OCTOBER 1991

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

OCTOBER 1991

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

Peabody Coal Company v. Secretary of Labor, MSHA, Docket No. KENT 91-179-R, KENT 91-185-R. (Judge Melick, August 30, 1991)

Secretary of Labor, MSHA v. U.S. Steel Mining Company, Docket No. WEVA 91-73. (Judge Koutras, September 16, 1991)

Secretary of Labor, MSHA v. LJ's Coal Corporation, Docket No. VA 90-7. (Judge Weisberger, September 18, 1991)

The following list of miners filed for review of the decision of Chief Judge Merlin issued on September 4 and 5, 1991. Review was granted on October 15.

Larry Flynn, SE 91-538-R
Donald Case, WEVA 91-1614-R
Everette Ballard, WEVA 91-1385-R
Benny Johnson, KENT 91-934-R thru 955-R
Brent Roberts, KENT 91-896-R
Paul Cotton, KENT 91-897-R
Steve Little, KENT 91-898-R
Sydney Pie, KENT 91-992-R
Robert Bennett, LAKE 91-478-R
Sharell Clark, WEVA 91-1331-R
James Matics, WEVA 91-1332-R
Robert Persinger, WEVA 91-1333-R
Jimmy Hayworth, WEVA 91-1525-R
Reggie Philyaw, WEVA 91-1926-R
James Jack, LAKE 91-503-R thru 529-R
John S. Biby, LAKE 91-530-R thru 605-R
Kimmie Noah, SE 91-544-R thru 655-R
Sandra Eastham, WEVA 91-1414-R thru 1435-R
Kevin Tustin, WEVA 91-1436-R thru 1493-R
Daniel Serge, WEVA 91-1386-R, WEVA 91-1494-R thru 1509-R
Steven Perkins, WEVA 91-1510-R thru 1524-R

There were no cases filed where review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 90-285-R
UTAH POWER & LIGHT COMPANY, MINING DIVISION	:	

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This review proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act" or "Act"). It involves the validity of a withdrawal order issued by the Secretary of Labor to Utah Power & Light Company, Mining Division ("UP&L"), alleging that the limited visibility of operators of EIMCO 915 diesel scoops ("scoops") created an imminent danger. The imminent danger withdrawal order was issued by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") under section 107(a) of the Mine Act, 30 U.S.C. § 817(a), at UP&L's Cottonwood Mine. [1] The withdrawal order did not charge UP&L with violation of any of the safety standards promulgated by the Secretary and no citations or orders were issued under section 104 of the Act, 30 U.S.C. § 814, in conjunction with the section 107(a) withdrawal order.

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[1] Section 107(a) of the Mine Act provides, in pertinent part:

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

30 U.S.C. § 817(a).

Following an expedited evidentiary hearing, Commission Administrative Law Judge Michael A. Lasher affirmed the section 107(a) withdrawal order. Utah Power and Light Co., 12 FMSHRC 1706 (August 1990)(ALJ). The Commission granted UP&L's Petition for Discretionary Review challenging the judge's determination that an imminent danger existed. For the reasons that follow, we reverse the judge's decision.

I.
Factual and Procedural Background

UP&L operates the Cottonwood Mine in Emery County, Utah. UP&L uses the scoops at issue in the main haulageways to haul material into and out of the mine and to move equipment around in the mine. The scoops[2] weigh about 20 tons each and are about 30 feet long, eight feet wide and six feet high. They travel at an average speed of five miles per hour with a top speed of seven miles per hour. When loaded with heavy material, such as gravel, they travel as slowly as one to two miles per hour. Tr. 251. The two scoops were purchased in 1985 and have been in almost continuous use, three shifts a day, since that time. Tr. 152-53. The operator's cab on each scoop is located on one side of the scoop rather than in the center, and the operator sits sideways facing the opposite side of the scoop. Since their introduction into the mine, the scoops have been involved in about 15 accidents, none of which resulted in a lost time injury to a miner or required a report to be filed with MSHA under 30 C.F.R. Part 50 (reporting of accidents, injuries and illnesses). As discussed further below, UP&L does not dispute that scoop operators cannot directly see all areas around the scoop due to blind spots on the side of the scoop opposite the operators cab (the "offside").

A. Events preceding the issuance of the order

On April 9, 1990, a parked Isuzu pickup truck ("pickup") used by Nick Manning was struck by a scoop. The pickup was parked in a haulage entry and was unoccupied at the time of the collision. On May 13, 1990, Steven Thornton, President of the UMWA local, wrote to Randy Tatton, UP&L's safety director for the mine, concerning safety problems in the haulageways. The letter summarized the safety concerns of heavy equipment operators and suggested several improvements. Exh. A-6. UP&L responded with a letter dated May 16, 1990, that set forth changes being made to resolve the union's safety concerns. Exh. A-5. These changes included, for example, installing quartz halogen lights on the scoops, realigning the fenders on the scoops to improve visibility, and improving haulage operating procedures. On May 20, 1990, MSHA received a request for an inspection under section 103(g) of the Act.[3] The

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[2] Although UP&L uses two scoops at the mine, which are essentially the same, the MSHA inspector issued the order of withdrawal based on his examination of one of the scoops.

[3] Section 103(g) of the Mine Act provides, in pertinent part:

> Whenever a representative of the miners has reasonable grounds to believe that a violation of a

section 103(g) complaint alleged that visibility limitations on the scoops created an imminent danger.

On May 22, 1990, MSHA Inspector Fred Marietti was sent to investigate the complaint. Inspector Marietti determined that safe operation of the scoops depended upon the adoption of safe working procedures in the haulageways. He noted that traffic rules needed to be followed and other precautions needed to be taken to operate the scoops safety. He concluded by stating that "[a]t the time of this investigation, the problems addressed have been implemented or are being worked on." Exh. A-7. He issued no citations, withdrawal orders or safeguards.

B. Order of withdrawal

Subsequently, MSHA Inspector Jerry Lemon was instructed by the MSHA District Manager to take a "second look" into the complaint. Tr. 29. Inspector Lemon inspected the mine on July 12, 1990, and issued the section 107(a) order of withdrawal that is the subject of this proceeding, requiring UP&L to withdraw both scoops from the mine. The order states that "[s]afe operation of the EIMCO 915 diesel scoop ... could not be done in that ... serious vis[i]bility problems existed..." Exh. G-1.

Inspector Lemon performed his inspection in two parts. First, he asked UP&L for permission to examine a scoop on the surface, where he performed a number of visibility tests. In one test a miner was placed four feet from the side of the scoop opposite the operator's cab and was asked to walk parallel to the scoop towards the radiator end of the scoop. Exh. G-1; 12 FMSHRC at 1714. During this test, the scoop operator could not see this miner for a distance of approximately 24 feet as he walked parallel to the scoop. Id.

The inspector also performed a number of tests underground. In one test, the scoop was parked in an offside turning position (as if making a left turn into a crosscut) and a pickup located in the crosscut was backed away

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> mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title.

30 U.S.C. § 813(g).

from the scoop. Exh. G-1; 12 FMSHRC at 1715. The operator could not see the pickup during this test but could see the glare of the pickup's lights on the mine roof. Id. After performing these tests, Inspector Lemon issued the order of withdrawal later that day. The following day the inspector modified the order to describe accidents that the inspector believed were caused by the visibility limitations of the scoops and to correct a portion of the original order. Exh. G-1.

UP&L contested the order and an expedited hearing was held on July 19, 1990. On September 7, 1990, after the judge's decision was issued, the order was terminated when certain modifications were made to the scoops.

In concluding that the visibility limitations associated with the scoops presented an imminent danger, the judge relied on the Commission's decision in Rochester & Pittsburgh Coal Company, 11 FMSHRC 2159 (November 1989). The judge first concluded that an "emergency" situation is not a prerequisite to the existence of an imminent danger. 12 FMSHRC at 1722. Based on his reading of Rochester & Pittsburgh, the judge then evaluated the potential risk of the scoops causing serious physical harm at any time. Id. The judge credited Inspector Lemon's testimony that a miner could be killed or seriously injured if the condition was allowed to continue. 12 FMSHRC 1722-23. After rejecting the arguments made by UP&L, the judge held that he could "find no basis for concluding that Inspector Lemon abused his discretion or authority in the issuance of an imminent danger withdrawal order in this matter." 12 FMSHRC at 1725. The judge then stated:

> It is concluded that the conditions observed by the Inspector and described in the record could reasonably have been expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed, and that the use of the [scoops] with the severe visibility limitations described herein above created a significant potential of causing serious physical harm at any time.

Id.

II.

Disposition of Issues

The issue in this case is whether the visibility limitations of the scoops created an imminent danger requiring their immediate removal from service. UP&L disputes that the danger presented by the visibility limitations of the scoops was imminent at the time the order of withdrawal was issued and argues that the alleged hazard was not so serious or imminent that immediate withdrawal of miners was required. [4] We hold that the Secretary

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[4] UP&L also argues that Inspector Lemon's alleged hesitation and delay in issuing the imminent danger order supports its view that the order is not valid. The judge rejected UP&L's argument. 12 FMSHRC at 1723-25. We agree with the judge that "[f]orcing a hasty decision may not always be consistent with either

failed to prove that the visibility limitation presented a danger that was imminent.

A. Requirement of imminence

The word "imminent" is defined as "ready to take place: near at hand: impending...: hanging threateningly over one's head: menacingly near." Webster's Third New International Dictionary (Unabridged) at 1130 (1986). The language of the Act and its legislative history make clear that Congress intended that there must be some degree of imminence to support a section 107(a) order.

The term "imminent danger" is defined in section 3(j) of the Act to mean "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). This definition was not changed from the definition contained in the Coal Mine Health and Safety Act of 1969 30 U.S.C. § 801 et seq. (1976)(amended 1977)(the "Coal Act"). The Senate Report for the Coal Act states that an imminent danger is present when "the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any formal proceeding or notice." S. Rep. No. 411, 91st Cong., 1st Sess 89 (1969) reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess. Part 1 Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 215 (1975)("Coal Act Legis. Hist.") It further states that the "seriousness of the situation demands such immediate action" because "[d]elays, even of a few minutes, may be critical or disastrous." The Conference Report for the Coal Act states that imminent danger orders are concerned with "any condition or practice...which may lead to sudden death or injury before the danger can be abated." Coal Act Legis. Hist. at 1599 (emphasis added). Finally, the Senate Report for the Mine Act states that imminent danger orders deal with "situations where there is an immediate danger of death or serious physical harm." [5] S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978)("Mine Act Legis. Hist.")(emphasis added). Thus, the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners.

The role of section 107(a) orders in the statutory scheme of enforcement

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sound mine safety enforcement or justice." 12 FMSHRC at 1725. In any event, Inspector Lemon reasonably believed that the scoops were out of service during the time he was deciding what action to take.

[5] Several courts have rejected the arguments of mine operators that imminent dangers orders can be issued only for conditions that create an immediate danger of death or serious injury. See, e.g. Old Ben Coal Corp. v. IBMA, 523 F. 2d 25 at 32-33 (7th Cir. 1975). Nevertheless, the Senate Report makes clear that imminence is required.

is based on a requirement of imminence. Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Mine Act or the Secretary's regulations. This is an extraordinary power that is available only when the "seriousness of the situation demands such immediate action." Coal Act Legis. Hist. at 215. As a consequence, an inspector does not have the authority to issue a section 107(a) order in situations where the danger does not necessitate the immediate removal of miners. Thus, the inspector must determine whether the hazardous condition presents a danger of death or serious injury that is imminent. Without considering the "percentage of probability that an accident will happen," the inspector must determine whether the condition presents an impending threat to life and limb. Mine Act Legis. Hist. at 626. Only by limiting section 107(a) withdrawal orders to such impending threats does the imminent danger provision assume its proper function under the Mine Act.

If the imminent danger provisions of the Act are interpreted to include any hazard that has the potential to cause a serious accident at some future time, the distinction is lost between a hazard that creates an imminent danger and a violative condition that "is of such nature as could significantly and substantially contribute to the cause and effect" of a mine safety hazard. Section 104(d)(1); 30 U.S.C. § 814(d)(1). A violation is of a significant and substantial ("S&S") nature if "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 Company, 3 FMSHRC 822, 825 (April 1981). In that case, the Commission held that to be of an S&S nature, a cited condition "need not be so grave as to constitute an imminent danger." 3 FMSHRC at 828.

In Rochester & Pittsburgh, the Commission referenced Congress's intention that the focus should be on an examination of the "potential of the risk to cause serious physical harm at any time." 11 FMSHRC at 2164. The judge appeared to base his decision on his interpretation of the phrase "at any time." The Commission used the phrase "potential of the risk to cause injury" to make clear that the percentage of probability of an injury is not the focus of the inquiry. It appears that Judge Lasher interpreted the phrase "at any time" to mean "at any time in the future," thereby eliminating any requirement that the danger be imminent or impending. The Commission used the phrase "at any time" in the sense of "at any moment." Where an injury is likely to occur at any moment, and an abatement period, even of a brief duration, would expose miners to risk of death or serious injury, the immediate withdrawal of miners is required.

To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. An inspector, albeit acting in good faith, abuses his discretion in the sense of making a decision that is not in accordance with law when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to

miners.[6]

B. Analysis of the record

A review of the record as a whole demonstrates that the Secretary failed to prove that the visibility limitation of the scoops presented a danger that was imminent.

1. Visibility measurements

UP&L does not dispute the results of the visibility tests, but contends that the tests do not demonstrate the presence of an imminent danger. Substantial evidence supports the judge's finding that, during the surface test, the scoop operator could not see a miner who was walking parallel to and four feet from the side of the scoop opposite the operator's cab, for a distance of approximately 24 feet. 12 FMSHRC at 1714. Substantial evidence also supports the judge's finding that, during an underground test, while the scoop was parked in an off-side turning position, the operator of the scoop could not see a pickup as it backed away from the scoop. 12 FMSHRC at 1715.

The judge relied on these tests, along with the history of prior accidents, in concluding that an imminent danger existed. While he noted that UP&L's operating practices and procedures were designed to address the hazard associated with the scoop's visibility limitations, he concluded that they "did not change the testing and measuring results." 12 FMSHRC at 1719. UP&L argues that because these tests did not take actual mining conditions or practices into account, the tests were incapable of proving that the scoops presented an imminent danger. UP&L contends that no imminent danger existed because scoop operators could identify the presence of miners and other vehicles during actual mining operations and could mitigate the danger through the use of safe operating procedures.

The tests performed by the inspector do not, by themselves, establish the existence of an imminent danger because they did not take into account actual working conditions. For example, the underground test described above did not duplicate actual operating conditions. The scoop was stationary during the entire test and was parked so that the blind spot was in the

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[6] Abuse of discretion may be broadly defined to include errors of law. See generally, Butz v. Glover Livestock Commission Co., 411 U.S. 182, 185-86 (1973); NL Industries, Inc. v. Department of Transportation, 901 F.2d 141, 144 (D.C. Cir. 1990); U.S. v. U.S. Currency, in the Amount of $103,387.27, 863 F.2d 555, 561 (7th Cir. 1988); Bothyo v. Moyer, 772 F.2d 353, 355 (7th Cir. 1985)("abuse of discretion may be found only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law"); Bosma v. United States Dept. of Agriculture, 754 F.2d 804, 810 (9th Cir. 1984)(the choice of sanction is largely within an agency's discretion; the reviewing court may overturn it only if it is unwarranted in law or unjustified in fact); Taylor v. United States Parole Commission, 734 F.2d 1152, 1155 (6th Cir. 1984)("'Abuse of discretion' is a phrase which sounds worse than it really is."); Beck v. Wings Field, 122 F.2d 114 (3rd Cir. 1941).

direction of the crosscut. Exh. G-5. As a result, the pickup was not visible for a considerable distance. In an operating situation, however, the scoop would complete the turn and the crosscut would become visible because it would no longer be in the operator's blind spot. Tr. 189. An analysis of the operating procedures used by scoop operators is therefore required.

2. Haulage operating procedures

UP&L's argument is that at the time the order was issued, no imminent danger existed because physical conditions and operating procedures in the haulageways greatly reduced any visibility problems presented by the scoops. In particular, UP&L relies on the fact that it strengthened its haulage safety procedures in response to the UMWA's letter of May 13, 1990 and Inspector Marietti's investigation of May 22. See Exhs. A-5, A-6, A-7 & A-8. It is undisputed that UP&L made a number of improvements in the operating procedures prior to Inspector Lemon's July 12, 1990 inspection. In May and June 1990, UP&L: (1) installed brighter lighting systems on scoops (quartz halogen lights), (2) modified the fenders, cab and engine cowling on scoops to improve visibility, (3) required pickups and other small vehicles to use other roadways where feasible, (4) installed strobe lights on pickups to be used when parked,[7] (5) required all pickups and other small vehicles to yield right-of-way to scoops by pulling into crosscuts whenever a scoop approaches, (6) required all vehicles, especially pickups, to maintain a safe rate of speed, (7) required the flashing of lights and the sounding of horns at all corners and intersections, (8) required that pickups be parked in crosscuts and prohibited the parking of vehicles in the haulage entries, and (9) eliminated the visibility limitations at one of the most severe dips in the mine by cutting back the roof. Exh. A-8. These procedures were communicated to all affected miners. Tr. 172-73.

Scoop operators, aware of the scoop's visibility limitations, testified about the operating procedures they use to reduce the risk of collisions and accidents. Tr. 235-36. They stated that the improved haulage procedures introduced in May and June 1990 reduced the risk of accidents and collisions. For example, pickups had frequently been parked in the haulage entries or at the intersections of crosscuts and entries where they could not be seen. As a result, several collisions had occurred. Under the procedures in effect at the time of the withdrawal order, parking in such locations was prohibited and, more importantly, strobe lights or flashers were used on the pickups. Tr. 125-26. The operators testified that, as a result of the strobe light policy, they are now aware of the presence of such vehicles and can stop the scoop, get out and move the pickup if it is in the way. Tr. 126; 131-33; 232-33; 243; 279. They may not always be able to see the parked pickup from the

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[7] At the time of Lemon's inspection, strobe lights had been installed on about 75% of pickups. Pickup drivers were required to use yellow flashers until strobe lights were installed. The strobe lights, similar to the blue lights on the top of police cars, are permanently mounted on top of the pickups' cabs. The yellow flashers, similar to yellow flashers used on road construction barricades, are placed on top of the cab by the driver using the attached suction cup.

cab of the scoop, but the flashing light alerts them to its presence so that they can take preventive action. Id. They stated that they can detect a moving pickup from the glare of its lights. Tr. 231-32; 272.

Scoop operators testified further that the new halogen lights made it easier to see and be seen. Tr. 230-32, 285-87. Scoop operators flash their lights and blow their air horns when making turns and at dips in the entry. Tr. 236-37. They also testified that pedestrians are rarely in the haulageways where scoops travel and that such pedestrians are easily spotted because of the cap light and reflective tape on their hard hat, and the reflective tape on their clothing. Tr. 252-56; 273; 280; 285-86; 296; 309. The scoop operators acknowledged that visibility from a scoop is limited, but testified that that visibility is often restricted when operating mining equipment. They are of the opinion that the scoops can be operated without incident as long as safe operating procedures are followed. Tr. 135-36; 228-29; 231; 243-44; 274-75; 279-80.

Inspector Lemon was aware of UP&L's work rules but he did not believe that those work rules solved the visibility problems. Tr. 385. He went on to state that "[t]hey were adding safety precautions to take, but they were not solving this [visibility] problem." Tr. 386. Judge Lasher also recognized that these changes had been made, but concluded that these changes "did not change the testing and measuring results ... nor the opinions of various credible witnesses ... as to the visibility problem." 12 FMSHRC at 1719. In essence, both the inspector and the judge determined that no matter what work rules were adopted or how strictly they were enforced, the visibility problems of the scoops created an imminent danger.

The inspector testified that he was concerned with three situations in which there might be an injury-producing accident: (1) when the scoop is making an offside turn, (2) when a dip in the haulageway limits the scoop operator's line of vision, and (3) when pedestrians are present. The issue in this case is not whether the visibility limitations of the scoops presented some degree of hazard in these situations but whether the scoops created an imminent danger.

As noted above, when a scoop operator makes an offside turn, his visibility is reduced during that turn. The scoop operators testified that they were aware of this limitation and regularly take steps to reduce the hazard. Tr. 230-31. Some of these steps were included in the new operating procedures. Operators regularly slow down, sound their air horns and flash their lights when turning. Tr. 188; 236-37. They look for light reflections on the roof and ribs to detect the presence of vehicles. Tr. 231-32. Finally, if they are uncertain as to what may be in the area, they stop, get out of the scoop and look around before turning. Tr. 121-22; 231.

When scoop operators and operators of pickups and other small vehicles approach a dip in the mine, their visibility is reduced because they cannot see as far down the entry. UP&L instituted a number of changes to reduce this hazard. First, it eliminated the line of sight problem at one of the biggest dips by cutting back the roof in the dip. Second, operators of vehicles sound their horns and flash their lights before entering a dip. Tr. 236. Third,

pickups and other small vehicles use alternate roadways rather than the main haulageway when traveling in the mine. Tr. 161-62. Finally, scoops are given the right of way and pickups are to pull into a crosscut whenever they see an approaching scoop. Tr. 163; 230; 253. The brighter halogen lights, which are unique to scoops, alert pickup drivers that a scoop is approaching. While these practices do not eliminate the hazard, they reduce significantly the danger associated with dips.

There has never been a scoop accident in this mine involving pedestrians. There are very few pedestrians in the main haulageways in which the scoops travel. Tr. 253; 280. Pedestrians are most likely to be encountered when repairs are being made along the haulageway and at the places where the scoops are delivering supplies. Tr. 253; 280. Flashing lights are set up in areas where repair work is being done. Tr. 280. Miners also wear cap lights and reflective tape on their hard hats and on their clothing. Tr. 252, 284; 286. At locations where supplies are to be delivered, a miner on the ground often directs the scoop operator or, if no one is available, the scoop operator gets out and looks around before proceeding into the area. Tr. 122; 245-46. The scoop operators testified that they have no difficulty detecting the presence of pedestrians because of the reflective tape and cap lights. Tr. 124; 252; 255; 273; 288-90. A scoop operator testified that miners on foot generally make their presence known to machine operators by flashing their cap lights at the operators. Tr. 308-09.

3. Accident history

It is not disputed that there have been approximately 15 accidents involving the scoops in the five years that they have been used. None of these accidents resulted in an occupational injury as that term is defined in 30 C.F.R. § 50.2(e); [8] one accident required the application of first aid, 30 C.F.R. § 50.2(g). All of these accidents occurred before UP&L changed its haulage operating procedures. Eight of the 14 accidents discussed in the record involved scoops hitting unoccupied pickups that were parked in a haulageway, a crosscut, or in an intersection. The scoop operators testified that they cannot always see a pickup when it is parked offside the scoop but that they can determine its location when it is equipped with a strobe light and can move it if necessary. Tr. 126; 131-33; 232-33; 243; 279.

Judge Lasher emphasized in his decision an accident involving Robert Phelps and Larry Hunsaker. 12 FMSHRC at 1716. Scoop operator Phelps was traveling along the main haulageway with a load of gravel in his bucket. Tr. 100. He had the bucket in a raised position in front of him. Hunsaker was driving a pickup in the opposite direction. Tr. 100-01; 111. They collided head on at a dip in the haulageway. Id. Phelps said he could not see very well over the raised, fully loaded bucket. Tr. 101. The bucket hit the cab of the pickup. Tr. 102; 111. Hunsaker did not see the scoop because

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[8] 30 C.F.R. § 50.2(e) defines "occupational injury" as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury...."

he was reaching down for his radio. Tr. 103. He testified that he could not see the lights of the scoop because they were behind the bucket. Tr. 113; 116. Phelps stated that he saw the pickup before he entered the dip. Tr. 104. Hunsaker testified that if Phelps had been driving the scoop so that the bucket was at the back and the radiator was at the front, Hunsaker would "have had a lot better chance of seeing the [scoop's] headlights." Tr. 118.

The record discloses that at least four factors contributed to this accident: the dip in the roadway; the fact that Phelps was driving the scoop with a loaded bucket in a raised position in front of him, blocking his vision and obscuring the scoop's lights; the fact that Hunsaker reached down for his radio; and the speed of the pickup. Phelps was unable to see the pickup because the position of his bucket restricted his vision. Two scoop operators testified that they drive the scoop with the radiator in the front and the bucket in the back when the bucket is loaded with bulky materials. Tr. 235; 298. The measures UP&L has taken since this accident, as discussed above, are aimed at eliminating the risk of similar accidents.

The evidence demonstrates that haulage operating procedures used at the time the imminent danger order was issued significantly reduced the risk of accidents. Scoop operators testified that most of these accidents would not have occurred if these procedures had been in place. See, e.g., Tr. 237-238. The history of accidents provides little support for the imminent danger finding.

III.

Conclusions

The evidence of record fails to establish that the scoops presented a danger to miners that posed an imminent or impending threat to their safety. The withdrawal of miners under section 107(a) is authorized only where the danger is imminent. Thus, we conclude that MSHA issued a withdrawal order under section 107(a) under circumstances where an imminent threat to the safety and health of miners was not present. [9]

We reaffirm our holding in Rochester & Pittsburgh that an inspector must have considerable discretion in determining whether an imminent danger exists. This is because an inspector must act immediately to eliminate conditions that create an imminent danger. We also reiterate here that the hazardous condition or practice creating an imminent danger need not be restricted to a threat that is in the nature of an emergency, and that section 107(a) withdrawal orders are "not limited to just disastrous type accidents." Coal

[9] We note that the inspector in this case was not limited to the provisions of section 107(a) in addressing hazards presented by the scoops. For example, he might have utilized the safeguard provision of section 314(b) of the Act, 30 U.S.C. § 874(b), which was designed to address mine-specific transportation hazards, to tailor a notice to provide safeguard. If the operator failed to comply with the safeguard, he could have issued a citation or order under section 104 with an appropriate abatement time.

Act Legis. Hist. at 1599.

For the foregoing reasons, we reverse the judge's decision holding that the two EIMCO scoops presented an imminent danger to miners and we vacate the section 107(a) order of withdrawal. [10]

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

Distribution:

Thomas C. Means, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, DC 20004

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Mary Lu Jordan, Esq.
United Mine Workers of America
900 15th Street, N.W.
Washington, DC 20005

Administrative Law Judge Michael A. Lasher, Jr.
Federal Mine Safety & Health Review Commission
1244 Speer Blvd., Room 280
Denver, CO 80204

[10] Chairman Ford did not participate in the consideration or disposition of this case.

ADMINISTRATIVE LAW JUDGE DECISIONS

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

OCT 7 1991

STEVEN BROWN for UNITED STEELWORKERS OF AMERICA, District 38, Subdistrict 7, Applicants	:	COMPENSATION PROCEEDING
	:	Docket No. WEST 91-196-CM
v.	:	Sunshine Mine
SUNSHINE MINING COMPANY, Respondent	:	

DECISION

Before: Judge Morris

Complainants seek relief under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").

The complaint states as follows:

> Contract miners at the Kellogg operation are paid on an agreed to incentive basis in relation to the work done. This rate usually exceeds the hourly rate of a grade 7 miner. In completing the required MSHA safety training, these miners are deprived of the opportunity to earn contract rate. The employer insists that they are only required to pay these miners the days pay rate of grade 7 for time spent in MSHA safety training. The Union does not agree. Since the normal rate of pay for the miners in question is based on their contract, they should receive compensation at that rate when training.

