal preparation plant, it is constructing a facility "to be used in" the work of extracting or processing coal." Id. at 245 (emphasis added). The court observed that workers engaged in such activities are frequently exposed to the same hazards as miners, giving as an example an instance where a construction contractor hired by a mine operator to excavate three shafts failed to comply with mine safety standards and caused a methane explosion. Id. The court therefore concluded that "construction companies must observe the health and safety standards set forth in the Act and the regulations that implement it", and that "the Act authorizes the Secretary to ...[proceed] against a construction company that violates the Act while it is exercising supervision and control over a facility that is to be used for extracting or processing coal." Id. at 245, 246 (emphasis added).

The next major event in the development of the issue before us is the amendment of the definition of mine "operator" by the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). The litigation summarized above had not gone unnoticed during Congress' consideration of extensive amendments to the Coal Act. In direct response to this litigation, Congress amended the definition of "operator" to read as follows:

"[O]perator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.

30 U.S.C. §802(d)(emphasis added). The Senate Committee Report accompanying the proposed definitional amendment explained:

[T]he definition of mine "operator" is expanded to include "any independent contractor performing services o[r] construction at such mine." It is the Committee's intent to thereby include individuals

or firms who are engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of the Federal Mine Safety and Health Act of 1977. In enforcing this Act, the Secretary should be able to issue citations, notices and orders, and the Commission should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F.2d 240 (C.A.4, 1977).

S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978) ("Legis. Hist.") (emphasis added).

The Joint Explanatory Statement of the Conference Committee also specifically addressed the reason for the change in the definition:

The Senate Bill modified the definition of "operator" to include independent contractors performing services or construction at a mine. This was intended to permit enforcement of the Act against such independent contractors, and to permit the assessment of penalties, the issuance of withdrawal orders, and the imposition of civil and criminal sanctions against such contractors who may have a continuing presence at the mine.

S. Rep. No. 95-461, 95th Cong. 1st Sess. 37; Legis. Hist. at 1315 (emphasis added).

After passage of the Mine Act but prior to its effective date, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in the appeal of the district court's decision in ABC v. Morton, supra, interpreting the Coal Act's definition of "operator". ABC v. Andrus, 581 F.2d 853 (D.C. Cir. 1978). Largely guided by the Fourth Circuit's decision in BCOA v. Secretary, the D.C. Circuit held that "an independent construction company, which operates, controls, or supervises excavation work on shafts, slopes, or tunnels to be used in the work of extracting coal from a coal mine is an 'operator of a coal mine' within the meaning and purposes of" the Coal Act. 581 F.2d at 862 (emphasis added)(footnote omitted). Notable in its decision is the court's discussion of the familiar rule of statutory construction, *ejusdem generis*.¹ Applying this

¹ The maxim *ejusdem generis* is described as follows:

Where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. (citations and footnote omitted).

rule, the court concluded that the general phrase "other person" in the definition of "operator" referred to "other persons of the same class as those enumerated by the specific words. Thus, the other persons must be similar in nature to owners and lessees." 581 F.2d at 862 (footnote omitted).

Importantly, this same interpretative principle has guided the two courts of appeals that have construed the Mine Act's amended definition of "operator." In National Industrial Sand Ass'n v. Marshall, 601 F.2d 689 (3d Cir. 1979) ("NISA"), the court was faced with a challenge to miner training regulations promulgated by the Secretary of Labor. In the course of its decision the court addressed the proper interpretation to be given to the definition's inclusion of "independent contractor[s] performing services or construction at such mine." The court stated:

The reference made in the statute only to independent contractors who "perform[] services or construction" may be understood as indicating ... that not all independent contractors are to be considered operators. There may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or *de minimis* that it would be difficult to conclude that services were being performed. Such a reading of the statute is given color by the fact that other persons deemed operators must "operate[], control[], or supervise[]" a mine. Designation of such other persons as operators thus requires substantial participation in the running of the mine; the statutory text may be taken to suggest that a similar degree of involvement in mining activities is required of independent contractors before they are designated as operators.

601 F.2d at 701 (emphasis added)(footnote omitted). As support for its conclusion, the Third Circuit quoted the D. C. Circuit's discussion of the doctrine of *ejusdem generis*, noting that the rationale of ABC v. Andrus "also sheds light on the 'independent contractor' phrase in the definition of operator under the Mine Act." 601 F.2d at 701-02 n. 42.

The Fourth Circuit thereafter completed the case law circle concerning the interpretation of "operator" with the issuance of its decision in Old Dominion Power Co. v. Donovan, 722 F.2d 92 (4th Cir. 1985). In Old Dominion an employee of an electric utility was electrocuted while on a service call to an electrical substation owned by the mine operator and located on mine property. The Secretary charged Old Dominion with failure to comply with a mandatory mine safety standard prohibiting working on energized high-voltage lines. Rejecting Old Dominion's argument that it was not a mine "operator", the Commission upheld the Secretary's authority to proceed against Old Dominion under the Mine Act on the basis that Old Dominion was an independent contractor performing services at a mine and therefore fell within the Act's definition of "operator." On appeal, however, the Fourth Circuit reversed the Commission and in doing so reviewed the extensive legislative and judicial history summarized above and set forth a framework for analysis of the independent contractor issue before us.

2A Sutherland, supra, at §47.17.

The court found that the legislative history, including the reference to its previous decision in BCOA v. Secretary:

make[s] clear Congress' intent to define as "operators" only those independent contractors who are engaged in mine construction or the extraction process, and who have a "continuing presence at the mine.

772 F.2d at 97 (emphasis added). The court further noted the Third Circuit's holding in NISA v. Marshall, *supra*, that designation of independent contractors as "operators" "requires substantial participation in the running of the mine" by the contractors. *Id.* Importantly, the court rejected the claim that deference must be accorded the Secretary's view of whether a contractor is an operator because of the inconsistent positions that have been expressed by the Secretary on the independent contractor issue. *Id.*² See Natural Resources Defense Counsel v. E.P.A., 790 F.2d 289,290 (3d Cir. 1986).

² The court traced in detail the Secretary's comments accompanying the proposal of criteria to be used in identifying independent contractors as "operators". 772 F.2d at 97-98 n.6; 44 Fed Reg. 47,746-53 (1979). The court noted the Secretary's stated agreement with the NISA decision that not all contractors are appropriately cited as "operators"; rather a contractor's "substantial participation in the running of the mine" is required. The court referenced the Secretary's reliance on a contractor's performance of "major work" at a mine as a basis for deeming the contractor an "operator", which work includes "extraction and production, construction of cleaning plants and sinking of shafts and slopes." *Id.*, quoting 44 Fed Reg. at 47,747-48. The court quoted the Secretary's statement that "it is improbable that independent contractors performing most repair or general maintenance work would have effective control over an area of the mine." *Id.* (emphasis by the court). The court also emphasized the Secretary's view that a "continuing presence" at a mine by a contractor is important to its status as an "operator": "[A]n independent contractor's regular, essentially uninterrupted presence at a mine while performing work is related to the contractor's ability to effectively control an area of the mine". *Id.*, quoting 44 Fed. Reg. at 47,748 (emphasis by the court).

Based on its review of the history of the Secretary's interpretation of the definition of "operator", the Fourth Circuit concluded:

Although MSHA retreated from its proposed criteria in the final rule, it nowhere stated in the preamble to the final rule that its earlier construction of the legislative history and case law had been wrong. The unequivocal explication of the history accompanying the proposed rule thus remains MSHA's principal pronouncement on the history of [section] 3(d), and further confirms our conclusion that Congress intended to define as "operators" only those independent contractors who are engaged in mine construction or extraction and who have a "continuing presence" at the mine.

772 F.2d at 97-98 n.6 (emphasis added).

Applying these principles to the facts before it, the Fourth Circuit concluded that Old Dominion is not an "operator" under the Mine Act, but is appropriately regulated under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (1982). 772 F.2d at 96. The court observed that "Old Dominion's only contact with the mine is the inspection, maintenance, and monthly reading of a meter" *Id.* It pointed out that the utility's employees "perform no activities or functions on mine property which they do not perform elsewhere." *Id.* It emphasized that "Old Dominion's employees are otherwise totally regulated by OSHA", and that "MSHA seeks to regulate those few moments every month when electric utility workers read or maintain meters on mine property". *Id.* The court noted that Old Dominion's employees "hardly, if ever, come into contact with the hazards of mining" (*id.*), and that the utility's "contacts are rare and remote from the mine construction or extraction process." 772 F.2d at 97. In sum, the court concluded that because Old Dominion did not have a "continuing presence" at the mine and did not "substantially participate" in the running of the mine, it was not a mine "operator" within the meaning of section 3(d) of the Mine Act. *Id.*

Applying this extensive background and the Fourth Circuit's Old Dominion decisional framework to the record before us, the conclusion that Otis Elevator Company is not a mine "operator" is likewise compelled. Although the Secretary and the majority here attempt to justify their contrary conclusion by emphasizing factual distinctions between the nature of the work performed by Otis and that performed by Old Dominion, in all controlling legal respects the cases are the same. Indeed, the essential basis for the Secretary's arguments for finding Otis to be an "operator" might best be understood when viewed in the light of her disagreement with and call for Commission rejection of the Fourth Circuit's decision in Old Dominion.³

It is clear that Otis is not the type of independent construction contractor that was involved in the long-running dispute under the 1969 Coal Act as to whether such contractors were "operators". Otis is not involved in the building of surface facilities such as "preparation plants, tipples, conveyor equipment, storage silos, bath houses, office buildings, power lines, roads, drag lines, and shovels." BCOA v. Secretary, 547 F.2d at 243. Nor is Otis involved in the construction of "underground facilities, such as shafts,

³ Among her arguments, the Secretary asserts that liability can *ipso facto* be imposed on Otis simply because Otis provides services at a mine. The Secretary asserts: "Section 3(d) provides quite simply that if the contractor 'performs services ***' it is covered. This language is unambiguous." Sec. Br. at 24. She further argues:

To the extent that the Fourth Circuit may have intended the interpretation ... as urged by Otis, the Secretary disagrees and urges the Commission in performing its role as an adjudicative body with particular expertise under the Mine Act to reject that interpretation, notwithstanding what may be the position of the panel that decided Old Dominion.

Id. at n.9.

slopes, and tunnels." Id. In fact, it has never been argued in this case that the inspection and maintenance work performed by Otis at the mine site constitutes "construction" work. 9 FMSHRC at 1935. Therefore, the sole possible basis for finding Otis to be an "operator" is whether Otis performs "services" at the mine within the meaning of the Mine Act.

The legislative history set forth above indicates that, apart from construction contractors, Congress intended to include as "operators" those contractors who are "engaged in the extraction process for the benefit of the owner or lessee of the property" and who "have a continuing presence at the mine." Legis. Hist. at 602, 1315 (emphasis added). Accord, Old Dominion Power Co., 772 F.2d at 97. The Third Circuit and the Fourth Circuit, in NISA v. Marshall and Old Dominion, respectively, further explain that a contractor performing services can be considered an "operator" only if it "substantial[ly] participat[es] in the running of the mine." 601 F.2d at 701; 772 F.2d at 97. Thus, whether Otis is an "operator" depends on whether the work that Otis performs at the mine is such that Otis can fairly be characterized as: 1) being engaged in the extraction process; 2) having a continuing presence at the mine; and 3) substantially participating in the mine's operation. On the basis of the record before us, it is clear that Otis meets none of these tests.

Although Otis is an independent contractor, it is not engaged in the extraction process. It is not uncommon in the mining industry for a mine owner to hire a contractor to run its extraction operations. That, however, is not the case here. Pennsylvania Mines Corporation ("PMC"), the owner of the underground coal mine, itself engages in the extraction and processing of its coal. If PMC had hired a contractor to mine its coal, then that contractor would be engaged in the extraction process and would be an "operator" within the meaning of the definition. Otis was not hired by PMC to take part in the extraction process. Otis' contract with PMC was for a far more limited and specialized role, aptly summarized by the judge as follows:

As a practical matter, ... [Otis' responsibilities under the contract] amounted to Otis conducting weekly inspections of the elevators, performing bi-monthly safety tests and responding to trouble calls and repairing the elevators on an as-required basis.

9 FMSHRC at 1934. Although it is true, as the Secretary and the majority assert, that an elevator used to transport miners underground is an integral component of a mine's physical plant, it does not follow that simply because an outside contractor is called to service such equipment the contractor therefore becomes "engaged in the extraction process." Indeed, if repair of equipment important to a mining operation were to be the controlling criterion for determining "operator" status, the result in Old Dominion would have been different, for not even the elevators that Otis was servicing, nor the rest of the mine's electrical equipment for that matter, could operate properly without safe and effective transmission of electricity. To conclude that the nature of the service that Otis provided here is sufficient to thrust it into the mine's "extraction process" is to dilute that requirement for "operator" status beyond any recognizable limit.

A similar dilution occurs if, on the facts before us, Otis is found to

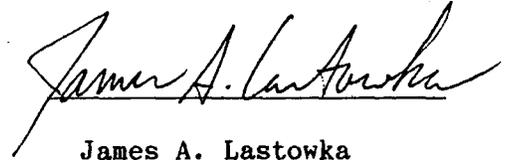
have a "continuing presence at the mine." Otis' service contract called for it to conduct weekly inspections, to perform safety tests every two months, and to perform repairs on an as-needed basis. The Secretary's proof as to Otis' presence at the mine pursuant to the contract falls far short of establishing a "continuing presence." The most that the Secretary can point to in this regard is that the performance of the weekly elevator inspections took an Otis employee, on average, only one and one-half hours per week. Tr.43-44; Sec. Br. at 3; 9 FMSHRC at 1935. The Secretary's witness also alluded to a hoist rope replacement operation that would take four or five Otis employees 20 hours to complete, but the witness did not know how often Otis performed this task. Tr. 44-45. Including unspecified repair calls, the witness stated: "I would say counting all the call backs and stuff like this, I wouldn't doubt that you can say they was there weekly." Tr. at 25.

This evidence cannot be found to establish that Otis had a "continuing presence at the mine" within the meaning of the legislative history and the case law. It certainly does not meet the "regular, essentially uninterrupted presence at a mine" formulation of "continuing presence" previously expressed by the Secretary and referenced by the Fourth Circuit in Old Dominion. 772 F.2d at 98-99 n.6 (quoting 44 Fed Reg. at 47,748).

The third element entering into the determination of whether an independent contractor is an "operator" is whether the contractor "substantially participates in the running of the mine." NISA, 601 F.2d at 701; Old Dominion, 772 F.2d at 92. What has been set forth above is generally sufficient to also overcome any claim that Otis' work under the elevator service contract "substantially" involved Otis in the running of the mine. In this regard, however, it is important to also note that even the administrative law judge found that Otis did not "control any area of the mine." 9 FMSHRC at 1935. This finding by the judge is in accordance with the terms of the governing contract. Gov. Ex. 1 at 3. Certainly, where a contractor's only duty is to periodically service mine elevators and the contractor does not control any area of the mine, it cannot be said that such contractor "substantially participates in the running of the mine."

In sum, the evidence establishes that although Otis performs services at a mine site, neither the nature of its work nor the extent of its presence at the mine is sufficient to justify its classification as a "mine operator." To conclude otherwise, I believe, is to ignore applicable judicial precedent. To do so might be appropriate if that precedent was obviously flawed or fundamentally misguided. Here, however, the applicable case law is largely the product of a court of appeals intimately involved in the historical development of the issue before us. As Otis correctly observes, the "Fourth Circuit is no bit player in the development of the law concerning who is and who is not an operator as the term is used in the [Mine] Act." Otis Reply Br. at 8. Although this case arises in the Third Circuit, that court's decision in NISA v. Marshall adhering to the rationale of the Fourth Circuit's BCOA decision, and the Fourth Circuit's approving cross-reference to the NISA decision in Old Dominion, indicate a common judicial interpretation of the issue before us warranting adherence by the Commission.

Accordingly, I conclude that Otis Elevator Company is not a mine operator and I dissent from the majority's affirmance of the judge's decision.



James A. Lastowka
Commissioner

Distribution

Vicki Shteir-Dunn, Esq.
Dennis D. Clark, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

W. Scott Railton, Esq.
Gary L. Melampy, Esq.
Reed, Smith, Shaw & McClay
1150 Connecticut Ave., N.W.
Suite 900
Washington, D.C. 20036

Administrative Law Judge William Fauver
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket Nos. PENN 87-25-R
 : PENN 87-26-R
OTIS ELEVATOR COMPANY : PENN 87-69
 : PENN 87-86

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

DECISION

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

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), we are asked to decide whether Otis Elevator Company ("Otis") is the type of "independent contractor" that falls within the definition of "operator" as set forth in the Mine Act and, if so, whether Otis was properly cited for two violations of 30 C.F.R. § 77.501. Commission Administrative Law Judge William Fauver found that Otis was an "independent contractor" and, thus, an "operator" under the Act and sustained both citations. 9 FMSHRC 2038 (December 1987). We granted Otis' petition for discretionary review and consolidated this case, for purposes of briefing and oral argument, with Otis Elevator Company, Docket No. PENN 87-262 ("Otis I"), which also presented as its primary issue Otis' independent contractor status under the Mine Act. In light of our decision issued separately this date in Otis I, we affirm the judge's finding that Otis is an operator under the Mine Act, and we also affirm the judge's finding of the two violations of section 77.501.

The Cambria Slope Mine No. 33, an underground coal mine, is owned and operated by BethEnergy Mines, a subsidiary of Bethlehem Steel Corporation ("Bethlehem"). Bethlehem maintains an elevator service contract with Otis to perform maintenance and service on the one

elevator located at the mine. The elevator is located in the portal building of the mine, in which the miners' changing and shower rooms and the company offices are also located. The elevator shaft is 800 feet deep, with openings at the two working seams of the mine.

The primary function of the elevator is to transport the work force of approximately 200 miners in and out of the mine both at shift changes and during shifts, as needed. The elevator holds 31 miners and takes two or three minutes for each round trip. Unavailability of the elevator would result in a work delay of about two and one-half hours each shift and a decrease of one-third in the mine's coal production of three thousand clean tons per shift. The elevator also serves as a primary escapeway for some sections, and as an alternate escapeway for others.

The elevator service contract between Bethlehem and Otis became effective August 26, 1981, and under it Otis was paid \$1,300 per month, adjustable annually. Exhibit G-8. The contract provided that Otis would maintain the mine elevator, its parts and equipment, in safe operating condition and provide weekly inspection, maintenance and "on call" emergency repair service. Mine Superintendent Merritts estimated that the weekly maintenance calls involved up to two hours of work if no special problems were encountered and that, during the prior year, an average of two to four additional service calls were made monthly, each taking from one and one-half to three hours. The maximum time spent by Otis employees at the mine was about 20 hours per month. Additionally, every 60 days, Otis performed a required no-load safety test on the elevator.

MSHA penalty assessment reports identify Otis as an operator under the Mine Act, and list previous violations for which civil penalties were paid by Otis when cited for violations of MSHA mandatory safety standards at the Cambria Slope and other mines. Further, Otis had filed and obtained an MSHA Identification Number as an independent contractor pursuant to 30 C.F.R. Part 45.

On October 27, 1986, Leroy Niehenke, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), observed Otis employee Gordon Sutter disconnecting electrical leads on the motor of the elevator door at a surface work area of the Cambria Slope No. 33 Mine. In response to Niehenke's questions, Sutter stated that he was not a "qualified person" for performance of electrical work within the meaning of MSHA electrical regulations and was not being directly supervised by a person so qualified. Tr. 151. Niehenke thereupon issued a citation for a violation of the "qualified person" requirements set out in the first sentence of 30 C.F.R. § 77.501 and checked the violation as being of a significant and substantial nature. 1/ Five minutes later, Niehenke issued a second citation,

1/ Section 77.501 provides:

No electrical work shall be performed on electric distribution circuits or equipment, except

citing a violation under the second sentence of section 77.501, alleging that, while performing electrical work on the motor of the elevator door, Sutter and another Otis employee had locked out the main power disconnect located in the surface area of the elevator shaft but had failed to tag the device as required by the standard. The switch on the power line had been "locked out" by a padlock placed on the switch by the Otis elevator serviceman, making it impossible for anyone to turn on the electric power until the padlock was removed. Otis contested the citations, the Secretary proposed civil penalties for the alleged violations, and the various proceedings were consolidated and proceeded to hearing before Judge Fauver.

Niehenke, MSHA electrical engineer Ron Gossard, and MSHA supervisor Willis Cupp testified that on numerous occasions since 1980 Otis representatives had been informed of the qualification requirements for performing electrical work under section 77.501. Gossard stated that a qualified person would not be required to supervise Otis employees with respect to their specialized elevator electrical work, but that a qualified person would have to be available to insure that all electrical safety precautions were otherwise properly observed for the safety of the miners. Gossard further indicated that the qualified supervisor would not necessarily need to be physically present but only to be available on the property. Gossard also suggested that Otis could have filed a petition for modification pursuant to section 101(c) of the Mine Act, 30 U.S.C. § 811(c), to obtain simplification or modification of the procedures and of the requirements for becoming "qualified" as an electrician under section 77.501 since those procedures, requirements and examinations do not specifically apply to an elevator mechanic's work.

Cupp testified that an MSHA policy memorandum of October 29, 1979, requires that, in order to assure compliance with MSHA regulations, work performed by manufacturers' service representatives who are not

by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

The term, "qualified person," is defined in section 77.501-1 as:

A qualified person within the meaning of § 77.501 is an individual who meets the requirements of § 77.103.

In turn, section 77.103 sets forth an extensive list of requirements necessary for obtaining qualified person status.

qualified persons must be examined and tested, as necessary, by a qualified person before the machine or equipment is placed in service.

Gordon Sutter, an Otis mechanic's helper, described in detail the specialized electrical and safety training courses and experience required for all Otis elevator mechanics. James Beattie, Otis District Maintenance Supervisor, testified at length as to the particular complexities of elevator repair and maintenance that require qualifications beyond those required for mine electricians. He stated that supervision by a qualified mine electrician was not only unnecessary but could be unsafe if an unqualified person supervised an elevator mechanic's specialized work. Tr. 472-499.

Before the judge, Otis argued that it was not engaged in mine construction or extraction with a continuing presence at the mine, and was not, therefore, an "operator" subject to section 3(d) of the Mine Act under the controlling precedent of Old Dominion Power Company v. Donovan, 772 F.2d 92 (4th Cir. 1983). Further, as an elevator service company, Otis contended it was regulated under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1982)(the "OSHAct"), and was not subject to MSHA regulation. With respect to the alleged violations of section 77.501, Otis argued that its compliance with the mandatory standard would create a "greater hazard" or a "diminution of safety" in that supervision of Otis' specially trained elevator mechanics by MSHA qualified mine electricians, untrained in elevator repairs, could result in incorrect or dangerous work, thereby putting both Otis employees and miners at risk.

In his decision, the judge rejected Otis' jurisdictional arguments, relying on the definition of "independent contractor" adopted by the Secretary in 30 C.F.R. Part 45 as including "a business that contracts to perform services or construction at a mine." ^{2/} The judge noted that the Secretary's preamble to the final rule in Part 45 included as "independent contractors," those performing "short-term" and "intermittent" work of "every type," including "minor repairs." 45 Fed. Reg. at 44494 (July 1, 1980). Finding further that the mine elevator was a "critical part of the mine," and that Otis employees have a "substantial recurring presence at the mine" performing "crucial safety repairs on a key facility of the mine," the judge distinguished this case from Old Dominion, supra, and held that Otis was an independent contractor as defined by the Secretary and, hence, an operator under the Act. 9 FMSHRC at 2040-41.

As to the alleged violation of the "qualified person" requirements in section 75.501, the judge rejected Otis' defense that compliance with

^{2/} 30 C.F.R. § 45.2(c) states in relevant part:

"Independent contractor" means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine

the standard would have created a "greater hazard" or a "diminution of safety." Relying on the Commission's decisions in Penn Allegh Coal Co., 3 FMSHRC 1392 (June 1981) and Sewell Coal Co., 5 FMSHRC 2026, 2029 (December 1983), the judge held that Otis' defense was raised in the wrong forum, since the "greater hazard" defense is not permissible in enforcement proceedings where the operator has not first filed a petition for modification under section 101(c) of the Mine Act. 9 FMSHRC at 2042-43. Nor, he found, did the "gravity of circumstances and presence of danger" exception carved out in Sewell apply under the facts of this case, since Otis had not demonstrated that compliance with the standard would result in a safety or health emergency to mine personnel. 9 FMSHRC at 2043. 3/ Having rejected Otis' affirmative defense, the judge concluded that Otis had violated the standard as charged. He also affirmed the inspector's significant and substantial finding and assessed a civil penalty of \$300 for the violation. He affirmed the second citation for failure to properly tag the disconnect device, found the citation to be technical, and assessed a penalty of \$20.

On review, Otis contends that the judge erred in concluding that it is an "operator" as defined in the Mine Act, that he erred in rejecting Otis' affirmative defense with respect to the first citation, and that substantial evidence does not support his finding that the violation was significant and substantial in nature. 4/

Concerning the jurisdictional issue, we have concluded in Otis I that Otis, by virtue of the services provided and its continuing presence at the mine site, falls within the definition of "operator" set forth in the Mine Act and is, therefore, subject to its jurisdiction. See slip op. at 5-8. The operative facts in the two cases are strikingly similar and the conclusion that we reached in Otis I obtains with equal validity here.

As in Otis I, it is evident here that Otis was functioning as an independent contractor on property that plainly is a mine within the Act's scope. Slip op. at 4-8. In Otis I, we held that Otis' continuing maintenance and service work on a mine elevator used to transport miners in and out of the mine bore a close proximity to, and relationship with, the overall extraction process. See slip op. at 7. We reach the same conclusion here. We further conclude as in Otis I, that Otis' contacts

3/ In Sewell, the Commission stated that "emergency situations may arise where the gravity of circumstances and presence of danger may require an immediate response by the operator or its employees, necessitating a departure from the terms of a mandatory standard without first resorting to the Act's modification procedures." 5 FMSHRC at 2029 n. 2.

4/ As to the second violation, Otis agrees on review that its employees had failed to place the tag as required, and argues only that MSHA lacked jurisdiction to cite Otis as an operator. In light of our holding on that issue, we affirm the judge's finding of violation with respect to the second citation.

with the Cambria Slope mine were not so rare, infrequent, and attenuated as to bring this case within the holding of Old Dominion, supra. See slip op. at 7. We also find that Otis' activities here were not properly subject to OSHA jurisdiction. See slip op. at 7-8. In sum, and for the reasons explained in Otis I, we conclude that Otis had a continuing presence at the Cambria Slope mine performing a function substantially related to the extraction process and, therefore, was an operator within the meaning of the Mine Act. Otis is therefore subject to the Mine Act.

With respect to the first alleged violation of section 77.501, Otis raises, as it did before the judge, the affirmative defense of "diminution of safety," arguing that application of section 77.501 would actually increase the risk of danger and result in a diminution of safety to both Otis' employees and the miners. Otis further argues that requiring its employees to meet the "qualified person" criteria set out in section 77.501 is unnecessarily and unduly burdensome in that its employees are well qualified by virtue of Otis' own rigorous training requirements and that, in other settings, these employees must comply with regulations under the OSHA Act.

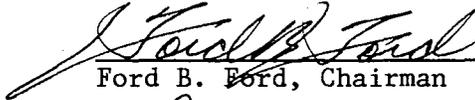
The record in this case leaves little doubt that, prior to being cited for the violations, Otis had long been on notice that MSHA regarded it as subject to the provisions of section 77.501 and had been advised of the requirements for compliance. Rather than seeking relief through the modification procedures of section 101(c) of the Act or achieving compliance through the alternative procedures suggested by MSHA, Otis waited until it was cited for non-compliance and then alleged for the first time the defense of diminution of safety as an excuse for its non-compliance.

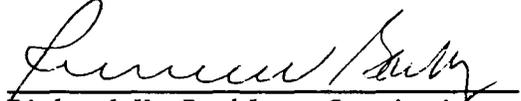
In Penn Allegh, supra, the Commission held that questions of diminution of safety are to be first pursued and resolved in modification proceedings and cannot be raised in enforcement proceedings, as Otis has attempted to do here. 3 FMSHRC at 1398, 1400. As noted by the judge in his decision, were we to accept Otis' argument, we would be concluding that an operator, not the Secretary, may determine when compliance with a mandatory standard is necessary. Accordingly, we hold that the diminution of safety defense asserted by Otis was improperly raised in this enforcement proceeding.

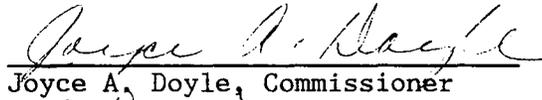
Moreover, even if that defense were properly raised, we are not convinced that the record of this case establishes that application of the standard would result in a diminution of safety. Otis has described a number of hypothetical scenarios involving interference with trained Otis technicians by supervisors unskilled in elevator work, but has failed to demonstrate that application of section 77.501 actually has resulted in a diminution of safety to miners or that it will, in fact, do so. Conversely, we find no basis to rebut the presumption that Otis' mechanics, working with electrical components in both the surface and underground areas of the mine, and admittedly untrained in and unfamiliar with MSHA regulations, may adversely affect the safety of miners.

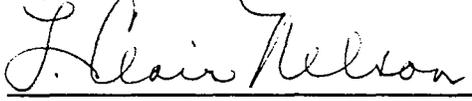
Finally, with respect to Otis' argument that MSHA's regulations are unnecessarily burdensome, we observe that compliance with the Mine Act is an essential component of doing business in a mine and that relief from compliance is only available through a section 101(c) petition for modification.

Accordingly, and for the foregoing reasons, we affirm the judge's decision. 5/


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

5/ In its petition for discretionary review, Otis challenged the judge's finding that the first violation was of a significant and substantial nature but did not discuss the issue in its briefs or at oral argument. Notwithstanding this virtual waiver of the issue, we have examined the record with respect to that finding, and we conclude that the judge's findings in this regard are supported by substantial evidence.

Commissioner Lastowka, dissenting:

In all material respects, this case and Otis Elevator Co., FMSHRC Docket No. PENN 86-262 ("Otis I"), issued this date, are the same. As in Otis I, the record in this case establishes that Otis Elevator Company: 1) is not engaged in either mine construction or the coal extraction process; 2) does not have a "continuing presence" at the mine; and 3) does not "substantially participate in the running of the mine." Rather, as the record in this case illustrates, Otis' function and presence at the mine is extremely limited. In fact, the elevator inspection and repair service Otis provides at the mine constitutes only one stop on a general service route that "includes elevators in a Sears and Roebuck store, an office building, two banks and a hospital." 9 FMSHRC 2038, at 2039 (ALJ).

Therefore, for the reasons more fully set forth in my dissenting opinion in Otis I, I dissent from the majority's affirmance of the administrative law judge's conclusion that Otis Elevator Company is a mine operator.


James A. Lastowka
Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket Nos. WEST 87-211-R
UTAH POWER & LIGHT COMPANY : WEST 87-224-R

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

DECISION

BY THE COMMISSION:

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), involves alleged violations of 30 C.F.R. § 75.1704 by Utah Power & Light Company ("UP&L") at its Wilberg Mine located in Orangeville, Utah. 1/

1/ Section 75.1704 essentially restates section 317(f)(1) of the Mine Act, 30 U.S.C. § 877(f)(1), and provides:

Escapeways.

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

The primary issue presented is whether the Secretary of Labor may cite a violation of section 75.1704 for failure to comply with the six foot by five foot dimension criteria for escapeways contained in 30 C.F.R. § 75.1704-1(a) irrespective of the passability of the escapeways in question. 2/ Commission Administrative Law Judge John J. Morris concluded that the criteria set forth in section 75.1704-1(a) were not mandatory requirements and that the proper test for the adequacy of escapeways is, as provided in section 75.1704, whether they are "maintained to insure passage at all times of any person, including disabled persons...." 10 FMSHRC 71 (January 1988)(ALJ). Accordingly, the judge dismissed a citation issued to UP&L in Docket No. WEST 87-224-R, on the basis that the parties had stipulated that, apart from a failure to comply with the criteria, the cited portion of the escapeway was fully passable by all persons, including disabled persons. The judge also found that the cited portion of the escapeway involved in Docket No. WEST 87-211-R was in violation of section 75.1704 on other grounds, but determined that the violation did not result from UP&L's unwarrantable failure to comply with the standard. We granted the Secretary's petition for discretionary review, which challenges the judge's findings that no violation occurred in Docket No. WEST 87-224-R and that there was no unwarrantable failure in Docket No. WEST 87-211-R. For the reasons that follow, we affirm.

On June 17, 1987, Ted E. Farmer, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), and his supervisor, William Ponceroff, inspected a designated escapeway in the

prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

2/ 30 C.F.R. § 75.1704-1 provides in pertinent part:

Escapeways and escape facilities.

This section sets out criteria by which District Managers will be guided in approving escapeways and escape facilities. Escapeways ... that do not meet these criteria may be approved providing the operator can satisfy the District Manager that such escapeways ... will enable miners to escape quickly to the surface in the event of an emergency.

(a) Except in situations where the height of the coalbed is less than 5 feet, escapeways should be maintained at a height of at least 5 feet (excluding necessary roof support) and the travelway in such escapeway should be maintained at a width of at least 6 feet....

3rd Right Section of the Wilberg Mine. Farmer noted that a water pipe, six inches in diameter, was angled across the escapeway and restricted the travelway at that point to a width of 43 inches. The inspector also noted the presence of an offset two feet higher than the level of the walkway running along one rib, an accumulation of loose coal and rib sloughage on the bottom, and an extension of a rib "toe" into the walkway that restricted the width of the walkway to four feet. He also observed two miners were in the area at the time, working on removing the accumulation. Based on his observations, Inspector Farmer issued to UP&L an order of withdrawal pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a violation of section 75.1704 that he found to be of a significant and substantial nature and that resulted from UP&L's unwarrantable failure to comply with section 75.1704. This withdrawal order is the subject of Docket No. WEST 87-211-R.

On July 20, 1987, MSHA Inspector Richard Jones inspected another portion of the same escapeway. Inspector Jones observed an "overcast" in the escapeway and found the escapeway to be from four to four and a half feet high. 3/ Although the inspector did not believe that the escapeway was impassable, the height of the escapeway near the overcast did not meet the criteria of section 75.1704-1. Accordingly, he issued to UP&L a citation pursuant to section 104(a) of the Act alleging a violation of section 75.1704-1(a). 4/ This citation is the subject of Docket No. WEST 87-224-R.

In his decision, the judge characterized the principal issue as "whether the 6 foot by 5 foot criteria in [section] 75.1704-1 may be enforced without regard to functional passability in an escapeway." 10 FMSHRC at 71. 5/ The judge noted that the Secretary's uncontroverted evidence showed that UP&L's escapeways, in some instances, were less than five feet high or six feet wide. The Secretary's basic contention was that the operator was required under section 75.1704-1(a) to seek approval from the appropriate MSHA district manager for maintenance of escapeways with non-complying dimensions. 10 FMSHRC at 72.

The judge rejected the Secretary's position and determined:

When Congress enacted the escapeway regulations
it established a functional test. The statutory

3/ An overcast is "an enclosed airway to permit one air current to pass over another one without interruption." Bureau of Mines, U.S. Dep't of Interior, Dictionary of Mining, Mineral and Related Terms 780 (1968).

4/ The citation was subsequently modified to allege a violation of section 75.1704.

5/ At the hearing, the parties stipulated that the term "passability" would be used as an abbreviated expression for the phrase in section 75.1704, "maintained to insure passage at all times of any person, including disabled persons." Tr. 11. We adopt the same shorthand expression for purposes of this decision.

mandate, now embodied in the regulation, is that escapeways must be "maintained to insure passage at all times of any person, including disabled persons...."

* * *

In the instant case the Congressional mandate, as now embodied in the regulation, directly addresses the precise issue in question. Notably, Congress did not establish specific size requirements for escapeways as it has done in other contexts....

* * *

... Congress clearly knew how to mandate specific linear foot requirements when it wished to do so. Its failure to do so here is a confirmation of its intent to require a functional test as expressed in the statutory language.

10 FMSHRC at 73-74. The judge concluded that the language of section 75.1704 is clear on its face and that MSHA cannot, at least without the benefit of further rulemaking, ignore that regulation's passability test and substitute in its place the linear foot criteria for height and width of escapeways. 10 FMSHRC at 74. The judge then considered UP&L's contests as to each of the alleged violations.

In Docket No. WEST 87-211-R, the judge found that the uncontroverted evidence established that the water pipe across the escapeway reduced the escapeway to a width of 43 inches and that loose coal and rib sloughage also restricted the passability of the escapeway. The judge found that these facts established a violation of section 75.1704 and dismissed UP&L's contest of the withdrawal order. As to the inspector's unwarrantable failure finding, however, the judge concluded that the operator's conduct constituted ordinary negligence but not the type of aggravated conduct constituting unwarrantable failure as set forth by the Commission in Emery Mining Corp., 9 FMSHRC 1997 (December 1987) and Youghioghney & Ohio Coal Co., 9 FMSHRC 2004 (December 1987). 10 FMSHRC at 85. Finally, in Docket No. WEST 87-224-R, the judge sustained UP&L's contest of the section 104(a) citation based upon the parties' stipulation that the inspector believed that the escapeway in question was "adequate and fully passable for all persons including disabled persons." 10 FMSHRC at 85.

The Secretary appealed the judge's finding no violation in WEST 87-224-R and his finding an absence of unwarrantable failure in WEST 87-211-R.

On review, the Secretary first contends that the judge erred in concluding that the criteria of section 75.1704-1(a) are not mandatory and are unrelated to the "functional passability" of escapeways as set forth in section 75.1704. Stating that section 75.1704-1(a) is a

"reasoned and logical implementation" of the statutory mandate embodied in section 75.1704 to insure passage at all times of any miner, including disabled persons, the Secretary urges reversal of the judge's conclusion to the contrary. PDR 10. UP&L asserts that operators have no legal duty under either section 75.1704 or 75.1704-1 to obtain prior approval from the Secretary for the escapeways mandated by section 75.1704. UP&L asserts that, as a matter of law, it cannot be held liable under section 75.1704 solely for its failure to obtain prior approval for escapeway width and height that do not conform to section 75.1704-1's criteria. Since section 75.1704-1(a) is advisory and imposes no mandatory duty upon an operator, UP&L argues that the Secretary's attempt to enforce the provisions of that subsection through section 75.1704 is an impermissible circumvention of the legally mandated requirements for rulemaking.

I.

We first consider whether the judge properly found in Docket No. WEST 87-224-R that UP&L had not violated section 75.1704. Where the language of a statutory or regulatory provision is clear, the terms of that provision must be enforced as they are written unless the legislature or regulator clearly intended the words to have a different meaning. See Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842-43 (1984); United States v. Baldrige, 677 F.2d 940, 944 (D.C. Cir. 1982); Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1192-93 (9th Cir. 1982). "In statutory interpretation, the ordinary meaning of words must prevail where that meaning does not thwart the purpose of the statute or lead to an absurd result," Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987), citing In re Trans Alaska Pipeline Rate Case, 436 U.S. 631 (1978).

We find the language of section 75.1704, as relevant here, plain and unambiguous. Section 75.1704 provides that escapeways be "maintained to insure passage at all times of any person, including disabled persons." Thus, the standard establishes a general functional test of "passability," as argued here by UP&L and as found by the judge. Further, section 75.1704 does not by its terms impose upon operators any obligation to seek the Secretary's prior approval for their escapeways. In contrast, we note that the third sentence of section 75.1704 requires that "[e]scape facilities approved by the Secretary ... shall be present at or in each escape shaft or slope...." (emphasis added). The Secretary does not argue that the term "escape facilities" in the standard includes "escapeways." Compare BethEnergy Mines, Inc., 11 FMSHRC 1445, 1450 (August 1989) (section 75.1704 requires operator to provide two designated escapeways from each working section of a mine pursuant to section 75.1704). The Secretary contends, however, that what constitutes a "passable" escapeway is open to widely varying interpretations and that section 75.1704-1(a) was promulgated to "improve" upon the functional passability standard enunciated in section 75.1704. 6/ While development by the Secretary of more specific

6/ Section 101(a) of the Mine Act, 30 U.S.C. § 811(a), grants the Secretary authority to "develop, promulgate, and revise ... improved

requirements for passability might be a laudable regulatory goal, section 75.1704-1 presently fails to achieve that purpose in an enforceable manner.

The Mine Act sets forth a scheme by which the Secretary's enforcement agency, MSHA, regulates mine operations. MSHA promulgates, pursuant to section 101 of the Act, regulations that establish general and mandatory standards with which all mine operators must comply. See n. 6, supra. MSHA also requires mine operators to adopt comprehensive plans addressing specific subjects such as roof control and ventilation. 30 U.S.C. §§ 862(a) and 863(a). These plans must then be submitted to an MSHA District Manager for approval. Once approved, the plans are mandatory in the sense that violations of the requirements in the plans constitute violations of the Act. United Mine Workers of America v. Dole, 870 F.2d 662, 667 (D.C. Cir. 1989).

The Secretary argues that section 75.1704-1 implements the second method of enforcement with regard to escapeways and escape facilities. It "sets out criteria by which District Managers will be guided in approving escapeways and escape facilities." According to the Secretary, the language of the regulation contemplates a process by which MSHA District Managers consider certain criteria in deciding whether to "approve" escapeways or escape facilities. However, as UP&L accurately notes, a critical regulatory step is missing. Neither section 75.1704, section 75.1704-1, nor any other regulation requires operators to seek the Secretary's approval for escapeways or to otherwise conform the dimensions of escapeways to five feet in height and six feet in width. Lacking any such statutory or regulatory approval requirements, there can be no violation for failure to conform to the criteria set forth in section 75.1704-1(a) or for failure to seek a District Manager's approval for noncompliance with those criteria. 7/

The Secretary's argument is undercut also by the use of the term "should" in the wording of the criteria, a term that normally signals

mandatory health or safety standards for the protection of life and prevention of injuries in ... mines."

7/ The U.S. Court of Appeals for the District of Columbia Circuit has explained that similar types of criteria may constitute mandatory safety standards when they afford to miners no less protection than the statutory standard or the improved mandatory standard from which they are derived. United Mine Workers of America v. Dole, supra, 870 F.2d at 667-672. However, in Dole the court considered the validity of roof control plan criteria that implement a statutory and regulatory mandate requiring operators to submit and District Managers to approve roof control plans. 870 F.2d at 670. "While mine operators were not per se required to comply with each and every criterion so that the criteria were not themselves mandatory standards, if the criteria were actually incorporated into an approved plan, the operator was bound to comply with them." 870 F.2d at 670. (emphasis added). Unlike the roof control criteria at issue in Dole, there is no statutory or regulatory mandate that individual mine operators submit in advance plans for escapeways to appropriate MSHA District Managers for approval.

the non-mandatory nature of a regulation. See generally, Jim Walter Resources, Inc., 3 FMSHRC 2488 (November 1981). The Commission has emphasized that when assessing the nature of a regulation the essential question is whether the standard as written imposes a mandatory duty upon operators. For instance, the Commission has found that even the inadvertent use of the word "should" instead of "shall" could be overcome as an indicia of a regulation's non-mandatory nature where the regulatory history of the standard made clear that the standard imposes a mandatory duty on mine operators. See Kennecott Minerals Co., Utah Copper Division, 7 FMSHRC 1328, 1332 (September 1985). The standard at issue, however, was neither proposed as mandatory nor promulgated with a mandatory designation. Compare Kennecott Minerals Co., supra. Rather, as the judge properly observed, the standard simply purports to set forth criteria by which MSHA's District Managers will be guided in approving escapeways, without imposing a commensurate mandatory duty on mine operators to seek such approval. 10 FMSHRC at 23.

