OCTOBER 1995

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

OCTOBER 1995

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

Secretary of Labor, MSHA on behalf of James Reike v. Akzo Salt Company, Inc., Docket No. LAKE 95-201-DM. (Judge Melick, August 31, 1995)

Secretary of Labor, MSHA v. Broken Hill Mining Company, Docket No. KENT 94-972. (Judge Hodgdon, September 1, 1995)

Secretary of Labor, MSHA v. Harlan Cumberland Coal Co., Docket No. KENT 94-996, etc. (JudgeMaurerSeptember 6, 1995)

Whayne Supply Company v. Secretary of Labor, MSHA, Docket No. KENT 94-518-R, etc. (Judge Amchan, September 7, 1995)

Review was not granted in the following cases during the month of October:

Secretary of Labor, MSHA b. Buck Creek Coal, Inc., Docket No. LAKE 94-72. (Interlocutory Review of July 17, 1995 Order by Judge Hodgdon)

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. SE 94-448, SE 94-586-R. (Judge Barbour, August 23, 1995)

Reconsideration of the above Jim Walter Resources case was also denied.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 2, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. LAKE 94-72, etc.
BUCK CREEK COAL INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY: Jordan, Chairman; Doyle and Holen, Commissioners

On July 18, 1995, Buck Creek Coal Inc. ("Buck Creek") filed with the Commission its third petition for interlocutory review of an order staying proceedings issued by Administrative Law Judge T. Todd Hodgdon in these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). For the reasons that follow, we deny interlocutory review.

At the request of the Secretary of Labor and the Department of Justice, and over the objections of Buck Creek, the judge issued orders on September 8, 1994, and February 15, 1995, staying all proceedings based on an ongoing federal criminal investigation of Buck Creek. The Commission denied Buck Creek's petition for interlocutory review of the September 8 order on grounds of mootness. The Commission granted Buck Creek's petition for interlocutory review of the February 15 order and, in a decision issued on April 25, 1995, set forth five factors that should be considered by the judge in determining whether a stay should be granted. *Buck Creek Coal Inc.*, 17 FMSHRC 500, 503 (April 1995). Because the judge had not addressed these factors and the record did not show that the stay criteria had been met, the Commission vacated the blanket stay "without prejudice to the imposition . . . of a limited stay covering particular proceedings based on the [five] criteria[,] . . . including the commonality of issues and evidence between the civil and criminal matters." *Id.* at 505. At the time of the *Buck Creek* decision, the consolidated dockets contained more than 500 alleged violations. *Id.* at 503.

On May 12, 1995, the Secretary filed a motion to stay proceedings covering approximately 275 of the consolidated citations and orders. The judge denied this motion on the ground that the Secretary had failed to establish the "key threshold factor" of commonality of evidence

between the civil and criminal proceedings. Order Denying Mot. for Stay at 1-4 (May 31, 1995), *quoting Buck Creek Coal Inc.*, 17 FMSHRC at 503.

On June 19, 1995, the Secretary renewed his motion for a 90-day stay, but limited the request to proceedings involving approximately 80 citations and orders. In support of his motion, the Secretary described the broad areas that form the basis of the criminal investigation, identified the "core violations" that prompted the Secretary's referral to the Justice Department, and identified additional violations for which a stay was being sought because of their similarity to the "core violations." S. Renewed Mot. for Limited Stay of Civ. Proceedings at 3-6 & App. In addition, the Secretary provided the judge with a sealed declaration from the Assistant United States Attorney purportedly describing the "parameters" of the criminal investigation. The judge reviewed the declaration *in camera*.

Buck Creek opposed the motion. It asserted that the Secretary's request for stay failed to establish commonality of evidence between the criminal and civil proceedings and would prejudice Buck Creek's right to "a fair and expedient determination of its rights." B.C. Opp. to Renewed Mot. for Ltd. Stay of Civ. Proceedings at 1.

On July 17, 1995, the judge granted the Secretary's motion for a limited stay. The judge found that the Secretary's motion, as supplemented by the declaration of the Assistant United States Attorney, established the threshold factor of commonality between the civil and criminal proceedings. Order Granting Mot. for Stay of Proceedings and Denying Mot. to Compel ("Stay Order") at 2-3. The judge concluded that each of the other criteria also indicated that a stay was warranted. Stay Order at 4. He noted that litigation of more than 420 other matters in this docket is unaffected by the Stay Order. *Id.*

On July 18, 1995, Buck Creek filed both a motion with the judge for certification of the Stay Order, and a motion for interlocutory review with the Commission, asserting that the judge's order is erroneous as a matter of law and fact and poses legal questions requiring the Commission's immediate review. Mot. for certif. at 1; mot. for interloc. review at 2. On August 7, 1995, the judge issued an order certifying the Stay Order for interlocutory review by the Commission.[1]

Commission Procedural Rule 76(a)(2) provides that "the Commission . . . *may* grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(2) (emphasis added). The granting of interlocutory

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[1] Commission Procedural Rule 76(b) permits the filing of a petition for interlocutory review only "[w]here the Judge denies a party's motion for certification of an interlocutory ruling . . . ." 29 C.F.R. § 2700.76(b). Rule 76(b) also requires the petitioner to attach to the petition a copy of the order denying certification. Buck Creek filed its petition for interlocutory review of the February 15, 1995, stay order before filing a motion for certification with the judge and filed the instant petition for interlocutory review before the judge ruled on its motion for certification. Buck Creek is reminded to comply with the provisions of Rule 76(b).

review is a matter of the Commission's sound discretion. 29 C.F.R. § 2700.76(a). The Commission previously decided the question of law at issue when it set forth in *Buck Creek*, 17 FMSHRC at 503, the determinative factors applicable to requests for stays. On remand, the judge applied those factors in his Stay Order. Thus, we disagree with the judge's conclusion that Buck Creek's challenge to the July 17 Stay Order involves a controlling question of law. *See* Order of Certif. for Interloc. Review.[2]

For the foregoing reasons, Buck Creek's petition for interlocutory review is denied.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

[2] We disagree with the view apparently held by our dissenting colleague, that appeal of an interlocutory order based in part on the inspection of documents *in camera* automatically satisfies the Commission's requirements for interlocutory review. Slip op. at 4, 5. A judge's reliance on documents inspected *in camera* is not determinative of whether the judge's stay order "involves a controlling question of law" the resolution of which may "materially advance final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(2).

Commissioner Marc Lincoln Marks, dissenting:

I dissent.

I would grant interlocutory review in this case pursuant to Judge T. Todd Hodgdon's Order of Certification for Interlocutory Review ("Order"). In his Order, Judge Hodgdon concluded that his Order Granting Stay of Proceedings involves a controlling question of law. Contrary to my colleagues and for the reasons set forth below, I agree.

In *Buck Creek Coal Inc.*, 17 FMSHRC 500 (April 1995) ("*Buck Creek*"), for the first time we set forth the analytical framework that our judges are to employ in deciding the propriety of granting stays in civil proceedings when parallel criminal proceedings are under way. *Buck Creek,* 17 FMSHRC at 503. That analytical framework requires the consideration of five factors. *Id.* In deciding whether to grant the Secretary's motion for a stay of approximately 80 citations and orders, Judge Hodgdon recognized that the "commonality" factor is the key threshold factor that must be established in the record before a stay may be granted. Order Granting Motion for Stay of Proceedings and Denying Motion to Compel at 2, citing *Buck Creek,* 17 FMSHRC at 503. The judge concluded that the Secretary's motion failed to establish that there was a commonality of evidence and issues in the civil and criminal matters. Order Granting Motion for Stay of Proceedings and Denying Motion to Compel at 3. However, without further comment or analysis, the judge concluded that certain *in camera* documents provided by the Assistant U.S. Attorney were sufficient to satisfy the key threshold "commonality" factor. I have reviewed the documents submitted to the judge for *in camera* review and I am not satisfied that they establish the key threshold "commonality" factor.

In my view, it is incumbent upon the Commission to review the judge's determination that the documents submitted to him for *in camera* review satisfies the key threshold "commonality" factor set forth by the Commission for the first time in *Buck Creek.* The five-factor analytical framework involves mixed questions of law and fact. I agree with Judge Hodgdon's assessment that his analysis in this connection involves a controlling question of law and that the Commission should review his determination. *See* Order of Certification for Interlocutory Review. My colleagues conclude that when the Commission set forth the analytical framework five months ago in *Buck Creek* it also "decided the question of law at issue" in the present case. Slip op. at 3. Their conclusion is wrong. The question of law here is whether the meager *in camera* material provided by the Assistant U.S. Attorney satisfies the key threshold "commonality" factor in each of the 80 stayed citations and orders. I find it extraordinary that my colleagues had the foresight to "decide[] the question of law at issue" here five months ago. I confess that I have no such prophetic capabilities and, so, I will confine myself to deciding such questions of law on a case-by-case basis.

Further, interlocutory review would "materially advance the final disposition of the proceeding." 29 C.F.R. 2700.76(a)(1)(i). This "proceeding" includes approximately 560 citations and orders in 448 contest of citations/orders dockets and 66 contest of civil penalty

dockets. These dockets have been assigned to one judge and lumped into one "proceeding" for administrative convenience. The 80 stayed citations and orders constitute 35 of the 66 civil penalty dockets. Buck Creek has expressed a desire to proceed on all the contested citations and orders. If the stay is allowed to stand, no progress will be made on the 80 stayed citations and orders constituting 35 of the 66 civil penalty dockets.

Parallel civil and criminal proceedings are unobjectionable under our jurisprudence and the Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995). Further, in order for a judge to issue a stay, the petitioning party must establish that a stay is appropriate. Once a stay is granted in civil proceedings, the stayed case(s) will not, by definition, materially advance to a final disposition. Buck Creek has a legitimate interest in the expeditious resolution of the civil cases. Consequently, before this Commission sanctions the extraordinary action requested by the Secretary it should consider whether the judge's action staying the 80 citations and orders passes muster under our newly minted analytical framework. This is particularly so when, as here, Buck Creek has not had the opportunity to confront the *in camera* documentation that the judge exclusively relied on in making his determination that the key threshold criterion had been satisfied.

Finally, I note that this case is in the pre-indictment stage. As a general rule, "stays will . . . not be granted before an indictment is issued." *Trustees of Plumbers Pen. Fund v. Transworld Mech., Inc.*, 886 F.Supp. 1134, 1139 (S.D.N.Y. 1995); *see also S.E.C. v. Dresser Industries, Inc.*, 628 F.2d 1368, 1376 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980). The Commission has been called upon by both Buck Creek and Judge Hodgdon to determine whether the judge appropriately granted the motioned for stay. Because I find that the criteria for interlocutory review has been met in this case, I would grant such review.

Marc Lincoln Marks

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	
JIM WALTER RESOURCES, INC.	:	Docket Nos. SE 94-448 SE 94-586 -R

BEFORE: Jordan, Chairman; Doyle, Holen, and Marks, Commissioners

ORDER

BY THE COMMISSION:

Jim Walter Resources, Inc. ("JWR") has filed a Motion for Reconsideration of the Commission's October 2, 1995, denial of JWR's previously filed Petition for Discretionary Review in the above-captioned matter. Upon review of the Motion for Reconsideration, Chairman Jordan and Commissioner Marks vote to deny the motion; Commissioner Doyle and Commissioner Holen would grant the motion and issue a direction for review granting the underlying Petition for Discretionary Review. To reverse the prior action of the Commission and grant the relief requested requires the affirmative vote of a majority of participating Commissioners. Accordingly, the Motion for Reconsideration is denied.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 93-119
U.S. COAL, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). The issue is whether the negligence of a non-supervisory certified electrician is imputable to his employer, U.S. Coal, Inc. ("U.S. Coal"), for civil penalty purposes. Administrative Law Judge William Fauver concluded that the electrician's negligence was imputable. 16 FMSHRC 649 (March 1994) (ALJ). The Commission granted U.S. Coal's petition for discretionary review of the judge's decision. For the reasons that follow, we reverse and remand.

I.

Factual and Procedural Background

On April 16, 1992, Lonnie Phillips, a certified electrician qualified by U.S. Coal to do electrical work at its No. 3-2 Mine, removed the electrical panel covers on a continuous mining machine and began working on the panel board with a screwdriver. He did not deenergize or lock out and tag the continuous miner before beginning his repair.[1] 16 FMSHRC at 649; Tr. 18.

[1] Electrical equipment is locked out and tagged by placing a padlock through a hole in the disconnecting device and attaching a tag stating that work is being performed on the circuit. Tr. 19. The padlock prevents reenergization of the electrical equipment while the work is performed. Tr. 26-27.

As a result, Phillips suffered electrical shock and burns to his hand. 16 FMSHRC at 650. The accident was investigated by MSHA Inspector Don A. McDaniel, who issued two citations to U.S. Coal alleging significant and substantial ("S&S") violations of 30 C.F.R. §§ 75.509 and 75.511.[2] MSHA filed a petition for assessment of civil penalty, which sought to impute Phillips' negligent conduct to the operator.

The judge determined that Phillips violated the cited standards, that the violations were S&S, and that Phillips was grossly negligent. 16 FMSHRC at 651-52. Citing *Mettiki Coal Corp.*, 13 FMSHRC 760 (May 1991), and *Rochester and Pittsburgh Coal Co.*, 13 FMSHRC 189 (February 1991) ("*R&P*"), the judge concluded that Phillips' negligence was imputable to U.S. Coal because a "'designated person to conduct electrical examinations of electrical equipment' is regarded as an agent of the operator and his negligence is imputable to the operator." 16 FMSHRC at 652. The judge noted *Nacco Mining Co.*, 3 FMSHRC 848, 850 (April 1981), in which the Commission declined to impute a supervisor's negligence because the operator had taken reasonable steps to avoid an accident and the supervisor's conduct did not expose other miners to risk. 16 FMSHRC at 652. The judge found the *Nacco* defense inapplicable because the electrician endangered other miners. *Id.* Accordingly, the judge affirmed the citations and ordered payment of civil penalties in the amount of $8,000. *Id.* at 652-53.

II.

Disposition

U.S. Coal contends that Phillips' negligence is not imputable to it and that the judge erred in determining that Phillips was its agent. U.S. Br. at 11-13. It asserts that it had acted to ensure compliance and that the accident resulted from Phillips' idiosyncratic and unforeseeable conduct, which was not associated with any management function on his part. *Id.* at 10, 12-13. Alternatively, the operator argues that, even if Phillips were considered its agent, the *Nacco* defense applies because it had taken precautions to avoid the accident and other miners were not placed at risk by Phillips' conduct. *Id.* at 13-16. It also asks the Commission to take judicial

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[2] Section 75.509 provides:

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

Section 75.511 provides, in part:

> Disconnecting devices shall be locked out and suitably tagged by the persons who perform [electrical work on circuits or equipment] . . . .

notice of the Secretary's proposed rule regarding decertification of certified and qualified persons (59 Fed. Reg. 54,855 (1994) (to be codified at 30 C.F.R. pts. 42, 48, 70, 71, 75, 77, & 90) (proposed Nov. 2, 1994)), asserting that the proposed rule should be considered in relation to the Secretary's argument that certified persons are to be considered agents of corporate operators. U.S. Supp. F. at 1-2.

The Secretary responds that substantial evidence supports the judge's determination that Phillips was the operator's agent and his negligence was imputable to the operator. S. Br. at 5-10. He asserts that Phillips was an agent because he was qualified and designated by the operator to perform electrical work and had supervisory authority to order miners to stop operating dangerous machinery and to remove machinery from service. *Id.* at 6-7. The Secretary contends that the *Nacco* defense does not apply because Phillips' conduct exposed other miners to risk of injury. *Id.* at 9-10. The Secretary replies that U.S. Coal mischaracterizes the proposed rule on decertification and that the preamble to the rule does not mean that certified persons are not agents when the operator is a corporate operator. S. Supp. F. at 1-2.

Under the Mine Act, an operator is liable for its employees' violations of the Act and the mandatory standards. *E.g., Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (November 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462 (August 1982) ("*SOCCO*"). Further, absent a *Nacco* defense, the negligent actions of an operator's "agent"[3] are imputable to the operator for the purpose of assessing civil penalties.[4] *Mettiki,* 13 FMSHRC at 772; *R&P*, 13 FMSHRC at 194-98; *SOCCO*, 4 FMSHRC at 1463-64. However, "[t]he conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes." *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995) (citing *SOCCO*, 4 FMSHRC at 1464). "Rather, the operator's supervision, training, and disciplining of [rank-and-file] miners is relevant." *Id.* (citing *SOCCO*, 4 FMSHRC at 1464; *Western Fuels*, 10 FMSHRC at 261).

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[3] Section 3(e) of the Mine Act defines "agent" as "any person charged with responsibility for the operation of all or a part of a . . . mine or the supervision of the miners in a . . . mine . . . ." 30 U.S.C. § 802(e).

[4] Section 110(i) of the Mine Act requires that in assessing civil penalties the Commission consider six criteria, one of which is "whether the operator was negligent." 30 U.S.C. § 820(i); *see generally Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th Cir. 1984).

Here, the judge concluded that, because Phillips was the operator's agent, his negligence should be imputed to the operator. We examine whether substantial evidence supports the judge's finding that Phillips was U.S. Coal's agent.[5]

The Secretary attempts to establish that Phillips is the operator's agent by arguing that he is certified and designated by the operator as "qualified" to perform electrical work,[6] and that such a qualified person "is cloaked with the responsibility to discover electrical malfunctions and correct them, and his failure to discover or properly repair electrical malfunctions exposes miners to a multitude of dangerous violative conditions and to the very real danger of injury or death." S. Br. at 8.

U.S. Coal's superintendent, Johnny Mack Smitty, testified that U.S. Coal employs two supervisory electricians to whom rank-and-file maintenance employees report. Tr. 59, 61, 63-64. Phillips is not one of those supervisors but, rather, a rank-and-file maintenance employee; he is responsible only for "upkeep" on his section, i.e., finding and fixing electrical problems. *Id.* The record indicates that, prior to the accident, the operator of the continuous miner had sent for Phillips because the miner was malfunctioning. 16 FMSHRC at 649; Tr. 17.