In support of their position Complainants submitted (Exhibit B), an employment agreement between the United Steel Workers of America and Sunshine.

Complainants state that "Gypo" miners at Sunshine are paid by a complicated incentive system. Basically the system is based on the amount of work done by the individual miner. "Gypo miners are disciplined by the Company for failure to meet what the Company considers the reasonable incentive production level."

The crux of Complainants' case is that the normal rate of pay for a "Gypo" miner is his incentive rate of pay. Therefore, the miners should be paid at the incentive rate when undergoing mandatory health and safety training.

In addition to the captioned case, Complainants have also filed a grievance under the terms of their employment contract with Sunshine.

In support of their position, Complainants further rely on Section 115(b) [1] of the Mine Act as well as 30 C.F.R. Part 48, [2] relating to the training and retraining of miners.

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1 The cited portion of the Act reads as follows:

> "(b) Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

2 Complainants rely on the following regulations:

30 C.F.R. § 48.10

> Training shall be conducted during normal working hours; miners attending such training shall receive the rate of pay as provided in 48.2(d) (Definition of normal working hours) of this subpart A.

30 C.F.R. § 48.2(d)

> (d) "Normal working hours" means a period of time during which a miner is otherwise scheduled to work. This definition does not preclude scheduling training classes on the sixth or seventh working day if such a work schedule has been established for a sufficient period of time to be accepted as the operator's common practice. Miners shall be paid at a rate of pay which shall correspond to the rate of pay they would have received had they been performing their normal work tasks.

Sunshine asserts miners are paid their normal rate of pay for mandatory health and safety training. The operator claims no incentive pay is earned or due for time spent in such training.

Specifically, Sunshine claims there is only one rate of pay which is the rate set by the labor management agreement. The agreement states as follows:

ARTICLE IV

Classification and Rates of Pay

> 4.1 All job classifications of work coming under the jurisdiction of the Union and the rates of pay applicable thereto shall be set forth in schedule "A" which is attached hereto and by reference made a part hereof. The said schedule "A" shall set forth all classifications coming under the terms of this Agreement and explains other forms of compensation such as profit sharing and common stock distribution. (emphasis added).
>
> Schedule "A" to the agreement states:
>
> The "wage rates" for classifications of employees represented by the United Steelworkers of America at the Kellogg Operations will be the rates shown on the Wage Table. (emphasis added).

Sunshine further relies on the Grievance and Arbitration portion of collective bargaining agreement which provides as follows:

ARTICLE XV

Grievance and Arbitration

> Any question or dispute concerning compliance by the Company with, or interpretation or application of this Agreement, memoranda or supplemental agreements concerning wages, hours and other terms and conditions of employment, shall be treated as a claimed grievance in the sequence outlined as grievance procedure until settled. Should an agreed settlement be lacking

> at the final stage of the grievance procedure, said claimed grievance may then be referred by the grievant's representative to arbitration. The arbitrator's decisions made within the scope of the submission and authority of the arbitrator shall be final and binding on all parties.

Inasmuch as no issue of fact was involved, the Judge requested the parties to submit authorities in support of their positions. After review, the Judge indicated he would enter a decision in the matter.

Discussion

There are no MSHA enforcement documents involved in this case. Further, I am unable to find any portion of the Mine Act that vests jurisdiction in the Commission to determine the issues presented here.

Further, it appears the Union seems to have a determination of what constitutes the "normal rate of compensation" under the collective bargaining agreement.

The Union's claim is over "wages, hours and other terms and conditions of employment." Under those circumstances, the parties must honor the arbitration provisions. Such provisions will be enforced by the courts. Sams v. United Food & Commercial Workers Union 835 F.2d 848 (11th Cir. 1988); Hillard v. Dobelman, 774 F.2d 886 (8th Cir. 1985).

The Judge raised the issue of the Commission's jurisdiction and Complainants state they don't know how the issue arrived before the Commission. In particular, Complainants state they filed a complaint with the MSHA Field Office in Coeur d'Alene, Idaho.

Complainants position may be well taken. Section 48.32 outlines an appeals procedure from a decision by MSHA's District Manager.

Since the Mine Act fails to vest jurisdiction in the Commission, this case is **DISMISSED.**

John J. Morris
Administrative Law Judge

Distribution:

Mr. Steve Brown, Staff Representative, United Steelworkers of America, Post Office Box 726, Kellogg, ID 83837 (Certified Mail)

Fred M. Gibler, Esq., EVANS, KEANE, KOONTZ, BOYD, SIMKO & RIPLEY, Post Office Box 659, Kellogg, ID 83837 (Certified Mail)

sh

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

OCT 7 1991

BECO CONSTRUCTION CO., INC., Contestant	:	EQUAL ACCESS TO JUSTICE ACT
	:	Docket No. EAJ 91-1
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Morris

This case is an application under the Equal Access Justice Act, 5 U.S.C. § 504 (1988) as implemented by Commission Rules at 29 C.F.R. Part 2704.

This matter arises from Beco Construction Co., Inc. Docket Nos. WEST 91-25-RM and WEST 91-26-RM.

Prior to a hearing, the parties reached an amicable settlement.

In view of the settlement between the parties, the caption case should be and is hereby DISMISSED.

John J. Morris
Administrative Law Judge

Distribution:

Merrily Munther, Esq., PENLAND & MUNTHER, Jefferson Place, Post Office Box 199, Boise, Idaho 83701 (Certified Mail)

Rochelle Kleinberg, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, Washington 98101 (Certified Mail)

sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 10 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 90-146-M A. C. No. 41-02976-05526-A
v.	:	Helotes Mine
CARROLL FRANK BLUEMEL, EMPLOYED BY SOUTH TEXAS AGGREGATES, INCORPORATED, Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Arlington, VA, for Petitioner;
Mr. Carl Strating, San Antonio, TX, for Respondent.

Before: Judge Fauver

This is a petition for a civil penalty under § 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., charging Carroll Frank Bluemel, as an agent of a corporate mine operator, with knowingly authorizing, ordering or carrying out a violation by the mine operator. [1]

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

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[1] Section 110(c) of the Act provides:

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

and further findings in the Discussion below:

FINDINGS OF FACT

1. South Texas Aggregates, Inc., a corporation, operates an open pit mine, known as Helotes Mine, where it produces limestone for use and sales substantially affecting interstate commerce.

December, 1988, Fire

2. On December 14, 1988, Gary Tucker drove a 275 B Michigan front loader to the South Pit to load haulage trucks. On one load, as he started to hoist the bucket, he noticed a bright glow reflecting in his windshield and heard a swooshing sound. He turned and saw flames erupting from the engine compartment. He opened the left door of the operator's compartment, but flames immediately enveloped the doorway. He shut the door and tried the right door. There were flames on the right side, too, but he pushed the door open and started to exit. As he was trying to get out, the door swung back and struck him, but he grabbed the handrail, pushed himself out and jumped about 7 1/2 feet to the rocky floor of the quarry. He broke both ankles, and lay near the flaming vehicle, unable to escape farther. Someone saw his predicament, and helped him get away from the fire and a possible fuel tank explosion.

3. The fire damage was so extensive that the MSHA accident investigators could not determine the precise cause of the fire, "except that there was an unplanned release of hydraulic oil in the engine compartment due to damaged and leaking hydraulic lines" (Exhibit G-8).

4. On December 20, 1988, MSHA issued Citation No. 3278307, charging South Texas Aggregates, Inc., with a violation of 30 C.F.R. § 56.14100(c), [2] as follows:

> Excessive hydraulic [sic] leaks due to chaffing [sic] high pressure, (2500 psi) lines in the engine compartment of the 275B Michigan front loader and the subsequent rupture of one of these lines caused the unit to explode in

---

[2] Section 56.14100(c) provides:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

> flames on December 14th, 1988. Flames rapidly engulfed the operator's cab due in part to missing protective panels. The operator jumped 7 1/2 feed to escape the flames breaking both ankles. The hydraulic [sic] leaks had been reported repeatedly on pre-shift inspection reports. This is an unwarrantable failure.

5. The citation was served on Respondent, Frank Bluemel, as mine superintendent.

Inspection on January 5, 1989

6. MSHA Inspector James S. Smiser inspected the mine on January 5, 1989, and found safety defects in a Hough 560 front-end loader, which was operating in the pit. He issued § 104(d)(1) Order No. 3063887, charging a violation of 30 C.F.R. § 56.1400(c). The order, as modified, alleges the following condition:

> Defects on the Hough 560 front end loader were not corrected prior to continued operation which were hazardous to persons. The equipment was taken out of service for repairs to be completed but put back into service prior to completion. Defects are: Leaks in Hydraulic system, leaks in bucket cylinder-right side, leak in steering cylinder, hydraulic tank leaking, oil filter leaking, fuel system leak, brake fluid storage tank both left and right rear wheel cylinders leaking, inspection plates missing, both left and right hoist cylinder pressure hoses rubbed threw [sic] to inside metal covering, fuel/stop linkage disabled which required operator to dismount loader, walk to opposite side of machine and manually cut off engine.

7. Shortly after the fire on December 14, 1988, Respondent Bluemel had taken the Hough 560 out of service to have extensive repairs made, including the brakes, back-up alarm, fuel-linkage stopping mechanism, and hydraulic lines.

8. As of January 5, 1989, some of the repairs had been made, but repair work was far from complete. On that date, pit foreman Billy Tucker told Respondent Bluemel that the "shovel" operating in the pit had broken down, and asked for permission to use the Hough 560 loader while the shovel was being repaired. Bluemel asked Tucker whether the brakes and back-up alarm had been repaired, and Tucker said, "Yes." Bluemel authorized him to use the Hough loader. At that time, the loader was still in the repair shop, and Bluemel knew or had reason to know that the fuel-linkage stopping

mechanism was not working and the machine had a number of hydraulic leaks.

9. Before he authorized Tucker to use the Hough 560 loader, Bluemel did not ask the mechanic or anyone else to troubleshoot the machine to be sure that necessary repairs had been made on the fuel-linkage stopping mechanism and the hydraulic system.

10. Citation No. 3278307 and Order No. 3063887 were the bases of § 110(c) charges against corporate officers in Secretary of Labor v. Strating and Coleman, 13 FMSHRC 425,430(1991). Judge Melick dismissed the charges for insufficient proof.

DISCUSSION WITH FURTHER FINDINGS

The Commission has defined the term "knowingly," as used in § 110(c) of the Act, as follows:

> "Knowingly", as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.... We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. [Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8, 16 (1981), 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U. S. 928 (1983).]

Inspector Smiser testified that he alleged oil "leaks" in Order No. 3063887, rather than hazardous "accumulations," because he observed fresh pools of oil in locations where oil would not be expected unless there was a leak. On this basis, he testified that the oil he observed on the bucket cylinder, the steering cylinder, the oil filter, and the rear wheel cylinders was due to leaks and not to possible spillage in filling tanks. He acknowledged that the oil he observed on the hydraulic oil tank and the petroleum fluid he observed on the brake fluid storage tank may have been due to spillage in filling the tanks. He observed diesel fuel dripping from the rear of the equipment, but acknowledged that, since a source of a fuel leak could not be found after issuance of his

order, the dripping fuel may have been due to normal overflow after filling the fuel tank.

Oil leaks presented two main hazards. First, they indicated a risk of leaks that could turn into sprays of misting oil which could be ignited into a fire. Secondly, they created accumulations sufficient to propagate a fire or noxious smoke. Substantial accumulations of petroleum fluids, e. g., lubrication oil, hydraulic oil, brake fluid and transmission fluid, sufficient to propagate a fire or noxious smoke are hazardous conditions within the meaning of § 56.14100(c).

I credit the inspector's testimony, and find that there were a number of hazardous hydraulic leaks that required repair before the machine could be operated under § 56.14100(c).

The defect in the fuel-linkage stopping mechanism was itself a safety hazard that required repair before the machine could be operated under § 56.14100(c). This device, known as a "kill switch," is in the operator's compartment and is used to stop the engine in an emergency. This could save the operator's life or prevent crippling burns or injury from fire or smoke inhalation. For example, if a hydraulic line ruptured, and ignited into fire, unless the "kill switch" was used, the engine would keep pumping hydraulic oil to feed the fire, and the external fan would keep blowing across the engine, to intensify the fire into a likely inferno threatening the operator's life, including the possibility of a fuel tank explosion. Bluemel knew that the "kill switch" was defective when he authorized Tucker to use the Hough loader.

I find that Respondent knowingly authorized the violation of § 56.14100(c) alleged in Order No. 3063887.

The violation was due to aggravated conduct beyond ordinary negligence because Bluemel had been put on notice of the danger of hydraulic leaks and the importance of an operable "kill switch." It was therefore an unwarrantable violation. The violation presented a "significant and substantial" risk of igniting or propagating a hydraulic oil fire with serious injury to the equipment operator. It was therefore an S&S violation within the meaning of § 104(d)(1) of the Act.

Considering the civil penalty assessments previously assessed against the corporation ($700) and the pit foreman, Billy Tucker ($400), for their part in the violation alleged in Order No. 3063887, and the criteria for a civil penalty in § 110(i) of the Act, I find that a civil penalty of $500 is appropriate for the violation found in this case.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent, Carroll Frank Bluemel, knowingly authorized the violation of 30 C.F.R. § 56.14100(c) alleged in Order No. 3063887.

ORDER

Respondent, Carroll Frank Bluemel, shall pay to the Secretary of Labor a civil penalty of $500 within 30 days of the date of this decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mr. Carl Strating, 8926 Wexford, San Antonio, Texas 78217 (Certified Mail)

/fas

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 10 1991

GATLIFF COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 89-242-R Citation No. 3178703; 8/3/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 89-243-R Citation No. 3178704; 8/3/89
	:	Docket No. KENT 89-244-R Citation No. 3178706; 8/3/89
	:	Docket No. KENT 89-245-R Citation No. 3178707; 8/3/89
	:	Docket No. KENT 89-246-R Citation No. 3178708; 8/3/89
	:	Docket No. KENT 89-247-R Citation No. 3178709; 8/3/89
	:	Docket No. KENT 89-248-R Citation No. 3178710; 8/3/89
	:	Docket No. KENT 89-249-R Citation No. 3178711; 8/3/89
	:	Docket No. KENT 89-250-R Citation No. 3178712; 8/3/89
	:	Docket No. KENT 89-251-R Citation No. 3178713; 8/3/89
	:	Docket No. KENT 89-252-R Citation No. 3178714; 8/3/89
	:	Gatliff No. 1 Mine Mine ID No. 15-04322

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 90-100
	:	A.C. No. 15-04322-30530
v.	:	
	:	Docket No. KENT 90-215
GATLIFF COAL COMPANY, INC., Respondent	:	A.C. No. 15-04322-30531
	:	
	:	Gatliff No. 1 Mine

DECISION

Before: Judge Melick

These cases are before me upon remand by the Commission on September 25, 1991, following a determination that a violation of the standard at 30 C.F.R. § 77.1701 was indeed committed by the Gatliff Coal Company, Inc., (Gatliff). In particular, the matter has been remanded for resolution of "any remaining issues, including whether the violation resulted from the operator's unwarrantable failure, whether it was significant and substantial, and for the assessment of an appropriate civil penalty."

Order No. 3178705, issued pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charges as follows: [1]/

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[1]/ Section 104(d)(1) of the Act provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such violation has been abated."

Emergency communications were not available at the Colonel Hollow Job Number 75. Communications with the services that provide emergency medical assistance and transportation were discontinued when the company vehicle with the company radio left the mine property. On 8/1/89, following a serious accident which occurred at approximately 3:20 a.m., employees were required to travel approximately 2-1/2 miles to a public telephone to summons an ambulance.

The cited standard, 30 C.F.R. § 77.1701, provides as follows:

> (a) Each operator of a surface coal mine shall establish and maintain a communication system from the mine to the nearest point of medical assistance for use in an emergency.
>
> (b) The emergency communication system required to be maintained under paragraph (a) of this section may be established by telephone or radio transmission or by any other means of prompt communication to any facility (for example, the local sheriff, the State highway patrol, or local hospital) which has available the means of communication with the person or persons providing emergency medical assistance or transportation in accordance with the provisions of paragraph (a) of this section.

The facts in this case were summarized by the Commission in its decision as follows:

> The facts of this case are largely undisputed. Gatliff Coal Company, Inc. ("Gatliff') owns and operates a surface strip coal mine located in Whitley County, Kentucky known as Gatliff No. 1, Job 75. At about 3:20 a.m. on August 1, 1989 a truck driven by Gatliff employee Boyd Fuson went off an elevated roadway on the mine property and tumbled down a 120 foot embankment. In response to the accident, two Gatliff employees, Donald Hopkins and Richard Gibbs, drove from the mine property to the nearest telephone, which was about two miles away, in order to summon help. There was no telephone at Job 75. Fuson died as a consequence of the accident.
>
> In the investigation that followed, MSHA inspector James Payne issued a 104(d)(1) order charging a violation of 30 C.F.R. § 77.1701, because there was no company radio at Job 75 at the time of the accident. According to James Meadors, Gatliff's day shift foreman at the time of the accident, each mine site typically

has three company radios. The company radios are two-way 40 watt radios with sufficient range to reach the Gatliff mine office and are located in the foreman's truck, the mechanic's truck and the lube truck. On the night of the accident, however, there was no company radio on site at Job 75. Meadors testified that he had taken the foreman's truck off the Job 75 site, that the lube truck was at another Gatliff mine site "roughly three miles away, maybe a little more," and that the mechanic's truck had been taken home. At the time of the accident, there was, however, a citizen band radio ("CB radio" or "CB") belonging to the day shift operator of the bulldozer being operated by Mark Hopkins.

John Blankenship, Gatliff's safety director, testified about the operator's emergency notification procedures. He acknowledged that under normal circumstances those procedures consisted of communication via one of the two-way radios back to the mine office, where there was a telephone. Blankenship's signed statement of Gatliff's company policy regarding emergency communications was read into the record:

> . . . Gatliff Coal Company, Inc. has a standard operating procedures (sic) of the company's radio communication to be provided on the job in case of emergency. This provides for the job to contact base and base then calls for assistance, base being the guard shack. And this has always been our standard operating procedure.

Thus, Gatliff conceded that its standard emergency communication procedure involved using 40 watt two-way radios and that there were no such two-way radios at Job 75 on the night of the accident. However, before the administrative law judge Gatliff took the position that, although no 40 watt two-way radio was present at Job 75 at the time of the accident, CB radios were present, which would have enabled the miners to link up with a different, but nearby, Gatliff mine site (Job 74) that did have such a two-way radio on the lube truck. Foreman Meadors testified that miners routinely communicated by CB radios between the two sites.

Safety Director Blankenship stated that the miners at Job 75 could have reached the lube truck at Job 74 by using the CB, but he acknowledged that the miners were never told to use the CBs. In response to

questions from the court, Blankenship testified as follows:

> Q. Well, how do you get in touch with the lube truck if you're 3 miles away?
>
> A. With the CB.
>
> Q. Do you understand why these people did not use it?
>
> A. No, I don't.
>
> Q. Were they told to use the CBs?
>
> A. They were never per se told to use the CBs except, you know, they would have radio communication there and someone would get on the company radio and call. Now, how they got ahold of one another to use the company radio to call the guard that was pretty much left to their own discretion.

Blankenship testified that, since the accident, miners have been told to communicate for help the "fastest possible way" and that they have been told to use CBs. Prior to the accident, however, the miners had not been specifically told to use a CB radio or to walk to the mechanic's truck. Blankenship assumed that in an emergency the miners would find the quickest way to get help.

Mark Hopkins testified that, although there was a CB radio on the bulldozer he was operating the night of the accident, it never entered his mine to use it to summon help. ALJ decision at 13 FMSHRC 373. The CBs were used by the miners to give directions, to keep each other company, to communicate with other job sites, and to use if there was something wrong. When asked why he did not use the CB to reach another Gatliff job site the night of the accident, Hopkins stated he was "just scared." He testified further stated [sic] that he was trained, in the event of an emergency, to use either the foreman's truck or the lube truck to make a call for help.

Inspector Payne testified that a CB radio could be used for emergency communication under the standard if there were someone monitoring it on the other end. He noted that the CBs were owned by the employees and that

during his investigation no one told him that there was an alternate emergency communication system.

In his decision the judge noted the undisputed testimony of Inspector Payne that the only radio at Job 75 at the time of the accident was the CB in Hopkins' bulldozer and that this radio had insufficient range to reach either the mine office or medical or police assistance. 13 FMSHRC at 373. The judge further found that the CB at Job 75 could have reached the lube truck at Job 74 and that the lube truck had a radio sufficiently powerful to reach the mine office. On this basis, the judge concluded that the Secretary had failed to prove a violation because the CB radio on the bulldozer at Job 75 was capable of reaching the lube truck radio, which in turn could communicate with the mine office, where a telephone was located. 13 FMSHRC at 374.

In evaluating whether a violation is "significant and substantial" the Commission in Mathies Coal Co., 6 FMSHRC 1 (1984), explained as follows:

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

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

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

The question of whether any particular violation is significant and substantial must be based on the particular facts

surrounding the violation. Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

The third element of the formula requires that the Secretary establish "a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573 (1984); Monterey Coal Co., 7 FMSHRC 996 (1985). The time frame for determining if a reasonable likelihood exists includes the time that a violative condition existed or would have existed if normal mining operations continued. Rushton Mining Co., 11 FMSHRC 1432 (1989). In this case the hazard which the instant standard is designed to protect against is the aggravation of a pre-existing injury or of death due to the lack of prompt medical attention. While this case does not therefore fit neatly within the cited definitions analogies can appropriately be made.

In any event, I conclude that the violation herein was neither "significant and substantial" nor serious. Ordinarily, according to the undisputed evidence, Gatliff maintains as its standard operating procedures, three 40-watt two way radios at each mine site sufficient to call the mine office where there is a telephone. It is further undisputed that these communication systems would meet the cited regulatory requirements. On the night at issue however, for reasons not fully explained, none of the three vehicles having such radios was at this particular location at the mine. It may reasonably be inferred, therefore, that the absence of such a radio was an aberrant situation and would not ordinarily have existed under normal mining operations.

It is also undisputed that alternative means of communication was available at the time at issue from the mine to the nearest point of medical assistance in the event of an emergency. This system was provided by CB radio and two-way radio on the lube truck to the mine office. Under all the circumstances, I do not find that the violation was "significant and substantial" or of high gravity.

In addition, in light of the evidence that ordinarily three two-way radios are present at the mine and that the absence of a radio on the night at issue was anything other than the result of inattention or inadvertence, and that the miners were not left without a means of emergency radio communication, I cannot find that the violation was the result of "unwarrantable failure," or more than simple negligence. Emery Mining Corporation, 9 FMSHRC 1997 (1987) and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (1987). The order must accordingly be modified to a citation

under section 104(a) of the Act. In addition, considering all of the criteria under section 110(i) of the Act, I find that a civil penalty of $50 is appropriate.

ORDER

Order No. 3178705 is modified to a citation under section 104(a) of the Act. Gatliff Coal Company, Inc., is ordered to pay a civil penalty of $50 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Robert I. Cusick, Esq., David B. Wicker, Esq., Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, KY 40202 (Certified Mail)

Jerald S. Feingold, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 400, Arlington, VA 22203 (Certified Mail)

/fb

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

OCT 11 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-201-M A.C. No. 04-05077-05501
v.	:	Docket No. WEST 90-261-M A.C. No. 04-05077-05502
JVAL INCORPORATED, Respondent	:	Stewart Mine

DECISION

Appearances: Susan Gillett, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner; Charles H. Schultz, Superintendent, Pro Se for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") charges Respondent JVAL, Incorporated ("JVAL") with violating safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (the "Act").

A hearing on the merits was held in Sacramento, California, on June 18, 1991. The Secretary of Labor filed a post-trial brief.

STIPULATION

At the commencement of the hearing, the parties stipulated as follows:

1. The Stewart Mine located at 10323 Adam Avenue, Grass Valley, California, is a mine within the meaning and interpretation of the Federal Mine Safety and Health Review Commission at 30 U.S.C. Section 802(h).

2. The Mine is subject to the coverage of the act within the meaning and interpretation of the Act at 30 U.S.C. 802(b).

3. The size of the respondent operator is approximately 488 man-hours per year.

4. There has not been previous history of a violation at the Stewart Mine.

Citation No. 3464304

In this citation, the Secretary charges JVAL with violating 30 C.F.R. § 57.3360. [1]

The citation reads as follows:

> There were no timbered sets, nor sets of any kind at the portal "collar" of the underground drift to keep loose or thawing ground from releasing cracked ground or the cemented placer rock, or anything to keep the back from falling in when it (the face of the drift), is being blasted. The face of the drift being blasted & worked was less than 150 feet from the outside surface ground of the portal of the mine.

FRANK B. SEALE, an MSHA inspector experienced in mining, conducted a courtesy inspection (CAV) of the Stewart Mine on February 7-8, 1990. Mr. Schultz, Superintendent, and others were present. The inspector gave Mr. Schultz a copy of the CAV non-penalty violations. (Tr. 12).

The 8-foot by 10-foot portal with a Roman arch lacked structural support. The inspector believed support was necessary as the ground was thawing. The inspector also saw a small rock tumble out of the side of the hill and almost strike miner Lee.

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[1] The cited regulation reads as follows:

§ 57.3360 Ground support use.

Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

The entry went 135 feet into the mountain without structural support. There could be a total and complete collapse. (Tr. 15). The condition was pointed out to Mr. Schultz. On March 6-7, 1990, at a regular MSHA inspection, the inspector did not see any change in the condition of the portal but they had dug an additional 12 or 14 feet into the shaft. Usually 7 or 8 sets would have been installed for 50 feet or so. (Tr. 16-18). Miner Jed Lee was present and they were blasting at the bottom of the drift (Tr. 17) at the time the moist earth was drying out. (Tr. 19). If a collapse of the ground occurred it was reasonably likely that a fatality would occur.

During the penalty inspection in March, Mr. Seale was accompanied by Messrs. Schultz, Lee and Morey. (Tr. 21). The inspector again pointed out the need for timbered sets. In the inspector's opinion, Mr. Schultz is very conscientious and had been an MSHA inspector. (Tr. 54). The company had two miners at the site. (Tr. 38). The inspector agrees that Mr. Schultz had ordered steel sets before the penalty inspection but they had not arrived. (Tr. 35). The tunnel, to a depth of 135 to 150 feet, had been there since the 1800s. JVAL had advanced it 12 feet. When the mine was shut down the total advance was 36 feet. (Tr. 37).

CHARLES H. SCHULTZ, a consulting engineer and experienced in mining and tunneling, testified for JVAL. (Tr. 45).

When the inspector arrived in February, the mining had progressed about 50 feet underground. (Tr. 46). All the CAV notices were correct and Mr. Schultz intended to comply. (Tr. 46-48).

After the CAV inspection, Mr. Schultz attempted to secure the necessary Douglas fir from three lumber companies. (Tr. 48). He believes timbered sets were necessary. (Tr. 57). All the companies indicated they would be cutting Douglas fir in a week or two. But in view of the delay in securing the timber, he ordered two steel sets. On March 6, employee Dwayne Davis bought some timber and steel sets. From March 6, the miners worked on the portal until completion. (Tr. 49; Ex. R-1, R-2, R-3, R-4).

Discussion

The evidence is uncontroverted that ground support was needed due to the thawing conditions in the area. No such ground support was provided.