If the Secretary desires to require operators to obtain prior approval for escapeways, MSHA can pursue such a requirement through formal rulemaking. See e.g., 30 C.F.R. §§ 75.220 (requiring each mine operator to develop and follow a roof control plan approved by the District Manager); 75.316 (requiring each operator to adopt and the Secretary to approve a ventilation system and methane and dust control plan). Indeed, subsequent to the events giving rise to this case, the Secretary initiated a revision of the escapeways standards. On January 27, 1988, MSHA issued proposed rules governing underground coal mine ventilation, including amended regulations for escapeways. 53 Fed. Reg. 2382 (1988). In explaining the proposal, MSHA stated that it "would establish requirements for escapeways for all miners." Id. at 2408. (emphasis added). The proposed standards would eliminate the approach presently found in section 75.1704-1 and substitute specific requirements for escapeways through mandatory standards. Proposed rule 30 C.F.R. § 75.380(a)(4)-(5) states that "escapeways ... shall be ... [m]aintained to at least a height of 5 feet ... [and] ... [m]aintained at least 4 feet wide...." Id. at 2422.

Finally, the Secretary introduced into evidence a memorandum dated May 7, 1987, from former MSHA District Manager John W. Barton to sub-district managers and field office supervisors. The memorandum instructs MSHA's enforcement personnel then under Barton's supervision that escapeways must "meet the height and width requirements" of section 75.1704-1(a) and that "[f]ailure to meet the requirements should result in the issuance of appropriate enforcement action." Gov. Ex. 3. The judge declined to find that the policy expressed in the Barton memorandum is binding departmental policy, and we agree. 10 FMSHRC at 74. Although the Commission has previously recognized that while Secretarial documents may "reflect a genuine interpretation or general statement of policy whose soundness commands deference and therefore results in [the Commission] accord[ing] it legal effect," it has declined to do so where the interpretation or policy statement cannot be squared with the plain language of the standard. King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981). See also Western Fuels-Utah, Inc., 11 FMSHRC 278, 285-86 (March 1989), appeal filed, No. 89-1258 (D.C. Cir. April 20, 1989); United States Steel Corp., 5 FMSHRC 36 (January 1983).

Here, the memorandum from the former district manager is at odds with the express language of sections 75.1704 and 75.1704-1(a).

Therefore, for all of these reasons, we agree with the judge that section 75.1704-1(a) does not impose upon mine operators a mandatory duty to either maintain escapeways in accordance with the subject criteria or to seek prior approval from a district manager for non-conformance with the criteria.

II.

The judge also concluded that the violation of section 75.1704 at issue in Docket No. 87-211-R was not the result of UP&L's unwarrantable failure to comply with the standard. Noting the Commission's holdings in Emery Mining Corp., 9 FMSHRC at 2004, and Youghiogheny & Ohio Coal Co., 9 FMSHRC at 2010, that unwarrantable failure means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act," the judge found that UP&L's conduct in relation to the violation constituted ordinary negligence but not aggravated conduct. 11 FMSHRC at 85. The question is whether substantial evidence supports the judge's finding. We hold that the record supports the judge's finding.

The judge found that uncontroverted evidence established that the six inch water line in the escapeway reduced clearance and that loose coal and sloughage restricted the width of the escapeway. 11 FMSHRC at 84. However, these violative conditions were neither extensive nor longstanding. Randy Tatton, the chief safety engineer at the mine, testified that he measured the escapeway in the vicinity of the water pipe and that while his measurements indicated that the width at the base of the pipe was 48 inches, and the width of the escapeway at the top was 43 inches, the pipe was located on the edge of a crosscut and the crosscut provided added space to pass around the pipe. Tr. 298-300. In addition, Ted Farmer, the inspector who cited the violation, stated that the reduction in the width of the escapeway extended along the escapeway for only six inches, the diameter of the pipe. Tr. 107-08. Further, the condition regarding the pipe had been created during the shift immediately prior to the shift on which the violation was found by the inspector. Tr. 83, 87, 258-60.

As to the presence of the loose coal and rib sloughage, Tatton's un rebutted testimony established that, because sloughage is common in the mine, beltmen are routinely assigned to keep passageways clean. (Tr. 235-237). Tatton further testified that, at the time of Farmer's inspection, two beltmen were shoveling loose coal and sloughage from the cited area and had been doing so for an hour before Farmer arrived. Tr. 297-298.

Finally, Inspector Farmer's testimony concerning UP&L's unwarrantable failure in relation to the violation was equivocal. Although he stated that he considered the condition of the escapeway to be the result of a lack of due diligence and indifference, when asked if there was a serious lack of reasonable care on UP&L's part in relation to the violation, he stated, "I really don't know about that ... I

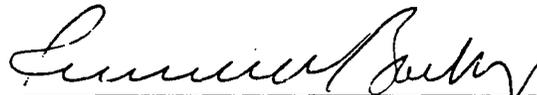
wouldn't speculate on that at all." Tr. 90.

Given the limited extent of the conditions, the short period during which they existed, the fact that clean-up operations had begun before the inspector arrived, and the inspector's equivocal testimony regarding unwarrantable failure, we conclude that the judge's holding that the violation was not the result of UP&L's unwarrantable failure to comply is supported by substantial evidence.

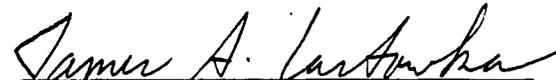
III.

Accordingly, we affirm the judge's decision finding no violation in Docket No. WEST 87-224-R and finding no unwarrantable failure in Docket No. WEST 87-211-R.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

Distribution

Thomas C. Means, Esq.
Ann R. Klee, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
280 Colonnade Center
1244 Speer Blvd.
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEVA 88-176
 :
CONSOLIDATION COAL COMPANY :

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), involves a citation issued to Consolidation Coal Company ("Consol") alleging that it violated 30 C.F.R. § 50.10 by failing to notify immediately the Department of Labor's Mine Safety and Health Administration ("MSHA") of a reportable unplanned roof fall. 1/

1/ 30 C.F.R. § 50.10 provides:

If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582.

30 C.F.R. § 50.2(h)(8) defines "accident," in relevant part, as follows:

"Accident" means,

* * *

An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use;

Commission Chief Administrative Law Judge Paul Merlin concluded that Consol violated section 50.10 and, finding the violation to be serious in nature, assessed a civil penalty of \$500. 10 FMSHRC 1633 (November 1988)(ALJ). For the following reasons, we affirm the judge's finding of violation, reverse his determination as to the gravity of the violation and reduce the penalty.

Consol owns and operates the Humphrey No. 7 Mine, an underground coal mine in Monongalia County, West Virginia, utilizing longwall mining. On Friday, November 13, 1987, at about 2:00 p.m., an unplanned roof fall occurred in the headgate entry of the 2-southwest longwall section. The fallen roof covered the crusher and resulted in 2-2½ feet of debris between the ribs and the sides of the crusher.

At the time of the roof fall, Sam McLaughlin, Consol's longwall coordinator, was approximately 1,500 feet from the face. He was notified immediately and proceeded to the area of the roof fall. Once there, he communicated by mine telephone with the longwall section foreman, who was at the longwall face in by the fall, and learned that no one had been injured and that ventilation was not impaired. McLaughlin directed the section foreman to send the miners out through the longwall tailgate entry. (The normal route of egress from the longwall face was through the headgate entry.) McLaughlin next telephoned Blaine Myers, Mine Superintendent, informed him of the roof fall and that the miners were leaving through the tailgate entry, and requested assistance in timbering the area of the fall.

While at his surface office, Stanley Brozik, Consol's safety supervisor and the person designated by Consol to notify MSHA of reportable accidents, was informed of the roof fall in a telephone call received a few minutes after 2:00 p.m. Brozik was told that there were no injuries and that the miners were retreating through the tailgate entry. Brozik proceeded underground and reached the roof fall site in approximately 35 minutes. He spent about 45 minutes determining the extent of the fall and examining conditions at the site. Brozik devoted his attention primarily to determining whether the fall affected the area above the anchorage zone of the roof bolts. He testified that because "the men had got off the back end of the storage loader," he "never really reported this incident as being impassable." Tr. 46.

Brozik thereafter left the site and returned to the surface, which took him about 20 to 25 minutes, and he then telephoned MSHA to report the roof fall. The recorded time of the telephone call to MSHA was 3:58 p.m., approximately two hours after the roof fall had occurred. Brozik testified that he could have made the call to MSHA from an underground mine telephone.

MSHA inspector Lynn Workley inspected the mine on the following Monday, November 16, 1987. He issued a citation to Consol, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), for what he regarded as the late reporting of the roof fall. In his citation, the inspector

or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage....

mentioned that the unintentional roof fall was a reportable accident because it had occurred "above the anchorage zone of roof bolts [and] interfered with passage of persons...." The Secretary subsequently proposed a penalty of \$250 for the alleged violation, determining that the violation was not of a serious nature. The matter proceeded to hearing before Chief Judge Merlin.

The parties stipulated that the roof fall was an unplanned roof fall within the meaning of section 50.2(h)(8). In his decision, the judge examined the specific grounds upon which the fall constituted an "accident" within the purview of that provision. While Consol's witness Brozik testified that he had focused his inquiry on whether the fall extended above the roof bolt anchorage zone, the judge determined that passage was impeded and that the roof fall, therefore, constituted an "accident" within the meaning of section 50.2(h)(8). 10 FMSHRC at 1635-36.

The judge next focused on whether Consol's notification to MSHA was "immediate" within the meaning of section 50.10. He found that "[i]f the safety supervisor [Brozik] or others had taken the moment or two necessary to ask the obvious questions [about the passage being impeded], they would have known immediate notification was required and so would have called MSHA before going underground." 10 FMSHRC at 1637. The judge determined that the procedures followed by Brozik and other management officials failed to satisfy the requirements of the regulations. 10 FMSHRC at 1636. In reaching this conclusion, the judge considered Consol's argument that an operator must have an opportunity to conduct a "reasonable" investigation in order to determine whether notification of MSHA is required under section 50.10. He found that Consol, with a minimum of effort, could have ascertained the facts necessary to determine the requirement of immediate notification. 10 FMSHRC at 1637. The judge noted that "even after his investigation, [Brozik] waited until he was above ground to notify MSHA although he could have telephoned MSHA from below ground 20 or 25 minutes earlier." *Id.* He concluded that the operator's position in this case "would mean that instead of being 'immediate', notification would be virtually the last thing to be done and accorded little, if any, priority." *Id.* In considering the appropriate penalty, the judge rejected the Secretary's position that the violation was not serious. 10 FMSHRC at 1637-38. Based on his belief that Part 50 violations are intrinsically serious, the judge found a high degree of gravity and assessed a civil penalty of \$500. 10 FMSHRC at 1638.

The Commission granted Consol's Petition for Discretionary Review ("PDR") challenging the judge's finding of violation and his determination as to the gravity of the violation.

With respect to the issue of violation, Consol argues on review that under the circumstances of this case it satisfied the immediate notification requirement of section 50.10. Consol asserts that an operator should be allowed a reasonable opportunity to investigate a roof fall to determine its duties under the Secretary's regulations, *viz.*, whether a particular roof fall is, in fact, reportable. Consol contends that it was not instantly obvious that the roof fall was

reportable under section 50.10 and that once "the proper management persons determined the roof fall was reportable they 'immediately' report[ed] the roof fall to MSHA." PDR 8. Consol bases this contention on Brozik's investigation of whether the roof fall affected the area above the anchorage zone of the roof bolts -- a task that Brozik testified took him some 45 minutes to complete. Consol argues that, once it became evident to Brozik that the roof fall was reportable because it was above the anchorage zone of the roof bolts, he made the call to MSHA within 20 minutes. Consol asserts that this was sufficiently "immediate" notification to meet the requirements of the regulation. Under the facts presented, we disagree.

Section 50.10 provides that operators "shall immediately contact" appropriate MSHA representatives regarding specified "accidents," including certain "unplanned roof falls." For present purposes, the key regulatory consideration is that such accident notification must be made "immediately."

There is no definition of the term "immediately" in the Secretary's regulations. It is, however, a common term. The relevant ordinary meaning of the word "immediate" is: "occurring, acting or accomplished without loss of time: made or done at once: instant...." Websters Third New International Dictionary (Unabridged) 1129 (1986 ed.) See also Random House Dictionary of the English Language (Unabridged) 956 (2d ed. 1987). "Immediately" is defined as "without interval of time: without delay: straightaway...." Webster's, supra.

Although the regulation requires operators to report immediately certain "accidents" as defined in section 50.2(h), it must contemplate that operators first determine whether particular events constitute reportable "accidents" within that definition. Section 50.10 therefore necessarily accords operators a reasonable opportunity for investigation into an event prior to reporting to MSHA. Such internal investigation, however, must be carried out by operators in good faith without delay and in light of the regulation's command of prompt, vigorous action. The immediateness of an operator's notification under section 50.10 must be evaluated on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting.

Applying these considerations to the present case, we agree in result with the judge that Consol violated section 50.10. The judge concluded that the actions of Brozik, the Consol official responsible for making the accident report, violated the regulation in two respects: (1) in view of the information conveyed during the initial telephone call from the longwall section notifying him of the roof fall, he should have determined that passage was "impeded" in the entry; and (2) after his investigation at the site, he could have reported the accident to MSHA using the underground telephone rather than waiting 20 to 25 minutes to make the call from the surface. 10 FMSHRC at 1636-37. Even were we to agree with Consol's position that Brozik did not violate the regulation by not contacting MSHA prior to his onsite investigation, we nevertheless conclude that, under the circumstances involved, an unreasonable amount of time elapsed between his arrival underground and

his call to MSHA.

As the judge recognized (10 FMSHRC at 1635-36), an unplanned roof fall in active workings is a reportable "accident" if it occurs at or above the anchorage zone where roof bolts are in use, or if it "impairs ventilation" or "impedes passage." Section 50.2(h)(8), n. 1 supra. Substantial evidence supports the judge's finding that the roof fall impeded passage in the headgate entry: the roof had fallen on the crusher and there was debris 2-2½ feet high between the ribs and the sides of the crusher. Tr. 40, 44, 48-50, 53. It was obvious that passage was "impeded" in the headgate entry. As noted above, miners in the area were evacuated through the tailgate entry, not through the headgate entry, which was the normal route of travel. Considering his testimony, Brozik may have believed that a roof fall had to render a passage impassable before the reporting requirement is triggered. See Tr. 44, 46, 49-50. The regulation, however, speaks in terms of impeded passage, not impassability. In addition, once Brozik arrived at the site, he proceeded to spend 45 minutes investigating the fall and then another 20-25 minutes traveling to the surface before contacting MSHA. We are satisfied that, upon observing the roof fall, Brozik should have reported the accident to MSHA at some time prior to his 4:00 p.m. notification. Under the circumstances, the 4:00 p.m. notification was not "immediate" and a violation of the regulation occurred.

With respect to the penalty, section 110(i) of the Mine Act grants the Commission final authority to assess civil penalties for all violations under the Act and sets forth six criteria, including "gravity of the violation," that the Commission shall consider in assessing penalties. 30 U.S.C. § 820(i). The Secretary proposed an assessment of a \$250 penalty based, in part, on her determination that the gravity of the violation was of a low degree. The judge rejected the Secretary's position concerning gravity and assessed a penalty of \$500. The judge based his gravity finding on a per se determination that all violations of section 50.10 are intrinsically serious. 10 FMSHRC at 1637-38. On review, Consol asserts that the judge abused his discretion in rejecting the Secretary's position on gravity and argues that if there is a violation in this case, it is not of a serious nature.

The Commission has repeatedly made clear that assessment of appropriate civil penalties based on the criteria specified in 30 U.S.C. § 820(i) is de novo before the Commission and that Commission judges and the Commission are not bound by the Secretary's proposed penalties or her views as to any of the specific penalty criteria. See, e.g., Sellersburg Stone Co., 5 FMSHRC 287, 290-93 (March 1983), aff'd, 736 F.2d 1147, 1151-52, (7th Cir. 1984).

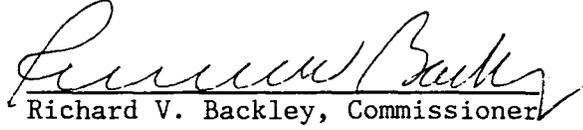
With respect to the merits, we perceive no warrant for adopting a per se rule that all violations of section 50.10 necessarily reflect a high degree of gravity. Here, the accident report was made, and was made within two hours of the accident. During a considerable portion of that time, the responsible person was engaged in a good faith investigation into the particulars of the accident. Also, we note that the MSHA representative's initial post-accident visit to the mine the following Monday generated no indication in the record that any

necessary corrective action was frustrated by the delayed accident report. The Secretary initially determined that the violation was not serious. In considering gravity, the judge relied in part upon prior litigation involving reporting violations by Consol. However, we note that in the earlier case, Consol actually failed to file the required accident and injury reports. Consolidation Coal Company, 9 FMSHRC 727 (April 1987)(ALJ).

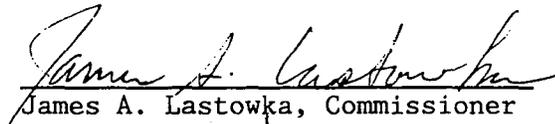
Thus, we conclude that substantial evidence of record does not support the judge's finding that the violation in this case reflected a high degree of gravity and, accordingly, we vacate that finding. "While a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal by the Commission." United States Steel Corporation, 5 FMSHRC 1423, 1432 (June 1984). Discounting the judge's finding as to gravity, we hold that a civil penalty of \$250 is appropriate and consistent with the statutory criteria.

For the foregoing reasons, we affirm the judge's finding of violation, reverse his determination as to the gravity of the violation, and assess a civil penalty of \$250.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

Distribution

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Michael R. Peelish, Esq.
Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 1989

RONALD TOLBERT :
 :
 v. : Docket No. KENT 86-123-D
 :
 CHANEY CREEK COAL CORPORATION :

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

ORDER

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), complainant Ronald Tolbert has filed with the Commission a Motion to Reopen and Remand. The 1987 decisions of the administrative law judge finding discrimination and awarding complainant relief became final decisions of the Commission because the Commission did not grant the petition for discretionary review filed by Chaney Creek Coal Corporation ("Chaney Creek") and Chaney Creek did not petition for review in a United States Court of Appeals. 9 FMSHRC 580 (March 1987)(ALJ); 9 FMSHRC 929 (May 1987)(ALJ); 30 U.S.C. §§ 816 and 823(d)(1). Shortly thereafter, complainant filed a motion to reopen the proceeding, which motion was denied by the Commission. See Ronald Tolbert v. Chaney Creek Coal Corp., 9 FMSHRC 1847 (November 1987).

Complainant's present motion seeks further proceedings before the Commission to determine (1) additional back pay and attorney's fees that complainant asserts are due, and (2) whether John Chaney, owner of respondent Chaney Creek, is the alter ego of the company and, therefore, personally liable for the relief due complainant. Counsel for the Secretary of Labor has submitted a Motion for Leave to File a Memorandum as Amicus Curiae in support of complainant's motion. No response to these motions has been filed by Chaney Creek.

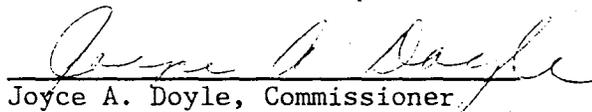
Upon consideration of the Secretary's motion, it is granted and the Secretary's amicus memorandum is accepted this date for filing in this proceeding.

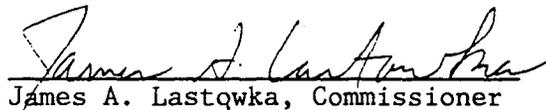
Concerning complainant's motion to reopen and remand, complainant has failed to identify any specific basis or authority upon which the Commission can rely to reopen this proceeding to consider the merits of his request for relief at this time. Complainant is accordingly directed to file with the Commission a supplemental memorandum on or before November 27, 1989, setting forth (1) the jurisdictional authority permitting the reopening of this matter before the Commission for the purpose of considering the issues raised in complainant's motion and (2) his position, as to why, given the May 1988 enforcement of the Commission judge's decisions in this proceeding by the United States Court of Appeals for the Sixth Circuit, the Court of Appeals is not the proper tribunal before which to pursue the alter ego issue (see 30 U.S.C. § 816(b)).

The Secretary of Labor as amicus may also file a memorandum within this time identifying the jurisdictional basis for its view that the Commission may reopen this case for further proceedings. Respondent Chaney Creek may file a response to any submission by Tolbert or the Secretary within 15 days of the date of service of such memorandum. No memorandum submitted in response to this order shall exceed 15 pages.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

Distribution

Dennis D. Clark, Esq.
Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Tony Opegard, Esq.
Appalachian Research & Defense Fund
of Kentucky, Inc.
P.O. Box 360
Hazard, Kentucky 41701

John Chaney
Route 1, Box 286
East Bernstadt, Kentucky 40729

Steven D. Cundra, Esq.
Peter A. Greene, Esq.
Thompson, Hine & Flory
1920 N Street, N.W.
Washington, D.C. 20036

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 3 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 89-58-M
Petitioner : A. C. No. 08-01026-05509
v. :
: Charlotte County Rock Plant
FLORIDA MINING & MATERIALS, :
Respondent :

DECISION

Appearances: Stephen Alan Clark, Esq., for the Secretary of Labor;

Archie B. Clark, Director, Human Resources and Safety, for Respondent

Before: Judge Fauver

The Secretary of Labor brought this case for a civil penalty under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below.

FINDINGS OF FACT

1. Respondent operates a limestone mine, known as the Charlotte County Rock Plant, in North Fort Myers, Florida, which produces limestone for sale or use in or substantially affecting interstate commerce. It employs about 25 employees at the mine, and its total employment in mining is about 690 employees.

2. On August 10, 1988, Federal Mine Inspector Harry Verdier inspected the mine and issued Order 3250044 charging a violation of 30 C.F.R. § 56.9003, for operating a Michigan 125 front end loader without operative brakes.

3. The front end loader did not have operative brakes.

4. The back-up alarm on the front end loader was also inoperative.

5. The front end loader was used to haul drill tubes from the storage area to the drill area, near a water-filled pit. The water in the pit was 40 to 50 feet deep.

6. The front end loader was also used to transport personnel from the drill area to a parking area near a repair shop, a distance of about one-half mile.

7. Three citations for brake defects had been issued at this mine before the date of Order 3250044. Two of them were issued to an independent contractor, Goodwin Construction Company, for its equipment. One of the citations was issued to Respondent for inadequate brakes on equipment owned and operated by Respondent.

DISCUSSION WITH FURTHER FINDINGS

The brakes on the Michigan 125 front end loader were inoperative when inspected by Mine Inspector Verdier on August 10, 1988. The vehicle had been used that morning without operative brakes, before the federal inspection, and it was reasonably likely that it would have been used again in the same defective condition, if the inspector had not ordered it to be withdrawn from service.

The equipment operator knew that the brakes were inoperative. The mechanic was also aware that the front end loader had defective brakes. The mechanic informed Mine Inspector Verdier that there had been problems with the master cylinder of the front end loader.

The front end loader also had an inoperative automatic back-up alarm signal. This fact would have been known to at least two of Respondent's employees: the equipment operator and the drill operator.

Respondent acknowledges that the violation was substantial and significant in terms of gravity. Its defense is that it should not be charged with high negligence because the equipment operator was required to report safety defects and failed to do so. The plant manager testified that "if the [equipment] operator gets on a piece of equipment and finds a defect, there is a reporting system through the card system that that defect is to be reported and recorded on a card." Tr. 42. He further testified that no defect was reported by the equipment operator before the inspection, and if the defective brakes had been reported to management, Respondent "would have parked that piece of equipment, tagged it out and not operated it until the brakes had been repaired." Tr. 44.

There are three prior citations for defective brakes on equipment operated at this mine. Two were issued in 1986 to an

independent contractor doing work for Respondent; the third was issued later, in 1987, for equipment that was owned and operated by Respondent. Respondent had knowledge of the three citations when they were issued. If thus had ample prior knowledge of the safety standard for adequate brakes involved in the present case.

The fact that the front end loader was being operated without brakes and without a back-up alarm underscores a negligent disregard of safety standards respecting this vehicle. Considering all the evidence, I find that Respondent's employees were highly negligent in operating and permitting the operation of the front end loader without operative brakes and that their negligence is imputable to Respondent. It was within the authority and control of Respondent to supervise and train its employees and manage its operations to ensure that its equipment would not be operated without defective brakes, but Respondent failed to meet this statutory obligation.

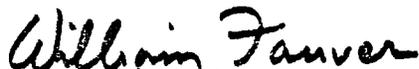
Considering each of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$1,000 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.
2. Respondent violated 30 C.F.R. § 56.9003 as charged in Order 3250044.

ORDER

Respondent shall pay the above civil penalty of \$1,000 within 30 days of this Decision.


William Fauver
Administrative Law Judge.

Distribution:

Stephen Alan, Esq., Office of the Solicitor, U.S. Department of Labor, Federal Building, Room 407B, 299 East Broward Boulevard, Fort Lauderdale, FL 33301 (Certified Mail)

Mr. Archie B. Clark, Jr., Director, P.O. Box 23965, Tampa, FL 33630 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 3 1989

CONNIE MULLINS, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. VA 89-18-D
: MSHA Case No. NORT CD 88-8
CLINCHFIELD COAL COMPANY, :
Respondent : Splashdam Mine

DECISION

Appearances: Jerry O. Talton, Esq., Front Royal, Virginia, for
the Complainant;
W. Challen Walling, Esq., Penn, Stuart, Eskridge &
Jones, Bristol, Virginia, and Hilary K. Johnson,
Esq., Clinchfield Coal Company, Lebanon, Virginia,
for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Connie Mullins against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. Mr. Mullins filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and by letter dated October 28, 1988, he was advised by MSHA that after review of the information gathered during its investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred. Subsequently, on November 30, 1988, Mr. Mullins filed his complaint with the Commission.

The complainant contends that the respondent discriminated against him when it suspended him from his laborer's job, and subsequently discharged him on May 16, 1988, out of retaliation for his engaging in certain safety activities protected by the Act, and the respondent denies that it discriminated against the complainant. A hearing was held in Kingsport, Tennessee, and the parties filed posthearing arguments which I have considered in the course of my adjudication of this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Issues

The issues presented in this case are as follows:

1. Whether the complainant's suspension and subsequent discharge was motivated by the respondent's intent to harass him, or to retaliate against him, because of his insistence that ventilation checks be made when machinery was moved from location to location, and because of his reporting of an alleged safety violation to an MSHA inspector.

2. Whether the respondent's suspension and discharge of the complainant for failing to adhere to a "last chance agreement," in connection with the respondent's chronic and excessive absenteeism policy, was pretextual.

3. Whether the application of the respondent's absenteeism policy and program was discriminatory.

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

Stipulations

The parties stipulated to the admissibility of all documents marked and received in evidence as Joint Exhibits 1 through 21 (Tr. 7). The parties stipulated that Mr. Mullins was suspended, and subsequently discharged on or about May 15, 1988 (Tr. 48-49). They agreed that at the time of the suspension and discharge Mr. Mullins was earning \$15.56 per hour for a normal 40-hour work week.

The respondent agreed that the Commission and the presiding judge have jurisdiction in this matter, and that the respondent's underground Splashdam Mine, where Mr. Mullins was employed, is subject to the Act (Tr. 52, 68).

The respondent stipulated that it does not disagree that in March, 1988, MSHA Inspector Charlie Reese issued a citation

related to two missing roof bolts which were pointed out to him by Mr. Mullins (Tr. 39-41).

The parties stipulated that exhibits JE-6 through JE-13, consisting of certain mine management records concerning Mr. Mullins' past absences, accurately reflect what is stated in these documents (Tr. 95).

The parties also stipulated that at the time of the hearing in this case, there was no union/management contract, and that a strike which began on April 5, 1989, was still in effect. Although the mine was in operation, no union personnel were working at the mine (Tr. 196-197).

Discussion

During opening arguments at the hearing, complainant's counsel asserted that Mr. Mullins' discharge was in part, if not primarily, due to an intent by the respondent to retaliate against him for engaging in protected activities. Counsel asserted that Mr. Mullins was part of a union "inside campaign" to require the respondent to comply with the mine ventilation regulations and that he was one of the principal individuals at the mine who insisted that ventilation checks be made on all occasions when mining machinery was moved from location to location. Counsel concluded that as a result of this protected activity, Mr. Mullins was discharged (Tr. 8-9). Counsel asserted further that shortly before the discharge, Mr. Mullins reported a safety violation to an MSHA inspector, which resulted in the issuance of a citation, and that the respondent had knowledge of this report by Mr. Mullins, and retaliated against him by discharging him (Tr. 9).

With regard to the respondent's defense that it discharged Mr. Mullins pursuant to its chronic and excessive absenteeism program, counsel asserted that the respondent's policy and program is discriminatory per se, is not in writing, and allows the respondent to discharge employees for excused absenteeism related to injuries and accidents, and as applied to Mr. Mullins, the policy provides a pretextual means or method for respondent to retaliate or terminate "problem" employees because of their union or safety activities (Tr. 10).

With regard to Mr. Mullins' prior contention that his failure to report for work on April 14 and 21, 1988, was based on his belief that to report for work on those days would have constituted a safety threat to himself and his fellow workers because he was on medication, counsel asserted that he would not pursue this issue for "strategic reasons," and would not contend that this "work refusal" by Mr. Mullins was protected activity which would provide a claim for relief pursuant to section 105(c) of

the Act (Tr. 11-12). When asked whether he intended to withdraw this issue, counsel responded as follows at (Tr. 18):

MR. TALTON: Well, I don't want to dilute my case, and I'm going to stick with my original position. We're not going to contend that the unsafe personal condition of Connie Mullins was a -- that that was grounds for a protected activity in this case. We're premising our contention of harassment-discrimination upon the grounds previously set forth, Your Honor.

Respondent's counsel asserted that the action taken by the respondent against Mr. Mullins was proper and nondiscriminatory, and that even assuming that Mr. Mullins engaged in protected activity, the respondent would have suspended and discharged him anyway for his nonprotected activity. With regard to the withdrawal of Mr. Mullins' "work refusal" claim based on a medical condition, counsel pointed out that this was the only issue raised by Mr. Mullins when he filed his initial discrimination complaint with MSHA on July 13, 1988 (Joint Exhibit-1), and since he has withdrawn it, counsel moved for a dismissal of this case (Tr. 14).

In response to the motion to dismiss, I pointed out to respondent's counsel that in his pro se complaint filed with the Commission, Mr. Mullins raised the issue relative to his safety activities concerning ventilation checks, and his reporting of an alleged safety violation to an MSHA inspector, and claimed that the actions taken by the respondent were based on these protected activities. I also pointed out that the complaint also raised the issue of an alleged "pretextual" discharge based on a "last chance agreement" entered into by Mr. Mullins and the respondent with respect to his asserted absenteeism, and that all of these claims were sufficiently viable issues for at least a prima facie case of discrimination. Under the circumstances, the motion to dismiss was denied from the bench (Tr. 13-17).

Complainant's Testimony and Evidence

Connie D. Mullins testified that he worked for the respondent for 13-years prior to his discharge, and served as a miner helper for approximately a year. He confirmed that he has been a member of the UMWA Local 7170 since 1975, but has held no office. He also confirmed that upon the expiration of the BCOA Labor-Management contract on January 31, 1988, his union local requested him, as well as other miners, to initiate an "inside campaign" at the respondent's mine to insure that all work performed was done to the letter of the law. He explained that miners were expected to "work to the law" to insure that all mine safety laws were enforced.

Mr. Mullins stated that as a result of the union "inside campaign," he began to insist that air ventilation checks be made during his work shift in each area where coal was cut, and that his insistence that this be done began in February, 1988. He believed that a ventilation air reading was required to be made at each new cut of coal.

Mr. Mullins stated that in April, 1988, approximately 1 to 2 weeks before his discharge, he asked his foreman Cleeborn Newberry to take an air reading after he had finished a coal cut. Mr. Newberry responded to his request and took an air reading. Mr. Mullins stated that another coal cut was taken and he asked Mr. Newberry to take another air reading, and he again responded and took the reading. Mr. Mullins stated that he continued to request that additional ventilation air readings be made after each cut of coal for the rest of the evening, and that Mr. Newberry responded and made the checks. Mr. Mullins stated that he continued to request ventilation checks at least three to five times during each of his succeeding work shifts, and that there were no coal cuts made when he did not insist on a ventilation check (Tr. 20-33).

Mr. Mullins stated that sometime in March of 1988, he observed that two roof bolts were missing from a roof area and that he reported this to his foreman Grady Colley. Mr. Colley told him that he would take care of the condition, and 2 or 3 days later when no corrective action was taken, Mr. Mullins reported the condition a second time to Mr. Colley, but nothing was done about it. Mr. Mullins stated that he then reported the two missing roof bolts to MSHA Inspector Charles Reese who happened to be underground conducting an inspection, and that he took the inspector to the area and showed him where the bolts were missing (Tr. 33-35).

Mr. Mullins also alluded to a "wide place" which had been cut, but he was not certain whether a violation was issued for this condition. He confirmed that after the missing roof bolt citation was issued, Mr. Colley assigned him to abate the condition and to set timbers and crib blocks to support the roof. Mr. Mullins believed that the missing roof bolts presented a hazard and danger of draw rock falling, and that the wide cut also presented this same danger. He confirmed that eight or nine other men were available to abate the condition, but that Mr. Colley assigned him to this task (Tr. 41-47).

Mr. Mullins confirmed that he did not discuss the ventilation checks with management prior to his discharge, other than to request that they be made (Tr. 48). He confirmed that on one occasion when he requested Mr. Newberry to make an air reading, Mr. Newberry informed him that since the ventilation curtain was moving, there was enough air. However, Mr. Newberry proceeded to make the check as he requested (Tr. 28-30).

Mr. Mullins stated that he has not been employed since his discharge on May 15, 1988, and he confirmed that he has not looked for work in any union or non-union mines. He also confirmed that he has looked for work near his place of residence, Clintwood, Virginia, and has made work inquiries at a local repair shop, Exxon Service station, a farm store, and the S & J Tire Store. He stated that he received 6 months of unemployment payments, and that his name is on a job roster maintained by the State of Virginia Employment Commission (Tr. 53-55).

Mr. Mullins stated that he was "somewhat familiar" with the respondent's chronic absenteeism policy, but has never seen it in writing, and to his knowledge, the respondent has never posted it at the mine. He confirmed that the BCOA contract covers this subject, and he believed that absences where doctor's slips are produced by an employee are treated as excused absences. He identified exhibits JE-15 and JE-16 as a doctor's excuse and dental appointment notice covering the 2 days he did not report for work on April 14 and 21, 1988. He stated that he gave them to his foreman or the mine superintendent upon his return to work, but he did not recall specifically who he gave them to (Tr. 56-61).

Mr. Mullins confirmed that he filed a grievance and arbitration action in connection with his suspension and discharge but did not prevail in these actions (Tr. 63).

On cross-examination, Mr. Mullins confirmed that his union began a strike at the mine on April 5, 1989, and that upon the expiration of his unemployment benefits, he received union strike benefit payments of \$200 a week, and received these benefits before the actual start of the strike (Tr. 63-67).

Mr. Mullins confirmed that prior to his discharge he worked the evening shift from 4:00 p.m. to 12:00 p.m. He also confirmed that Mr. Colley was his foreman until a week or so prior to his discharge, that Mr. Newberry was his foreman immediately prior to his discharge, and that he had only worked for Mr. Newberry for approximately a week prior to his discharge. He confirmed that he got along well with Mr. Colley, and that he had shown no animosity towards him (Tr. 69-70).

Mr. Mullins stated that prior to the start of the union "inside campaign," he did not request ventilation checks at each coal cut interval. He confirmed that on each occasion when he requested a ventilation check, Mr. Newberry agreed and made the check. Mr. Mullins assumed that in each instance, adequate air ventilation was available, and he could recall no instances where the ventilation checks made by Mr. Newberry indicated less than adequate air ventilation in the areas which were tested. Mr. Mullins stated that on one occasion where the ventilation air

curtains "were blowing," Mr. Newberry was of the opinion that a ventilation reading was not needed (Tr. 71-73).

With regard to the reported roof bolt condition which resulted in a citation being issued to the respondent, Mr. Mullins stated that the bolts had been cut off or "sheared off" after they had been installed, but he had no knowledge as to how this may have occurred (Tr. 79). Mr. Mullins confirmed that Mr. Colley informed him that he would correct the condition, but he could not recall precisely when he informed Mr. Colley of the condition because he could not recall when he first noticed it. Mr. Mullins stated that after 2 or 3 days passed, the bolts were not fixed, and he again asked Mr. Colley about it, and he replied that he would take care of it. Mr. Mullins could not recall how soon after this he informed the inspector of the condition, but confirmed that a citation was issued, and the condition was corrected and abated (Tr. 81-82).

With regard to his assignment by Mr. Colley to correct and abate the cited roof bolt condition, Mr. Mullins confirmed that he was qualified to do this work in a safe manner. He also confirmed that the roof bolt and crib work which he performed to abate the condition was work which he had normally performed in the past (Tr. 82-83).

Mr. Mullins stated that he could not state for sure that Mr. Colley assigned him to do the aforementioned abatement work to punish him for reporting the condition. Mr. Mullins confirmed that Mr. Colley never told him that he was wrong in reporting the condition to the inspector, and that Mr. Colley was not angry with him, and did not act, or otherwise indicate, that he held it against him for reporting the matter. Mr. Mullins also confirmed that he got along well with Mr. Colley and that Mr. Colley never expressed any personal animosity towards him (Tr. 84-85).

Mr. Mullins denied that he has had a problem with absenteeism, but admitted that he had been counseled by mine management about absenteeism on many occasions (Tr. 94). He conceded that mine management expressed their concern to him about his absences from work during the past 3-years prior to his discharge, and that he had meetings and discussions with his foreman Colley and assistant mine superintendent William Seik about these absences.

Mr. Mullins confirmed that at no time during his meetings and discussions with Mr. Seik or Mr. Colley concerning his work absences was the subject of safety ever discussed. Mr. Mullins also confirmed that he was aware of the fact that he would be in "serious trouble" if he had two consecutive AWOL absences on his record, and that he was aware that miners have been discharged for such an offense (Tr. 96-97).

Mr. Mullins confirmed that he missed 2 consecutive days of work in January, 1988, and he confirmed that exhibit JE-5 reflects that he was charged with being AWOL on January 15 and 16, 1988, when he failed to produce "doctor slips" for these absences (Tr. 97-100).

Mr. Mullins confirmed that he was summoned to a meeting with Mr. Seik and Mine Superintendent Barry Compton on January 18, 1988, to discuss his absenteeism, and that he attended the meeting with his union committeeman William Powers. Mr. Mullins estimated that the meeting lasted 1 hour, and he confirmed that he signed the document detailing what transpired during the meeting (exhibit JE-14).

Mr. Mullins confirmed that he discussed no safety matters with Mr. Seik or Mr. Compton during their meeting. Mr. Mullins acknowledged that as a result of the meeting, he knew that if he had any further work absences during the ensuing 180 days which exceeded the mine average for absences that he would be "in trouble." However, he believed that these absences would have to be AWOL absences rather than absences involving sick days (Tr. 101-120).

With regard to his absence of April 14, 1988, when he visited a dentist, Mr. Mullins stated that his dental visit was at 3:30 p.m., and that he was scheduled to be at work at 4:00 p.m. He confirmed that he did not call in to report that he would be absent, and although the dentist's office opened at 9:00 a.m., he called the dentist earlier in the day, and was told that 3:30 p.m. was the only time available to see the dentist. Mr. Mullins stated that while other dentists may have been available to him he did not call them because the dentist he went to was his family dentist.

With regard to his doctor's appointment of April 21, 1988, Mr. Mullins confirmed that he stayed off work on April 20, and 21, and does not recall calling in to report that he would be absent from work. He confirmed that he has had sinus problems in the past and has worked on these occasions. He also confirmed that he never informed Mr. Compton that he was too sick to perform his work safely, and that he did not communicate any safety concerns concerning his sinus condition to his foremen. Mr. Mullins further confirmed that he never informed Mr. Seik or Mr. Compton that his foremen Colley and Newberry were discriminating against him (Tr. 120-133).

In response to further questions, Mr. Mullins referred to his attendance records (exhibit JE-5), and he explained the days he was absent and the codes used on these records (Tr. 138-142). He stated that no one ever told him that the two days coded as "AWOL" on his records, April 14, and 21, 1988, were in fact AWOL's, and he indicated that he was granted "sick days" for

those absences (Tr. 143). He also stated that no one ever told him or warned him that these two particular absences were going to be used to terminate him (Tr. 158).

Upon review of his last chance agreement, (exhibit JE-14), Mr. Mullins stated that when he left the meeting with management concerning this agreement, he did not believe that he had made any promises (Tr. 160-162). However, he conceded that management made it clear to him that he must stay within the mine average for non-allowed absences for the next 180 days, and that he believed non-allowed absences meant AWOL's or nonexcused absences. He stated further that under the applicable 1984 labor-management wage agreement, he was not aware of any non-allowed absenteeism other than AWOL's (Tr. 163). Mr. Mullins also stated that as of April, 1988, it was his understanding that all that was necessary for allowed sick leave was a doctor's slip, and no one ever told him that anything else was necessary, or that sick leave was not included as an allowed absence pursuant to his last change agreement (Tr. 166).

Mr. Mullins confirmed his understanding that the mine average of non-allowable absences were those days not allowed under the wage agreement, and that under that agreement, vacation days, bereavement days, and birthdays, for which he may excused or be paid triple time if he works, are different days off, and that the mine average only covers days not allowed under the agreement (Tr. 168).

In response to further questions, Mr. Mullins stated that he believed that foreman Colley was present when he pointed out the sheared roof bolts to the MSHA Inspector. He was not sure whether Mr. Colley was present when he met with Mr. Compton and Mr. Seik about his absenteeism, and he confirmed that he got along with Mr. Colley and that Mr. Colley never said anything to him about speaking with the inspector (Tr. 172).

Mr. Mullins stated that he believed the respondent suspended and discharged him because "it costs them so much time" to take ventilation readings and "the violations cost the company money" (Tr. 172). He confirmed that he said nothing to the inspector about ventilation readings, and that any time he insisted on taking air readings, the respondent always complied and never refused him (Tr. 173). He confirmed that in some instances, the air was insufficient, and curtains would have to be put up (Tr. 174). He confirmed that prior to the expiration of the union contract with the respondent, he did not make it a practice to insist on ventilation checks, but he always made sure there was enough air. He confirmed that he began insisting on ventilation checks "because our union leaders told us to make the company work to the letter of the law. So that's what I was engaged in." He further stated that "we was hoping to get a contract without a

strike. And we was hoping to put pressure on through that way" (Tr. 175-176).

Mr. Mullins confirmed that the only time management ever said anything to him about his insistence on making air checks was the one occasion when foreman Newberry disagreed with him and told him that since there was air movement on the line curtain, the ventilation was sufficient. He further confirmed that Mr. Newberry never complained or resisted his requests for air checks, and that this was never mentioned during any management meetings concerning his absences (Tr. 177).

Mr. Mullins confirmed that the union effort to "work to the letter of the law" was a concerted effort by all union miners at the mine, and he knew of no one else who was suspended or fired for this activity (Tr. 179). Mr. Mullins confirmed that he was aware of at least two miners who asked for ventilation checks on his working section, but he could not state how often this was done (Tr. 182). He stated that based on his observations, the only time management made ventilation checks was when an inspector was on the section, but that he did not complain about this "unless it was real bad." He confirmed that he began "doing something about it" only after January 31, 1988, because he was instructed to do so by his union, and he admitted that he engaged "in a little chain pulling on management" (Tr. 188).

Mr. Mullins stated that he saw no preshift examination air readings, but conceded that company policy requires such readings and that they "could have been made" (Tr. 192). He also confirmed that he would not always be present in the places where these readings would have been made (Tr. 192). He confirmed that when he complained about inadequate air, it was taken care of within a reasonable time soon after it was discovered (Tr. 195).