Inspector McDaniel testified that Phillips performed rank-and-file electrical work on the section (Tr. 35) but that, in his opinion, electricians are part of mine management. Tr. 23, 27, 35. McDaniel's opinion is based on his general belief that electricians are authorized to order miners to stop operating dangerous machinery and to order machinery taken out of service for repairs. Tr. 35-36. No other evidence supports the judge's finding that Phillips was the operator's agent.

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[5] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980).

[6] The Mine Act and the Secretary's mandatory standards require that repair and maintenance of electrical equipment be performed only by "qualified" persons. 30 U.S.C. § 865(f) & (g); 30 C.F.R. §§ 75.511 & 75.512; *see also* 30 U.S.C. § 878(b)(2); 30 C.F.R. § 75.153.

In *Mettiki*, the Commission determined that a rank-and-file miner was acting as an agent while conducting required electrical examinations in the mine. 13 FMSHRC at 772. Similarly, in *R&P*, the Commission concluded that a rank-and-file miner was acting as the operator's agent while he performed a statutorily mandated weekly examination. 13 FMSHRC at 194-96. In both cases, the Commission relied, not upon the job title or the qualifications of the miner, but upon his function, which was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel. Here, Phillips' negligent conduct occurred while he was repairing a continuous miner, a routine assignment not encompassing managerial responsibility or the supervision of other miners. There is no record evidence that Phillips was engaged in work entailing "responsibility for the operation of all or a part of a . . . mine or the supervision of the miners in a . . . mine . . . ." 30 U.S.C. § 802(e).

We hold, as a matter of law, that Phillips' certification as an electrician, his qualification by the operator to repair and maintain electrical equipment, and his authority, as understood by the inspector, to take that equipment out of service if he found it in dangerous condition, are insufficient, standing alone, to support a finding that he is an agent of the operator. Thus, under the facts of this case, we conclude that Phillips was not functioning as an agent of U.S. Coal when he repaired the continuous miner. Accordingly, we reverse the judge's determination that Phillips' gross negligence is imputable to U.S. Coal.[7]

[7] In light of our disposition, we do not reach U.S. Coal's other arguments.

III.

Conclusion

For the foregoing reasons, we reverse the judge's imputation of negligence to U.S. Coal and remand for assessment of appropriate civil penalties.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 2 1995

VULCAN MATERIALS COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 94-363-RM
	:	Citation No. 4305646; 03/02/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Rockingham Quarry
	:	I.D. No. 31-00198

ORDER OF DISMISSAL

Appearances: Leslie John Rodriguez, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Respondent;
William K. Doran, Esq., Smith, Heenan & Althen, Washington, D.C., for the Contestant.

Before: Judge Melick

At hearing Contestant requested approval to withdraw its Contest in the captioned case. Under the circumstances, permission to withdraw was granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.

Gary Melick
Administrative Law Judge

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/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 2 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. SE 95-244-M
	:	A.C. No. 31-00198-05535A
RICHARD DALE MILLER and, JON LEE STEVENS, employed by VULCAN MATERIALS CO., Respondent	:	Docket No. SE 95-245-M
	:	A.C. No. 31-00198-05536A
	:	Rockingham Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. SE 94-605-M
	:	A.C. No. 31-00198-05531
v.	:	Rockingham Mine
VULCAN MATERIALS COMPANY, Respondent	:	

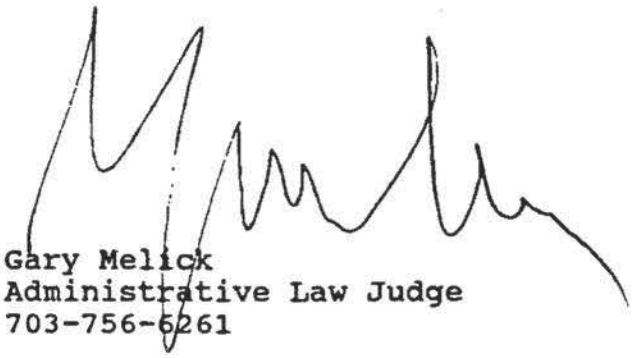
DECISION

Appearances: Leslie John Rodriguez, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
William K. Doran, Esq., Smith, Heenan & Althen, Washington, D.C., for the Respondent.

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings Petitioner filed a motion to approve a settlement agreement proposing to vacate the charges in Docket Nos. SE 95-244-M and SE 95-245-M and to increase the penalty in Docket No. SE 94-605-M from $4,000 to $6,500. I have considered the representations and documentation submitted in these cases and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**. Case Docket Nos. SE 95-244-M and SE 95-245-M are accordingly vacated and in case Docket No. 94-605-M it is **ORDERED** that Respondent pay a penalty of $6,500 within 30 days of this order.



Gary Melick
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 3 1995

BLAINE A. KELLEY, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 95-195-D
	:	HOPE CD 95-05
ELK RUN COAL COMPANY, Respondent	:	Queen Mine

ORDER OF DISMISSAL

On September 13, 1995, Complainant Blaine A. Kelley indicated by letter that he had "decided to drop the case" for reasons that were unclear. In order to verify Mr. Kelley's decision, a show cause order was thereafter issued giving him a final opportunity to proceed with this case. No response to that order has been received. Accordingly this case is dismissed.

Gary Melick
Administrative Law Judge
703-756-6261

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 5 1995

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE AND SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	Docket No. KENT 95-603-D
LONNIE BOWLING,	:	MSHA Case No. BARB CD 95-11
Complainant	:	
v.	:	Darby Fork Mine
	:	
MOUNTAIN TOP TRUCKING COMPANY AND	:	
MAYES TRUCKING COMPANY, INC.,	:	
Respondents	:	
	:	
SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE AND SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	Docket No. KENT 95-612-D
WALTER JACKSON,	:	MSHA Case No. BARB CD 95-13
Complainant	:	
v.	:	Darby Fork Mine
	:	
MOUNTAIN TOP TRUCKING COMPANY AND	:	
MAYES TRUCKING COMPANY, INC.,	:	
Respondents	:	
	:	
SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE AND SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	Docket No. KENT 95-614-D
DAVID FAGAN,	:	MSHA Case No. BARB CD 95-14
Complainant	:	
v.	:	Darby Fork Mine
	:	
MOUNTAIN TOP TRUCKING COMPANY AND	:	
MAYES TRUCKING COMPANY, INC.,	:	
Respondents	:	

ORDER GRANTING SECRETARY'S MOTION TO AMEND
AND
DECISION[1]

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Edward M. Dooley, Esq., Harrogate, Tennessee, for the respondents.

Before: Judge Feldman

On August 10 and August 15, 1995, Edward M. Dooley filed notices of appearance on behalf of Anthony Curtis Mayes (Tony Mayes), Elmo Mayes and Mountain Top Trucking, Inc. (Mountain Top). These consolidated temporary reinstatement proceedings were heard on August 23 and August 24, 1995, in Pineville, Kentucky, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c). This statutory provision prohibits operators from discharging or otherwise discriminating against a miner who has filed a complaint alleging safety or health violations or who has engaged in other safety related protected activity. Section 105(c)(2) of the Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of miners pending the full resolution of the merits of their complaints. At trial, the Secretary moved to withdraw the temporary reinstatement application filed on behalf of Walter Jackson. (Tr. 42-43).

At the hearing, the Secretary asserted that Mayes Trucking Company, Inc. (Mayes Trucking), is the successor to Mountain Top. Tony Mayes is the President of Mayes Trucking. Consequently, despite Dooley's objections, at the hearing the Secretary was granted leave to move to amend the subject discrimination complaints to add Mayes Trucking as a respondent.

For the reasons stated herein, the caption in these matters has been amended to reflect that Elmo Mayes, William David Riley and Anthony Curtis Mayes have been deleted as parties, and, Mayes Trucking Company, Inc., has been added as a party as the successor to Mountain Top Trucking Company.

The pertinent motion to amend was filed by the Secretary on September 13, 1995. On September 15, 1995, I issued an Order requesting Mayes Trucking to show cause, within ten days, why it should not be added as a party given the fact that Dooley has appeared in these proceedings on behalf of its President, Tony Mayes.[2]

On September 29, 1995, Dooley filed an opposition to the Secretary's motion to amend. Dooley's opposition was not filed on behalf of Mayes Trucking despite Dooley's representation of its Corporate President, Tony Mayes. Dooley's opposition, which was filed on behalf of Tony Mayes as an individual, was based on the assertion the Secretary had failed to state sufficient grounds for his motion to amend. Mayes Trucking Company, Inc., failed to file an opposition or otherwise respond to my September 15, 1995, order to show cause.

Dooley is without standing to oppose Mayes Trucking's inclusion as Dooley has repeatedly stated that he does not represent Mayes Trucking in these matters. Even if Dooley had standing, his opposition is without merit. The Secretary has clearly based his motion on the successorship issue. Moreover, Mayes Trucking failed to oppose its addition as a party to this proceeding. Consequently, I view the Secretary's motion as unopposed.

Finally, Mayes Trucking is neither legally prejudiced nor otherwise surprised by its inclusion in these proceedings as its President was represented by counsel throughout these matters. Moreover, there is no substantive difference in the Secretary's cases against Tony Mayes as a sole proprietor and the Secretary's prosecution against the corporate entity controlled by Mayes.

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[2] Commission Rule 45(e), 29 C.F.R. § 2700.45(c), provides that decisions in temporary reinstatement matters should be issued within 7 days following the close of the hearing unless the presiding judge finds extraordinary circumstances that warrant an extension of time. Mayes Tucking Company, Inc.'s objection to its inclusion as a party, as well as the successorship issue discussed herein, required additional time for motions and briefing that justified an extension of the 7 day period for issuance of a decision.

Accordingly, the Secretary's motion to add Mayes Trucking Company, Inc., as a party **IS GRANTED**.

Procedural Framework

The scope of these proceedings is governed by the provisions of section 105(c) of the Act and Commission Rule 44(c), 29 C.F.R. § 2700.44(c), that limit the issue to whether the subject discrimination complaints have been "frivolously brought." Rule 44(c) provides:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

Thus, the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court of Appeals, in *J. Walter Resources v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), has stated:

> The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' -- an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous*. 920 F.2d at 747 (citations omitted).

> . . . Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of an employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by . . . a decision on the merits in the employer's favor. *Id.* at 748, n.11.

Consequently, the Supreme Court has articulated that the narrow scope of these temporary reinstatement proceedings as well as the minimal statutory standard of proof required by the Secretary under section 105(c)(2) of the Act far exceeds the Constitutional requirements of due process. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

Preliminary Findings of Fact

Mountain Top is incorporated in the State of West Virginia. Its corporate officers are Tommy C. Bays, President, and his son, Tommy Bays, Jr. Mayes Trucking is also incorporated in the State of West Virginia. Tony Mayes is the corporate President and his wife, Mary Mayes, is the Secretary. Mountain Top and Mayes Trucking leased their haulage trucks from Tony's father, Elmo Mayes. From 1991 until 1993 Mountain Top hauled coal in Mount Carbon, West Virginia from the Cypress Mine at Armstrong Creek. Mayes Trucking also hauled coal from Cypress' mine site during this period.

On July 12, 1993, Mountain Top contracted with Lone Mountain Processing, Inc., (Lone Mountain) to haul coal from Lone Mountain's Darby Fork and Huff Creek mines in Harlan County, Kentucky, to Lone Mountain's processing plant in Lee County, Virginia. Mountain Top continued to lease its trucks from Elmo Mayes. Mountain Top operated approximately 30 trucks to haul Lone Mountain's coal. Helen Mayes, Elmo's wife, signed and issued the pay checks for Mountain Top's employees.

The haulage route from the Darby Fork mine site is on State Road 38 to a county highway, a distance of approximately three to five miles, to Lone Mountain's narrow private haulage road that winds up and over a mountain across state lines down to Lone Mountain's processing prep plant near St. Charles, Virginia. The length of the haulage road is approximately seven to ten miles. Thus, the total length of the one-way haulage trip is approximately ten to fifteen miles. The average round trip takes approximately an hour and 15 minutes to an hour and 30 minutes. (Tr. 284, 361).

Lone Mountain was dissatisfied with Mountain Top's haulage production. Consequently, Mountain Top's contract was extended for only six months on October 12, 1994. However, the contract was not renewed and expired on April 12, 1995. On or about April 12, 1995, Mayes Trucking took over the contractual rights and obligations that Mountain Top had with Lone Mountain. Mayes Trucking continued to operate the same trucks formerly leased from Elmo Mayes by Mountain Top and continued to employ Mountain Top's truck drivers. Mayes Trucking also employed William David Riley, who had been Mountain Top's truck foreman, as its own truck foreman.

Riley testified, prior to April 1995, when Mayes Trucking succeeded Mountain Top, Mountain Top's normal workday began at approximately 5:00 a.m. when the truck drivers would arrive and prepare to load for their first trip to the processing plant. The truck drivers would make repeated trips to and from the processing plant until approximately 5:00 p.m. Thus, the normal workday was approximately 12 hours. The truck drivers were paid $13.00 per load and $6.00 per hour during any down periods when trucks were being repaired.

Riley further stated that, the extracted coal from Darby Fork started to accumulate in February and March 1995 due to severe winter snow storms that interfered with haulage operations. Thus, truck drivers were required to work until 9:00 or 10:00 p.m. during an interim period in March 1995 to haul the backlog of coal.

Bowling's Complaint

Lonnie Ray Bowling was hired by Mountain Top on August 17, 1994. Bowling testified, when he was initially hired, he normally finished work at 4:00 or 5:00 p.m. However, as the winter weather became more severe he was required to work until the 9:00 p.m. scale cut-off which would sometimes require him to drive until past 10:00 p.m. on his last return trip to the mine site. During this period Bowling testified that he worked 80 to 85 hours per week and he estimated that he exceeded ten hours of driving each day.

Bowling testified he had complained to Riley about the long working hours. (Tr. 287). On March 7, 1995, at approximately 5:30 p.m., after Bowling had worked over 12 hours, Bowling and fellow truck driver Darrell Ball spoke to Riley and Elmo Mayes. They expressed their concerns that it was unsafe to work such long hours. They informed Riley and Elmo Mayes that they had contacted the Department of Transportation and were advised it was illegal to drive a truck more than ten hours per day.[3] Bowling and Ball were told that if they could not work the required hours, they should "go to the house" and find another job. (Tr. 289). Bowling's testimony was essentially corroborated by Ball and Riley. Bowling left and did not return to work.

On March 9, 1995, Bowling filed a discrimination complaint with the Mine Safety and Health Administration under section 105(c) of the Act. Bowling testified he received a telephone call from Tony Mayes on March 16, 1995, during which Mayes asked him to return to work. Bowling testified he returned to work the

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[3] The Secretary contends the respondents are subject to the provisions of Department of Transportation (DOT) regulation 49 C.F.R. § 395.1 that prohibit truck drivers from driving more than ten hours per day. Whether, the respondents' coal shuttle operations are subject to this regulation, and if so, whether the respondents have violated this regulation, in the absence of evidence of a pertinent DOT determination, is beyond the scope of these proceedings. However, the question of whether Bowling's DOT complaint is protected under section 105(c) of the Act is a relevant issue in these matters.

following day on Friday, March 17, 1995. He refused to drive the truck assigned to him because it had a missing nut and bolt on a rear wheel. Bowling estimated he stayed from 5:00 a.m. until approximately 8:00 a.m. when he went home. Bowling returned to work on Monday morning March 20, 1995, but found the truck still had not been repaired. Bowling tagged the truck out of service and left at approximately 9:00 a.m. Bowling testified that when he returned on Tuesday, March 22, 1995, he observed someone leaving with a load of coal with his truck. Riley asked Bowling to wait until the truck came back at which time he could have the truck to begin hauling. Bowling felt this was what "they do just to get back at you." (Tr. 303). Bowling left work and never returned.

Riley disputes the dates and critical elements of Bowling's account. Riley states Bowling returned to work on Thursday, March 23 at 5:00 a.m. Bowling was assigned truck 139 but refused to drive it. Riley states Bowling stated that he would wait on MSHA's ruling on his discrimination complaint and that Bowling immediately left to return home. On Monday, March 27 Bowling called Riley to ask if he could return to work. Bowling arrived at work shortly thereafter but found a broken stud on the rear axle of truck 139. Since the truck mechanics were busy working on another truck, Bowling left shortly after arriving for work. Bowling returned to work on Tuesday, March 28 at 5:06 a.m. Bowling asked if there was anything for him to drive. Bowling was told by Riley to wait to see if all the drivers showed up for work. Bowling refused to wait and left. Bowling was called the next day about why he was not at work. Bowling stated he had to talk to the MSHA investigator and never returned to work. Company payroll records reflect Bowling was paid $9.00 for 90 minutes down time the week ending March 31, 1995, while he waited for an available truck. (Tr. 548, 558; Resp. Ex 5).

Fagan's Complaint

David Timothy Fagan was employed by Mountain Top Trucking from October 1993 until he was terminated on October 10, 1994. At the time he was terminated, Fagan testified he usually worked from 4:00 a.m. until 6:00 or 7:00 p.m. However, Fagan's testimony is inconsistent with the testimony of Bowling, Ball and Riley that shifts of more than 12 hours did not begin until after the severe weather in the winter of 1995. Fagan reportedly

complained of long working hours. However, these complaints are inconsistent with his testimony that he routinely started work at 4:00 a.m. every morning in order to "get a load up on everybody." (Tr. 357).

Fagan also testified that he communicated several complaints to Riley and Tony Mayes about general working conditions. For example, Fagan complained about the poor condition of State Road 38 with respect to holes in the road; the rough and bumpy road conditions on Lone Mountain's haulage road; dust on the roads; and no truck air conditioning to filter the dust.