The Secretary further asserts the lack of ground support in the portal and tunnel was a significant and substantial violation. I agree. It has been noted that mine roofs are inherently dangerous and even a good roof can fall without warning. Consolidated Coal Co., 6 FMSHRC 3A, 37-38; Halfway, Inc. 6 FMSHRC 8, 13. The above cited cases involved underground coal mines and the requirements of 30 C.F.R. 75.200 but the reasoning is equally applicable here.

The testimony is clear that the roof could fall at any time. Further, if it fell a fatality could occur.

Citation No. 3464304 should be affirmed and a civil penalty should be assessed.

Citation No. 3464305

In this citation, the Secretary charges Respondent with violating 30 C.F.R. § 57.11058.[2]

The citation reads as follows:

> A mine, check-in check-out system had not been provided, so a person checking the shift attendance could tell whether a given miner was underground or out on the surface.

At the time of the CAV visit, Inspector Seale concluded there was no check-in, check-out tags, called "brass tags". Such a system is used by potential rescuers of any individual who may be in the mine. (Tr. 22-24). Such systems are usually located at the portal of the mine. The inspector told Mr. Schultz that he needed to develop such a system.

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[2] The cited regulation reads as follows:

§ 57.11058 Check-in, check-out system.

Each operator of an underground mine shall establish a check-in and check-out system which shall provide an accurate record of persons in the mine. These records shall be kept on the surface in a place chosen to minimize the danger of destruction by fire or other hazards. Every person underground shall carry a positive means of being identified.

On his penalty inspection the following month, the inspector did not see any kind of a check-in, check-out system. Messrs. Schultz, P.D. Morey, President, and Joel Lee were there. (Tr. 24). When the lack of brass tags was pointed out to Mr. Schultz, he said he was working on it. Mr. Schultz didn't tell the inspector where the system could be found. The failure to have such a system presents a danger to the men underground. (Tr. 25).

At the regular MSHA inspection, the inspector agrees he didn't know if he discussed the check-in, check-out system with Mr. Schultz. (Tr. 38-43). The citations issued in March came by mail a week later. (Tr. 40). When he sees a violation, it is the inspector's normal practice to point it out to the operator. (Tr. 43). Witness Schultz indicated the check-in, check-out board was known by the two miners to be located in the pickup truck (Tr. 47) but he and the inspector did not discuss the check-in, check-out system during the March inspection. (Tr. 47). Mr. Schultz believed he was in compliance and the inspector didn't know the check-out board was in the pickup and he automatically wrote the citations. (Tr. 48). According to Mr. Schultz it was very convenient to keep the check-out system in the truck because there are no buildings in the area. After the portal was rebuilt, the check-in, check-out system was hung at the portal. (Tr. 66).

Discussion

A credibility issue arises concerning this situation. I credit Mr. Schultz's testimony that the check-in, check-out system was available at the time of the penalty inspection in March. The inspector admits he didn't discuss the system with Mr. Schultz at the time of the penalty inspection. Mr. Schultz, who was described as a conscientious superintendent, should have been aware of the system and its location on the premises.

Citation No. 3464305 should be vacated.

Citation No. 3464306

In this citation, the Secretary charges JVAL with violating 30 C.F.R. § 57.15001. [3]

The citation reads as follows:

> Neither a stretcher nor blankets or first-aid supplies of any kind were available at the mine site for use in the event of a mine emergency.

At the CAV inspection, the inspector did not see a stretcher or any first-aid material. (Tr. 26). Such materials are usually kept in a small nearby office or an old truck or in something immobile. (Tr. 26). The materials shouldn't be in a location where they could be removed at the end of the shift. They had one or two trucks present during the CAV. There were no small buildings. A trailer was up the road about a mile. (Tr. 27). There were no first-aid materials around the mine. (Tr. 28).

In March, at the penalty inspection, the inspector did not see any first-aid supplies in the truck. Messrs. Schultz, Morey and Lee were also present. (Tr. 28). The company representatives stated the materials would be provided. During the termination of the citation on March 7th, they stated they were in a nearby trailer. The trailer must have been in the watchman's house up the road. The inspector would not have written the citation if the material had been there on March 6. (Tr. 29). When he returned for the March inspection, he remembered discussing the first-aid materials. (Tr 40).

Witness Schultz indicated the inspector didn't leave the citation with JVAL. Before they were received he had produced a stretcher and blankets. The first-aid kit itself was always in

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[3] The cited regulation reads as follows:

§ 57.15001 First aid materials.

> Adequate first-aid materials, including stretchers and blankets shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

the pickup truck. (Tr. 46). At the end of the shift, the truck goes "home" but it is returned the next day. (Tr. 47). Witness Schultz testified that during the March inspection he and the inspector did not discuss the first-aid supplies. Miner Davis brought the stretcher and blanket in the pickup truck. (Tr. 47). Mr. Schultz believes he was in compliance because the inspector didn't know a stretcher and blanket were in the pickup and he automatically wrote the citation. (Tr. 48). Mr. Schultz did not tell the inspector that the first-aid materials were in the truck. (Tr. 65).

Discussion

A credibility issue arises in connection with this citation. I credit Inspector Seale's testimony to the effect that he would not have written this citation if the first-aid supplies had been present. Mr. Schultz agrees he did not advise the inspector that the materials were in the truck. In view of the previous CAV notice he had received, one would anticipate Mr. Schultz would discuss this matter with the inspector.

Citation No. 3464306 should be affirmed and a penalty assessed.

CIVIL PENALTIES

Section 110(i) of the Act, 30 U.S.C. 820(i) mandates the criteria for assessing civil penalties.

JVAL does not have an adverse prior history (Stipulation). The proposed penalties appear appropriate since the operator's size is small, only 488 manhours per year (Stipulation). The lack of ground support at the portal was open and obvious. Further, the lack of first-aid supplies should have been known to JVAL personnel. These factors establish the company's negligence was moderate.

In the absence of any facts to the contrary, I find that the payment of the proposed penalties will not cause JVAL to discontinue its business. Buffalo Mining Co., 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974). The gravity for the lack of ground support at the portal is high but the gravity due to lack of first-aid supplies is moderate. JVAL demonstrated good faith in abating the violative condition. On balance, I deem that the penalties affirmed in the order of this decision are appropriate.

For the foregoing reasons, I enter the following:

ORDER

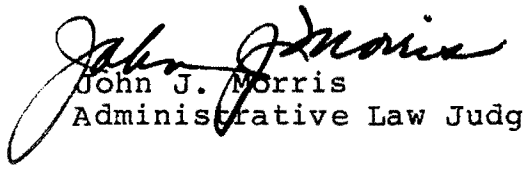
In WEST 90-261:

1. Citation No. 3464304 is **AFFIRMED** and a penalty of $50 is **ASSESSED.**

2. Citation No. 3464305 and all penalties therefor are **VACATED.**

In WEST 90-201:

3. Citation No. 3464306 is **AFFIRMED** and a penalty of $40 is **ASSESSED.**



John J. Morris
Administrative Law Judge

Distribution:

Susan Gillett, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105 (Certified Mail)

Mr. Charles H. Schultz, Superintendent, JVAL, INC., 10323 Adam Avenue, Grass Valley, CA 95945 (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 16 1991

AIR PRODUCTS AND CHEMICALS, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 91-1488-R
	:	Citation No. 3486528; 9/5/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Cambria Co-Generation Facility
	:	Mine ID 36-99999

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for the Contestant; Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Melick

These expedited contest proceedings were filed by Air Products and Chemicals, Inc., (Air Products), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Mine Act," to challenge a citation issued by the Secretary of Labor for Air Products' refusal to permit an inspector of the Federal Mine Safety and Health Administration (MSHA), to enter its Cambria Cogeneration Facility (Cambria CoGen) in alleged violation of section 103(a) of the Mine Act. [1]/ The preliminary issues before me are whether those areas of the Cambria CoGen facility at issue in this case are a "coal mine" within the meaning of the Mine Act and therefore subject to MSHA jurisdiction, and if so, whether MSHA has exercised its authority in a manner sufficient to displace enforcement authority by the Occupational Safety and Health

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[1] Section 103(a) of the Mine Act provides in part that "[f]or the purpose of making any inspection or investigation under this Act, the Secretary [of Labor] or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine."

Administration (OSHA) under section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(1) (OSHAct). [2]/ For the reasons that follow, I find that while the cited areas of the Cambria CoGen facility herein come within Mine Act jurisdiction, MSHA has failed to exercise its authority in a manner sufficient to displace OSHA enforcement authority and that, accordingly, the citation at bar must be vacated.

Cambria CoGen is an electrical generating facility utilizing two combustion boilers with bituminous coal refuse as its primary energy source to power a steam turbine-generator. Its primary business is to produce and sell electricity to the Pennsylvania Electric Company but it also produces steam for a local nursing home.

The fuel is obtained from bituminous coal refuse piles located at a mine owned by RNS Services, Inc. (RNS), and supplied by RNS. The coal refuse is delivered by truck to the Cambria CoGen facility and dumped into a hopper at the refuse receiving building. The product then passes through a grizzly which screens out large objects, including rock, slate, timbers, roof bolts, and large pieces of coal. The product is then transported to a refuse storage building and then conveyed as needed to the Bradford breaker building. It is there fed onto a rotating Bradford drum breaker which further screens and sizes the material for easier handling and to prevent damage to other equipment in the facility.

The remaining minus-6 inch material then proceeds onto the C-1 belt to a refuse storage dome. A stacker distributes the piles and a reclaim machine places coal on another conveyor as needed. The C-2 belt then transports coal to the crusher building where screens separate minus-2 inch material. That material is then further crushed to one-quarter inch to zero-inch size with a roll crusher. This product is then conveyed to the boiler building storage facility, where it is stored until conveyed to the boilers by way of the boiler plant feed belt. The Secretary acknowledges that MSHA jurisdiction would not extend beyond the point where the coal product is dumped onto the plant feed belt.

In addition to refuse coal, run-of-mine coal is used in the boilers to maintain a proper mix of combustibility. This coal is delivered by truck and transported by belt to the run-of-mine coal storage tepee. That material then proceeds to the crusher

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[2]/ Section 4(b)(1) of the OSHAct provides in part that "[n]othing 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."

building where it is screened down to one-quarter inch by zero-inch size. The material is then fed to the boiler building but stored separate and apart from the refuse coal for later mixing as needed for the boilers. The general areas over which MSHA claims inspection jurisdiction and authority are depicted in Government Exhibit No. 2 attached hereto as Appendix A, in the lower portion of the schematic marked with the letter "M".

The evidence is in essential respects not disputed. On August 2, 1989, shortly after construction of the facility began, officials of Cambria CoGen met with MSHA subdistrict manager Timothy Thompson to discuss the plant's coal handling systems for determination of Mine Act authority. It was represented at these discussions that RNS would perform onsite processing of the coal refuse before delivering it to the Cambria CoGen facility and that upon arrival at the facility, the coal would only be customized by crushing and sizing to meet the one-quarter-inch size specification. Based on this information, Thompson concluded, and advised the Cogen representatives, that the operation would not come within MSHA inspection authority.

According to Thompson, MSHA later learned, upon examination of an RNS ground control plan, that RNS would in fact not be performing any onsite processing and that Cambria CoGen would be purchasing unprocessed coal refuse. That coal would then require additional processing at the Cambria CoGen facility and the addition of a Bradford breaker. Thompson thereupon changed his opinion and advised Cambria CoGen in an October 31, 1990, meeting that under these changed circumstances, MSHA would assume inspection authority.

Thompson testified that he was aware of the OSHA-MSHA Interagency Agreement [3]/ but concluded that it did not need to be invoked because he felt there was no interagency conflict. In this regard, just before the October 31, 1990, meeting with Cambria CoGen, he called Terry Lane, an OSHA regional administrator, and explained the basis for his belief regarding MSHA jurisdiction at the coal preparation and cleaning facility. According to Thompson, Lane stated that he would not attend the meeting and in fact no one from OSHA showed up at that meeting. Thompson acknowledges that he has had no further contact with any OSHA official regarding this matter. He further indicated that Lane never stated whether he agreed or disagreed with his position regarding MSHA's assertion of inspection authority at the facility.

According to the undisputed testimony of Cambria CoGen plant manager Mark Reed, the Cambria CoGen plant was built with OSHA specifications in mind and the training of employees was

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[3]/ 44 Fed. Reg. 22,827 (1979) and 48 Fed. Reg. 7521 (1983).

performed with OSHA training regulations in mind. In addition, according to the undisputed testimony of James Stango, project manager for the Cambria CoGen facility, OSHA conducted a 3 day inspection in August, 1990, with three to five-person-teams of inspectors and issued citations in areas over which MSHA now claims inspection authority, including the Bradford breaker building, the tepee building, and the BMR building.

Plant manager Reed testified that he expects OSHA will return for further inspections of the entire Cambria CoGen facility. Reed and Stango both noted a number of potential conflicts between MSHA and OSHA including training requirements, guardrail and berm requirements and fire extinguisher examination requirements. They noted that additional conflicts were also likely since some of their subcontractors perform maintenance work in both the areas over which MSHA now maintains it has inspection authority and in areas of the plant MSHA has not yet claimed such authority.

It was also noted that at least one conveyor belt performs two functions -- to remove ash from the boilers and to carry reject coal refuse material from the crushers. According to supervisory MSHA coal mine inspector James Biesinger, when the conveyors bring ash from the boiler plant, they would not be under MSHA inspection authority. However, when the same conveyor carries reject material from the coal processing presumably it would be under MSHA inspection authority. It is further noted that even as of the date of hearing, MSHA was not certain as to the full extent of the processes or areas over which it intends to assume inspection authority. The apparent arbitrary delineation of particular parts of roadways, over which MSHA now claims inspection authority (See Government Exhibit No. 2, Appendix A), also highlights the uncertain and ambiguous boundaries between the claimed MSHA inspection areas and those presumably left to OSHA.

Section 3(h) of the Mine Act provides in part as follows:

> (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 subchapters [titles] II, III, and IV of this chapter [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.

Section 3(h) of the Mine Act thus defines a "coal or other mine" and "coal mine" to include the "work of preparing the coal." Section 3(i) of the Mine Act defines the "work of preparing the coal" as "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."

Within this framework, it is clear that in at least a portion of the Cambria CoGen facility cited by MSHA in this case, coal refuse is broken, crushed, sized, and/or cleaned in preparation for consumption in the generating facility. These activities are all within the scope of "work of preparing coal" within the meaning of section 3(i) of the Mine Act. It is also clear that the area at issue includes "structures," "equipment," and "machinery" that are "used in or to be used in" the "work of preparing the coal." It is therefore clear that the areas cited in this case were indeed subject to Mine Act jurisdiction. In this regard it is also noted that Air Products acknowledges that the nature of the facility herein is essentially indistinguishable from the nature of the facility found by the Commission in Westwood Energy Properties, 11 FMSHRC 2408 (1989), to be within Mine Act jurisdiction.

The problem in this case arises, however, from the failure of the Secretary to have clearly designated whether OSHA or MSHA should exercise regulatory authority over the working conditions herein. In Westwood Energy Properties the Commission discussed the issue as follows:

> As in Pennsylvania Electric, [11 FMSHRC 1875 (1989)] a brief overview of the statutory interplay between the Mine Act and the OSHAct is necessary to a proper analysis of the issue. The OSHAct is the most broadly applicable statute regulating the safety and health aspects of the working conditions of American

workers. The OSHAct, like the Mine Act, is enforced by the Secretary of Labor. Although broadly applicable, section 4(b)(1) of the OSHAct 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). Therefore, OSHA standards pertaining to the working conditions at the culm bank would be applicable unless another federal agency, with a proper grant of jurisdiction over such working conditions, exercises its authority in a manner displacing OSHA coverage. See, e.g., Southern Pacific Transportation Co. v. Usery, 539 F.2d 386, 389 (5th Cir. 1976), cert. denied, 434 U.S. 874, 98 S.Ct. 221, 54 L.Ed.2d 154 (1977); Southern Rv. 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).

It is undisputed in this case , however, that both OSHA and MSHA have asserted inspection authority at the cited facility. Indeed OSHA has cited violations of its regulations in the same areas over which MSHA also claims inspection authority, and there is no reason to believe OSHA will not return for further inspections in these areas. Moreover, neither the MSHA representatives nor the Secretary's counsel at hearing could provide assurances that OSHA would not continue its inspections in these areas.

The record also shows that there has been but one communication between MSHA and OSHA officials regarding the Cambria CoGen facility, and that conversation by telephone as reported at hearing was ambiguous and lacking in detail. Accordingly, there is no evidence that a clear delineation of OSHA/MSHA inspection authority has been made at the facility and it is likely under the circumstances that both OSHA and MSHA will continue to perform duplicative inspections over the same areas now claimed in this case by MSHA. Significantly, MSHA subdistrict manager Thompson has expressed the belief that there is no need in this case to utilize the OSHA-MSHA Interagency Agreement. This Agreement was promulgated in 1979 by the agencies to prescribe the appropriate interagency procedure for resolving general jurisdictional questions between the two agencies and provides in part as follows:

> 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.

44 Fed. Reg. 22827, 22828 (1979).

In sum, there is no evidence in this record that the MSHA inspection of the Air Products' facility "reflects a reasoned resolution of the jurisdictional question by the Secretary and her agencies" but rather the evidence suggests that the inspection "simply resulted from an ad hoc unilateral assertion of jurisdiction by MSHA." Westwood Energy, 11 FMSHRC at 2417. See also Pennsylvania Electric Company, 12 FMSHRC 1562 (1990), and 11 FMSHRC 1875 (1989). Under the circumstances, Citation No. 3486528 must be vacated.

ORDER

Citation No. 3486528 is vacated.

Gary Melick
Administrative Law Judge

Distribution:

R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, 58th Floor, USX Tower, 600 Grant Street, Pittsburgh, PA 15219 (Certified Mail)

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

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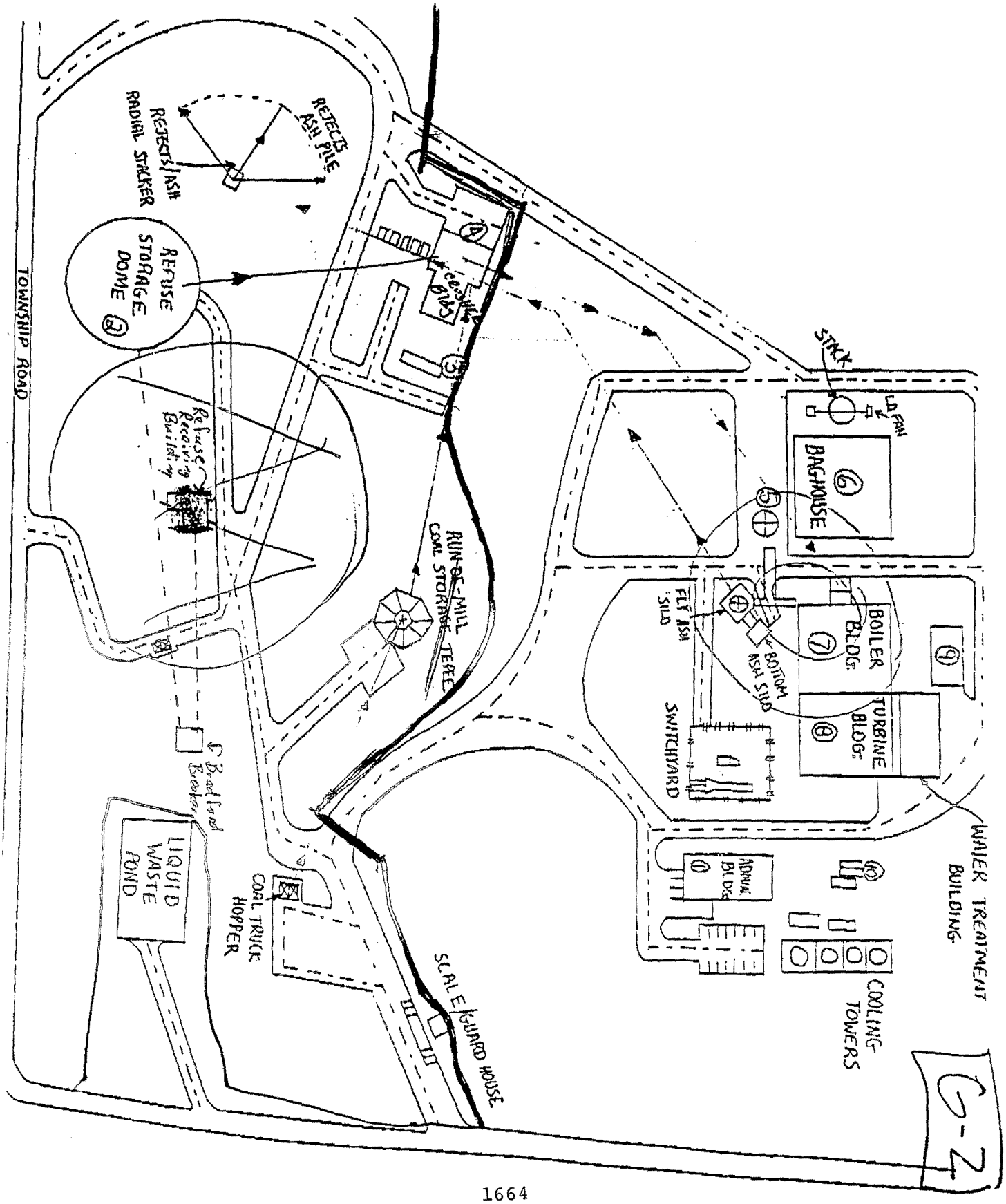
APPENDIX A


TOWNSHIP ROAD
REJECTS ASH PILE
REJECTS/ASH RADIAL STACKER
REFUSE STORAGE DOME ②
Refuse Receiving Building
RUN-OF-MILL COAL STORAGE TERE
Road Breaker
LIQUID WASTE POND
COAL TRUCK HOPPER
SCALE
GUARD HOUSE
STACK
I.D. FAN
⑥ BAGHOUSE
⑤
FLY ASH SILO
BOTTOM ASH SILO
BOILER BLDG. ⑦
⑨
TURBINE BLDG. ⑧
SWITCHYARD
ADMIN. BLDG. ①
WATER TREATMENT BUILDING
COOLING TOWERS
C-2

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 1991

WILLIE WILLIAMS, JR., Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 91-95-D
JIM WALTER RESOURCES, INC., Respondent	:	BARB CD 88-32

ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of discrimination filed by the complainant (Willie Williams, Jr.), against the respondent (JWR) pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. By letter dated January 25, 1991, and received by the Commission on January 29, 1991, Mr. Williams stated as follows:

> I recently received a determination letter from the Mine Safety and Health Administration (MSHA) concerning a discrimination complaint that I filed. MSHA has determined that no violation occurred and reference is made to the time delay in this case. At the time I was contacted by the MSHA Special Investigator, I was hospitalized with a stress related condition which was caused by my employment. I was never interviewed by the special investigator and to my knowledge my complaint was never investigated. To the best of my recollection, my complaint was filed in early 1988. I do not recall receiving a reply from MSHA in 1988.
>
> I had previously filed a number of complaints with MSHA involving my former employer Jim Walter Resources, Incorporated. I was discharged from employment numerous times because of my reporting unsafe conditions at the mine. I was injured while employed with Jim Walter Resources and I continue to suffer from that injury. I am requesting that you consider these conditions that I have raised and allow my case to be heard under the private provision of the law or if necessary an investigation be initiated to collect the necessary facts. If you desire that I provide medical

evidence to substantiate my condition, I can provide that evidence.

In an undated letter addressed to the Commission's Chief Judge Paul Merlin, and received on May 22, 1991, Mr. Williams stated as follows: "I feel that the company violated several rules under our contract and that they breached the contract in several ways".

A copy of an MSHA complaint form filed by Mr. Williams with MSHA's District 7 Field, Hueytown, Alabama, on May 10, 1988, reflects that he was employed by the respondent as a longwall helper at a salary of $14.41 an hour. The information on the form further reflects the date of the alleged "discriminatory action" as October 9, 1987, and the "persons responsible" as Personnel Director Steve Dickerson and Longwall Coordinator Trent Trachor.

In a handwritten statement signed by Mr. Williams on May 10, 1988, and attached to the complaint form, he stated that he was discharged from his job, and that "they discharged me because of the legal action that I have filed against the company and the union. I also feel that the company and union got together and arranged my discharge".

A copy of a June 30, 1988, letter addressed to Mr. Williams from MSHA's Chief, Office of Technical Compliance and Investigation, Arlington, Virginia, informed Mr. Williams that after a review of the information gathered during the investigation of his complaint, MSHA made a determination that JWR did not violate section 105(c) of the Act. The letter further advised Mr. Williams of his right to file a complaint on his own behalf with the Commission within 30 days. Mr. Williams did not pursue his complaint further until January 25, 1991, when he filed his instant complaint with the Commission.

JWR filed an answer to the complaint denying any discrimination, and as part of its answer moved for a dismissal of the complaint on the following grounds:

1. The Complaint should be dismissed for failure to state a claim upon which relief may be granted under Section 105(c) of the Mine Safety and Health Act.

2. The complaint is barred by the statute of limitations and by laches.

3. The complainant has failed to exhaust contractual remedies.

4. The complainant's claims are preempted under § 301 of the National Labor Relations Act.

5. The complaint should be dismissed in its entirety because it is frivolous and designed to harass the respondent.

6. The complainant has filed several other complaints under § 105(c) and all such claims have been dismissed in favor of the respondent.

In further support of its motion, JWR points out that the alleged act of discrimination appears to be a discharge which allegedly occurred on October 9, 1987, nearly four years ago, and that if the complainant had timely filed his complaint JWR would have been in a much better position to investigate and defend against the allegations made in the complaint. However, as a result of the untimely filing, JWR believes it has been prejudiced, and as an example, it cites the fact that Steve Dickerson, the personnel director who is named in the complaint, and who was responsible for enforcing company procedures, is no longer employed by JWR.

Discussion

It would appear that Mr. Williams wrote to the Secretary of Labor in July and September 1990, concerning his complaints against JWR. As a result of his letters, MSHA reviewed its files and conducted a personal interview with Mr. Williams at his home in October, 1990. Subsequently, by letter dated December 24, 1990, the Labor Department's Assistant Secretary for Mine Safety and Health, William J. Tattersall, advised Mr. Williams that based on MSHA's review of the matter, "the issues you have raised appear to be the same as those identified in the complaints you previously filed with MSHA under the miner discrimination provisions of the Federal Mine Safety and Health Act of 1977". With regard to the disposition of his prior complaints, Mr. Tattersall advised Mr. Williams as follows:

> Each of those complaints have previously been acted upon by MSHA. The last complaint, filed in May 1988, concerned your discharge from Jim Walter Resources. By letter dated June 30, 1988, MSHA responded advising you that your complaint had been investigated to the extent possible and that there was no violation of the Mine Act's discrimination provisions. Throughout the investigation, we found no facts to support a claim of discrimination under the Mine Act. During our most recent contacts with you, no additional information was provided. Accordingly, our previous finding of no discrimination remains unchanged.

> As you know, you have the right as a complainant to file a complaint on your own behalf with the Federal Mine Safety and Health Review Commission (Commission). However, as you were advised in our letter of June 30, 1988, this right must be exercised within 30 days of notification that MSHA has found no act of discrimination. While this filing period has clearly passed, you advised us in our meeting with you in October that you were either hospitalized or medically incapacitated, or your medical condition may have diminished your capability to fully participate in the exercise of your rights.
>
> If you believe that there is sufficient medical evidence to support your incapacity at that time, you might consider presenting this evidence and any other evidence of extenuating circumstances directly to the Commission, requesting that your complaint be accepted by them under Section 105(c)(3).