Barry N. Compton, general mine superintendent, confirmed that he was familiar with the respondent's absenteeism policy, and that an AWOL is not an excused absence. He also confirmed that any employee missing two consecutive work days on AWOL is subject to termination. He stated that an "S" code on an employment record means a suspension, and that an "X" code signifies sick leave in cases where an employee has not brought in a doctor's excuse verifying his absence from work. In some circumstances, even though an employee has a doctor's excuse, he may still be considered AWOL where the absences are chronic or the employee has failed to adhere to a last chance agreement. He identified employee Mike Puckett as an individual who was suspended with intent to discharge for being sick when no AWOL was involved. He explained that this action was taken pursuant to the respondent's chronic and excessive absentee policy, and that Mr. Puckett had several AWOL's and absences not allowed under the contract (Tr. 198-202).

Mr. Compton also identified employee Bobby Brannan as an individual who was terminated in 1986 or 1987, after being suspended with intent to discharge under the same policy, and he indicated that Mr. Brannan's absences included sick days and AWOL's over a period of time (Tr. 203). He confirmed that these discharges resulted from a combination of reasons, and that no one has been discharged for simply being sick (Tr. 204).

Mr. Compton conceded that but for Mr. Mullins' absences on April 14 and April 20, 1988, he would not have been discharged, and he stated that "those two days were involved in the fact that he didn't live up to the agreement," *i.e.*, the last chance agreement of January 18, 1988 (Tr. 204-205). Mr. Compton stated that the agreement was discussed with Mr. Mullins and that he understood its conditions (Tr. 205).

Mr. Compton stated that neither he or his foreman grant employees time off from work when they are sick, and that "we just keep the records" of an employee's contractual and non-contractual absences under the applicable personnel codes reflected in their records. He confirmed that he has the authority to suspend an employee with intent to discharge, and to make a determination as to whether or not an employee's sickness is grounds for discharge (Tr. 206). He confirmed that in Mr. Mullins' case, management considered his absences of April 14, and 20, to be less than excused, and that this resulted in his being over the mine average pursuant to the formula used for determining employee absence rates (Tr. 207).

Mr. Compton explained that pursuant to the union contract, an employee is allowed 5 days of sick leave or personal business, which is coded P on his attendance records. If an employee calls in sick five times, the respondent accepts this. If he does not call in to report that he is sick, as required by the contract, he is given an AWOL. If he continues to take sick leave for more than his allotted 5 days, and it becomes a habit or trend, *i.e.*, calling in sick on Fridays or Mondays on "long weekends," his absences are coded X on the attendance roster and he is counseled. If an employee who has been charged with an AWOL for not calling in returns to work and submits a doctor's excuse for the absence, the AWOL is changed to an X code on his records, and he confirmed that this is what is reflected quite often in Mr. Mullins' leave records (Tr. 211-215). He confirmed that when Mr. Mullins visited his dentist on April 14, he was initially marked AWOL, but when he brought in his doctor's appointment slip, his record was changed from AWOL to X for that day (Tr. 215).

Mr. Compton stated that an employee who has three AWOLS in a 30-day period, or six AWOL's in a 180-period, is coded as an "irregular worker." In his opinion, Mr. Mullins' failure to call in before taking a sick day on April 14, was an AWOL, and that

his record was coded X to indicate that he had not called in. He confirmed that after an employee has used up his 5 days of allotted sick leave, and then misses more work time and brings in doctor's excuses, he is not paid for these absences, and his absence is treated as not allowed, and it is counted against his overall absences. The reason it is considered as not allowed is because it is separate and apart from the approximately 40 days of contractual leave days which are afforded employees (Tr. 219).

Mr. Compton stated that Mr. Mullins was discharged for his failure to adhere to the last chance agreement. He explained that the chronic absenteeism policy was only used as a standard to be followed by Mr. Mullins, and that he was under this policy plan and had been counseled under this plan (Tr. 233). He explained further as follows at (Tr. 234-237):

[W]e use the standard of the chronic and excessive plan because he was in that plan under the counseling sessions. He understood what the nonallowable days were under the contract, he understood what it meant to stay within the mine average. That's why that standard was used.

He wasn't discharged because his failure to -- because of the chronic and excessive plan, but because of the fact that the standards that were set up in this last chance agreement which it spells out, the agreement, we gave up the right to discharge him under Article 22(I). He gave up the fact that -- in turn for not being discharged, that he would abide by this agreement, he would stay within the nonallowable absenteeism average for 180 days. He knew what it meant to be in that, because he was in the C & E policy -- chronic and excessive policy by the fact that he had been in the counseling. That's why I referred to the chronic and excessive plan, only as a standard for him to go by, and which he agreed to do.

BY MR. TALTON:

Q. Why don't you excuse people from work who have doctor's slips? Are you telling us you don't?

A. In what instance?

JUDGE KOUTRAS: Why didn't you excuse Mr. Mullins in this case?

THE WITNESS: By the fact that he had already used up his five paid days and it was a non allowable day that was calculated in --

JUDGE KOUTRAS: Why did you consider it now allowable?

THE WITNESS: Because he had certain amount of days within the contract -- 40-some days to take for those purposes, and anything above and beyond that --

JUDGE KOUTRAS: Is not allowed?

THE WITNESS: Is not allowed.

JUDGE KOUTRAS: Not withstanding whether they bring in a doctor's excuse or not, is that right?

THE WITNESS: Yes.

JUDGE KOUTRAS: Doctor's slip or not?

THE WITNESS: But one thing --

MR. TALTON: He's answered.

THE WITNESS: I don't know how much you want me to run on here or not, but anyhow, you know, we take into consideration the amount of days they take above and beyond the contract, we take into consideration the history, you know, and I take into consideration Connie's history, the fact that he had been under the - - you know, he had had absentee problems for the last several years, and he had a trend of missing on Mondays and Fridays, and trends of long weekends. Those are where those unexcused absences play a big part. I don't know of anybody that's just missed two days sick and brought in a doctor's excuse that's ever been discharged * * *.

And, at (Tr. 239-240):

JUDGE KOUTRAS: My understanding of this agreement, Counsel, is, he characterizes an agreement for 180 days from the date of this agreement, you shall not have any nonallowable days of absences, and if you do, you violated this agreement. Is that --

THE WITNESS: Above the mine average.

JUDGE KOUTRAS: In other words, if he had only had one day nonallowable, if it didn't bring him over the average, are you telling me you wouldn't have suspended and fired him?

THE WITNESS: No, sir.

JUDGE KOUTRAS: But the two days brought him up, right?

THE WITNESS: Right.

JUDGE KOUTRAS: And you applied the formula to the standard, and you came out with a suspension with intent to discharge? Is that what you're telling me?

THE WITNESS: The counseling sessions, this has all been explained to him several times before.

Mr. Compton explained further that missing work because he was under a doctor's care are not allowable absences because Mr. Mullins executed a last chance agreement, had undergone counseling, and he was subject to discharge if he exceeded the mine average for absences (Tr. 243). He confirmed that the 2 days of AWOL chargeable to Mr. Mullins caused him to breach his agreement, and that pursuant to Article 22(I) of the wage agreement, he had the authority to suspend him with intent to discharge (Tr. 251). Mr. Compton stated that he could have fired Mr. Mullins on January 18, 1988, and would have had good grounds for doing so (Tr. 252). He confirmed that the decision to discharge Mr. Mullins for violating his agreement was a joint decision made with mine superintendent Bill Seik (Tr. 254). Mr. Compton stated that he also spoke with Mike Cutlip, human services department, and advised him that Mr. Mullins was under a last chance agreement, and had exceeded the mine average for absences (Tr. 255-256).

Mr. Compton confirmed that while other employees may miss more than their allotted days of sick leave, and may not be discharged for this, they are not under a last chance agreement as was Mr. Mullins (Tr. 257-258). He explained the respondent's absenteeism policy as follows at (Tr. 260-262):

JUDGE KOUTRAS: Please, Mr. Compton, tell me what a chronic and excessive absenteeism program is?

THE WITNESS: Okay.

JUDGE KOUTRAS: Who's the program administrator?

THE WITNESS: I guess I administrate the program at our operations.

JUDGE KOUTRAS: And what is it?

THE WITNESS: Okay. We orally communicated the policy to the work force through communication meetings, and if an employee doesn't ever get above the mine average then they have no other reason to bring them into them and counsel them, as in Mr. Mullins' case, which he had

been counseled since 1984, ever since the policy came into effect.

Each time someone gets above the mine average, and they get chronic and excessive in the fact that -- like I said, that for instance, they have a habit of just getting sick on Monday and Friday. You know, flu when it hits me, it don't just hit me Monday and Friday.

JUDGE KOUTRAS: All right.

THE WITNESS: Before long weekends, or they have a history of continually being sick or whatever that may be --

JUDGE KOUTRAS: Then they go into this program.

THE WITNESS: They come into this program, they are orally counseled. They are counseled until they get to -- in trying to rehabilitate these people. We make them aware that they have an absentee program, that they are constantly above the mine average --

Q. Is this all documented, the warnings that are given --

A. When we orally counsel someone, generally it is put down in written form, which I think that has been submitted as evidence.

Mr. Compton reviewed some of Mr. Mullins' absences, and gave several examples of his discussions and counseling with him concerning his absences (Tr. 262-263). He characterized the last chance agreement executed by Mr. Mullins as a "warning," as well as an agreement on his part, and he indicated that such agreements are rare, but nonetheless enforceable among the workforce (Tr. 266-267). He stated that Mr. Mullins has been counseled about his absences since 1982, and that his situation was handled on its merits (Tr. 271-273).

Mr. Compton confirmed that he became aware of the union's "inside campaign" in approximately the middle of 1988, and believed that it involved "slow down the work force," "slow down production of the mine, sabotage equipment, whatever" (Tr. 281). Mr. Compton stated that he did not know whether ventilation checks were made at every cut of coal because he is not constantly in the mine. He stated that the law does not require such a check at each cut, but that preshift and onshift examinations are made and recorded in the fire boss books as required by the law (Tr. 282). He explained the mine production figures (Tr. 283-285).

Mr. Compton confirmed that his foremen are required to conduct ventilation checks when they have some doubt that the air in any place is insufficient, and that if a ventilation curtain is blowing against the rib "you pretty well know you got enough ventilation" (Tr. 293). He also indicated that air readings may be taken before a miner machine reaches a working place and that this does not entail any "lost down time" (Tr. 293). He also confirmed that he has advised his foremen that they are expected to make ventilation checks to insure the proper volume of air in the working place (Tr. 297-298).

Mr. Compton stated that in approximately April or May, 1988, foreman Cleveland Newberry mentioned that Mr. Mullins had requested him to take two or three air readings one evening, and that Mr. Newberry confirmed that he had taken the readings and had sufficient volume of air. Mr. Compton stated further that he instructed Mr. Newberry to comply with Mr. Mullins' requests to take air readings, to insure that all ventilation curtains are maintained, and that the proper volume of air is maintained at the faces. He also advised Mr. Newberry that he could establish the proper volume of air before the miner machine arrives at an area so that it can begin cutting coal upon its arrival. Mr. Compton believed that this discussion with Mr. Newberry took place after Mr. Mullins missed work on April 14 and 21, and he indicated that this is the only discussion he had with Mr. Newberry concerning this matter (Tr. 300).

Mr. Compton stated that Mr. Mullins was not discharged prior to May 16, 1988, because it takes 2 weeks after the end of the month for him to receive the computer print-out record concerning leave (Tr. 301). He believed that he received the leave information concerning Mr. Mullins during the week of April 9 (Tr. 301).

Mr. Compton stated that he had no knowledge of any citation received by the respondent in March or April, 1988, concerning sheared off roof bolts on Mr. Mullins' section, and that he had no conversations with anyone concerning any violation reports filed by Mr. Mullins with any federal inspectors (Tr. 302). Mr. Compton stated that he was not concerned that Mr. Mullins' insistence on making ventilation checks may have resulted in a 15-minute production delay (Tr. 304). He reiterated that he advised Mr. Newberry that he could make his ventilation checks as the miner machine is travelling from one location to another "so when he comes into the place; he's automatically got his air," and also to avoid unnecessary production delays (Tr. 307-309).

Mr. Compton reiterated that in January of 1988, he believed he had a right to discharge Mr. Mullins for two consecutive days of AWOL, but that he gave up this right when he entered into the last chance agreement with Mr. Mullins, and Mr. Mullins gave up his right to file a grievance when he signed the agreement (Tr. 315). Mr. Compton confirmed that he discharged Mr. Mullins for

failing to live up to his agreement, and because his past history of absenteeism reflected that he had an absenteeism problem (Tr. 316). He confirmed that he spoke with Mr. Mullins with his union representative present, and made it clear to him that if he violated the last chance agreement he would be "in deep trouble," and he believed that Mr. Mullins understood this (Tr. 318). Although Mr. Mullins' absenteeism improved in February and March, it exceeded the mine average in April, and he then suspended Mr. Mullins with intent to discharge him, and informed him of his decision in his office. Mr. Seik and Mr. Mullins' union committeeman Billy Powers were present when he advised Mr. Mullins of his action, and neither Mr. Mullins or Mr. Powers said anything about mine safety or safety discrimination at that time (Tr. 319).

Mr. Compton stated that Mr. Mullins has never complained to him about any hazards in the mine, and never complained that he was being treated differently because of the exercise of any of his safety rights. He confirmed that Mr. Mullins never said anything to him about requesting his foreman to make ventilation checks, and that he was unaware that Mr. Mullins may have pointed out any safety infractions to an MSHA inspector (Tr. 332). Mr. Compton denied that he suspended and discharged Mr. Mullins out of retaliation for any of these activities (Tr. 334).

William R. Seik, mine superintendent, confirmed that he "played a role" in the decision to discharge Mr. Mullins. He confirmed that he was aware of the fact that a citation was issued in March or April, 1988, to the respondent because of two sheared roof bolts in the mine, but denied that he was aware of the fact that Mr. Mullins had reported this condition to a federal inspector, or that Mr. Mullins had been assigned to correct the condition. Mr. Seik also denied that he was aware of Mr. Mullins' role in requesting ventilation checks every time a different cut of coal was made on the section (Tr. 357-358).

Mr. Seik confirmed that the only conversation he had with foreman Brady Colley about the citation concerned Mr. Mullins leaving his miner helper's position to show the inspector where the roof bolts in question were located. Mr. Seik stated that he advised Mr. Colley that "he was to keep Connie on his job, and that Connie would not leave his job without permission" (Tr. 358). Mr. Seik stated that it was his understanding that Mr. Mullins did not request permission to go with the inspector and simply "went on his own." Since Mr. Colley was the foreman in charge, Mr. Mullins should have asked for his permission before leaving his job. Mr. Seik confirmed that he was aware of the fact that a citation was issued because he reviewed a copy of it which was left on his desk by a company safety inspector. He learned "after the fact" that Mr. Mullins had some involvement in the issuance of the citation, and he knew about this at the time the decision was made to discharge him on May 16, 1988. However,

he had no conversation at any time with Mr. Colley concerning Mr. Mullins' requests for ventilation checks (Tr. 359-360).

Mr. Seik stated that the only discussion he had with Mr. Compton concerning Mr. Mullins involved Mr. Mullins' past absenteeism record, and that he said nothing to Mr. Compton about the roof bolt citation. Mr. Seik confirmed that he had counseled Mr. Mullins many times about his absenteeism, and that his record in this regard was reviewed on its own merit and it was not a "snap decision" (Tr. 365-366).

On cross-examination, Mr. Seik stated that while he discussed the matter of suspension and discharge with Mr. Compton, the final decision was Mr. Compton's (Tr. 366). Mr. Seik stated that Mr. Mullins could have been discharged in January, 1988, for the two consecutive AWOL's which resulted in the last chance agreement, but that Mr. Mullins was "given a break" at that time (Tr. 366-367).

Mr. Seik stated that he had no complaint about Mr. Mullins telling the inspector about the roof bolts, and that this did not bother him. He acknowledged Mr. Mullins' right to report any safety violations, and stated that he held no grudge against Mr. Mullins for reporting the condition (Tr. 368). He stated that Mr. Mullins should have been aware of the fact that he simply cannot leave his job without advising his foreman, and that anyone may make a safety complaint, and that other miners have done so and not been fired. Miners are free to make safety complaints to management and to their safety committee (Tr. 369-370).

Mr. Seik confirmed that Mr. Mullins has never made any safety complaints to him, and has never advised him that he believed he was being treated differently because of the exercise of any of his safety rights. He denied that the issuance of the citation had anything to do with his involvement in the discharge of Mr. Mullins, and he believed that the monetary fine for the citation was \$20 (Tr. 371).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on

behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ___ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

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 Eight 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.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

As stated earlier, Mr. Mullins has abandoned his earlier claim that he was discharged because of his refusal to work because he had a good faith belief that certain medication he was taking for a sinus condition would have endangered himself and his fellow miners. Accordingly, I have made no findings or conclusions with respect to this abandoned claim and theory of his case, and have confined my findings and conclusions to Mr. Mullins' claim that his suspension and subsequent discharge were motivated by mine management's intent to harass him, or to retaliate against him, because of his insistence that certain ventilation checks be made, and because of his alleged reporting of a safety violation to an MSHA inspector.

Mr. Mullins' Protected Activity

It is clear that Mr. Mullins enjoys a statutory right to voice his concern about safety matters or to make safety complaints to mine management or a mine inspector without fear of retribution or harassment by management. Management is prohibited from interfering with such activities and may not harass, intimidate, or otherwise impede a miner's participation in these kinds of activities. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra.

With regard to the ventilation air checks, Mr. Mullins confirmed that prior to the union "work to the letter" campaign, he had not requested or insisted that checks be made each time a cut of coal was made. He testified that he began insisting on ventilation air readings in February, 1988, after being instructed to do so by his local union, and he admitted that this

was done to put pressure on the respondent in connection with labor and management's contract negotiations.

Mr. Mullins confirmed that on each occasion when he requested that ventilation checks be made, his foreman responded and made the checks. On one occasion when the foreman disagreed that a ventilation check was necessary, he nonetheless complied with Mr. Mullins' request and took an air reading. Mr. Mullins confirmed that with the exception of this disagreement on the need for a check, his foreman never complained or resisted his requests for air readings. Mr. Mullins also confirmed that he got along well with foreman Colley and that his foreman had no animosity towards him. Mr. Mullins conceded that on each occasion when he requested a ventilation check, mine management always complied with his requests and never refused him.

Mr. Mullins testified that in each instance when he requested a ventilation air reading, he assumed that adequate air was available, and he could recall no instance where the air reading taken by his foreman indicated less than adequate air in the areas tested. Mr. Mullins confirmed that company policy required preshift air readings, that he was not always present at the place where air readings were made, and that when he complained about inadequate air ventilation, it was always taken care of by management within a reasonable time.

Mr. Mullins confirmed that he was not the only miner who insisted that management operate the mine "to the letter of the law" as part of the union campaign. He also conceded that no one from management said anything to him about this campaign, no one was mad at him, and that no other miner was suspended or discharged during this time.

With regard to his complaint to the MSHA inspector about two missing roof bolts, Mr. Mullins confirmed that foreman Colley was not angry with him for informing the inspector about the condition, and said nothing, or did anything, that would lead him to believe that Mr. Colley held it against him for reporting the matter to the inspector. Mr. Mullins also confirmed that the subject of safety was never discussed during his meetings with Mr. Colley, Mr. Seik, and Mr. Compton concerning his absenteeism, and he confirmed that he got along well with Mr. Colley. Although Mr. Colley assigned Mr. Mullins to abate the cited roof bolt violation, Mr. Mullins could not state for certain that Mr. Colley assigned him this task in order to punish him for reporting the condition. Mr. Mullins implied that this was the case when he testified that other miners were available to abate the condition, but Mr. Colley selected him for this job. Mr. Mullins conceded that he was qualified to do the abatement work in connection with the roof bolt condition in a safe manner, that he did so, and that abatement work of this kind was work which he had normally done in the past.

Mine Superintendent Seik testified that he was aware of the fact that a violation was issued in March or April, 1988, because of two sheared off roof bolts, but he denied that he was aware of the fact that Mr. Mullins had reported the condition to the inspector, at the time the violation was issued, or that Mr. Mullins had been assigned to abate the condition. Mr. Seik conceded that he learned about Mr. Mullins' "involvement in the issuance of the citation" after the violation was issued, and that he was aware of this when he and Mr. Compton made the decision to discharge Mr. Mullins on May 16, 1988. Mr. Seik also denied that had ever discussed Mr. Mullins' ventilation check requests with Mr. Colley, or that he discussed the roof bolt citation with Mr. Compton.

Mr. Seik acknowledged Mr. Mullins' right to make safety complaints, and he confirmed that other miners have done so and have not been discharged. Mr. Seik also acknowledged that when he learned that Mr. Mullins had left his job without the foreman's permission to show the inspector the roof bolt condition, he informed foreman Colley that Mr. Mullins should not simply leave his job without telling him. Mr. Seik stated that the fact that Mr. Mullins informed the inspector about the condition did not bother him, and that he held no grudge against Mr. Mullins for doing so. Mr. Seik also stated that Mr. Mullins had never made any safety complaints to him, and never advised him that he believed he was being treated differently from other miners because of the exercise of his safety rights.

General Mine Superintendent Compton testified that he was aware of the union's "inside campaign," and he confirmed that when foreman Newberry informed him in April or May, 1988, that Mr. Mullins requested him to make ventilation checks two or three times one evening, he instructed Mr. Newberry to comply and to insure that adequate ventilation was established. Mr. Compton denied any knowledge of the citation concerning the roof bolts, and he confirmed that he had no discussion with anyone concerning Mr. Mullins' reporting of any safety violations to the inspector. Mr. Compton confirmed that Mr. Mullins never said anything to him about requesting his foreman to make ventilation checks, that he was unaware that Mr. Mullins may have pointed out any safety infractions to the inspector, and he denied that he suspended or discharged Mr. Mullins out of retaliation for these activities.

After careful consideration of all of the testimony and evidence adduced in this case, I find no probative or credible evidence of any harassment, intimidation, or retaliation by mine management as a result of Mr. Mullins' insistence on the making of ventilation checks or his complaint to the inspector. I reject Mr. Mullins' suggestion that he was assigned to abate the roof bolt condition out of retribution for his making the complaint, and I find no credible basis for concluding that his

foreman assigned him this task to punish him for making the complaint. Mr. Mullins conceded that he was qualified and able to do this job safely, that such abatement work was something that he would normally do as part of his job, that he gotten along well with his foreman, and that his foreman who assigned him the task displayed no displeasure or animosity towards him when he assigned him the abatement work.

The record establishes that mine management responded in a positive way to Mr. Mullins' requests for ventilation checks, and Mr. Mullins conceded that management always complied with his requests, including the one time that he and his foreman disagreed as to the need for a check. I take note of the fact that although other miners were involved in the "work to the law" campaign, they were not disciplined or otherwise interfered with in any way because of these activities.

The record establishes that Mr. Mullins' ventilation concerns were never discussed or mentioned during the meetings between Mr. Mullins and mine management, concerning his attendance record, and there is no evidence that Mr. Mullins ever made any safety complaints to Mr. Seik or to Mr. Compton, the two individuals who made the decision to suspend and discharge him. There is also no evidence that Mr. Mullins ever informed Mr. Seik or Mr. Compton that he believed he was being put upon because of his insistence in making daily ventilation checks, and Mr. Mullins himself conceded that mine management responded promptly to his requests, and that his foremen displayed no animosity towards him. He also conceded that his foreman did not appear angry with him for complaining to the inspector about the roof bolt condition, and I find no evidence of any harassment or disparate treatment of Mr. Mullins by his foremen because of his complaint to the inspector or his insistence that ventilation checks be made.

The record reflects that Mr. Mullins was suspended and discharged on May 16, 1988. Mr. Mullins suggested that his requests to foreman Newberry to take air readings 1 or 2 weeks in April before his discharge, prompted his suspension and discharge. However, Mr. Mullins' confirmed his insistence on making ventilation checks began as early as February, 1988, yet no action was ever taken against him, and there is no evidence that Mr. Newberry was in any way connected with the decision to discharge him.

The record also reflects that Mr. Mullins' complaint to the inspector concerning the roof bolt condition was made sometime in March, 1988, 2 months before his discharge. Mr. Mullins confirmed that foreman Colley displayed no animosity towards him for calling the condition to the attention of the inspector, that he got along well with Mr. Colley, and that Mr. Colley never harassed him or treated him badly. There is also no evidence

that Mr. Colley had nothing to do with the decision to discharge Mr. Mullins.

The evidence establishes that at the time the decision was made to suspend and discharge Mr. Mullins, Mr. Seik was aware of the fact that Mr. Mullins spoke with the inspector about the roof bolt violation, and that Mr. Compton was aware of the fact that Mr. Mullins had requested daily ventilation checks. However, Mr. Seik denied that he ever discussed the roof bolt violation with Mr. Compton, and Mr. Compton denied any knowledge of the violation or Mr. Mullins' conversation with the inspector. The record reflects that Mr. Mullins never complained to Mr. Seik or Mr. Compton about safety matters, and there is no evidence that Mr. Seik or Mr. Compton harbored any ill will towards Mr. Mullins because of his safety concerns. Based on the evidence adduced in this case, I conclude and find that any concerns that Mr. Seik and Mr. Compton may have had with regard to Mr. Mullins focused on his work attendance and not on his safety related activities.

Although Mr. Seik's and Mr. Compton's awareness of Mr. Mullins insistence on making ventilation checks, and his contact with the MSHA inspector who issued the roof bolt violation raises an inference that their decision to suspend and discharge Mr. Mullins may have been tainted or influenced by Mr. Mullins' safety related activities, having viewed Mr. Compton and Mr. Seik during the course of their testimony, I find them to be credible witnesses, and I believe their denials that the decision to suspend and discharge Mr. Mullins had anything to do with his safety related activities, or that this decision on their part was motivated or made to retaliate against Mr. Mullins for insisting on ventilation checks or bringing the roof bolt condition to the attention of the inspector. In short, I conclude and find that any inference of discriminatory intent by the respondent in connection with Mr. Mullins' suspension and discharge has been rebutted by the respondent's credible evidence which I believe establishes that Mr. Mullins was suspended and discharged because of his poor work attendance record and absenteeism.

The Respondent's Motivation for the Suspension and Discharge of Mr. Mullins.

In his posthearing brief, Mr. Mullins' counsel asserts that Mr. Mullins' report of a safety violation to a Federal mine inspector is protected activity under the Act. Counsel also asserts that Mr. Mullins' insistence that ventilation checks be made every time the continuous miner was moved was reasonably calculated to apprise him of information essential to a determination as to whether or not the respondent was in compliance with the federal laws mandating adequate ventilation, and was part and parcel of his right to a safe work environment and of

his right to notify a federal inspector of an unsafe condition should the ventilation be deficient.

The focus of counsel's argument is in on the "last chance agreement" executed by Mr. Mullins. Counsel disagrees with the respondent's contention that the agreement gave the respondent the right to terminate Mr. Mullins, and that he would have been terminated even had he not engaged in the activities of reporting an unsafe condition to a federal inspector and insisting upon repetitive ventilation readings on every occasion that the miner was moved.

In support of his argument concerning the agreement in question, counsel takes the position that the document identified as the agreement contained no agreement by Mr. Mullins to do anything, and in the absence of some express promise by Mr. Mullins to do or not do a certain act, there was no contract. Counsel notes that the agreement did not state that Mr. Mullins would be terminated if his absenteeism rate exceeded the mine average, but simply stated that ". . . further disciplinary action up to and including discharge will be taken." Counsel concludes that this left it up to the respondent to decide what action was appropriate given the nature of the absence and the surrounding circumstances.

Counsel asserts that the unfair and harsh nature of the respondent's absenteeism policy is apparent in this case, and the fact that it is not a written policy indicates that it is particularly susceptible to arbitrary application. Counsel argues that it is not probable that the respondent's decision to discharge Mr. Mullins, the most severe action available, was not motivated to any significant extent by his protected safety activities. Counsel submits that this case is not one of happenstance or coincidence, and that it is a case of "enemy action" by an employer who determined that Mr. Mullins' exercise of protected activities was an annoyance and a nuisance. Counsel concludes that the facts in this case supports the contention that Mr. Mullins was discharged because of the fact that "he was at war" with the respondent over safety issues, and to assume otherwise is unreasonable.

I believe that the thrust of Mr. Mullins' complaint lies in his dispute with the respondent's leave and absenteeism policy, the legality of the last chance agreement, and Mr. Mullins' belief that the agreement and absenteeism policy is patently unfair and arbitrary, and has been used by the respondent as a pretext to support his suspension and discharge for engaging in protected activity. The record establishes that Mr. Mullins filed a grievance on these issues and proceeded to arbitration. In a written decision issued on October 12, 1988, the arbitrator denied his claims and ruled against him (Joint Exhibit 20). As a result of this unfavorable decision, Mr. Mullins, by and through

his UMWA union, filed an unfair labor practice charge against the respondent with the NLRB, and it was likewise denied after the NLRB declined to issue a complaint (Joint Exhibit 21).

Although I am not bound by decisions of arbitrators, I may nonetheless give deference to an arbitrator's "specialized competence" in interpreting any applicable labor-management agreements. Chadrick Casebolt v. Falcon Coal Company, Inc., 6 FMSHRC 485, 495 (February 1984); David Hollis v. Consolidation Coal Company, 6 FMSHRC 21, 26-27 (January 1984); Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981).

I take note of the fact that the union's position before the arbitrator with respect to the last chance agreement was that "The company is discriminating against the Grievant for his union activities at the mine. The Grievant is being prosecuted to the fullest for no other reason." (Pg. 6, arbitrator's decision). The arbitrator found that the last chance agreement was valid and reasonable on its face, that the respondent treated Mr. Mullins fairly and properly, that there was no disparate treatment of Mr. Mullins, and he rejected the claim that the respondent's action was tainted by unlawful animus. The arbitrator concluded that there was no reasonable basis for him to conclude that the motivation of the respondent in discharging Mr. Mullins was something other than the proven fact that he violated the terms of his agreement with respect to absenteeism.

I also take note of the fact that at the time Mr. Mullins initiated his grievance on May 24, 1988, his sole contention was that he was unjustly discharged by the company's absentee policy (Joint Exhibit 18). The Union's position before the arbitrator does not include a claim that Mr. Mullins' safety activities prompted his discharge, and although the arbitrator's decision makes reference to testimony by Mr. Mullins during the arbitration hearing that he had arguments with his foreman Colley over safety issues in connection with adequate air at the face, the arbitrator concluded that the evidence "did not establish a causal relationship between the safety issues raised by the Grievant and his supervisor and action taken by the General Mine Superintendent for his failure to come to work often enough," and that the superintendent "acted to enforce an attendance settlement agreement which was fairly arrived at and which was not ambiguous" (Pgs. 13, 14, arbitrator's decision).

I also take note of the NLRB's decision not to initiate an unfair labor practice case against the respondent, and the NLRB's conclusion that its investigation failed to establish that the respondent was unlawfully motivated in discharging Mr. Mullins, and that the evidence adduced by the NLRB established that

Mr. Mullins discharge "was with cause, i.e., poor attendance" (See NLRB letter of November 25, 1988, Joint Exhibit 21).

The respondent's absentee policy, including the use of last chance agreements, has been previously litigated before the Commission in a discrimination proceeding heard and decided by Judge Weisberger on February 1, 1989. In Lindia Sue Frye v. Pittston Coal Group/Clinchfield Coal Company, 11 FMSHRC 187 (February 1989), the complaining miner asserted that she was discharged for making safety complaints and for refusing to work under conditions which she believed were unsafe. Judge Weisberger's decision reflects that the miner was counseled with respect to her absentee rate, and that a proposal was made by the respondent in that case to suspend and discharge her due to excessive absenteeism. However, she avoided this action by executing a last chance agreement that she would not exceed the mine absentee rate in any month in the next 12 months. When she failed to keep her agreement and exceeded the absentee rate some 2 months after the agreement was made, she was suspended and discharged. Judge Weisberger dismissed her complaint after concluding and finding that the sole reason for the discharge was excessive absenteeism, that the discharge was not motivated in any part by any protected activities, and that the action taken by the respondent was clearly a prerogative of management.

The evidence in the instant case establishes that Mr. Mullins has undergone counseling concerning his absenteeism periodically since 1982 (Joint Exhibits 6 through 15). Although he stated that he was "somewhat familiar" with the respondent's absenteeism policy, and that it is not reduced to writing or posted on the mine bulletin board, I am not convinced that he was ignorant of the policy or did not understand it. Mr. Mullins admitted that he had been counseled by mine management on many occasions concerning his absenteeism, that management had expressed their concern to him in this regard during the past 3-year prior to his discharge, and that he had meetings with his foreman and mine management concerning his work attendance record.

Mr. Compton testified that he could have fired Mr. Mullins in January, 1988, for two consecutive days of AWOL, but did not do so because the respondent and Mr. Mullins executed the last chance agreement. At the time the agreement was executed on January 18, 1988, Mr. Mullins admitted that he knew he was in serious trouble, and that miners have been discharged for two consecutive days of AWOL. Immediately prior to the AWOL days of January 15 and 16, 1988, he was talked to by foreman Colley and superintendent Seik about missing work (Joint Exhibit 13). After returning to work on January 18, 1988, Mr. Mullins was summoned to Mr. Compton's office for a meeting with Mr. Compton and Mr. Seik, and he appeared with his union representative to discuss his absenteeism.

Mr. Mullins admitted that he was under the impression at the meeting with Mr. Seik and Mr. Compton that the respondent was ready to take some disciplinary action against him, and that he was aware of the fact that the respondent could have fired him for being AWOL but was going to give him a last chance (Tr. 103-104). A memorandum of that meeting, which is signed by Mr. Mullins, reflects that he was informed that he would not be suspended or discharged for his AWOL's, but that due to his excessive absenteeism, he was further informed that he must stay within the mine average of unallowed absences, and that if he did not, he would be subject to further disciplinary action, including a discharge (Joint Exhibit 14).

Although Mr. Mullins claimed that he did not believe that he had made any promises concerning his absenteeism to management when he left the meeting with Mr. Seik and Mr. Compton, he admitted that "he got the message," and understood that if he missed anymore days from work within the ensuing 180 days, he would be discharged (Tr. 108). Mr. Mullins' claim that he understood "non-allowed absences" to mean only AWOL's or nonexcused absences, and that the mine average absenteeism formula used by the respondent only pertained to absences not allowed under the labor/management contract, is rejected. I find no credible evidence to suggest or support any conclusion that Mr. Mullins was confused or unsure about the respondent's method for calculating a mine absentee average for purposes of its counseling program. The documentary evidence detailing Mr. Mullins' past counseling sessions concerning his absences from work all make reference to this policy, including references to absentee averages, and assurances by Mr. Mullins that "he would get his rate down," that "he understood the absentee plan . . . and would try to improve," and "do better in the future" (Joint Exhibits 9, 11, 12, 13).

Superintendent Compton testified that under the respondent's chronic and absentee policy, absences due to illness documented by a doctor's excuse may still be considered AWOL absences in the case of employees who have chronic absentee records or who have failed to adhere to last chance agreements. He cited at least two employees who were suspended with intent to discharge for violations of the respondent's policy under circumstances similar to Mr. Mullins' case, and confirmed that no one has ever been discharged simply because of being sick, but because of a combination of absences. Mr. Compton stated that the last chance agreement was discussed with Mr. Mullins and that he understood its conditions.

Mr. Compton conceded that but for Mr. Mullins' absences on April 14 and 20, 1988, which placed him over the mine average, he would not have been discharged. After careful review of Mr. Compton's explanation of the respondent's absentee policy,

including the method used for calculating an employee's average rate of absences, I find it to be plausible and reasonable and I cannot conclude that it was applied arbitrarily in Mr. Mullins' case. I further conclude and find that Mr. Mullins understood the respondent's policy and ground rules concerning absenteeism, and his assertions to the contrary are rejected.

On the basis of the record in this case, I conclude and find that Mr. Mullins had been subjected to repeated counselling concerning his absences, that the respondent had shown leniency towards him by not discharging him earlier, and that he entered into the last chance agreement knowing the risks and implications if he failed to adhere to the agreement. His failure to do so resulted in his suspension and discharge, and I conclude that the respondent's action in this regard constituted a reasonable exercise of its managerial authority over its workforce. I further conclude and find that the reason for Mr. Mullins' discharge was his failure to live up to his last chance agreement with the respondent, and that the respondent's motivation in discharging him had nothing to do with his insistence on making ventilation checks or informing the inspector about a roof-bolt condition. As stated by the Commission in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982), citing its Pasula and Chacon decisions, supra, "* * * Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." On the facts presented in Mr. Mullins' case, I conclude and find that the respondent's stated reason for discharging Mr. Mullins is both credible and reasonable in the circumstances presented.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that Mr. Mullins has failed to establish that the respondent has discriminated against him or has otherwise harassed him or retaliated against him because of the exercise of any protected rights on his part. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.


George A. Koutras
Administrative Law Judge

Distribution:

Jerry O. Talton, Esq., 222 East Main Street, Front Royal, VA
22630 (Certified Mail)

W. Challen Walling, Esq., Penn, Stuart, Eskridge & Jones,
306 Piedmont Avenue, P.O. Box 2009, Bristol, VA 24203
(Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 4 1989

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|-----------------------------------------------|---|----------------------------|
| ROCHESTER & PITTSBURGH COAL COMPANY, | : | CONTEST PROCEEDINGS |
| | : | |
| Contestant | : | Docket No. PENN 88-284-R |
| v. | : | Order No. 2888902; 7/14/88 |
| | : | |
| SECRETARY OF LABOR, | : | Docket No. PENN 88-285-R |
| MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Order No. 2888903; 7/14/88 |
| | : | |
| Respondent | : | Greenwich Collieries |
| | : | No 2. Mine |
| | : | Mine ID 36-02404 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| | : | |
| MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Docket No. PENN 89-72 |
| | : | A.C. No. 36-02404-03740 |
| Petitioner | : | |
| v. | : | |
| | : | Greenwich Collieries |
| ROCHESTER & PITTSBURGH COAL COMPANY, | : | No. 2 Mine |
| | : | |
| Respondent | : | |

DECISION

Appearances: Joseph A. Yuhas, Esq., Greenwich Collieries, Ebensburg, Pennsylvania for Contestant/Respondent. Paul D. Inglesby, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Rochester & Pittsburgh Coal Company (R&P), has filed notices of contest challenging the issuance of Order No. 2888902 (Docket No. PENN 88-284-R) and Order No. 2888903 (Docket No. PENN 88-285-R) at its Greenwich No. 2 Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of \$2,200 for the violations charged in the above two contested orders.

Pursuant to notice, these cases were heard in Pittsburgh, Pennsylvania on April 27, 1989. John L. Daisley testified for

the Secretary. He was the only witness. After the Secretary rested, R&P moved that the two orders at bar be modified to citations issued under § 104(a) of the Act and affirmed as such and that an appropriate civil penalty be assessed. I granted that motion on the record at the hearing. Pursuant to the Rules of Practice before this Commission, this written decision confirms the partial bench decision I rendered at the hearing as well as disposes of the remaining issues in the cases.

Issues

The issues presented in these proceedings are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act; and (3) whether the violations were "significant and substantial." Additional issues include the inspector's "unwarrantable failure" findings with respect to the two contested section 104(d)(2) orders.

Stipulations

The parties have agreed to the following stipulations, which I accepted (Tr. 4-6):

1. Greenwich Collieries is owned by Pennsylvania Mines Corporation and managed by Respondent Rochester and Pittsburgh Coal Company.

2. Greenwich Collieries is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject Orders were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

5. The respondent demonstrated good faith in the abatement of the orders.

6. The assessment of a civil penalty in this proceeding will not affect respondent's ability to continue in business.

7. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the fact that:

a. The respondent company's annual production tonnage is 10,554,743;

b. And that the Greenwich Collieries No. 2 Mine's annual production tonnage is 1,195,419.

8. Greenwich No. 2 Mine was assessed 879 violations over 1,224 inspection days during the 24 months preceding the issuance of the subject order.

9. The parties stipulate to the authenticity of their exhibits, but not to their relevance, nor to the truth of the matters asserted therein.

10. The respondent admits to at least a recording violation of 30 C.F.R. § 75.305 in each of the cited instances.

Discussion

R&P stipulated to the fact of violation concerning both of the orders at bar, at least insofar as a recording violation is concerned. Quite candidly, the company is also of the opinion that the examinations cited in these two orders were not in fact done. However, they were not willing to stipulate to that as a fact because they were unable to determine whether the examinations were or were not done.

Section 104(d)(2) Order No. 2888902 was issued to the operator on July 14, 1988, cites a violation of 30 C.F.R. § 75.305 and the condition or practice states as follows:

The required weekly examination for hazardous conditions for P9 intake, P-9 right and left returns including bleeder rooms, and the alternate escapeway from P-9 to P-20 for July 6, 1988, was recorded as being made by Joseph D. Mantini, mine examiner. However, an inspection of this area on 7-13-88 did not reveal any evidence, dates, times, and initials of the physical presence of the examiner in these areas. The last date of examination was 6-29-88-JM. The person

making such examinations and tests shall place his initials and the date and time at the place examined.

Section 104(d)(2) order No. 2888903 was likewise issued on July 14, 1988, cites a violation of 30 C.F.R. § 75.305 and alleges as follows:

The required weekly examination for hazardous conditions for main S return from regulator to 23 La Bour pump, alternate escapeway from 23 La Bour pump to T4, BE points in T2 and T-4 intake and return entries for July 7, 1988, was recorded as being made by Joseph D. Mantini, mine examiner. However, an inspection of this area on 7-14-88 did not reveal any evidence of dates, times, and initials of the physical presence of the examiner in these areas. The last date of examination of these areas was 6-30-88 J.M. The person making such examinations and tests shall place his initials and the date and time at the places examined.

Inspector Daisley testified that at the time he made his inspections of the above two cited areas, he could not find any times, dates or initials as evidence that the weekly examination for hazardous conditions was conducted for the week stated in the orders. This establishes in my mind a rebuttable presumption that the required inspections were not in fact done. This presumption is not rebutted in the record and therefore I am satisfied that the inspections were not accomplished and the Secretary has established the cited violations in both instances under consideration herein.

Furthermore, the failure to examine the cited areas for almost two weeks when some of these areas were designated as alternate escapeways and could very well have been blocked by roof falls or accumulations of water is a very serious situation. Also, there could have been a dangerous undetected accumulation of methane which is a potential hazard for a mine fire or explosion. The inspector was of the opinion that this practice he cited with regard to the failure to examine significantly and substantially compromised the health and safety of the miners. I concur and find both of these proven violations to be significant and substantial violations of the cited mandatory standard and serious. See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

I disagree with the Secretary, however, on the issue of unwarrantability. Mr. Mantini, a rank-and-file miner was assigned the responsibility to examine the cited portions of the mine and as I found above, he did not perform the examinations. However, Mr. Mantini did certify that he had performed the

examinations in the mine examiner's book and as the inspector testified, as far as the operator is concerned that entry would indicate that Mantini had actually performed the examinations. The mine examiner's book was falsified, apparently by Mr. Mantini, and unbeknownst to the operator.

Inspector Daisley very candidly admitted that in his opinion management was not aware of the violation and that they were, in effect, entitled to rely on the mine examiner's book. As far as management was concerned, the required examinations were done. The inspector also testified that in his opinion, excluding the intentional misconduct of Mr. Mantini, no other employee of R&P was in any manner negligent concerning this violation.

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

The Secretary urges that the misconduct of Mantini be imputed to the mine operator in this instance because even though Mantini is a rank-and-file miner, he was given mine examiner status by the operator, at least for the limited period of time covering "miners vacation," and essentially became the operator while performing the certified mine inspections.

In this case, Mantini's misconduct was willful and intentional. He did not perform the required examinations, he knew he did not, and yet he certified in the operator's official records that he had performed them. I have a lot of trouble with the idea that a rank-and-file employee's intentional misconduct is imputable to management as their own "aggravated conduct" when there is absolutely no evidence in the record that any member of mine management actually knew or even should have known that the examinations were not done. The inspector admitted as much. Therefore, I reject the notion that a rank-and-file miner's intentional misconduct is per se imputable to the operator simply because the operator has appointed that individual to be a mine examiner.