Approximately two weeks before he was terminated, Fagan told Tony Mayes one afternoon at approximately 12:00 noon that he was "just too tired" and that he felt he was unsafe to drive anymore that day and that he wanted to go home. (Tr. 400-401). Fagan stated Mayes told him to go home and get some rest. (Tr. 402).

On Friday, September 30, 1994, one week prior to Fagan's last day of work, Fagan had hauled six loads of coal by 1:00 p.m. Since there was no more coal to haul, and Fagan was not getting paid the $6.00 per hour he felt he was entitled to for waiting for more coal, Fagan parked his truck and went "home to stay awake." (Tr. 403). Fagan provided no testimony to explain what, if any, effect his leaving early on September 30, 1994, had on his ultimate discharge on October 10, 1994. In fact, company records completed by Fagan reflect finishing work early on September 30 was not an isolated event. Fagan finished work between 1:00 p.m. and 3:00 p.m. during the entire week of September 30 through October 7, 1994. (Tr. 431-434; Resp. Ex 1).

Fagan had a history of three truck mishaps. In January 1994, Fagan's truck skidded off the haulage road into a ditch during a snow storm. In May or June 1994, Fagan drove into the rear of another truck on State Road 38. Finally, Riley testified on Friday, October 7, 1994, Fagan drove around a curve on the haulage road and hit the side of the cliff with his truck in order to avoid hitting the grader. (Tr. 520-522). Although Fagan denied hitting the mountain side, he admitted to a close call with a water truck on his last day of work, Friday, October 7, 1994. (Tr. 437).

As a result of Fagan's October 7, 1994, driving mishap on the haulage road, Tommy Bays told Riley that Fagan would have to be terminated. The following workday, on Monday, October 10, 1994, Fagan reported to work and was told by Riley that he was no longer needed.

Fagan filed his discrimination complaint on March 14, 1995, after being encouraged to do so by Darrell Ball. (Tr. 424). Fagan's discrimination complaint states:

> I feel like I was discriminated against due to being fired for complaining about operating a coal truck unsafely. I was ordered to operate a coal truck for approximately 14 hours per day in unsafe weather conditions.
>
> In recourse, I request, my job back with back pay, regulated working hours, regulated breaks and lunch breaks. I also request one of the new trucks, and to be able to park on the Kentucky side of the mountain instead of driving approximately 20 miles to the Virginia side to park my personal vehicle and for Lone Mountain Processing to maintain the haul road.

At the hearing, Fagan summarized the substance of his work related complaint as follows:

> It was [the] hours --- it was hours and the road conditions are (sic), you know, sometimes --- my eyes just got so sore and you just can hardly stand it sometimes. I mean, a ten-hour day or eight hours a day for driving. It takes a toll on ---. (Tr. 453).

Further Findings and Conclusions

a. Bowling

As noted above, the not frivolously brought standard imposes a considerably lesser burden of proof on the Secretary in a temporary reinstatement case than that required in a full hearing on the merits of a discrimination complaint. Thus, in order to prevail, the Secretary need only show that an applicant for temporary reinstatement engaged in activity arguably protected by

the Act, and, that such activity is not so far removed from the alleged discriminatory action in time and circumstance as to render the complaint frivolous.

With respect to Bowling, refusal to perform work is protected under section 105(c) if it results from a reasonable, good faith belief that to perform the assigned work would expose the miner to a safety hazard. *Secretary of Labor on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev on other* grounds, 663 F.2d 1211 (3rd Cir. 1981); *Secretary of Labor on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 302 (April 1981); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982 (June 1982). Here, Riley, the respondents' foreman, conceded there was a significant change in the conditions of employment in February and March 1995. At that time, the usual workday was extended from 5:00 p.m. until as late as 9:00 or 10:00 p.m., in order to haul the extracted coal that had accumulated due to haulage interruptions caused by snow storms. (TR. 573-575). Thus, the Secretary has established a reasonable cause to believe that Bowling's work refusal was protected by the Act.

Similarly, consistent with *Pasula* and *Robinette*, a miner has an absolute right to make safety related complaints about mine conditions which he believes present a hazard to his health and safety, and, the Act prohibits retaliation by mine management against such a complaining miner. Clearly, Bowling's complaints to The Department of Transportation and The Mine Safety and Health Administration constitute protected activity.

Although Bowling was called back to work by Tony Mayes, the Secretary asserts Mountain Top's alleged reluctance to provide Bowling with a suitable haulage truck upon his return to work was tantamount to a constructive discharge. A constructive discharge occurs when a miner who engaged in protected activity would reasonably be compelled to resign because he was forced to endure harassment or other intolerable conditions. *See, e.g., Simpson v. FMSHRC*, 842 F.2d 639, 642 (D.C. Cir. 1988).

Whether the Secretary can prevail on the issue of constructive discharge must be resolved in a subsequent discrimination hearing on the full merits of Bowling's complaint. However, reporting for work on three occasions without the

availability of a haulage truck presents an arguable contention that Bowling was the victim of a constructive discharge. In this regard, it is noteworthy that the respondents failed to call Tony Mayes to testify about Bowling's rehiring and the circumstances surrounding his subsequent departure. Thus, the Secretary's assertion that Bowling was constructively discharged cannot be deemed frivolous or otherwise lacking in merit. Accordingly, the Secretary's application for Bowling's temporary reinstatement will be granted.

b. Fagan

Section 105(c)(2) of the Act provides that a miner who believes that he has been discriminated against may, within 60 days after such violation occurs, file a complaint with the Secretary. Fagan alleges his October 10, 1994, discharge was discriminatorily motivated. Fagan's March 14, 1995, complaint was filed with MSHA approximately 90 days beyond the 60 day filing period contemplated by the statute. Thus, the respondents assert Fagan's complaint should be dismissed as untimely.

It is well settled that the filing periods provided in section 105(c) of the Act, such as the 60-day time period for the filing of a complaint with the Secretary, are not jurisdictional. *Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327 (August 1987), *rev'd on other grounds*, 866 F.2d 1433 (D.C. Cir. 1989). Rather, the timeliness of discrimination complaints must be determined on a case by case basis by examining whether the delay in filing deprives a respondent of a meaningful opportunity to defend. *See Roy Farmer v. Island Creek Coal Company*, 13 FMSHRC 1226, 1231 (August 1991), *citing Donald R. Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986).

In this case, Fagan's three month delay in filing his complaint is excusable because there is no showing that he was aware of the 60 day filing requirement. Moreover, the respondents have failed to demonstrate any cognizable legal prejudice in defending their positions as a result of Fagan's filing delay. *See Walter A. Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8 (January 1984) (where 30 day filing delay was excused); *Cf. Joseph W. Herman v. Imco Services*, 4 FMSHRC 2135, 2139 (December 1982) (where an 11 month delay was not excused due

to unavailability of relevant evidence and missing witnesses). Consequently, the respondents' request to dismiss Fagan's complaint as untimely is denied.

Turning to the merits of Fagan's application for temporary reinstatement, I note that Fagan's complaint is significantly different from the circumstances in Bowling's complaint. Bowling had no history of losing control of his truck. Moreover, Fagan was discharged on October 10, 1994, long before Bowling's complaints concerning the extended work hours caused by severe winter weather.

Thus, unlike Bowling's complaint, the central issue is whether Fagan's expressed concerns regarding working his normal (10 to 12 hour) shift because he was too tired to operate his truck safely is protected under the Act, and, if so, whether Fagan's October 10, 1994, discharge was motivated by his expressed concerns. *See James Eldridge v. Sunfire Coal Company*, 5 FMSHRC 408 (ALJ Koutras, March 1993); *Cf. Paula Price v. Monterey Coal Company*, 12 FMSHRC 1505, 1519 (August 1990) (concurring opinion of Commissioner Doyle that problems idiosyncratic to the miner are not protected regardless of the seriousness of the hazard). A related issue is whether Fagan's alleged complaints about conditions inherent to his employment (*i.e.*, a dusty, bumpy, narrow and steep haulage road) are entitled to statutory protection. *See Price, supra.*

Regardless of whether any of Fagan's alleged complaints are protected, the respondents contend Fagan was terminated on October 10, 1994, after his third unsafe driving incident, when he lost control and nearly missed the grader on the haulage road on October 7, 1994. Although Riley testified this incident was reported by Gary Neal, Lone Mountain's grader operator, the respondents failed to call Neal as a witness. (Tr. 521). In addition, as noted above, the respondents failed to call Tony Mayes to refute alleged complaints made to him by Fagan.

Thus, while Fagan's complaint differs from Bowling's complaint in important respects, the Secretary has presented the minimum amount of evidence to satisfy the low threshold "frivolously brought" standard. While the Secretary's legal theories concerning the protective nature of the alleged complaints and the alleged discriminatory motive of Mountain Top

in discharging Fagan may raise serious issues and may not be sustained at trial, the current record is adequate to warrant Fagan's temporary reinstatement.

The Successor Issue

The Secretary asserts that Mayes Trucking is liable for the reinstatement of Bowling and Fagan as the successor corporation of Mountain Top. The Commission's successorship standards in discrimination cases are well settled and were initially enunciated under the former Federal Mine Safety and Health Act of 1969 in *Munsey v. Smitty Baker Coal Company, Inc.*, 2 FMSHRC 3463 (December 1980), *aff'd in relevant part sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir.), *cert. den. sub nom. Smitty Baker Coal Co. v. FMSHRC*, 464 U.S. 851 (1983), and readopted under the current 1977 Mine Act in *Secretary on behalf of James Corbin et al. v. Sugartree Corp., Terco, Inc., and Randal Lawson*, 9 FMSHRC 394, 397-399 (March 1987), *aff'd sub nom. Terco Inc. v. FMSHRC*, 839 F.2d 236, 239 (6th Cir. 1987). *See also Secretary on behalf of Keene v. Mullins*, 888 F.2d 1448, 1453 (D.C. Cir. 1989). Under this standard, the successor operator may be found liable for, and responsible for remedying, it's predecessor's discriminatory conduct. The indicia of successorship are:

> (1) whether the purported successor company had notice of the underlying charge of possible discrimination; (2) the ability of the purported successor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the purported successor uses the same plant; (5) whether the purported successor employs the same work force; (6) whether the purported successor uses the same supervisory personnel; (7) whether the same job exists under substantially the same working conditions; (8) whether the purported successor uses the same machinery, equipment and methods of production; and (9) whether the purported successor produces the same product. *See Terco*, 839 F.2d at 239; *Mullins*, 888 F.2d at 1454.

In the instant case there is compelling evidence of successorship. With regard to notice of the underlying allegations of discrimination, Tony Mayes, President of Mayes

Trucking, clearly had managerial authority in Mountain Top. In fact, Tony Mayes recalled Bowling to work for Mountain Top in March 1995, before Mountain Top's contract with Lone Mountain had expired. Turning to the other criteria of successorship: (1) Mayes Trucking employs Riley, the same truck foreman; (2) to supervise the same drivers; (3) to drive the same trucks; (4) to haul coal from the same mine site to the same processing plant; (5) over the same route; precisely as Mountain Top had done. Thus, Mayes Trucking is indeed the successor of Mountain Top Trucking, and, clearly has the wherewithal to provide relief to Bowling and Fagan. Consequently, Mountain Top and Mayes Trucking are jointly and severally liable for their temporary reinstatement.

Although the successor criteria establishes Mayes Trucking and Mountain Top Trucking as proper parties, the Secretary has failed to demonstrate that the complainants were employed by Elmo Mayes, Riley or Tony Mayes, individually, or that these individuals are successors to Mountain Top. In addition, the evidence does not reflect that these individuals are in a position to provide the reinstatement relief requested. Accordingly, Elmo Mayes, Riley and Tony Mayes **ARE DISMISSED** as parties in these temporary reinstatement proceedings. The Secretary should address whether these individuals are proper parties in the related discrimination proceedings that involve proposed civil penalties for the alleged discriminatory acts.

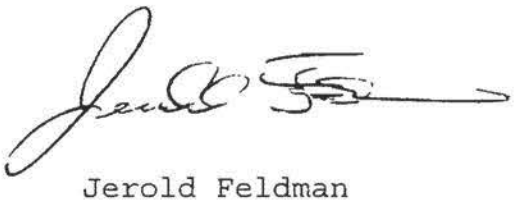
ORDER

Accordingly, the Secretary's motion to amend his applications for the temporary reinstatement of Bowling and Fagan to include Mayes Trucking Company, Inc., as a party as the successor to Mountain Top Trucking, Inc., **IS GRANTED**. Elmo Mayes, William David Riley, and Anthony Curtis Mayes **ARE DISMISSED** as parties to these temporary reinstatement proceedings.

IT IS ORDERED that Mayes Trucking Company, Inc., as the successor of Mountain Top Trucking, immediately reinstate Lonnie Bowling and David Fagan to their former positions as coal haulage truck drivers at the same rate of pay and with the same work hours as the other truck drivers at the Darby Fork mine site.

IT IS FURTHER ORDERED that the Secretary's motion to withdraw the temporary reinstatement application of Walter Jackson **IS GRANTED**. Accordingly, Jackson's application for reinstatement **IS DISMISSED** without prejudice to the Secretary's prosecution of Jackson's discrimination complaint.

In view of the significant legal issues and defenses presented at the temporary reinstatement hearing, a full hearing on the merits of the subject discrimination complaints will be scheduled shortly in the vicinity of Pineville, Kentucky. The hearing date and location will be designated in a subsequent order.



Jerold Feldman
Administrative Law Judge

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/rb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 5 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 95-59-M
Petitioner	:	A.C. No. 09-00265-05520
v.	:	
	:	Junction City Mine
BROWN BROTHERS SAND COMPANY,	:	
Respondent	:	

DECISION

Appearances: Robert L. Walter, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Steve Brown, Partner, Brown Brothers Sand Company, Howard, Georgia, for the Respondent.

Before: Judge Feldman

This matter is before me as a result of a 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). The petition seeks total civil penalties of $269 for five alleged violations of mandatory standards in Part 56, 30 C.F.R. Part 56. The proposed $269 penalty consists of a proposed $69 penalty for an alleged handrail violation designated as significant and substantial, and, proposed $50 penalties for each of four alleged nonsignificant and substantial guarding violations.

This case was heard on July 26, 1995, in Butler, Georgia. Mine Safety and Health Administration (MSHA) Inspector Kenneth Pruitt testified on behalf of the Secretary. Partner Greg Brown, who accompanied Pruitt on his inspection, testified for the respondent. The parties stipulated the respondent is a small operator subject to the jurisdiction of the Act, and, that all cited violations were abated in a timely manner. At the hearing, the Secretary moved to vacate nonsignificant and substantial

Citation No. 4302159. Thus, the Secretary now seeks a total civil penalty of $219 in this matter.

The respondent's Junction City Mine is comprised of two plants which are approximately one mile apart. Sand is extracted by shooting a high pressure water gun on an embankment washing sand off into a pit. The sand is then washed down to a barge in the pit where a powerful sump pump is located. The pit material is pumped to shaker screens where debris is removed. The sand and is then pumped to a classifying plant where it is stockpiled by a conveyer belt. The stockpiled sand is transported through a tunnel on belts. At Plant No. 1 the sand comes out of the tunnel onto a conveyer belt and goes directly into rail cars for shipment. At Plant No. 2, the sand is transported from a tunnel up an incline conveyer belt and into storage bins.

Findings of Fact and Conclusions

As a general matter, in his post-hearing filing, Steve Brown, does not expressly deny the fact of occurrence of the cited violations. Rather, Brown objects to MSHA's purported inconsistent enforcement standards because different inspectors have differing interpretations regarding whether a given condition constitutes a violation. Brown is also dismayed by the fact that the same inspector may overlook a violation during prior inspections only to cite the same condition on a subsequent inspection.

Thus, in the instant case, Brown complains the cited conditions were never cited before. Brown summarizes his predicament as follows: "Living with MSHA is like having 6 or 8 wifes (sic). It sure is hard to please all of them all of the time. We comply with one and the next one changes." (Brown letter dated Sept. 19, 1995).

Brown's analogy of MSHA enforcement to the rigors of domesticated life is misplaced. The past failure of inspectors to cite violative conditions, although potentially dangerous, is fortuitous rather than burdensome. Surely, Brown would not argue he is immune from a speeding citation simply because a police officer who had previously observed him speeding did not issue a citation. Similarly, the Commission has repeatedly held that a lack of previous enforcement of a safety standard does not

constitute a defense to a violation and that estoppel does not generally apply to the Secretary. *See U.S. Steel Mining Company, Inc.*, 115 FMSHRC 1541, 1546-47 (August 1993), *and cases cited therein.* Any other approach would be contrary to the Act's fundamental purpose of promoting safety by immunizing operators from enforcement of safety violations that were previously overlooked.

Citation No. 4302153

Inspector Pruitt inspected the respondent's mine site on September 13, 1994. Pruitt observed two employees working on the sand pump barge which is located in the pit at the No. 2 Plant. The barge was elevated approximately nine feet above the pit's surface at the time of the inspection. The barge has a smooth metal floor which was on a slight decline in the direction of the sump pump. The barge floor is subject to becoming wet and slippery due to moisture from the operation of the pump. The outer perimeter of the barge platform did not have handrails to prevent an employee from falling off.

Pruitt observed the end of the barge in accumulated pit water approximately three feet in depth. The end of the barge is in close proximity to the high powered suction pump that pumps approximately 100 tons of sand per hour. Employees use the platform at the rear of the barge on a regular basis to observe the functioning of the pump, to grease its bearings, and, to clear roots or other debris from the suction area. Greg Brown conceded that if an employee fell from the rear of the barge, serious if not fatal injuries could occur because it would be difficult to disengage a victim from the powerful pump suction. (Tr. 38-39).

Based on Pruitt's observations, the respondent was cited for a violation, characterized as significant and substantial, of the mandatory safety standard in section 56.11002, 30 C.F.R. § 56.11002. This standard provides, in pertinent part, that elevated walkways shall be of substantial construction and provided with handrails.