As a result of the Tattersall letter, Mr. Williams apparently obtained copies of his prior May 10, 1988, MSHA complaint, and MSHA's June 30, 1988, adverse determination letter through a Freedom of Information Act request made to MSHA's Arlington, Virginia office, and his Commission complaint of January 25, 1991, followed. In his complaint, Mr. Williams asserted that he did not recall receiving MSHA's June 30, 1988, determination letter, which states in part that his complaint was investigated "to the extent possible" without his cooperation. Mr. Williams further asserted that "at the time I was contacted by the special investigator, I was hospitalized with a stress related condition which was caused by my employment. I was never interviewed by the special investigator and to my knowledge my complaint was never investigated".

In view of Mr. Williams' assertions that he had no knowledge of the disposition of his May 10, 1988, complaint, I issued an Order to Show Cause on August 8, 1991, affording the parties an opportunity to submit information explaining the circumstances of that complaint, the timeliness of Mr. Williams' appeal to the Commission, and any documentation concerning any prior complaints. Based on the information filed by the parties in response to my order, it would appear that Mr. Williams filed the following prior complaints:

Case No. BARB-CD-82-11

This case concerned a complaint by Mr. Williams that his foreman, mine foreman, and others "have threatened me in a way that I feel they will try and knock me off". Mr. Williams stated that he was a belt repairman, and he alleged that he complained about the tying up of large cables with small wire, and working

under unguarded belts. He further alleged that "since this time I have been fired out of the mine", and that mine management tried to remove him from his job "because I complain about too many things".

By letter dated March 9, 1982, MSHA advised Mr. Williams that after investigation of his complaint and a review of the information gathered during the investigation, MSHA determined that a violation of section 105(c) of the Act did not occur. The letter also advised Mr. Williams of his right to further pursue this determination by filing a complaint on his own behalf with the Commission within 30 days. There is no information that Mr. Williams filed any further complaint with the Commission.

Case No. BARB-CD-82-39

This case concerned a complaint filed by Mr. Williams with MSHA on September 8, 1982. Mr. Williams had received a written reprimand on September 2, 1982, for violating a company rule by operating a track jeep at an unsafe rate of speed, and a copy of an accident report reflects that an employee was injured when the jeep collided with a manbus.

Mr. Williams characterized his complaint as a "section 105(G)" complaint, and he alleged that he was reprimanded because he had previously filed another "section 105(g)" complaint against the driver of the manbus involved in the accident (the driver was identified as a foreman). Mr. Williams further alleged that other union personnel had been involved in accidents with management personnel, but only he was singled out for a reprimand. He claimed disparate treatment because only he and not the manbus driver was reprimanded, and he also claimed that management "would like to get back" at him because of his prior "105(g)" complaint, and that the union did not come to his defense.

MSHA investigated the complaint, and by letter dated April 25, 1983, Mr. Williams was advised of MSHA's determination that a violation of section 105(c) had not occurred. The letter also advised Mr. Williams of his right to appeal that determination by filing a complaint with the Commission within 30 days. There is no information that Mr. Williams filed any complaint with the Commission.

Case No. BARB-CD-84-34

This case concerned a complaint filed by Mr. Williams with MSHA on July 9, 1984. Mr. Williams invoked his individual safety grievance rights by filing the complaint against the general mine foreman, his shift foreman, and two union co-workers who worked on his shift. Mr. Williams alleged that the two co-workers were trying to injure him on the job by engaging in unsafe acts, and

that one of them had cursed him and threatened to beat him up. He further alleged that his request to be transferred to another work area under a different foreman was denied, and that his foreman had threatened to fire him if he complained to the "safety men". He also alleged that the two co-workers engaged in horseplay, that they conspired to have him moved to another job, and otherwise threatened and harassed him without intervention by the foreman. Mr. Williams stated that he did not feel that he could continue to work under these conditions and he requested to be paid for all lost time while he was off work.

On July 25, 1984, Mr. Williams filed a regular union grievance "demanding that management make every effort to work me in my classification that I bidded on". The grievance was settled by the union and management after management agreed "to work the grievant in his bid classification to the extent that it is practicable to do so".

On August 6, 1984, Mr. Williams amended his July 9, 1984, MSHA complaint and he alleged that after working four years on the same job, management disqualified him from the job, cut his pay from Class 4 to Class 1, and placed him in jobs which were unsafe and hazardous. He claimed that his union contractual rights were violated.

In a letter dated August 30, 1984, from JWR to MSHA's special investigator, JWR supplied the investigator with a doctor's statement of August 8, 1984, reflecting that Mr. Williams was hospitalized under the care of Birmingham Psychiatry, P.A., on August 7, 1984. JWR also supplied the investigator with copies of the July 25, 1984, grievance reflecting a settlement of the dispute.

In a letter dated September 11, 1984, from JWR to MSHA's special investigator, JWR informed the special investigator that Mr. Williams was having problems working with other union co-workers on the belt crew and that on July 5, 1984, after further arguments with his crew, and at his request, Mr. Williams was reassigned. However, he was absent from work about two weeks for medical reasons, and during this time, management decided that it would be best to separate Mr. Williams from the belt crew with whom he was having trouble.

JWR further stated to the investigator that upon Mr. Williams' return to work after his hospitalization he informed his foreman that he did not want to be reassigned and filed the grievance stating his desire to work in the classification he bid on, which was belt repairman. JWR pointed out that pursuant to the grievance settlement, Mr. Williams was reassigned to the belt repairman position, and although he suffered a loss of pay amounting to $15.90, for three shifts, that issue was also settled through the grievance procedure.

JWR denied that Mr. Williams was ever assigned to any jobs that were unsafe, and it pointed out that Mr. Williams was aware of the fact that he had a contractual right to remove himself from any condition he believed to be unsafe, but did not do so. Finally, JWR pointed out that Mr. Williams believed that the company had violated his union-management contractual rights. Citing Lane v. Eastern Associated Coal Corporation, 2 MSHC 1082 (1980), and Harry P. Gilpin v. Bethlehem Mines Corporation, 6 FMSHRC 47 (January 1984), JWR took the position that such contractual matters are not within the jurisdiction of the Commission.

MSHA investigated the complaint, and by letter dated October 10, 1984, Mr. Williams was advised of MSHA's determination that a violation of section 105(c) had not occurred. The letter also advised Mr. Williams of his right to appeal that determination by filing a complaint with the Commission within 30 days. There is no information that Mr. Williams filed any complaint with the Commission.

Case NO. BARB-CD-86-38

This case concerned a complaint filed by Mr. Williams with MSHA on April 17, 1986. Mr. Williams alleged that coal was being cut with the methane monitor showing 1.7 and 1.8 percent methane, that he complained about this to the longwall coordinator, and that he withdrew himself from the mine on several occasions. He also alleged that his foreman tried to injure him by activating a longwall shearer valve while he (Williams) was near the pan line.

A copy of a disciplinary action dated April 16, 1986, supplied by JWR, reflects that Mr. Williams was suspended for five days with intent to discharge, for the following reason: "Violation of work rule #1 and work rule #7, cursing, intimidating and insubordinate conduct toward his supervisor in front of entire crew and failure to obey a direct order".

In a letter dated May 28, 1986, to MSHA's special investigator, JWR disputed Mr. Williams' allegations, and after investigation, MSHA advised Mr. Williams by letter dated June 12, 1986, that the information received during its investigation did not establish a violation of section 105(c) of the Act. The letter also advised Mr. Williams of his right to appeal this determination by filing a complaint with the Commission within thirty days. There is no information that Mr. Williams filed any further complaint.

NLRB Complaint

In addition to the aforementioned MSHA complaints, Mr. Williams filed a complaint on July 3, 1986, with the National Labor Relations Board against the United Mine Workers of America,

and the basis for his charge is stated as follows in the complaint form which he signed:

> On or about April 17, 1986, the above-named labor organization through its officers, agents and representatives failed to properly process Willie Williams grievance because of his race and internal union political activities.

The medical information supplied by Mr. Williams reflects the following:

1. A statement of August 8, 1984, addressed to JWR by Doctor James M. Lee, Birmingham, Psychiatry, P.A., Birmingham, Alabama, confirming that Mr. Williams was admitted to Baptist Medical Center, Birmingham, Alabama, on August 7, 1984, and that he was currently hospitalized.

2. A Physical and History Report prepared by Doctor Lee on August 7, 1984, in which Dr. Lee recorded his "impression" of Mr. Williams' condition as "Adjustment reaction with depression and anxiety. Chronic low back syndrome". The doctor noted that Mr. Williams would undergo physical and psychiatric evaluation, and that appropriate medication would be prescribed. The report reflects that Mr. Williams reported that he strained his back in August, 1983, was seen at a hospital emergency room, and that he has taken medication in the past for his back complaints.

3. A consultation report prepared by Dr. Sue Trant, PHD, on August 20, 1984, in which the following diagnostic impressions are recorded: "1. Adjustment disorder with mixed emotional features including anxiety, depression, anger and hypersensitivity. 2. Personality disorder with dependent and passive aggressive features".

4. A consultation report prepared by Dr. Trant on June 21, 1987, in which the following diagnostic impressions are recorded: "1. Rule out major depression. 2. Rule out melancholia with significant anxiety. Psychological factors affecting physical condition. 4. Mixed personality disorder".

5. A July 1, 1987, statement addressed to Dr. Lee by the respondent's insurance benefits claims department (Aetna Life and Casualty) certifying Mr. Williams for admission to the Birmingham Baptist Medical Center.

6. A September 14, 1987, statement addressed to JWR by Dr. Tyree J. Barefield-Pendleton, Bessemer, Alabama, stating that Mr. Williams was under the doctor's care for low back pain and was unable to report for work because of his illness. The doctor stated that Mr. William "has been disabled since 5/14/87, and he is still disabled".

7. A November 15, 1989, statement addressed to the United Mine Workers of America by Dr. Lee stating that Mr. Williams has been a patient under his care beginning August 7, 1984, and that he was last seen in the doctor's office on November 15, 1989. The statement reflects the doctor's opinion that Mr. Williams is disabled and unable to be gainfully employed, and that "an integral part of his health problems stem from his job conflicts". The statement also reflects that Mr. Williams was drawing social security disability benefits since 1987.

8. An October 15, 1987, letter from Dr. Lee to an attorney summarizing Mr. Williams' hospitalization and treatment. With respect to his 1987 hospitalization, Dr. Lee states that Mr. Williams was hospitalized from June 15, 1987 through June 30, 1987. Dr. Lee noted several follow-up office visits, and the summary includes a statement by Dr. Lee that Mr. Wiliams "reported that he was feeling extremely frustrated in his attempts to deal with his company concerning his benefits".

Findings and Conclusions

Mr. Williams' Prior 1982-1986 Complaints.

After careful review of all of the information submitted by the parties, I find no reasonable basis for revisiting any of the prior 1982 through 1986 complaints filed by Mr. Williams with MSHA. It seems clear to me from the information provided that MSHA investigated each of those complaints and concluded that JWR

had not violated section 105(c) of the Act. Further, the information submitted by the parties, including Mr. Williams, includes copies of MSHA's determination letters advising Mr. Williams of the results of its investigations and informing him of his right to file further complaints with the Commission if he so desired. There is no evidence that Mr. Williams filed any such complaints, and he does not claim that his complaints were not investigated or that he was not advised of MSHA's dispositions of those complaints. I take note of the fact that in his statement filed September 12, 1991, in response to my show cause order, at page 5, Mr. Williams acknowledges that in each instance where he alleged he was terminated prior to July 1987, he was restored to duty through the grievance procedure. Under the circumstances, I conclude and find that Mr. Williams' attempts to reassert these prior complaints and incorporate them by reference with his most recently filed complaint with the Commission are clearly untimely and they are rejected.

Mr. Williams has submitted a copy of a November 15, 1990, internal MSHA memorandum authored by MSHA headquarter special investigator Wilbert B. Forbes, the investigator who personally contacted and interviewed Mr. Williams in response to his July and September 1990, letters to the Secretary of Labor. Mr. Forbes is critical of the "lack of thoroughness" with respect to MSHA's field investigations of some of Mr. Williams prior complaints, but he concludes that "due to the passage of time little if anything can be done". I conclude and find that the personal opinions of Mr. Forbes with respect to MSHA's prior investigations provide no basis for allowing these prior complaints to be reasserted in the instant proceeding, and any suggestion to the contrary by Mr. Williams is rejected.

Mr. Williams' Present Complaint

In his present Commission complaint, Mr. Williams seeks an opportunity to pursue his discharge of October 9, 1987, by JWR. As noted earlier, at the time he filed his complaint with MSHA, he claimed that he had been discharged "because of the legal action that I have filed against the company and union. I also feel that the company and union get together and arranged my discharge". He named company personnel director Steve Dickenson and longwall coordinator Trent Trachor as the company officials responsible for this discharge. As part of his Commission complaint, Mr. Williams stated as follows: "I feel that the company violated several rules under our contract and that they breached the contract in several ways".

I take note of the fact that in his prior MSHA complaint, as well as the instant Commission complaint, Mr. Wililams never alleged that his discharge was in any way connected with any safety complaints or protected activity on his part. In view of the untimely filing of the complaint with the Commission (three

years after it was filed with MSHA, and four years after the discharge), and the absence of any allegation that the discharge was safety related, JWR moved for a summary dismissal of the complaint.

In addressing the question of the timeliness of his complaint, Mr. Williams seeks to excuse his untimely filing by asserting that he was hospitalized with a stress condition in 1987, when he was contacted by MSHA's special investigator, that he was never interviewed by the investigator, and that he could not recall ever receiving a copy of MSHA's determination letter advising him of the results of the investigation of his complaint. In fairness to Mr. Williams, he was afforded an opportunity to document these claims, and in response to my orders both he and the respondent have submitted information relative to his condition at the time of his complaint, as well as an assortment of additional matters.

With regard to any protected safety rights, Mr. Williams, through his counsel, suggests that his discharge during a long-term disability "might be a pretext and a sham". In addition, Mr. Williams takes issue with MSHA's investigation of his complaint, and the manner in which his union represented him during an arbitration related to his discharge. Mr. Williams alleges that the union failed to reschedule his arbitration hearing despite being told that he was medically disabled. He also alleges that he was unable to appear at the Arbitration hearing.

With regard to his discharge, based on the information supplied by Mr. Williams, it would appear that the October 9, 1987, date of termination is in fat the day that the arbitrator who presided over his discharge grievance decided the grievance in JWR's favor. The information supplied by Mr. Williams reflects that JWR sent him a letter on August 28, 1987, suspending him with intent to discharge for a violation of the labor-management contract of 1984 and a company work rule relating to unsatisfactory work attendance. The arbitration decision reflects that the proposed discharge proceeded to the 24-48 hour meeting stage, and then went to arbitration by the union. Contrary to Mr. Williams' assertion that the union failed to reschedule the arbitration hearing, the arbitration decision, on its face, reflects that the hearing was originally set for September 14, 1987, and although Mr. Williams did not appear at that time, the union asked for a continuance, and it was granted over the objection of JWR. The hearing was rescheduled and held on October 1, 1987, and the grievance decision reflects that Mr. Williams appeared and participated in the hearing.

I have reviewed the arbitration decision sustaining Mr. Williams' discharge, and nowhere is there any mention of any safety complaints or protected activity by Mr. Williams as the

reason for the discharge. The sole issue in that case was whether or not the work absences which prompted JWR to suspend and discharge Mr. Williams were justified because of his asserted work-related illnesses and injuries. I take note of the fact that the arbitrator was the same individual who had previously ordered Mr. Williams reinstated after a previous discharge in October, 1986, for absenteeism. In that previous proceeding, although Mr. Williams was reinstated, the arbitrator observed that Mr. Williams "appears to be a chronic absentee".

With regard to MSHA's investigation of his complaint, Mr. Williams states that he did not meet with MSHA's special investigator Dennis Ryan because "he was simply unable to do so". In an undated affidavit, Mr. Williams suggests that he never met with Mr. Ryan because he was under a doctor's care and was dysfunctional as the result of treatment for depression. However, the aforementioned Forbes Memorandum reflects that during a personal interview with Mr. Forbes, Mr. Williams acknowledged that he was contacted by Mr. Ryan, but refused to speak with him because he was not sure of his identity and whether or not Mr. Ryan would be fair in the conduct of his investigation. Mr. Ryan confirmed to Mr. Forbes that Mr. Williams refused to talk to him. This information is corroborated by a July 8, 1990, memorandum by Mr. Ryan, a copy of which was supplied by Mr. Williams, in which Mr. Ryan confirms that Mr. Williams would not meet with him and that he provided no witnesses or information concerning his complaint.

I take further note of the fact that in the October, 1987, grievance proceeding, the arbitrator expressed some credibility reservations with respect to some of the medical evidence submitted by Mr. Williams in defense of his absences from work, and noted that Mr. Williams stated that he "had no intention of ever returning to work and that he had filed for total disability". With regard to the initial continuation of the grievance hearing, the arbitrator observed that Mr. Williams was given the benefit of the doubt when the continuance was granted. The arbitrator also made reference to the fact that while he was attempting to obtain doctor's excuses to justify a continuance, Mr. Williams was at the same time making court appearances and testifying on September 8, and 16, 1987, in connection with certain workers' compensation claims he had filed against JWR. The arbitrator observed that "it seems clear that Mr. Williams was able to attend to all his business except to appear" at the initial grievance hearing.

After careful review of all of the information submitted by Mr. Williams, I am not convinced that his treatment and hospitalization for stress and his chronic back ailments mitigate or excuse his failure to timely pursue his complaint further before this Commission. Mr. Williams makes no claim that he was ignorant of his rights and remedies under the Mine Act. His

claim is that he was being treated for stress and could not recall receiving MSHA's determination letter which included information concerning his right to file a further complaint with the Commission. However, given the number of complaints and grievances Mr. Williams has filed over the years, I cannot conclude that he was unaware of his rights and remedies. Indeed, Mr. Williams makes no claim that he never received any of the prior MSHA adverse determination letters in which he was specifically informed of his right to file further complaints on his own behalf with the Commission within 30 days if he disagreed with MSHA's determination.

In David Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 9, 1984), aff'd mem., 750 F.2d 1093 (D.C. Cir. 1984) (table), the Commission affirmed a dismissal of a miner's discrimination complaint filed six months after his alleged discriminatory discharge. In that case, the Commission stated that "Tardiness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation", 6 FMSHRC 24.

In Ernie L. Bruno v. Cyprus Plateau Mining Company, 10 FMSHRC 1649 (November 1988), Commission Review Denied January, 1989, aff'd, No. 89-9509 (10th Cir., June 5, 1989) (unpublished), Commission Judge John Morris found that a complaint filed more than four and one-half years after the alleged act of discrimination was untimely. He concluded that the company officials who investigated and made the termination decision no longer worked for the company, and that it was questionable whether these individuals would have a present recollection of the events in question.

In Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135, 2138-2139, (December 1982), the Commission observed that the placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by:

> ... preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Mr. Williams suggests that allowing him to proceed with his complaint would only result in minimal prejudice to the respondent "because the business records still exist, and the issues are narrow". The respondent, however, points out that personnel director Steve Dickerson, the individual responsible

for enforcing the company rules at the time of Mr. Williams' discharge, is no longer employed by JWR. Further, JWR maintains that if the filing deadline had been met by Mr. Williams, it would have been in a much better position to investigate and defend against the allegations made in the complaint. JWR believes that it would be prejudiced if it is now required to defend against an untimely claim based upon a discharge which occurred four years ago. I agree.

After careful examination of all of the available information, and aside from the fact that the complaint is untimely, I believe that Mr. Williams' complaint against JWR is the result of a longstanding contractual dispute connected with his asserted job-related injuries, disability compensation, and workers' compensation claims. Under the circumstances, I reject Mr. Williams' attempts to "bootstrap" these disputes into a viable discrimination complaint pursuant to section 105(c) of the Mine Act. Accordingly, I conclude and find that the complaint should be dismissed.

ORDER

In view of the foregoing findings and conclusions, the complaint filed by Mr. Williams IS DISMISSED, and his claims for relief pursuant to section 105(c) of the Mine Act ARE DENIED.

George A. Koutras
Administrative Law Judge

Distribution:

Gregory T. Bailey, Esq., 434 Flat Shoals Avenue, S.E., Atlanta, GA 30316 (Certified Mail)

David M. Smith, Mark Strength, Esqs., Maynard, Cooper, Frierson & Gale, P.C., 1901 Sixth Avenue North, 2400 AmSouth/Harbert Plaza, Birmingham, AL 35203-2602 (Certified Mail)

Harold Rice, Esq., Jim Walter Resources, Inc., No. 7 Mine, Rt. 1, Box 9750, Brookwood, AL 35444 (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 16 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-142 A. C. No. 46-06887-03522
v.	:	
	:	Montague Mine
MACK ENERGY COMPANY, Respondent	:	

DECISION

Appearance: Pamela S. Silverman, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
Gerald P. Duff, Esq., Hanlon, Duff & Paleudis CO., LPA, St. Clairsville, Ohio, for the Respondent.

Before: Judge Maurer

This civil penalty proceeding concerns proposals for the assessment of civil penalties against the respondent, Mack Energy Company (Mack) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), for four alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. At hearing, the parties proposed a settlement concerning three of these section 104(d)(2) orders. Concerning Order No. 3476017, the Secretary proposes to modify it to a section 104(a) citation and reduce the civil penalty from $850 to $395. With regard to Order No. 3476019, the Secretary proposes to also modify that order to a section 104(a) citation and likewise reduce the proposed penalty from $850 to $395. Finally, the Secretary also proposes to modify Order No. 3476030 to a section 104(a) citation and reduce the proposed civil penalty from $1000 to $395. Taking into account the six statutory criteria for civil penalty assessment contained in section 110(i) of the Act, I conclude that the proposed settlements are reasonable, proper and in the public interest. They are therefore approved and will be incorporated into my final decision and order herein.

The issues contained in one section 104(d)(2) Order —— Order No. 3476018 were tried before me on May 30, 1991, in Wheeling, West Virginia. Both parties have filed posthearing briefs, which I have duly considered in making the following decision.

STIPULATIONS

The parties stipulated to the following, which I accepted (Tr. 10-11):

1. Mack Energy Company is the operator of the Montague Mine which is the subject of this proceeding.

2. Operations at the Montague Mine are subject to the Mine Safety and Health Act.

3. The undersigned Administrative Law Judge has jurisdiction to decide this case.

4. MSHA Inspector Sherman Slaughter was acting in an official capacity as a duly authorized representative of the Secretary of Labor when he issued Order No. 3476018 on July 12, 1990.

5. A true copy of Order No. 3476018 was properly served on the operator or its agent.

6. The violation history constitutes 57 assessed violations on 49 inspection days which is an average of 1.165 violations per inspection day.

7. The violation was abated within the time set for abatement.

8. The operator is a moderate sized operator, and the mine is a moderate sized mine. The operator produced 222,000 tons and this mine produced 209,000 tons in 1989.

DISCUSSION

Section 104(d)(2) Order No. 3476018 was issued by MSHA Inspector Sherman Slaughter on July 12, 1990. The inspector cited a violation of the mandatory safety standard found at 30 C.F.R. § 77.1004(b)[1]/ and the cited condition or practice is described as follows:

> Loose, cracked, unconsolidated, overhanging rocks existed in the approx. 35 foot highwall of the Pittsburgh 8 pit where an end loader and two rock trucks were loading spoil directly under the rocks and hauling it back along the highwall. The rocks existed in the wall approximately 20 feet above the floor of

---

[1]/ This section of the standards requires that overhanging highwalls and banks be taken down or in the alternative, the area posted.

the pit and extended along the wall approximately 120 feet. The affected area was not posted and this was an unsafe ground condition with overhanging highwall. Jack Wilfong, Superintendent, examined this pit area and highwall and directed the end loader and rock trucks to work in the pit. He knew this condition existed. It was raining and had rained during the night previous to this shift.

On July 12, 1990, Inspector Sherman Slaughter conducted an inspection of the Montague Mine. He arrived at the mine site at approximately 6:00 a.m., and met with miner safety representative Larry Curtis, maintenance foreman Bud Conner, and mine superintendent Jack Wilfong. However, only Larry Curtis accompanied Inspector Slaughter on the ensuing inspection.

During that inspection, the inspector examined the highwall in the Pittsburgh Eight Pit and found what he described as loose, cracked rock and two areas of overhanging rock extending out from the wall a distance of approximately 6 and 8 feet, respectively. The overhangs and cracked rock encompassed a distance of approximately 120 feet along the wall.

The 8 foot overhang was supported by a rock which was cracked on both sides and was identified by the inspector as the "No. 1" rock. [The rock the inspector was most concerned with — see Govt. Ex. Nos. 3 and 4]. On one side of the "No. 1" rock, the crack had widened into an 8 to 10 inch vertical gap filled with loose rock. The cracked gap extended up the wall and curved around toward the overhang where it intersected with another vertical crack. This crack had also widened into a gap of approximately 6 inches and extended up the overhang from where the overhang met the highwall. In addition, another crack extended down the wall behind the "No. 1" rock and the cap rock on top of the overhang consisted of layered or fractured sandstone which was not consolidated with the wall.

Significantly, neither of the aforementioned overhangs were posted as required by 30 C.F.R § 77.1004(b). That fact alone, without more, substantiates a violation of the cited standard. That settled, the next issue to consider is whether the failure to take down the overhangs or post the area is a "significant and substantial" violation of the cited mandatory standard.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts

surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

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

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

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

Inspector Slaughter testified that due to the condition of the highwall and the fact that he observed an end loader and two rock trucks working in the area around the highwall, he believed there to be a significant rock fall hazard if the condition was not abated. Furthermore, I believe the inspector properly

considered the effect of continuing mining operations on the gravity of the situation. The overhanging rocks were large and because of the existing cracks in the wall, reasonably likely to fall if the overhanging conditions were allowed to persist.

Respondent Mack raises two substantive issues in defense of this point. First, they contend that the highwall was safe. They know this because they tried to scale the entire highwall a day or two prior to the citation being issued and no loose material could be brought down. But this defense fails to take into account the dynamics of the environment the highwall exists in. Changes in the weather occur for instance. It was raining at the time the citation was issued and it certainly is in the realm of possibility that it could rain for several days running. A lot of running water could loosen a rock that just a few days before could not be scaled down. The inspector testified from his experience that he has observed many occasions where a rock could not be scaled down off a highwall only to have it fall out of the wall at some later time because of changing pressures in the highwall or because of weather-related deterioration of the highwall.

Secondly, Mack contends that the inspector must be mistaken or even lying about seeing the end loader and rock trucks operating at 11:00 a.m., underneath the overhanging rocks. Upon reflection, it is my view that it is not necessary to belabor the issue of exactly what time the equipment was in service or out of service. Nor is it essential to prove that the equipment was operating directly underneath the overhanging rocks. What is clearly in the record is the inspector's sworn testimony, which I do credit, that he personally observed the equipment working in the area of the overhanging highwall that morning between 10:00 and 11:00 a.m. He testified that he saw the situation at approximately 10:30 a.m. and issued the order at 11:00 a.m. More specifically, he observed the two rock trucks working within 12 to 15 feet of the highwall at that time. Given the condition of the highwall that morning, that was too close in his opinion, and a serious or even fatal injury could reasonably have resulted if any of this overhanging rock material had fallen down on them.