This case is reminiscent of that line of Commission precedent where it has been repeatedly held that an operator is liable for violations of the Act and the mandatory standards promulgated thereunder that are attributable to the "idiosyncratic and unpredictable" acts of its rank-and-file

employees. I believe this language includes intentional violations committed by its employees, and R&P is responsible therefore for the two violations at bar. However, with regard to unwarrantability findings, I believe the requisite "aggravated conduct" must be the operator's conduct, not the rank-and-file miner's. For this reason, I modified the two § 104(d)(2) orders at bar to citations issued under § 104(a) of the Act.

For penalty assessment purposes, it is settled that rank-and-file employee negligence is not imputable to the operator. The operator's negligence in these instances must be determined by an examination of the operator's own conduct. Secretary of Labor v. Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-65 (August 1982). In this case, I find the evidence of operator negligence established in the record to be nil.

On the basis of the foregoing findings and conclusions, including the Stipulations accepted herein, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$450 for each of the two violations found herein is appropriate and reasonable.

ORDER

It is ORDERED that Order Nos. 2888902 and 2888903 be MODIFIED to § 104(a) citations.

It is further ORDERED that the operator pay \$900 within 30 days from the date of this decision.


Roy J. Maurer
Administrative Law Judge

Distribution:

Joseph A. Yuhas, Esq., Greenwich Collieries, P.O. Box 367,
Ebensburg, PA 15931

Paul D. Inglesby, Esq., Office of the Solicitor, U.S. Department
of Labor, 3535 Market St., Room 14480, Philadelphia, PA 19104
(Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 6 1989

KENNETH HOWARD, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 89-2-D
: BARB CD 88-56
B & M TRUCKING, :
Respondent : No. 2 Mine

DECISION

Appearances: Phyllis L. Robinson, Esq., Hyden, Kentucky for
Complainant;
W. Henry Lawson, Esq., Pineville, Kentucky for
Respondent.

Before: Judge Melick

This case is before me upon the Complaint of
Kenneth Howard under section 105(c)(3) of the Federal Mine
Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the
"Act," alleging unlawful discharge by the B & M Trucking
Company, Inc., (B&M) in violation of section 105(c)(1) of the
Act.^{1/}

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

No person shall discharge or in any manner
discriminate against or cause to be discharged or
cause discrimination against or otherwise interfere
with the exercise of the statutory rights of any
miner, representative of miners or applicant for
employment in any coal or other mine subject to
this Act because such miner, representative of
miners or applicant for employment, has filed or
made a complaint under or related to this Act,
including a complaint notifying the operator or the
operator's agent, or the representative of the
miners at the coal or other mine of an alleged
danger or safety or health violation in a coal or
other mine or because such miner, representative of
miners or applicant for employment is the subject
of medical evaluations and potential transfer under
a standard published pursuant to section 101 or
because such representative of miners or applicant
for employment has instituted or caused to be
instituted any proceedings under or related to this
Act or has testified or is about to testify in any
such proceeding, or because of the exercise by such
miner, representative of miners or applicant for
employment on behalf of himself or others of any
statutory right afforded by this Act.

Counsel for Mr. Howard preliminarily claimed that Mr. Howard was fired on August 10, 1988, because he had requested training on a front-end loader he was directed to operate as an employee of B&M and because he later complained that he had not received such training.^{2/} However in his testimony at hearing Howard denied any such claims. Howard further admitted at hearing that when he first reported for work as a truck driver for B&M, Mitch Sturgill, the President of B&M, told him that it would be necessary for him to load the coal himself with the front-end loader and that he told Sturgill, that he would try. Howard further concedes that he never complained to anyone about health or safety concerns and admits that he never even "came close to" injuring anyone while operating the front-end loader. Howard maintains only that he told Sturgill that he was "having trouble" operating the loader and, after three weeks on the job, told Sturgill that he would no longer operate the loader.^{3/}

Sturgill testified that when he first telephoned Howard about working as a truck driver for B&M he told him "we have to load our own coal". This was required under the B&M haulage contract and, according to Sturgill, it is not unusual in eastern Kentucky for the truck drivers to have to load their own coal with a front-end loader. Indeed Howard's father-in-law had been working as a truck driver for B&M before Howard was hired and had been loading his own coal in this manner. It is clear from this evidence then that Howard knew when he was hired that his duties included operating a front-end loader. According to Sturgill, Howard told him before he was hired that he could "run a loader" and commented only that he was "not the best". Indeed Sturgill

^{2/} There is evidence that the Complainant did in fact provide information to the Federal Mine Safety and Health Administration leading to the issuance by that agency of a citation to B&M for failing to provide safety task training to Howard. However it is clear that that report was made subsequent to the discharge here at issue. It is accordingly not relevant to these proceedings.

^{3/} While Sturgill thought that Howard may have complained about his exposure to coal dust while operating the loader, Howard maintains that he only complained about the dust to "Skeeter", an employee of Four-Aces Coal Company, who would then spray the coal with water to keep the dust down. In any event it is clear within the evidentiary framework of this case that no retaliatory motive was based upon any such complaint.

later observed Howard loading his truck and found that he did a "good job" and was "normal" but a "little slower". Howard, who claimed at hearing that he had never previously operated a loader, admitted that he never asked any questions about how to operate the loader even though Sturgill was present when he began work.

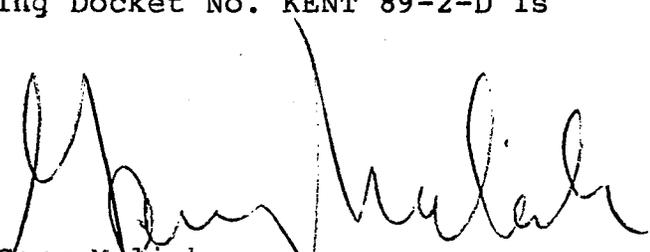
After three weeks of loading his own coal Howard suddenly refused to continue and Sturgill himself then loaded the trucks for 4 1/2 days. Around this time Sturgill also found that Howard was spilling large amounts of coal from his truck onto the public highway and was not cleaning it up. This was in violation of B&M's contract and resulted in a loss to B&M of one-half day of work while it was cleaned up. According to Sturgill, continued spillage could have resulted in the termination of the B&M haulage contract. Sturgill had previously warned his drivers, including Howard, that they were responsible for cleaning up their own spillage.

Sturgill testified that he decided to fire Howard at this time because of Howard's failure to clean up his coal spillage and because of his refusal to load his own truck. Sturgill testified that he could not afford at that time to hire a separate loader operator. I find Sturgill's testimony in this regard to be credible.

The credible evidence shows that Howard did not refuse to operate the loader until three weeks after he began working and then, by his own admission, simply refused to operate it because he was "having trouble". Howard admits that he never asked for training and it did not appear to Sturgill that he needed it. Accordingly I cannot find that either a safety or a health related complaint was made in connection with the operation of the loader. Moreover since no health or safety related basis for a "work refusal" was ever communicated to any agent of the operator, the Complainant could not in any event sustain his burden of proving that he engaged in a protected work refusal. Conaster v. Red Flame Coal Co., Inc., 11 FMSHRC 12 (1989). See also Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988) and Sammons v. Mine Services Co., 6 FMSHRC 1391 (1984). Indeed Mr. Howard has in this case failed to sustain his burden of proving that he engaged in any activity protected by the Act and his case must accordingly be dismissed.

ORDER

Discrimination Proceeding Docket No. KENT 89-2-D is
DISMISSED.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Phyllis L. Robinson, Esq., P.O. Box 952, Hyden, KY 41749
(Certified Mail)

W. Henry Lawson, Esq., P.O. Box 449, Pineville, KY 40977
(Certified Mail)

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

OCT 10 1989

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-246-DM
ON BEHALF OF HARRY RAMSEY, :
Complainant : MD 87-51
v. :
 : Colosseum Mine
INDUSTRIAL CONSTRUCTORS CORP., :
Respondent :

DECISION

Appearances: Norman J. Reed, Esq. and Nathaniel J. Reed, Esq.
Las Vegas, Nevada,
for Complainant;
William T. Murphy, Esq., Washington Corporations,
Missoula, Montana,
for Respondent.

Before: Judge Morris

This case involves a discrimination complaint originally filed by the Secretary of Labor on behalf of complainant pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

After notice to the parties a hearing on the merits was held in Las Vegas, Nevada on January 31, 1989. The issue of attorney fees was reserved for a later date.

In an interim order issued August 2, 1989, published at 11 FMSHRC 1585, the presiding judge found in favor of complainant.

The interim order provided:

1. For the reinstatement of complainant.
2. For back pay with interest from August 13, 1987, until complainant was reinstated.
3. The parties were further directed to stipulate, if possible, on the issue of the amount of damages and attorney fees. If the parties could not agree then a hearing would be held on October 24, 1989.

On October 4, 1989, the parties filed a document entitled "Stipulation On Damages." The document reads as follows:

The undersigned parties to Mining Safety and Health Administration Docket No. WEST 88-246-DM involving Harry Ramsey and Industrial Constructors Corporation (hereinafter ICC) stipulate and agree to certain facts for purpose of settling the record on the amount of Mr. Ramsey's past, present and future damage claim. This agreement pertains to amount only and is not an agreement as to entitlement thereto.

Both parties preserve the right to appeal, and do not waive their right to contest the issues in the case, except that if ICC's liability to pay wages for any time period is affirmed in any appeal, the damages are set as follows:

1. Mr. Ramsey has waived reinstatement, and the parties agree that Mr. Ramsey declined reinstatement as of August 31, 1989, and that Mr. Ramsey's wage loss stopped accruing on that date.

2. The night shift at the Colosseum Mine terminated September 25, 1987, and thus the wages stated herein are divided into wages loss accumulated before said date and losses accumulated after said date. Wages before said date include overtime.

3. Mr. Ramsey's wage loss from August 13, 1987, to September 25, 1987, if affirmed, is:

- a. \$2,631.01 in regular time wages, after payroll deductions.
- b. \$943.23 in overtime wages, after payroll deductions.
- c. \$709.71 in interest to August 31, 1989, on regular time and overtime wages.
- d. \$226.00 in 401(k) payments.

4. ICC's liability from September 25, 1987, to August 31, 1989, if affirmed, is:

- a. \$37,137.00 in regular time wages, after payroll deductions.
- b. \$3,408.00 in interest to August 31, 1989, on regular time wages.
- c. \$2,994.00 in 401(k) payments.

5. Attorney fees are set in the amount of \$15,375.00 for attorney fees up to September 27, 1989. Any fees incurred by Mr. Ramsey in an appeal or post trial work after September 27, 1989, shall be in addition to the above, if the court or Review Board allows said fees.

6. Mr. Ramsey's trials costs are \$1,556.00.

7. Interest accumulated on the above amounts after August 31, 1989, will be added to the above amounts up to time of collection, if allowed by the Court or Review Board.

Based on the record herein and the stipulation filed October 4, 1989, I hereby enter the following:

ORDER

1. The order reinstating complainant heretofore entered by the presiding judge is vacated.

2. Respondent is ordered to pay to complainant the following amounts for lost wages and interest:

- a. For the period from August 13, 1987, to September 25, 1987, the total sum of \$4,509.95.
- b. For the period from September 25, 1987, to August 31, 1989, the sum of \$43,539.00.

3. Respondent is further ordered to pay to complainant the sum of \$15,375.00 as and for attorney fees incurred by complainant until and including September 27, 1989.

4. Respondent is further ordered to pay to complainant the sum of \$1,556.00 as and for trial costs.

5. After August 31, 1989, interest shall accrue on the above amounts until paid at such rates as may be published by the Executive Director of the Commission.

6. The hearing scheduled in Las Vegas, Nevada for October 24, 1989, is cancelled.

7. This is a final decision and order pursuant to Fed. R. Civ. P. 54(b).


John J. Morris
Administrative Law Judge

Distribution:

Nathaniel Reed, Esq., Norman Reed, Esq., 1405 South Maryland Parkway, Las Vegas, NV 89104 (Certified Mail)

William T. Murphy, Esq., Washington Corporations, 101 International Way, Missoula, MT 59902 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 16 1989

| | | |
|-----------------------------|---|----------------------------|
| SOUTHERN OHIO COAL COMPANY, | : | CONTEST PROCEEDING |
| Contestant | : | |
| v. | : | Docket No. WEVA 88-144-R |
| | : | Order No. 2895540; 1/27/88 |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Martinka No. 1 Mine |
| ADMINISTRATION (MSHA), | : | Mine ID 46-03805 |
| Respondent | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 88-212 |
| Petitioner | : | A.C. No. 46-03805-03852 |
| v. | : | |
| | : | Martinka No. 1 Mine |
| SOUTHERN OHIO COAL COMPANY, | : | |
| Respondent | : | |

DECISION

Appearances: Joseph T. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner; David A. Laing, Esq., Porter, Wright, Morris & Arthur, Columbus, Ohio, for Contestant/Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Southern Ohio Coal Company (SOCCO), has filed a notice of contest challenging the issuance of Order No. 2895540 at its Martinka No. 1 Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of \$1700 for the violations charged in the aforementioned contested order as well as the unrelated, uncontested \$ 104(d)(2) Order No. 2895348 which was also issued on January 27, 1988.

At the hearing on these cases, which was held on June 28, 1989, in Morgantown, West Virginia, the parties jointly moved for approval of their settlement of that portion of the civil penalty case that pertained to Order No. 2895540. I approved a reduction from \$900 to \$500 of that part of the civil penalty assessment and granted the motion on the record (Tr. 4-7). That settlement proposal, once approved, effectively mooted out the contest proceeding docketed at WEVA 88-144-R.

The aforementioned partial settlement did not include Order No. 2895348, which alleges a violation of 30 C.F.R. § 75.1403-9(a) and proposes a civil penalty of \$800. That alleged violation was tried before me at the hearing on June 28, 1989.

The general issues before me concerning this remaining order and its accompanying civil penalty proposal are whether the order was properly issued, including an examination of the validity of the underlying notice to provide safeguards, whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial", and caused by the "unwarrantable failure" of the mine operator to comply with that standard. Additionally, should a violation be found, an appropriate civil penalty must be assessed.

Order No. 2895348, issued pursuant to § 104(d)(2) of the Federal Mine Safety and Health Act of 1977 (the Act), alleges a violation of the regulatory standard at 30 C.F.R. § 75.1403-9(a) and charges as follows:

A shelter hole is not provided along the E4 section supply track for a distance of 170 feet when measured. The area is between No. 1 block and No. 3 block. Overcast walls are in the crosscuts left and right of the track. Notice to provide Safeguard was issued No. 1JF 5/23/75.

Notice To Provide Safeguard No. 1JF, issued on May 23, 1975, states in pertinent part:

Shelter holes are not provided at 105 foot intervals on the 1 Left section supply track for a distance of 400 feet.

Shelter holes shall be provided on all track haulage roads in this mine.

Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

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

1. SOCCO and its Martinka No. 1 Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. This administrative law judge has jurisdiction over these proceedings pursuant to Section 105 of the Act.

3. Order No. 2895348 was properly served by a duly-authorized representative of the Secretary on the date reflected therein.

4. SOCCO is a large operator, and the assessment of a civil penalty in this proceeding will not affect SOCCO's ability to remain in business.

5. The alleged violation set forth in Order No. 2895348 was abated in good faith by SOCCO.

FINDINGS OF FACT

1. Order No. 2895348 was issued on January 27, 1988, by Inspector Charles J. Thomas during a AAA inspection of the Martinka No. 1 Mine.

2. Inspector Thomas observed, representatives of SOCCO essentially admitted, and I so find as a fact that shelter holes had not been provided every 105 feet along the E-4 Section supply track haulage. More particularly, the inspector located an area along that track haulage, 170 feet in length, that did not contain a shelter hole.

3. On May 23, 1975, a notice to provide safeguards was issued for this mine concerning shelter holes. This safeguard essentially stated that shelter holes shall be provided on track haulage at intervals of not more than 105 feet.

4. Inspector Thomas has inspected approximately 30 underground coal mines during his 20 year tenure as an MSHA inspector. Of these 30 underground coal mines, approximately 21 utilize track haulage. All of these 21 mines have a safeguard requiring that shelter holes be located every 105 feet on the track haulage. Inspector Thomas could not recall any underground coal mine with track haulage that did not have a safeguard requiring shelter holes every 105 feet.

5. A similar safeguard requiring shelter holes every 105 feet on track haulage has been issued at SOCCO's Meigs No. 1, Meigs No. 2 and Raccoon No. 3 mines located in Ohio. In addition, a similar safeguard has been issued at the Windsor Coal Company in Moundsville, West Virginia. Windsor Coal Company, like SOCCO, is part of the American Electric Power system.

DISCUSSION

The Secretary bears the burden of proof to demonstrate that the violation occurred as alleged in the instant order. Since this is a "safeguard" case, SOCCO argues that that burden includes establishing the validity of the underlying safeguard at issue. I agree. Secondly, given that burden, SOCCO argues that the Secretary has failed in this instance to demonstrate the validity of Safeguard No. 1JF in that there is no evidence in this record that the safeguard was issued because of any peculiar circumstance or configuration existant in the Martinka No. 1 Mine. To the contrary, the operator states that the record evidence clearly demonstrates that the subject safeguard has been issued in a blanket manner at every underground coal mine that utilizes track haulage.

If the safeguard is not valid, then the section (d)(2) order which purports to enforce it would likewise be invalid.

30 C.F.R. §§ 75.1403-2 through 75.1403-11 set out the criteria by which an MSHA inspector is guided in imposing safeguards on a mine-by-mine basis under section 75.1403, which repeats section 314(b) of the Act. These criteria are not enforceable as mandatory standards but become enforceable when the operator is issued a notice to provide safeguards.

Section 314(b) of the Act grants the Secretary the extraordinary authority to essentially create mandatory safety standards on a mine-by-mine basis without resorting to the normal rulemaking procedures contemplated by the Act. Normally, mandatory safety standards are developed and promulgated in accordance with section 101 of the Act and the rule-making provisions contained in the Administrative Procedure Act, 5 U.S.C. § 551, et seq. SOCCO maintains that the requirements set forth in the instant safeguard should have properly been the subject of such rule-making, rather than a safeguard notice issued under section 314(b) of the Act, inasmuch as the safeguard was not issued on a mine-by-mine basis and not due to any particular circumstances or configuration of the Martinka mine.

In Southern Ohio Coal Company, 10 FMSHRC 963 (August 1988), the Commission discussed the issue of the general application of safeguards, but declined to rule on the specific issue of whether a safeguard of general applicability could pass muster and be enforceable under the Act, due to the inadequacy of the trial record before it in that case.

The identical issue resurfaces repeatedly at the trial level and is the major issue before me in the instant case.

Subsequent to that Commission decision, Commission Judge Weisberger, in Southern Ohio Coal Co., 10 FMSHRC 1564 (November 1988) vacated a citation alleging a safeguard violation because of the Secretary's failure to establish that the underlying safeguard was mine-specific to the Martinka No. 1 Mine.

Similarly, in Beth Energy Mines, Inc., 11 FMSHRC 942 (May 1989) Commission Judge Melick vacated a citation premised on a safeguard violation when he held that safeguards cannot be used to impose general requirements on all mines throughout a district without regard to the circumstances of the specific mines. Conversely, Judge Melick noted that MSHA may legitimately use safeguards to "impose requirements on an operator on a mine-by-mine basis subject to the specific conditions and requirements necessitated by the peculiar circumstances at a particular mine". Id. at 948.

See also, U.S. Steel Mining Co., Inc., 4 FMSHRC 526 (March 1982) where Commission Chief Judge Merlin vacated a similar citation on the basis that the underlying safeguard had nothing to do with the conditions peculiar to that mine as opposed to all other mines.

In this case, Inspector Thomas testified that he cannot recall a single instance where an underground coal mine that utilizes track haulage does not also have a safeguard requiring shelter holes every 105 feet along that track haulage. Furthermore, all of the approximately 21 underground coal mines that he personally has inspected that have track haulage also have this same safeguard requiring shelter holes every 105 feet.

Moreover, similar safeguards requiring shelter holes every 105 feet along track haulage have also been issued at SOCCO's Meigs No. 1, Meigs No. 2 and Raccoon No. 3 mines in southern Ohio. Additionally, a similar safeguard has also been issued to the Windsor Coal Company, in West Virginia.

The evidence in this case could hardly be stronger that the safeguard at bar as well as those widespread similarly worded safeguards that apparently are prevalent throughout the industry are issued without regard to the conditions at any particular mine as long as that mine has track haulage. For all intents and purposes, these safeguards are an across-the-board mandatory safety standard requiring shelter holes every 105 feet along track haulage, period. If that is what the Secretary believes is necessary in the interest of mine safety, and it may very well be an essential rule, then it is incumbent upon her to promulgate that standard in accordance with the rule-making procedures contained in Section 101 of the Act.

The Secretary clearly has the burden of proving every element of her case necessary to establish the violation alleged and I believe that includes the validity of the underlying safeguard in this type of a case which involves enforcing a safeguard.

I conclude that in this case, the Secretary has failed to demonstrate that Safeguard No. 1JF was issued on a "mine-by-mine" basis and more particularly, has failed to demonstrate that it was issued at the Martinka No. 1 Mine because of any peculiar circumstances or physical configuration of that mine. The safeguard had nothing whatsoever to do with conditions peculiar to that mine as opposed to other mines that also have track haulage. For these reasons, I find it to be an invalid safeguard.

Therefore, I find that Order No. 2895348, being based on an invalid safeguard, was improperly issued and must be vacated.

ORDER

Based on the above findings of fact and conclusions of law, and on the motion to approve settlement, IT IS ORDERED THAT:

1. Order No. 2895540 is MODIFIED to a Section 104(a) citation.
2. Order No. 2895348 is VACATED.
3. Docket No. WEVA 88-144-R is GRANTED in part insofar as it contests the finding of unwarrantability in Order No. 2895540.
4. The Southern Ohio Coal Company pay a civil penalty of \$500 within 30 days of the date of this decision for the violation found in Citation No. 2895540.



Roy J. Maurer
Administrative Law Judge

Distribution:

David A. Laing, Esq., Porter, Wright, Morris & Arthur, 41 S. High St., Columbus, OH 43215-3406 (Certified Mail)

Joseph T. Crawford, Esq., U.S. Department of Labor, Office of the Solicitor, 14480 Gateway Bldg., 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 17 1989

| | | |
|---------------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. PENN 88-304 |
| Petitioner | : | A. C. No. 36-00958-03739 |
| v. | : | |
| | : | Livingston Portal Eighty |
| BETH ENERGY MINES INCORPORATED, | : | Four Complex |
| Respondent | : | |
| | : | |

DECISION

Appearances: Anita Eve, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, PA, for the Secretary;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this proceeding, the Secretary (Petitioner) seeks a civil penalty for an alleged violation by the Operator (Respondent) of 30 C.F.R. § 75.316. A Petition for Assessment of Civil Penalty was filed on September 23, 1988, and Respondent filed its Answer on September 30, 1988. On March 28, 1989, the case was set for hearing on June 21 - 22, 1989. Pursuant to a telephone conference call on April 6, 1989, between the undersigned and attorneys for both Parties, a hearing in this matter was rescheduled for August 1 - 3, 1989.

On April 10, 1989, Petitioner filed a Motion to Reopen Discovery, and on April 12, 1989, Respondent filed its response in opposition. The Motion was granted by Order of April 25, 1989.

Subsequently the case was heard on August 1 - 2, 1989, in Johnstown, Pennsylvania. James High, Alvin Shade, Lorenzo Steele, and Richard Zilka testified for Petitioner. Steve Carson, Bruce Sheets, Thomas Mucho, George Kupar, David Morris, Dale Anders, and Michael Error testified for Respondent.

The Parties were granted time to file proposed Findings of Fact and Briefs 3 weeks subsequent to the receipt of the Hearing Transcript. The official Transcript was filed on August 17, 1989. Respondent filed its Brief on September 11, 1989. Petitioner was granted an extension until September 20, 1989, to file its Brief, but none was filed.

Stipulations

1. At all times pertinent to these proceedings, Beth Energy Mines, Incorporated was the owner and operator of an underground coal mine known as the Livingston Portal, Eighty-Four Complex located in Washington County, Pennsylvania.

2. Beth Energy's mining operations affect Interstate Commerce.

3. Beth Energy is a large operator and the subject mine is also a large mine.

4. In the 24 months proceeding the issuance of the subject citation there were 1,022 violations cited in the subject mine.

5. The ability of Beth Energy to remain in business will not be affected by the assessment of a penalty in this case.

6. As noted on Government Exhibit Number Two A, the Livingston Portal Eighty-Four Complex had been under a 104(d)(2) change since October 7, 1987, and that at the time of the issuance of the Order in this case on May 3, 1988, there had not been a completed inspection prior thereto.

Findings of Fact and Discussion

I.

On May 3, 1988, the approved ventilation plan at Respondent's Livingston Portal Eighty-Four Complex, as evidenced by Government Exhibit 3 and Exhibit O-3, required that air in the return entry be coursed in the proper direction, and air that had been used to ventilate old workings not be used to ventilate the active workings of the section. At 9:15 a.m. on May 3, 1988, James High, an MSHA Inspector, tested the ventilation of a transformer (load or power center) located between the cross cut and the No. 2 Entry. The transformer was to be ventilated by a tube, 4 to 6 inches in diameter, which was to ventilate the air from the transformer to No. 4 Entry. When High performed a chemical smoke cloud test, he observed that the cloud "blowed back out" (August 1, 1989, Vol. I), Tr. 29), rather than being drawn in toward the tubing. High's testimony has not been contradicted by Respondent's witnesses, and

was corroborated by Alvin Shade, an MSHA Inspector, who was present with High and agreed that there was return air going to the face. Further, Lorenzo Steele, a coal mine inspector supervisor, was also present and observed a reversal of the air. In addition, Bruce Sheets, a longwall foreman employed by Respondent, who testified on Respondent's behalf, also observed the reversal of air. Thus, I conclude that Respondent herein did violate its ventilation plan, and hence did violate 30 C.F.R. § 75.316.

II.

Significant and Substantial

According to High, because of the reversal of the air flow from the transformer and battery changer to the longwall section, should there be a fire at the former location, it would be "reasonably likely" for smoke to go to the longwall section. He indicated that the battery changing station and the transformer are ignition sources. He concurred that he was concerned that if anything happened to the battery charger or transformer, smoke could be generated which would go to the face. However, he agreed that these items were "in good working order" (Vol. I, Tr. 81). Further, the uncontradicted testimony of Thomas Mucho, the manager of Respondent's operations at the subject mine, indicates that carbon monoxide from a fire at the area in question would "probably" pass by sensors at the tail piece of the longwall. (August 2, 1989, (Vol. II), Tr. 52). (The sensors are designed to produce a warning or alarm.)

Alvin Shade, an inspector who was present with High, essentially corroborated High's testimony, but did not elaborate on the likelihood of a fire occurring. Lorenzo Steele, an MSHA Supervisor who also was present during High's inspection, indicated that methane readings as high as 9/10 of 1 percent were detected outby the regulator in the No. 4 entry, and there was coal dust and respirable dust present. He stated that at any time the methane in the area at issue could increase, as on two prior occasions the subject mine had to be closed down due to a high level of methane. He indicated that he would have issued a withdrawal order based on an imminent danger. I find that at most Steele's testimony establishes that an increase in methane could have occurred, but it does not establish that it was reasonably likely to have done so. Further, based on Mucho's testimony, it appears that methane in the area in question, that is brought to the face by an air reversal, would be exceedingly diluted by the volume of air at the face (Vol. II, Tr. 57). Thus, the likelihood of injuries appears to be mitigated.

Richard Zilka, a ventilation specialist employed by MSHA, indicated that the battery charger produces noxious gasses and hydrogen which as a consequence of the air reversal, would go to the face. However, there was no evidence presented as to the quantities of these elements, and their specific impact if any on the air at the face.

I find that there is insufficient evidence presented by Petitioner to conclude that the production of smoke or fire was reasonably likely to occur. The record also is lacking with regard to a description of the types of injuries which could reasonably be expected from the violation herein. Thus, I find that it has not been established that the violation herein was significant and substantial (See, Mathies Coal Co., 6 FMSHRC 1 (1984)).

III.

Unwarrantable Failure

Some time prior to the issuance of the order in question, Respondent decided to cut through three entries to connect the 4 left panel with the 3C longwall panel. This connection (cut-through) was made in order to experiment with certain 10 foot pillars, and to shorten the left split return in the 4 left section. By May 2, 1988, in the evening shift, two entries had already been cut through to the 3C longwall panel. At approximately 7 to 8 p.m., on May 2, the last entry was cut through and curtains were installed. At that time air and methane readings were taken in the left and right splits of the 4 left return, and according to Steve Carson, the section foreman there was nothing unusual. Robert Merasoff, who was the longwall foreman, for the 4 p.m. to midnight shift on May 2, in the 5A longwall panel, indicated in a deposition taken on July 12, 1988, (Exhibit O-5), that he was not aware of the cut-through. Merasoff indicated that, in a preshift examination, the air current was moving in its proper course and was of the usual volume. He also indicated that he examined the battery and power center and did not recall any problem. Further, examinations of the tubing with a crumbled piece of chalk, both on preshift and on-shift, indicated that air was traveling in the proper course.

David Morris, the section foreman on the 5A longwall for the midnight shift, May 3, 1988, indicated that he did not test the air going through the tubes. He indicated that he just walked by the battery and power center, and did not recall anything unusual. Bruce Sheets, Respondent longwall foreman for the 5A panel on the morning of May 3, could not recall if he tested the air at the power center and battery prior to the time High issued the order at issue.

In essence, according to High, the violation herein is to be considered to be as a result of Respondent's unwarrantable failure, inasmuch as after the connection between the 4 left and 3C areas was made, Respondent should have checked the air at all areas to be affected, including the regulator for the 5A longwall panel. 1/ In this connection, he indicated that George Kubar, Respondent's inspection coordinator, who accompanied him on the inspection, on May 3, indicated to him essentially that the cut-through had made an imbalance in the air, and had caused air to go from the 3C section across the 4 left area to the 5A longwall panel. 2/

Richard Zilka, a Federal Coal Mine Inspector Ventilation Specialist employed by Petitioner, opined that the ventilation in the 4 left area is "delicate" as it abuts the 5A longwall section. (Vol. I, Tr. 181). Hence, according to Zilka, if the regulator for the right split of the 4 left panel is "satisfied" (Vol. I, Tr. 182) by the amount of air it is adjusted for, then air from the No. 4 Entry can not go that way, and instead will go by the most available way to the fan which is back through the tube in the No. 2 Entry at the battery and power center. He asserted that accordingly, if there is a ventilation change in the 4 left, such as a cut-through, there should be an examination afterwards in the 5A panel to make sure that there are no ventilation changes in that area. He indicated that because the 4 left area and 5A longwall panel are so close, it was "negligence" (Vol. II, Tr. 154) not to note that any increase in the ventilation in the right split of the 4 left area would affect the regulator for the 5A longwall panel.) He opined that the reversal of the air in the tube in question was caused by some ventilation change in the vicinity and possibly, by the cut-through.

In order to find that the violation herein resulted from Respondent's unwarrantable failure, it must be established that there was "aggravated conduct" on the part of Respondent, which is more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997 (1987)). After considering the record as a whole, based on the reasons that follow, I conclude that Petitioner has not met this burden. 3/

1/ The preshift examination normally did not include the regulator for the 5A longwall.

2/ When Kubar was asked whether he had made the statement, he answered "I do not believe so" (Vol. II, Tr. 98). Based on observation of the witness' demeanor, I accept High's version.

3/ In light of this conclusion, it is not necessary to decide Respondent's Motion for Summary Decision which was made at the conclusion of Petitioner's case, and as to which I had reserved decision.

A material issue to be decided is whether there was any aggravated conduct on the part of Respondent in not checking the tubing and the 5A longwall regulator after ventilation changes, occasioned by the completion of the connection on the evening of May 2, 1988, and the removal of two stoppings (E and B in Exhibit O-2) on the midnight shift of May 3. Also, according to Thomas Mucho, who was the mine manager at the subject 84 Complex, the violative condition was abated upon the removal of the two old partial block stoppings in the 4 left panel. Hence, it also must be decided whether there was any aggravated conduct on the part of Respondent in not having removed these stoppings previously upon completion of the connection and removal of stoppings labeled E and B on Exhibit O-2.

According to Mucho, who has a Bachelor of Science Degree in Mining Engineering, he has experience as an engineer in mines in the area of ventilation, and oversees the drawing up of the ventilation plans for the subject mine. Mucho indicated that prior to the report to him of the air reversal in the tubing in question, he did not anticipate that the completion of the connection and the removal of the stoppings E and B in the 4 left panel area would have caused any affect at the regulator for the No. 4 entry of the 5A longwall section, and thus did not assign anyone to check the air there. Specifically, he indicated that he did not anticipate that the completion of the connection, and the removal of the old stoppings E and B would have caused any air reversal at the tubes in question. He indicated that his lack of concern was based upon an assumption that, because of the close proximity of the 5A longwall section to the intake shaft as opposed to the distance of the 4 left area to the shaft, there would be more pressure in the 5A longwall section as compared to the 4 left. He was of the opinion that if the pressure would be less at the regulator labeled GG on Exhibit O-2, as a result of the removal of the old partial stoppings, air would be expected to go through that regulator from the 5A longwall panel and not from the 4 left panel. In this connection, Mucho indicated that on May 2, he did not feel any air change on either side of the partial stoppings, and concluded that there was no pressure drop and that these old partial stoppings were not affecting the system. On May 2, he was of the opinion that the ventilation changes in the 4 left area would not have any affect on these stoppings. ^{4/}

^{4/} Mucho indicated, in essence, that he considered them to be "needless resistance" (Vol. II, Tr. 75) in that they decreased efficiency and hence caused an increase in production costs. He said that he would have knocked them down, on May 2, if he had a sledge hammer, but that other matters that he was concerned with were on his mind.

Petitioner did not, upon cross-examination, elicit from Mucho any admission which would tend to indicate that the assumptions he made were not proper or reasonable. Nor did Petitioner adduce any evidence which would tend to indicate that the assumptions Mucho made were not prudent mining practices.

Dale E. Anders, Respondent's chief longwall foreman, indicated that when he was informed of the reversal, on the date in question, he checked the ventilation at the load center and it was "fine," (Vol. II, Tr. 120), and also the air in the opposite end in the No. 4 Entry was "fine." (Vol. II, Tr. 121). He indicated that when he checked 10 minutes later, the air direction had reversed. Petitioner's witnesses essentially agreed that the air direction at the tube did fluctuate. Neither High nor Shell nor Sheets was able to establish how often the air reversed itself. Neither High nor Shell established the duration of the air reversal and when it initially commenced. Accordingly, had the air at the No. 4 Entry of the 5A longwall panel regulator or the tubing in question been checked in the midnight shift of May 3, or the morning shift of that date, there is no certainty that such an examination would have uncovered the reversal, as the air direction fluctuated. Also, the evidence does not establish either the frequency or duration of the fluctuation. Taking into account all the above, I conclude that it has not been established that Respondent exhibited any "aggravated conduct" in connection with the violation herein.

IV.

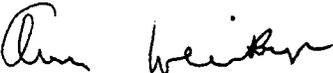
In essence, Michael Error, Respondent's ventilation foreman who planed the connector (cut-through), indicated, in looking at the results of the air reversal in the tube in question, that he would agree that once the permanent stoppings were removed, the old partial stoppings on May 3, were acting as regulators. Also, in essence, Mucho indicated that once he became aware of the air reversal, he concluded that it was caused by the effect of the old partial stoppings once the two permanent stoppings had been removed. Accordingly, I find that Respondent was negligent to a moderately high degree, as it should have known that the removal of the old stoppings would have had an impact on the ventilation in the 4 left area, and would have caused the reversal in question.

According to High, methane readings in the area in question were between .3 to .9, and Steele observed dust going down No. 4 Entry. An air reversal could have brought these hazards as well as noxious gases produced by the battery to the face. According to Mucho's uncontradicted testimony, any methane so drawn to the face would be diluted by the 40,000 cubic feet per meter air flow

at the face, and thus would be "imperceptible." (Vol. II, Tr. 57) There is no evidence to support Steele's opinion that at any time the methane could go higher. I conclude that the violation herein was of a moderately serious nature. Taking into account the balance of the statutory factors in section 110(i) of the Act as stipulated to by the Parties, I conclude that Respondent shall be assessed a penalty herein of \$700.

ORDER

It is hereby ORDERED that Order No. 3093147 issued on May 3, 1988, be amended to a section 104(a) Citation, and reflect the fact that the violation therein is not significant and substantial. It is further ORDERED that Respondent shall pay a civil penalty of \$700 within 30 days of this Decision.


Avram Weisberger
Administrative Law Judge

Distribution:

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

R. Henry Moore, Esq., Buchanan Ingersoll, 600 Grant Street, 57th Floor, Pittsburgh, PA 15219 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 17 1989

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|-------------------------------------------------------------------|---|---------------------------------|
| ROCHESTER & PITTSBURGH COAL COMPANY | : | CONTEST PROCEEDINGS |
| | : | |
| Contestant | : | Docket No. PENN 88-309-R |
| v. | : | Citation No. 2889075; 8/24/88 |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Docket No. PENN 88-310-R |
| Respondent | : | Citation No. 2889167; 9/6/88 |
| | : | |
| | : | Greenwich Collieries No. 2 Mine |
| | : | Mine ID 36-02404 |
| | : | |

DECISION

Appearances: Joseph A. Yuhas, Esq., Rochester & Pittsburgh Coal, Ebensburg, Pennsylvania, for the Contestant; B. Anne Gwynn, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Cases

In these proceedings, Rochester & Pittsburgh Coal Company (Contestant) seeks to contest two section 104(a) Citations issued on August 24, 1988, and September 6, 1988, respectively. Pursuant to notice, the cases were heard in Ebensburg, Pennsylvania on July 26, 1989. Nevin Davis testified for the Secretary (Respondent). Contestant did not adduce any testimony. Contestant indicated however, that if the citation was sustained, the penalties proposed by the Secretary are "appropriate" (TR. 8).

Respondent filed a posthearing brief on October 3, 1989, and Petitioner filed Proposed Findings and Fact and a Memorandum on October 4, 1989.

Stipulations

1. Greenwich Collieries is owned by Pennsylvania Mines Corporation and managed by Respondent, Rochester and Pittsburgh Coal Company.

2. Greenwich Collieries is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. Safeguard Number 2885431 was properly served by a duly authorized representative of the Secretary of Labor upon agents of the Rochester and Pittsburgh Coal Company on the day, time and place stated therein.

5. Safeguard Number 2885431 had not been vacated or withdrawn at the time citation numbers 2889075 and 2889167 were issued.

6. Citation Numbers 2889075 and 2889167 were properly served by a duly authorized representative of the Secretary of Labor upon agents at the Rochester and Pittsburgh Coal Company on the days, times and places stated therein.

7. The Respondent demonstrated good faith in the abatement of the citation.

8. The assessment of the civil penalty in this proceeding will not affect Respondent's ability to continue in business.

9. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the facts that, (a) the Respondent companies annual production tonnage is \$10,554,743, and (b) that the Greenwich Collieries Number Two Mine's annual production tonnage is \$1,195,419.

10. Greenwich Number Two Mine was assessed 881 violations over 1,224 inspection days during the 24 months preceding the issuance of Citation Number 2889075; and 911 violations over 1,228 inspection days during the 24 months preceding the issuance of Citation Number 2889167.

Findings of Fact and Conclusions of Law

Nevin Davis, an MSHA Inspector, testified that while at Contestant's Greenwich Collieries No. 2 Mine on May 16, 1988, he observed two of Contestant's employees unloading metal pipes from an elevator in the South Portal. He described the pipes as being approximately 2 inches in diameter and between 2 - 4 feet in length. He said that there were approximately four or five pipes, and that he also observed two "cylindrical" objects on the floor of the elevator that were approximately 1 foot to 1 and 1/2 feet high (Tr. 22). He said he testified that ". . . these have been known" (Tr. 23) to speed up or slow down,

thus, in his opinion, creating a hazard of the pipes moving, flying, and striking anyone riding in the elevator. In essence, he said that, considering the size and weight of the pipes, they created a serious hazard to persons present in the elevator. He opined that if the pipes were to strike an employee, there could be "any type of injury," including broken bones or open wounds. He indicated that the elevator in question was not being used as a "man trip" which he defined as a regularly scheduled trip transporting miners at a set time at the beginning or end of a shift. According to Davis, in essence, he was guided by a memorandum dated May 8, 1978, from Donald W. Huntley, District Manager Coal Mine Safety and Health, which stated that "In accordance with the procedure for expansion of provisions under section 75.1403 . . . the following list of provisions should be enforced: No persons shall ride on a cage or elevator with equipment, supplies, or other materials. This does not prohibit the carrying of small hand tools, surveying instruments, or technical devices." (Government Exhibit 1).

Davis indicated that on May 18, 1988, he issued a safeguard, pursuant to the above memorandum, in which he recited what he observed on May 16, 1988, and which requires ". . . that no person shall be transported on any cages or elevators with equipment, supplies, or other materials. This does not prohibit the carrying of small hand tools, surveying instruments, or technical devices." (Government Exhibit 2).

On August 24, 1988, Davis returned to the No. 2 Mine for a spot inspection and observed a miner exiting the same elevator he had observed on May 16. He said that a miner was riding in the elevator with a metal type portable dolly made out of pipe approximately 2 feet high, and which tapered to the bottom having a dimension of approximately 1 foot by 18 inches to 2 feet. He said that the dolly is designed to be pushed. Davis said that "If the elevator speeds up or slows down suddenly" (Tr. 31) the dolly could strike an employee. He described this event as being likely to occur and said that it could cause injuries to an employee such as broken bones or bruises. In view of the presence of an employee, he described the condition as serious, and presenting the same hazard as the one observed by him on May 16. Accordingly, he issued a citation, alleging, in essence, a violation of the safeguard previously issued on May 18.

On September 6, 1988, Davis returned to the No. 2 Mine and again observed a miner exiting the South Portal elevator with a metal type dolly which he described as the same one that he had observed on August 24, 1988. He again issued a section 104(a) Citation alleging a violation of the safeguard previously issued on May 18, 1988.

The Contestant did not dispute the conditions observed by Davis on May 16, August 24, or September 6, 1988. Contestant, however, challenges the underlying safeguard issued on May 18, 1988, on the ground that it addresses hazards that exist in all mines with elevators. Contestant also argues that the safeguard is not valid as it is insufficiently specific. In contrast, Respondent argues that the underlying safeguard although not being mine-unique was mine-specific.

The Commission in Secretary v. Southern Ohio Coal Co., 10 FMSHRC 963 at 967 (August 1988), noted that the Court of Appeals of the District of Columbia Circuit in Zeigler Coal Co. v. Kleppe, 536 F2d 389 (D.C. Cir. 1976) ". . . has recognized proof that ventilation requirements are generally applicable, rather than mine-specific, may provide the basis for a defense with respect to alleged violations of mandatory ventilation plans." The Commission in Southern Ohio, supra, at 967 further analyzed Zeigler as follows:

[T]he court considered the relationship of a mine's ventilation plan required under section 303(o) of the Act, 30 U.S.C. § 863(o), to mandatory health and safety standards promulgated by the Secretary. The court explained that the provisions of such a plan cannot "be used to impose general requirements of a variety well-suited to all or nearly all coal mines" but that as long as the provisions "are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application." 536 F.2d at 407; See also, Carbon County Coal Co., 6 FMSHRC 1123, 1127 (May 1984) (Carbon County I); Carbon County Coal Co., 7 FMSHRC 1367, 1370 72 (September 1985) (Carbon County II).