It is undisputed that employees routinely traverse the barge floor and that there was no guardrail installed along the outer

perimeter of the barge. This condition is depicted in photographs P-1 and P-2 which show the post-inspection installation of guardrails. It is not uncommon for floating structures to have railings to prevent individuals from falling overboard. Thus, the Secretary has established a violation of the mandatory standard in section 56.11002.

Resolving the issue of whether this violation was properly designated as significant and substantial requires an analysis of whether there is "a reasonable likelihood that the hazard contributed to will result in an event in which there is [a serious] injury." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). In addressing the significant and substantial question, the Commission has noted the likelihood of injury must be evaluated in the context of an individual's continued exposure during the course of continued normal mining operations to the hazard created by the violation. *Halfway, Inc.*, 8 FMSHRC 8, 12 (August 1986); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985); *U.S. Steel Mining Company*, 6 FMSHRC 1573, 1574 (July 1984).

Here, employees regularly traveled the barge platform, which is frequently wet and slippery, to observe and service the sump pump. The photographs in P-1 and P-2 illustrate that employees would have to position and extend themselves at the end of the barge in order to reach the sump pump lines and motor. They would also have to extend over the outer perimeter of the barge to clear debris from the sump pump area. It is therefore reasonably likely that an employee performing such functions would slip given the wet and muddy condition of the barge floor. In the absence of railings, there is nothing to prevent such an employee from falling into the pit and sustaining serious or fatal injuries as a result of exposure to the powerful suction of the sump pump. Consequently, the record adequately establishes this violation was properly characterized as significant and substantial. Accordingly, the Secretary's proposed $69 civil penalty for Citation No. 4302153 is affirmed as issued.

Citation Nos. 4302156, 4302157 and 4302158

Citation Nos. 4302156, 4302157 and 4302158 were issued by Pruitt for alleged nonsignificant and substantial violations of the standard in section 56.14107(a), 30 C.F.R. § 56.14107(a), for guarding failures on the No. 2 shaker screen flywheel, the No. 2 storage tank takeup pulley, and the No. 1 shaker screen v-belt drive, respectively. Section 56.14107 requires:

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury (emphasis added).
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

In considering the fact of occurrence of alleged guarding violations, the dispositive issue is whether the cited unguarded moving part can cause injury. The potential for injury requires exposure to the subject moving part by personnel who must pass within a reasonable proximity to the hazard. In this regard, the Commission has stated:

> [T]he most logical construction of [a guarding] standard is that it imports the concepts of *reasonable possibility of contact* and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. . . . Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis. (Emphasis added). *Thompson Brothers Coal Company, Inc.*, 6 FMSHRC 2094, 2097 (September 1984).

Thus, the hazard sought to be avoided by mandatory guarding standards is the sudden inadvertent contact of extremities with

moving equipment parts. It is the possibility of exposure rather than the likelihood of exposure that establishes a violation of section 56.14107. Consequently, the Secretary has moved to vacate Citation No. 4302159 for an unguarded v-belt drive on the south masonry sand conveyor because of its location high above working surfaces. (Tr. 4).

With regard to the remaining citations in this matter, the testimony, as well as the photographs in P-3 through P-7, demonstrate the cited unguarded flywheel, takeup pulley and v-belt drive are all in close proximity to walkways or working surfaces. Although Pruitt concluded, given the nature and frequency of exposure, that it was unlikely that employees would inadvertently contact these unguarded pinch points, the condition and location of the cited moving parts near working surfaces establish the fact of the cited violations. Accordingly, the $50 proposed civil penalty for each of the nonsignificant and substantial violations cited in Citation Nos. 4302156, 4302157 and 4302158 are affirmed.

ORDER

In view of the above, Citation No. 4302159 **IS VACATED.** Citation Nos. 4302153, 4302156, 4302157 and 4302158 **ARE AFFIRMED.** Consequently, **IT IS ORDERED** that the respondent pay a total civil penalty of $219 in satisfaction of the four affirmed citations in this matter. Payment is to be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of the $219 payment, Docket No. SE 95-59-M **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

Distribution:

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/rb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 5 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-442
Petitioner	:	A. C. No. 46-02052-03693
v.	:	
	:	Mine No. 20
OLD BEN COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-18
Petitioner	:	A. C. No. 46-02052-03720 A
v.	:	
	:	Mine No. 20
DALLAS THURMAN RUNYON,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-19
Petitioner	:	A. C. No. 46-02052-03721 A
v.	:	
	:	Mine No. 20
JAMES CARLTON DOWNEY, JR.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-20
Petitioner	:	A. C. No. 46-02052-03722 A
v.	:	
	:	Mine No. 20
JERRY DALE CISCO,	:	
Respondent	:	

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-21
Petitioner	:	A. C. No. 46-02052-03723 A
v.	:	
	:	Mine No. 20
IRVIN CUSTER DEAN,	:	
Respondent	:	

DECISION

Appearances: Javier I. Romanach, Esq., (Pamela S. Silverman, Esq., on brief), Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Timothy M. Biddle, Esq., Thomas A. Stock, Esq., and Lisa A Price, Esq., Crowell & Moring, Washington, D.C., for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Old Ben Coal Company, Dallas T. Runyon, James C. Downey, Jr., Jerry D. Cisco and Irvin C. Dean pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that the company violated Section 75.202(b) of the Secretary's Regulations, 30 C.F.R. § 75.202(b), that Messrs. Runyon, Downey, Cisco and Dean, as agents of the company, knowingly authorized, ordered or carried out the violation, and that Dallas T. Runyon, as an agent of the company, knowingly authorized, ordered or carried out two violations of Section 75.400, 30 C.F.R. § 75.400. For the reasons set forth below, I find that Old Ben did not violate Section 75.202(b), that, therefore, the named agents did not knowingly authorize, order or carry out the violation, and that Dallas T. Runyon did not knowingly authorize, order or carry out the violations of Section 75.400.

The cases were heard June 21-23, 1995, in Logan, West Virginia. MSHA Coal Mine Inspectors Vicki L. Mullins, Elzie J. Burgess, Jefferson Adkins and Ernie Ross, Jr., MSHA Supervisor William A. Blevins, MSHA Special Investigator James F. Bowman, and miners Garland Mahon, William M. Tate, Bennie Ray White, Robert Stone and George Hager testified for the Secretary. West Virginia State Mine Inspector Lee Sipple, and Old Ben employees James C. Downey, David L. Bailey, James A. Bowers, Jr., Jerry D. Cisco, Irvin C. Dean, Dallas Runyon and Trellis Cisco testified on behalf of the Respondents. The parties also submitted briefs which I have considered in my disposition of this case.[1]

CITATION NO. 3747181

The company is alleged, in Docket No. WEVA 93-442,[2] to have violated Section 75.202(b) because:

> Evidence showed that employees had been working and traveling under unsupported roof in the Beech Creek Belt Entry approximately between the 23 and 24 crosscuts. A fall had occured [*sic*] on 4/14/93 and two certified foreman [*sic*] and a crew of approximately 7 men were sent to clean up the fall. The roof fall area was approximately 9 feet wide to approximately 20 feet in length and the area had been cleared of rock and no additional support was installed. The following tools and supplies were laying [*sic*] under unsupported roof: 2 pieces of pinsteel, 2 pieces of top belt structure, 1 bottom belt roller, 1 air drill were approximately 8 feet outby roof support on the left rib.

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[1] Counsels for the Respondent submitted a motion for leave to file a reply and a Reply Brief. Since there was no response by the Secretary, I will grant the motion and consider the reply.

[2] The remaining citations in this docket were disposed of in a partial decision issued on July 14, 1994. *Old Ben Coal Co.*, 16 FMSHRC 1583 (Judge Hodgdon, July 1994).

(Govt. Ex. 4.) The four individuals are alleged, in Docket Nos. WEVA 95-18, WEVA 95-19, WEVA 95-20 and WEVA 95-21, to have knowingly authorized, ordered or carried out this violation.[3]

Section 75.202(b) states that "[n]o person shall work or travel under unsupported roof unless in accordance with this subpart." With regard to installing temporary roof support, Section 75.210(a), 30 U.S.C. § 75.210(a), requires "[w]hen installing temporary support, only persons engaged in installing the support shall proceed beyond permanent support."

The petitions, with respect to the individuals, were brought under Section 110(c) of the Act, 30 U.S.C. § 820(c) which provides:

> Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a) and (d).

There is no dispute that a roof fall occurred in the mine on April 14, 1993. Thus, the issues of fact under this citation are whether Old Ben employees worked and traveled under unsupported roof and whether Jerry D. Cisco and Irvin C. Dean knowingly authorized, ordered or carried out this violation.

Miner Garland Mahon asserted that the violation did occur and that the two foremen knowingly authorized, ordered and carried out the violation. On the other hand, the two foremen and two other miners who worked at the site, William M. Tate and David L. Bailey, testified that they did not go under unsupported roof except to install temporary roof supports. The two inspectors, who did not conduct their investigation until the next day, believed that the circumstantial evidence they observed

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[3] At the start of the trial, counsel for the Secretary moved to dismiss the petitions concerning this violation with respect to James C. Downey, Jr. and Dallas T. Runyon. There being no objection, the motion was granted. (Tr. I. 8.) The dismissals will be indicated in the order at the end of this decision.

supported Mr. Mahon's assertions, consequently they did not interview any of the other witnesses. Based on the evidence discussed below, I conclude that no violation occurred.

Garland Mahon testified that he was called to the roof fall on the Beech Creek belt. When he arrived, he observed a

> kind of an L shaped fall and it was wide at one end and narrow at the other. It was probably ten or twelve feet across one end and approximately eighteen feet long, twenty feet long, somewhere in that neighborhood. It was probably in the neighborhood of four feet thick because it pulled four-foot bolts out and there was some of those sticking up so it was slightly under four foot.

(Tr. I. 109.)[4] He stated that Jerry Cisco was standing "five to eight feet" away from supported roof, *i.e.* under unsupported roof, when he arrived. (Tr. II. 158.)

The miner asserted that he observed other miners working under unsupported roof removing broken rock from the belt and that both Cisco and Irvin Dean were present while this happened. He stated that when he came back from lunch temporary roof supports (jacks) had been set "on top of the belt and under the brow of the fall on the inby side." (Tr. II. 166.) He said that he saw ten to twelve roof bolts sticking out from the fallen rock. Mr. Mahon related that he was on the "outby side of the fall," "on the walkway side of the belt," under "the last row of support" when he observed this. (Tr. I. 110, Tr. II. 165.)

Irvin Dean testified that he observed the clean-up operation on the outby side of the fall and did not travel or work under unsupported roof or see any other miners doing so. He stated

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[4] There is a separate transcript, beginning with page one, for each day of the hearing. Consequently, transcript cites will be to "Tr. I," "Tr. II" and "Tr. III" as appropriate.

that he subsequently measured the largest rock in the fall, which fell on the beltline, and it was "approximately 28 inches thick, four and a half foot wide, and probably six and a half foot long." (Tr. II. 131.) It had "at least two, maybe three" roof bolts sticking out of it. (Tr. II. 132.)

Jerry Cisco testified that the only time he or anyone else went under unsupported roof was for "preparations to get a jack set and set a jack." (Tr. II. 110, 112-13.) Concerning the preparations necessary to set a jack, he stated that "the rock was every which way piled in there. There really was no way you could set a jack on top of that rock to make it safe. So, we cleared out enough to set the jack to try to get the jack set on a solid bottom." (*Id.*) He said that three jacks were installed between 11:00 a.m. and 11:20 a.m., "one on the walk side of the belt, one on top of the belt and one on the off side of the belt." (Tr. II. 117, 122.)

William Tate and David Bailey gave testimony which corroborated that given by the foremen. They stated that they did not work under unsupported roof, nor did they see anyone working under unsupported roof. They agreed that three jacks were set during the clean-up. James Bowers testified that two or three jacks were set in the area when he arrived at about 4:30 p.m. on the second shift to make preparations to install roof bolts in the fall area.

It is not necessary to conclude that Garland Mahon gave false testimony to find that no violation occurred in this instance. In fact, it is readily apparent that he still believes that work was performed under unsupported roof in connection with the clean-up of the roof fall. Nevertheless, the other evidence in the case undercuts the accuracy of his observations and indicates that his belief, however well intentioned, is mistaken.

As shown in his diagram of the fall, (Resp. Exs. A and B), he apparently mistook the area of a 1978 roof fall as the area of the one in question. The fall in 1978 covered a much larger area. (Resp. Ex. D.) That he was mistaken as to the size of the area in which the fall occurred is further evidenced by his statement that he saw 10 to 12 roof bolts sticking out of the fallen rock. If these bolts were on four foot centers, as he and the other evidence in the case agree, then the fall would have

had to have been much larger than even he indicated. On the other hand, in addition to the testimony discussed above, West Virginia state inspector Lee Sipple testified that the fall was smaller and the Secretary's witness, William Tate, diagramed it as being significantly smaller that the prior roof fall. (Resp. Ex. C.)

Consequently, I conclude that the Secretary has not proven that miners worked or traveled under unsupported roof in violation of Section 75.202(b).[5] In reaching this conclusion, I find, despite the testimony of Jefferson Adkins to the contrary, that clearing a space to set up a temporary support comes within the exception to 75.202(b) found in 75.210(a). Mr. Adkins could provide no basis for his statement that this could not be done. Furthermore, it defies common sense to separate preparing a space for a jack from installing a jack and say that a person can go under unsupported roof to do one but not the other. Manifestly, installing temporary roof support includes clearing a place for it, if necessary.

Having found that the Secretary did not prove that miners traveled or worked under unsupported roof in violation of Section 75.202(b), I conclude that Old Ben Coal Company did not violate the regulation. Since there was no violation, it necessarily follows that Jerry Cisco and Irvin Dean did not knowingly authorize, order or carry out a violation.

CITATION NO. 3991478

Dallas Runyon, in Docket WEVA 95-18, is charged with knowingly authorizing, ordering or carrying out a violation of

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[5] Although I have not specifically discussed it, I find the inspectors' testimony to have little probative value in view of the fact that they did not observe the scene until the next day, they only observed it from one side, which apparently was not the best side from which to observe it, they did not interview any of the witnesses except Garland Mahon, they did not relate what he told them, and their evidence does not completely square with his testimony, *e.g.*, they only observed one jack while he said there were at least two.

Section 75.400[6] of the Secretary's Regulations on November 19, 1992. The citation alleges:

> The operators clean-up program was not being complied with on the Mate Creek belt flight. Float coal dust, measured to be from 0 to 1/4" in depth, was deposited under the belt, in the entry, and crosscuts, on the belt structure, crib blocks and ventilation devices from the tailpiece to the drive which was scaled to be 1950 feet in length. Wet coal fines and coal dust that measured from 0 to 3 feet in depth was allowed to accumulate under the belt flight at approximate 10 foot intervals for the length of the belt. Loose coal and coal dust had accumulated up to 4 feet in depth at the West Mains discharge area and the belt was running in the accumulations in this area. The float coal dust was black and dry in the majority of the area covered. The belt examination books indicate that this belt flight needed clean and dusted in every examination entry starting 11/1/92 with no corrective action taken to this date.

(Govt. Ex. 8.) The Respondent did not contest whether this violation had occurred. (Tr. II. 172.)

The issue with regard to this citation is whether Dallas Runyon, the mine superintendent, knowingly authorized, ordered or carried out the violation. The evidence presented at the hearing does not establish that he did.

The Secretary's case is principally based on the *Preshift-Mine Examiner's Reports* for November 1 through 19, 1992. Almost every entry for the Mate Creek beltline, as well as every other beltline, during that period indicates either that it "needs clean" or "clean & dust" or "needs clean & dust." (Govt. Ex. 9.) In the action taken column, it states "reported," with the

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[6] This section provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

exception of November 8, 9:00 p.m. to 12:00 p.m., when it does not say anything and November 19, 12:00 a.m. to 7:50 a.m., when it states "being corrected." (*Id.*) All of the reports are signed by "Dallas Runyon" as superintendent. (*Id.*) From this, the Secretary infers that "Mr. Runyan (*sic*) had actual knowledge that violative or hazardous accumulations were reported to exist on the Mate Creek belt flight for fifty consecutive shifts over a period of eighteen days." (Sec. Br. at 7.)

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983) when it stated: "If a person in a position to protect 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."

In *Roy Glenn*, 6 FMSHRC 1583 (July 1984), the Commission explained that this test also applies to a situation where the violation does not exist at the time of the agent's failure to act, but occurs after the failure. It said:

> Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted 'knowingly', in violation of Section 110(c) when, based on the facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventive steps.

Id. at 1586. The Commission has further held, however, that to violate Section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (August 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

With regard to the examination book entries, Mr. Runyan testified that "I countersigned them saying that these belts were reported to me that they needed some work done. They reported that they needed cleaning and dusting, or whatever." (Tr. II. 238.) Concerning the entries themselves, he stated: "It means it

needs additional cleaning and it hasn't been completely cleaned up." (*Id.*) He further testified as follows:

> Q. Does that mean that [there] was no work being done on those belts, in your mind?
>
> A. No, sir.
>
> Q. Why doesn't that mean that?
>
> A. Because I knew that each shift foreman was working on the belts that he was assigned to, and when he got a belt line completely cleaned, he would put in there, okay. You'll see some of them says okay. That means it's been completely cleaned up.

(*Id.*)

Third Shift foreman Trellis Cisco and fire boss Bennie Ray White testified that the entries in the examination book were not intended to indicate that nothing was being done about cleaning up accumulations along the belt line, but only that someplace along the belt there were accumulations to clean up. They also testified, as did Runyon, that a scrapper problem caused accumulations to occur rapidly. They agreed that Mr. Runyon responded to specific reports of accumulation problems and required that cleaning be ongoing.