The important features at this stage of the proceeding are that the overhanging highwall had not been taken down or posted and men were working in that area that morning. It is not so important exactly what time it was, or if the equipment that was operating was ever observed directly underneath the overhangs. The rock trucks passing 12 to 15 feet from the wall as they backed in front of the overhang is close enough to make this an "S & S" violation and I so find.

I fully realize that there is a conflict in the evidence. The respondent's witnesses state that the end loader broke down between 9:00 and 10:00 a.m. on the morning in question, whereas

the inspector insists that the two rock trucks were still operating at 10:30 a.m. Since there would be no use for the rock trucks without the end loader to load them, by implication, the respondent's evidence is that they also were not operating at that time. On the other hand, the inspector was at the mine site since 6:00 a.m. that morning. Maybe he saw the rock trucks in operation before 10:30 or even before 10:00 a.m. In any event, he was a very credible witness with no demonstrable bias against this operator. He testified very clearly on direct that he saw the rock trucks operating in the close vicinity of a potentially dangerous overhanging highwall. He was unshakable on cross-examination and I simply believe him. He has no reason to lie about it and I believe the trucks were operating where he says they were that morning at approximately 10:30 a.m., give or take 30 minutes.

The Secretary also urges that I find this violation to be an "unwarrantable failure."

It should be pointed out here that Order No. 3476018 was issued by Inspector Slaughter as a section 104(d)(2) order on July 12, 1990, relying on section 104(d)(1) Order No. 3334014 in the section 104(d) "chain" for its procedural validity. However, on March 15, 1991, Commission Judge George A. Koutras modified that (d)(1) order which had been issued on January 4, 1990, to a section 104(d)(1) citation. Mack Energy Company, 13 FMSHRC 432, 468 (March 1991).

Section 104(d)(1) authorizes the inspector to issue an unwarrantable failure order if, during the same inspection, or any subsequent inspection conducted within 90 days after the issuance of the initial unwarrantable failure citation, he finds another violation of any mandatory safety standard which he believes was also caused by an unwarrantable failure by the operator to comply.

In this case, however, since more than 90 days elapsed between the issuance of section 104(d)(1) Citation No. 3334014 on January 4, 1990, and the purported order issued by Inspector Slaughter on July 12, 1990, it cannot stand as a section 104(d) order. It must therefore necessarily be modified to either a section 104(a) citation or a section 104(d)(1) citation, depending on the unwarrantable failure finding which I make herein.

The Commission has held that an "unwarrantable failure" to comply with a mandatory standard 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). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

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

Superintendent Wilfong was aware of the condition of the highwall, knew it was not posted or "dangered off," and knew men (rock truck drivers) were to be working in the immediate area of the highwall on the morning of July 12, 1990. I therefore find that the failure of Wilfong to either promptly take down the overhanging portions of the highwall or post the dangerous area exposed miners to a falling rock hazard and constitutes negligence of such an aggravated nature so as to establish an "unwarrantable failure" in this case. Under these circumstances, the inspector's "unwarrantable failure" findings will be affirmed herein.

With regard to the assessment of a civil penalty for the violation, the parties have stipulated to the operator's violation history, good faith abatement, and moderate size and I concur in the inspector's high negligence and "S & S" findings. I also find the violation to be a serious one.

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty of $700 is reasonable and appropriate.

ORDER

1. Order Nos. 3476017, 3476019, and 3476030 **ARE MODIFIED** to section 104(a) citations, with "S & S" findings, and as modified, they **ARE AFFIRMED**.

2. Order No. 3476018 **IS MODIFIED** to a section 104(d)(1) citation, with an "S & S" finding, and as modified, it **IS AFFIRMED**.

3. Mack Energy Company is **ORDERED TO PAY** the sum of $1885 within 30 days of the date of this decision as a civil penalty for the violations found herein.

Roy J. Maurer
Administrative Law Judge

Distribution:
Pamela S. Silverman, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Gerald P. Duff, Esq., Hanlon, Duff & Paleudis CO., LPA, 46457 National Road West, St. Clairsville, OH 43950 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 16, 1991

J. MIKE PLEVICH, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 91-1993-D
	:	MORG CD 91-03
v.	:	
	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On August 14, 1991, the Complainant filed with the Commission a discrimination complaint pursuant to section 105(c) of the Mine Act. 30 U.S.C. § 815(c). On August 19, 1991, the Commission sent a letter to the Complainant requesting him to send additional information in order to process his complaint. On October 2, 1991, the Complaint filed a letter stating that he was withdrawing his complaint because he had received favorable results through a grievance procedure.

In light of the foregoing, the Complainant's request to withdraw his complaint is **GRANTED.**

It is **ORDERED** that this case be and is hereby **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

Distribution:

Mr. J. Mike Plevich, Chairman Safety Committee, Local 1058, District 31, UMWA, 444 Western Avenue, Morgantown, WV 26505 (Certified Mail)

Mr. John Higgins, Consolidation Coal Company, P. O. Box 100, Osage, WV 26505 (Certified Mail)

/gl

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

OCT 21 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 90-110
	:	A.C. No. 29-01168-03532
	:	
	:	Docket No. CENT 90-143
v.	:	A.C. No. 29-01168-03533
	:	
	:	Docket No. CENT 90-144
	:	A.C. No. 29-01168-03534
SAN JUAN COAL COMPANY, Respondent	:	San Juan Mine & Plant
	:	
	:	Docket No. CENT 90-166
	:	A.C. No. 29-01825-03513
	:	
	:	La Plata Mine

DECISION

Appearances: Michael H. Olvera, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Donald L. Jumphreys, Esq., San Juan Coal Company, San Francisco, California, for Respondent.

Before: Judge Lasher

In these four proceedings the Secretary of Labor (MSHA) seeks assessment of penalties for a total of 26 alleged violations (described in 26 Citations) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1977).

After the commencement of hearing in Durango, Colorado, on May 13, 1991, the parties concluded settlements of 22 of the 26 enforcement documents, which accord as reflected below was approved from the bench and is here affirmed. The remaining four Citations (three involving so-called "grounding" charges and one "highwall" matter involving an alleged infraction of Respondent's Ground Control Plan) were fully litigated. As result of the settlement, the only Citation involved in Docket No. CENT 90-110 was fully disposed of.

As to the four Citations litigated, Respondent challenges the occurrence of violation on all and the "Significant and Substantial" designations in two of the three "grounding" Citations (Nos. 3414864 and 3413540) and the highwall Citation, and as to the grounding Citations makes a serious challenge to the standard involved on the basis that it is unconstitutionally vague with respect to its application to the three electrical appliances cited, pointing out that MSHA's Program Policy Manual (Ex. P-7, II-T. 27-28, 40-42) and personnel have apparently exempted the type of appliances involved here from coverage.

DOCKET NO. CENT 90-110

This docket contains one Citation, No. 9996512, which was settled at the hearing. Pursuant to their agreement, the parties concur that this Citation should be modified

(1) to change paragraph 10 A thereof to reduce the "Gravity" of the violation from "Reasonably Likely" to "No Likelihood";

(2) to change paragraph 10 B thereof from "Lost Workdays or Restricted Duty" to "No Lost Workdays";

(3) to delete the "Significant and Substantial" designation contained in paragraph 10 C thereof; and

(4) to change the "Negligence" designation in paragraph 11 A from "Moderate" to "Low."

As modified, the parties stipulated that $147 is an appropriate penalty for this violation. Such penalty is here assessed and the settlement reached, having been approved from the bench, such is here **AFFIRMED**.

ORDER (CENT 90-110)

Citation No. 9996512 is **MODIFIED** as agreed to by the parties as set forth above. Respondent, if it has not previously done so, **SHALL PAY** to the Secretary of Labor within 30 days from the date of this decision the sum of $147 as stipulated.

DOCKET NO. CENT 90-166

This docket contains one Citation, No. 5414864, a so-called "grounding" allegation which was not settled. Discussion and decision thereof appears below under the heading "Three Grounding Citations."

DOCKET NO. CENT 90-143

This docket contains 20 Citations, 18 of which were settled at hearing. Of the remaining two Citations, No. 3413540 involves an alleged infraction of 30 C.F.R. § 77.701 and is discussed in the subsequent section "Three Grounding Citations." The last Citation, No. 3414683, referred to in the transcript as the "highwall" Citation, is likewise discussed and decided subsequently.

THE PARTIAL SETTLEMENT

As noted, 18 of the Citations were settled at the hearing. (I-T. 98-104). Respondent agreed to pay in full MSHA's initially proposed penalties as to 11 of these 18, 6 were modified, and as to one, Citation No. 3413538, the "excessive history" upgrading was waived by Petitioner and the proposed penalty reduced from $649 to $413. The agreement reached as set forth below was approved from the bench at hearing and that approval is here **AFFIRMED.**

Citation Number	Agreed Penalty	Modification
3413538	$ 413	None
3413539	350	None
3414668	350	None
3414669	350	None
3414670	350	None
3414671	350	None
3414672	350	None
3414673	350	None
3414674	264	See "Order" below
3414675	350	None
3414676	350	None
3414677	350	None
3414686	264	See "Order"
3414687	214	See "Order"
3414688	264	See "Order"
3414689	264	See "Order"
3414690	350	None
3414691	357	See "Order"
TOTAL	$5,890	

Order Effectuating Partial Settlement (CENT 90-143)

Citation No. 3414674 is modified to change paragraph 11 thereof pertainng to "Negligence" from "Moderate" to "None." Citation No. 3414686 is modified to change paragraph 11 thereof pertaining to "Negligence" from "Moderate" to "None." Citation No. 3414687 is modified to change paragraph 10 A thereof pertaining to "Gravity" from "Reasonably Likely" to "Unlikely"; to change paragraph 11 thereof pertaining to "Negligence" from "Moderate" to "None"; and to delete the "Significant and Substantial" designation contained in paragraph 10 C thereof.

Citation No. 3414688 is modified to change paragraph 11 thereof pertaining to "Negligence" from "Moderate" to "None."

Citation No. 3414689 is modified to change paragraph 11 thereof pertaining to "Negligence" from "Moderate" to "None."

Citation No. 3414691 is modified to change paragraph 11 thereof pertaining to "Negligence" from "Moderate" to "Low."

Respondent, if it has not previously done so, within 30 days from the date hereof, **SHALL PAY** to the Secretary of Labor the total sum of $5,890.00 as and for the civil penalties above assessed in this docket pursuant to their settlement agreement. Penalties for the two remaining Citations in this docket, Nos. 3413540 and 3414683 will be determined separately and subsequently herein.

DOCKET NO. CENT 90-144

This docket contains four Citations, three of which were settled at the hearing as reflected below. The remaining Citation, No. 3414692, involves an alleged infraction of 30 C.F.R. § 77.701 and is discussed in the subsequent section entitled "Three Grounding Citations."

The Partial Settlement

As noted, three of the four Citations in this docket were settled at hearing. (I-T. 105). Pursuant thereto, Citation No. 3414693 and Citation No. 3414694 are both to be modified to change paragraph 11 to show the degree of negligence involved in the violation to be "Low" rather than "Moderate" and the penalty for each is to be reduced from $350 to $192. As to Citation No. 3414698, there are no modifications and the penalty concurred in by both parties is $259. This agreement was approved from the bench and such approval is here **AFFIRMED.**

Order Effectuating Partial Settlement (CENT 90-144)

Citations numbered 3414693 and 3414694 are modified as agreed to by the parties and reflected above, and Respondent **SHALL PAY** to the Secretary of Labor within 30 days from the date of this decision the total sum of $643.00 as and for the civil penalties agreed to. The penalty for Citation No. 3414692 will be assessed separately subsequently herein.

THREE "GROUNDING" CITATIONS

These three Citations, each in a different docket as noted above, all originally involved alleged "Significant and Substantial" infractions of the standard contained in 30 C.F.R. § 77.701 pertaining to "Grounding" which provides:

> **Grounding metallic frames, casings, and other enclosures of electric equipment.**
>
> Metallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary.

Evidence for these three Citations was received separately and appears in different parts of the transcript. The parties stipulated that the evidence introduced with respect to the Citation in Docket No. CENT 90-166 (which was tried first), insofar as relevant, is to be incorporated by reference into the record for the other two Citations in dockets numbered CENT 90-143 and CENT 90-144, respectively, and vice versa. (I-T. 107-108; II-T. 29). [1]

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[1] The hearing was held on two days, May 13 and May 14, 1991. For each of the two days of hearing there is a separate transcript beginning with page 1. Accordingly, transcript citations will be prefaced with "I" and "II" for May 13 and 14, respectively.

Citation No. 3414864 (Docket No. CENT 90-166)

This Citation, issued by MSHA Inspector Larry W. Ramey during an AAA (regular) inspection on May 16, 1990, charges Respondent as follows:

> A ground was not provided for the energized General Electric Toast-Oven located in the warehouse. This toaster was 110 AC. The outer housing of the toaster was constructed of Metallic. There was no external ground observed for the toaster. This toaster was equipped with a 16/2 cable.

This appliance (I-T. 33) was located on a formica-topped metal table sitting in an eating area in a warehouse with a concrete floor. As charged in the Citation, it had no external ground, had a metal housing, and was equipped with a size 16 cord (four feet long) with two conductors. (I-T. 24-26, 33, 46).

Inspector Ramey felt that, in terms of the "hazard" involved, the warehouse was unlike a residential dwelling since it was constructed of steel and had concrete floors, which he said was "a good conductor of electricity." (I-T. 28). The Inspector believed that the toaster would have been used on every shift, five to seven days a week, by miners wearing steel-toed shoes. He felt that people could become the "ground" themselves, if "something happened to the internal wiring" and the insulation failed and a person walked up and touched it. He knew of no specific instance where such toasters were involved in such an occurrence. (I-T. 28-29). In his opinion, a shock injury occurring from such event could reasonably be expected to result in lost work days, and he pointed out that electrical shock could cause even electrocution and heart attacks. (I-T. 29, 30). He was of the opinion that Respondent was "moderately negligent" since the foreman should have been aware of the toaster and because he felt the toaster was "electrical equipment" which was subject to a monthly "electrical equipment" check. He believed the area in question would not have been "hosed down" for cleaning purposes, but would have been mopped. He also speculated that the toaster would have been used more frequently than one in the average household." (I-T. 38).

Like the other two appliances (Proctor-Silex Toaster and portable heater) involved in the related grounding Citations, this G.E. toaster was U.L. approved. It was not in any way damaged. (I-T. 45). According to Terrance D. Dinkel, an electrical engineer with MSHA's Safety and Health Technology Center

in Denver, Colorado, in order for a toaster to become hazardous it would "have to develop a fault in it." (I-T. 55). He was unable to express an opinion as to the likelihood of an accident occurring. (I-T. 58, 61). He knew of one fatality from a miner using a power tool, but none involving a toaster. (I-T. 64-65).

The National Electrical Code (NEC) provides that such a toaster can be used in areas which are not damp or wet. (I-T. 54-55).

Contrary to the somewhat speculative tenor of Petitioner's witnesses, Respondent established that only three warehousemen used the toaster. (I-T. 70). Respondent also established that (1) from its inquiry to Black & Decker, G.E.'s small appliance division, there had been no instances of product liability for toaster ovens (I-T. 70-71) and (2) it had not had, in the prior 13 years, any employee injuries from an appliance.

Respondent's expert witness, Lynn Byers, a master electrician, testified that the fact of U.L. approval indicates an appliance complies with the N.E.C. (I-T. 73-77). He also indicated, contrary to Mr. Dinkel, that there is a significant difference between a power tool, which is motor driven and can be overloaded, and kitchen "fixed resistance" appliances which are not subject to overload abuse. (I-T. 77). Also, contrary to Petitioner's witnesses, he convincingly testified concerning the significance of any differences between residential environments and the warehouse environment:

> Q. Much was made of the differences between the residential environment and warehouse environment in a surface coal mine. Do you see any basis for such a distinction?
>
> A. I think two of them are alike in some respects and different in others. As far as National Electric Code is concerned, indoor locations are the same whether they're in a coal mine or residence. <u>They're not damp or wet locations</u>.
>
> Further, I believe at the strip mine, you know, we're talking about certified electricians under direct supervision of management performing the different tasks and work. We're talking about adults in the mine rather than kids and elderly people, and maybe people that are incapacitated using these appliances. The people at the mine are also trained in electrical hazards and avoidance as well. We're not--I think it's

> unfair to compare general public with qualified trained miners who are in good health, and so forth. (I-T. 77-78). (Emphasis supplied).

Respondent also established that the G.E. toaster oven in question sits on a credenza on the exterior portion of a small office (of drywall construction) in the southeast corner of the two 50- by 100-foot warehouse. (I-T. 69-70).

In response to an inquiry from Respondent (Ex. P-3; II-T. 405), concerning grounding of the toasters, Paul Duke, Assistant to the Vice President, Electrical Division, Underwriters Laboratories, Inc., gave an incisive and probative analysis of the situation (Ex. R-5; I-T. 80-82), which is in part quoted here:

> Underwriters Laboratories Listed electrical equipment for ordinary locations has been evaluated for use in accordance with the National Electrical Code and to determine that the design of such equipment provides for the reduction of the risk of injury to life and property.
>
> Grounding of equipment connected by cord-and-plug is covered in Section 250-45 of the NEC and is reflected in our Standards.
>
> Electric toasters are not among the appliances in residential occupancies required to be grounded by Section 250-45(c). Additionally, in other than residential occupancies, cord-and-plug connected appliances <u>not used in damp or wet locations</u> or by persons standing on the ground or on metal floors or working inside metal tanks are not required to be grounded. Please refer to Section 250-45(d), item (5). UL considers Listed electric toasters, although not grounded, to comply with the NEC whether used in residential occupancy or the type of premises you described which I understand is a dry location.
>
> Modifications to toasters to replace the power cord with a grounding type cord, which you indicate is required by the inspector, can introduce risks of electric shock or fire ... .

* * * * *

> All of the foregoing and possibly other concerns, depending on the toaster construction, lead to the conclusion that risks of fire or electric shock may be introduced when field modifications are made to a Listed product.
>
> UL cannot comment on MSHA regulations other than it appears subparagraph 77.701 is intended to apply to mining equipment, tools, and appliances used in the mining operation and not to appliances used in an office-type dry location. (Emphasis added).

Citation No. 3413540 (Docket No. CENT 90-143)

This Citation, issued on April 2, 1990, by Inspector Ramey, charges the following violative condition:

> The 110 AC electrical wall heater located in the Radio Repair shop was not provided with a ground. The heater was equipped with a 16/2 electrical cable. No external ground was provided. This heater was energized when this condition was observed. The outer frame was metal.

Petitioner points out with respect to this Citation [2] that the fact situation and expert testimony is essentially the same as that in Docket CENT 90-166, with the exception that this Citation refers to a 110 A.C. electrical wall heater located in the radio repair shop (a small room) in close proximity to one radio repairman (I-T. 109). Petitioner's evidence indicates that the repairman works at a metal desk and the 8 x 10 room has a concrete floor. The ungrounded heater was about one foot by four feet in size and the inspector thought it was mounted on a wall. (I-T. 113-114). Inspector Ramey thought that electrical shock would result in a "lost work days" type of injury. (I-T. 115). The general conclusion of Mr. Dinkel was that if the heater was used in an area with a "conductive" concrete floor, it was required to be grounded. (I-T. 116, 119).

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[2] Petitioner's Brief, page 3.

Respondent's evidence differed from Petitioner's--and is credited--in that it was shown that the repairman sat at a workbench with a formica top and that the U.L. approved heater sat on a stool about three feet high and was not mounted on the wall.

Merrit D. Redick, Chief Electrical Engineer for BHP-Utah International, testifying for Respondent, gave the following testimony which was convincing and also is credited:

> Q. Mr. Redick ... is there any reason to draw a distinction between this portable heater and the toaster oven ... ?
>
> A. I think it would be similar in the sense as long as it was a U.L. approved appliance. There's now been a lot of research done before it was given approval, and I think very minimal chance of picking up a shock off of it. We all have the same type heaters around our kids at home.
>
> * * * * *
>
> A. ... I think U.L. agrees that U.L. approved equipment loses its approval when you tear into it and modify it. Unless you're very careful and knowledgeable about what you're doing, you can increase the risk of being shocked off that piece of equipment.
>
> Q. ... How would you characterize the chances of getting seriously injured by shock from ... this ... portable heater ... ?
>
> A. It's very remote, in my opinion. Anything that's been researched by U.L. and put out to the general public in the United States, is really no risk at all. (I-T. 123-124).

Citation No. 3414692 (Docket No. CENT 90-144)

Inspector Ramey issued this citation on April 16, 1990, charging as follows:

> The energized 110-volt AC Proctor-Silex toaster oven located in the control room of the new plant was not provided with a ground. This toaster was equipped with a 16/2 electical cable. There was no external ground wire provided. The outer housing of the toaster was constructed of metallic.

It is noted that Petitioner MSHA has modified this citation to delete the "Significant and Substantial" designation thereon, and also that Petitioner agrees that the fact situation and expert testimony with respect to this Citation is essentially the same as that in Docket No. CENT 90-166 except that a "Proctor-Silex toaster resting on a formica table on a tiled floor" is involved in this Citation. [3]

Petitioner's evidence (which is not entirely accurate) was to the effect that this undamaged (II-T. 7) toaster oven was sitting on a metal table in an 8- x 24-foot control room having a concrete floor near a metal refrigerator. [4] The floor, according to Inspector Ramey, would not have been cleaned by washing down with a hose, but rather it would have been "dry" mopped. (II-T. 7-8, 16). The inspector again "speculated" that the toaster oven would have been used on every shift to warm food. (II-T. 8-9). The area the toaster oven was in was essentially a dry environment. (II-T. 16) [5]

Respondent established--in some contradiction to Petitioner's showing--that the table in question had a formica top and that the floor of the control room was overlaid with green asphalt commercial tile. [6]

DISCUSSION, ADDITIONAL FINDINGS, AND CONCLUSIONS
THREE GROUNDING CITATIONS

Respondent's fundamental position with respect to these three Citations is found meritorious.

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[3] Petitioner's Brief, page 3.

[4] According to MSHA's expert, Mr. Dinkel, the presence of the refrigerator would "probably" not add to the situation. There was no sink, and attendant water, in the area. (II-T. 8).

[5] MSHA did not establish that any of the three areas involved in the three Citations were "damp" or "wet."

[6] At this juncture in evidence-taking, Petitioner modified the Citation on the record to delete the "Significant and Substantial" designation. (II-T. 22-23).

A safety standard must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and it "cannot be so incomplete, vague, indefinite, or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application." (Emphasis added). [7]

30 C.F.R. § 77.701, as Respondent contends, is sufficiently indefinite and unclear in its application here as to cause disagreement among Petitioner's own hierarchy (I-T. 82-83; Exs. R-1A, R-7), as well as failing to communicate that it could be intended to apply to small toaster-ovens and a small portable heater manufactured for use without a grounding conductor in the cord and plug. [8]

MSHA's own Program Policy Manual, at Section 77.702 thereof (Ex. R-7), appears to exempt U.L. approved cord-and-plug appliances such as the toaster ovens and heater involved here. It states:

> Portable tools and appliances that are protected by approved systems of double insulation [9], or its equivalent, [10] need not be grounded. (Emphasis supplied).

---

[7] Alabama By-Products Corporation, 4 FMSHRC 2128 (December 1982).

[8] Petitioner did not establish that the toaster-ovens and the heater were used for any mining-related purpose, or for any purpose other than what one might expect them to be used for in the domestic market and, as noted elsewhere in this decision, while showing the three appliances were in areas with concrete floors, Petitioner did not establish that such areas were damp or wet or that there was really much of a difference between these areas and places in homes where such appliances would be used to prepare food or to heat a room.

[9] Although a portion of the record (II-T. 27-29, 39-41) was devoted to discussion of this subject, Respondent does not contend that any of the three subject appliances are covered by this "double insulation" exemption. (II-T. 41).

[10] Respondent does however contend and I conclude that U.L. approval is tantamount to "equivalent" protection. (II-T. 41-42).

As argued by Respondent, I conclude from reliable evidence of record that the U.L. listing is in effect a certificate that the three listed appliances have means of shock protection equivalent to double insulation. (I-T. 90-92, 96; II-T. 27-28, 42, 44; Ex. R-5).

Further, MSHA's Program Policy Manual (at Section 701 thereof, Ex. R-1A) appears to give some idea of the type of "electric equipment" 30 C.F.R. § 77.701 is intended to encompass, i.e., "Certain movable electrical equipment, e.g., rail-mounted and pivoting coal stackers, traveling shop cranes on track rails, small traveling hoists on I beams, etc." The types of clear-cut mining equipment mentioned as examples by MSHA as a minimum delivers considerable weight to Respondent's contention that the subject standard is unenforceably vague when applied to the three appliances in question.

Conclusions

1. The safety standard, 30 C.F.R. § 77.701, in its application to the three subject appliances, is unenforceably vague in that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized the specific prohibition or requirement of the standard. [11]

2. Applying the "reasonably prudent person" test to the subject standard, such a person would not consider the term "electric equipment" used in 30 C.F.R. § 77.701 to apply to the three U.L. approved appliances in question and have recognized a requirement to modify each appliance by grounding it externally.

3. The three appliances involved--the two toasters and the portable heater--are not "electric equipment" as that term is used in 30 C.F.R. § 77.701.

ORDER

Citations numbered 3414864, 3413540, and 3414692 are VACATED.

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[11] See Canon Coal Co., 9 FMSHRC 667, 668 (April 1987); Lanham Coal Company, Inc., 13 FMSHRC ____ (September 3, 1991).

THE "HIGHWALL" CITATION (DOCKET NO. CENT 90-143; CITATION NO. 3414683

This Citation, issued by MSHA Inspector Larry W. Ramey at 9:10 a.m. on April 11, 1990, charges Respondent with a violation of 30 C.F.R. § 77.1000 as follows:

> The operator was not complying with the approved ground control plan. Loose hazardous material was observed, loose and hanging over the top of the highwall. This condition was located at North Piñon Marker 600 East of Piñon 3. The loose overhanging material revealed large cracks on both sides of the material. The cracks appeared to be from 1 to 1 $^{1}/_{2}$ feet in width. The loose overhanging mass appeared to be 20 feet in height by 18 feet in width. Void could be observed behind the overhanging material. The roadway leading to the DRE 82 dragline was located under this overhanging material. Tire marks showed that traffic vehicles traveled to within 10 feet of the highwall. This overhanging material appeared to hang out from the highwall bank-slope approximately 4 to 6 feet thick.

The Citation (paragraphs 16, 17, and 18) indicates that the condition was timely abated by 10:20 a.m. by the following action: "The operator installed a 32-inch high dirt barrier in the travel road to prevent traffic from driving through this area."

30 C.F.R. § 77.1000 pertaining to "Ground Control" provides:

> Each operator shall establish and follow a ground plan for the safe control of all highwalls, pits, and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

Petitioner contends that Respondent did not comply with paragraph 6 b of its Ground Control Plan (Ex. P-4) which requires that "Unstable highwall and banks shall be taken down and other recognized unsafe ground conditions shall be corrected promptly, or such area shall be posted."

In his testimony, after confirming the description of the violative conditions contained in the Citation, Inspector Ramey described such as "overhanging rock" (II-T. 51) "rock that was leaning out" (II-T. 49) and "outcropping" (II-T. 53) separated from the highwall by a void (II-T. 49). He said there were large cracks around this rock, which he estimated to be 20 feet in height and 18 feet in width (II-T. 52-53, 61). He also described the instability thereof:

> ... when you look at the other section, the highwall, then it's stable. It's all bonded together. This one section here has pulled loose from the main highwall and my opinion of it, it was ready to fall. (II-T. 54).