In Southern Ohio, supra, the Commission did not resolve the question of whether a defense to a safeguard may be based on its being generally applicable, as it found that there was no evidence of whether the safeguard was general or mine-specific. Specifically, the Commission in Southern Ohio, supra, at 965 indicated that no evidence was presented as to the circumstances under which the safeguard was issued or the "specific reasons" why the safeguard was imposed at the subject mine. In the case at bar, Davis, who issued the original safeguard, did not indicate that there was any specific reason why the safeguard was issued for the elevator at Mine No. 2. The terms of the Huntley Memorandum (Government Exhibit 1) which led Davis to issue the safeguard, and the terms of the safeguard itself, relate to conditions that are applicable to all elevators and are not unique to

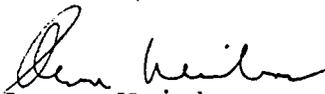
the elevators at Mine No. 2. According to Davis, the riding compartment of the elevator at Mine No. 2 is basically the same, aside from its dimensions, as the elevators found in other mines he inspects. Although the conditions that gave rise to the safeguard, i.e., men riding an elevator that also contained pipes, might be considered hazardous, there is no evidence that this condition is unique to Mine No. 2, or is occasioned by equipment peculiar to Mine No. 2.

I find that generally, in allocating the burden of proof, one factor taken into account is which Party has the best knowledge of the particular disputed facts (Lindahl v. Office of Personnel Management, 776 F.2d 276 (Fed. Cir. 1985)). The burden is not placed upon a Party to establish facts particularly within the knowledge of its adversary. In this connection, it appears that Respondent would have particular knowledge as to the circumstances under which the safeguard was issued, and the existence or need of similar safeguards at other mines (See, Southern Ohio, supra, at 967-968). In addition, it has been held that, generally, MSHA has the burden of putting forth a prima facie case of a violation (Miller Mining Co., Inc. v. Federal Mine Safety and Health Review Commission, 713 F.2d 487 (9th Cir 1983) See also, Old Ben Coal Corp. v. IBMA, 523 F.2d 25, 39 (7th Cir. 1975)). As such, it had the burden of establishing all elements of the citation including the validity of the underlying safeguard.

I thus conclude, based on all the above, that Petitioner has failed to establish that the safeguard in issue was mine-specific to the subject mine. As such, based on the rationale of Zeigler, supra, that applies with equal force to the case at bar, I conclude that because it has not been established that the safeguard was mine-specific, it therefore is invalid as it was not promulgated pursuant to the rule-making procedures of section 314(b) of the Act. (See Beth Energy Mines, Inc., 11 FMSHRC 942 (Judge Melick 1989), Southern Ohio Coal Co., 10 FMSHRC 1564 (Judge Weisberger 1989.)) Accordingly, I find that the Citations herein should be dismissed, inasmuch as they were predicated upon an invalid safeguard.

ORDER

It is ORDERED that the Notices of Contest, Docket Nos. PENN 88-309-R and PENN 88-310-R, are SUSTAINED.


Avram Weisberger
Administrative Law Judge

Distribution:

Joseph A. Yuhas, Esq., Rochester & Pittsburgh Coal Company, P. O.
Box 367, Ebensburg, PA 15931 (Certified Mail)

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

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR

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FALLS CHURCH, VIRGINIA 22041

OCT 17 1989

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 89-44 |
| Petitioner | : | A.C. No. 46-03805-03880 |
| v. | : | |
| | : | Martinka No. Mine |
| SOUTHERN OHIO COAL COMPANY, | : | |
| Respondent | : | |

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor (Secretary); David M. Cohen, Esq., Lancaster, Ohio, for Southern Ohio Coal Company (SOCCO).

Before: Judge Broderick

STATEMENT OF THE CASE

In this docket, the Secretary seeks civil penalties for two alleged violations of mandatory safety standards. The violations were charged in two withdrawal orders issued under section 104(d)(2) of the Federal Mine Safety and Health Act (Act). With respect to the violation charged in Order 3106068, the parties have agreed to a settlement, and the Secretary filed a motion for its approval subsequent to the hearing. Pursuant to notice, a hearing was held on the other alleged violation in Morgantown, West Virginia on June 14, 1989. Homer Delvich, Patrick Grimes, Warren Bates and Gary Eagle testified on behalf of the Secretary. David Stout, Mattio Mugnano and Paul Zanussi testified on behalf of SOCCO. No provision was made on the record for posthearing briefs. SOCCO filed such a brief; the Secretary did not. I have considered the entire record and the contentions of the parties, on the bases of which I make the following decision.

FINDINGS OF FACT

SOCCO is the owner and operator of an underground coal mine in Marion County, West Virginia, known as the Martinka No. 1 Mine. The mine has an annual production of two million tons; the operator has an annual production of eleven million tons. It is a large operator. Martinka has a history of prior violations

amounting to approximately one significant and substantial violation per inspection day during the two year period prior to the violations involved in this proceeding. The two violations involved herein were abated in a timely manner.

ORDER NO. 3106068

This order charges a violation of 30 C.F.R. § 75.202. It was originally assessed at \$950, and the motion proposes a reduction to \$800. The violation involved a hazardous roof condition which had been noted in SOCCO's preshift book. For that reason, the violation was found to result from SOCCO's unwarrantable failure to comply. The motion states that pretrial discussion persuaded the Secretary to reduce the negligence somewhat because the condition had worsened within a few days of the inspection. I have considered the motion in the light of the criteria in section 110(e) of the Act, and conclude that it should be approved.

ORDER NO. 3106064

On August 15, 1988, Federal coal mine inspector Homer Delirch was inspecting the subject mine. He entered the mine at about 8:30 a.m. and arrived at the belt feeder on North Main Section 037 at about 9:45 a.m. He found a large pool of hydraulic oil, about 3 inches deep, 6 feet wide and 12 feet long under the feeder. Rock dust had been added only to the edges of the oil puddle against the rib lines. There was also a coating of coal dust about 1/8 of an inch deep caked with oil on the frame and motor of the feeder. The oil was hydraulic oil used to coal motors and it was combustible. The belt feeder was running at the time. The prior shift (cat-eye shift) had produced coal. Ignition sources were in the area: the motor (covered with oil saturated coal dust) runs hot. There are power cables going to the feeder.

SOCCO had had problems with this belt feeder for some time prior to August 15, 1988. On July 29, 1988, during the midnight shift, O-rings and a "busted fitting" were replaced. On August 1, 60 gallons of oil were added to the feeder. On August 2, 8 and 11 further work was done on the hoses, O-rings and oil tank. One mechanic, Patrick Grimes (also a UMWA walkaround), testified that oil had been on the floor "possibly a week or longer" (prior to August 15). (R. 39). Grimes never saw anyone trying to take up the oil "until the inspector wrote it up." (R. 39). Another mechanic, Warren Bates, testified concerning the feeder: "You poured it (oil) in and it runs out, and you pick it up off the ground. I mean, it's just a cycle." (R.62). On August 12, the mechanic's work sheet noted that the mechanic took oil and rock dust to feeder. In his remarks he

noted: "Did not get oil spill covered." (Exhibit 1, SOCCO's Response to Secretary's Request for Production of Documents.) Matio Mugnano, the day shift section foreman, testified that during the weekend (August 13-14), the O-rings and a hose were replaced on the feeder.

The condition was abated by taking up the oil in 5 gallon cans, which were placed on the belt and taken out of the mine. Between ten and thirty gallons of oil were removed. The feeder pump frames were degreased and washed and coal dust was removed from the frames and motor. The order was terminated at 12:30 p.m., August 15, 1988.

REGULATION

30 C.F.R. § 75.400 provides as follows:

Coal dust, including 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.

CONCLUSIONS OF LAW

I

SOCCO is subject to the provisions of the Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

II

Although SOCCO contends that a violation of 30 C.F.R. § 75.400 has not been shown, because the accumulations cited were minimal and not combustible, the evidence is overwhelming that the pool of oil under the belt feeder was (1) hydraulic oil with very little water, (2) combustible and (3) a large accumulation. The evidence further establishes that there was oil soaked coal dust on the frame and motor housing of the feeder. I conclude that these conditions establish a violation of 30 C.F.R. § 75.400.

III

A violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to will result in a serious injury. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981); Florence Mining Company, 11 FMSHRC 747 (1989). Here there is evidence of a substantial amount of combustible material on and near electrical

equipment. I conclude that a mine fire was reasonably likely. This could result in fire entrapment, smoke, and carbon monoxide. With miners working in the area, serious injuries would be probable. I conclude that the violation was significant and substantial.

IV

Unwarrantable failure is established by a showing of aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997 (1987). The problem of oil leaks from the belt feeder in question go back more than two weeks from the date the order was issued. SOCCO was aware of the leaks, and made some attempts to take care of the problem. The evidence however establishes that substantial accumulations of oil under the feeder were common--the rule rather than the exception--from at least July 29 to August 15, 1988. SOCCO should have effectively repaired the equipment or withdrawn it from service. In view of the accumulations and SOCCO's awareness of them, its failure to do so constituted aggravated conduct, more than ordinary negligence. I conclude that the violation resulted from SOCCO's unwarrantable failure to comply with the standard.

V

The violation was serious and resulted from aggravated conduct. SOCCO is a large operator. Its history of prior violations is not such that a penalty otherwise appropriate should be increased because of it. The violation was abated in a timely fashion. In the light of the criteria in section 110(i) of the Act, I conclude that \$1000 is an appropriate penalty for the violation.

ORDER

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

1. Order 3106064 is AFFIRMED, including the special findings that the violation was significant and substantial and caused by unwarrantable failure;
2. Order 3106068 is AFFIRMED, including the special findings that the violation was significant and substantial and caused by unwarrantable failure.
3. Within 30 days of the date of this decision, SOCCO shall pay the following civil penalties:

Order

3106064
3106068

Penalty

\$1000
800
\$1800

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Mark M. Malecki, Esq., U.S. Department of Labor, Office of the
Solicitor, 4015 Wilson Blvd., Arlington, Va 22203 (Certified
Mail)

David M. Cohen, Esq., American Electric Power Service Corp., 161
W. Main Street, P.O. Box 700, Lancaster, OH 43130 (Certified
Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 17 1989

SOUTHERN OHIO COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 89-124-R
: Order No. 3117373; 1/31/89
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Martinka No. 1 Mine
ADMINISTRATION (MSHA), :
Respondent : Mine I.D. 46-03805
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 89-204
Petitioner : A.C. No. 46-03805-03916
v. :
: Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, :
Respondent :

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Secretary of Labor (Secretary);
David M. Cohen, Esq., Lancaster, Ohio for Southern
Ohio Coal Co. (SOCCO).

Before: Judge Broderick

STATEMENT OF THE CASE

In the contest proceeding, SOCCO contests the validity of an order of withdrawal issued under section 104(d)(2) of the Federal Mine Safety and Health Act (the Act). In the penalty proceeding, the Secretary seeks a civil penalty for the violation charged in the contested order. The cases were consolidated for the purposes of hearing and decision. Pursuant to notice, the consolidated cases were heard in Morgantown, West Virginia, on June 13 and 14, 1989. Bretzel Allen, Patrick Grimes, Paul Mitchell and Ronald Tulanowski testified on behalf of the Secretary; David Stout, Ernest Weaver, Frank Zuleski, Wesley Dobbs, Pat Zuchowski, Michael Miano, Wesley Hough and Charles Arnold testified on behalf of SOCCO. Both parties have filed posthearing briefs. I have considered the entire record

and the contentions of the parties, on the basis of which I make the following decision.

FINDINGS OF FACT

SOCCO is the owner and operator of an underground coal mine in Marion County, West Virginia known as the Martinka No. 1 Mine. The mine produces approximately 2 million tons of coal annually; the operator produces slightly less than 12 million tons annually. During the past three years, SOCCO has had approximately one significant and substantial violation per inspection date. I have no reason to conclude that this is a substantial history of prior violations, and therefore will not increase any appropriate penalty because of it. Prior to the order contested herein, the subject mine has not had "an intervening inspection free of unwarrantable failure violations since September 1, 1989." The violation cited in the order contested herein was abated in a timely fashion.

I

On January 30, 1989, during the day shift Federal coal mine Inspector Bretzel Allen was making a triple A inspection of the subject mine. He was accompanied by a union representative, a company representative and an MSHA supervisory inspector Paul Mitchell. Inspector Mitchell was present for the purpose of evaluating and rating the quality of Allen's inspection. The party travelled to the E-3 longwall section. The longwall face was about 700 feet long. There were about 144 roof support shields on the longwall, each with two pontoons at the base of the shield. The pontoons had coal, rock and emulsion oil packed on them and between and behind the pontoon jacks. Some of the pontoons contained packed coal, some mixed coal and rock. Most were mixed with oil but some were dry. Mitchell states that this was about the shoddiest longwall that he had been on in a while: there was coal and grease on and in the shields and there were cans and boards lying in the area.

There was an accumulation of loose coal, resulting from spillage off the longwall face, in the tailgate entry. This was in a "wind-row" about 7 or 8 feet wide, 4 feet high and 60 or 70 feet long. About 52 feet was toward the gob area from the longwall ("inby" see R. 33); about 18 feet extended outby, toward the block of coal being cut. No rock dust had been applied to the coal accumulation.

The MSHA inspectors and company officials discussed SOCCO's longwall clean-up program. No citations or orders were issued for the accumulations seen on the E-three longwall section. When it appeared that SOCCO did not have a written clean-up plan, a

section 104(d)(2) withdrawal order was issued for failure to have such a plan. Before the order was served, a copy of a clean-up plan was found, and the order was withdrawn.

II

During the afternoon of January 30, 1989, the longwall supervisor, Ernest Weaver, assigned six people to clean the shields from number 96 to 48 (the shields were numbered 1 to 144). The crew completed cleaning shields 96 to 58. A later shift apparently cleaned shields 48 to 58. SOCCO officials estimated that of the 144 shields approximately three quarters had been cleaned and one quarter not cleaned prior to the inspector's return to the area on January 31. The inspector testified that 4 or 5 pontoons had been cleaned, but most of them still had a mixture of coal, rock, and emulsion oil packed on the faces of the pontoons of the shields. He issued a section 104(d)(2) withdrawal order citing the accumulations on the pontoons and an accumulation in the tailgate entry of the longwall section which will be discussed hereafter. I find as a fact that SOCCO cleaned shields 96 through 48, and few if any others. Thus 48 shields were cleaned and 96 were not. On January 31, SOCCO took samples of the material on the shields, beginning with shield one and every fifteenth shield thereafter. The combustible matter in the samples ranged from 15.05 percent (No. 30 shield) to 45.22 percent (No. 1 shield). (SOCCO Ex. 17). SOCCO had a chemical auto-ignition point test performed on shields 1, 15 (29.12% combustible), 45 (18.34% combustible), 120 (28.49% combustible) and 144 (34.81% combustible). Autoignition point is defined as the temperature required to initiate or cause self-sustained combustion in any substance in the absence of a spark or flame. (SOCCO Ex. 19). Bituminous coal has an autoignition point of 765 degrees Fahrenheit. The test of the five samples raised the temperature to 900 degrees Fahrenheit without producing any flame. The foregoing establishes that the samples tested consisted of noncombustible material. I find that the samples were fairly representative of the material on all the shields. Therefore, I find that the accumulations on the shields on January 31, 1989, were not combustible.

III

In the tailgate entry on January 31, 1989, there was a wind-row of coal approximately 37 inches deep, 7 feet wide, extending 18 feet from the longwall face inby to the yielding point of the shield and 40 feet back into the gob line. Rock dust had been applied since the inspection of January 30. The inspector testified that a small amount of rock dust had been scattered over the accumulation, perhaps one bag. SOCCO's witnesses testified that the area was heavily rockdusted and that

five bags of rock dust had been applied, the same amount normally applied after a pass of the longwall. The inspector took a sample from the accumulation. The sample was analyzed at an MSHA laboratory and found to be 20.3 percent incombustible. (Govt. Ex. 3). Based on the sample, on the testimony of Inspector Allen and UMWA walkaround miner Grimes, and on the photographs of the area (SOCCO Ex. 4-9), I find as a fact that the accumulation in the tailgate entry consisted largely of loose coal and was combustible.

IV

The tailgate entry outby the longwall shields is a return air entry and an alternate escapeway from the longwall face. A fireboss must examine this area weekly. On January 31, 1989, two miners were cutting at the No. 10 shield with an open flame torch. An electrical cable travels the length of the longwall face during production. The loader on the tailgate is an electrically operated motor.

REGULATIONS

30 C.F.R. § 75.400 provides as follows:

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.

30 C.F.R. § 75.2(g)(4) provides as follows:

'Active workings' means any place in a coal mine where miners are normally required to work or travel.

ISSUES

1. Whether on January 31, 1989, there was loose coal and other combustible materials on the longwall shield pontoons, or in the tailgate entry of the E-3 longwall section of the subject mine?

2. Whether the tailgate entry of the longwall section constitutes active workings?

3. If a violation is established, was it significant and substantial?

4. If a violation is established, was it caused by SOCCO's unwarrantable failure to comply with the standard?

5. If a violation is established, what is the appropriate penalty.

CONCLUSIONS OF LAW

I

SOCCO is subject to the provisions of the Act in the operation of the Martinka No. 1 Mine and I have jurisdiction over the parties and subject matter of this proceeding. SOCCO is a large operator.

II

The Secretary has failed to establish that the accumulations on the longwall shield pontoons on January 31, 1989, consisted of combustible material. Therefore, she has failed to establish that this condition was violative of 30 C.F.R. § 75.400.

III

The evidence does establish that the loose coal in the tailgate entry of the E-3 longwall section was combustible. It was not cleaned up and was permitted to accumulate. The evidence further establishes that the 18 feet of such accumulations outby the longwall shield line existed in an area where miners are normally required to travel. Therefore it was in active workings. A violation of 30 C.F.R. § 75.400 is established.

IV

A violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to would result in serious injury. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981); Florence Mining Co., 11 FMSHRC 747 (1989). Although the accumulation could provide fuel for a fire, and although there are potential ignition sources on the longwall, there is no evidence as to the "likelihood" of a fire, nor is there evidence from which I reasonably could infer that a fire is reasonably likely. The Secretary has failed to carry her burden of establishing that the violation was significant and substantial.

V

A violation is caused by unwarrantable failure if it results from aggravated conduct, constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997 (1987). The accumulation in the tailgate entry existed and was pointed out to

SOCCO on January 30, and had obviously existed for some time prior thereto. Despite these facts, SOCCO failed to clean up or inert the accumulations before the inspection on January 31. I conclude that this establishes aggravated conduct, constituting more than ordinary negligence. The violation was the result of SOCCO's unwarrantable failure to comply with the standard.

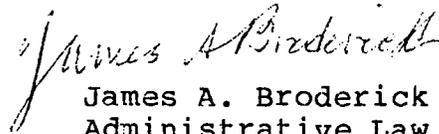
VI

SOCCO is a large operator; its history of prior violations will have no effect on the penalty. The violation was moderately serious, and resulted from SOCCO's unwarrantable failure. The violation was abated in a timely fashion. I conclude that \$700 is an appropriate penalty.

ORDER

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

1. Order No. 3117373 issued January 31, 1989, is MODIFIED to remove the designation of significant and substantial and, as modified, is AFFIRMED.
2. The Notice of Contest is GRANTED in part and DENIED in part.
3. SOCCO shall within 30 days of the date of this order pay the sum of \$700 as a civil penalty for the violation found herein.



James A. Broderick
Administrative Law Judge

Distribution:

David M. Cohen, Esq., American Electric Power Service Corp., 161 W. Main Street, P.O. Box 700, Lancaster, OH 43130 (Certified Mail)

Mark R. Malecki, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

OCT 18 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 89-64-M
Petitioner : A.C. No. 29-00917-05504
v. : San Antone Pit
GALLUP SAND & GRAVEL COMPANY, :
Respondent :

DECISION

Appearances: Brian L. Pudenz, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
For Petitioner;
Frank A. Kozeliski, Materials Engineer, Gallup Sand
Sand and Gravel Co., Gallup, New Mexico,
For Respondent.

Before: Judge Lasher

This matter was commenced by the filing of a Complaint Proposing Penalty by the Petitioner on April 17, 1989, seeking penalties for 6 violative conditions described in 6 Citations issued on October 19, 1988, by MSHA Inspector William Tanner, Jr.

Respondent concedes the occurrence of the violations (T. 5, 6), but primarily questions the appropriateness of the amount of penalties (totalling \$188) sought by Petitioner.

Respondent also pointed out that it had not been previously cited during prior MSHA inspections for the same or similar violations (T. 6, 7; Letter dated May 9, 1989). Taking this question first and viewing the allegations in this connection and the evidence presented most generously in favor of Respondent, a New Mexico corporation which was not represented by legal counsel, the question of the applicability of the doctrine of equitable estoppel will be deemed raised and briefly considered. The Respondent made out no credible case factually that the conditions cited in any of the 6 Citations involved here had been specifically evaluated by the Secretary's representative at any prior time and determined to be within the boundaries of the pertinent regulations. In other words, a factual foundation of the precision which would be required to cause one to conclude that there was a clear-cut or enlightened prior "non-enforcement" by MSHA inspectors previously was not presented. In any event, in Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), the Commission has generally rejected the doctrine of equitable estoppel.

However, it also viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which can be considered in mitigation of penalty, stating:

"The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against the government in some circumstances. See, for example, United States v. Georgia-Pacific Co., 421 F.2d 92, 95-103 (9th Cir. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it.

Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty..."

Accordingly, the doctrine of equitable estoppel will not be applied to the enforcement actions of the Secretary here. However, the Respondent's evidence in this connection will be considered in determining penalties.

Preliminary Penalty Assessment Factors

The parties stipulated that Respondent, which operates a readi-mix crushed-stone operation (T. 28, 51) in the vicinity of Albuquerque, New Mexico, is a small mine operator (T. 73). It had a history of 2 prior violations prior to the occurrence of the violations in question. Petitioner conceded that Respondent, after notification of the violations, proceeded in good faith to promptly abate the same (T. 17). Respondent made no claim that payment of reasonable penalties or penalties at some given monetary level would jeopardize its ability to continue in business.

Penalty Assessment

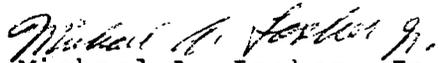
Two of the six Citations (Nos. 3274946 and 3274948) involved so-called "significant and substantial" violations. It was the inspector's un rebutted opinion, and the record clearly substantiates such, that both of these violations were the result of a "moderate" degree of negligence on Respondent's part and were serious in nature since it was reasonably likely that the hazards posed by the violations could have occurred and that injuries resulting therefrom could have been permanently disabling, and, in the case of Citation No. 3274946, even fatal. These penalties will not be increased in view of Respondent's apparent belief that it was proceeding in compliance with the regulations involved (T. 6, 42). MSHA's assessment of \$54 each for these two violations is found appropriate and here assessed.

The four remaining Citations (Nos. 3274949, 3274950, 3274951 and 3274952) were all considered by MSHA to not be "significant and substantial" and were given routine \$20.00 single penalty assessments. The inspector who issued these Citations attributed the violations to have occurred as a result of but "moderate" negligence on the part of Respondent. These are modest penalties and I find no basis to disturb the Secretary's assessments.

ORDER

(1) The six subject Citations are affirmed.

(2) Respondent is ordered to pay the Secretary of Labor within 30 days from the date hereof the total sum of \$188 as and for the civil penalties above assessed.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Brian L. Pudenz, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Mr. Frank A. Kozeliski, Gallup Sand & Gravel Company, 601 West Roundhouse Road, P.O. Drawer 1119, Gallup, NM 87301 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 18 1989

WINSTON MADDEN, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 89-62-D
: :
RONALD SUMMERS AND SUMCO, : BARB CD 88-46
Respondents :

DEFAULT DECISION

Before: Judge Maurer

On December 28, 1988, complainant filed a Complaint, alleging a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1). There was no response from the respondents, so on February 13, 1989, Chief Judge Merlin issued an Order directing the operator to answer or show cause within 30 days. On March 13, 1989, an Answer was received and on March 17, 1989, the case was assigned to this administrative law judge.

On April 26, 1989, complainant, by counsel, filed a set of interrogatories and requests for production. When no responses were received, complainant filed a motion to compel discovery and for attorney fees with me on June 5, 1989. No responsive pleading to this motion was filed. On July 20, 1989, I issued an Order granting complainant's motion to compel discovery and awarding complainant \$156.25 as attorney fees for the time spent by his lawyer in obtaining this order. That order directed the respondents to answer complainant's interrogatories, produce the documents sought and pay the attorney fees awarded within the following 15 days, or by August 4, 1989.

On August 18, 1989, complainant filed a motion for default decision, alleging that the respondents had still not responded in any manner to complainant's discovery requests and had not paid the awarded attorney fees, as ordered on July 20.

On September 6, 1989, a response to this latest motion was received from counsel of record for respondents. He asserted that since May of 1989, he has not been able to contact the respondents herein and has been informed that they are no longer living at their former address. He was unable to obtain any forwarding address for them and has likewise been unable to contact them by telephone.

On September 12, 1989, I issued an Order to respondents to show cause within 10 days why they should not be held in default for failure to comply with my order of July 20, 1989. There has been no response to date.

After reviewing the entire file of this proceeding once again, I am of the opinion that because of the respondents' extremely lackadaisical approach to the defense of this case, outlined above, they have waived any further right to a hearing. Therefore, complainant's motion for default decision IS GRANTED.

Accordingly, I find that as alleged in the Complaint:

1. Complainant Madden was employed by Sumco and Summers for approximately 4 months prior to his discharge on June 14, 1988, as a welder and general laborer.

2. On June 14, 1988, Madden was assigned to cut out (remove) a section of an abandoned coal tippie located at the mine site operated by Summers and Sumco.

3. Complainant Madden was discharged by Summers on June 14, 1988, because of his refusal to continue working on the tippie unless safety precautions were taken; and because he had pulled down part of the tippie with an endloader in order to abate a hazardous condition.

4. The discharge of Madden by Summers on June 14, 1988, violated section 105(c)(1) of the Federal Mine Safety & Health Act of 1977.

ORDER

It is ORDERED that:

1. Complainant shall file a statement within twenty (20) days of this Decision, indicating the specific relief requested. The statement shall be served on the respondents who shall have twenty (20) days from the date service is attempted to reply thereto.

2. This Decision is not final until a further Order is issued with respect to complainant's relief. In the event that a contested issue of fact arises as to the proper type or quantum of damages due the complainant, a hearing on that issue or issues will be required.


Roy J. Maurer
Administrative Law Judge

Distribution:

Tony Oppegard, Esq., Appalachian Research & Defense Fund of
Kentucky, Inc., P.O. Box 360, Hazard, KY 41701 (Certified Mail)

Rodney E. Buttermore, Esq., Forester, Buttermore, Turner &
Lawson, P.O. Box 935, Harlan, KY 40831 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 18 1989

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 89-102-DM
ON BEHALF OF FRED BARTLEY, :
Complainant : Jenkins Quarry
v. :
ADAMS STONE CORPORATION, :
Respondent :

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant; David Adams, Esq., Vice-President, Adams Stone Corporation, Pikeville, Kentucky, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary brings this case on behalf of Fred Bartley, and claims that on March 29, 1988, Bartley was discharged from his job with Respondent because he complained to MSHA about unsafe conditions at Respondent's limestone quarry. Respondent contends that Complainant was suspended for three days for insubordination, and was thereafter laid off in accordance with the seniority provisions of the union contract. Following a hearing before an arbitrator, Complainant was reinstated to his position as crusher operator. He was awarded and received back wages and other benefits to the date of his layoff. The three day suspension was upheld by the arbitrator. When Complainant returned to work, he was assigned to the job of plant walker. He was told not to run the crusher and was limited to working eight hours per day. the plant was on strike from January 15, 1989 to July 13, 1989. Complainant has been working since July 13, 1989.

Pursuant to Notice, the case was called for hearing in Wise, Virginia, on July 20, 1989. Fred Bartley, James G. Roberts, Jimmy Ray Woods, Vernon Denton, William R. Talley and Ernest R. Thompson testified on behalf of Complainant. Stuart H. Adams and Darrell Webb testified on behalf of Respondent. Both parties were given the opportunity to file

post-hearing briefs. The Secretary filed such a brief; Respondent did not. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Respondent operates a limestone quarry in Letcher County, Kentucky, known as Jenkins Quarry. The operation includes open pit mining of stone, a primary crusher plant, a secondary crusher plant, a blacktop plant, a block plant and a "ford shop" where mechanical work is performed on equipment. The crushed limestone is used in highway and building construction. The mining operation is normally discontinued in the winter months, although some of the employees are retained to do maintenance and repair work.

Complainant Bartley has been employed by Adams Stone since September 1977. In 1987 and for five or six years prior thereto, Bartley operated the gyrodisc crusher on the night shift. The gyrodisc crusher crushed stone into limestone dust, which was used in asphalt making. He worked with limited supervision. The Superintendent, Darrell Webb, complained in September 1987, that Bartley was not operating the crusher at full capacity and not enough dust was being produced. Bartley testified that Webb was intoxicated and abusive. For these reasons, Bartley shut down his machine and went home. He returned to work the next day. He underwent eye surgery in December 1987, and was off work until about March 20, 1988. Between March 20 and March 28, he was doing labor work and repair work. On March 28, he was doing repair work on the gyrodisc crushers, taking hoses off and repairing or replacing the hoses which were leaking. Stuart Adams, President of Adams Stone, who had a short time before assumed active supervision of the quarry, angrily questioned Complainant about why he was removing the hoses. He seemed satisfied after Complainant explained what he was doing. Later the same day Bartley was taking a short break after pumping 55 gallons of oil into a tank with a hand pump and lifting several 5 gallon buckets of oil onto to a beltline. Adams walked by and told Bartley to get a shovel and get back to work. Subsequently Adams asked Bartley to place some 4x4 pieces of wood under the secondary crusher which was being lowered to the ground by a crane. The crusher weighed about eight tons. Bartley was concerned because the crane was known to slip and fall free and he told Adams he would place the 4x4s under the crusher after it was lowered closer to the ground. Adams became angry. He cursed and told Bartley to put the boards under the crusher now. Bartley also became angry and told Adams he would put them down when he got "damn ready." After the crane lowered the crusher close to the ground, Bartley put the boards under it and the crusher was lowered on top of the boards. At that point Bartley

told Adams he was tired of hearing his big mouth. Adams told him if he did not want to work, he could go home. However, Bartley continued working until the end of his shift.

The following day Adams told Bartley that he was suspended for three days for insubordination. Bartley replied that he would call the OSHA inspector who would be at the plant the next day. The following day an MSHA inspector came to the plant, having received a 103(g) complaint alleging a loader without brakes, a crane subject to free falls, drinking on the job, and failure to wear hard hats. When the Inspector contacted Adams, Adams was very angry and initially refused to permit the inspector to go on the premises. He later cooled down and the inspection proceeded. A loader was inspected and found to have adequate brakes. The crane had no load on it, so the inspector took the crane operator's word that the crane was operating properly. The inspector did not find any evidence of drinking, nor did he see anyone not wearing a hard hat who would be required to wear one. He notified the operator of his negative findings.

During the three day suspension, the operator notified Bartley that he was laid off because the night shift was being discontinued. Adams subsequently told an MSHA investigator that one reason for the "layoff" was the fact that Bartley called MSHA with a 103(g) complaint. I find as a fact that Bartley was laid off in part because he made safety complaints to MSHA which resulted in an MSHA inspection. Bartley filed a grievance under the collective bargaining contract. The grievance went to arbitration. The arbitrator decided that (1) the three day suspension was for just cause and (2) Bartley's layoff was not in accordance with the provisions of the contract. She ordered the company to reinstate Bartley to his classification of crusher operator and to pay all back wages and other benefits which he lost because of the improper layoff. He returned to work and was paid 40 hours per week straight time for the period of time that he was off.

During the time Bartley was off on his suspension, the company learned that the rock which had been ordered for a highway project in East Kentucky would not be needed until August. Adams then directed his superintendent to cut the work crew back to 8 hours per shift with no overtime and to eliminate the operation of the gyrodisc crusher for the time being.

In the winter 1987-88, Respondent essentially rebuilt its plant: each of the crushers was torn down and rebuilt; new monitoring devices and a computer system were installed, as well as new feed systems and new belt scales.

ISSUES

1. Whether the three day suspension of Complainant on March 28, 1988, was adverse action for activity protected under the Mine Act?
2. Whether the layoff or discharge of Complainant on March 29, 1988, was adverse action for activity protected under the Act?
3. If either issue No. 1 or issue No. 2 is answered in the affirmative, what remedies should be awarded and assessed?

CONCLUSIONS OF LAW

I

Complainant Bartley and Respondent are subject to and protected by the provisions of the Act, Complainant as a miner and Respondent as a mine operator. I have jurisdiction over the parties and the subject matter of this proceeding.

Under the Act, a miner establishes a prima facie case of discrimination if he proves that he was engaged in protected activity and was subjected to adverse action which was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. If the operator cannot rebut the prima facie case in this manner, it may defend affirmatively by proving that it was also motivated by the miner's unprotected activity, and would have taken the adverse action for that activity in any event.

II

Bartley's three day suspension resulted in part from his refusal to place boards under the crusher being lowered by a crane. Bartley testified that he believed it was dangerous to approach the crusher until it was close to the ground. I conclude that this was a good faith, reasonable refusal to perform work which he considered dangerous. Therefore, the work refusal was activity protected under the Act. Because the suspension was motivated in part by the protected activity, Complainant has established a prima facie case of discrimination for the suspension. Respondent, however, has shown that the

suspension was also motivated by unprotected activity, namely by Bartley's statement to Adams that he was tired of hearing Adams' big mouth. I am persuaded by Adams' testimony that this was the primary reason for the suspension, and I conclude that Respondent would have taken the adverse action for that reason alone.

III

Although Stuart Adams denied that he told the MSHA investigator that one of the reasons he laid off Bartley was because of his safety complaints to MSHA (Tr. 243-4), I conclude, based on the statement made to the investigator, that he did so. I further conclude that in fact he laid off Bartley primarily because of his safety complaints to MSHA. Therefore Complainant has made out a prima facie case under the Pasula test. Respondent contends that it would have laid Bartley off in any event for reasons not related to protected activity, namely because the night shift gyrodisc crusher was not being operated. I conclude that Respondent has not met its burden of proving that it would have laid off Bartley in any event for unprotected activity. Bartley was classified as a crusher operator. The arbitration proceeding established that he had seniority over another employee who was retained. I conclude that the layoff was motivated by protected activities, and the alleged business motive was a pretext. The evidence establishes that the lay off was in violation of section 105(c) of the Act.

IV

The Secretary contends that Complainant is entitled to back pay measured by the number of hours worked by Tommy Roberts, the other crusher operator, including the overtime hours worked by Roberts. The evidence does not establish that Bartley would have worked the same number of hours as Roberts or that he would have worked overtime. I conclude that Bartley is entitled only to regular time wages for forty hours per week during the time he was laid off until he was ordered back to work in September 1988 and worked until the plant was shut down for the season.

ORDER

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

1. The three day suspension of Bartley on March 29, 1988 was not in violation of section 105(c) of the Act.
2. The "layoff" of Bartley on March 29, 1988, was in violation of section 105(c) of the Act.

3. Complainant was reinstated to his position of crusher operator by an arbitrator under the union contract. Respondent shall pay Complainant back wages, based on a 40 hour week, from the date of the layoff until the date of his reinstatement, with interest thereon computed in accordance with the Commission decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988). Respondent shall have credit for the amount paid as back wages following the arbitration decision. Respondent shall also pay Complainant other benefits to which he was entitled and which were withheld during the time of his layoff.

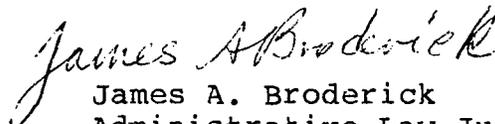
4. The parties shall attempt to agree on the amount due Complainant under the above order. If they cannot agree, the Secretary shall within 20 days of the date of this decision, submit a statement of the amount she believes is due. Respondent shall have 10 days thereafter to reply.

5. Respondent and its officers and agents shall CEASE and DESIST from discriminatory acts against its employees for making safety complaints to the Secretary.

6. Respondent shall expunge from its employment records all references to the unlawful layoff or discharge of Bartley.

7. Respondent shall, within 30 days of the date this decision becomes final, pay to the Secretary a civil penalty in the amount of \$1000 for the violation found herein.

8. This decision is not final until the amount due Complainant under No. 3, above, is determined.


James A. Broderick
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. David Adams, Vice President, Adams Stone Corp., P.O. Box 2320, Pikeville, KY 41501 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 20 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 89-126
Petitioner : A.C. No. 15-13469-03699
v. :
 : Mine No. 9
GREEN RIVER COAL CO., INC., :
Respondent :

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Secretary of Labor (Secretary);
B. R. Paxton, Esq., Paxton & Kusch, Central City,
Kentucky, for Respondent Green River Coal Co., Inc.
(Green River).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for a violation of 30 C.F.R. § 75.200 charged in a section 104(d)(2) order of withdrawal issued November 21, 1988. Pursuant to notice, the case was called for hearing in Owensboro, Kentucky, on September 12, 1989. George L. Newlin testified on behalf of the Secretary; Michael McGregor testified on behalf of Green River. The record was kept open to allow the Secretary to file a computer print out of prior violations by Green River at the subject mine. Green River contends that the history is not relevant because of a change in management of the mine. Both parties have filed posthearing briefs on this issue and I will discuss and decide that question in this decision. I have considered the entire record and the contentions of the parties in making this decision.

FINDINGS OF FACT

Green River is the owner and operator of an underground coal mine in Hopkins County, Kentucky, known as the Green River No. 9 Mine. The management of the mine changed in November 1988. MSHA agrees that the new management has a new attitude toward safety:

it is aware of safety problems and is trying to correct them. Weekly safety meetings are held involving all employees.

On November 21, 1988, Federal mine inspector George Newlin was engaged in an on-going general inspection ("AAA inspection") of the subject mine. In the Northwest B return aircourses, he observed that one row (on the left side) of timbers had been knocked down and not replaced. Some of the timbers on the right side were down and the right side was covered with gob. The area was passible, but with difficulty. At least 30 days prior to November 21, the gob, resulting from rock falls, had been cleaned out of an adjacent entry and deposited in the entry in question. At the same time the timbers had been knocked down. The fireboss book had referred to the condition for seven weeks. The roof was bolted and supported and was in stable condition. The area where the timbers were down extended for a distance of 120 to 300 feet. Timbers were missing on both sides for about 50 feet, and on the left side for more than 120 feet. The entire entry was about 910 feet long.

Inspector Newlin issued a section 104(d)(2) withdrawal order alleging a violation of 30 C.F.R. § 75.220 because the timber line was not continuous in the return from crosscut No. 65 to crosscut No. 52 as required in the approved roof control plan.

The approved roof control plan in effect at the mine required one return aircourse to be timbered. A double row of timbers is required, six feet apart, with five foot centers on the advance. The area is required to be travelled every seven days by the fireboss. Otherwise, miners are not normally in the entry.

Respondent has about 200 employees. It produces more than one million tons of coal annually. The history of prior violations shows that 1,074 paid violations were cited during the 24 months prior to the order involved herein, of which 139 were roof control violations. Since the new management took over about November 15, 1988, only one (d) order has been issued to Green River, the one involved here.

The order was terminated December 12, 1988, when timbers were set in the entry as required by the roof control plan. The abatement was effected promptly and in good faith.

REGULATION

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

(a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager,

that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

ISSUES

1. Whether the evidence establishes a violation of 30 C.F.R. § 75.220 on November 21, 1988?
2. If so, whether the violation resulted from Green River's unwarrantable failure to comply with the standard?
3. If a violation is established what is the proper penalty?
 - a. In view of the change in mine management, is it proper to use the two year history of prior violations as a criterion in determining the appropriate penalty?

CONCLUSIONS OF LAW

Green River is subject to the provisions of the Federal Mine Safety and Health Act (the Act) in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

The evidence clearly establishes that Green River was not in compliance with its approved roof control plan in the Northwest B return aircourse on November 21, 1988. A substantial number of posts required by the plan were dislodged, and had been dislodged for many weeks. The inspector believed the condition was not significant and substantial because it was unlikely to result in injury: the roof was in stable condition and was adequately bolted.

However, the condition had existed for a substantial period of time and had been noted in the fireboss book for seven weeks. The company must have been aware of the condition and, until the order was issued, it made no attempt to correct it. The Commission has held that unwarrantable failure is established by a showing of aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997 (1987). The circumstances here clearly point to aggravated conduct constituting more than ordinary negligence: the repeated references in the fireboss book which were ignored establish more than ordinary negligence. Green River's attempt to show that the fireboss was attempting to persuade the company to timber the adjacent entry which had a higher roof is a lame

excuse. The order including the unwarrantable failure finding should be affirmed.

At the hearing, it was agreed that the computer printout of Green River's violation history could be offered post-hearing. Respondent objected on the ground of relevance, arguing that the change in management of the mine on November 15, 1988, renders any prior history of violations irrelevant and immaterial. Green River Coal Co., Inc., is a corporation and has been the operator of the subject mine during the entire period in question. Section 110(i) of the Act obliges me to consider "the operator's history of previous violations" as one criterion in determining an appropriate penalty. See Secretary v. Peabody Coal Co., 1 FMSHRC 28 (1979).

Although the history of prior violations is therefore a statutorily mandated criterion to be considered in fixing the amount of the penalty, the improved safety record and safety outlook of the new management should also be taken into consideration. The purpose of the civil penalty provisions of the Act is to promote safety in the mines, not to collect money for the Federal Government.

I conclude that under all the circumstances of this case an appropriate penalty is \$300.

ORDER

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

1. Order No. 3296525 issued November 21, 1988, is AFFIRMED.
2. Respondent shall, within 30 days of the date of this decision, pay the sum of \$300 as a civil penalty for the violation found herein.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

Joseph B. Lockett, Esq., U.S. Department of Labor, Office of the
Solicitor, 202 Richard Jones Road, Suite B-201, Nashville, TN
37215 (Certified Mail)

B. R. Paxton, Esq., P.S.C. 213 E. Broad Street, P.O. Box 655,
Central City, KY 42330 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

OCT 20 1989

| | | |
|--------------------------------------------------------------------------------|---|----------------------------|
| FMC WYOMING CORPORATION, Contestant | : | CONTEST PROCEEDINGS |
| | : | |
| v. | : | Docket No. WEST 89-170-RM |
| | : | Order No. 2647760; 2/28/89 |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Respondent | : | Docket No. WEST 89-171-RM |
| | : | Order No. 2648041; 2/28/89 |
| | : | |
| | : | Docket No. WEST 89-179-RM |
| | : | Order No. 2647759; 2/28/89 |
| | : | |
| | : | FMC Trona Mine |
| | : | Mine I.D. No. 48-00152 |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | |
| | : | Docket No. WEST 89-355-M |
| | : | A.O. No. 48-00152-05572 |
| | : | |
| v. | : | FMC Trona Mine |
| | : | |
| FMC WYOMING CORPORATION, Respondent | : | |

DECISION APPROVING PARTIAL SETTLEMENT

Before: Judge Lasher

Three of the four enforcement documents in the above penalty docket are the subject of an agreement reached by the parties. One of the enforcement documents resolved, Order No. 2647758, is not related to any contest docket. The remaining (fourth enforcement document, Order No. 2647760, is related to Contest Docket No. WEST 89-170-RM, and the parties have (1) reached a contingency agreement thereto depending on the determination by the D.C. Circuit Court of Appeals of the Secretary's appeal of a Commission decision in an unrelated case (Western Fuels-Utah, Inc., Docket Nos. WEST 86-113-R and WEST 86-114-R). Thus, by separate Order, this penalty docket, WEST 89-355-M (since it is not entirely resolved) and related Contest Docket WEST 89-170-RM are being stayed pending the aforesaid decision by the D.C. Circuit Court.