In a case very similar to this one, the Commission held that a general mine foreman had knowingly authorized a violation of Section 75.400. *Prabhu Deshetty*, 16 FMSHRC 1046 (May 1994). Belt examiners' reports for 12 of the 13 shifts preceding the violation had stated that the No. 1 belt was "dirty" or "needed cleaning" and Deshetty testified that when he read the reports "he understood that a violative or hazardous accumulation was present." *Id.* at 1050-51. In addition, the inspector testified that he had discussed the accumulation problem with Deshetty and warned him that the mine needed to look more closely at the problem. *Id.* at 1051. Further, Deshetty testified that he knew of prior accumulation violations because of his review of the mine's citations. *Id.* Consequently, the Commission found that "Deshetty ignored the specific warnings from MSHA about the large number of accumulation violations at the mine and disregarded the

repeated entries in the belt examiners's reports indicating that the No. 1 belt was in serious need of cleaning" and, therefore, with actual knowledge of the accumulations, was liable under Section 110(c). *Id.* at 1052.

This case is distinguishable from *Deshetty*. Mr. Runyon did not testify that he knew that violative or hazardous accumulations were present. In fact, from the way the examiners' reports were submitted at this mine there was no way for anyone to determine what specific accumulations were being reported. If this were done purposely so that supervisors could say that they were not aware of the violations, then a knowing violation may well have existed. *Roy Glenn* at 1587. However, there is no evidence that that was the case. Rather it appears that in November 1992 the mine believed in good faith that the reports were being submitted properly. Accordingly, I conclude that the reports did not provide Mr. Runyon actual knowledge of the violation.[7]

Further, there is no evidence in this case that MSHA had specifically warned the superintendent in particular, or the mine operators, that they had an accumulation problem that needed looking into. Nor did any of the witnesses testify that the mine had a problem with serious accumulations of which Mr. Runyon should have been aware in the normal course of business.

I conclude that Mr. Runyon did not have knowledge of the accumulations in question and that based on the way that examiners' reports were made at that time there was nothing in the reports that would have put him on notice that specific action needed to be taken. Accordingly, I conclude that Dallas Runyon did not knowingly authorize, order or carry out the accumulation violation on November 19, 1992.

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[7] There was testimony that the mine no longer makes its examiners' reports in such a loose fashion, but states specifically where cleanup is needed and what corrective action is being taken. It is to be hoped that this is true, because the mine supervisors should now be on notice that such reporting will not shield them from personal liability in the future.

CITATION NO. 3994511

This citation was also issued on November 19, 1992, for a violation of Section 75.400. It alleged that:

> Numerous piles of loose coal and coal dust measuring up to 20 feet in length, 10 feet in width and 3 feet in height was [*sic*] being stored at intermittent location [*sic*] in the No. 2 Grapevine Mains entry. The combustible material had been scooped from the No. 3 belt conveyor entry to abate 104B order 3995339, dated Nov. 17, 1992. Also several piles of loose coal, coal dust and float coal dust, measuring up to 20 feet in length, 8 feet in width and 4 feet in height was [*sic*] being stored at spot locations in rooms driven left off Grapevine Mains. The operator has been issued 190 violations in the past 3 years for permitting combustible material to accumulate in active workings and on electrical and mobile equipment.

(Govt. Ex. 13.)

The Secretary's evidence showed that Inspector Mullins had issued a 104(b) order, 30 U.S.C. § 814(b), shutting down the No. 3 belt until the accumulations along it had been removed. She had terminated the order in the early morning hours of November 19 after finding that the violation had been abated. Inspector Mullins testified that when she terminated the order she did not check any of the adjacent entries for accumulations. Later that morning, Inspector Blevins discovered the accumulations in question.

George Hager testified that he was the foreman on the Grapevine section. He stated that two scoops and some shoveling were used to abate the 104(b) order. A small scoop was used to clean under the belt and then the accumulations were "hauled over to the adjacent entry and pushed against the rib to be picked up by the larger scoop and transported to the face." (Tr. III. 70-71.) Mr. Hager related that sometime during the process the large scoop broke down and the battery had to be recharged.

During this time, the small scoop was still hauling the accumulations to the adjacent entry, where they remained until the large scoop was back in operation and could begin removing them to the face.

With regard to Dallas Runyon, Mr. Hager testified as follows:

> Q. Who assigned you to clean the belt?
>
> A. Honestly I don't know if it was Ronald Kennedy or Dallas or maybe both of them together. At times we talked together. Either or both.
>
> Q. Did you all discuss the manner in which to abate Ms. Mullins' 104(b) order?
>
> A. To scoop it with the small scoop, and transport it from there to the face with a larger scoop.
>
> Q. Did you all discuss about dumping any of the material scooped from the belt -- to dump it in the No. 2, in the neutral entry?
>
> A. Yes, to transfer it from one scoop to the other.
>
> . . . .
>
> Q. Did you discuss with Dallas Runyon the best way to clean the belt after Inspector Mullins had issued the 104(b) order?
>
> . . . .
>
> A. I can't exactly remember the conversation with Dallas or with Bo, but it was determined among us to use the small scoop to scoop under the belt and the large scoop to haul it to the face.
>
> . . . .
>
> Q. Did Dallas Runyon tell you to hide that coal?

A. He did not.

. . . .

Q. Did Dallas Runyon say anything to you regarding the placement of the material that was scooped from the belt?

A. No, other than discussing about moving from the belt to the No. 2 entry and then hauling from there with the larger scoop to the face.

Q. Did you have any concern that the withdrawal order issued by Inspector Mullins would not be abated if the material was left in the No. 2 entry?

A. No I hadn't thought about it.

(Tr. III. 67, 69-70, 75, 82-3.)

At the close of the Secretary's case, the Respondent moved to dismiss this charge against Mr. Runyon for failure to present a *prima facie* case. The Secretary argued that because the company had not used the smaller scoop to haul the accumulations to the face after the large scoop broke down and because Mr. Runyon knew of the method being used to remove the accumulations, he knowingly authorized this violation.

I granted the motion, stating:

> I think a 110(c) requires a knowing violation. It also requires aggravated conduct and I see no evidence of aggravated conduct in the evidence that's been presented so far. I don't see any direct evidence that Mr. Runyon even knew about the accumulations in the No. 2 entry. . . . I don't see any evidence that they weren't doing what they could to remove the coal.

(Tr. III. 89.)

ORDER

It is **ORDERED** that Citation No. 3747181 in Docket No. WEVA 93-442 is **VACATED** and **DISMISSED** and that the petitions for assessment of civil penalty filed against Dallas T. Runyon, James C. Downey, Jerry D. Cisco and Irvin C. Dean are **DISMISSED.**

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 10 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-53
Petitioner	:	A.C. No. 46-05890-03502 MHF
	:	
v.	:	Tug Valley Coal Processing
	:	
COAL PREPARATION SERVICES,	:	
INCORPORATED,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Weisberger

Based on the representations set forth in Petitioner's statement dated October 4, 1995, it is **ORDERED** that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 13 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 95-500
	:	A.C. No. 15-17475-03519
v.	:	
	:	Hatchett Mill
LARC COAL, INC., Respondent	:	

DECISION

Appearances: Thomas Grooms, Esq, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
W. L. Cook, Vice President, Larc Coal, Inc., Madison, West Virginia for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings Petitioner filed a motion to approve a settlement agreement. A reduction in penalty from $12,500 to $7,500 was proposed. I have considered the representations and documentation submitted in this case, including those representatives made at hearing, and I conclude that the proffered settlement is acceptable 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 $7,500 within 30 days of this order.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 19 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1242
Petitioner	:	A.C. No. 15-03013-03537
v.	:	
	:	Mine No. 1
D & E COAL COMPANY, INC.,	:	
Respondent	:	

DEFAULT DECISION

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against D & E Coal Company, Inc., pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges seven violations of the Secretary's mandatory health and safety standards and seeks a penalty of $35,000.00. For the reasons set forth below, I find the company in default, affirm the orders and assess a penalty of $35,000.00.

The company has been recalcitrant at all stages of this proceeding. The Chief Administrative Law Judge issued two orders to show cause before D & E responded to the petition for assessment of penalty.

On May 9, 1995, a prehearing order was issued to the parties requesting a response not later than May 26, 1995. The order informed the parties that "[f]ailure by any party to comply with this order will subject the party in default to a show cause order and possible default decision."

A copy of a letter, dated June 26, 1995, from the Secretary to Respondent's counsel was received in this office on June 29. The letter indicated that the parties had reached a settlement agreement and requested that the agreement enclosed with the letter be signed and returned to the solicitor's office for submission to the judge.

On August 2, 1995, counsel for the Secretary was informed by Respondent's attorney, Herman W. Lester, Esquire, that he no longer represented the company. Consequently, on August 15, counsel sent another copy of the agreement directly to D & E Coal Company, requesting a response by August 31, 1995. Not receiving a response by that date, the Secretary filed a motion for default judgment on September 1, 1995. The company did not respond to the motion.

Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal." Rule 66(c), 29 C.F.R. § 2700.66(c), provides that "[w]hen the Judge finds a party in default in a civil penalty proceeding, the Judge shall also enter an order assessing appropriate penalties and directing that such penalties be paid."

Accordingly, on September 25, 1995, an Order to Show Cause was issued ordering the Respondent to show cause within 15 days of the date of the order why a Default Decision finding that it violated Sections 75.220(a)(1), 75.203(a), 75.370(c), 75.1725(a), 75.334(c)(3) and 75.364(b)(4) of the Secretary's Regulations, 30 C.F.R. §§ 75.220(a)(1), 75.203(a), 75.370(c), 75.1725(a), 75.334(c)(3) and 75.364(b)(4), and assessing and directing payment of the proposed penalty of $35,000.00 should not be entered pursuant to Commission Rule 66, 29 C.F.R. § 2700.66.

The order to show cause was sent to the Respondent's president by certified mail-return receipt requested. On October 17, 1995, the order was returned to this office in its original envelope by the U.S. Postal Service with the notation that it had been "refused."

ORDER

Based on the above facts, I find that the Respondent, D & E Coal Company, is in default in this matter. Accordingly, Order **Nos.** 4003887, 4011787, 4011788, 4012381, 4012385, 4012392 and 4012394 are **AFFIRMED.** D & E Coal Company, Inc., **is ORDERED TO PAY** a civil penalty of **$35,000.00** within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED.**

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 19, 1995

ROMA STONE CORPORATION, Applicant	:	EQUAL ACCESS TO JUSTICE
	:	Docket No. EAJ 95-1
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MISHA), Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On October 13, 1995, the applicant filed a motion to withdraw and dismiss its application for attorney fees. The applicant advises that the Solicitor does not object.

In light of the foregoing, it is ORDERED that the applicant's motion to dismiss be GRANTED and that this case be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 2 3 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-467
Petitioner	:	A.C. No. 15-16792-03502 HTW
v.	:	
	:	Mine: No. 4
ROCKY'S TRUCKING,	:	
Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
James E. Peterson, Pro Se, for Respondent.

Before: Judge Amchan

Issue Presented

The issue in this case is the extent, if any, that Respondent is to be held responsible for the conduct of its non-supervisory miner/truck driver in assessing a civil penalty. The Secretary has proposed a $3,000 penalty for this employee's continued operation of his truck after the issuance of two section 104(b) failure to abate/withdrawal orders[1].

Findings of Fact

The facts in this case are established by the uncontroverted testimony of MSHA Inspector Robert Clay. On February 28, 1994, Mr. Clay conducted an inspection of the Black Thunder Limited No. 1 mine in Evarts, Kentucky (Tr. 13-14). Coal is brought from this underground mine by a conveyor and is dumped into a pit. At

[1]The case also involves a $117 proposed penalty for Respondent's failure to abate a citation regarding an inspection tag on the truck's fire extinguisher.

the pit coal trucks are filled with a front-end loader. The trucks then take the coal away from the mine to a preparation plant (Tr. 14-15).

At the pit, Inspector Clay saw four coal trucks belonging to independent contractors. One of them was owned by Respondent and was driven by miner Bill Martin. Clay inspected all four trucks and issued citations to Mr. Martin and to at least one other contractor (Tr. 15-17, 25-26).

Citation No. 4242348 was issued to Mr. Martin because his truck's reverse signal alarm was inoperable. The driver's view to the rear was limited and miners in the pit were exposed to the hazard of having the truck back into or over them. Inspector Clay required abatement of the violation by 8:00 a.m. the next morning, March 1, 1994 (Tr. 16-17, 21-23).

Mr. Martin gave no indication that he could not fix the alarm within this time period. Indeed, abatement could possibly have been achieved simply by taking the truck to a car wash and having it cleaned. If not, the alarm could have replaced in a few hours at a cost of about $50 (Tr. 18-20).

Citation No. 4242349 was issued because the tag on the fire extinguisher in Martin's truck did not indicate that it had been inspected within the last six months as required by 30 C.F.R. §77.1110. As was the case with the reverse signal alarm, Inspector Clay required correction of this violation by 8:00 a.m. the next morning. To abate, Respondent had only to make a visual inspection of the extinguisher to determine that it was properly charged and then record the date of the inspection on the tag (Tr. 16-17, 26-28).

On March 1, 1994, Clay returned to the Black Thunder mine. He first discussed abatement of violations with the superintendent of the mine and then turned his attention to the contractors. The inspector looked at the truck of contractor Gilles Greer and determined that Greer had abated citations issued the day before regarding a broken windshield and fire extinguisher inspection (Tr. 24-26, 28-29).

Clay then saw Martin driving his truck, loaded with coal. He asked Martin to pull over so that he could determine whether

the previous day's citations had been abated. Martin refused, became verbally abusive, and stated that he did not have time "to fool with" Clay that day (Tr. 30).

At 1:45 in the afternoon Clay informed Martin that he was issuing two section 104(b) withdrawal orders. These were later reduced to writing as Order Nos. 4242361 and 4242363. Martin was again verbally abusive and drove off. Fifteen minutes later Clay issued Citation No. 4242362 charging Respondent with a section 104(a) violation for failing to take its truck out of service after the issuance of the withdrawal order (Tr. 30-35). Within a few days of these incidents, Respondent sold the truck in question and at about the same time went out of business (Tr. 35-36, 52).

Is Mr. Martin's conduct imputable to Respondent?

There is no indication that Respondent's owner, James Peterson, knew of Mr. Martin's conduct or that it was consistent with any instructions given by Mr. Peterson. Nevertheless, Respondent was properly cited because the Federal Mine Safety and Health Act is a strict liability statute and the conduct of a non-supervisory employee is imputed to his employer for purposes of determining whether a citation is valid, A.H. Smith Stone Co., 5 FMSHRC 13, 15 (January 1983).

On the other hand, the conduct and knowledge of a rank-and-file miner generally cannot be imputed to an operator for penalty purposes. However, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner's violative conduct, Southern Ohio Coal Co., 4 FMSHRC 1459, 1464-5 (August 1982).

In the instant case there is no evidence concerning the training, supervision and disciplining of Mr. Martin. Thus, there is no evidence regarding Respondent's negligence, apart from that which the Secretary argues must be imputed to it from Martin's behavior. The Secretary contends that Mr. Martin should be considered the agent of Respondent for penalty purposes, citing the Commission's decisions in Rochester &

Pittsburgh Coal Company, 13 FMSHRC 189 (February 1991) and S&H Mining, Inc., 15 FMSHRC 956 (June 1993)[2].

In the lead case, Rochester & Pittsburgh Coal, the Commission reversed the decision of the judge, who, relying on the Southern Ohio Coal decision, found the intentional misconduct of a rank-and-file employee not imputable to the operator. The employee in question failed to carry out preshift examinations required by the Act. Thus, the Commission concluded that he was "charged with responsibility for the operation of ... part of a mine" and therefore was the "agent" of the operator within the meaning of section 3(e) of the Act.

Additionally, in concluding that the rank-and-file employee was Rochester & Pittsburgh's agent, the Commission relied on the (Second) Restatement of Agency (1958). It stated that "the essential feature of the principal-agent relationship is that the agent has authority to represent his principal with third parties in dealings that affect the principal's legal rights and obligations."

Applying this rule to the instant case, a rank-and-file miner working alone on a mine site must be deemed to have either actual or "constructive" authority to abate violations in a timely fashion and to respond to withdrawal orders. I would thus conclude that Mr. Martin was Respondent's agent in his dealings with Inspector Clay and with regard to his response to the citations and orders issued to Respondent[3]. I therefore

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[2]Also see, Mettiki Coal Corp., 13 FMSHRC 769, 772 (May 1991).

[3]In Whayne Supply Company, Docket Nos. KENT 94-518-R, KENT 94-519-R and KENT 95-556, Slip op. p. 6, n. 5 (September 7, 1995), I declined to conclude that a rank-and-file employee is the agent of a contractor simply because he was working without supervision at a mine site. Judge Fauver in U.S. Coal, Inc., 16 FMSHRC 649, 652 (March 1994-review pending), concluded that when a rank-and-file employee's misconduct threatens the health or safety of others, his negligence is imputable to his employer for penalty purposes. Although Judge Fauver's decision is not expressed in terms of "agency," I would interpret his decision as

impute his conduct to Respondent for purposes of determining its negligence and an appropriate civil penalty.

The Civil Penalty Assessment

After considering the six penalty criteria in section 110(i) of the Act, I assess a civil penalty of $720 for the operation of the truck in defiance of the withdrawals orders (Citation No. 4242362) and the failure to abate the fire extinguisher violation (Order No. 4242363). The penalty shall be paid in twelve monthly installments of $60. The first payment is due 30 days after the date of this decision.

My consideration of the penalty factors is as follows:

The demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violations. This factor, by itself, would lead me to assess a much higher penalty than $720. Intentional disregard of a withdrawal order is a very rare occurrence (See Tr. 41). It must be penalized severely not only because it endangers the health and safety of miners but also because a significant penalty is likely to deter others from similar conduct.

The gravity of the violation. The continued operation of the truck without a reverse signal alarm was reasonably likely to result in serious injury. Mr. Martin indicated to Inspector Clay that the alarm had not been repaired (Tr. 38).