The loose overhanging material, i.e., rock outcropping, was created after blasting a month before the Citation was issued. (II-T. 66-67, 68). The area was not posted. Below the loose rock material was a bench approximately 120 feet wide. Tire marks on the roadway below the unstable outcropping indicated that vehicles had been traveling in the exposed area and several miners were exposed to the hazard that the rock would fall. (II-T. 54-55). The tire marks were within 10 feet of the highwall. (II-T. 54). The outcropping (depicted in Exs. P-5 and P-6) was approximately 50 feet high (II-T. 55) and it was vividly described by the Inspector as having "pulled loose from the main highwall" and as being "a large chunk of rock ... that is cracked on both sides, behind even the bottom." (II-T. 58-59).

Respondent's stripping foreman, George Francis, was of the opinion that the condition was not a hazard since (a) it had been there a month and had not fallen or crumbled, (b) the material was "laid back"--not at a vertical angle--and (c) it was sitting on solid rock. (II-T. 67, 68, 69-71). However, there had previously been a failure at a San Juan mine of a highwall which Respondent also considered stable. (II-T. 72, 75-76).

The Inspector's description of the violative condition, and his opinion that the outcropping was unstable and ready to fall because of the cracks and void, are corroborated by photographic evidence submitted by Petitioner in Exhibits P-5 and P-6. There is no reason to discount his testimony and opinion in this matter. It is concluded that the infraction of Respondent's ground control plan did occur in that an unstable area of highwall did exist and had not been taken down for one month and the area was not posted. Infraction of such a plan is enforceable as a safety standard. Jim Walters Resources, Inc., 9 FMSHRC 903 (May 1987).

Since the violative condition existed for a month in an area where the foreman would have traveled and been aware of such (II-T. 55), it is concluded that the violation resulted from Respondent's negligence.

The issuing inspector's opinion that this was a "Significant and Substantial" violation is borne out by the reliable evidence of record. A violation is properly designated "Significant and Substantial" ("S&S") "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission listed four elements of proof for S&S violations:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (1985), the Commission expounded thereon as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of Section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-1575 (July 1984).

It has been previously found that a violation occurred. On the basis of prior findings, I also conclude that a measure of danger to safety was contributed to by the violation and there existed a reasonable likelihood that the hazard contributed to would result in a serious injury or fatality. Thus, not only was the Inspector's opinion as to the "significant and substantial" nature of the violation (T. 54-55) left largely unrebutted, but the evidence demonstrates that there was exposure of several miners to the hazardous conditions present which would have resulted in serious injury. (II-T. 54-55).

Thus, the Inspector testified:

> I felt if the rock did fall that there's definitely going to be an injury because of that mass of rock falling on a vehicle. And if you--in the body of the Citation, now, I estimate the rock to be 20 feet in length, so it it's driving within ten foot of the highwall. It the rock fell, it's going to come in contact with the vehicle, and/or person, or persons, that could be working in the highwall area. (II-T. 55). [12]

The Inspector's opinion that the relatively large rock outcropping could fall "at any time" (II-T. 62); coupled with the visible cracks and looseness of the rock and the height it would fall are all factors which confirm that the element of reasonable likelihood of such events occurring was established by MSHA. This combined with the exposure of miners (not denied by Respondent) and the seriousness of injuries which reasonably would ensue from such occurrence is sufficient to establish Petitioner's burden of proof as to the four prerequisite elements of the Mathies formula, supra. Consequently, it is concluded that the violation in question was "significant and substantial," as well as otherwise serious in nature. Citation No. 3414683 is **AFFIRMED** in all respects.

---

[12] See also II-T. 62-63.

Penalty Assessment for Citation No. 3414683

Respondent San Juan Coal Company is a Delaware corporation and is the owner-operator of the San Juan Mine and Pit (60 employees) and the La Plata mine (18 employees) which respectively mine 2 million tons and between 1.1 million and 2 million tons annually. (I-T. 5). The controlling entity produces over 10 million tons of coal annually and is found to be a large mine operator. During the 24-month period preceding the occurrence of the violation, 68 prior violations occurred at the San Juan Mine and Pit and 20 occurred at the La Plata mine. (See I-T. 5-6; Exs. P-1 and P-2). [13] Assessment of penalties will not adversely affect Respondent's ability to continue in business. Upon notification of the violation, Respondent proceeded in good faith to achieve rapid compliance with the standards cited. The remaining statutory penalty assessment criteria of negligence and gravity have been previously determined. A penalty of $600 is found appropriate and is here **ASSESSED.**

ORDER (Citation No. 3414683)

Respondent **SHALL PAY** to the Secretary of Labor the sum of $600 within 30 days from the date of this decision.

FINAL ORDER

The modifications of various Citations are reflected in the separate sections for each docket herein. In the section of this decision entitled "Three Grounding Citations," Citations numbered 3414864, 3413540, and 3414692 have been **VACATED.** Citation No. 3414683 has been **AFFIRMED.**

---

[13] The transcript incorrectly shows the figures for number of employees as being the number of previous violations. The "employee" numbers indicated were taken from my notes taken at hearing. The figures for history of previous violations were taken from Exhibits P-1 and P-2. The figures for the two categories are similar and the changes have no bearing on penalty assessment.

Likewise, all penalties assessed for Citations involved in the four subject dockets are directed for payment at the end of each of the various sections. The total amount for all penalties in these four dockets is $7,280.00, and Respondent should make payment as indicated.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Michael H. Olvera, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Donald L. Humphreys, Esq., SAN JUAN COAL COMPANY, 550 California Street, San Francisco, CA 94104 (Certified Mail)

ek

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

OCT 21 1991

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-143-DM
on behalf of	:	
MARTIN L. RICHARDSON,	:	MD 90-19
Complainant	:	Mine I.D. No. 26-02161
	:	
v.	:	Docket No. WEST 91-262-DM
	:	
F.K.C., INCORPORATED,	:	WE ME 90-19
Respondent	:	F.K.C. Portable
	:	
	:	(Consolidated)

ORDER OF DISMISSAL

Before: Judge Morris

These cases arose under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

On December 26, 1990, the Secretary of Labor filed an application for reinstatement on behalf of Complainant, pursuant to Section 105(c) and Commission Rule 44.29 C.F.R. § 2700.44, as amended.

On January 15, 1991, an order of temporary reinstatement was issued.

On April 9, 1991, in the case docketed as WEST 91-262-DM, the Secretary filed a complaint of discrimintation on behalf of Complainant, pursuant to Section 105(c)(2) of the Mine Act. Complainant alleged Respondent violated Section 105(c)(1) of the Act.

In its answer filed on May 13, 1991, Respondent denied the Commission had jurisdiction in this matter. Further, Respondent asserted its activities did not render it subject to the Mine Act. In addition, Respondent asserted Complainant was not a miner subject to the Act.

On June 5, 1991, Docket Nos. WEST 91-143-DM and WEST 91-262-DM were consolidated and scheduled for a hearing on July 18, 1991.

On June 17, 1991, the hearing date was canceled and the case was reset to begin on October 16, 1991.

On October 15, 1991, the Secretary moved to dismiss the proceedings. As a grounds therefor, the Secretary stated that "at the time of the alleged discriminatory act, the Complainant was not a 'miner,' as defined by Section 3(g)" ... of the Act.

In her motion the Secretary further alleged that "at the time of the alleged discriminatory act, neither F.K.C., Inc., nor F.K.C. Sand and Gravel Products, Inc., were engaged in the type of activity that would classify the companies as operators under Section 3(d), 30 U.S.C. § 802(d) of the Mine Act. In addition, neither company was engaged in activity as a mine, as defined in Section 3(h)(1) or (2), 30 U.S.C. § 802(h)(1) or (2) of the Mine Act.

For good cause shown, the motion to dismiss is **GRANTED** and the cases are **DISMISSED** without prejudice.

John J. Morris
Administrative Law Judge

Distribution:

Lisa A. Gray, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Bill C. Hammer, Esq., 2300 Paseo del Prado #B202, Las Vegas, NV 89102 (Certified Mail)

Mr. Martin L. Richardson, 2316 Statz Street, North Las Vegas, NV 89030 (Certified Mail)

ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 21 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 90-266
	:	A.C. No. 46-05972-03531
v.	:	
	:	No. 8 Mine
PIGEON BRANCH COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $4,400 to $2,200 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $2,200 within 30 days of this order.

Avram Weisberger
Administrative Law Judge

Distribution:

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

Ms. Ruby H. Cyphers, Bookkeeper, Pigeon Branch Coal Company, Inc., 106 Suffolk Avenue, Richlands, VA 24641 (Certified Mail)

Mr. William T. Heflin, Pigeon Branch Coal Company, Box 364, North Tazewell, VA 24630 (Certified Mail)

nb

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 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 89-186
	:	A. C. No. 15-13428-03508
v.	:	
	:	Lanham No. 1 Mine
LANHAM COAL COMPANY, INC., Respondent	:	

DECISION ON REMAND

Before: Judge Broderick

On September 3, 1991, the Review Commission remanded this case to me to "determine, through application of the reasonably prudent person test, whether Lanham had fair notice that section 77.1710(g) required the use of safety belts or lines under the circumstances of this case." 13 FMSHRC ____. At my request, both parties filed briefs addressed to the issue. Neither wished to submit further evidence.

I

Lanham was the owner and operator of a surface coal mine in Daviess County, Kentucky. It contracted with Caney Creek Trucking Company to haul coal from the mine to Lanham's coal dock. After the coal was loaded into the trucks, Caney's drivers covered the load with a tarp in a parking lot on mine property. Safety belts and lines were not provided or worn by the drivers while tarping their trucks. On December 29, 1988, Charles Daugherty, the owner of Caney and a truck driver, fell from his truck approximately 10 feet to the ground while tarping his truck. He was not wearing a safety belt or line. Daugherty was taken to the hospital and subsequently died from reasons not related to the fall. MSHA issued a citation charging a violation of 30 C.F.R. § 77.1710(g).

Prior to the accident, neither Lanham nor the MSHA inspector who issued the citation considered the cited standard applicable to the tarping of trucks. The inspector had never previously cited the practice, and had never observed safety belts or line

used in such situations in more than 40 years of mining experience. MSHA had no standards or guidelines that covered the practice, and Lanham had no specific notice that the practice violated the standard.

II

30 C.F.R. § 77.1710 provides in part that surface coal mine employees shall be required to wear "safety belts and lines where there is a danger of falling." The regulation is on its face simple and straightforward. The facts in this case very clearly show that there was a danger of falling: in fact a miner fell.

III

In the Alabama By-Products case, 3 FMSHRC 2128 (1982), the Commission considered the regulation requiring that machinery and equipment be maintained in safe operating condition. It concluded that a reasonably prudent person familiar with the factual circumstances including facts peculiar to the mining industry would recognize that the cited equipment was in an unsafe condition. In United States Steel Corporation, 5 FMSHRC 3 (1983) the Commission held that the reasonably prudent person standard applies to the berm regulation: the issue is whether the operator's berms or guards measure up to the kind that a reasonably prudent person would provide under the circumstances. In Great Western Electric Company, 5 FMSHRC 840 (1983), the Commission in considering the same regulation as in the instant case, held that "the applicability of the standard [should be determined] in terms of whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." 5 FMSHRC 842. In November, 1990, the Commission phrased the test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition of the standard." Ideal Cement Company, 12 FMSHRC 2409, 2410 (1990) [Emphasis added].

The Great Western Electric Company test seemed to be whether the reasonably prudent person would recognize that the factual circumstances created the hazard which the regulation attempted to prevent. The Ideal Cement test, as I read it, involved a subtle change: it is not whether the reasonably prudent person would recognize that the facts create the hazard, for example whether such a person would recognize that tarping a truck by climbing on the load of coal creates a danger of falling, but whether that person would recognize the specific prohibition of the standard, that is, whether such a person would have recognized that attaching a tarp to a truck without utilizing safety belts and lines was prohibited by the regulation. The

change in the test is evident from the terms of the remand: I am required to determine, through application of the reasonably prudent person test, whether Lanham had fair notice that section 77.1710(g) required the use of safety belts or lines under the circumstances of this case.

IV

The law of Kentucky requires that a loaded coal truck be covered with a tarp before the truck is operated on State highways. In order to affix a tarp, the driver is required to mount the back of the loaded truck, which is approximately 8 feet wide, and unroll the tarp while walking backwards on the load of coal. The load is normally uneven and higher in the center than on the sides. In the instant case, it was about 10 feet from the ground to the top of the load.

The tarping of trucks is, and has been for many years, a daily occurrence in the coal industry. The MSHA inspectors who testified in this case had never previously cited the practice involved here. Neither had ever observed coal trucks provided with belts or lines for persons putting on a tarp or removing it from a loaded coal truck. The inspector who issued the citation did not consider the cited practice a violation of the standard before he issued the citation contested here. The evidence establishes that the practice of using safety belts and lines while tarping trucks is rarely or never followed in the coal industry. It also establishes that prior to this case, the practice was rarely or never cited by MSHA.

I think it is clear that a reasonably prudent person would recognize that the activity cited here is hazardous, i.e., it creates a danger of falling. On the other hand, in view of the evidence concerning the practice in the industry and in MSHA's enforcement history, it is equally clear that such a person would not have recognized the specific requirement of the standard, i.e., that tarping a truck requires safety belts and lines.

V

Following Commission precedent in its most recent decision, Ideal Cement Company, and the terms of the remand, I conclude that the evidence does not establish that Lanham violated 30 C.F.R. § 77.1710(g) in failing to require safety belts and lines for miners engaged in the tarping of loaded coal trucks.

ORDER

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

1. Citation 3297324 is **VACATED.**

2. This civil penalty proceeding is **DISMISSED.**

James A. Broderick
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-102, Nashville, TN 37215 (Certified Mail)

Flem Gordon, Esq., Gordon & Gordon, P.S.C., 1500 Frederica Street, P. O. Box 390, Owensboro, KY 42302 (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 2 4 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JIMMIE L. CALLAN Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 92-1-DM
v.	:	SE-MD-91-03
	:	Beers Pit
S & S MATERIAL, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Weisberger

The Secretary's Motion to Withdraw Appication for Temporary Reinstatement is **GRANTED** based on the assertions in the Motion.

It is **ORDERED** that this case be **DISMISSED.**

Avram Weisberger
Administrative Law Judge

Distribution:

Lisa A. Gray, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, 4th Floor, Arlington, VA 22203 (Certified Mail)

John Hargrove, Esq., 2001 Park Place Tower, Suite 1400 Birmingham, AL 35203 (Certified Mail)

Jimmie L. Callan, Route 1, Box 185, Jones, Alabama 36749 (Certified Mail)

nb

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

OCT 28 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 90-262 A.C. No. 05-03672-03591
v.	:	Mt. Gunnison No. 1 Mine
MOUNTAIN COAL COMPANY, (Successor to West Elk Coal Company, Incorporated), Respondent	:	

DECISION

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

Before: Judge Cetti

This case is before me on petition for civil penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), charging the Mountain Coal Co. with violating 30 C.F.R. § 75.503(a) a mandatory regulatory standard and proposing a civil penalty for the alleged violation. Pursuant to notice, the case was heard on the merits before me at Glenwood Springs, Colorado. Helpful post-hearing briefs were filed by both parties which I have considered along with the entire record in making this decision.

The Regulation

The regulation cited reads as follows:

> 30 C.F.R. § 75.503, Permissible Electrical Face Equipment; Maintenance
>
> The operator of each coal mine shall maintain in permissible condition all electrical face equipment required by § 75.500, 75.501 and 75.504 to be permissible which is taken into or used inby the last open cross-cut of any such mine.

The Citation

The citation issued to Respondent states the following:

> The jeffrey-type ram-car R-9 serial number 38297 and approval number 31-35-5 operating in the 2W 1N/002-0 section was not maintained in a permissible condition in that there was a .005 opening between the flame arrestor unit and exhaust [1] unit when checked.

ISSUES

1. Whether a preponderance of the evidence established facts that constitute a violation of 30 C.F.R. § 75.503.

2. If the cited violation is established, was it a "significant and substantial" violation.

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

STIPULATIONS

The parties stipulated (Joint Exhibit 1) as follows:

1. West Elk Coal Company, Inc., [2] is engaged in the mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. West Elk Coal Company, Inc., is the owner and operator of the Mount Gunnison #1 Mine, MSHA I.D. No. 05-03672.

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

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[1] Inspector Gutierrez on cross-examination admitted the citation was in error in stating "exhaust" unit in describing the location of the feeler gauge penetration in question. The correct location was between the "air intake" unit and the flame arrestor unit. (Tr. 13).

[2] Now Mountain Coal Company, successor by merger to West Elk Coal Company, Inc., and Beaver Creek Coal Company.

2. West Elk Coal Company, Inc., is the owner and operator of the Mount Gunnison #1 Mine, MSHA I.D. No. 05-03672.

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

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

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place 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.

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

7. The proposed penalty will not affect Respondent's ability to continue business.

8. The operator demonstrated good faith in abating the violation.

9. West Elk Coal Company, Inc., is a large operator of a coal mine with 564,850 tons of production in 1989.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

DISCUSSION

Section 75.503 states "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 which is taken into or used inby the last open crosscut of any such mine." According to the plain language of this standard, a violation of Section 75.503 is established where 1) there is a piece of electric face equipment; 2) the equipment is taken into or used inby the last crosscut; and 3) the equipment is not maintained in permissible condition.

In this case, there is no dispute that this citation involved a piece of electrical face equipment being used in the working section inby the last open crosscut. During a regular inspection, Inspector Cosme Gutierrez examined a Jeffrey ram-car (a piece of hauling equipment with electrical components and a diesel-powered engine) used to haul fresh coal being cut by a miner from the working face. (Tr. 23-24). Gutierrez explained that the ram-car is considered both a diesel and an electrical piece of face equipment. (Tr. 25). The ram-car had been located at the working face inby the last open crosscut before it was removed outby the active section about four or five crosscuts for inspection purposes. (Tr. 23, 40). The primary issue in this case is whether this ram-car was being maintained in a permissible condition.

Permissibility requirements for electrical equipment are contained in Part 18 C.F.R. and for diesel-powered equipment in Part 36 C.F.R. Jerry Taylor, the highly qualified expert and engineering coordinator for District 9, explained permissibility and the permissibility requirements for this ram-car. Mr. Taylor testified that "permissibility means that the whole machine, when properly maintained, will not ignite a methane air mixture and/or coal dust and/or cause a fire of combustibles because of an energy source contained within one of their explosion-proof compartments." (Tr. 117). As defined in Part 18.2, "permissible equipment" means "a completely assembled electrical machine or accessory for which a formal approval has been issued as authorized" by MSHA. Part 36, states that diesel-powered equipment must comply with the requirements of Part 36 and have a certificate of approval to this effect issued. The Jeffrey ram-car in question was subject to the MSHA approval process and, pursuant to the permissibility requirements, Jeffrey Mining Machinery Division developed a specific permissibility checklist for the type of ram-car in question for MSHA's review. (Ex. P-3). Mr. Taylor explained the MSHA approval and certification process in relation to this type of ram-car. (Tr. 113-115). In general, MSHA reviews the design and performance of the equipment to insure that, when functioning as designed, the equipment will be explosion proof within the confines of a methane air mixture.

The flame arrestor assembly unit is an enclosed component attached to the air intake side of the engine. It is designed to prevent a flame from the engine escaping to the outside mine atmosphere at the face. (Tr. 24). The flame arrestor consists of a flat disc shaped wire mesh screen through which all air in the engine intake system must pass in order to enter the engine. The flame arrestor cools any flame from the engine before the flame reaches the outside air where it could cause an ignition of combustible material.

The flat disc shaped wire mesh (flame arrestor) is encircled with a flat 1.95 inch wide solid metal flange or collar that keeps the wire screen disc in place.

The flame arrestor collar or flange is sandwiched between two other flat circular metal flanges and the three flanges are tightly bolted by six bolts. The flange on the engine side being referred to as the "inby flange", and the flange on the outside air side being referred to as the "outby flange". (Ex. P-2).

To check the flame arrestor, the inspector used "feeler gauges"--flat metal pieces of varying thicknesses used to measure any openings. (Tr. 28). He used the .005 thick gauge inserting it in between the outby flange and the flame arrestor flange. Inspector Gutierrez was able to insert a .005" gauge in some limited depth over some limited width at the interface of the flame arrestor flange and the outby flange. Upon questioning by the Court, Inspector Gutierrez explained that the gauge penetrated "about" an inch and that an inch was not sufficient to get down to the enclosed area where the flame arrestor (the wire screen mesh disc) was held in place. (Tr. 51-52).

There was no evidence that the inspector made or even attempted to make an accurate objective measurement of the depth of the feeler gauge penetration.

Respondent's Position and Evidence

Respondent, at the hearing, presented pertinent evidence to support its position which it stated upon opening of the record as follows:

> First of all that there was no violation of 30 C.F.R. 75.503 because the ram-car at issue was in a permissible condition. The gap that Inspector Gutierrez found did not penetrate all the way down to the flame arrestor itself and therefore allowed no pathway for a flame, if there were one, to escape to the atmosphere.
>
> In addition, even if there was a violation, West Elk objects to the S&S designation because (for several reasons) there was no reasonable likelihood that any injury would occur as the result of the gap. It was not likely that the engine would backfire or cause any flame that could cause an ignition. Secondly, the loca-

> tion of the gap was on the outside or upward side of the flame arrestor, and so there was no way that a flame could escape through that gap. Thirdly, there are very low levels of methane or coal dust in this mine, as will be demonstrated by the record, and therefore, even if there was flame that escaped, it would be very unlikely there would be any ignition. (Tr. 11-12).

It was clear from the testimony presented that Inspector Gutierrez was able to insert the .005" feeler gauge only to a limited depth and that he failed to measure that depth. When questioned as to the depth, he was able to penetrate the feeler gauge on the outby side of the flame arrestor flange, the best the inspector could do was give an estimate "about an inch."

Robert Morgan, the Section Mechanic responsible for the ram-car and who was with Inspector Gutierrez during the inspection, testified that he watched Inspector Gutierrez check the flame arrestor with the .005 feeler gauge. He saw him insert the feeler gauge on the outby, or fresh air side of the flame arrestor flange. (Tr. 160). The gauge went in only approximately 3/8 to 1/2 inch. Inspector Gutierrez marked the gauge with a felt pen to mark the depth of the penetration and showed the mark to Mr. Morgan and Mr. Walker. (Tr. 178-179, 199). Before abating the condition, Mr. Morgan checked the gap in question with his own feeler gauge, using a .004" thick gauge. The .004 gauge penetrated only the same distance as Inspector Gutierrez' gauge did, which was 3/8 to 1/2 inch. (Tr. 175).

Mr. Dewey Walker, Production Supervisor at the mine, was also present when Inspector Gutierrez checked the gap (Tr. 191-192). He testified that the gauge penetrated approximately 1/2" (Tr. 193), and that circumferentially the gap was approximately the width of the feeler gauge. (Tr. 193).

Inspector Gutierrez testified that the cause of the gap was that the bolts were loose. He based this conclusion on the fact that he saw Mr. Morgan tightening the bolts. (Tr. 34). Inspector Gutierrez said that it took Mr. Morgan approximately 20 minutes to abate the citation because it took him about 10 minutes to find the proper wrench to do the tightening and about 10 minutes to do the actual tightening. (Tr. 51). Inspector Gutierrez also speculated that the flame arrestor could move back and forth, thereby switching the gap from the outby side to the inby side and vice versa. (Tr. 55). He testified he did not attempt to move the flame arrestor back and forth so did not know that it

could move. He assumed that it could move because he found a .005" gap rather than the maximum of .004" gap on the outby side. (Tr. 55).

The inspector's conclusion that the bolts holding the flame arrestor unit flanges together were loose was based simply on the fact he saw Mr. Morgan tightening the bolts and assumed that Mr. Morgan abated the condition by doing nothing more than tightening three bolts. Inspector Gutierrez stated this as follows:

> Q. I believe you testified on redirect that you noticed loose bolts after checking a gap. In fact three bolts were loose; is that correct?
>
> A. They tightened three bolts. That showed me that they were loose. I didn't wiggle them. When they tightened them, they tightened the three bolts.
>
> Q. So you are assuming, or concluding, if you will--
>
> A. Concluding
>
> Q. --that the bolts were loose because you saw him tighten them.
>
> A. Exactly. (Tr. 98).

Mr. Morgan testified on the contrary that the bolts were not loose and that he was not able to tighten them at all. (Tr. 168). Mr. Morgan tried to tighten the two bolts that were on either side of the opening, and he couldn't tighten them. Therefore, he loosened all of the bolts enough to get a flat file in between the two surfaces to clean them. He concluded that because it was just a small gap there must be something in there, either a burr on the metal or some foreign object, so he filed it, tightened the bolts back up and checked the gap. (Tr. 166-167).

Mr. Walker, who was present there the entire time, confirmed that Mr. Morgan attempted to tighten the bolts and could not tighten them, so he loosened them up, did some filing on the inside and then tightened the bolts back up. (Tr. 192).

With respect to the width of the flame arrestor flange, the distance from the outer edge of the flame arrestor collar or flange to the flame arrestor itself is approximately 2 inches, as testified to by Inspector Gutierrez. (Tr. 72). Mr. Taylor, MSHA's expert witness and the Engineering Coordinator of MSHA's

District 9, estimated the distance to be just under 2 inches. (Tr. 141). When he was recalled to the stand by the Court to make an accurate objective measurement, he determined that the width of the flame arrestor flange was 1.95 inches.

Further Discussion and Findings

Respondent has the burden of proving by a preponderance of the evidence that there was a violation of the cited safety standard 30 C.F.R. § 75.503. This section does not define what constitutes permissibility. However, the Court and the parties were fortunate to have the assistance and testimony of an experienced and highly qualified expert, Mr. Jerry Taylor, Engineering Coordinator for Coal Mine Safety and Health District 9. [3]

Mr. Taylor testified that for the flame arrestor unit, the maximum gap allowed is defined in 30 C.F.R. Part 18, specifically in the Table at 18.31 entitled "Enclosures-Joints and Fastenings." (Tr. 182). That chart, according to Mr. Taylor, shows that a flame path of a maximum of .004" must be maintained for at least 1 inch in distance from the flame arrestor (outer edge of the wire mesh disc) to the outside of the flame arrestor flange. (Tr. 125-126). Consequently, in order for there to be a violation of § 75.503, the flame arrestor unit must have had less than 1" in depth between the flame arrestor flange and the outby flange that was .004 of an inch or less in gap. As stated by the permissibility expert, Mr. Taylor, the requirement of the safety standard in question "is that the flame path be at least an inch wide--not less than an inch wide, and that the gap be not greater than .004." Put another way, in this case there would have been a violation only if a gap greater than .004" extended more than .95 of an inch in depth measured from the outer circumference edge of the flame arrestor flange since the flange was 1.95 inches wide.

The preponderance of the evidence did not establish that there was a violation. As discussed above, the actual distance from the opening for the flame arrestor and the outside edge of the flame arrestor flange was 1.95", as measured very precisely by Mr. Taylor. (Tr. 208). There is no precise measurement as to how far Inspector Gutierrez inserted the metal gauge. The best the inspector could do was to estimate it to be "about" an inch. (Tr. 30, 51, 59). Messrs. Morgan and Walker testified, however, that the gauge penetrated only about 3/8" to 1/2". (Tr. 161,

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[3] Mr. Taylor has a Bachelor of Science degree in Mechanical Engineering and in his present position coordinates all of the engineering functions in District 9.