In summary, the partial settlement reached by the parties is as follows:

| <u>Related Contest Docket No.</u> | <u>Citation/ Order No.</u> | <u>Proposed Penalty</u> | <u>Settlement</u> |
|---------------------------------------|--------------------------------|-----------------------------|-------------------|
| WEST 89-170-RM | 2647760 | | (Stayed) |
| WEST 89-171-RM | 2648041 | \$1,000 | \$ 500 |
| WEST 89-179-RM | 2647759 | 1,000 | 500 |
| (None) | 2647758 | <u>3,000</u> | <u>2,000</u> |
| | | \$5,000 | \$3,000 |

As to Citation No. 2647759 in Docket No. WEST 89-179-RM, the parties have also agreed that the "unwarrantable failure" aspect of this enforcement should be deleted by the modification of the Citation to reflect its issuance under Section 104(a) of the Act rather than under Section 104(d) thereof.

The settlement is well-supported in the stipulation signed by both parties and, in the premises, is found reasonable and here approved.

ORDER

Citation No. 2647759 is MODIFIED to reflect its issuance under Section 104(a) of the Act rather than Section 104(d) thereof, and is otherwise AFFIRMED.

Withdrawal Order No. 2648041 is AFFIRMED.

Contestant/Respondent, if it has not previously done so, is ordered to pay to the Secretary of Labor within 50 days from the date hereof the total sum of \$3,000.00 as and for the civil penalties agreed on and here assessed.

Contest Proceedings numbered WEST 89-171-RM and WEST 89-179-RM are DISMISSED.

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

Distribution:

Matthew F. McNulty, III, Esq., VanCott, Bagley, Cornwell & McCarthy, 50 South Main Street, Suite 1600, Salt Lake City, UT 84144 (Certified Mail)

Edward Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 23 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA) : Docket No. WEVA 89-20
Petitioner : A. C. No. 46-01433-03848
: :
v. : Loveridge No. 22 Mine
: :
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Ronald Gurka, Esq., Office of the Solicitor
U. S. Department of Labor, Arlington, Virginia,
for Petitioner;
Michael R. Peelish, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty for an alleged violation filed by the Secretary of Labor against Consolidation Coal Company, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820. An evidentiary hearing was held on September 12, 1989. The parties have filed post-hearing briefs.

Citation No. 3106116 dated August 29, 1988, charges a violation of 30 C.F.R. § 75.401 for the following condition or practice:

"Excessive coal dust (visual) can be seen during mining operations in the air over the continuous mining machine, the dust is coming back to the operators compartment, through the miner boom and out both side's where the mounted roof bolters are located. Tom Chickerell is the foreman in charge."

30 C.F.R. § 75.401 which is a restatement of section 304(b) of the Act, 30 U.S.C. § 864(b), provides as follows:

§ 75.401 Abatement of dust; water or water with a wetting agent.

Where underground mining operations in active workings create or raise excessive amounts of dust, water or water with a wetting agent added to it, or other no less effective methods approved by the Secretary or his authorized representative shall be used to abate such dust. In working places, particularly in distances less than 40 feet from the face, water, with or without a wetting agent, or other no less effective methods approved by the Secretary or his authorized representative, shall be applied to coal dust on the ribs, roof, and floor to reduce dispersibility and to minimize the explosion hazard.

30 C.F.R. § 75.401-1 defines "excessive amounts of dust" as follows:

The term "excessive amounts of dust" means coal and float coal dust in the air in such amounts as to create the potential of an explosion hazard.

At the prehearing conference prior to going on the record counsel for both parties agreed to several stipulations which were placed on the record at the hearing (Tr. 4). These stipulations are as follows:

1. The operator is the owner and operator of the subject mine.
2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. I have jurisdiction in this case.
4. The inspector who issued the subject citation was a duly authorized representative of the Secretary.
5. A true and correct copy of the subject citation was properly served upon the operator.
6. Copies of the subject citation and termination are authentic and may be admitted in evidence for purpose of establishing their issuance but not for the purpose establishing the truthfulness or relevancy of any statements asserted therein.
7. Imposition of a penalty will not affect the operator's ability to continue in business.
8. The alleged violation was abated in good faith.

9. The operator's history of violations reveals 999 assessed violations and 978 inspection days in the 24-month period preceding the subject violation, which is an average of 1.02 violations per inspection day.

10. The operator's size is large.

The MSHA inspector testified he was at the mine on the day in question to conduct a regular inspection (Tr. 11). Upon arrival on the six left section he checked a new conveyor system (Tr. 12). He then proceeded to a continuous miner which was being operated in a cross-cut (Tr. 12). According to the inspector a lot of coal dust was being generated from the cutting bits of this continuous miner (Tr. 12). He determined there was one-half inch of dust on the right side of the continuous miner near the roof bolter (Tr. 16). The inspector described how the dust was coming off the front of the miner, the right and left sides, and the hinge points (Tr. 18). The dust rolled back from the face to the point where the roof bolter was located and then further back past the cab of the continuous miner operator (Tr. 16). The coal was soft and because it was not virgin coal, it was dry (Tr. 28). These characteristics created more dust (Tr. 59). The inspector said the dust was so thick it was like a sandstorm (Tr. 62).

Contrary to the inspector's testimony, the operator's safety escort who accompanied him stated the dust was normal (Tr. 98). He agreed the dust rolled back to where the roof bolter was, but said this was normal (Tr. 103). He could not remember whether the dust went as far back as the continuous miner operator (Tr. 105). The operator's respirable dust supervisor who did not visit the scene until the day after the citation was issued, did not see much difference between the cited continuous miner and other machines that were in operation elsewhere (Tr. 75). He agreed that the coal was extremely soft, but said that because of this it produced less dust (Tr. 70-71).

This case therefore, presents the not unusual situation of a conflict between the inspector and the operator's witnesses regarding the cited condition. After a review of all the evidence I find the inspector's testimony more persuasive. As set forth above, his description regarding depth, location, and movement of the dust was more precise and detailed than that of the operator's witnesses. The operator's safety escort did not offer any specifics to support his conclusion that the dust was normal. In fact, his statement written at the time the citation was issued contradicted his testimony at the hearing by reporting the condition of the area as "excessive accumulations of visual dust on the miner." (Resp. Exh. No. 2). On the crucial point of whether the dust was carried as far back as the continuous miner operator, the escort testified he could not remember (Tr. 105). The operator's dust supervisor was not present on the day the citation was issued and he offered nothing concrete to support

his statement that on the next day he saw nothing unusual (Tr. 75). Then too, conditions in a mine change from day to day and shift to shift (Tr. 106). Accordingly, the inspector's description of the cited situation is accepted.

As set forth above, "excessive dust" is defined as coal dust in such amounts as to create the potential of an explosion hazard. In this connection I accept the inspector's testimony that the dust in suspension in the face area was sufficient to ignite and that friction from the bits on the continuous miner as well as electrical components on the miner constituted ignition sources (Tr. 25, 39). In addition, heat itself could ignite the dust (Tr. 25, 73). Mining was going on while the inspector was present (Tr. 15-16). In light of these circumstances, I conclude the dust created the potential of an explosion hazard and that therefore, a violation has been proved. See Black Diamond Coal Mining Company, 7 FMSHRC 1117, 1120-1121 (August 1985).

I have not overlooked the fact that in attempting to abate, a second set of extra sprays installed by the operator did not help and were removed (Tr. 47, 79). This circumstance does not affect the existence of a violation as found herein and it does not alter the fact that as the inspector stated, the first set of additional sprays made the situation alot better (Tr. 45, 47-49). I also take note of the operator's argument that no violation existed because it was in compliance with its respirable dust plan. This assertion cannot be accepted. The record shows only that no citation was issued for respirable dust, not that there was compliance (Tr. 55). In fact, the respirable dust records submitted by the operator were for different dates and places than those involved in this case (Resp. Exh. No. 1, Tr. 89-91). Finally, although respirable dust and excessive dust violations may involve consideration of the same or similar facts they are by no means synonymous and one can exist without the other.

The next issue is whether the violation was significant and substantial. The Commission has held that 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--contri-

buted to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission subsequently explained that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" U. S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

As set forth above, a violation existed. As explained herein the evidence establishes the potential of an explosion hazard. Potential means possible. See Websters Third International Dictionary (1986) and Random House Dictionary, Second Edition (1987). The possibility of a frictional dust ignition presented a discrete safety hazard. However, the evidence does not rise to the level of establishing a reasonable likelihood that the dust hazard would result in an event in which there would be an injury. The inspector described possible ignition sources and dust ignition from heat but he did not explain why an ignition would be reasonably likely. The inspector said an ignition was "highly probable" with this type of equipment but he failed to support this assertion (Tr. 39). Finally, although the inspector estimated ignition as probable or "highly probable" he also portrayed it as "possible" (Tr. 25, 39, 55). In light of the foregoing, the finding of significant and substantial is vacated.

As I have previously held, significant and substantial is not synonymous with gravity. Secretary of Labor v. A. H. Smith Stone Company, 11 FMSHRC 1203 (1989). A violation may not rise to the level demanded by the Commission for significant and substantial, but still possess a degree of gravity. This is such a case. The amount of dust was serious because it presented the possibility of explosion or fire. I find gravity was moderate.

The operator was guilty of ordinary negligence. I accept the inspector's testimony that the foreman was in a position to see what the inspector saw (Tr. 42). Although the sprays had been cleared at the start of the shift it was obvious they were not doing the job when the inspector arrived (Tr. 32-33).

In assessing an appropriate civil penalty good faith abatement is one of the factors to be considered under section 110(i) of the Act. 30 U.S.C. § 820(i). As set out above, the parties stipulated to good faith abatement. But particular note is taken of the great effort expended by the operator in this respect.

The remaining 110(i) criteria are covered by the stipulations.

In light of the foregoing, I determine a penalty of \$175 is appropriate.

The post hearing briefs of the parties have been reviewed and were very helpful in reaching a decision. The efforts of counsel are much appreciated. To the extent the briefs are inconsistent with the decision, they are rejected.

ORDER

It is ORDERED that the finding of a violation in Citation No. 3106116 be AFFIRMED and that the Citation be AFFIRMED.

It is further ORDERED that the finding of significant and substantial be VACATED.

It is further ORDERED that a penalty of \$175 be ASSESSED.

It is further ORDERED that the operator PAY \$175 within 30 days from the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution:

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

Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Robert Stropp, Esq., UMWA, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 24 1989

BUFORD SMITH, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 88-201-D
: :
R.J.F. COAL COMPANY, INC., : BARB CD 88-45
Respondent :
:

DECISION

Appearances: Mr. Buford Smith, Hazard, Kentucky, for Complainant;
Leon Hollon, Esq., Hollon & Hollon, Hazard,
Kentucky, for Respondent.

Before: Judge Weisberger

Statement of the Case

This is before me based upon a Complaint filed by Buford Smith (Complainant) on September 14, 1988, alleging discrimination by R.J.F. Coal Company (Respondent) under section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). On April 5, 1989, an Order was issued directing the Respondent, within 30 days of the Order, to file an Answer to the Complaint or show good cause for the failure to do so. On June 27, 1989, Respondent filed a response to the Show Cause Order, and a Motion to Permit Late Filing of the Answer. This response established good cause to permit the late filing of the Answer, and the Answer is considered as being filed as of June 27, 1989. Pursuant to notice, the case was heard in Johnson City, Tennessee, on September 21, 1989. At the hearing Irvin Neace, Claude Branson, Gary Goodson, Shade Neace, and Buford Smith testified for Complainant. Kevin Moore, Braxton Mullins, Boyd Wilson testified for Respondent.

Issues

1. Whether the Complainant has established that he was engaged in an activity protected by the Act.
2. If so, whether the Complainant suffered adverse action as the result of the protected activity.

3. If so, to what relief is he entitled.

Stipulations

1. At all relevant times in this action, including February 11, 1988 (the date of layoff), the Respondent, RJF Coal Company, operated surface mines located at Vicco in Perry and Knott Counties, Kentucky, and at Red Oak in Knott County, Kentucky. The products of these coal mines enter the stream of commerce within the meaning of the Act.

2. Buford Smith, Complainant, first became employed by a company known as River Processing, Inc. on August 6, 1981. River Processing, Inc. was subsequently acquired by and became a subsidiary of Coal Ridge Fuel, Inc. on December 22, 1983. Thereafter, the surface coal mining operations of the companies were conducted by an affiliated general partnership, RJF Coal Company. Buford Smith was hired by Respondent, RJF Coal Company, on December 23, 1983, and was a "miner" within the meaning of the Act. RJF Coal Company was later incorporated and also became a subsidiary of Coal Ridge Fuel, Inc.

3. At the time of the layoff at issue in this case, Respondent, RJF Coal Company, employed approximately 130 persons at its various operations and at its offices. Of these, approximately 70 were employed in the surface mining operations.

4. At the time of the layoff on February 11, 1988, Complainant, Buford Smith, was earning \$10.50 per hour for a 40-hour week. In addition, he earned \$15.75 per hour for any hours worked in addition to 40 hours per week. Employees recalled from the layoff accepted a 10 percent pay reduction upon their return on March 12, 1988.

5. In late November or early December, 1988, the Board of Directors of the Respondent voted to dissolve Respondent, RJF Coal Company, in conjunction with negotiations for the acquisition of approximately 50 percent of the outstanding corporate stock of Respondent's parent corporation, Coal Ridge Fuel, Inc. Articles of Dissolution for Respondent were filed with the Secretary of State on November 26, 1988. After the sale of the stock was consummated on February 1, 1989, the name of RJF's corporate parent was subsequently changed to Diamond May Coal Company.

6. Diamond May Coal Company laid off all remaining surface coal mining employees of the company at the Red Oak and/or Vicco surface mines on July 14, 1989, and has now entered into contract mining arrangements for the operation of both mines. The only remaining company employees are employed in its office as clerical staff or in the field as part of its tipple or reclamation crew.

Findings of Fact and Conclusions of Law

Complainant first became employed by a company known as River Processing, Inc. on August 6, 1981. River Processing, Inc. was subsequently acquired by and became a subsidiary of Coal Ridge Fuel, Inc. on December 22, 1983. Thereafter, the surface coal mining operations of the companies were conducted by an affiliated general partnership, RJF Coal Company. Complainant was hired by Respondent, RJF Coal Company, on December 23, 1983, and was a "miner" within the meaning of the Act. RJF Coal Company was later incorporated and also became a subsidiary of Coal Ridge Fuel, Inc.

Irwin Neace, who worked for Respondent, RJF Coal Company for approximately 1 1/2 years commencing in January 1984, indicated that during that time he replaced the brake chambers on the lowboy that Buford Smith drove for Respondent. Buford Smith indicated that the brakes on his Birmingham Lowboy had been repaired by mechanic Irvin Neace, sometime in 1986, but that after that time the brakes began to deteriorate. He indicated that he was scared to drive the lowboy, but he had to work to support his family and send his children to college. He indicated that in early 1987 and on several occasions thereafter, he told Jimmy Ambergay and Glenn Sharpe, Respondent's mechanics, to work on the brakes, as he knew that the lining was gone and that new brakes were needed. He indicated that Sharpe told him that he did not have time to work on the brakes, and Ambergay told him to see the foreman Bill O'Donnell. He said that O'Donnell or another supervisor would tell him that he needed to do production work first. Specifically, he indicated that when he told O'Donnell in the spring of 1987, that he needed to have the brakes fixed on the lowboy, O'Donnell said that he would do the best that he could. He indicated that whenever he had to move a dangerous piece of equipment, which occurred daily, he "probably" talked to O'Donnell about the brakes (Tr. 78). He said that "several dozen times" he mentioned to O'Donnell about the brakes (Tr. 78). He said that O'Donnell sometimes said he'll fix it and sometimes he said for Smith to see the mechanics. Smith indicated that on the few occasions when he did go to the mechanics, he did not get any "action" from the mechanics (Tr. 79). Smith also indicated that on "several occasions" over a 2-year period prior to his layoff in February 1988, he told Lloyd Harvey, Respondent's purchasing agent, that the lowboy did not have any brakes, but does not recall Harvey's response (Tr. 86). He also indicated that in 1987, he received a total of a half a dozen citations from the Tennessee Department of Transportation for faulty brakes. He said that when this occurred, he called into Respondent's Office

on a CB Radio, but did not receive any response with regard to the citations. He said that when he arrived in the office he presented the citations to Harvey who did not say anything. Smith also indicated, in essence, that in the summer of 1987, after he had an incident where brakes did not work, he spoke to Chesten Wooton and told him that the brakes were "out" on the lowboy and that it was unsafe (Tr. 95).

Gary Goodson, one of Respondent's foremen, indicated that probably in the fall of 1986, he observed that while Smith was driving the lowboy down a wet hill, the brakes locked up and agreed that the lowboy slid "quite a ways" (Tr. 48). He indicated that he told Smith the same thing he told other persons, i.e., that if he is afraid to operate a piece of equipment he should not do so.^{1/}

The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff, supra, at 1863, stated as follows:

A complaining miner establishes a prima facie case of prohibited discrimination under the Maine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The Operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. 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).

^{1/} Smith indicated that Goodson told him "if it was me I would not drive." Having observed the demeanor of the witnesses I find Goodson's version more credible.) Shade Neace was asked whether Smith had problems with the brakes on the lowboy and said "you better believe it" (Tr. 53). He indicated that in the latter part of 1986, or early 1987, he was driving with Smith on a real steep incline and indicated that there were no tractor brakes and the tractor was being pushed by the trailer and the drill.

I find, based upon the above testimony, that Smith did perceive that there was a problem with brakes on the Birmingham Lowboy, and did communicate this concern to Respondent. As such I find that he did engage in protected activities.

In order for the Complainant to prevail herein, he must establish not only that he engaged in protected activities, but that adverse action taken against him by Respondent was motivated in any part by the protected activities (Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (1981)). According to Smith, when he spoke with Wooton in the summer of 1987, and informed him that the brakes were out on the lowboy, and that it was unsafe to haul it, the latter told him "you will do it if you stay here" (Tr. 94). He also indicated that in the summer or fall of 1987, when he was hauling a wide load, he was concerned that he might be given a citation by the Tennessee Department of Transportation and so informed Howard Woolum (check spelling) who told him "we'll get you out if it takes us 5 years" (Tr. 98). He also indicated that O'Donnell threatened him four or five times in the summer of 1987 and 1988, and that they argued a few times concerning hauling on the steep grade. He indicated that on one occasion O'Donnell told him that the same road that brought him in will take him out. Smith indicated that approximately 1 1/2 to 2 weeks before he was laid off in February 11, 1988, he turned the Birmingham Lowboy upside down. He indicated that when O'Donnell asked him why he did it, he told him that he was not going to drive it again as it did not have any brakes. He indicated that it had only one good spring out of four. He said that O'Donnell told him "it looked like that was about it for me (you)" (Tr. 81, sic).

Smith indicated that on February 11, 1988, at quitting time, 35 to 40 employees at Respondent's Red Oak location, including himself, received a paper indicating that they were laid off until further notice due to a slowdown of work. Smith indicated that he took it for granted that he was fired, and concluded that O'Donnell's previous comments in response to his turning the Birmingham Lowboy upside down, were to be interpreted as his being fired. However, according to the uncontradicted testimony of Kevin Moore, the assistant secretary/treasurer of Diamond May Coal Company, the successor to RJF, the latter was operating at a loss for a number of years, and in the month of January 1988, had lost \$303,000. He indicated that on February 11, 1988, 120 employees were laid off, including 70 at the surface and reclamation locations.

I thus find that Smith's lay off was motivated by Respondent's economic conditions. The evidence is insufficient to establish that the lay off of Smith was motivated in any part by protected activities.²

Braxton Mullins indicated that he, Boyd Wilson, and Lou Warrix were asked by Edward L. Clemens, in essence, to act as consultants to manage Respondent's above ground operations. Mullins, Wilson, and Warrix decided to rehire various categories of employees who had been laid off on February 11, and to rehire them based upon seniority within the various job categories. Mullins obtained a list from Respondent's personnel office listing all previously laid off employees and their job titles. Mullins had the office staff also indicate the dates that employees were hired by RJF. He then fed this information into a computer and obtained a printout whereby, for each job category, the employees were listed in order of seniority. According to Braxton and Wilson no other persons were involved in this process aside from the two of them and Warrix. In order to reduce mining cost, not all employees were called back. Indeed, 20 employees, including Smith, who had been laid off on February 11, 1988, were not recalled. Those who were recalled were recalled on the basis seniority.^{3/}

^{2/} Claude Branson indicated on direct examination that maybe 5 months prior to Smith's dismissal he (Smith) was threatened by Larry Bowling, over "this safety thing" and about "brakes" (Tr. 35). Bowling was an owner of Coal Ridge Fuels for whom Respondent operated the facility and in which Smith was employed. However, I did not place much weight on Branson's testimony in this regard as on cross-examination he indicated that the incident occurred back in the middle of the summer of 1987, and that he did not over hear any conversation between Smith and Bowling in which brakes were discussed.

^{3/} There were only two exceptions. In one situation, Bowling was unable to fill all of the necessary dozer positions. As most of of the previous employees, who were dozer operators, already had other jobs. Accordingly, Mullins consulted with Foreman Donald Hilton, who indicated that another employee had dozer experience and he was hired. According to the uncontradicted testimony of Mullins, he and Hilton did not discuss Smith in this connection. In addition, a decision was made to rehire two day shift oilers rather than the night shift oiler who was more senior, as there was no need for a night oiler, and the latter (day shift oilers) had better experience.

Wilson and Mullins indicated with regard to rehiring those who were laid off on February 11, 1988, that they had not discussed their decision with any of Respondent's foreman or supervisors and the decision was made solely by the two of them and Warrix. In contrast, Respondent testified that O'Donnell had threatened him, and that O'Donnell was friendly on a social bases with Clemens, one of the principles of RJF. I find that it is mere speculation, and totally without foundation, that O'Donnell had discussed the firing of Smith with Clemens. Also I did not place much weight on Branson's testimony, that Bowling, a principle in Coal Ridge Fuels, had threatened to dismiss Smith with regard to safety of the brakes, as Branson indicated in cross-examination that he did not hear any conversation between the two in which the issue of the brakes was discussed. Thus, I find, based on the testimony of Mullins and Wilson, that the decision not to rehire Smith was based solely on business reasons, and not motivated in any part by Smith's protected activities. Hence I find that Respondent did not discriminate against Smith in violation of section 105(c) of the Act. (See, Secretary on behalf of Robinette, supra).

ORDER

It is hereby ORDERED that the complaint herein be DISMISSED and this case be DISMISSED.


Avram Weisberger
Administrative Law Judge

Mr. Buford Smith, Route 2, Box 329, Hazard, KY 41701 (Certified Mail)

Leon Hollon, Esq., Hollon, Hollon, & Hollon, P. O. Box 779, Hazard, KY 41701 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 24 1989

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|---------------------------------------------------------------------------------------|---|------------------------------------------------------------------------------------------------|
| CONSOLIDATION COAL COMPANY, Contestant | : | CONTEST PROCEEDING |
| v. | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Docket No. PENN 88-252-R Citation No. 3096663; 6/14/88 Dilworth Mine Mine ID 36-04281 |
| UNITED MINE WORKERS OF AMERICA ON BEHALF OF EDWARD BANDISH, Complainant | : | DISCRIMINATION PROCEEDING |
| v. | : | |
| CONSOLIDATION COAL COMPANY, Respondent | : | PENN 89-43-D PITT CD 88-21 Dilworth Mine |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| v. | : | |
| CONSOLIDATION COAL COMPANY, Respondent | : | Docket No. PENN 89-76 A. C. No. 36-04281-03652 Dilworth Mine |

DECISION

Appearances: Michael J. Healey, Esq., Healey, Davidson & Hornack, Pittsburgh, Pennsylvania, for Edward Bandish; David J. Laurent, Esq., Polito and Smock, P.C., Pittsburgh, Pennsylvania, for Respondent; Covette Rooney, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Cases

In these consolidated cases, the Operator (Respondent), contests a finding by the Secretary (Petitioner), that it violated section 103(f) of the Federal Mine Safety and Health Act of 1977,

and the Petitioner seeks a civil penalty alleging a violation of section 103(f), supra. In addition, the Complainant seeks various declaratory relief, alleging that Respondent discriminated against him in violation of section 105(c) of the Act, by denying him his rights under section 103(f) to accompany an inspector during an inspection of Respondent's mine. Subsequent to discovery, and pursuant to notice, the cases were heard in Pittsburgh, Pennsylvania, on July 11, 1989. James Samuel Conrad, Jr. testified for Petitioner, Paul Edward Bandish and Larry E. Swift testified for Complainant, and Phillip Mark Rebottini, Louis Barletta, Jr., and Mark Schultz testified for Respondent. At the hearing, at the conclusion of the Petitioner's case, Respondent made a Motion for Directed Verdict, and decision was reserved. Post Hearing Briefs were submitted by Complainant and Respondent on September 28, 1989. Petitioner filed Proposed Findings and Facts and a Memorandum on October 1, 1989.

Stipulations

1. The Dilworth Mine is owned and operated by the Respondent, Consolidation Coal Company.

2. The Dilworth Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject Citation and order were properly served by a duly authorized representative of the Secretary of Labor, upon an agent of the Respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements assessed therein.

5. The assessment of a civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

6. The appropriateness of a penalty, if any, to the size of the Respondent's business should be based upon the fact that the Respondent's company and mine size are large.

7. The Dilworth Mine was assessed a total of 368 violations over 513 inspection days.

8. The Parties stipulate to the authenticity of their exhibits, but not to their relevance or the truth of the matters asserted therein.

Findings of Fact and Discussion

At approximately 11:30 p.m. on June 2, 1988, MSHA Inspector James Samuel Conrad, Jr. arrived at Respondent's Dilworth Mine to continue a Triple A Inspection during the midnight shift commencing 12:01 a.m., June 3, 1988. Larry E. Swift, a Safety Committee member of the Local Union, was scheduled to work the midnight shift, and was the designated walkaround to accompany Conrad, and Conrad was so informed. Prior to the commencement of the inspection, Conrad ran into Paul Edward Bandish, a miner employed by Respondent on its day shift. Bandish, who was not scheduled to work the midnight shift, was at the mine to give a section 103(g) complaint, concerning certain meetings, to Swift. Bandish, in his capacity as Chairman of the Local Safety Committee, requested of Conrad to accompany him and Swift on the inspection. Neither Bandish nor Conrad indicated that Bandish presented any specific reason in support of his request. Bandish indicated that he did not know that Conrad was going to be conducting an inspection on the midnight shift, and Conrad indicated that prior to Bandish's request, he had not intended to ask for an additional walkaround. In response to Bandish's request, Conrad indicated that he did not have any problem with the request, and so informed Bandish. In addition Conrad suggested that Bandish in turn check with management. Bandish then made his request of the shift foreman, Phillip Mark Rebottini, who in turn conferred with his supervisor Mine Superintendent Louis Barletta, Jr. Barletta in turn called his supervisor Bill Porter, Respondent's Vice President, who checked with legal counsel. Barletta was advised that Respondent had the right to deny Bandish access, and Barletta so informed Rebottini. According to Rebottini, he was informed by Barletta to deny Bandish the right to accompany the inspector, inasmuch, as the inspector already had a paid walkaround, from the night shift, to accompany him and Bandish was a day shift employee. According to Conrad he met with Rebottini, Steven Wolf, Bandish, and Swift, in the maintenance office, and informed Rebottini that "an extra set of eyes has always been beneficial in the conducting of my inspections," (Tr. 43). He also told them that in the past an additional walkaround has brought matters to his attention. In this connection, Conrad indicated that the belt line was one of the items that had not yet been inspected, and there would be a more thorough examination with him on one side of the belt line, and the additional walkaround (Bandish) on the other side, along with the miner's original walkaround and Respondent's representative. In this connection he said that he believed that Bandish was knowledgeable and had experience as a walkaround. Bandish, in essence, corroborated the testimony of Conrad that the latter said something about "his eyes and everybody eyes" (Tr. 109, sic), and informed Wolf, Swift, and Rebottini that, in essence, with more persons present at an inspection, there is a better chance of observing conditions.

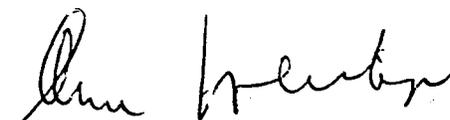
Rebottini indicated, on two occasions in his testimony, that Conrad said that he had the authority to take as many walkarounds as were needed. However, Rebottini indicated specifically that Conrad did not use the word "need," and that he did not say that an extra set of eyes would aid the inspection. He indicated that Conrad did not say anything about needing Bandish, or that having Bandish accompany him would aid the inspection. It is significant to note that Swift, who was present when Conrad allegedly made a statement to the effect that an extra set of eyes would be helpful, did not corroborate Conrad's version. According to Swift, Conrad merely indicated that if Bandish was not allowed as an additional walkaround, he would issue a citation, and that if the Company wanted another walkaround, it was acceptable. Also, although Bandish corroborated Conrad's version and stated, in essence, that, when testifying, he remembered all the items he testified to, he indicated that, in January 1989, he suffered a head injury which affects his memory. Further, it is significant to note that in notes contemporaneous to the events at issue, Conrad indicated, in essence, that in response to Bandish's request, he had "no trouble" with Bandish traveling with him (Government Exhibit 2). There is no reference to an "extra set of eyes" as being helpful, nor is there any statement indicating specifically that Bandish would aid in the inspection. In the same fashion, in a statement signed by Conrad on June 27, 1988, less than 4 weeks after the incidents in question occurred, he indicated that "there was no special reason for Bandish to travel with me as far as I know." (Respondent's Exhibit 1). Further, on cross-examination, Conrad indicated that prior to the time Bandish requested to serve as an additional walkaround he (Conrad) had no intention to have an additional walkaround, and had not determined which areas of the mine to inspect. He indicated that there were several areas to inspect, including the belt line. Although Bandish had experience as a walkaround, and in Conrad's opinion was "knowledgeable," and could have observed conditions on the side of the belt line opposite where Conrad would walk, it is clear that the regular walkaround, Swift, could function in the same manner. Further, it should be noted that Bandish did not know that Conrad was to be at the mine on the midnight shift, and did not express any intention of going to the mine on June 2, to bring any matters to the attention of Conrad concerning any underground conditions. (According to Bandish, his only reason for being on the premises was to present to Swift a 103(g) complaint concerning some meetings). Thus, I conclude that there is not sufficient evidence to support a finding that Conrad, on June 2, 1988, made any determination that Bandish would further aid his inspection.

In order for the Complainant to prevail in his 105(c) action, he must first establish a violation of section 103(f), supra. Similarly, Petitioner's petition for assessment of civil penalty is predicated upon a violation of section 103(f), supra. As

pertinent, section 103(f), supra provides as follows: ". . . To the extent that the Secretary or an authorized representative of the Secretary determines that more than one representative from each Party would further aid the inspection, he can permit each Party to have an equal number of such additional representatives." Thus, based upon a reading of section 103(f), supra, and giving a plain meaning to its terms, it is clear that Respondent has a duty to allow an additional walkaround (and the Complainant has a right to be the additional walkaround), only if the Inspector "determines" that such additional walkaround "would further aid the inspection." In the instant case as analyzed above, the evidence fails to establish that such a determination was made. Accordingly, it is concluded that Complainant has not established that he has been denied the exercise of any rights under section 103(f), supra, and has not been discriminated against under section 105(c)(1) of the Act. Similarly, inasmuch as there has not been a violation of section 103(f), supra, the petition for assessment of civil penalty herein shall be dismissed and the Respondent's Notice of Contest shall be sustained.

ORDER

1. It is hereby ORDERED that Docket No. PENN 89-43-D be DISMISSED.
2. Docket No. PENN 89-76 be DISMISSED.
3. The Notice of Contest, Docket No. PENN 88-252-R, is SUSTAINED.


Avram Weisberger
Administrative Law Judge

Distribution:

Michael Healey, Esq., Healey, Davidson & Hornack, 1906 Law and Finance Boulevard, Pittsburgh, PA 19219 (Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 24 1989

| | | |
|--------------------------------------------------------------------------------------|---|-------------------------------|
| TUNNELTON MINING COMPANY, Contestant | : | CONTEST PROCEEDING |
| v. | : | Docket No. PENN 88-258-R |
| | : | Citation No. 2888637; 6/21/88 |
| SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Marion Mine |
| | : | Mine ID 36-00929 |
| | : | |
| SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| v. | : | Docket No. PENN 88-333 |
| | : | A. C. No. 36-00929-03638 |
| | : | |
| TUNNELTON MINING COMPANY, Respondent | : | Marion Mine |
| | : | |
| | : | |

DECISION

Appearances: Joseph Yuhas, Esq., Tunnelton Mining Company, Ebensburg, Pennsylvania, for the Respondent; Thomas A. Brown, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Secretary (Petitioner) seeks a civil penalty for an alleged violation by the Operator (Respondent) of 30 C.F.R. § 77.1710(h). Pursuant to notice, these cases were heard in Bellefonte, Pennsylvania on June 19, 1989. Rex Morgart and Kenneth Dice testified for Petitioner, and Harold Kimmel and Darryl Hanna testified for Respondent. Proposed Findings of Fact and Memorandum of Law were filed by Respondent and Petitioner on September 21 and 25, 1989, respectively. A Reply Brief was filed by Respondent on October 1, 1989.

Stipulations

1. The Marion Mine is owned and operated by Respondent, Tunnelton Mining Company. Tunnelton Mining Company is a subsidiary of the Pennsylvania Mines Corporation.
2. Tunnelton Mining Company and the Marion Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction over this proceeding, pursuant to Section 105 of the 1977 Act.
4. The inspector who issued the subject citation was a duly authorized representative of the Secretary of Labor.
5. A true and correct copy of the subject citation was properly served upon the Operator in accordance with Section 104 of the 1977 Act.
6. Copies of the subject citation and termination may be admitted into evidence for the purposes of establishing their issuance, and not for truthfulness or relevance of any statements asserted therein.
7. Respondent demonstrated good faith in the abatement of the citation.
8. The assessment of a civil penalty will not affect Respondent's ability to continue in business.
9. The Respondent's annual production tonnage is 1,435,690 tons.
10. The Marion Mine produces an annual production of 773,668 tons.
11. Tunnelton Mining Company was assessed 327 violations over 522 inspection days during the 24 months preceding the issuance of the subject citation.
12. The printout of the civil penalty complaint reflects the Secretary of Labor's history of violations at the Marion Mine.

Findings of Fact and Discussion

I.

On June 21, 1988, Respondent's employees Harold Kimmel and Darryl Hanna, were in the process of removing a pump from a water clarifier bin in order to repair it. Hanna stood on a catwalk alongside a boom post and was ratcheting a chain in order to

raise the pump which was submerged in the bin. Kimmel was approximately 4 feet below Hanna, and had his left foot on a 4 inch angle iron and his right foot on a pipe. He had his knee on a pipe and was leaning over the bin in order to attach a chain to the pump. (See, Government Exhibits 3-A, 6, 7, and 8 for a depiction of the position of Kimmel's right leg (R) and left leg (L), as testified to by Rex Morgart, an MSHA Inspector.) Although the testimony of Kimmel and Hanna was at variance with that of Morgart with regard to where the former had positioned his left foot, I accept the version testified to by Morgart, due to my observations of the witness' demeanor on this point, and also due to the fact that Morgart's testimony related specifically to what was observed by him, whereas the testimony of Kimmel did not specifically describe the placement of his left foot when he was observed by Morgart.^{1/} Kimmel thus was positioned in a leaning over position facing away from the catwalk and above the water. He was approximately 2 to 3 feet from the top of the water, and the water was approximately 12 feet deep. Kimmel had his left hand either on the structure or the chain, and was using his right hand to unhook the chain from the pump. According to Kimmel, the pump, which was approximately 18 inches in diameter, was located a couple of feet in front of him when he reached for the chain.

Kenneth Dice, a mechanic for Respondent who accompanied Morgart on his inspection, indicated that the pump was directly below Kimmel, and that Kimmel was probably "a wee bit" to the right. I accepted the testimony of Kimmel with regard to the position of the pump, relative to where he was working, as he was directly involved in the operation, and the record does not indicate where Dice was standing in relation to Kimmel. Thus, inasmuch as Kimmel was straddling a structure, had his left foot on an angle-iron that was only 4 inches wide, was holding on with only his left hand, leaning over water located about 2 feet below him, and reaching below him, I conclude that a reasonably prudent person would have recognized a danger of falling, and would have worn a lift jacket or belt. Accordingly, I find that Respondent herein did violate section 77.1710(h). (See Austin Power, Inc., 9 FMSHRC 2015 (December 1987)).

^{1/} Hanna testified in general as to where Kimmel stood, but did not specifically contradict Morgart's testimony with regard to the placement of Kimmel's feet as depicted in Government Exhibit 3A, 6, 7, and 8.

II.

Morgart indicated that in his opinion the violation herein was significant and substantial in that, if a worker would be without a belt or life jacket every time the pump was brought up, then there would be "a chance" of a fatality or a serious injury (Tr. 38). He said that there have been serious injuries in falling over the top of a bin including fatalities. He said, in essence, over a period of time there would be a reasonably likelihood for one to drown or lose one's balance, and strike one's head against two or three objects which were present. Dice opined that there was a "very good chance" of slipping and hitting one's head on a railing (Tr. 61) He said that in such an event a person ". . . could have knocked himself out or drowned." (Tr. 61, emphasis added.)

In order for a violation to be significant and substantial, in addition to establishing a violation of a mandatory safety standard and a discrete safety hazard, it must be established that there was a reasonable likelihood that the hazard contributed to would result in an injury-producing event. (See, Mathies Coal Company 6 FMSHRC at 3-4 (January 1984); Austin Power Inc., supra.) The discrete safety hazard contributed to by the violation herein, was the danger of falling into the water. However, Kimmel was supported by the placement of his legs. In addition, he was being supported by his left hand by holding onto the chain or structure, and all stationary obstructions were to his rear, the opposite direction in which he was facing. Further, the pump was approximately 5 feet below the surface, according to the uncontradicted testimony of Hanna, and Kimmel was only approximately 2 feet above the surface of the water. Also, although Kimmel was fully clothed and had on shoes with steel toes, he knew how to swim, and was working approximately 4 feet away, and in the view of Hanna throughout the time he was working. Hanna, although also wearing shoes with steel toes, was able to swim, and had at his feet a 1 inch aluminum pipe, approximately 8 to 10 feet long, which could have been used to save Kimmel had he fallen in. Also, a rope and an inflated rubber tube was approximately 20 to 25 feet away, and down a ladder. For all these reasons I conclude that it has not been established that there was a reasonable likelihood of the occurrence of an injury of a reasonably serious nature. Hence, I conclude that it has not been established that the violation herein was significant and substantial (See, Mathies Coal Company, supra.) (C.F. Austin Power, Inc., supra.)

III.

Both Hanna and Kimmel knew that Kimmel was working straddling two structures, and leaning over the bin containing water. Kimmel's testimony was to the effect that approximately once a year or less he has had to perform similar work pulling up a pump.

As outlined above, I., infra, a reasonably prudent person would have realized that there was some danger to Kimmel of falling into the water. Safety belts were available at the office of Kimmel's supervisor, Kirk McKnight, but neither a belt nor a life jacket was provided to Kimmel. Accordingly, I find that the violation herein resulted from Respondent's aggravated conduct and as such constitutes unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1997 (1987))^{2/}

IV

I find that the gravity of the violation herein to be less than moderate, taking into account the factors discuss in II, infra. Inasmuch as Respondent failed to act as a reasonable prudent person as set forth in I., infra, I conclude that Respondent's negligence herein was of a moderately high degree. Considering these factors, as well as the remaining factors set forth in section 110(i) of the Act, I find that a penalty herein of \$75 is appropriate for the violation of section 77.1710(h), supra.

ORDER

It is ORDERED that Order 2888637 be amended to reflect the fact that the violation herein is not significant and substantial. It is further ORDERED that Respondent shall, within 30 days of this Decision, pay \$75 as a civil penalty for the violation found herein.



Avram Weisberger
Administrative Law Judge

^{2/} I find that the cases relied on by Respondent at Pages 14-15 of its Brief are not dispositive of the issues presented herein. In Secretary v. Florence Mining Co., 11 FMSHRC 747 (1989), the Commission held that the Operator's conduct did not constitute an unwarrantable failure as it was based on its good faith interpretation of the requirements of an approved emergency escape facilities plan. In Secretary v. Rochester and Pittsburgh Coal Co., 9 FMSHRC 2069 (1987), Judge Koutras held that the Operator's negligence was to be mitigated as it was based upon an interpretation of provisions of a ventilation plan. Reasonable persons can differ with regard to the interpretation of various terms of ventilation plans. In contrast, in the case at bar, Respondent's conduct was as a consequence of failing to act as a reasonably prudent person. (Infra, I).

Distribution:

Joseph A. Yuhas, Esq., Tunnelton Mining Company, P. O. Box 367,
Ebensburg, PA 15931 (Certified Mail)

Thomas A. Brown, Esq., Office of the Solicitor, U. S. Department
of Labor, Room 14480-Gateway Building, 3535 Market Street,
Philadelphia, PA 19140 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 27 1989

PEABODY COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 88-239-R
: Order No. 3141311; 4/19/88
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Robinhood No. 9 Mine
ADMINISTRATION (MSHA), : Mine ID 46-02143
Respondent :

DECISION

Appearances: Thomas L. Clarke, Esq., Peabody Coal Company,
Charleston, West Virginia, for the Contestant;
Ronald E. Gurka, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a Notice of Contest filed by the contestant against the respondent challenging the validity of a withdrawal order issued pursuant to section 104(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(b). The contestant also seeks to challenge the underlying section 104(a) citation. The respondent filed a timely answer to the contest, and asserted that the order was properly issued and that a violation of the cited mandatory standard did in fact occur. A hearing was held in Charleston, West Virginia, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and I have considered their respective arguments in the course of my adjudication of this matter.

Issues

The issues in this case are (1) whether the contestant violated the provisions of mandatory respirable dust health standard 30 C.F.R. § 70.101, as stated in the contested section 104(a) citation, and (2) whether the inspector who issued the section 104(b) order properly determined that the violation had

not been timely abated and that the period of time for abatement should not be further extended. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.
2. Sections 104(a) and 104(b) of the Act.
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.
4. Mandatory respirable dust standard 30 C.F.R. § 70.101.

Discussion

During opening statements at the hearing, MSHA's counsel stated that on March 22, 1988, a section 104(a) citation was served on the contestant citing it with a violation of mandatory respirable dust standard 30 C.F.R. § 70.101. The contestant did not contest the citation, and it paid the civil penalty assessment for the violation. Although counsel recognizes the fact that the contestant takes the position that the penalty was inadvertently paid, he nonetheless asserted that pursuant to section 105(a) of the Act, since the contestant did not contest the citation or the penalty, the citation has become final and not subject to further review (Tr. 6, 13).

MSHA's counsel stated that after the issuance of the citation, the contestant was afforded time to abate the condition and to come into compliance with the respirable dust requirements. The abatement time was extended, and the contestant submitted dust samples which it had collected on or about April 12-14, 1988. Since these samples exceeded the required dust levels mandated by section 75.101, MSHA Inspector Orville Boggs issued a section 104(b) Order on April 19, 1988, and this order is the subject of the instant proceeding. Counsel stated that the issues presented with respect to the order are (1) whether or not the initial citation was abated within the time fixed by the inspector, and if not (2) whether the failure of the inspector to further extend the abatement time was reasonable or unreasonable in the circumstances (Tr. 7).

Contestant's counsel agreed that the issue presented in this case is whether or not the abatement time for compliance should have been extended further, and whether or not the contested order was appropriate under the circumstances. Counsel asserted that the contestant made every reasonable effort to abate the violation in light of the dust control system in use at the mine,

that MSHA was basically aware of these efforts, and that the time for abatement should have been extended (Tr. 8).

With regard to the payment of the civil penalty assessment for the citation which preceded the contested order, contestant's counsel asserted that payment was made through an inadvertent mistake after MSHA informed the contestant that it would institute a formal collection action for payment of the penalty (Tr. 9).