The negligence of the operator. I have found that Mr. Martin was the agent of Rocky's Trucking. On the other hand, I have considered that Mr. Peterson, the owner of Rocky's Trucking, knew nothing of this incident and, so far as the record indicates, did nothing to encourage it. However, it must also be

---

fn. 3 (cont.)
finding that the rank-and-file employee in that case was the agent of the operator. While there is no need for me to express agreement or disagreement with the U.S. Coal decision, I would note that Mr. Martin's insistence of operating his vehicle without fixing the back-up alarm certainly endangered the health and safety of others.

noted that Mr. Martin's behavior may have inured to the short-run benefit of Respondent. Martin may have been able to haul more coal by virtue of not taking his truck out of service for repairs and not allowing Mr. Clay to inspect it (Tr. 41, 54-55).

The size of the operator. Respondent was a very small operator and owned only two trucks. Due to this fact, I have assessed a lower penalty than I would have for a larger concern.

Respondent's history of previous violations. There is no evidence in the record regarding violations prior to February 28, 1994. Therefore, Respondent's history has not been a factor in assessing a penalty, except for the fact that a higher penalty would have been assessed if it had been shown to have a record of recurring similar violations.

The effect of the penalty on the operator's ability to stay in business. This factor cannot be applied to this case since Respondent has ceased operation. I have given consideration, however, to Mr. Peterson's representations regarding his financial condition. He receives approximately $2,000 per month in Social Security and Workers Compensation benefits (Tr. 52-54). I conclude he can afford to pay the assessed penalty in the installments which I have ordered.

ORDER

Citation No. 4242362 and Order No. 4242363 are affirmed and a $720 civil penalty is assessed for the two combined. This shall be paid in twelve monthly installments of $60 commencing within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 2 4 1995

AMAX COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. LAKE 95-259-R
	:	Citation No. 4263560; 2/28/95
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Wabash Mine
ADMINISTRATION (MSHA),	:	Mine I.D. No. 11-00877
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 95-267
Petitioner	:	A.C. No. 11-00877-04096
v.	:	
	:	Wabash Mine
AMAX COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for Amax Coal Company; Christine M. Kassack, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Secretary of Labor.

Before: Judge Amchan

Docket No. LAKE 95-267

On November 8, 1994, MSHA representative Robert M. "Bud" Montgomery inspected an area of the 2 West/Main West-South section of Respondent's Wabash Mine in eastern Illinois. While

inspecting the working faces, he came upon a ram or shuttle car sitting in the crosscut between entries 4 and 5, which was waiting to enter entry 6, where coal was being mined (Tr. 21-24).

When the ram car entered entry 6, Inspector Montgomery followed it. He saw section foreman Kyle "Jody" Wethington walking out of the entry (Tr. 23). When Wethington noticed the inspector he turned around and walked back to the working face. Wethington then had the continuous mining machine operator turn off his equipment and sent his helper outby the working face to obtain material to extend the line curtain (Tr. 116-118).

When Inspector Montgomery arrived at entry 6 he immediately noticed that the line curtain, erected to maintain an adequate airflow to the working face, was much farther away from the face than it should have been. The inspector measured the distance from the end of the line curtain to the tail of the continuous mining machine. The distance was between 20 and 25 feet. Since the continuous miner is approximately 35 feet long, the end of the curtain was 55 to 60 feet from the face, rather than within 40 feet as required by Respondent's ventilation plan (Tr. 24).

Montgomery issued Respondent, by serving Wethington, section 104(d)(2) Order No. 4258538, which alleges a violation of 30 C.F.R. §75.370(a)(1). The order alleges a significant and substantial (S & S) violation of this regulation due to Respondent's unwarrantable failure to comply with the requirements of its ventilation plan. A $6,000 civil penalty was subsequently proposed.

Respondent concedes that it violated the Act. It contests however that this violation was S & S or due to its unwarrantable failure to comply with the Act.

Unwarrantable failure

The Secretary's allegation of unwarrantable failure relates to the conduct of section foreman Wethington, who was in entry 6 at a time when the violation was obvious and left the entry without having it corrected. Although the continuous miner operators, William Rowe and Tommy Stephens, were obviously negligent, or worse, in failing to maintain the line curtain

within 40 feet of the working face, their conduct, as rank and file employees, is not imputable to Respondent for purposes of determining an "unwarrantable failure" or in assessing a civil penalty, Southern Ohio Coal Co., 4 FMSHRC 1459, 1464-5 (August 1982)[1].

On the morning of November 8, 1994, Wethington was in entry 6 prior to the commencement of mining. The miners had to clean up gob in the entry before beginning to cut coal. The line curtain was within 40 feet of the face (Tr. 112).

Wethington left the entry to examine some stoppings that had collapsed, pursuant to an inquiry from MSHA Inspector Michael Rennie. He returned 40 to 45 minutes later (Tr. 113-115). While he was gone Mr. Rowe had completed three cuts into the coal and was finishing a fourth. Respondent's procedure was to advance 20 feet on the right side of the entry, then 20 feet on the left. Thereafter the mining machine was moved back to the right to advance another 20 feet (Tr. 193). At this time the line curtain should have been advanced to stay within 40 feet of the face. However, it was never moved from its original position (Tr. 224). Thus, the third cut on the right and the fourth cut on the left side of the entry were performed without adherence to Respondent's ventilation plan.

---

[1] Respondent's supervision, training and discipline of rank and file employees, however, may be examined to determine whether it took reasonable steps to prevent the violative conduct. The instant record discloses no deficiencies in Amax's training, supervision and discipline of Rowe and Stevens with regard to its ventilation plan. Indeed, annual refresher training on the ventilation plan, including the placement of line curtains, was conducted a few days prior to the citation in this case (Tr. 261-265). Mr. Rowe and Mr. Stevens were present either at that session or at a make-up session held later in the same month.

When Wethington returned to the entry, he instructed Mr. Stephens, who would operate the mining machine in entry 5, to advance only 30 feet, rather than 40 feet, as they had in entry 6. After several minutes, Wethington left entry 6[2]. He saw Inspector Montgomery coming, turned around and went back into entry 6. Before Montgomery said anything to him, Wethington stopped the continuous miner and sent Mr. Rowe to get additional line curtain material and Mr. Stephens to get a ladder (Tr. 115-118).

Foreman Wethington contends he did not notice that the curtain was too far back because he was thinking about the collapsed stoppings and was concentrating on avoiding contact with the ram car (Tr. 117). The foreman's explanation of his thought process when he saw Inspector Montgomery is as follows:

> When I got to the intersection of No. 6, between 5 and 6, I saw Mr. Montgomery through the cross-cut, and I immediately turned around and started looking to see if everything was kosher.
>
> I noticed the curtain was too far back. I immediately told the men to shut the miner down and get the curtain hung.

Tr. 116.

Although it is difficult to delve into the foreman's mental processes, I draw an inference from several factors that Wethington was aware that the line curtain was not close enough to the face before he saw Inspector Montgomery. These factors

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[2]In finding that Wethington was in entry 6 for several minutes after his return I credit the testimony of ram car operator Robert Scott (Tr. 97) over that of Wethington (Tr. 116). Scott testified that Wethington was in entry 6 for approximately 5 minutes (Tr. 98-99) and that he saw Wethington in the entry on his ram car trip prior to the one in which he saw inspector Montgomery. I credit Mr. Scott because I find that he is the more disinterested witness of the two, and appeared to have a recollection of these events equal or superior to that of Mr. Wethington.

are the time he was in the entry, the obviousness of the violative condition, and his conduct upon encountering the inspector.

As to the obviousness of the violation, I note that Bruce Thompson, an Amax section supervisor who was accompanying Inspector Montgomery, recognized that the location of the curtain was in violation of the ventilation plan as soon as he walked into the entry (Tr. 183). I infer that Wethington's "about-face" was precipitated by his realization that the curtain's location violated the ventilation plan and that Montgomery would immediately notice it.

I conclude the foreman was unlikely to react as he did if he was not aware of any violations. As there appear to have been no violations other than the placement of the line curtain, I infer he was aware it violated Respondent's plan. Therefore, I impute his knowledge to Respondent and find an "unwarrantable failure" to comply with the regulation. Since Wethington knew that the violation existed and ignored it, his conduct is sufficiently aggravated to constitute an "unwarrantable failure", Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2011 (December 1987).

Significant and Substantial

The Secretary contends that failure to maintain the line curtain within 40 feet of the face of entry 6 was a "S & S" violation of the Act. Inspector Montgomery opined that there was a reasonable likelihood that the violation would contribute to an accident likely to result in serious or fatal injury. An accident, he believes, would likely occur due to a frictional ignition of methane at the face. This might result from the bits of the continuous miner sparking into an area in which methane had accumulated due to the inadequate airflow (Tr. 35-37). The violation would contribute to the hazard in that adequate airflow is dependent on maintaining the line curtain within 40 feet of the face.

The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is 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 applying this test to a situation in which the hazard is a methane ignition or explosion, the Commission has held that there must be a confluence of factors indicating a likelihood of ignition or explosion, Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). In this regard, the Secretary notes that the Wabash Mine liberates over a million cubic feet of methane through its North portal on a daily basis (Tr. 31-32). This puts the mine on a 5-day schedule for methane spot checks by MSHA.

Moreover, eight to nine months prior to the instant citation, Amax had to discontinue mining in the 1 North, 1 West section because it was unable to keep methane levels below 1 percent sufficiently to mine effectively (Tr. 179, 237-38). The Secretary also notes that Inspector Montgomery observed a .6 percent reading on the continuous miner's methane monitor when he entered entry 6[3] (Tr. 28-29).

Respondent, on the other hand, argues that an ignition or explosion was and is unlikely. Although some areas of the Wabash Mine have experienced significant methane problems, Amax argues that there have been no such problems in the 2 Main, West South sections. The 1 North, 1 West area in which it had

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[3]I credit Inspector Montgomery in this regard, although no other witnesses noticed readings that high. A reading of .6 percent is not out of line with the .4 percent noticed momentarily by Bruce Thompson (Tr. 176) or the readings taken by Respondent's pre-shift examiners in the three weeks prior to the citation (Tr. 241). Indeed, one reading of .6 percent was taken during this period by Amax, as well as two at .5 percent.

to discontinue mining due to methane, is 7,000 to 8,000 feet from the 2 Main, West South area (Tr. 238). Respondent contends its experience there is not relevant to the instant case.

The results of Respondent's preshift examinations of the 2 Main, West South sections in the three weeks prior to the instant citation, indicate that methane levels are most often between zero and .2 percent, and rarely above 3 percent (Tr. 241). There is no evidence of a reading above .6 percent (Tr. 170, 241).

Amax argues also that liberation of greater amounts of methane is not likely because the area in which the violation occurred is not virgin coal. The areas all around it had been previously mined (Tr. 154-58). Moreover, there has apparently been only one frictional ignition at the Wabash Mine, which occurred in 1981 as a roof bolting machine installed a bolt (Tr. 233).

I conclude that the record does not establish the confluence of factors necessary to establish that an ignition or explosion was reasonably likely to occur. I therefore find the violation to be non-significant and substantial. Methane liberation is not always predictable and an ignition or explosion under the circumstances created by the violation is well within the realm of possibility. However, under the circumstances that existed in entry 6 on November 8, 1994, and that may have been presented in the 2 Main, West South section during the continued course of mining operations, an ignition or explosion was unlikely to occur as a result of the instant violation.

Assessment of Civil Penalty

The Secretary proposed a $6,000 civil penalty for the instant violation. I assess a $1,500 penalty pursuant to the criteria in section 110(I). Although an ignition or explosion was not reasonably likely, I deem the gravity of the violation to be quite high. If the violation had contributed to such an incident there is a reasonable likelihood that it would have produced fatal injuries. I decline to assess a higher penalty due to the rather short duration of the violation.

Secondly, the negligence of Respondent's foreman warrants a relatively substantial penalty. Wethington had a lot of other things to be concerned with at the time of the violation and mining in entry 6 was almost finished when he returned. Nevertheless, as I conclude he was aware of the violation, it is apparent he would have done nothing to correct it had not Inspector Montgomery appeared on the scene. In order to adequately protect miners, operators and their agents must take corrective action when inspectors are not present. Thus, I assess what I consider a relatively large penalty based on the omissions of foreman Wethington.

Respondent has stipulated that such a penalty will not affect its ability to stay in business. The three other penalty criteria have been considered and have been found only marginally relevant in arriving at a penalty figure.

Docket No. LAKE 95-259-R

On February 28, 1995, MSHA representative Michael Pace conducted an inspection of the 3 South/4 East working section of the Wabash Mine. He measured the distance between the roof and the floor in a number of locations in the last open crosscut and one crosscut outby the last open crosscut. He found this distance to exceed 7 feet and to be over 9 feet for a distance of 10 feet (Tr. II: 40-41).

Randy Questelle, a Wabash safety inspector who accompanied Pace, took measurements between entries 4 and 5 in the last open crosscut at every row of bolts. His measurements ranged from 7 feet 3 inches to 7 feet 10 inches. Questelle tried to measure what he considered representative mining heights and avoided "holes in the floor." (Tr. II: 120). Between crosscuts 3 and 4, his measurements ranged between 7 feet, 2 inches and 8 feet, 3 inches (Tr. II: 121).

After taking his measurements and determining that rib bolts had not been installed in this area, Pace issued Amax Citation No. 4263560. This citation alleges that Amax violated 30 C.F.R. §75.220(a)(1) in failing to comply with its approved roof and rib control plan.

The Wabash Mine is the only one of the approximately 25 mines in MSHA's District 8 that has a roof control plan requiring rib bolting. The plan requires rib bolting under the following conditions:

> When the mining height is greater than 7 feet but less than or equal to 8 feet, partial rib bolting (East/West) is required;
>
> When the mining height is greater than 8 feet, full rib bolting is required.

Exhibit G-6, page 3.7, subparagraphs 8b and 8c.

The partial rib bolting scheme set forth at page 3.9 of the plan requires bolting on 7 foot centers in the East-West direction, bolting on 5 foot centers at the corners of the intersections between entries and crosscuts and no bolting in a North-South direction.

The rib bolting requirements have been part of the Wabash Mine's roof control plan since the 1970s (Tr. II: 81). These requirements have been relaxed since 1982, for example, by allowing Amax not to rib bolt when advancing in a North-South direction (Tr. II: 82-86).

Up until October, 1993, all mining at the Wabash Mine was performed in either a North-South or East-West direction. The ribs in the mine were much more stable in the North-South direction than in the East-West direction. This was the reason for the roof and rib control provisions exempting North-South entries from rib bolting if the mining height was under 8 feet.

In 1993 Amax experienced many roof falls in the southeastern perimeter of the Wabash mine (Tr. II: 143). To remedy this problem, Amax began advancing 5 entries in width, rather than 10 entries to reduce the stress on the roof. They also retained Jack Parker as a roof control consultant (Tr. II: 147-48). Mr. Parker and Amax concluded that the roof instability was due at least in part to an imbalance in the stress in the East-West direction, as compared to North-South (Tr. II: 148-152).

They further concluded that the stress could be equalized by advancing at an angle to North-South. Thus, in October 1993, Amax began advancing the 3 South/4 West section towards the southeast so that the entries were at a 58 degree angle from East-West (Tr. II: 168, Exh. R-3, R-4). At the same time the 1 North/4 East section and later the 6 East section were advanced at similar angles (Tr. II: 169-70, Exh. R-3). As of August, 1995, three of the mechanized mining units (working sections) at the Wabash Mine are advancing at angles and five are advancing North-South or East-West.

Amax contends that partial bolting under 8 feet is only required by its plan when mining East-West. MSHA contends that such bolting is required in all eight of the sections--unless Amax is advancing North-South.

I conclude that the current plan does not require partial rib bolting when advancing at an angle. I therefore vacate Citation No. 4263560 insofar as it alleges a violation in areas in which the mining height was under 8 feet. MSHA concedes that the mine's roof and rib control plan did not contemplate mining at an angle because when it was developed Wabash was only mining in a North-South and East-West direction (Tr. II: 90, 107, 241-2). Roof control plans are the product of good-faith negotiations between a mine operator and MSHA. Plan provisions therefore are generally the result of an agreement regarding mine specific requirements, Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). There has been no agreement, or in contract parlance, no "meeting of the minds" with regard to rib bolting in areas with a mining height of 7 to 8 feet in the angled sections.

That such is the case was admitted by Thomas Buelow, the roof control supervisor in MSHA's Vincennes, Indiana District Eight Office (Tr. II: 242.)

> THE COURT: But we are going back to when this plan and language first came into the plan. There was no discussion of what might happen if they were to turn at an angle?
>
> A. No, ...

Q. One reason for the failure to discuss it was there was no anticipation that angle mining would be instituted?

A. Well, I would say we failed to anticipate that. The thing was, Wabash said, 'Hey, our ribs stand better in a North-South direction. We would like to propose that. We want to have you come and evaluate it.' In fact, the ribs stood better in a North-South direction, and that was the relief we gave. You know, we gave relief in the North-South direction...

Since Amax started advancing at an angle in the southeast portion of the mine, it has experienced dramatic improvement in its roof conditions and improved rib conditions as well (Tr. II: 152-156). MSHA recognizes that the problems of rib stability are not as severe in the angled sections as they are in the East-West direction (Tr. II: 107). Although ribs have collapsed since October 1993 at the Wabash mine and miners have been injured, there is no evidence that any of these incidents have occurred in the angled sections (Tr. II: 52, 61-62, 127-29, 221, 248-49) Indeed, the record indicates that there were no injuries due to rib collapses in the angled sections between October 1993, and the issuance of the citation in February 1995 (Tr. 221)[4].