193). They were fairly confident about this estimate because Inspector Gutierrez had marked the feeler gauge with a felt tip pen and showed Messrs. Morgan and Walker how far the gauge had penetrated. (Tr. 160-161, 199). Further, Mr. Morgan checked the gap himself with his .004" feeler gauge and his gauge would go in no more than 1/2". (Tr. 161-162).

The preponderance of the evidence established that the gauge penetrated substantially less than .95 of an inch and, therefore, the flame arrestor unit was in compliance with § 75.18.31 and was permissible under § 75.503. Even if Inspector Gutierrez's testimony were to be accepted completely and that of Messrs Morgan and Walker rejected, the government would have failed to carry its burden of proof. Inspector Gutierrez merely estimated that the gauge penetrated "about" an inch, and Mr. Taylor measured the pertinent distance on the flange as being 1.95 inches. Therefore, the Petitioner failed to carry its burden of proof that Mountain Coal Company did not maintain the gap between the flanges at .004" or less for a distance of at least 1". The citation should be vacated.

On observing the demeanor of the three witnesses who testified as to the depth of the penetration of the feeler gauge, I find the testimony of each of the witnesses credible in the sense that each of these witnesses was giving his best estimate or "guesstimate" as to the depth of penetration from 3/8 inch to "about an inch". The Petitioner has the burden of proof. The best evidence it could offer on the depth of penetration was "about an inch". The weakness of Petitioner's case lies in the fact that the inspector failed to make an accurate measurement or any objective measurement at all in a situation where 1/20th of an inch could make the difference between a violation or no violation. Without a measurement "about an inch" means possibly a little under 1" or a little over 1". This evidence is insufficient for Petitioner to carry its burden of proof, particularly under the facts of this case where we have credible testimony from two eye witnesses who estimated the depth of penetration to be 3/8 to 1/2 of an inch.

Again on the question as to whether the bolts were loose and simply needed tightening to abate the problem, the testimony of all three witnesses as to what they observed was credible. The conclusion of the inspector differed from the other two witnesses but was based on his limited observation of what was needed to close whatever gap existed. Certainly Mr. Morgan who closed the gap was the witness in the best position to observe and testify what he had to do to close the gap. The testimony of the inspector as to the tightening of the bolts was not necessarily inconsistent with the testimony of Mr. Morgan and Mr. Walker that

Morgan had to loosen the bolts and use a file before he could tighten the bolts.

I was impressed with Mr. Taylor's expertise in the field of permissibility. However, his conclusion that there was a violation was based upon two assumed facts that the preponderance of the evidence failed to establish. Mr. Taylor's opinion was based upon the assumption that the .005 feeler gauge penetrated into the gap a depth of one inch and that these were loose bolts that only needed to be tightened. The preponderance of the evidence presented failed to establish either of these assumptions as fact. The Petitioner failed to carry its burden of proof. Citation No. 3413334 should be vacated.

ORDER

Citation No. 3413334 is vacated and this case is **DISMISSED.**

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

David M. Arnolds, Esq., Thomas F. Linn, Esq., WEST ELK COAL COMPANY, INC., 555 - 17th Street, 20th Floor, Denver, CO 80202 (Certified Mail)

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

OCT 28 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-57-M A.C. No. 26-00249-05511
v.	:	Gooseberry Mine
ASAMERA MINERALS (US) INCORPORATED, Respondent	:	

DECISION

Appearances: George B. O'Haver, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Charles R. Bush, Esq., Preston, Thorgrimson, Shidler, Gates & Ellis, Seattle, Washington, for Respondent.

Before: Judge Cetti

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charged Respondent with violating two safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq. (the "Act").

There was a fatal fall-of-person accident at the mine. The accident occurred while the miner was replacing damaged timber dividers in the manway for the 1000-7 stope on the 1000 level. The miner fell approximately 66 feet down a manway timber slide.

Following the accident investigation, MSHA issued two 104(a) citations to the Respondent alleging a violation of 30 C.F.R. § 57.15005 and 30 C.F.R. § 57.11012 and proposed penalties totaling $6,000. Respondent filed a timely answer denying any violation. After notice to the parties, the case came on for hearing before me. All issues were fully litigated. At the hearing, testimony was taken from the following individuals:

1. Robert H. Morley, Federal Mines Inspector for MSHA.

2. Ronald Barri, Federal Mine Inspector for MSHA.

3. Paul Belanger, Supervisory Mine Inspector for MSHA.

4. Richard Karlson, Mine Project Manager.

5. Melvin J. Wattula, Health, Safety and Security Manager for Respondent.

At the conclusion of the evidentiary hearing, that matter was left open for post-hearing briefs. After the receipt of the transcript, but within the time allowed for filing of the briefs, the parties negotiated and reached a settlement agreement on both citations. Under the proposed settlement agreement, the parties propose to reduce the penalty for the citations from $6,000 to $3,240.

Based upon my review and evaluation of the record, including the evidence presented at the August 22, 1991 hearing, I find the settlement agreement to be reasonable and consistent with the statutory criteria in Section 110(i) of the Act. The settlement agreement is **APPROVED.**

ORDER

After careful consideration of all the evidence and testimony adduced in this case, **IT IS ORDERED** that Respondent pay to the Secretary of Labor a civil penalty of $3,240 within thirty (30) days of the date of this decision. Upon such payment this proceeding is **DISMISSED.**

August F. Cetti
Administrative Law Judge

Distribution:

George B. O'Haver, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105-2999 (Certified Mail)

Charles R. Bush, Esq., PRESTON, THORGRIMSON, SHIDLER, GATES & ELLIS, 5400 Columbia Center, 701 Fifth Avenue, Seattle, WA 98104-7078 (Certified Mail)

Mr. Rick Karlson, Mine Manager, ASAMERA MINERALS (US) INC., 6121 Lakeside Drive, Reno, NV 89511 (Certified Mail)

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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

SEP 30 1991

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS **MASTER DOCKET NO. 91-1**

ORDER EXTENDING TIME

On September 17, 1991, I issued an order extending the time for mine operators to respond to the Secretary's written discovery requests, to utilize the document depository, to examine and test filter media, and to serve written discovery requests on the Secretary.

On Motion of Lambert Coal Company, Inc., and Koch Carbon, Inc., who were served with the Petition instituting the penalty proceeding against them on August 19, 1991, and who seek a further extension of time, and on Motion of Mid-Continent Resources and National King Coal, Inc., to amend the Plan and Schedule of Discovery, **IT IS ORDERED:**

1. Operators who were parties in these proceedings prior to June 28, 1991, are governed by the time limitations in the Plan and Schedule of Discovery issued June 28, 1991, as amended September 10, 1991, and as further extended by the Order Extending Time issued September 17, 1991.

2. Operators who became parties in this case between June 28, 1991 and September 17, 1991, shall serve responses to the Secretary's written discovery requests within 40 days of September 17, 1991.

3. Operators described in numbered paragraph 2 above shall have the same 40 day period to utilize the document depository and to serve written discovery requests on the Secretary. The Secretary shall respond to such written discovery requests within 30 days of service.

4. Operators described in numbered paragraph 2 above shall be permitted to examine and test their filter media in accordance with the Plan and Schedule of Discovery within the same 40 day period. Western operators may request transfer of their dust filters to the Denver Health Technology Center within the same 40 day period, for testing in accordance with the Plan and Schedule of Discovery. If the filters are transferred to Denver the testing shall be completed on or before November 30, 1991. All operators described in paragraph 2 above shall identify their employees involved in dust sampling in accordance with paragraph

II.D.6 of the Plan and Schedule of Discovery within 40 days of September 17, 1991.

5. Operators who become parties in this case after September 17, 1991, shall serve responses to the Secretary's written discovery requests, shall utilize the document depository, shall serve written discovery requests on the Secretary, shall be permitted to examine and test their filter media and shall identify their employees involved in dust sampling within 40 days of the date they become parties in this case.

6. All other dates and time limits in the Plan and Schedule of Discovery as amended September 10, 1991, shall remain the same.

/s/ James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

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

Edward Mulhall, Jr., Esq., Delaney & Balcomb, P.C., Drawer 790, Glenwood Springs, CO 81602 (Certified Mail)

Regular Mail to all other counsel and parties

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 04 1991

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS

MASTER DOCKET NO. 91-1

ORDER GRANTING IN PART THE SECRETARY'S MOTION TO AMEND

On October 1, 1991, the Secretary filed a motion for an order amending the Discovery Plan. She submitted with the motion a proposed Amended Prehearing Order Adopting Plan and Schedule of Discovery. The motion states that it followed a meeting between counsel for the Secretary and counsel representing more than seventy five percent of the contested cases under this master docket number, and all counsel present agreed that an amendment was necessary to allow additional time for the taking of depositions. In addition to seeking an extension of time for the taking of depositions, the motion proposes to include the provisions of my Order Extending Time issued September 17, 1991, into the Plan and Schedule of Discovery. However, I issued on September 30, 1991, a further order extending time for new parties' discovery.

I have considered the motion and agree that the requested extension of time for taking depositions is necessary. Therefore, the motion is GRANTED. The third Amended Prehearing Order Adopting Plan and Schedule of Discovery, incorporating therein the provisions for new parties contained in my Order Extending Time issued September 30, 1991, is issued this date, and a copy is attached hereto.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

See Attached List

OCT 04 1991

OFFICE OF ADMINISTRATIVE LAW JUDGES
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
FALLS CHURCH, VIRGINIA

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS

MASTER DOCKET NO. 91-1

AMENDED PREHEARING ORDER ADOPTING PLAN AND SCHEDULE OF DISCOVERY

I hereby adopt as an order of the Review Commission the plan and schedule of discovery submitted by counsel for the Secretary on June 18, 1991, with the following revisions which resulted from discussions at a Prehearing Conference on June 19, 1991, and the Secretary of Labor's Motion to Amend Prehearing Order Adopting Plan and Schedule of Discovery.

Introduction

The purpose of this plan is to avoid delay by providing a mechanism to fairly and efficiently conduct discovery regarding the Secretary of Labor's (hereinafter "the Secretary") allegations of alterations of coal dust filter media. This plan and schedule is intended to apply, to the extent feasible, to discovery in all cases pending before the Federal Mine Safety and Health Review Commission (hereinafter "the Commission") involving altered dust filter media. The plan and schedule of discovery provides for complete and effective discovery while minimizing the duplication of effort and unnecessary delay to the parties and the Commission. Adoption of this plan will provide for the economy of scarce judicial resources and prevent unnecessary disruption of enforcement functions of the Mine Safety and Health Administration, United States Department of Labor.

The parties submitting this plan have acknowledged that there may be fundamental distinctions in some cases and that there must be an opportunity for case-specific discovery. Other than as provided for in this plan, all case-specific discovery will be conducted under individual docket numbers.

All parties agree that the approval of this plan does not constitute a waiver of any party's right to assert any defense or privilege which is otherwise applicable.

References to "operators" in this document refer to: 1) any party designated as a contestant in a notice of contest previously filed with the Commission; and 2) any party designated as a respondent in the civil penalty proceedings filed by the Secretary of Labor. References to "other parties" includes references to: 1) operators and 2) all intervenors.

References to "dust filter media" mean the filter and the backing pad from the coal dust sample cassette identified in each citation.

Summary of the Plan

The plan and schedule of discovery provides for the issuance of a generic docket number applicable to discovery of facts and conclusions common to all of the citations at issue before an administrative law judge. The plan and schedule also provides for discovery of facts and conclusions which are not common to all citations and therefore outside of the scope of the generic docket number. Other than as specifically provided for in this plan,

case-specific discovery will be conducted under individual docket numbers.

The plan contemplates that, within five (5) days of the date of its adoption, or by June 25, 1991 whichever is later, all other parties will be provided with complete access to all non-privileged documents possessed by the Secretary that are properly subject to discovery. The plan also provides that the other parties may take the depositions of Robert Thaxton on July 24th through July 26th and Lewis Raymond on July 29th and 30th in order to discover generally how the Secretary made her determination that the weights of the samples at issue were altered. The plan further provides that the other parties may examine, pursuant to certain limitations, the dust filters applicable to their respective cases and may subject the dust filters to non-destructive testing. Examination of these filters is to be completed by October 30, 1991.

Other than the two depositions mentioned above, all depositions of witnesses will begin only after discovery by interrogatory and document production is completed on August 30, 1991. The depositions of individuals with first-hand knowledge regarding the dust sampling and the designation of the dust filters at issue as altered will precede the depositions of other individuals. Joint Depositions of fact witnesses will be taken between October 7, 1991 and November 22, 1991.

All expert witnesses will be required to prepare a written report summarizing their credentials, all opinions to which they

will testify in these matters, and the basis for such opinions. These reports must be exchanged by December 16, 1991. The depositions of expert witnesses will be taken between January 6, 1992 and February 14, 1992.

Upon the completion of the discovery specifically provided for in this plan, counsel for the Secretary and the other parties will meet to discuss proposing an order and schedule of trials and a plan and schedule for case-specific discovery in those matters.

I. ADOPTION OF A GENERIC CAPTION AND MASTER DOCKET NUMBER

A. To the extent feasible, all contest and civil penalty cases which involve altered dust filter media will carry a generic caption and master docket number to encompass discovery in all related litigation. Parties may serve pleadings, motions, and notices regarding discovery without having to list each party, citation number, and docket number. The generic caption and master docket number will be used in all pleadings, motions, or notices issued during the joint round of discovery. All motions or other pleadings relating to joint discovery and filed pursuant to the approved joint discovery plan shall be served on all other parties, including all operators.

B. In any civil penalty proceeding in which the Secretary's allegation regarding altered dust filter media has been previously contested, the Secretary of Labor shall file the Petition for Assessment of Civil Penalty (hereinafter "the Petition") under the master docket number and the individual docket number assigned by the Commission. The Secretary shall serve the Petition, a copy of

this Plan and Schedule of Discovery, and a copy of the list of documents available in the document repository upon each Respondent. All proceedings under Petitions so filed shall be governed, to the extent feasible, by the terms of this Plan and Schedule of Discovery.

C. In any civil penalty proceeding arising out of a citation alleging an alteration of a respirable dust sample issued by the Secretary on April 4, 1991, the Secretary of Labor shall file the Petition for Assessment of Civil Penalty (hereinafter "the Petition") under the master docket number and the individual docket number assigned by the Commission. The Secretary shall serve the Petition, a copy of this Plan and Schedule of Discovery, and a copy of the list of documents available in the document repository upon each Respondent. All proceedings under Petitions so filed shall be governed, to the extent feasible, by the terms of this Plan and Schedule of Discovery.

D. Contests of citations issued after April 4, 1991 to any of the other parties which involve allegations of the alteration of respirable dust samples, as well as all civil penalty proceedings arising out of such citations, shall be governed, to the extent feasible, by the terms of this Plan and Schedule of Discovery.

II. DISCOVERY UNDER THE GENERIC CAPTION AND MASTER DOCKET NUMBER

A. Creation of a Document Repository

1. The Secretary will create a document repository in Arlington, Virginia, where all documents to be made available by the Secretary during discovery will be indexed, described, and

filed in a central location. The document repository will contain authenticated copies of all discoverable non-privileged documents in the Secretary's possession or control relating to altered dust filter media as well as photographs of each dust filter. The document repository will include scientific reports relied upon by the Secretary in determining to issue the citations involved here. The document repository will be available for the other parties to use within five (5) days of the entry of an order adopting this plan, or by June 25, 1991, whichever is later. A copy of the list of documents available in the document repository will be sent to all other parties by June 21, 1991.

2. The other parties will be required to avail themselves of the documents in the document repository before filing further requests for production of documents. The Secretary will arrange for one copy of each requested document relevant to that party's citations to be made available to that party, without cost, upon ten (10) working days written notice. The other parties may also request copies of specific documents in the document repository by mailing a letter which specifically identifies the documents from the list provided by the Secretary. Such requests should be addressed to the Secretary's counsel. The Secretary will provide such documents within ten (10) working days of receipt of the request.

3. The Secretary will also compile a list, including the origin, date, recipient, brief description, and title, of any document deemed by the Secretary not to be discoverable or which is

otherwise privileged. The Secretary will on or before July 1, 1991, mail to all other parties copies of the list of documents she deems privileged or otherwise not subject to discovery and a statement of the basis for the claimed privilege. A copy of this list will be kept in the repository for examination and copying by the other parties.

4. Parties desiring physical access to the document repository will be expected to consult with the Division of Mine Safety and Health, Office of the Solicitor to insure that sufficient space is available to accommodate all interested parties at the requested time. Parties should call 703-235-1153, at least twenty-four (24) hours in advance of their expected arrival, to arrange for access to the document repository.

5. The document repository will be available from June 25, 1991 to August 30, 1991.

B. Testing of Dust Filters

The Secretary will make available for photographing and non-destructive testing the dust filter media which are the basis for the Section 104(a) citations and associated civil penalties issued to the other parties. The production of these dust filters will be limited as follows:

1. The dust filter media shall be made available first to the coal mine operator (or designated representative) named in the relevant citation. The other parties shall have access to each other's dust filter media only upon receipt by the Secretary's counsel of written permission from the counsel for the operator

named in the relevant citation. Upon the refusal of written permission by another party, or other inability to obtain the other party's permission, any party may move the administrative law judge for an order providing the moving party with access to the dust filter media of another party.

2. All dust filter media shall be made available in Arlington, Virginia, at a location designated by the Secretary for photographing, examination, and nondestructive testing.

3. Any party may request in writing that the Secretary transfer its dust filter media to the Denver Health Technology Center, Denver, Colorado, for photographing, examination, and nondestructive testing. Such requests must be received by the Secretary's counsel by July 25, 1991. The Secretary must complete the transfer of the dust filter media by August 8, 1991. All dust filter media for which no written request to transfer is received by July 25, 1991, shall remain in Arlington, Virginia@

4. Photographing, examination, and nondestructive testing may only be conducted in the presence of a representative of the Secretary. The Secretary's right to select a representative of her choice is not limited in any respect. The operators must provide their own equipment, chemicals, and other necessary materials needed to conduct their nondestructive testing. The operators must also provide for the safe removal and disposal of all waste materials which result from the nondestructive testing.

5. The request of the operator for the production of the dust filter media must be made in writing to the Secretary's counsel and

be received at least five (5) days in advance of the requested date for production. The request must state specifically: 1) the dust filter media the operator proposes to examine; 2) the names of the individuals to examine the dust filter media; 3) the specific examination procedures and the equipment, chemicals, and/or processes that the dust filter media will be subject to; 4) the equipment, chemicals, and materials the operators will use to perform the nondestructive testing; 5) an agreement that the operator will safely remove and dispose of all waste materials which result from the nondestructive testing; and, 6) the date, time, and anticipated duration of such examination.

6. The request must certify that the procedures, chemicals, and processes that the dust filter media will be subject to will not destroy or alter the dust filter in any material respect. The parties acknowledge that should the dust filter media be destroyed or materially altered during the operators' photographing, examination, or testing, the photograph of that dust filter media previously taken by the Secretary shall be admissible in these proceedings.

7. If counsel for the Secretary believes that the examination or the procedures, chemicals, and processes could result in the dust filter media being destroyed or altered, the Secretary shall promptly notify the requesting party of the basis for the Secretary's belief and the parties shall attempt to resolve the issue. Issues which cannot be resolved expeditiously may be submitted to the administrative law judge for resolution.

8. The operators' right to review and conduct non-destructive testing will be subject to reasonable limitations in terms of the duration of tests and the number of tests. The operators acknowledge that the Secretary may impose reasonable limitations, consistent with her obligation to maintain a chain of custody for each of the dust filter media, upon the number of parties conducting examinations or testing at one time. If the Secretary and the operators cannot expeditiously resolve any disputes regarding the duration or number of tests, the matter may be submitted to the administrative law judge for resolution.

9. Where the operators desire to conduct testing of the dust filter media which requires equipment which cannot be utilized at the location provided by the Secretary, the Secretary will make reasonable efforts to cooperate in such testing. If the Secretary and the operators cannot expeditiously resolve any disputes regarding such tests, the matter may be submitted to the administrative law judge for resolution.

10. The photographing, examination, and nondestructive testing of the dust filter media shall be completed by October 30, 1991.

11. The parties recognize that additional examination and testing of dust filter media may be necessary following the depositions of the Secretary's expert witnesses. The Secretary agrees to make reasonable efforts to comply with such requests. If the Secretary and the operators cannot expeditiously resolve any disputes regarding such tests, the matter may be submitted to the

administrative law judge.

C. Expert Witnesses

The provisions of this Plan and Schedule shall be applicable to all expert testimony offered by the Secretary or the other parties at any trial involving altered dust filter media. Testimony of expert witnesses for the Secretary and other parties will be taken subject to the following limitations:

1. The Secretary and the other parties will exchange lists of all experts they anticipate using at trial. These lists are to be exchanged by December 2, 1991. Any additions or deletions in these lists must be served on opposing counsel within ten (10) days of a party's decision to add or delete an expert witness.

2. Expert witnesses will be required to prepare a written report stating their credentials, all opinions or conclusions to which the expert expects to testify at trial, and a summary of any test, study, results, or evaluations which form the basis for such conclusions or opinions. These reports shall be served upon opposing counsel by December 16, 1991.

3. All costs associated with the depositions of experts, including expert fees for testifying, shall be controlled by Rule 26(b)(4) of the Federal Rules of Civil Procedure except when otherwise agreed to by the parties.

4. Depositions of experts shall be held where the expert is located, unless the party on whose behalf the expert will testify agrees to provide the expert at some other location. In this situation, the costs of having an expert travel to such other

location (and any associated travel expenses) shall be borne by the party on whose behalf the expert will testify.

5. Depositions of "case specific" expert witnesses may be noticed during the period for case specific discovery beginning in March 1992. Expert witnesses may be retained after and as a result of case specific discovery.

D. Sequence of Discovery

The First or Joint Phase

1. No depositions, except those provided for below in paragraph D. 2, shall be taken until such time as discovery through requests for admissions, interrogatories, the document repository, and requests for production of documents are completed. Except for good cause shown, responses to requests for admissions, answers to interrogatories, inspection of the document repository, and responses to requests for production of documents shall be completed by September 13, 1991. Motions to compel shall be filed by October 4, 1991. The pendency of any such motion shall not delay the implementation of any subsequent provision of this plan and schedule of discovery.

2. The Secretary shall make Robert Thaxton, District 4, Coal Mine Safety and Health, available for deposition on July 24, 25, and 26, 1991, and Lewis Raymond, Pittsburgh Health Technology Center, Mine Safety and Health Administration, available for deposition on July 29 and 30, 1991. These depositions shall be conducted at a suitable location designated by the Secretary in the

Washington, D.C. area. These two depositions shall be taken pursuant to the terms of paragraph D. 10 below.

3. The Secretary will initiate discovery by admissions, interrogatories, and request for production of documents and things of the other parties under the generic docket number within 15 days of the entry of the order adopting this discovery schedule or July 15, 1991, whichever is later.

4. The Secretary will, on or before July 1, 1991, identify all persons, including employees of the Secretary, who were involved in the receipt and processing of the dust filter media which led to the citations at issue.

5. The Secretary will, on or before July 1, 1991, identify all persons, including employees of the Secretary, who made the determination that the dust filter media at issue each had been altered.

6. The operators will, on or before August 30, 1991, identify, for each dust sample the Secretary has alleged was altered in the contested citations, those employees of the operator who were responsible for: (a) the dust sampling program at each mine; (b) the identity of the person who signed each dust data card; (c) the identity of the person responsible for the custody and control of each dust cassette after it had been removed from the miner or the designated sampling area; (d) the identity of the person responsible for the transferring of each dust cassette from the operator to MSHA; and, (e) a general description of the process

of the dust sampling program at each mine subject to the master docket.

7. All parties desiring to take the deposition of potential fact witnesses as a Joint Deposition shall notify the Secretary and the other parties in writing of the names of such witnesses by September 13, 1991. All parties may, by October 4, 1991, supplement their lists of potential fact witnesses identified from written discovery responses. With the exception of persons listed as witnesses by a party, or persons named by the Secretary or the other parties as required by paragraphs four (4), five (5), and six (6) above, such notifications shall include a brief recital of the reasons for the taking of the deposition. On or before October 14, 1991, the Secretary will notify all parties in writing of the names of any fact witnesses from whom the Secretary desires to take a deposition as a Joint Deposition. Joint Depositions will not be limited only to the witnesses listed in paragraphs II., D. 4, 5, and 6 above. Additional Joint Depositions will only be allowed if a party is permitted to amend its list of potential witnesses.

8. The depositions of the employees of the Secretary shall be taken in a sequence beginning with the lower level employees and proceeding up the chain of command. This is to insure that the individuals with first-hand knowledge will be deposed first and to reduce the necessity for repeatedly deposing individuals with important enforcement responsibilities.

9. The depositions of witnesses will be taken in two phases. The first phase of depositions will be taken under the generic

caption and master docket number referred to above and will be limited to Joint Depositions. The Joint Depositions of fact witnesses shall be taken prior to such depositions of expert witnesses.

a. Depositions of the Secretary's witnesses will be taken as Joint Depositions if the Secretary names the witness pursuant to paragraphs four (4) or five (5) above, or otherwise indicates that the witness is expected to testify in more than one proceeding pending before the Commission. The date and locations of Joint Depositions of the Secretary's non-expert witnesses will be proposed in writing by the Secretary within ten (10) days of the closing of the notice period for Joint Depositions (see paragraph 7 above). The Secretary will consult with opposing counsel prior to proposing such dates and locations. The other parties may file written objections to the proposed dates and locations with the administrative law judge. If written objections to the proposed dates and locations are received, the administrative law judge shall set the dates and locations of the depositions by order.

b. The deposition of a witness for the other parties will also be taken as a Joint Deposition if the witness is listed as a potential witness for more than one party, or if the witness is identified as an expert pursuant to paragraph C. 1 above. The date and locations of Joint Depositions of the other parties' non-expert witnesses must be proposed in writing by the parties within ten (10) days of the closing of the notice period for Joint Depositions (see paragraph 6 above). The other parties will consult with each

other and the Secretary's counsel prior to proposing such dates and locations. The Secretary may file written objections to the proposed dates and locations with the administrative law judge. If written objections to the proposed dates and locations are received, the administrative law judge shall set the dates and locations of the depositions by order.

10. Joint Depositions will be taken pursuant to the following procedures and limitations.

a. All Joint Depositions will be recorded by a certified court reporter and videotaped if requested by a party. The party making the request shall bear the cost of videotaping. The party noticing the deposition will be responsible for all fees associated with the certified court reporter.

b. The Joint Depositions will be limited to testimony that is common to all of the cases. In the case of expert witnesses, such Joint Depositions will be limited to the witness'expertise, methodology, data, conclusions, and the basis for such conclusions. Questions relating to specific citations will not be appropriate, unless the expert has such knowledge.

c. At all Joint Depositions of a witness for the Secretary the operators' counsel shall determine in advance the lead questioner and shall draw lots for the order of questioning by other operators' counsel. Questioning will be permitted by intervenors' counsel at the conclusion of the operators' questioning. Cumulative and repetitive questions from different counsel and parties will not be allowed.

d. At all Joint Depositions of a witness for a party other than the Secretary, only the Secretary, the parties retaining the individual as a witness, and the representative of miners in the subject mine, if the representative of miners at the subject mine has chosen to intervene pursuant to applicable Review Commission rules, shall be allowed to participate. The United Mine Workers of America (UMWA) filed an intervention on June 24, 1991, for mines in which it is the representative of the miners.