During a bench colloquy, contestant's counsel confirmed that while the contestant may have doubted the cited respirable dust level of 3.5, that resulted in the issuance of the citation, it did not contest the citation (Tr. 10). Counsel agreed that the order was issued after the contestant submitted additional samples which reflected sample results of 2.6 when tested by MSHA. Counsel asserted that the contestant disagrees with MSHA's test results, and that its own independent weighing of the sampling cassettes at its laboratory reflects compliance with the required MSHA dust standards. Further, counsel asserted that the contestant was making every effort to obtain compliance, and was attempting to isolate any dust problem which resulted in the high sampling results being received by MSHA, but had been unable to do so at the time the order was issued. Counsel asserted that "the inspector knew about this and perhaps even sympathized with our problems" (Tr. 12). Counsel identified the "mechanized mining unit" which was out of compliance as a continuous-mining machine equipped with a scrubbing device which is used for dust control purposes (Tr. 13).

The initial section 104(a) "S&S" Citation No. 9959601, was served on the contestant by certified mail on March 22, 1988, and it cites a violation of mandatory respirable dust health standard 30 C.F.R. § 70.101, for the following condition or practice:

Based on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit 017-0 was 3.5 mg/m³ which exceeded the applicable limit of 1.5 mg/m³. Management shall take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Dust Processing Laboratory.

The citation was signed by MSHA Inspector Billy G. Wiley, and he established April 13, 1988, as the abatement time for the violation. Inspector Wiley modified the citation on April 11, 1988, "to allow the operator to send respirable dust samples to the Mt. Hope Respirable Dust Processing Laboratory." The citation was modified again on April 13, 1988, by MSHA Inspector Orville E. Boggs, and the abatement time was extended to

April 18, 1988, "to allow the operator more time to collect the needed respirable dust samples on the MMU 017."

On April 19, 1988, Inspector Boggs issued a section 104(b) Order No. 3141311, withdrawing the 3 North 017-0 section from production, and his reasons for this action are stated as follows in the order:

Based on the results of five (5) respirable dust samples collected and submitted by the operator on April 13, 14, and 15, 1988, on the designated occupation 036 in MMU 017-0, the average concentration of respirable dust was 2.6 milligrams (mg/m^3) which exceeded the applicable limit of 1.5 mg/m^3 .

The operator has failed to adequately control the respirable dust in the working environment of designated occupation 036 continuous miner operators in the 3 North 017-0 section.

On 2:30 p.m., on April 19, 1988, Inspector Boggs modified the order, and the modification states as follows:

The operator has submitted and implemented a revised respirable dust-control plan. Therefore, this order is modified to permit the operator to collect respirable dust samples on MMU 017-0 to determine if compliance is attained.

The order was terminated by Mr. Boggs on April 21, 1988, and the reason for this is stated as follows on the face of the notification notice:

Based on the results of six (6) valid samples collected during an MSHA inspection, the respirable dust concentrations on the designated occupation (continuous miner operator -036) in mechanized mining unit 017-0 is 0.7 mg/m^3 which is within applicable limit of 1.5 mg/m^3 . The section average was 0.4 mg/m^3 .

MSHA's Testimony and Evidence

Donald L. Jennings, MSHA Physical Science Technician, Mt. Hope, West Virginia, testified as to her experience and training, and she stated that her duties include the testing and weighing of respirable dust samples submitted by mine operators and MSHA inspectors for analysis to insure compliance with MSHA's Part 70 respirable dust standards. In addition to the testing of these samples, she is also involved in the calibration and maintenance of the laboratory test equipment. She stated that she is familiar with the dust samples submitted by the contestant on April 12 and 14, 1988, and she confirmed that she weighed and

tested the samples, and she explained the laboratory procedures which she followed, including the use of an air sampling pump, and a balance device. She demonstrated the testing procedures she followed by references to two dust sampling cassettes, and she explained the calibration procedures she followed, and the recording of her test results on certain records which she maintained in the course of her duties. (Exhibits G-1, G-2, G-3 Joint Exhibits 1 and 2).

Mrs. Jennings confirmed that all dust samples received at the laboratory are weighed on the same day they are received, and she explained how she determines and documents the initial weight of the dust sample cassette, the final weight as determined by her laboratory procedures, and the method by which she determines the concentrations of respirable dust as converted to an equivalent MRE concentration as measured with the approved MSHA sampling devices and instruments.

Mrs. Jennings stated that some of the dust cassettes received in the laboratory are scratched and scuffed up, contain holes, and sometimes are broken. She confirmed that appropriate steps are taken to insure against contaminated cassettes (Tr. 15-35).

On cross-examination, Mrs. Jennings stated that she sometimes receives over-sized particles in the samples she receives, and she indicated the cyclonic action of the air pumping device used to test the samples is designed to take up these particles. Although such oversized samples are not considered to be respirable dust, they will be weighed if they are inside the cassette. She also explained the use of a balance and desiccator which is located on a heavy "brinkman table" located in the laboratory, and she did not believe that she made any mistakes in the procedures she follows in weighing and testing the samples and in calculating the results of her weighing and sampling (Tr. 35-45).

Ambrose Kokoski, MSHA mining engineering technician, Mt. Hope, West Virginia, testified as to his background and experience, and he confirmed that he was familiar with the respirable dust samples processed by Mrs. Jennings. He stated that he trained Mrs. Jennings when she was first employed in the Mt. Hope office, and he agreed that the laboratory procedures she followed in weighing and testing the samples in question were correct, and that she routinely follows these procedures for every sample which she processes.

Mr. Kokoski stated he "checked weighed" two of the samples processed by Mrs. Jennings as shown in exhibit G-2, to verify the accuracy of her weighing procedures and documentation, and that he initialed the record verifying the accuracy of her weighing of the samples, and placed a check mark next to the samples which he verified. He stated that he used a different sampling balance

machine in checking her sample weighing results, and that he also initialed the back of the cassette sampling card verifying the results of his weighing of the samples, as shown in exhibit G-1 (Tr. 45-51).

Robert A. Thaxton, supervisory industrial hygienist, MSHA, Mt. Hope, West Virginia, testified as to his background, experience, and education, and stated that he holds a BS degree in Chemistry, with a minor in math, and a Master's degree in Occupational Health and Safety Engineering. He confirmed that the laboratory technicians at Mt. Hope, including Ms. Jennings and Mr. Kokoski, work directly under his supervision.

Mr. Thaxton stated that he was familiar with the dust conditions at the mine in question through his review of respirable dust samples and compliance problems that come to his attention with respect to the mine. He identified exhibit G-4 as a copy of pages from a log book maintained at the lab showing the results of respirable dust sampling for various mining units at the mine, and he confirmed that on the basis of the collected samples for the cited MMU 017 section, the respirable dust standard for this unit was computed at 1.5 milligrams of respirable dust per cubic meter of air, as of August, 1987 (Tr. 51-61).

Mr. Thaxton also identified certain MSHA records concerning respirable dust citations issued at the mine, and he confirmed that he reviewed the FY 1987 compliance records in 1988 to identify the mines which are to be placed under MSHA's "increased awareness" because of a repeat respirable dust non-compliance history. He confirmed that a mine which has two citations in any one year on any one mining entity is targeted by MSHA for increased attention under its "target mine program" for repeat non-compliance (Tr. 64).

Mr. Thaxton stated that dust samples submitted by mine operators are usually weighed at MSHA's laboratory in Pittsburgh, and that targeted mine samples may also be sent to the Mt. Hope laboratory because that lab has a quicker "turnaround" time for weighing and processing samples (Tr. 66). Mr. Thaxton explained MSHA's target mine program, and he confirmed that he developed the program for MSHA District No. 4. He also confirmed that the contestant's mine was under this program in 1988 and 1989, and that some of its employees who were in attendance at the hearing attended some of the MSHA meeting under this program (Tr. 67-69).

Mr. Thaxton confirmed that the compliance information he reviewed indicates that in FY 1987, the mine received two citations for violations of section 70.101, on the 015 MMU unit. He explained that an MMU, or mechanized mining unit, consists of a continuous-mining machine, shuttle cars, and a roof bolter, and that the dust samples taken and submitted by the contestant are taken only of the designated occupation, which in this case is

the continuous-miner operator. The roof bolter and scoop operator are not sampled because the designated occupation (miner operator) is representative of the "worse case situation" on the entire MMU because the miner operator would be in the highest concentration of dust generated on the unit. Mr. Thaxton concluded that based on the two citations in question, the mine, in 1987, had a problem with respirable dust, and that the two citations represent the amount of high dust levels to which the men on the MMU unit in question were exposed for a 4-month period out of the total 12 months in the year (Tr. 73-74).

Mr. Thaxton identified exhibit G-5, as a compilation of the respirable dust sampling reports concerning the 017 MMU unit at the mine, and he explained that five valid dust samples are required to be collected bi-monthly for the designated occupation, and that an average of five samples taken together will establish an average concentration of dust which is then compared against the actual standard established for the particular MMU in question. He explained the laboratory procedures, including the handling of oversized particles, and he identified the dust sample results used to support the citation issued on March 22, 1988 (Tr. 78). He also identified the samples taken on April 7 and 19, 1988, which indicate average concentrations of respirable dust of 2.5 and 2.6 respectively, both of which still exceeded the 1.5 standard established for the cited MMU in question (Tr. 80).

When asked to comment about the significance of the aforementioned sample results on the 017 MMU, and the contestant's compliance efforts, Mr. Thaxton stated as follows (Tr. 81-82):

A. The samples of all three groups of samples submitted by the operator all exceeded the standard. Some of the samples did have some variation to them, some being low, some being higher than others. This indicated to us, looking at the reports of the three sets of samples collected by the operator that sufficient action had not been taken to reduce the dust below the standard and the last two surveys were about the same thing, and therefore we had a time period there that I am not sure what would have been done to reduce the dust. Whatever action was taken was significant enough to reduce the dust levels.

* * * * *

A. By them all being above the standards then that indicates to me that the planned parameters for the dust controls that are actually in place on this MMU are probably inadequate or are not being followed on a routine basis. If we had samples that fluctuated dramatically up and down, some being extremely low and

some being extremely high, then that resulted in an average concentration that exceeded the standard, then we might say that there are some isolated problems in the way that the mine is being operated, the miner is being operated. It may contribute to the dust problem, but with consistent results showing over ten samples, which was ten shifts or ten different days, that the dust concentrations were very uniform; that they were never below the 1.5 standard.

Mr. Thaxton confirmed that he has never been in the Robinhood No. 9 Mine. He stated that the measures taken on an MMU continuous miner to control dust would include ventilation controls around the miner, use of water sprays or wetting agents, and the use of a scrubbing unit. He stated that a complete change over to a scrubbing system on a machine may take 3 weeks, and that simply altering the water sprays may take as little as one or 2 days. If an operator is under MSHA's target program with respect to a non-compliance problem, MSHA would expect it to take stronger action once it is out of compliance and to insure the use of necessary dust controls (Tr. 84).

On cross-examination, Mr. Thaxton confirmed that the MMU unit which was cited in both the disputed citation and order is the 017 unit, and the applicable respirable dust standard established by the appropriate sampling cycles for this unit is 1.5 (Tr. 84). Mr. Thaxton confirmed that the 017 MMU was cited one time in FY 1989 for a violation of section 70.101, and that the citation was terminated when the unit was abandoned and removed from the mine on March 1, 1989. He also confirmed that the unit was cited two times in 1988 for violations of section 70.101 (Tr. 85), and that for the past three fiscal years, the unit has been cited a total of three times for violations of 70.101 (Tr. 90).

Mr. Thaxton confirmed that he had no personal knowledge of the actions taken by the contestant in this case after receiving the citation, and that the basis for any conclusion on his part that the mine might have a particular dust problem is based on the "historical data" from the mine which indicates "that they possibly have problems with this particular MMU because of the repeat non-compliance." In support of his conclusions that there is a "problem," Mr. Thaxton stated that "two violations in any one fiscal year in any one entity indicates a potential for problems on that particular entity" (Tr. 91). He conceded that he does not know what may be the "cause" of any "problem," and he conceded that in order to abate a dust violation, the operator must have some knowledge as to what caused it, and that in order to effectively abate a violation, the operator must have enough time to discover what is causing it (Tr. 91).

Mr. Thaxton stated that when an inspector modifies a citation to permit an operator to take additional samples, he does so because an operator usually indicates that he has adopted some additional dust controls and needs time to obtain and submit additional samples to the laboratory for analyses (Tr. 93). Mr. Thaxton stated that it is normal procedure for an inspector to issue a withdrawal order if he determines that there has been an insufficient effort made to control the dust. In the instant case, he pointed out that the contestant took two sets of samples after being initially cited, and that after the second extension of the citation, which still reflected non-compliance based on the additional sampling, Inspector Boggs determined that the contestant had made an insufficient effort to control the dust (Tr. 94).

Mr. Thaxton confirmed that he did not discuss the violation with Inspector Boggs, and that he (Thaxton) received no information with respect to any particular dust problem which may have caused the contestant to be out of compliance. He confirmed that the only information available to him is the methane dust-control plans that are submitted by the contestant for the MMU in question, including any changes made after a citation is issued, and any new plans which may be submitted (Tr. 95). Mr. Thaxton stated that an operator is required to make some changes in its dust-control plan and sample again, or else they are not given an extension. He confirmed that he saw no meaningful changes made by the contestant in this case, and that the MMU went back out of compliance at the end of the fiscal year, and was abandoned and is no longer available (Tr. 96).

Mr. Thaxton stated that the "target" mine in question is assigned to Madison sub-district office supervisor Henry Keith, and he confirmed that he has memos from Mr. Keith indicating that "he has made contacts with the operator," but has no information as what the problem may be (Tr. 98). When asked whether anyone has ever identified the respirable dust problem in question, Mr. Thaxton responded as follows (Tr. 98):

THE WITNESS: In some cases. This miner is a continuous miner with a scrubber on it, deep cut. Those miners typically have no problem in maintaining dust compliance. It usually relates to, in this case, this miner having reduced standards, I expect that they are cutting rock. Scrubbers have a harder time being maintained when you are cutting rock. They tend to clog up, they lose their efficiency faster. The fact that they are cutting rock and having the quartz it also reduces the standard and they have less room to work with. Those things are what basically if we are getting citations on that one particular entity.

Mr. Thaxton stated that in the event Inspector Boggs was not aware of any action taken by the contestant to abate the violation, and that if all that was done by the contestant was to take additional samples, the inspector would be justified in issuing a section 104(b) withdrawal order. Mr. Thaxton stated further that MSHA's policy is that if an inspector determines that an operator has made no effort to control dust, and simply submits additional samples, and the samples show continued noncompliance, the inspector is instructed not to extend the abatement time further and to issue a section 104(b) order (Tr. 99).

Gary Turley, MSHA physical science technician, Madison, West Virginia, testified as to his experience and training, and he confirmed that he holds certifications in dust sampling, maintenance, calibration, and noise sampling, and that his duties include the weighing and testing of respirable dust samples submitted to his office laboratory. He confirmed that he is familiar with MSHA's Mt. Hope laboratory and that the Madison facility is essentially the same. He also confirmed that the dust sampling testing procedures which he follows are the same as those performed by Mrs. Jennings at the Mt. Hope Office, that the same type of balance machines are used, and that his testing procedures are routinely made for all of the samples which he tests, processes, and documents.

Mr. Turley stated that he was familiar with the dust samples processed in this case, and he confirmed that the samples taken by Inspector Boggs to abate the contested order were submitted to him for testing and analysis, and that they show compliance with the respirable dust requirements of section 70.101, for the continuous miner occupation on the 017 mechanized mining unit (exhibits G-6, G-7; Tr. 100-103).

Mr. Turley explained that the prior samples were taken to the Mt. Hope laboratory because they were samples submitted by the operator, and that Mr. Boggs' samples were submitted to the Madison laboratory because they were samples taken by Mr. Boggs (Tr. 103).

On cross-examination, Mr. Turley stated that MSHA purchases its dust sampling cassette devices from the MSA Manufacturing Company, and that the cassettes used by Inspector Boggs were obtained from MSHA's Madison Office (Tr. 106).

The parties agreed to the taking of the posthearing deposition of MSHA Inspector Orville E. Boggs, who was unavailable at the hearing.

Inspector Boggs testified as to his experience and training, and he confirmed that he was familiar with the subject mine, has inspected it several times since 1980, and that he was assigned to conduct an inspection at the mine during the spring of 1988.

He stated that the March 22, 1988, respirable dust citation was issued on the basis of computerized information reflecting non-compliance with the respirable dust standard. Mr. Boggs stated that Inspector Wiley informed him of the citation, and that he and Mr. Wiley issued two extensions of the abatement times to allow for more samples to be sent to MSHA's labs (Tr. 3-8).

Mr. Boggs could not specifically recall the reason for his extending the abatement time with respect to the citation, and he speculated that the contestant may have had an equipment breakdown on the section, and if this occurs, the production cycle is stopped, and mining moves to another spare production section. He confirmed that he would not have extended the abatement time if the contestant were not attempting to abate the violation in good faith (Tr. 9).

With regard to the issuance of the contested section 104(b) order, Mr. Boggs stated that he based the order on the fact that the dust samples submitted by the contestant for April 13, 14, and 15, 1988, reflected that the cited section was out of compliance. He stated that he "had no choice but to issue the order" for the failure by the contestant to abate the violation, and he explained as follows (Tr. 10-11):

Q. Why do you say you had no choice?

A. Well, we gave a reasonable time. We gave them a full second cycle. See, they got in trouble in March on their cycle. On their normal cycles, they sampled and they were out of compliance. Something's wrong. So we gave them -- they got the (a) citation, giving them a reasonable time to sample again and get into compliance.

Q. Why do you think that that was a reasonable time?

A. What did they need? They needed five samples, five valid samples. They had a reasonable time to get it if they would run five sections. If they run five production shifts, they would take those five continuous.

Mr. Boggs could not recall whether or not the contestant ever discussed any equipment problems with him, or informed him that additional time was required to abate the condition. He recalled that the contestant discussed the matter with his supervisor Henry Keith, but he could not recall being present during this discussion. Mr. Boggs confirmed that he was at the mine between the time the citation and the order were issued, but he was not sure whether he was on the cited section, could not recall discussing the problem with the contestant during this time, and could not recall the contestant ever seeking his advice on the dust problem (Tr. 13).

Mr. Boggs confirmed that he discussed the matter with Mr. Keith, but could not recall Mr. Keith mentioning anything to him about any of his discussions with the contestant. Mr. Boggs stated that he did not inform Mr. Keith that he was going to issue the order, but did discuss it with him after he had issued it (Tr. 14). Mr. Boggs believed that he gave the contestant a reasonable time to take additional samples and obtain the results, and in response to a hypothetical question stated as follows (Tr. 15-16):

Q. Let me ask you a hypothetical question here. Suppose the company said, "Well, look, something has come up or we are having problems with the machinery. We need an extra week. We want to change the machinery. It takes about a week, and then we want to take our samples after that." Would your normal practice have been to give them that additional time, or would you just have given them the time to take the samples?

A. If they could justify it, they would have got an extension. Equipment break down, strikes, whatever, if it's beyond the company's control, it's something that they don't do intentionally, then that justifies more time, an extension.

Q. You had already given them more time before the B-Order was issued?

A. Yes, I had. It could have been extended again if they had justified it.

Q. You cannot recall their justifying it or saying anything?

A. No.

Mr. Boggs confirmed that after a respirable dust inspection on April 20, 1988, and the results of a laboratory report of April 21, 1988, the cited section came into compliance with an average dust concentration of .4 for the section (Tr. 18). He identified a copy of a report of a respirable dust conference held with his supervisor and other MSHA officials, and he confirmed that MSHA must approve dust-control plan changes submitted by the operator to control respirable dust on the section. In this case, he confirmed that the PSI for each water spray was changed from 50 PSI to 60 PSI, and that someone was assigned to monitor the dust samples (Tr. 19-20).

Mr. Boggs stated that pursuant to MSHA's criteria with respect to respirable dust orders, the issuance of a section

104(b) order requires an operator to make dust control changes, and once an order is issued, the operator's dust-control plan must be improved. After changes are made, additional dust samples must be taken, and the operator must show that it is making changes and improvements to bring it into compliance. After the changes are made and approved by MSHA, the order is modified to permit coal production to continue, and dust samples are taken. The sampling is conducted by MSHA, and Mr. Boggs confirmed that he took the samples which resulted in the abatement of the order (Tr. 22). Other than the two changes he testified to, he could not recall any other changes made by the contestant in this case which may have affected the respirable dust on the section (Tr. 23).

On cross-examination, Mr. Boggs stated that if he were the contestant and received a section 104(a) citation for non-compliance with the respirable dust standards, he would have assigned someone to the sampling pumps to make sure that they were properly taken care of. He would also pay close attention to the ventilation on the section, and the mining machine water pressure and spray operation, and would check the water pressure and monitor the ventilation air and make adjustments as necessary (Tr. 24-26).

Mr. Boggs did not believe that the contestant assigned anyone other than the section boss to do the things he would have done. He confirmed that the checking of the dust pumps would not affect the amount of respirable dust in the air, and would only affect the measurement read-out of the instrument. Although MSHA's dust standards allow two milligrams of dust in the air, in this case where quartz is present, the allowable dust limit is 1.5 milligrams (Tr. 29).

Mr. Boggs stated that there were three working sections in the mine, and although a working section is one of the places that he would be concerned about as an inspector, he doubted that he was on the 017 Three North Section from March 7, through April 29, 1988 (Tr. 23). He could not recall discussing any dust control problems on the section with the contestant, and he did not believe that anyone asked him for any assistance because the contestant has an experienced safety department and does not necessarily ask for a lot of advice (Tr. 35).

Mr. Boggs could not recall making any comments about the reliability of the dust sampling results from MSHA's Pittsburgh laboratory, but he did recall hearing comments from contestant's employees Dennis Jarrell and Denver Carter, who complained that "they didn't think that they were being done right by Pittsburgh" (Tr. 36). Mr. Boggs recalled that these individuals were complaining because the MSHA individual doing the weighing of the samples was new "or something to that effect." Mr. Boggs could

not recall the specific complaint, but confirmed that the contestant requested that someone weigh the samples, and that is why his office sent them to the Mt. Hope laboratory (Tr. 37).

Mr. Boggs stated that prior to the issuance of the order, he could not recall discussing with Mr. Carter or Mr. Jarrell, or anyone else at the mine, any efforts by the contestant to come into compliance. He confirmed that he issues four or five section 104(b) orders annually, and only if they are justified. He stated that before issuing such an order, he considers whether the operator made a diligent effort to abate the violation in a reasonable time, taking into account the availability of manpower (Tr. 38).

Mr. Boggs confirmed that the modification of the order allowed mining to continue, and he believed that in order to lift a section 104(b) order, or to modify it to allow mining to continue, the Act requires the mine operator to submit a modification to its dust-control plan (Tr. 40). When asked whether or not it is standard MSHA procedure for an inspector to issue a section 104(b) order if an operator fails to come into compliance after he submits dust samples taken subsequent to the issuance of the initial section 104(a) citation, Mr. Boggs responded as follows (Tr. 42-43):

A. I'm not sure where it's written. It's standard operating procedure, though, for us. It's just like any other violation. If you write a violation, give a company a reasonable time to abate the violation. Then if he does not take a reasonable effort to abate that violation in the reasonable time given, that is known as failure to abate, which results in a B-Order, which ceases operations until the violation is corrected. It applies to any violation we write.

Q. Is that standard operating procedure the reason why you said, and I think these were your words, "I have no choice?"

A. No, I was going by the law. If I had the Act and my Notice and Order Abiding Manual and my CFR 30 with me, I could read it out as Congress wrote it. But I don't have it with me. That's what Congress stated when they wrote the Act in 1977, revised it.

Mr. Boggs confirmed that after the citation was issued, he did not return to the cited section because he was apparently working in another section of the mine. He could not recall anyone asking him to return to the cited section to determine if there were any problems, and if he had been asked, he would have done so. If he had observed anything that would have helped abate the violation, he would have probably offered his advice,

even though "they don't always take our advice" (Tr. 44). Mr. Boggs stated that as long as an operator is making a reasonable effort to abate a cited condition, he would grant an extension of the abatement time, even though the condition may not be completely abated. In the case at hand, he knew of no efforts made by the contestant to change the conditions that would have resulted in the abatement of the citation (Tr. 45).

Contestant's Testimony and Evidence

Stephen W. Richards, Safety Supervisor, testified as to his background and experience. He confirmed that the principal point of production of dust is at the face where coal is being extracted. He stated that the mining machine used on the 017 unit was a Joy 12-CM-7 equipped with a flooded bed scrubber, and he explained the probable dust sources and methods of controlling it with the scrubber which he characterized as "the state of the art dust collecting system" (Tr. 108-119).

Mr. Richards stated that respirable dust non-compliance associated with the machine scrubber system is a cause for concern and is not taken lightly. In such instances, the scrubber is checked in its entirety, and the ventilation system and individual administrative controls are examined in order to identify and correct the problem (Tr. 120).

Mr. Richards stated that with the use of the scrubber system, and based on samples taken by the contestant and MSHA, it is not uncommon to have dust samples ranging from .5 to 1.5 milligrams. Without the scrubber system, past samples have shown over 3.0 milligrams of dust (Tr. 121).

Mr. Richards "suspected" that the non-compliance problem may have been caused by the use of old dust cassettes which were stored for approximately a year at the Robinson No. 8 Mine which had worked out and was shut down. He speculated that the age of the cassettes may have affected the accuracy of the weight of the dust samples used to determine compliance (Tr. 123).

Mr. Richards explained the changes made to come into compliance, including the increase of the water supply line to the mining machine, and increasing the water pressure from 50 to 60 PSI, examining the different components of the scrubber system, and reviewing the dust-control plan with appropriate mine personnel to insure that they were aware of their dust monitoring responsibilities (Tr. 124).

Mr. Richards confirmed that after the abatement of the order, the mining machine was again out of compliance, and it was replaced with a rebuilt one. He also confirmed that the scrubbers were installed on the machines when they were out of compliance (Tr. 125). He stated that personal respirable dust

protective respirator devices are available to miner's working on the MMU, but they are not required to wear them (Tr. 128).

On cross-examination, Mr. Richards stated that the old dust cassettes were approximately a year old, but he had no personal knowledge as to whether or not the cassettes used for the dust samples taken by the contestant on March 22 and April 7, were the old ones or new ones. It was his understanding that the old cassettes were used to sample the dust, but he was not the individual who picked out the cassettes or assembled the cassette samplers used to sample the dust (Tr. 130). Mr. Richards explained what was done after the order was issued, including the change of water pressure in the machine, and changing the dust-control plan to reflect the changes in the water pressure being used to control the dust. He confirmed that no changes were made to the machinery because the water pressure already exceeded the minimum dust plan requirements and no machine changes were required (Tr. 132).

Mr. Richards could offer no explanation as to the precise problems which resulted in non-compliance, and he confirmed that after the order was issued, the mining machine was replaced, and to his knowledge, abatement was achieved, and no further problems were encountered (Tr. 135).

Mr. Richards explained that as part of the efforts to determine whether the old cassette sampling devices were the cause of the high dust sample readings, the contestant started weighing the cassettes in its coal laboratory but they were criticized by MSHA for doing this. He stated that the cassettes were being pre-weighed and post-weighed on scales which were representative of the scales used by MSHA, and a qualified person was performing the weighing. However, MSHA refused the contestant's requests to verify the questionable dust samples which were being tested and processed during the month or so that the contestant was attempting to come in compliance and abate the citation (Tr. 137).

Mr. Richards stated that he and two other individuals who worked with him had one or two conferences at MSHA's sub-district office, and on one occasion visited Mr. Thaxton at MSHA's laboratory building in an effort to look at the lab and to weigh the contestant's samples, but received no help or assistance from MSHA (Tr. 138).

Mr. Richards was of the opinion that Inspector Boggs issued the order as a "procedural and prudent thing to do," and did not consider the contestant's abatement efforts, or the amount of resources being used to abate the citation (Tr. 139).

Mr. Richards stated that after exhausting all efforts to dismantle the mining machine, insuring that it met the manufacturer's specifications, reviewing the dust-control plan with appropriate personnel, and assigning a crew to periodically monitor the situation, the contestant sought assistance from Mr. Thaxton to help them in looking at the samples and correcting the problem (Tr. 140).

Dennis Jarrell, mine safety supervisor, stated that he reports to Mr. Richards. He stated that after sampling the 017 unit during the bi-monthly period of March and April, 1988, Inspector Henry Keith called him on March 22, and advised him that the unit was out of compliance and that he was to resample the unit. Upon receipt of the call, Mr. Jarrell met with the mine manager, and special attention was given to the machine scrubber system. In addition, management decided to pre-weigh and post-weigh the sampling devices, and meetings were held with the section foreman and miners working on the unit in an effort to determine the reasons for being out of compliance (Tr. 146-151).

Mr. Jarrell stated that before taking the second set of samples from March 28 through 31, the 017 MMU was checked out, and no visual or mechanical problems were found. He explained what was done in an attempt to find the problem, including the weighing of the sample cassettes in order to obtain a representative sample (Tr. 157).

Mr. Jarrell stated that based on the pre-weighing and post-weighing of the second March-April samples submitted to MSHA to abate the citation, it was determined that the average set of samples indicated .6 milligrams of dust (Tr. 157). Contestant's counsel confirmed that these same samples were submitted to MSHA, and MSHA's test results indicated an average concentration of 2.5 milligrams of dust (exhibit G-5, Tr. 158). Mr. Jarrell explained the method used to weigh the sampling devices in question in an effort to find out the overall weight gain (Tr. 158-161).

Mr. Jarrell stated that after calculating the weight gain for the second set of samples in question, the contestant calculated an average respirable dust concentration of 1.5 milligrams. He stated that "I'm thinking at that point in time had our records been valid we would have been in compliance, we don't know" (Tr. 164).

Mr. Jarrell stated that Mr. Keith called him again on April 7, and advised him that the second set of samples still indicated non-compliance. Further management meetings were held, and on April 8, Mr. Jarrell and Mr. Richards went to Mt. Hope to meet with Mr. Thaxton. Mr. Jarrell took 12 dust sample cassettes with him, and five additional cassettes were weighed at the

contestant's lab and at MSHA's Mt. Hope lab. All of these samples were of the same weight. Once they were pre-weighed, Mr. Jarrell requested MSHA to post-weigh them, but MSHA would not do it. After the five samples were taken on April 12 through 14, using the five pre-weighed cassettes, MSHA did not post-weigh them as Mr. Jarrell thought they would, and on April 18, Mr. Keith called him again and advised him that the unit was still out of compliance (Tr. 168).

Mr. Jarrell stated that on April 19, he went to MSHA's office and agreed under protest to revise the dust-control plan, to increase the water pressure from 50 PSI to 60 PSI, to assign someone to monitor the samples spontaneously on the continuous miner, and to weigh all samples (Tr. 168).

Mr. Jarrell stated that Inspector Boggs came to the mine on April 20 and sampled the unit, and that his sampler weighing method was the same one used by the contestant, with similar results (Tr. 169). Mr. Jarrell confirmed that the old sampler cassettes were discarded, and that the contestant still does not know what caused the high dust readings (Tr. 170). Mr. Jarrell stated that he discussed the problem with Inspector Boggs, and that he (Boggs) could not see any problem and speculated that the samples may have been "miss-weighed in Pittsburgh" (Tr. 174).

Mr. Jarrell stated that if the order had not been issued, and the abatement time extended, the old sample cassettes would have been discarded and different cassettes would have been used (Tr. 179). He confirmed that he first suspected that there may have been a problem with the cassettes in mid-March, 1988, after the citation was issued, and after the first sampling cycle results were received. Mr. Jarrell also "suspected" that MSHA's Pittsburgh laboratory may have had some erratic weighing results, but he was not certain that this was the case (Tr. 180-181).

Mr. Jarrell stated that Mr. Boggs issued the order upon instructions from his supervisor Henry Keith, and that he was present when Mr. Keith instructed Mr. Boggs to issue the order and to abate it because the contestant was going to upgrade the dust-control plan to increase the water pressure from 50 PSI to 60 PSI. Mr. Jarrell stated that Mr. Keith did not suspect there was a water spray problem, but focused on that part of the dust plan "because it was the simplest thing to do" (Tr. 185).

Mr. Jarrell stated that Inspector Boggs and Mr. Keith said nothing to him to indicate that they were not satisfied with his efforts to abate the citation (Tr. 185). Mr. Jarrell believed there was a problem with the sampling, and he also believed that Mr. Keith also believed it (Tr. 186).

Rodney Barker, day shift maintenance foreman, testified that he has 17 to 18 years of experience, and has worked at the mine

for 9 years. He stated that the 017 mechanized mining unit operated on the afternoon and evening production shifts, and that it was idle during the day shift. Mr. Barker confirmed that he was responsible for the maintenance of the unit, which consisted of a continuous-mining machine, roof bolter, and scoop or shuttle car. He stated that prior to the respirable dust sampling cycle, and for the first 5 days of sampling, the continuous-mining machine was cleaned and maintained on a daily basis. Maintenance work was performed on the miner dust scrubber unit, and the machine water sprays were cleaned and serviced on a daily basis. Mr. Barker stated that he did not speak with any of the MSHA inspectors who issued the citation and order in this case (Tr. 198-204).

Timothy Bailey, laboratory technician confirmed that he pre-weighed and post-weighed some of the dust sampling cassettes used by the contestant to sample dust from April 12 to 14, 1988. These were the samples which were pre-weighed at the MSHA lab, but not post-weighed by MSHA, and they were the samples which resulted in the issuance of the order (Tr. 205-208).

On cross-examination, Mr. Bailey confirmed that the sample cassettes were weighed with the red plugs removed, and the cassettes were not passed through a desiccator. Mr. Bailey identified the balance which he used to weigh the cassettes in question, and he confirmed that it is accurate to four decimal points, and reads out in milligrams (Tr. 210-211).

Robert Thaxton was recalled by MSHA, and he stated that the balance described by Mr. Bailey was similar in design to the MSHA balance used at the Mt. Hope laboratory. MSHA's balance is a different model which weighs to the nearest thousands of a milligram, while the contestant's balance weighs to the nearest tenth of a milligram (Tr. 213). Mr. Thaxton observed that the balance used by Mr. Thaxton did not have a calibration sticker reflecting when it was last calibrated, and it appeared to have been used for other dust sampling, which creates dust and dirt which might produce erroneous dust samples. He also observed Mr. Bailey carrying the balance into the courtroom under his arm, and he stated that the balances used by MSHA are never transported in this manner because it may destroy the internal weights and calibration of the unit. Although the removal of the plug prior to weighing the cassette is not prohibited, its possible that Mr. Bailey may have inadvertently contaminated the dust inside the cassette (Tr. 215).

Mr. Thaxton stated that at the time Mr. Jarrell and Mr. Richards brought their samples to the MSHA lab to pre-weigh the cassettes, he advised them that this was an inadequate method of determining whether respirable dust was on the cassette. Mr. Thaxton confirmed that when Mr. Jarrell and Mr. Richards mentioned the fact that the old cassettes may have had erroneous

initial weights, the seven cassettes which they brought to the lab were opened up and the filters were weighed to determine whether the initial weights were correct. The results showed little to no difference in the initial weights, and Mr. Thaxton stated that the cassettes "were o.k." (Tr. 216).

Mr. Thaxton explained further that the Mt. Hope lab was not permitted to certify all of the old cassettes which may have been used by the contestant. On advice of the Pittsburgh lab, the Mt. Hope laboratory could not weigh the samples exposed to mine dust because the balances would have been exposed to dust contamination resulting in erroneous balance readings. Accordingly, Mr. Jarrell and Mr. Richards were not permitted to weigh the entire cassettes, but the internal filter packages were weighed as usual. Mr. Thaxton stated that persons other than authorized lab personnel were not permitted in the lab while dust samples were being processed because body temperatures will affect the balance readings, people moving around will cause air currents, and unauthorized people in the lab can detract from the lab technician's concentration (Tr. 217-218).

Mr. Thaxton questioned the method used by the contestant to establish the gross weight of the filter cassette in its entirety, and he believed it was an inappropriate method of trying to determine respirable dust (Tr. 220).

With regard to MSHA's policy concerning the necessary action required of a mine operator to prevent a mine closure and withdrawal of miner's, Mr. Thaxton stated as follows (Tr. 232-233):

JUDGE KOUTRAS: Do you know whether there is any policy in the district office with regard to respirable dust with regard to what an operator has to do as a minimum before--to prevent the actual shut-down and withdrawal of miners?

THE WITNESS: In response to the order the policy is that they obtain an updated plan which would result in compliance or the inspector must detail in this modification of the order controls that are changed in order to obtain compliance.

In our district with the relatively closeness of each field office and subdistrict offices to the mines, we opt to use the plan route as opposed to writing all that on the modification of the order.

JUDGE KOUTRAS: The inspector is not here to defend himself. I will still ask you, does it make sense just to say, "Well, pick something out in your plan. I need something, some modification and that way we won't have to close you down." Does that make sense?

THE WITNESS: They had already been closed down. The only thing that was doing was allowing MSHA to modify the order to take samples. The order was issued and the section was closed.

With regard to the reasonableness of the actions taken by the contestant to abate the citation, Mr. Thaxton stated as follows (Tr. 233-235):

JUDGE KOUTRAS: You understand the issue in this case. I've got to make a judgment here as to whether the operator took reasonable action to abate the original citation. After hearing all of the testimony, do you have an opinion on that?

THE WITNESS: The only opinion that I can draw from the information that we have available from respirable dust samples and from hearing what was said is whatever action was taken when MSHA was there resulted in compliance, why couldn't it have been done when the citation was issued to start with.

It may have been in the past maybe the plan parameters weren't being followed exactly. Maybe somebody was putting too much air up there that it overcame the scrubbers. Maybe the people weren't standing exactly where there were -- we don't know.

When the operator is taking his samples, it is up to him to see that the plan parameters are being followed. When our inspector is there, he is supposed to see that the plan parameters are being followed. Mr. Boggs would have to tell you what he actually observed.

MR. GURKA: I'd like to ask Mr. Thaxton, before the order was issued, the company said they had done everything, there was nothing else possible they could do. In your opinion, given that set of circumstances, would it still be reasonable to go ahead and issue the (B) order or do you think they should have been given additional time?

THE WITNESS: Given the results of the samples that had been submitted by the operator we didn't see where a significant effort was being made on the operator's part to come back into compliance.

Mr. Richards was recalled by the contestant and he denied that Mr. Thaxton said anything about the Pittsburgh laboratory advising Mr. Thaxton not to post-weigh the contestants cassettes.

Mr. Richards stated that he was under the impression that Mr. Thaxton's staff would cooperate and help solve the suspicion that the cassettes may have been contaminated and post-weigh the cassettes (Tr. 236). Mr. Richards confirmed that he was not aware of the fact that MSHA conducted tours of the Mt. Hope laboratory, and that he was simply told he could not see the lab, and it was his understanding that he was not allowed in under any circumstances (Tr. 236-238).

Mr. Thaxton was recalled by the court, and he confirmed that the Mt. Hope laboratory is a "controlled environment" and that only "authorized personnel" are permitted to enter the lab. He also confirmed that he informed Mr. Richards that he would try to post-weigh samples, but after subsequently speaking to the Pittsburgh lab, he was informed not to post-weigh the full cassette capsule by placing them in the balance with dirt on them. Mr. Thaxton stated that he had no weighing problem with the samples the contestant was using for its own benefit because they were clean. He confirmed that he may not have informed Mr. Richards that he could have a tour of the lab (Tr. 241).

In response to further questions, Mr. Thaxton stated as follows (Tr. 241-243):

JUDGE KOUTRAS: Do you have an opinion as to whether the testimony that you've heard today about Peabody's concern with regard to the possible problem with the cassette to be reasonable or valid, or do you think it is just something they are trying to conjure up here? Try to beat the rap so to speak?

THE WITNESS: I purchase cassettes for our entire district. I buy cassettes and have used them for two or three years. They are that old. We have never had a problem with any of our cassettes. They are checked by manufacturers through our Pittsburgh lab. Eight percent of the cassettes are sent in for verification of the initial weights. We have never had any problem with MSA cassettes in the past.

JUDGE KOUTRAS: Were they using MSA cassettes?

THE WITNESS: Yes, sir. It is the only approved cassette assembly at this time.

JUDGE KOUTRAS: You've heard their testimony that they explored every reasonable possibility: the scrubbers, the machines, the men, everything. They thought it might be possible that there was something wrong with the cassettes. They went to MSHA for some assistance and they were turned away and that made them feel pretty bad.

Now they are defending this thing on the basis that MSHA wouldn't help them and they didn't get any cooperation. They say, "we did everything that we thought was reasonable and we don't understand why this guy dropped an order on us."

THE WITNESS: Like they stated, they brought 12 cassettes into us when they thought the cassettes were a problem. We did open up seven of the cassettes, weighed the internal package and did not find a significant difference between the initial weights of those cassettes. From that we gathered that the filters were indeed . . .

JUDGE KOUTRAS: Let me ask you this one more time. Do you know of any policy in the district office with regard to the enforcement of respirable dust samples, and whether the inspectors are instructed if the samples show non-compliance after the initial citation, they are to issue an order.

THE WITNESS: Only if they determine that significant action is not being taken by the operator to be in compliance.

JUDGE KOUTRAS: Here you have a case where the inspector was on scene and the mine operator both agree that there is no problem. They can't find a problem.

THE WITNESS: That is quite possible. The inspector is not trained actually to go in and take the system apart. He may or may not be able to see anything.

Findings and Conclusions

The undisputed facts in this case establish that a section 104(a) "S&S" Citation No. 9959601, was issued by MSHA Inspector Billy G. Wiley on March 22, 1988. The citation was served on the contestant by mail, and it was based on the fact that five valid dust samples collected by the contestant for the designated occupation in mechanized mining unit 017-0, exceeded the requirements of mandatory health standard 70.101. As a result of the citation, the contestant was required to "take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory." Inspector Wiley fixed the abatement time as April 13, 1988.

The contestant concedes that it did not contest the citation or the proposed civil penalty assessment for the violation, and that the penalty was paid. However, contestant asserts that the

payment of the penalty was an inadvertent mistake, and that it was paid when it received a collection letter from MSHA in which legal action to collect the penalty was threatened. Citing the Commission's decisions in Old Ben Coal Company, 7 FMSHRC 205 (February 1985) (footnotes 4 and 6), and Rivco Dredging Corp., 10 FMSHRC 624 (May 1988), contestant takes the position that an inadvertent or mistaken payment of a civil penalty assessment should not pose a technical obstacle to a decision on the merits of a contested withdrawal order.

In support of its contention that the civil penalty assessment for the citation was paid by mistake, contestant submitted an affidavit executed by its counsel Eugene P. Schmittgens, Jr. Mr. Schmittgens explains that a review of his file with regard to the civil penalty mine identification assessment control number 46-012143-03580, dated June 13, 1988, reflects a notation that Order Number 09959601 was marked DNP (Do not pay), and that the proposed civil penalty amount of \$620 was deducted from the total proposed penalty for the order and underlying citation. Mr. Schmittgens explains further that upon receipt of a letter from MSHA's collections office September 8, 1988, advising the contestant that MSHA had received a partial payment for the case, and that it was to remit an additional \$620 under threat of a collection action if it did not do so, payment was made. Mr. Schmittgens asserted that the payment was the result of an administrative error, oversight or mistake, and that at no time was any action contemplated by the contestant which would be inconsistent with its right to contest the section 104(b) order which is in issue in this case.

MSHA concedes that the Notice of Contest filed by the contestant preserved its right to contest the section 104(b) order. However, MSHA takes the position that the contest filed by the contestant was filed too late to preserve its right to contest the section 104(a) citation. MSHA points out that the contestant failed to timely contest the section 104(a) citation which was issued on March 22, 1988, and that when it filed its Notice of Contest on May 19, 1988, while it preserved its right to contest the section 104(b) order, the contest was too late to preserve its right to contest the citation. MSHA further points out that the contestant had a second chance to contest the citation when the civil penalty proceeding was initiated, but that it failed to request a hearing on the merits of the violation, and subsequently paid the civil penalty assessment for the violation in question.