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[4]Although I find that the existing roof and rib control plan does not require partial rib bolting in the angled sections, MSHA could try to impose such a change in the plan. If Amax does not acquiesce in such a change, its plan approval can be terminated and the dispute can be brought to the Commission for resolution. If the parties pursue such a course, the Secretary would have the burden of proving that the plan without partial rib-bolting in the angled sections is unsuitable for the Wabash mine and that a plan requiring such bolting is suitable, Peabody Coal Company, 15 FMSHRC 628 (April 1993); 15 FMSHRC 381 (March 1993).

Essentially the Secretary would have to show that rib conditions in the angled sections pose a sufficient hazard to mandate partial bolting. The Secretary would also have to address Amax's contention that in some situations rib bolting increases the hazards to which miners are exposed (See, e.g. Tr. II: 50, 103-04, 130)

Is the Secretary's interpretation of Respondent's roof and rib control plan entitled to deference from the Commission?

In Energy-West Mining Company, 17 FMSHRC 1313, 1317 (August 1995), the Commission stated that MSHA's reasonable interpretation of a ventilation plan is entitled to deference from the Commission. I conclude in the instant case that the Secretary's interpretation of Amax's roof and rib control plan is not sufficiently reasonable to be entitled to such deference.

I reach this conclusion because the Secretary's interpretation of Amax's roof and rib control plan addresses a situation not contemplated by either party in the plan approval process. My conclusion is also based on the fact that the Secretary has not established that rib bolting is "suitable" for the angled sections of the Wabash Mine (see footnote 4, herein).

Areas in which the mining height was over 8 feet

There remains the question as to whether the Secretary established a violation with regard to areas in which the mining height exceeded 8 feet. Amax challenges Inspector Pace's measurements as not being representative and therefore argues that they do not establish mining heights over 8 feet. I agree with Contestant's position that an isolated spot or depression in which the distance from floor to ceiling exceeds 8 feet does not establish a mining height above 8 feet.

I credit the testimony of Mr. Questelle and find that the mining height in the cited area was generally between seven and eight feet(Tr. II: 119-121). Nevertheless, even Mr. Questelle measured areas between crosscut 3 and 4 in which the "representative height" exceeded 8 feet (Tr. II: 121). These areas had to be rib-bolted under the plan. I therefore affirm the citation with respect to this area.

ORDER

Section 104(d)(2) Order No. 4258538 in Docket LAKE 95-267 is affirmed as a non-significant and substantial violation and a $1,500 civil penalty is assessed.

Citation No. 4263560 in Docket LAKE 95-259-R is vacated with respect to those areas in which the mining height was below 8 feet and is affirmed with regard to the area between crosscut 3 and 4 in which the mining height exceeded 8 feet.

The penalty in Docket LAKE 95-267 shall be paid within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 27 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-44
Petitioner	:	A.C. No. 46-01968-04165
v.	:	
	:	Docket No. WEVA 95-95
CONSOLIDATION COAL COMPANY,	:	A.C. No. 46-01968-04169
Respondent	:	
	:	Blacksville No. 2 Mine
	:	
	:	Docket No. WEVA 95-96
	:	A.C. No. 46-01455-04040
	:	
	:	Osage No. 3 Mine
	:	
	:	Docket No. WEVA 95-117
	:	A.C. No. 46-01452-04001
	:	
	:	Arkwright No. 1 Mine

DECISION

Appearances: Elizabeth Lopes, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Consolidation Coal Company (Consol) pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege several violations of the

Secretary's mandatory health and safety standards and seek penalties of $14,050.00. For the reasons set forth below, I affirm all citations and orders, modifying two of them pursuant to a settlement agreement, and assess civil penalties of $10,050.00.

A hearing was held on July 18, 1995, in Morgantown, West Virginia. MSHA Coal Mine Inspector Edwin W. Fetty, Fred D. Smith, David B. Myers, and MSHA Conference and Litigation Representative Lynn A. Workley testified for the Secretary. Michael L. Cole, Larry J. Johnson, William A. Runyan, David R. Pile, Charles Clark, Carl G. Weber, Sr., and Clifford J. Cutlip were witnesses for Consol. The parties also submitted briefs which I have considered in my disposition of these cases.

SETTLED DOCKETS

At the beginning of the hearing, counsel for the Secretary stated that they had settled Docket Nos. WEVA 95-44, WEVA 95-95 and WEVA 95-96. With respect to Docket No. 95-44, the agreement provides that Consol will pay the proposed penalty of $50.00 for Citation No. 3319362 in full and that the penalty for Order No. 3318854 will be reduced from $1,500.00 to $1,000.00. For Docket No. WEVA 95-95, Order No. 3319349 will be modified to delete the "significant and substantial" designation and the penalty reduced from $3,000.00 to $1,500.00. In Docket No. WEVA 95-96, the degree of negligence in Citation No. 3319345 will be reduced from "moderate" to "low" and the penalty reduced from $4,000.00 to $2,000.00.

After considering the parties' representations, I concluded that the settlement was appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i), and informed the parties that I would accept the agreement. (Tr. 9-13.) The provisions of the agreement will be carried out in the order at the end of this decision.

DOCKET NO. WEVA 95-117

Inspector Fetty was driving on I-79 past Consol's Arkwright No. 1 mine on July 6, 1994, when his attention was attracted to a crane boom that he believed was too close to some high tension lines. He pulled onto the mine property to investigate the

situation. Once he arrived at the scene, he concluded that there was no problem. Unfortunately, for Consol, however, while on the property he noticed a coal feeder on an equipment carrier parked on a spur track in the post pile area. The inspector observed what appeared to be accumulations of coal, coal dust, oil and grease on the feeder and went to inspect it.

Inspector Fetty testified that:

> On July 6 when I observed the feeder, there was accumulation of coal on the sides and the angles of the feeder. There was [*sic*] accumulations of oil and grease in the deck where the motor had been removed. And coal and coal dust was also present there.
>
> And on the trolley and feeder wire side, around the operating controls, there was an excessive amount of fine, loose, dry coal accumulated there.
>
> . . . .
>
> There was accumulation of the coal through the entire throat of the machine, in between each flight, ranging from one to three inches deep.
>
> . . . .
>
> Like I said, the accumulation existed down on the inside, between the conveyor flights, in the feeder. Also, on the left-hand edge, there was coal around -- accumulated on the sides. Coming up to the next piece there, . . . is your electrical box.
>
> Accumulations was [*sic*] on top of that box and around the other controls, on up, and coming up into the front where you can see the drive motor that drives the conveyor, which had been removed, there was accumulation of oil and grease over the entire area.

(Tr. 39-41.)

The inspector further testified that he "observed two pieces of conveyor belting, one on the right side, and one on the left

side. And the area between the conveyor for approximately 20 inches wide, there was nothing, or nothing down the trolley wire side." (Tr. 50.) He stated that he believed that the feeder had not been covered as required because of this opening and because "[t]here was a mark on top of the metal, on top of the feeder, that indicated that at one time the trolley or trolley feeder had contacted this portion of the feeder" and that the mark "was fresh, because it was still shiny." (Tr. 51.)

Finally, the inspector testified that the feeder was not properly grounded for the move "[b]ecause the only method of grounding that was provided, that I observed at the time I was there, there was a piece of track bond twisted around a portion of the feeder and just twisted around the frame of the lowboy." (Tr. 55.)

As a result of his observations, Inspector Fetty issued order No. 3122362 under Section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2),[1] alleging a violation of Section 75.1003-2 of the Secretary's Regulations, 30 C.F.R. § 75.1003-2. The order alleges that:

> A coal feeder was observed setting [*sic*] on a spur track of the main track haulage between the hills of the Arkwright No. 1 Mine. The feeder had been moved from underground under energized 300 vdc trolley wire and trolley feeder wire on a previous shift. The feeder was not cleaned and there were accumulations of fine dry coal and coal dust, oil, grease and wooden material on the coal feeder. The coal feeder was not

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[1] Section 104(d)(2) states:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

properly covered on the top and trolley wire side. There was evidence that the energized trolley wire or trolley feeder wire had contacted the center support of the coal feeder, leaving indications of arcing for 9 inches and molten metal splatter. Electrical contact was not maintained between the coal feeder being transported and the rail-mounted low boy barrier. According to a company foreman, the equipment was being moved under the direction of a certified foreman and with a qualified electrician. The condition was observed by at least two foremen. A fire could have occurred causing injuries from smoke inhalation, asphyxiation or burns. Proper safety precautions should have been provided prior to and during equipment move.

(Govt. Ex. 1.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 75.1003-2 requires, in pertinent part:

(a) Prior to moving or transporting any unit of off-track mining equipment in areas of the active workings where energized trolley wires or trolley feeder wires are present:

(1) The unit of equipment shall be examined by a certified person to ensure that coal dust, float coal dust, loose coal oil, grease, and other combustible materials have been cleaned up and have not been permitted to accumulate on such unit of equipment;

. . . .

(d) The frames of off-track mining equipment being moved or transported, in accordance with this section, shall be covered on the top and on the trolley wire side with fire-resistant material . . . .

(e) Electrical contact shall be maintained between the mine track and the frames of off-track mining equipment being moved in-track and trolley entries . . . .

As a preliminary matter, Consol argues that this regulation does not apply to the coal feeder in question. It bases this contention on *Southern Ohio Coal Co.*, 3 FMSHRC 1449 (Judge Koutras, June 1981), where the judge held "that section 75.1003-2 only applies to complete or reasonably complete pieces of off-track mining equipment." *Id.* at 1455. At issue in that case was whether the boom of an off-track shuttle car being transported on a low-boy was covered by Section 75.1003-2. The case does not support the Respondent's position.

The boom of a shuttle car is a small part of the shuttle car, while in this case it is the small parts, such as the motor, which have been removed leaving a reasonably complete feeder. Further, as Consol admits in its brief, at a minimum the frame of the feeder was involved in this move. In that connection, the judge noted in *Southern Ohio*, "[s]ince subsection (d) [also alleged to have been violated in this case] mentions only frames, it is evident that the drafters were considering only large, nearly complete, or complete pieces of machinery." *Id.* at 1456. Clearly, Judge Koutras considered a frame to be a complete or reasonably complete piece of equipment. I concur, and conclude that Section 75.1003-2 applies to the move of the coal feeder in this case.

This case turns on the credibility of the witnesses. There is no dispute that the feeder was moved out of the mine in three separate moves over the period from July 2 through July 6, 1994. Nor is there any dispute that when Inspector Fetty observed the feeder on the morning of July 6, it was located where the last move had parked it during the early morning hours of that day. However, there is a dispute as to whether the move complied with Section 75.1003-2.

Claiming that it did, Consol's witnesses testified that the feeder was carefully cleaned before the move on the first day, that it was rock dusted and then completely covered with pieces of conveyor belt which were laced together. They testified that the required, certified person checked the feeder to ensure that it was clean before the move was commenced. The witnesses maintained that it was not uncovered while stopped twice before being moved again and that it was grounded with a clamp attached to the feeder frame and to the "low-boy" carrier.

While admitting that two incidents of arcing occurred during the move, they deny that the wire came in contact with the feeder, claiming that on one occasion a trolley wire hanger came loose and swung down hitting the side of the "low-boy" and on the other occasion the belting on the feeder pushed up, causing the trolley wire to contact a metal ceiling beam. Consol's miners averred that what appeared to Inspector Fetty to be an area on the feeder where the feeder contacted the trolley wire was, in fact, a place where an L-shaped bracket had been cut off of the feeder with an acetylene torch.

The Consol witnesses hypothesized that the accumulations observed on the feeder by Inspector Fetty resulted from roof and rib sloughage, as well as accumulations knocked off of water pipes, during the move. Finally, they assert that the reason the feeder was not completely covered by conveyor belting when observed by the inspector was that the movers started to remove the belting on completing the move before deciding to leave that task to the day shift.

I find the testimony of the inspector to be the most believable in this case. Generally, there has been no showing that Inspector Fetty had any reason or motive to make up what he observed. In fact, while the conclusions that he drew from his observations are clearly challenged by Consol, his observations are not. On the other hand, the Respondent's employees, who were involved in committing a violation, if one is found, had an obvious reason for shading the truth. Furthermore, Fetty's observations are corroborated by a disinterested witness.

Section 75.1003-2(a)(1)

Turning first to the accumulations of coal, coal dust, oil and grease and wood material observed by the inspector, his description is very detailed and describes accumulations in places and to extents that could not have resulted from sloughage and dislodgements onto a covered feeder during the move. This testimony was supported by the testimony of Fred Smith, a retired miner who had no apparent motive to dissemble.

Mr. Smith testified that he saw the feeder on July 6 when he moved it from the track spur to the No. 8 shop and "[i]t had a heavy debris, like bug dust, coal and oil, all over the

equipment, all over the whole machine." (Tr. 117.) He further stated that "it didn't look like it had been hosed off like the other machines I have hauled out of that mines [*sic*] and other mines" and that in his opinion "[w]ith the fine dust and accumulation of the oil, it would have to be accumulated where it was in operation." (Tr. 117.) Finally, he said that it was unlikely that the accumulations had occurred while the feeder was being moved because they were under sloped parts of the feeder.

In addition, the Respondent took some pictures of the feeder the next day at the shop. (Jt. Exs. A-L.) Although both the inspector and Mr. Smith testified that the feeder had been cleaned up by July 7 and appeared cleaner than when they saw it on July 6, it is apparent from these pictures that there were still accumulations of combustible materials on the feeder. Consequently, I conclude that the Respondent violated subsection (a)(1) of the regulation by not ensuring that the feeder had been cleaned up prior to the move.

Section 75.1003-2(d)

The evidence concerning whether the feeder was properly covered during the move is not as explicit. The inspector based his conclusion on this issue on his observation of the gap in the covering and the presence on the feeder of an area in the gap which appeared to have come in contact with the wire. Mr. Smith agreed with Inspector Fetty that the shiny area appeared to be a place where the feeder contacted the wire. Conversely, the Respondent explains the gap as being an unfinished attempt to uncover the feeder after the move was completed and the shiny area as being the result of a brace being cut off of the feeder.

Only Mr. Clark and Mr. Weber testified concerning uncovering the feeder. Mr. Clark stated: "We just started to peel back one piece. That was it." (Tr. 322.) Mr. Weber related: "I moved one piece and I think the motorman and Chic Martin started to take another piece off, moved it around." (Tr. 362.) However, none of this explains the 20 inch gap observed by the inspector. If one piece were partly peeled back, it would have been obvious to the inspector. Further, if one piece had been removed and another moved, the gap would have been larger than 20 inches and presumably the piece that had been removed would have been present in the area.

With regard to the shiny area, both Inspector Fetty and Mr. Smith testified that this was different in appearance from areas that had been cut with a torch and they were able to point out the difference in the photographs where there is no dispute that a part had been cut off of the feeder. While Consol's witnesses all maintained that a part had been cut off at the shiny spot, they did not attempt to explain why there was a difference in the appearance of the cuts. In fact, there is an observable difference. (Jt. Exs. E and L.)

Based on the evidence available, there are only two explanations for the shiny area. Either a part was removed from the area, or the feeder came in contact with the wire. Based on the difference between the areas known to have been cut and the area in question, I find that the shiny area resulted from contact with the wire. Based on all of the evidence on this issue, I conclude that the feeder was not covered as required by subsection (d).

Section 75.1003-2(e)

Inspector Fetty did not see a proper ground on the feeder at the time he observed it. At that time, no explanation was given to him of the reason the feeder did not appear to be properly grounded. However, the next day he was informed that a ground clamp had been used and he was provided with the clamp that was allegedly used. On receiving the clamp, the inspector tested it with his equipment for continuity. Continuity was not obtained.

Mr. Cutlip testified that the clamp did maintain continuity when tested by the inspector. However, I do not credit this testimony. Mr. Cutlip made extensive contemporaneous notes at the time the order was issued, (Govt. Ex. 5 and Resp. Ex. 10), yet this incident, which if true demonstrates that the company did properly ground the feeder and that the inspector was lying, is not mentioned. Further, although several other people were present when the test was made, none testified to corroborate this claim.

I find it suspicious that no mention was made of the clamp until the next day and am not convinced that one was used. Nevertheless, even if the one given to the inspector the next day was, in fact, used, it obviously did not provide a proper ground

based on the inspector's testing. Therefore, I conclude that Consol violated subsection (e).

Based on a preponderance of the evidence, I find that Consol did not ensure that the feeder had been cleaned of combustible materials prior to moving it, did not completely cover the top and trolley wire side of the feeder with fire-resistant material while it was being moved, and did not maintain electrical contact between the mine track and the feeder during the move. Accordingly, I conclude that the company violated Section 75.1003-2 of the regulations as alleged.

Significant and Substantial

The inspector determined that this violation was "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is "significant and substantial" must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

Inspector Fetty testified that the widespread accumulations on the feeder were dry and combustible. He further testified that it was reasonably likely that if a trolley wire came in contact with the feeder it would cause arcing that would ignite

the accumulations resulting in a fire. The evidence indicates that at least twice during the move contact with the trolley wire or a wire hanger resulted in arcing, although fortunately there was no ignition. The inspector also testified that if a fire occurred, serious injuries such as burns and smoke inhalation were likely to occur.

Based on this evidence, I find that the *Mathies* criteria have been met. The failure to clean, cover and ground the feeder for the move contributed to the danger of a fire in the mine. A fire was reasonably likely, assuming normal mining operations, and if a fire occurred it could be expected to result in reasonably serious injuries. Accordingly, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

Inspector Fetty also found that this violation resulted from Consol's "unwarrantable failure" to comply with the regulation. The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

In this case the accumulations were widespread and readily apparent to Inspector Fetty and Mr. Smith and, according to the inspector's notes made at the time of his inspection, members of Consol's management also. (Govt. Ex. 2.) Indeed they are readily apparent in the photographs taken a day later. Despite this, the move was carried out after a certified person indicated that he had examined the feeder and it was "cleaned and covered." (Resp. Ex. 5.)