11. Subpoenas shall not be necessary to require the attendance of any salaried employee of a party or retained expert to testify at a deposition. Subpoenas for entities or individuals requiring the attendance of witnesses and the production of documents at deposition will be available upon the filing of a notice of depositions and a written request for a subpoena which specifies the individual and/or the things sought. A copy of such written request shall be served upon all counsel served with the notice of deposition.

12. The Joint Depositions of non-expert witnesses shall be completed by November 22, 1991. Additional depositions may be permitted only for good cause shown.

13. All parties desiring to take the deposition of an expert witness as a Joint Deposition shall notify the Secretary and the other parties, in writing of the identity of the expert by December 24, 1991. The party noticing such a deposition shall confer with counsel of the party offering the expert testimony for the purpose of fixing the dates and locations of the depositions.

If the parties cannot agree, the administrative law judge shall set the dates and locations of the depositions by order.

14. The Joint Depositions of all expert witnesses shall be completed by February 14, 1992. Additional depositions may be permitted only for good cause shown.

15. Joint Depositions may be used, consistent with the Federal Rules of Evidence and Federal Rules of Civil Procedure, at the trial of any proceeding subject to the master docket number.

E. Notices

Notices of all proceedings under this plan shall be sent to all parties.

F. Filing of Discovery

Pursuant to Rule 5(d) of the Federal Rules of Civil Procedure, discovery requests and responses will not be filed with the Commission except in connection with a motion seeking a ruling @n a discovery dispute.

III. CASE SPECIFIC DISCOVERY AND ORDER OF TRIALS

Counsel for the Secretary and the other parties shall meet, within ten (10) days of February 14, 1992 for the purpose of discussing and proposing to the administrative law judge a proposed order and schedule of trials and a plan and schedule for case-specific discovery in such matters. A discovery conference shall be held on March 2, 1992, at a time and location specified by the administrative law judge, to discuss the order and schedule of trials and a schedule for case-specific discovery.

IV. DISCOVERY FOR NEW PARTIES

1. Operators who were parties in this case prior to June 28, 1991 (the date of the issuance of the Plan and Schedule of Discovery), shall serve responses to the Secretary's written discovery on or before September 20, 1991.

2. Operators who become parties in this case between June 28, 1991 and September 17, 1991, shall serve responses to the Secretary's written discovery within 40 days of September 17, 1991.

3. Operators described in numbered paragraph 2 above shall have the same 40 day period to utilize the document repository and to serve written discovery requests on the Secretary. The Secretary shall respond to such written discovery requests within 30 days of service.

4. Operators described in numbered paragraph 2 above shall be permitted to examine and test their filter media in accordance with the Plan and Schedule of Discovery within the same 40 day period. Western operators may request transfer of their dust filters to the Denver Health Technology Center within the same 40 day period, for testing in accordance with the Plan and Schedule of Discovery. If the filters are transferred to Denver, the testing shall be completed on or before November 30, 1991.

5. Operators described in numbered paragraph 2 above shall identify their employees involved in dust sampling in accordance with paragraph II.D.6 of the Plan and Schedule of Discovery within the above mentioned 40-day period.

6. Operators who become parties to this case after September 17, 1991, shall serve responses to the Secretary's written discovery requests, shall utilize the document depository, shall serve written discovery requests on the Secretary, shall be permitted to examine and test their filter media, and shall identify their employees involved in dust sampling within 40 days of the date they become parties in this case.

V. AMENDMENTS TO PLAN

Amendments to this Discovery Plan and Schedule may be granted, for good cause shown, upon the motion of any party.

/s/ James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 07 1991

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS

MASTER DOCKET NO. 91-1

ORDER GRANTING MOTION FOR RECONSIDERATION
ORDER UPHOLDING CLAIM OF PRIVILEGE FOR CERTAIN DOCUMENTS
ORDER TO PRODUCE CERTAIN DOCUMENTS

On October 4, 1991, counsel for Kentucky Carbon Corp., et al., filed a "renewed" motion to compel production of documents in accordance with my orders issued September 27, 1991. The Secretary on October 4, 1991, filed a motion for reconsideration of my order of September 27, 1991, insofar as that order required the Secretary to produce Documents Nos. 3, 5, 201, 203, 350, 353, 365, 366, 367, 401 and 424. The Secretary submitted each of these documents for my in camera inspection.

I have considered the two motions and have reviewed the documents submitted for in camera inspection. On the basis of that consideration and review, the Secretary's Motion for Reconsideration is GRANTED.

In my order issued September 13, 1991, I indicated that following a determination of the propriety of the Secretary's claims of privilege, I would determine whether privileged documents should be ordered disclosed because Contestants' need for the documents outweighed the Secretary's interest in keeping them confidential. Order of September 13, 1991 at 8-9, 17. My order of September 27, 1991, to produce certain documents concerning which I upheld the claim of privilege was not issued sua sponte as the Secretary asserts, but pursuant to the motions to compel production filed July 26, 1991, August 13, 1991 and August 19, 1991. Contestants have asserted that the documents in question directly relate to the central issue of this case, that they are exclusively in the possession of the Government, and that they consist largely of factual material. The Secretary has not denied the first two assertions, but has, at least with respect to certain of the documents, denied that they are largely factual. Since I have now examined all the withheld documents in camera, I can decide whether they are exclusively factual or are deliberative.

I

On reconsideration of my order of September 27, 1991, the following documents need not be produced.

Document No. 5. This is a draft report of PHTC dated June 1991 entitled Investigation of Dust Deposition Patterns on Respirable Coal Mine Dust Samples, consisting of 102 pages. I erroneously concluded that this document was a preliminary draft of a completed study. On review, it is obviously part of a continuing study. It is privileged as part of the deliberative process, and the needs of the Contestants do not outweigh the Secretary's interest in confidentiality.

Document No. 201. This is a memorandum from the MSHA Chief Division of Health to District Managers dated May 7, 1991 and, as the Secretary points out in her argument, involves the current development of a new investigative program in the dust sampling area. The document is privileged as part of an investigative effort which is continuing. The operators' need for this document does not outweigh the Secretary's interest in confidentiality.

Document No. 203. This is a memorandum of a telephone instruction March 21, 1990, from Glen Tinney, Arlington Health Division, entitled "New Void Code AWC--abnormal white center." The Secretary's motion states that this document, like document 201, involves "the current development of a new investigative program concerning other potential violations of the dust sampling program." On the basis of this representation, the operators' need for the document does not outweigh the Secretary's interest on confidentiality.

II

On reconsideration of my order of September 27, 1991, the Secretary is **ORDERED** to produce the following documents by placing them in the Document Depository on or before October 15, 1991.

Documents 3, 365, 366 and 367. These documents are a draft report of investigation by Warren R. Myers, Ph.D. and Allen Wells, M.S., of the Department of Industrial Engineering, West Virginia University concerning "Mine Compliance Sampling Filter Abnormalities" dated February 15, 1990, with handwritten comments apparently inserted by MSHA personnel (367), letters from Glenn Tinney (MSHA) to Dr. Myers, March 16, 1990 and May 4, 1990 with comments on the draft reports of Dr. Myers (365, 366), and a letter from Dr. Myers to Glenn Tinney, April 11, 1990, with responses to Tinney's comments on the first draft report (3).

As the Secretary noted in her Motion, I held that all of

these documents fell within the deliberative process privilege. The question remains whether they are discoverable because the operators' need for the documents outweighs the Secretary's interest in keeping them confidential. The litigation before the Commission involves the Government's charge that the mine operators tampered with respirable coal mine dust samples. This contention is based in part on the study and report prepared by West Virginia University. I conclude that fairness to the operators (and in the Commission's interest in fairly deciding these cases) demands that they be apprised not only of the final report, but also of the deliberations, Government suggestions, changes and revisions that led to the final report. I do not believe that the disclosure of these documents will compromise governmental policy deliberations. The operators' need for the documents outweighs the Secretary's interest in keeping them confidential.

Documents 350 and 353. Document 350 is a computer printout showing the number and percentage of "tampered" samples from over six hundred mines. Robert Thaxton in an affidavit August 30, 1990, states that this document was prepared at the request of the U.S. Attorney for the Southern District of West Virginia. There is nothing in the document that refers to any criminal investigation and nothing limiting it to such an investigation. Document 353 is a computer printout of the number of tampered samples at different mines in different MSHA districts as of October 13, 1989. Mr. Thaxton's affidavit states that the content and organization of the document are related to criminal investigations. But again there is nothing in the document to show that it is part of, or limited to, a criminal investigation. The documents are entirely factual. I conclude that the need of the operators for this information outweighs the Secretary's interest in confidentiality.

Documents 401 and 424. Document 401 is 74 pages in length and includes drafts of the 1989 PHTC report. Document 424 is a draft "List of Tables" with handwritten changes and notations showing results of dust filter testing as part of the PHTC 1989 report. For the reasons given above with reference to Documents 3, 365, 366 and 367, I conclude that the operators' need for the documents outweighs the Secretary's interest in keeping them confidential.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution List attached:

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor (Certified Mail)

Laura E. Beverage, Esq., Jackson & Kelly (Certified Mail)

Linda Homerding, Esq., Williams & Connolly (Certified Mail)

Thomas R. Scott, Esq., Street, Street, Street, Scott & Bowman (Certified Mail)

All other Counsel and Parties served by Regular Mail

Robert B. Allen, Esq.
John J. Polak, Esq.
King, Betts and Allen
P.O. Box 3394
Charleston, WV 25333

Karl F. Anuta, Esq. (Co-counsel Crowell & Moring)
Western Fuels-Utah, Inc.
P.O. Box 1001
1720 14th Street
Boulder, CO 80306

Charles J. Baird, Esq.
Baird, Baird, Baird and Jones, P.S.C.
P.O. Box 351
415 Second Street
Pikeville, KY 41502

Brandan G. Baker
Farkus Coal Co., Inc.
107 Linden Avenue
Charlerio, PA 15022

Harold Baldridge, President
Prater & Baldridge Coal, Inc.
P.O. Box 167
Garrett, KY 41630

Ralph Ball, President
Sterling Energy, Inc.
Rt. 3, Box 22
Industrial Park Road
Jacksboro, TN 37757

Phillip D. Barber, Esq.
Wellbon, Dufford, Brown & Tooley
1700 Broadway
Suite 1700
Denver, CO 80290-1701

George Basara, Esq.
Polito & Smock, P.C.
Suite 400, Four Gateway Center
Pittsburgh, PA 15222-1207

Sheila Becker, Vice President
Jim Dandy Coals, Inc.
P.O. Box 328
Buckhannon, WV 26201

Laura E. Beverage, Esq.
Jackson and Kelly
P.O. Box 553
Charleston, WV 25322

Timothy M. Biddle, Esq.
Crowell and Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

William H. Bland, President
Edward A. Moss, Safety Coordinator
B.S. & S. Coal Co., Inc.
P.O. Box 639
Morgantown, WV 26507

Virgil C. Blankenship
Bear Ridge Mining, Inc.
P.O. Box 255
Tazewell, VA 24651

Michael W. Boehm, Esq.
Spears, Moore, Rebman and Williams
8th Floor, Blue Cross Building
P.O. Box 1749
Chattanooga, TN 34402

Harold D. Bolling, President
Daniel Lee Coal Co., Inc.
135 W. Main Street
Whitesburg, KY 41858

William E. Bradshaw, Esq.
Keuling, Stout and Bradshaw
P.O. Box 400
Big Stone Gap, VA 24219

Clifford D. Burden
Pyro Mining Co.
P.O. Box 289
Sturgis, KY 42459

David Burden
Prestige Coal Company
275 A.S. Main Street
Madisonville, KY 42431

Harry L. Capadano, III, Esq. (Co-counsel Crowell & Moring)
Decker Coal Company
One Thousand Kiewit Plaza
Omaha, NE 68131

David E. Cecil, Esq.
Robertson, Cecil, King and Pruitt
237 Main Street
Drawer 1560
Grundy, VA 24614

Harry M. Coven, Esq.
Gould and Ratner
222 North LaSalle Street
8th Floor
Chicago, IL 60601-1086

Michael W. Critch, Superintendent
Thor, Inc.
1000 Dupont Road
Building #6
Morgantown, WV 26505

Martin J. Cunningham, Esq.
Reece, Lang & Breeding
London Bank & Trust Bldg.
400 S. Main Street
P.O. Drawer 5087
London, KY 40745-5087

Robert I. Cusick, Esq.
David B. Wicker, Esq.
Wyatt, Tarrant and Combs
Citizens Plaza
Louisville, KY 40202

Forester, Buttermore, Turner & Lawson
P.O. Box 935
Harlan, KY 40831-0935

Denise A. Dragoo, Esq.
Geoffrey P. Griffin, Esq.
Fabian & Clendenin
215 So. State Street, 12th Floor
P.O. Box 510210
Salt Lake City, UT 84151

H. G. Freeman, President
Estel Crouse, Vice President
Doris Coal Company
Box 235
Grundy, VA 24614

Loyal G. Forman, Jr., President
Ringold Mining, Inc.
P.O. Box 433
Kingwood, WV 26537

Ray D. Gardner, Esq. (Co-counsel Crowell & Moring)
Pittsburg and Midway Coal
6400 South Fiddler's Green Circle
Englewood, CO 80111-4991

Charles B. Hall, President
H&D Coal Co., Inc.
P.O. Box 480
Whitesburg, KY 41858

James A. Harris, Esq.
Waters, Warner & Harris
701 Goff Building
P.O. Box 1716
Clarksburg, WV 26301

Carl David Harold
Fire Creek, Inc.
P.O. Box 5066
Princeton, WV 24740

Carl H. Hellerstedt, Jr., Esq.
Volk, Frankovitch, Anetakis, Recht, Robertson & Hellerstedt
Three Gateway Center
15th Floor East
Pittsburgh, PA 15222

Michael T. Heenan, Esq.
Smith, Heenan and Althen
1110 Vermont Avenue, N.W.
Washington, D.C. 20005

Linda Homerding, Esq.
Williams and Connolly
839 17th Street, N.W.
Washington, D.C. 20006

David Howard
Cumberland Valley Contractors, Inc.
P.O. Box 1329
Middlesboro, KY 40965

John M. Huddle, Esq.
Gentry, Locke, Rakes & Moore
P.O. Box 1018
Roanoke, VA 24005

Donald L. Humphreys, Esq.
BHP-Utah International, Inc.
550 California Street
San Francisco, CA 94104

Morris Issac
Safety Director
Reynolds Branch Coal Company, Inc.
P.O. Box 620
Martin, KY 41649

Mary Lu Jordan, Esq.
Michael Dinnerstein, Esq.
United Mine Workers of America
900 15th Street, N.W.
Washington, D.C. 20005

James R. Justus
Just-Us Coal Corp.
P.O. Box 359
Hurley, VA 24620

D. B. Kazee, Esq.
Francis, Kazee & Francis
111 East Court Street
P.O. Box 700
Prestonsburg, KY 41653

David A. Laing, Esq. (Co-counsel Crowell & Moring)
Porter, Wright, Morris and Arthur
41 S. High Street
Columbus, OH 43215

[redacted]

Dan Llewellyn
Delta Coal Sales, Inc.
P.O. Box 309
Grantsville, MD 21536

Louis Lorenzo, President
Lorenzo Mining Co., Inc.
R.R. 1, Box 464
Linton, TN 47441

John C. Martin, Esq.
V. Heather Sibbison, Esq.
Patton, Boggs & Blow
2550 M Street, N.W.
Washington, D.C. 20037

Matthew G. Melvin, Esq.
Barbera and Barbera
146 W. Main Street
P.O. Box 775
Somerset, PA 15501

Marcus P. McGraw, Esq.
Greenbaum, Doll and McDonald
1400 Vine Center Tower
P.O. Box 1808
Lexington, KY 40593

Matthew F. McNulty, III, Esq.
Van Cott, Bagley, Cornwall and McCarthy
50 South Main Street, Suite 1600
Salt Lake City, UT 84145

Dina M. Mohler, Esq.
Kay, Casto, Chaney, Love and Wise
P.O. Box 2031
Charleston, WV 25327

R. Henry Moore, Esq.
Buchanan Ingersoll
600 Grant Street, 58th Floor
Pittsburgh, PA 15219

Edward Mulhall, Jr., Esq.
Delaney and Balcomb, P.C.
Drawer 790
Glenwood Springs, CO 81602

Randall K. Osborne
Rt. 1, Box 53
Pennington Gap, VA 24277

Jackie Owens
Pa-Pa Coal Mining Co., Inc.
146 W. Main Street
P.O. Box 775
Somerset, PA 15501-0775

John Palmer, Esq.
Robinson and McElwee
P.O. Box 1791
Charleston, WV 25326

Karl-Hans Rath, Vice President
Dunkard Mining Co.
P.O. Box 8
Dilliner, PA 15327

Michael J. Schmitt, Esq.
Wells, Porter, Schmitt & Walker
327 Main Street
P.O. Box 1179
Paintsville, KY 41240-5179

Randall Scott May, Esq.
Barett, Haynes, May, Carter & Roarck, P.S.C.
P.O. Box 1017
Hazard, KY 41701

Thomas R. Scott, Jr., Esq.
Street, Street, Street, Scott and Bowman
P.O. Box 2100
Grundy, VA 24614

Leo M. Stepanian, Esq.
Stepanian & Muscatello
228 So. Main Street
Butler, PA 16001

David M. Smith, Esq.
Maynard, Cooper, Frierson and Gale
1901 6th Avenue, North
Suite 2400 Amsouth/Harbert Plaza
Birmingham, AL 35203

S. R. Smith, President
Teays Mining, Inc.
P.O. Box 72
Mt. Hope, WV 25880

William D. Stover, Esq.
41 Eagles Road
Beckley, WV 25326

Ora Dwaynne Tennant, Superintendent
Gray Stone Mining, Inc.
Route 2
Box 284
Fairview, WV 26570

K. Dale Tolliver
Quality Energy, Inc.
P.O. Box 1740
Princeton, WV 24740

Charles A. Wagner, Esq.
Wagner, Myers and Sanger
P.O. Box 1308
Knoxville, TN 37901

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

R. Gregory West, Esq.
106 Municipal Drive, Suite 200
Oneida, TN 37841

Douglas N. White, Esq.
U.S. Department of Labor
Office of the Solicitor
4015 Wilson Blvd.
Arlington, VA 22203

Jackson S. White, Jr., Esq.
Mark R. Graham, Esq.
White, Elliott and Bundy
P.O. Box 429
Abingdon, VA 24210

Robert C. Wilson, Esq.
Wilson & Cape
105 S. Commercial
P.O. Box 544
Harrisburg, IL 62946

Joseph A. Yuhas, Esq.
R.D. #1, Box 40
Barnesboro, PA 15714

Revised 10/3/91

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 18 1991

DOTSON & RIFE COAL CO., INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 91-670-R through KENT 91-678-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine No. 1
SECRETARY OF LABOR, MINE SFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 91-1200 A.C. No. 15-05417-03532D
v.	:	Mine No. 1
DOTSON & RIFE COAL CO., INC., Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Contestant/Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Contestant/Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Contestant/Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is GRANTED. The above proceedings are STAYED until all criminal proceedings concerning Contestant/Respondent have been concluded.

James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 91-466
	:	A.C. No. 44-04559-03565D
v.	:	
	:	Mine No. 1
BLACK NUGGET MINING, INC., Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is GRANTED. The above proceedings are STAYED until all criminal proceedings concerning Respondent have been concluded.

James A. Broderick
Administrative Law Judge

Distribution:

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Richard High, Director of Assessments, MSHA, 4015 Wilson Blvd., Arlington, VA 22203

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OCT 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 91-468
	:	A.C. No. 46-06547-03514D
v.	:	
	:	Mine No. 1
AMERICAN CARBON CORPORATION, Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is **GRANTED**. The above proceedings are **STAYED** until all criminal proceedings concerning Respondent have been concluded.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Richard High, Director of Assessments, MSHA, 4015 Wilson Blvd., Arlington, VA 22203

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OCT 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 91-462
	:	A.C. No. 44-06333-03508D
v.	:	
	:	Mine No. 2
GOOD TIMES MINING, INC., Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is **GRANTED**. The above proceedings are **STAYED** until all criminal proceedings concerning Respondent have been concluded.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Richard High, Director of Assessments, MSHA, 4015 Wilson Blvd., Arlington, VA 22203

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OCT 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 91-1051
	:	A.C. No. 15-16410-03514D
v.	:	
	:	Mine No. 3
GOOD TIMES MINING, INC., Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is GRANTED. The above proceedings are STAYED until all criminal proceedings concerning Respondent have been concluded.

James A. Broderick
Administrative Law Judge

Distribution:

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Richard High, Director of Assessments, MSHA, 4015 Wilson Blvd., Arlington, VA 22203

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OCT 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 91-458
	:	A.C. No. 44-02241-03516D
v.	:	
	:	Mine No. 1
LUCKY L & L COAL CO., INC., Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is **GRANTED**. The above proceedings are **STAYED** until all criminal proceedings concerning Respondent have been concluded.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Richard High, Director of Assessments, MSHA, 4015 Wilson Blvd., Arlington, VA 22203

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OCT 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 91-460
	:	A.C. No. 44-04862-03541D
v.	:	
	:	Mine No. 2
L & L ENERGY OF HURLEY, INC., Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is GRANTED. The above proceedings are STAYED until all criminal proceedings concerning Respondent have been concluded.

James A. Broderick
Administrative Law Judge

Distribution:

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Richard High, Director of Assessments, MSHA, 4015 Wilson Blvd., Arlington, VA 22203

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OCT 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 91-1638
	:	A.C. No. 44-04839-03553D
v.	:	
	:	Mine No. 1
DELBARTON MINING CORP., Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is **GRANTED**. The above proceedings are **STAYED** until all criminal proceedings concerning Respondent have been concluded.

James A. Broderick
Administrative Law Judge

Distribution:

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Richard High, Director of Assessments, MSHA, 4015 Wilson Blvd., Arlington, VA 22203

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OCT 18 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 91-482
	:	A.C. No. 44-06030-03546D
v.	:	
	:	Mine No. 2
B R D COAL COMPANY, INC., Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is **GRANTED**. The above proceedings are **STAYED** until all criminal proceedings concerning Respondent have been concluded.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Richard High, Director of Assessments, MSHA, 4015 Wilson Blvd., Arlington, VA 22203

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OCT 18 1991

DOUBLE L COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. VA 91-432-R through VA 91-445-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine No. 2

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Contestant/Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Contestant/Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Contestant/Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is **GRANTED**. The above proceedings are **STAYED** until all criminal proceedings concerning Contestant/Respondent have been concluded.

James A. Broderick
Administrative Law Judge

Distribution:

Ronald L. King, Esq., Robertson, Cecil, King & Pruitt, 237 Main Street, Drawer 1560, Grundy, VA 24614 (Certified Mail)

Douglas N. White, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

slk

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OCT 18 1991

EDD POTTER COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 91-680-R through KENT 91-697
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine No. 2
SECRETARY OF LABOR, MINE SFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 91-1136 A.C. No. 15-05436-03531D
v.	:	Mine No. 2
EDD POTTER COAL COMPANY, Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Contestant/Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Contestant/Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Contestant/Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is **GRANTED**. The above proceedings are **STAYED** until all criminal proceedings concerning Contestant/Respondent have been concluded.

James A. Broderick
James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 18 1991

RUBY HELEN COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 91-1160-R through WEVA 91-1161-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine No. 1
SECRETARY OF LABOR, MINE SFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-1759 A.C. No. 46-07554-03512D
v.	:	Mine No. 1
RUBY HELEN COAL COMPANY, Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Contestant/Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Contestant/Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Contestant/Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is GRANTED. The above proceedings are STAYED until all criminal proceedings concerning Contestant/Respondent have been concluded.

James A Broderick
James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 18 1991

SHADY LANE COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. VA 91-367-R through VA 91-368-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine No. 3
SECRETARY OF LABOR, MINE SFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 91-491 A.C. No. 44-06549-03507D
v.	:	Mine No. 3
SHADY LANE COAL COMPANY, Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Contestant/Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Contestant/Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Contestant/Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is GRANTED. The above proceedings are STAYED until all criminal proceedings concerning Contestant/Respondent have been concluded.

James A. Broderick

James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 18 1991

SUNSET LAND & COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. VA 91-386-R through VA 91-397-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine No. 1
SECRETARY OF LABOR, MINE SFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 91-502
	:	A.C. No. 44-06326-03538D
v.	:	
	:	Mine No. 1
SUNSET LAND & COAL COMPANY, Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Contestant/Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Contestant/Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Contestant/Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is GRANTED. The above proceedings are STAYED until all criminal proceedings concerning Contestant/Respondent have been concluded.

James A. Broderick

James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 18 1991

SUNRISE MINING, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 91-1167-R through WEVA 91-1177-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine No. 1
SECRETARY OF LABOR, MINE SFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 91-1718
	:	A.C. No. 44-07296-03513D
v.	:	
	:	Mine No. 1
SUNRISE MINING, INC., Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Contestant/Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Contestant/Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Contestant/Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is **GRANTED**. The above proceedings are STAYED until all criminal proceedings concerning Contestant/Respondent have been concluded.

James A. Broderick
James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 18 1991

RED DOG COAL CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 91-698-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine No. 3-A
SECRETARY OF LABOR, MINE SFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 91-1112 A.C. No. 15-15908-03525D
v.	:	Mine No. 3-A
RED DOG COAL CORPORATION, Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Contestant/Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Contestant/Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Contestant/Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is GRANTED. The above proceedings are STAYED until all criminal proceedings concerning Contestant/Respondent have been concluded.

James A. Broderick
James A. Broderick
Administrative Law Judge

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 1991

RED DOG COAL CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. VA 91-290-R through VA 91-292-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine No. 3
SECRETARY OF LABOR, MINE SFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 91-524 A.C. No. 44-05547-03538D
v.	:	Mine No. 3
RED DOG COAL CORPORATION, Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Contestant/Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Contestant/Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Contestant/Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is **GRANTED**. The above proceedings are **STAYED** until all criminal proceedings concerning Contestant/Respondent have been concluded.

James A. Broderick
James A. Broderick
Administrative Law Judge

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 1991

CLASSIC COAL CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. VA 91-306-R through VA 91-309-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine No. 1
SECRETARY OF LABOR, MINE SFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 91-484 A.C. No. 44-06195-03529D
v.	:	Mine No. 1
CLASSIC COAL CORPORATION, Respondent	:	

ORDER STAYING PROCEEDINGS

On September 27, 1991, Counsel for Contestant/Respondent filed a motion to stay further proceedings in these cases. As grounds for the motion Contestant/Respondent states that it has entered into an agreement to plead guilty to a charge of conspiracy to defraud the Mine Safety and Health Administration in connection with Contestant/Respondent's dust sampling program. As part of the plea bargain agreement, the Secretary of Labor has agreed to move to dismiss any pending civil penalty proceedings for violations of the laws governing the dust sampling program.

The motion states that Counsel for the Secretary consents to the entry of an order staying these proceedings.

Premises considered, the motion is GRANTED. The above proceedings are STAYED until all criminal proceedings concerning Contestant/Respondent have been concluded.

James A. Broderick
James A. Broderick
Administrative Law Judge