Recognizing the fact that the Commission has held that an operator's right to contest a violation is not extinguished when a civil penalty is paid by genuine mistake, MSHA concludes that on the facts of this case, there was no such mistake on the part of the contestant. Citing the decisions in Coal Junction Coal Company, 11 FMSHRC 502 (April 1989), Camp Fork Fuel Company,

11 FMSHRC 496 (April 1989), and Westmoreland Coal Company, 11 FMSHRC 275 (March 1989), MSHA point out that in each of these cases, the operator paid the penalty after it had timely requested a hearing on the violations in question. In the instant case, MSHA argues that the contestant did not timely request a hearing on the violation described in the section 104(a) citation, and that it would be absurd to allow it to resurrect its right to contest the violation simply because it "mistakenly" paid the assessed penalty after its right to contest the violation had expired. MSHA concludes that the contestant's mistake was not in paying the penalty, but in not requesting a hearing in the first place, and that since neither the citation or the penalty were contested, the citation has become a final order of the Commission pursuant to section 105(a) of the Act, and it is not subject to further review.

Section 105 of the Act provides an operator with two opportunities to contest and request a hearing concerning the issuance of a section 104(a) citation. It may seek review of an abated citation pursuant to section 105(d) before a civil penalty assessment is proposed by MSHA, and it may seek review pursuant to section 105(a) by contesting the proposed civil penalty assessment when such a proceeding is filed by MSHA. However, if an operator fails to contest a civil penalty proposed for a citation, section 105(a) expressly provides that both "the citation and the proposed assessment of penalty shall be deemed the final order of the Commission and not subject to review by any court or agency." Further, an operator's payment of a proposed penalty constitutes an admission of the underlying violation and precludes the operator from continuing a pending section 105(d) contest of the violation. Old Ben Coal Company, *supra*, 7 FMSHRC at 209. "For purposes of the Act, paid penalties that have become final orders pursuant to section 105(a) reflect violations of the Act and the assertion of violation contained in the citation is regarded as true" *Id.* See also Amax Coal Co. of Missouri, 4 FMSHRC 975, 978-79 (June 1982); Ranger Fuel Corporation, 10 FMSHRC 612 (May 1988).

On the facts of the instant proceeding, it seems abundantly clear to me that the contestant failed to avail itself of two opportunities granted by the Act to contest the allegation of violation made in the section 104(a) citation in question. Instead, it paid the civil penalty proposed for the violation, and I cannot conclude that such payment was inadvertently or mistakenly made. The facts here show that the contestant never requested to be heard on the citation, and information provided by the affidavit executed by Mr. Schmittgens leads me to conclude and find that the "DNP (Do not pay)" notation referred to therein makes specific reference to the order and not the citation. In any event, I agree with MSHA's position on this issue, and I conclude and find that while the contestant has preserved its right to challenge the legality of the section 104(b) order, both

the validity of the citation and the civil penalty proposal for the violation stated therein are final under section 105(a) of the Act and not subject to review. Accordingly, the contestant's arguments to the contrary ARE REJECTED.

The Section 104(b) Order

The principal issue presented in this case is whether or not Inspector Boggs acted reasonably in issuing section 104(b) Order No. 3141311, and declining to further extend the period of time for abatement of the conditions cited in the section 104(a) Citation No. 9959601.

Section 104(a) of the Act, 30 U.S.C. § 814(a), provides in part as follows:

Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for abatement of the violation.

Section 104(b) of the Act, 30 U.S.C. § 814(b), provides as follows:

If, upon any follow-up inspection of a . . . mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to [section 104] . . . has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

In this case, the section 104(a) citation was issued on March 22, 1988, and Inspector Wiley fixed the initial abatement time as April 13, 1988. He required the contestant to take the necessary corrective action to lower the respirable dust exposure, and to sample each production shift until five valid dust samples were taken and submitted to MSHA's Pittsburgh laboratory. Mr. Wiley subsequently modified the citation to permit the contestant to submit the samples to MSHA's Mt. Hope laboratory, and this modification was served on the contestant by mail on

April 11, 1988, 2 days before the abatement period was due to expire. The original abatement date remained unaffected by this modification.

On April 13, 1988, the date fixed for abatement of the citation, Inspector Boggs modified the citation in order to allow the contestant more time to collect the respirable dust samples for the cited MMU 017-0 unit, and he extended the abatement time five (5) additional days to April 18, 1988. Thereafter, on April 19, 1988, at 9:55 a.m., Inspector Boggs issued the contested section 104(b) withdrawal order, and the reason stated for this action is that "the operator failed to adequately control the respirable dust in the working environment of designated occupation 036 continuous miner in the 3 North 017-0 section." At 2:00 p.m. that same day, Inspector Boggs modified the order in view of the contestant's submission and implementation of a revised respirable dust-control plan, and the modified order allowed the contestant to continue to operate in order to collect dust samples on the cited unit to determine whether compliance had been attained. Mr. Boggs subsequently terminated the order at 4:50 p.m., on April 21, 1988, after the sample results for six valid samples collected during an MSHA inspection confirmed that the cited unit was in compliance.

The contestant argues that an inspector's determination to issue a section 104(b) withdrawal order must be based upon the facts confronting him at the time regarding whether an additional abatement period should be allowed, Old Ben Coal Company, 6 IBMA 294, 1 MSHC 1452 (1976). In making such a decision, contestant asserts that the inspector must exercise his discretion in a reasonable manner, and that any decision not to extend the abatement time must be reasonably made, and it cannot be arbitrary or capricious, United States Steel Corporation, 7 IBMA 109, 1 MSHC 1490 (1976); Peter White Coal Mining Corporation, 1 FMSHRC 255, 1 MSHC 2086 (1979).

The contestant asserts that on the facts of this case, Inspector Boggs abrogated his responsibility to make an informed judgment of all of the facts and circumstances necessary to any reasonable determination as to whether or not the time for abatement should be extended. Contestant asserts that Mr. Boggs' own testimony clearly shows that while he had an opportunity to acquaint himself with the facts, he neglected to do so. In support of this argument, contestant points out that Inspector Boggs was present at the mine on 8 of the 20-work days between the issuance of the citation and the order, and despite the fact that he knew that the mine had only three working sections, and that a working section is one of the places with which he was concerned, he did not visit the cited 017 unit in March or April, 1988, until after he issued the order. The contestant further points out that Mr. Boggs never discussed with the contestant a

respirable dust problem on the section, or efforts being made by the contestant to abate such a problem during this time.

Contestant concludes that at the time he issued the order, Inspector Boggs, by his own testimony, had no facts upon which to make a finding that the period for abatement of the citation should not be extended. Despite being present at the mine and having the information at his fingertips, contestant maintains that Mr. Boggs made no effort to inform himself of the nature of the problem on the 017 unit, or the efforts being made to control respirable dust there. Instead, without even discussing the matter with his supervisor, contestant concludes that Mr. Boggs cavalierly issued the order upon the bare knowledge that measurement of the dust samples taken on April 11 through 15, 1988, did not show compliance with the applicable dust standard. Contestant further concludes that Mr. Boggs gave no consideration to the second part of section 104(a), whether the time to abate should be extended, and because he ignored the facts which confronted him and acted in an arbitrary and capricious manner, the order must be vacated.

Contestant argues that the time for abatement of the violation should have been extended. In support of this conclusion, contestant argues that where the action that is required of an operator to achieve abatement is known, sufficient time to accomplish abatement may be considered to be reasonable abatement. However, in a case where the operator must first determine what action is necessary to achieve abatement, reasonable time must necessarily include both sufficient time for the operator to determine what action is necessary and sufficient time to accomplish that action. Additionally, in the case of a citation issued for an average concentration of respirable dust that exceeds the applicable standard, contestant suggests that the abatement time must also include sufficient time to take the required number of samples and have them processed by MSHA. In the present case, contestant maintains that even if Inspector Boggs had attempted to inform himself of the facts pertinent to the decision of whether to extend the abatement time, he considered only the time necessary to take five valid samples to be reasonable, and completely disregarded other factors.

Contestant argues that the cited MMU 107 represented a state of the art dust control system, and that at the time the citation was issued, it was already taking extraordinary measures to insure that this system was working properly. Because there appeared to be no problem in the actual control of respirable dust, contestant suspected that the violation arose from a problem in the testing or measurement of respirable dust, and while continuing its efforts to maintain MMU 017 in top operating condition as it had before receiving the citation, it directed its abatement efforts toward determining the cause of the problem in the testing and measurement area. Specifically, it considered

whether the problem had been caused by inaccuracies in the manufacturer's initial weights for the dust sampling cassettes used in determining weight gain and dust concentration; whether a physical change or deterioration in the cassettes had occurred due to their age; and whether MSHA had possibly made errors in its processing of samples.

Contestant maintains that all of its abatement efforts, including the meetings with mine personnel, the review of the ventilation and dust-control plan with the employees involved, the efforts at maintaining the dust control system, and the efforts to determine where a problem existed in the testing and measurement of dust, were all communicated to MSHA, and according to the testimony of the contestant's safety manager, Inspector Boggs was kept informed of these efforts. Contestant points out that it also met with Mr. Thaxton and with MSHA's subdistrict manager for the specific purpose of discussing the cause of the problems on the cited unit.

Contestant argues that despite its good faith efforts in attempting to abate the violation, Inspector Boggs followed MSHA's "standard operating procedure" in issuing the order, claiming that he had "no choice" but to issue the order by simply relying on his determination that a reasonable time for the contestant to abate the violation was merely the time required to take five valid samples over five continuous shifts. Contestant maintains that in complete disregard of the circumstances, and its abatement efforts, MSHA's "standard operating procedure" requiring the issuance of an order when an operator does not come back into compliance with the respirable dust standard and that a change be made in the ventilation and dust-control plan, regardless of the effect of such a change on dust control, gave the inspector "no choice" but to issue the order.

Finally, contestant argues that in addition to the reasonableness of the abatement time, and the operator's abatement efforts, another factor which should be considered in this case is the relative hazard to which the contestant's employees on the cited 017 unit were exposed, Eastern Associated Coal Corp., 1 MSHC 1165 (June 22, 1978); Youghiogheny & Ohio Coal Company, 8 FMSHRC 330, 3 MSHC 2179 (1986). Contestant asserts that there was little or no hazard posed by an extension of the abatement time, and although the figures for respirable dust that MSHA measured were in excess of the standard, there is no evidence that these figures actually resulted from excessive levels of respirable dust in the air on the 017 unit. To the contrary, contestant concludes that all of the evidence in the record points toward a problem in measurement of respirable dust, and that the only thing that Mr. Boggs testified that contestant had not done that it might have tried in order to abate the violation was to assign a person other than the section foreman to monitor the dust sampling pumps. Contestant points out that Mr. Boggs

conceded this would only have had a possible effect on testing and measurement and not on the actual levels of dust (Tr. 28). Therefore, contestant concludes that the employees on the 017 unit would suffer no harm by an extension of abatement time to enable the contestant to determine how to effectively measure levels of respirable dust to achieve compliance with the applicable standard.

Contestant concludes that it made diligent, good faith efforts to control respirable dust and to abate the respirable dust violation on the cited 017 MMU, and that the order was issued by MSHA in accordance with some "standard operating procedure" which considers only failure to attain compliance, and ignores the operator's abatement efforts, the real nature of the problem that led to the violation, and the fact that minimal or no harm was posed to the miners. Contestant concludes that such rigid inflexibility in enforcement is not contemplated by the Act and should not be permitted in this case, and that a reasonable time to abate a violation should include sufficient time for the operator to determine what action is necessary to achieve abatement and to perform that action, not just the amount of time necessary to take the required samples and to have them processed by MSHA. The nature of the problem in this case and the diligent, good faith efforts of the contestant make it reasonable for an extension of time to abate to have been given, especially when the extension poses little or no hazard to miners.

MSHA takes the position that Inspector Boggs acted reasonably in not extending the time for abatement of the citation. Citing United States Steel Corporation, 7 IBMA 109 (1976); Youghiogheny and Ohio Coal Company, 8 FMSHRC 330, 339 (1986); and Consolidation Coal Company, 3 FMSHRC 2201, 2204 (1981), MSHA states that three factors are generally considered in determining whether the decision not to extend the abatement time was reasonable, and it takes the position that these factors indicate that Inspector Boggs acted reasonably in this case. The factors cited are as follows:

1. The degree of danger that any extension would have caused to miners;
2. The diligence of the operator in attempting to meet the time originally set for abatement; and
3. The disruptive effect an extension would have had upon operating shifts.

MSHA argues that any extension of the abatement period would have increased the miners' exposure to the hazards of excessive concentrations of respirable dust. Although recognizing the fact that the harmful effect of any one incident of exposure to excessive concentrations of respirable dust is negligible, MSHA

points out that such exposure nonetheless is presumed to be a significant and substantial hazard. The miners on the cited 017-0 unit were not wearing protective equipment, and there is no other evidence indicating that their exposure would not significantly and substantially contribute to respiratory disease.

MSHA asserts that the subject mine, and the cited 017-0 unit in particular, have a history of excessive levels of respirable dust, and extending the abatement period would have increased the miners' cumulative exposure to this hazard (exhibit G-4, Tr. 64, 90-91). MSHA agrees that if the dust samples submitted by the contestant reflected inaccurate measurements, rather than excessive concentrations of respirable dust, and the respirable dust on the cited unit had in fact been below the applicable limit, there would have been no harm in extending the abatement period. MSHA states that there is no credible evidence to support any assertion that the dust samples were inaccurate, and it points out that the contestant has not contested numerous prior citation for excessive dust at the mine and the cited 017-0 unit.

With regard to the contestant's diligence in attempting to abate the citation, MSHA agrees that immediately after the citation was issued, the contestant attempted to abate the violation by thoroughly inspecting and repairing its mining equipment, dust scrubbers, and ventilation system on the cited unit, and that the abatement time was extended to allow the contestant to take additional samples. MSHA states further that by April 19, 1988, the contestant had determined that there was nothing more it could do underground to abate the violation, and MSHA suggests that it does not appear that the contestant had done everything possible to achieve abatement. In support of this conclusion, MSHA points out that Inspector Boggs suggested the assignment of a miner to monitor the pumps, and that Mr. Thaxton observed that the contestant did not balance its scrubber system (Dep. Tr. 27-28; Hrg. Tr. 228-29). MSHA also points out that the contestant had no problem coming into compliance once the order was issued (Tr. 233-34).

MSHA asserts that while the contestant may have been diligent in inspecting its mining equipment, it was lax in checking its sampling cassettes. MSHA points out that within an hour of the issuance of the citation, the contestant had suspected that the cassettes it was using had deteriorated due to age, and instead of using newer cassettes, or submitting the suspected ones to MSHA or an independent lab for analysis, it pursued an amateurish and inadequate investigation into the reliability of its old cassettes. Further, although the contestant's safety supervisor admitted that the contestant had suspected the filters to be defective, he did not really check them. MSHA concludes that had Inspector Boggs extended the abatement time, the only action the contestant would have taken would have been to use new

cassettes, and there is no credible excuse for its not having done so previously. MSHA further states that the pattern of dust concentrations analyzed during the abatement period supports the conclusion that the contestant was not making any progress in abating the violation (Tr. 81-82; 234-235).

With regard to the disruptive effect of the order, MSHA argues that the issuance of the order did not disrupt production on the cited unit because the unit was normally idle for maintenance during the day shift, and the order was modified 5 hours later the same day to allow mining and sampling to continue.

In response to the contestant's assertions that it received little or no cooperation from MSHA during its efforts to determine whether or not its sampling cassettes were defective, MSHA states that the contestant never expressed any dissatisfaction with the assistance provided by MSHA regarding its mining equipment, dust scrubbers, or ventilation system. MSHA asserts that Inspector Boggs made numerous visits to the mine during the period set for abatement, and although he did not inspect the 017 unit, he went out of his way to visit this area in an attempt to assist in abating the violation (Tr. 183). MSHA concludes that Mr. Boggs was no more successful at trouble-shooting than contestant's experts were, and that it does not appear that the contestant requested very much help with its underground mining operations (Dep. Tr. 35). MSHA further concludes that its failure to come up with a solution to the dust problem does not mean that it was not being cooperative or unreasonable.

In response to the contestant's dissatisfaction with the response it received from MSHA's laboratory personnel, MSHA points out that it agreed to weigh some filters from old cassettes to see if the weights reported by the manufacturer were accurate, and it pre-weighed some cassettes for use in subsequent samplings. MSHA admits that it refused to weigh these cassettes after sampling, and refused to allow the contestant's representatives to witness its laboratory analysis of the filters, but it maintains that given the sensitivity of its laboratory equipment, and the fear of contamination, its refusals were reasonable in the circumstances. Conceding that there may have been some misunderstanding over what could be done at its Mt. Hope Laboratory, MSHA states that it cooperated and assisted with the contestant's officials as much as possible.

Contrary to the contestant's assertions, MSHA argues that it was more than reasonable in giving the contestant the opportunity to abate the violation, and that the contestant was given a second chance when MSHA extended the time for abatement on April 13, even though a set of samples that exceeded the applicable standard had already been submitted during the original abatement period. Furthermore, MSHA states that it was quite lenient with the contestant after the order had been issued in

that knowing that the contestant had already reviewed the conditions on the cited unit, and that any defect in its sampling procedure would be eliminated because MSHA would be collecting the samples to determine whether the order should be lifted, MSHA accepted minor changes in the dust-control plan and promptly modified the order to allow mining to continue.

MSHA agrees that neither party in this case has been able to identify the problem that caused excessive concentrations of respirable dust in the sampling taken prior to April 20, 1988. In response to the contestant's insistence that the condition on the cited unit were the same on April 20 as they were when the previous samples were taken, and that the only difference was that the samples of April 20 were taken by MSHA personnel using cassettes supplied by MSHA, MSHA points out that Inspector Boggs recalled that the contestant may have installed a larger hose between the water supply and the continuous-mining machine (Dep. Tr. 39). MSHA concludes that unless the contestant made some other undisclosed changes, it is likely that the violation was caused by the contestant's improper sampling methods, its defective cassettes, or decreased production at the time of MSHA's sampling (Hrg. Tr. 78-79, 96). MSHA points out that because the serial numbers on the cassettes used by MSHA on April 20, 1988 are lower than the serial numbers on the cassettes the contestant had been using, the cassettes used by MSHA were probably older than the ones being used by the contestant (Tr. 243, exhibits G-1, G-5, G-6). MSHA concludes that any defects in the contestant's cassettes would have been caused by its storage and handling, rather than just the age of the cassettes.

MSHA further points out that subsequent to the termination of the contested order, the contestant was again cited for several violations of the respirable dust standards on its 017-0 unit (Tr. 84-85; exhibit G-4, pg. 3), and that the last citation was abated by the abandoning of its "state of the art" equipment (Tr. 112, 124-125). Since the contestant had already done everything it planned to do in regards to the dust concentrations on the cited unit, and since there is no credible excuse for continuing to use suspect sampling cassettes, MSHA concludes that the decision not to extend the time for abatement any further was more than reasonable.

There is no dispute that the cited respirable dust violation was not abated at the time Inspector Boggs issued the contested order, and the parties are in agreement that the cause of the high sampling results obtained by the contestant was never discovered. The critical issue is whether or not the inspector acted unreasonably in not extending the time for abatement, and whether the issuance of the order was arbitrary. Although MSHA is correct that the three factors stated in the Youghiogheny and Ohio Coal Company case, supra, namely (1) the degree of danger that any extension in the abatement time would have caused to

miners, (2) the operator's diligence in attempting to meet the initial abatement time, and (3) the disruptive effect that an extension of time would have had upon operating shifts, are factors to be considered in determining whether any decision not to extend the abatement time was reasonable, the threshold question in this case is whether or not Inspector Boggs made more than a cursory decision not to extend the time, or simply arbitrarily decided to issue the order without consideration of these or other factors.

In Peter White Coal Mining Corporation, 1 FMSHRC 255 (April 24, 1979), Judge Fauver vacated a section 104(b) order on the ground that the inspector failed to give any consideration to the extension of time allowed for abatement of the citation. The judge found that such consideration was a basic requirement for the issuance of such an order.

United States Steel Corporation, 7 IBMA 109 (November 29, 1976, 1 MSHC 1490 (1976)), involved a citation for a violation of respirable dust standard 30 C.F.R. § 70.250. It was held that as a matter of law, an inspector's authority under section 104(b) in determining whether the abatement time for the violation should be extended, or an order of withdrawal issued, carries the implication that it will be exercised reasonably, not arbitrarily or capriciously. In that case, although the inspector made inquiries into the operator's abatement efforts, and was aware of certain mitigating circumstances, he nonetheless issued a withdrawal order. The presiding judge held that the inspector's issuance of the order was unreasonable and he vacated it. On appeal, his decision was affirmed.

In Consolidation Coal Company, 1 FMSHRC 2638 (October 1979) Judge Broderick vacated a section 104(b) order after finding that the operator had done substantial work to abate the cited condition and that the work was ongoing when the inspector next returned to the mine to check on the abatement. Under these circumstances, Judge Broderick concluded that the abatement time should have been extended.

Eastern Associated Coal Corporation, 1 MSHC 1665 (June 22, 1978), decided by former Commission Judge Forrest Stewart, concerned an operator's challenge to the initial abatement time fixed by an inspector to abate a respirable dust violation of 30 C.F.R. § 70.100(b), and a challenge to the inspector's failure to further extend the abatement time, which resulted in the issuance of a section 104(b) order. Judge Stewart held that such an order should be based on the prevailing circumstances including the initial sampling processing time; the time required to evaluate the samples and make changes; the time to review the results of additional samples; and the degree of hazard presented. Judge Stewart noted that the citation was issued

solely on the basis of an MSHA computer print-out reflecting non-compliance with the applicable dust standard, that there was no communication between the operator and MSHA concerning whether the time set for abatement was sufficient considering the existing circumstances, that no inspection was made, and that the initial abatement time was the "standard" amount of time set in all respirable dust cases, i.e., the time determined by the inspector to sufficiently allow for the taking and receipt of results of post-notice respirable dust samples taken by the inspector.

On the facts of the Eastern Associated case, which indicated that the operator was experiencing adverse mining conditions, was shut down for a period of time due to a strike, experienced difficulties in obtaining repair items for its equipment, needed additional time to evaluate the results of its dust sampling in order to decide where the corrective action was needed, and the short term dust exposure hazard to miners, Judge Stewart found that the inspector failed to give adequate consideration to all of these circumstances, and he vacated the order based on his finding that the inspector should have allowed additional abatement time and extended the time rather than issuing a withdrawal order.

Mr. Boggs' belief that the contestant was given a reasonable time to abate the violation was based solely on his view that the time allowed for additional sampling and the receipt of the results was ample and reasonable. He confirmed that his normal practice in deciding whether or not to extend the abatement time is based on whether or not an operator can justify the additional time because of equipment breakdowns, strikes, or other circumstances beyond the operator's control, and that in this case, he would have extended the time if it were justified. I fail to understand how Mr. Boggs could have made any informed judgment as to whether or not the abatement time should have been further extended when he made no further inquiries as to the contestant's abatement efforts, made no effort to determine what the contestant was doing in its attempts to abate the violation, and simply concluded that no further time would be permitted because MSHA's "standard operating procedure" left him no choice but to issue the order simply because the additional sampling showed non-compliance. I find no rational basis for an inspector to automatically issue a section 104(b) withdrawal order simply because an operator's sampling results reflects continued non-compliance with the dust standards. If this were the case, an inspector could refuse to further extend any abatement time for any violation simply because an operator has not abated the condition within the initial time fixed for abatement, completely ignoring the circumstances presented, or the three factors alluded to by the aforementioned case law.

When asked what he would have done to achieve abatement, Inspector Boggs stated that he would have assigned someone to make sure the dust sampling pumps were properly taken care of, that he would have paid close attention to the ventilation on the section and the continuous-mining machine water spraying operations, and that he would have checked the water pressures on the machines, and monitored the ventilation for any necessary adjustments. However, since Mr. Boggs did not communicate further with anyone at the mine, and did not visit the working section where the cited unit was operating, even though he was in the mine conducting inspections during the abatement period, he obviously had no information as to whether or not the contestant was doing any of the things that he suggested. Any involvement by Mr. Boggs came after the order was issued. I can only conclude that his decision that a further extension of time was not justified was based solely on his belief that he was required to issue an order, regardless of any abatement efforts by the contestant, if the additional sampling showed non-compliance. I find such a procedure to be arbitrary on its face.

On the facts of this case, I agree with the contestant's assertion that Inspector Boggs did little or nothing to ascertain all of the facts and circumstances before issuing the order. By his own admission, Mr. Boggs confirmed that he had "no choice" but to issue the order, and his decision to do so was based solely on the fact that the dust samples submitted by the contestant for April 13 through 15, 1988, reflected that the cited unit was still out of compliance. Mr. Boggs believed that the contestant was given a reasonable time to abate the violation because it was allowed additional time to collect and submit dust samples to MSHA, and he confirmed that he would not have extended the citation abatement time if the contestant were not attempting to abate the violation in good faith. He further confirmed that it was MSHA "standard operating procedure" for an inspector to issue a section 104(b) order after additional sampling reflects non-compliance, and that after an order is issued, an operator is required to make changes in its ventilation and dust-control plan, in addition to further sampling.

I take note of the fact that the inspector who issued the initial citation and fixed the abatement time for April 13, 1988, subsequently modified it to permit the contestant to submit dust samples to MSHA's Mt. Hope Laboratory rather than to its Pittsburgh laboratory. This modification was made on April 11, 1988, 2 days before the expiration of the initial abatement time. Since the contestant had to sample over five consecutive working shifts, and since it was sampling during the period April 11 through 15, 1988, it had 3 days subsequent to the taking of the last sample to receive and consider the sampling results before the expiration of the extended abatement time on April 18, 1988, which was given by Mr. Boggs. Mr. Boggs concluded that this was ample and reasonable time to abate, and his conclusion in this

regard was obviously made without any knowledge of the contestant's abatement efforts, and was based solely on the results of the sampling.

MSHA's Supervisory Industrial Hygienist Thaxton confirmed that he did not discuss the violation with Inspector Boggs. Mr. Thaxton also confirmed that pursuant to MSHA's policy, if an inspector determines that a mine operator has made no effort to control dust, and simply submits additional samples, the inspector is instructed not to extend the abatement time further and to issue a section 104(b) order. In the instant case, Mr. Thaxton further confirmed that if Inspector Boggs was unaware of any action by the contestant to abate the violation and come into compliance, he would be justified in issuing a section 104(b) order if the only action taken by the contestant was to take additional samples.

Mr. Thaxton took the position that since the contestant took "whatever action" was necessary to abate the order, it could have done so when the citation was issued. Like Mr. Boggs, Mr. Thaxton's belief that the contestant made no significant compliance effort was based on the samples which it had submitted. However, Mr. Thaxton conceded that he had never been in the mine, never discussed the violation with Mr. Boggs, and had no idea what was causing the problem. He speculated that the contestant may not have been following its dust-control plan, may have introduced too much ventilation which may have reduced the efficiency of the scrubbers, and that the individuals being monitored for dust may not have been positioned properly. He stated that "when our inspector is there, he is supposed to see that the plan parameters are being followed. Mr. Boggs would have to tell you what he actually observed." Based on the record in this case, I cannot conclude that Mr. Boggs saw anything relating to the contestant's abatement efforts until after the order was issued. Mr. Thaxton agreed that in order to cure a dust problem, the operator must know what caused it, and that it must have enough time to discover the cause.

The credible testimony of contestant's safety supervisors Richards and Jarrell reflect that during the abatement period the contestant was making an effort to ascertain the cause of the dust problem, including the dismantling of the mining machine, reviewing and discussing its ventilation and dust-control plan with its employees, monitoring its operations, and meetings with MSHA officials. Maintenance foreman Barker testified that he had four maintenance people working on the cited unit on a daily basis cleaning and servicing the miner machine scrubber system prior to the sampling in March, 1988, and during the sampling of April 12 and 14, 1988. Laboratory technician Bailey confirmed that he preweighed and post weighed some of the sampling cassettes used during the April, 1988 sampling.

The record establishes that after exhausting all of its efforts to isolate the possible cause of the high dust sampling results, the contestant focused its efforts on pursuing its belief that one of MSHA's Pittsburgh laboratory technician's may have miscalculated the sampling results, or that the sampling cassettes used in the sampling by the contestant were either defective or contaminated. Inspector Boggs recalled that he heard some comments by contestant's personnel complaining about their belief that a new employee at the MSHA Pittsburgh laboratory may have made a mistake in the sampling, and that at the request of the contestant, some of the samples were allowed to be submitted to the Mt. Hope laboratory. At page 21 of its post-hearing brief, MSHA conceded that "it is likely that the violation was caused by Peabody's improper sampling methods, its defective cassettes, or decreased production at the time of MSHA's sampling." Under all of these circumstances, the contestant's suspicions that the defective sampling cassettes may have caused the high sampling results from its testing is plausible and reasonable, and I find no basis for concluding that the contestant advanced this theory as a delaying tactic or to avoid compliance.

Although it is true that the contestant suspected that its cassettes may have been defective after the citation was issued in March, 1988, the fact that it did not discard them because it had a large supply and they were expensive cannot detract from its good faith effort to ascertain whether the cassettes were in fact defective. Although one may agree that the contestant's methodology in attempting to determine whether the cassettes were defective was somewhat amateurish and inadequate, I cannot conclude that its efforts in this regard were less than reasonable or lacking in good faith.

Mr. Richards testified that he made one or two trips for conferences at MSHA's sub-district office, and also visited the Mt. Hope laboratory in an effort to have the sample cassettes weighed to determine whether they were defective. Mr. Jarrell confirmed that he and Mr. Richards visited the Mt. Hope laboratory on April 8, 1988, to weigh some dust samples. He also confirmed that after the five samples taken on April 12 through 14, 1988, were taken with the pre-weighed cassettes weighed at the Mt. Hope laboratory and the contestant's laboratory, he believed that MSHA's Mt. Hope laboratory would post-weigh them as a means of confirming whether they were contaminated or defective, but it did not do so. Mr. Thaxton confirmed that he informed Mr. Richards that he would try to post-weigh the samples, but subsequently declined to do so on advice of the Pittsburgh laboratory, and MSHA concedes that there may have been some misunderstanding over what could be done at the Mt. Hope facility (Brief, pg. 20). Mr. Jarrell confirmed that if the order had not been issued, the old sample cassettes would have been discarded (Tr. 179).

Under all of the aforementioned circumstances, I conclude and find that the contestant was making a diligent effort in its attempts to ascertain the cause of its dust sampling results which placed the cited unit out of compliance, and was attempting in good faith to meet the April 18, 1988, abatement time fixed by Inspector Boggs. While it may be true that the only action that the contestant would have taken would have been to discard the old cassettes and use new ones, I cannot conclude that the fact that it did not do so was unreasonable or inexcusable.

With regard to the degree of danger that any extension of the abatement time would have caused the miners, MSHA takes the position that the mine and the cited 017-0 unit in particular, have a history of excessive levels of respirable dust, and that the contestant has not contested numerous prior citations issued for excessive dust levels of respirable dust on the cited unit in question. The fact is that MSHA's evidence establishes that the cited 017-0 unit was previously cited on November 17, 1987, for a violation of section 70.207(a), for failing to take bimonthly samples, and was again cited on December 17, 1987, and February 1, 1989, for violations of section 70.101, for being out of compliance with the applicable respirable dust standard established for the particular work shifts cited (exhibit G-4). Thus, with the exception of the uncontested citation which preceded the order issued in this case, the contestant has been cited with two violations for exceeding the dust limits on the 017-0 unit. I cannot conclude that the cited 017-0 unit has "a history" of "numerous" violations on this unit.

With regard to the overall respirable dust record for the entire mine, the information which appears on exhibit G-4, shows that with the exception of sampling which occurred on March 11, 1988, reflecting 1.7 mg/m^3 for the 019-0 MMU unit for designated occupation 046, seven additional units which were sampled during various times in 1987 and 1988, including the 017-0 unit, were all in compliance with the established 1.5 mg/m^3 standard. The information also reflects that prior to March 22, 1988, MMU 015-0 was cited three times in 1987 for violations of section 70.101.

MSHA agrees that if the dust samples submitted by the contestant in this case reflected inaccurate measurements rather than excessive concentrations of respirable dust, there would have been no harm in extending the abatement period. MSHA also agreed that it was likely that the violation was caused by the contestant's improper sampling methods or defective cassettes, and this lends credence to the contestant's arguments that there may have been a problem in the measurement of respirable dust, rather than excessive levels of respirable dust in the air on the 017-0 unit, and that an extension of the abatement time to enable the contestant to determine how to effectively measure levels of

respirable dust to achieve compliance would not have exposed the employees on the unit to any harm.

After careful consideration of all of the evidence in this case, I cannot conclude that MSHA has advanced any probative or reliable evidence to establish that the extension of the abatement time would have adversely affected the safety of the miners on the unit in question, or that the contestant failed to diligently pursue the abatement of the violation. I further conclude and find that the failure by the inspector who issued the order to give any consideration to the contestant's abatement efforts, or to consider any hazard resulting from the extension of the abatement time, renders the order invalid. Under all of these circumstances, the contested order IS VACATED.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED THAT:

1. Contestant's Contest IS GRANTED.
2. The contested section 104(b) Order No. 3141311, April 19, 1989, IS VACATED.


George A. Koutras
Administrative Law Judge

Distribution:

Thomas L. Clarke, Peabody Coal Company, P.O. Box 1233,
Charleston, WV 25324 (Certified Mail)

Ronald E. Gurka, Esq., Office of the Solicitor, U.S. Department
of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203
(Certified Mail)

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

OCT 30 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-123
Petitioner : A.C. No. 05-00469-03642
: :
v. : Dutch Creek No. 2 Mine
: :
MID-CONTINENT RESOURCES, :
INC., :
Respondent :

DECISION

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

Before: Judge Lasher

This matter arose pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a) (herein the Act). Petitioner originally sought assessment of penalties for 20 alleged violations cited in 20 enforcement documents (Orders and Citations) involved in this docket.

A prehearing conference was held in this matter and in related dockets WEST 88-121, 122 and 124 on November 2, 1988, in Denver, Colorado. Thereafter, hearings were held in various of these latter dockets and prior to decision the parties reached amicable resolution thereof.

In this docket, pursuant to my Decision Approving Partial Settlement in August, 1989, the parties' settlement of 18 of the 20 enforcement documents involved was approved, leaving Order No. 3044101 and Citation No. 3044102 to be resolved. On October 28, 1989, the parties submitted their Joint Motion to Approve Settlement and Order Payment as to these last two violations involved, the terms of which are:

| <u>Citation/Order No.</u> | <u>Proposed Penalty</u> | <u>Amended Proposed Penalty</u> |
|---------------------------|-------------------------|---------------------------------------------|
| 3044101 - 104(d)(1) | \$1,500.00 | (Amended to 104(a) Citation) \$900.00 |
| 3044102 - 104(a) | 1,300.00 | 780.00 |

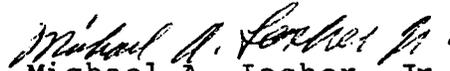
It is noted that this agreement is part of an overall agreement by the parties involving approximately 2,000 Citations and Orders issued from September, 1987, through March 31, 1989. The Joint Motion of the parties appears proper and is strongly supported in the record on the basis of policy and enforcement considerations, and economic factors relevant to both parties. Accordingly, the Joint Motion is approved and the agreed-on penalties here assessed.

ORDER

1. Order No. 3044101 is MODIFIED to reflect its nature and issuance authority from a Section 104(d) Withdrawal Order to a Section 104(a) Citation.

2. Respondent is ordered to pay to the Secretary of Labor on or before January 1, 1991, the total sum of \$1,680 as and for the civil penalties above assessed.

3. This proceeding is DISMISSED.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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

Edward Mulhall, Jr., Esq., Delaney & Balcomb, Drawer 790, 818 Colorado Avenue, Glenwood Springs, CO 81602 (Certified Mail)

/ot

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 03 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 89-81-M
Petitioner : A.C. No. 23-01785-05511
v. :
: Docket No. CENT 89-82-M
MOBERLY STONE COMPANY, : A.C. No. 23-01785-05512
Respondent :
: Moberly Stone Company Quarry

ORDER DENYING MOTION TO
APPROVE SETTLEMENT

On September 29, 1989, the Secretary filed a Motion to Approve Settlement and Dismiss Petition for Assessment of Civil Penalties.

Docket No. CENT 89-81-M contains seven alleged violations, each assessed at \$98 for a total of \$686. Docket No. CENT 89-82-M contains five alleged violations, assessed at a total of \$294. The motion states that with respect to four of the citations in Docket No. CENT 89-81-M and two in Docket No. CENT 89-82-M (each assessed at \$20), Respondent will pay the penalties originally assessed. With respect to the remaining three citations in Docket No. CENT 89-81-M, the motion proposes that they be reduced from \$140 each to \$20 each. The motion states with respect to each of these violations that "although any injury caused by an accident could be fatal," it is unlikely that the injury would occur, and the violation should be reclassified as "nonsignificant and substantial." The three remaining citations in Docket No. CENT 89-82-M are reduced from \$140 to \$20, \$84 to \$20 and \$140 to \$20. The same reasoning is advanced in support of the reduction sought.

I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that the reduction in penalties proposed is not consistent with those criteria.

Therefore IT IS ORDERED that the Motion to Approve Settlement is DENIED.

IT IS FURTHER ORDERED that the parties respond to paragraph 2 of the Prehearing Order of July 11, 1989, on or

before October 16, 1989, and inform me of any dates in January or February 1990 which would cause scheduling conflicts.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

Dewey P. Sloan, Jr., Esq., U.S. Department of Labor, Office of the Solicitor, 911 Walnut Street, Kansas City, MO 64106
(Certified Mail)

Mr. Paul R. Orr, President, Moberly Stone Co., P.O. Box 582, Moberly, MO 65270 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 27 1989

| | | |
|-------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 89-198 |
| Petitioner | : | A. C. No. 46-01456-03826 |
| v. | : | |
| | : | Docket No. WEVA 89-199 |
| EASTERN ASSOCIATED COAL | : | A. C. No. 46-1456-03824 |
| CORPORATION, | : | |
| Respondent | : | Federal No. 2 Mine |
| | : | |

ORDER OF CONSOLIDATION
AND ORDER

It is ORDERED that WEVA 89-199 be consolidated with WEVA 89-198.

On October 16, 1989, Petitioner filed a First Request for Production of Documents and a Motion to Compel Responses to the Request for Production of Documents. The Request seeks, inter alia, notes taken by Respondent's agent during a MSHA inspection.

Respondent, in a Response, and a Motion to Strike Petitioner's Request for Production of Documents filed October 23, 1989, essentially argues that the Motion should be denied as formal discovery was not initiated until October 13, 1989, and informal discovery was agreed to July 24, 1989, both dates being more than 20 days subsequent to the filing of the Proposal for Penalty on July 3, 1989.

Although formal discovery was not initiated within 20 days after the Proposal for Penalty was filed, and more than 60 days have elapsed since the Proposal was filed, Respondent has not established any legal prejudice should Petitioner's request be allowed. Accordingly, in the interest of justice, and in order to narrow the evidentiary issues, I find that the discovery rules in 29 C.F.R. § 2700.55 should be liberally construed. (See, Hickman v. Taylor 329 U.S. 495 (1947)). Accordingly, Respondent's Motion to Strike is DENIED.

Respondent, also argues, in essence, that notes taken at the inspection be not discoverable inasmuch as Petitioner can obtain the equivalent of the materials without "undue hardship" as its representative was at the scene of the alleged violation. (See,

Rule 26(b)(3), Fed. R. Civ. P.). I do not find merit to Respondent's argument. Clearly written statements of Respondent's agents that are contemporaneous with the cited condition, are unique and thus are discoverable (See, Galambus v. Consol. Freightways Corp. 64 FRD 468 (ND Ind (1974)); Gillman v. United States 53 FRD 316 (DC NY (1979))).

Respondent also asserts that the practice of taking notes at inspections "were implemented to aid in the preparation of cases for trial." (sic). Respondent further asserts that if notes were in fact taken, they were taken "to prepare a defense should litigation be required to resolve violations." As such, Respondent argues, that the notes are not discoverable as they are covered by the work product protection. Rule 26(b), supra, protects from discovery materials ". . . prepared in anticipation of litigation for trial" I find that Respondent has not established that the particular notes in question were prepared specifically in anticipation of litigation. It has not been established by Respondent that at the time the notes were taken, there was any substantial anticipation that the subject citation would be likely to be litigated. Rather, it appears from Respondent's assertion, that the notes were taken as a standard procedure at inspections, and as such were taken in the regular course of business. Accordingly, I conclude that they are outside the scope of the work product protection. (See, Moore's Federal Practice at 26-354, and cases cited therein).

Based on the above, Petitioner's Motion to Compel Responses is GRANTED.

It is ORDERED that, no later than 10 days after the date of this Order, Respondent shall produce and serve Petitioner with all materials requested in Petitioner's Request for Production of Documents filed October 16, 1989.


Avram Weisberger
Administrative Law Judge
(703) 756-6210

Distribution:

Glenn M. Loos, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Eugene P. Schmittgens, Jr., Esq., Michael A. Kafoury, Esq., Eastern Associated Coal Corporation, P. O. Box 373, St. Louis, MO 63166 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6220

October 30, 1989

| | | |
|------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 89-69-M |
| Petitioner | : | A.C. No. 34-01287-05507 |
| v. | : | |
| | : | Haskell County Pit & Plant |
| HASKELL COUNTY GRAVEL | : | |
| CO., INC., | : | |
| Respondent | : | |

ORDER DENYING MOTION TO APPROVE SETTLEMENT

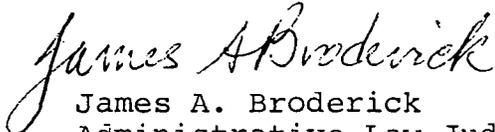
On October 30, 1989, the Secretary filed a settlement agreement of the parties to this proceeding and a motion to approve the settlement agreement. The violations were originally assessed at \$10,000, and the parties propose to settle for \$5000.

Four citations were issued to Respondent on November 2 and 3, 1988, growing out of an investigation of a fatal accident occurring on November 1, 1988. According to the 107(a)/104(a) order/citation issued November 2, a front end loader crossed over a bumper block into a feeder hopper and over the crusher. It turned over and fell 14 feet to the ground below killing the loader operator.

The citations charged first that Respondent failed to maintain an adequate bumper block at the jaw crusher feeder hopper where trucks and front end loaders dumped. This violation was assessed at \$5000. Second, Respondent was cited for failure to equip the front end loader with roll over protection and a seat belt. This violation was assessed at \$3,000. The third citation charged Respondent with a defect in the airline on the loader which could materially reduce the efficiency of the service brakes. This violation was assessed at \$1000. Finally, Respondent was cited because the braking system on the front end loader was defective in that the front service brakes were inoperable. This citation was assessed at \$1000.

The motion states that penalties in the total amount of \$10,000 will have an adverse effect on the ability of Respondent to continue in business, but no factual justification for this conclusion is given in the motion. The motion states that each of the alleged violations was considered to be of very high gravity and caused by Respondent's negligence. Respondent is a small operator and has a favorable history of prior violations, but these facts were presumably considered in the original assessments. Based on the information provided with the motion, the settlement agreement, reducing the penalties by 50%, does not conform to the criteria in section 110(i) of the Act.

Therefore, the motion to approve the settlement agreement is DENIED.


James A. Broderick
Administrative Law Judge

Distribution:

Robert A. Fitz, Esq., U.S. Department of Labor, Office of the Solicitor, 525 Griffin Street, Suite 501, Dallas, TX 75202
(Certified Mail)

Jerry Dick, Esq., 6700 W. Western, Oklahoma City, OK 73139
(Certified Mail)

slk