Clearly, Consol knew what Section 75.1003-2 required for the move of the feeder. Just as clearly, the company made only a superficial attempt to comply with those requirements. At best this resulted from "indifference," at worst it was "intentional

misconduct." Consequently, I conclude that this violation resulted from Consol's "unwarrantable failure" to comply with the regulation.

CIVIL PENALTY ASSESSMENT

The Secretary has proposed a civil penalty of $5,500.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in Section 110(i) of the Act. *Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147, 1151 (7th Cir. 1984).

In connection with the six criteria, the parties have stipulated that Consol is a large mine operator, that the maximum penalty permissible for this violation will not affect its ability to remain in business and that the company demonstrated good faith in abating the violation. (Tr. 21-22.) For the two years preceding this violation, the company received a moderate number of violations for a mine of this size, including seven for violation of the same regulation. (Govt. Ex. 7.) The evidence in this case demonstrates that the Respondent was highly negligent and that the gravity of the violation was very serious. Considering all of this together, I conclude that the proposed penalty of $5,500.00 is appropriate.

ORDER

Order No. 3318854 and Citation No. 3319362 in Docket No. WEVA 95-44 are **AFFIRMED**, Order No. 3319349 in Docket No. WEVA 95-95 is **MODIFIED** by deleting the "significant and substantial" designation and **AFFIRMED** as modified, Citation No. 3319345 in Docket No. WEVA 95-96 is **MODIFIED** by reducing the degree of negligence from "moderate" to "low" and **AFFIRMED** as modified and Order No. 3122632 in Docket No. WEVA 95-117 is **AFFIRMED**. Consolidation Coal Company is **ORDERED TO PAY** civil penalties of **$10,050.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 30 1995

BILLY R. McCLANAHAN, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. VA 95-9-D
	:	MSHA Case No. NORT CD 95-1
WELLMORE COAL INCORPORATION, Respondent	:	Preparation Plant
	:	Mine ID No. 44-05236

DECISION

Appearances: Billy R. McClanahan, Grundy, Virginia, Complainant;
Louis Dene, Esq., Abingdon, Virginia, Counsel for Complainant;
Ronald L. King, Esq., Grundy, Virginia, Counsel for Respondent;
Richard Farmer, Esq., Grundy, Virginia Corporate Counsel for Wellmore Coal Corporation.

Before: Judge David Barbour

This is a discrimination proceeding brought pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. § 815(c)(3)) by Billy R. McClanahan against Wellmore Coal Corporation. McClanahan's complaint was filed with the Secretary of Labor (Secretary) on November 7, 1994. The complaint was investigated by the Secretary's Mine Safety and Health Administration (MSHA). On December 14, 1995, MSHA advised McClanahan that it concluded no violation of section 105(c) had occurred. On January 6, 1995, McClanahan filed a complaint on his own behalf with the Commission.

The essence of McClanahan's complaint is that he was fired from his job as a haulage truck driver because he objected to hauling loads whose weight made them unsafe. McClanahan seeks reinstatement, back pay, benefits and legal fees. Wellmore denies the allegations. A hearing was conducted in Grundy, Virginia. Both parties were represented by counsel.

THE FACTS

BACKGROUND

In 1978, McClanahan, who had extensive experience in the maintenance and repair of large equipment, including haulage trucks, began working for United Coal Company (United) as a haulage truck driver (Tr. 47-50). United had a number of "divisions" or associated companies, two of which were Wellmore and Knox Creek Coal Company (Knox Creek). (McClanahan was uncertain of the exact relationship between United and the divisions. (Tr. 51, 132) He and other witnesses frequently referred to them collectively as "the company.").

McClanahan worked as an employee until August 1992. On August 20, McClanahan and the other truck drivers were advised by David Wampler, the president of Wellmore, that the company was going to cease its trucking operations (Tr. 315). Wampler told the drivers that although they were going to be terminated as company employees, they could purchase the trucks and the company would help with the financing. If they purchased the trucks, the drivers could continue to haul for the company under a contractual arrangement (Tr. 55-57, 459).

Wampler stated that the decision to contract-out trucking was based upon the desire of the company to reduce operating costs. By divesting itself of the trucks the company could shift costs such as maintenance, insurance and workers' compensation to the purchasers (Tr. 317,342).

The company sold eleven trucks to its former employees (Tr. 430, 458). Under the contractual arrangements, three of the purchasers were required to work primarily at Knox Creek and eight were required to work primarily at Wellmore's facilities (Tr. 430-431).

McClanahan decided to purchase the 1990 Ford truck he had been driving. The contract, dated August 21, 1992, was between McClanahan, operating under the name of Shanash Trucking Company, Knox Creek and Wellmore (See Resp. Exh. R-1). Under the contract, McClanahan, who had been hauling refuse primarily at Knox Creek's No. 3 Preparation Plant, was to continue to do so, although the work could include hauling at other facilities, including Wellmore's preparation plants (Tr. 225-226; see Comp. Exh. 8).

McClanahan was to be paid on an hourly basis when he hauled at Knox Creek. He also was to be paid on an hourly basis at Wellmore's No. 7 Preparation Plant. However, when he hauled slate or filter cake, at Wellmore's No. 8 Preparation Plant, he was to be paid by the ton (Tr. 153-154, 320; Comp. Exh. 8 at 24). ("Filter cake" is defined in part as, "[t]he compacted solid or semi-solid material separated from a liquid . . . " (U.S. Department of the Interior, A Dictionary of Mining Mineral and Related Terms (1968) at 426).) McClanahan's work hours and haulage routes were to be specified by the preparation plant managers (Tr. 65-66).

McClanahan maintained that prior to divesting itself of the trucks, the company had no formal policy regarding the minimum weight of loads. McClanahan thought they usually weighed between 18 and 20 tons (Tr. 67).

In late December 1993, or in early January 1994, a new refuse fill area was opened at Knox Creek. The area added about two miles (round trip) to the route of the trucks. Because of the change, it took the trucks longer to travel the distance required to dump refuse (Tr. 297). In addition, the new route involved a hill where the road was one lane. The trucks had to wait to go up or down the hill. This also added to the time it took to haul refuse (Tr. 68-69).

THE WEIGHT REQUIREMENT

Around this time, David Fortner, Wellmore's Vice President, William "Junior" Gross, Knox Creek's preparation plant supervisor, Danny Estep, Wellmore's trucking superintendent, and Wampler, discussed the weight of the load's being hauled at Knox Creek (Tr. 300). As a result, the company instituted a policy requiring the hauling of loads weighing at least 25 tons. (The requirement later was modified to 24 tons in order to give drivers a one ton "leeway" (Tr. 154, 228, 349-350).) Fortner stated:

> We required 25 tons to be hauled in order to move the refuse away at a rate that would allow the [preparation] plant to run . . . [W]e were not getting some of the trucks to haul the total amount so there was instituted a policy of weighing trucks because the

> trucks were being paid to haul by the hour and not by the ton . . . so the trucks would be . . . occasionally . . . weighed to ensure that . . . [they] were hauling a sufficient amount (Tr. 300-301, see also Tr. 302).

The company enforced the limit by weighing trucks at random (Tr. 77-78, 366). McClanahan stated that, at times, two or three trucks were weighed during a shift. Gross testified that Knox Creek kept a record of all the drivers who were weighed and of the results (Tr. 369; Resp. Exh. 4). The records were kept in a composition book in the control room of the preparation plant. Subsequently, the results were recorded on a table that was entered into evidence (Resp. Exh. 4; Tr. 419).

Imposition of the weight limit lead to a series of events that ended with the termination of McClanahan's employment at Knox Creek. McClanahan, his witnesses, and the company's witnesses described these events. (McClanahan had kept notes that detailed his version of what happened and he testified from these notes (Exh. 4; Tr. 69).)

EVENTS LEADING TO MCCLANAHAN'S TERMINATION

- January 12, 1994 -- McClanahan was asked by Junior Gross to weigh the truck's load. The load weighed 21 tons (Tr. 70-71).

- January 27, 1994 -- McClanahan was asked by Gross to weigh the truck's load. The load weighed 23 tons (Tr. 72). According to McClanahan, Estep told McClanahan that haulage traffic was being slowed and that McClanahan should "watch himself" and should start hauling 25 tons (Tr. 73-74). McClanahan testified that he responded that it was dangerous to haul 25 tons, that hauling loads of 25 tons damaged the roads and the trucks (Tr. 73-75).

- January 31, 1994 -- Estep advised all truck drivers via the CB radio that a new company policy required them to haul at least 25 tons and that if they hauled under that amount they would not be able to work the next day. (At first, the company allowed a driver whose load was under the limit to finish the shift. Later the rule was changed to require the driver to stop work the moment it was confirmed the load was underweight and to not work the following day.) McClanahan testified that he

responded that it is unsafe and unfair to require people to choose between being injured or going home. (Tr. 123, 444-445).)

• February 1, 1994 -- Estep again advised drivers via the CB radio of the weight policy. McClanahan testified that he told Estep that it was unsafe and the company should not put drivers in a situation where they were required to haul an unsafe weight (Tr. 78-79).

• February 4, 1994 -- McClanahan asserted he complained via the CB radio about the "overloading being so hazardous" (Tr. 79).

• February 17, 1994 -- The truck of driver William Ling was weighed. The load weighed 23.62 tons (Resp. Exh. 4 at 1). Ling was told the truck could not haul the next day (Tr. 182, 349, 370, 345).

• February 18, 1994 -- McClanahan contended that Ling talked to Wampler about unsafe conditions and that Wampler simply responded, "to[o] bad" (Comp. Exh. 4 at 1). However, Wampler denied that Ling ever raised the subject of safety (Tr. 357-358). (Ling did not testify.)

• February 23, 1994 -- McClanahan's load was weighed. The load weighed 21.59 tons (Resp. Exh. 4 at 1; Tr. 371). McClanahan stated that Estep called him at home that evening and told him he could not work the next day. McClanahan testified he told Estep about the problems drivers were having because of "excessive weight" (Tr. 84).

• February 24, 1994 -- McClanahan called Charles Carter, a Wellmore official. Carter was not in (Tr. 86).

• February 27, 1994 -- Carter returned McClanahan's telephone call. McClanahan asserted that he told Carter he was "scared to [try] to haul that much weight because of the hazards" (Tr. 87). According to McClanahan, Carter responded that he would get back to McClanahan (Tr. 88). He did not (Tr. 95).

• March 1, 1994 -- McClanahan's load was weighed. It weighed 26.57 tons (Tr. 91; Resp. Exh. 4 at 1).

• March 2, 1994 -- Estep climbed into McClanahan's truck and told him to weigh. The load was 100 pounds under 24 tons. Estep told McClanahan he could not work the following day (Tr. 93, 546; see also Tr. 372-373, 443-444.) It had been snowing and McClanahan stated that he told Estep he was "scared to death" to haul and that the snow made it worse (Tr. 93). Estep told McClanahan that Fortner would fire him if he refused to haul 24 tons. McClanahan stated that he responded that he was not refusing to haul 24 tons because he did not want to work but because he was afraid, that he considered it extremely hazardous to haul that much.

McClanahan testified he also told Estep the truck's gross vehicle weight (GVW) sticker stated that it was hazardous to haul the required weight. He tried to get Estep to look at the sticker, but Estep responded "[b]ull" (Tr. 94). Estep denied that McClanahan ever mentioned the GVW sticker or any other safety concerns(Tr. 479).

According to McClanahan, a GVW of 56,800 pounds represented the gross weight the truck was manufactured to haul. The truck weighed 26,900 pounds empty. Therefore, the truck was built to haul approximately 15 or 16 tons (Tr. 230-231, 232). McClanahan admitted that when he was driving the truck as an employee of the company and was hauling loads that weighed more than 25 tons, he never talked to anyone about hauling more than the recommended GVW (Tr. 161). McClanahan stated, "I was doing what I was ordered to do. I was told to haul whatever they put on me and I hauled it" (Tr. 233, see also Tr. 253).

McClanahan also agreed that in 1993, when the truck was owned by the company, it was licensed in Kentucky to operate at a GVW of 80,000 pounds and that the company obtained an extended permit, which allowed it to be operated at a GVW of 90,000 pounds (Tr. 169-171, 432; Comp. Exh. 8 at 27). In Virginia it was licensed to operate at a GVW of 60,000 pounds (Tr. 172, 432). In other words, in both states it was licensed to be operated at weights that exceeded the GVW recommended by the manufacturer. In Kentucky it was licensed to haul loads of approximately 26.5 tons. In Virginia it was licensed to haul loads of approximately 16.55 tons.

• March 3, 1994 -- McClanahan went to the mine office and

spoke with Wampler. According to McClanahan, as soon as he walked into Wampler's office, Wampler told him he had to haul at least 24 tons. McClanahan responded that much weight scared him. According to McClanahan, Wampler stated that if McClanahan did not want to haul 24 tons, the company would take back McClanahan's truck for what he owned on it. (McClanahan had paid approximately $20,000 on the truck and the book value was approximately $40,000. McClanahan described the "deal" as "they would take a forty-thousand dollar . . . truck for twenty thousand . . . and leave me owing the bills" (Tr. 97).) McClanahan maintained he tried again to get Wampler to look at the GVW information in the truck owner's manual, and Wampler refused (Tr. 98).

Wampler, however, maintained that McClanahan never mentioned safety. Wampler claimed that the closest thing to a safety concern that McClanahan ever expressed prior to filing his complaint of discrimination with MSHA was to state once that the road needed grading. According to Wampler, the company graded the road the following day (Tr. 324-325).

Wampler testified that at the March 3 meeting, McClanahan stated that he would not haul more than 24 tons because of the wear and tear on the truck -- that he would not be like other drivers who "just ran their trucks into the ground" (Tr. 323). Wampler claimed that some time after this conversation, Pam McClanahan, McClanahan's wife, called and asked Wampler if the company was going to raise the hourly rates for contract truckers -- that because of the cost of repair, of parts, and of taxes, the truckers needed "relief" (Tr. 328).

• March 4, 1994 -- McClanahan testified that he called MSHA about the hazardous conditions at Knox Creek and that whomever he spoke with (he did not recall a name) stated MSHA could not help. He testified that he also called the state department of mine land reclamation about making the road at Knox Creek safer to travel. McClanahan spoke with state reclamation inspector, Lawrence Odum, who stated that he knew the road was "a mess" and that he would come to the mine the next working day to determine what could be done (Tr. 98-99).

• March 7, 1994 -- Odum met McClanahan at the mine. (Odum believed the meeting was on March 6, 1994.) At the

meeting, McClanahan expressed to Odum his concern about dumping refuse near the slurry basins where the filter cake was deposited. He was afraid his truck would get too near the edge of one of the basins and would fall in (Tr. 33, 35, 43). The weight he was hauling would make it more likely that the edge would give way (Tr. 45). Odum suggested that McClanahan contact MSHA or the Occupational Safety and Health Administration (OSHA) (Tr. 26, 43).

• March 10, 1994 -- The loads of McClanahan and another driver were weighed. McClanahan's load weighed 24.30 tons (Resp. Exh. 4 at 1; Tr. 104).

• March 15, 1994 -- McClanahan's load was weighed. It weighed 24.50 tons (Resp. Exh. 4 at 1) (Knox Creek's records indicate that this occurred on March 14 rather than on March 15, 1995 (Id.).)

• March 18, 1994 -- McClanahan's load was weighed. It weighed 27.86 tons (Resp. Exh. 4 at 1).

• April 2, 1994 -- McClanahan's load was weighed (Tr. 108-109). It weighed 25.58 tons (Resp. Exh. 4 at 1). (Knox Creek's records indicate that this occurred on April 5, not April 2 (Id.).)

• May 25, 1994 -- McClanahan testified he called Carter. He told Carter that he was still having problems with hauling excessive weights. According to McClanahan, Carter's response "more or less" was to ask if McClanahan wanted to sell back his truck (Tr. 111-112).

• May 26, 1994 -- According to McClanahan, Estep asked him why he had called Carter. Estep stated that the company would end up getting the truck if McClanahan refused to haul the required weight (Tr. 112-113).

• June 6, 1994 -- McClanahan's load was weighed (Tr. 113-114). It weighed 25.07 tons (Resp. Exh. 4 at 2).

• June 20, 1994 -- McClanahan's load was weighed (Tr. 114). It weighed 25.74 tons (Resp. Exh. 4 at 2).

• June 23, 1994 -- McClanahan was in Durham, North Carolina and another miner was driving the truck. The other driver's load was weighed (Tr. 114). It weighed 28.35 tons (Resp. Exh. 4 at 2).

• August 3, 1994 -- McClanahan's load was weighed (Tr. 115). It weighed 24.74 tons (Resp. Exh. 4 at 2).

• September 1, 1994 -- McClanahan testified that he complained about the condition of the road because it had been raining and the road was slick (Tr. 117).

• September 12, 1994 -- McClanahan's load was weighed. It weighed 23.65 tons (Resp. Exh. 4 at 2). According to McClanahan, Estep stuck his finger in McClanahan's face and told McClanahan to "straighten up [his] attitude" (Tr. 117). When McClanahan responded that he would bite off Estep's finger, Estep stated that McClanahan would be "history" (Tr. 117).

Estep did not deny he told McClanahan he would be "history," but he was adamant that McClanahan never brought up safety concerns (Tr. 451). Rather, Estep maintained that when he confronted McClanahan about the weight of the load and pressed McClanahan about whether he was going to haul the required weight, McClanahan told him, "Well, I might be light again and I might not" (Tr. 450-451). McClanahan was told to go home and not to come to work the next day (Tr. 118-119).

• September 14, 1994 -- McClanahan's load was weighed. It weighed 22.74 tons (Resp. Exh. 4 at 2). McClanahan was sent home for the rest of the shift and was told not to report to work the following day (Tr. 120).

• September 19, 1994 -- McClanahan's load was weighed. It weighed 23.50 tons (Resp. Exh. 4 at 2). McClanahan was laid off for the rest of the shift and for the next day (Tr. 121).

• September 21, 1994 -- McClanahan's load was weighed. It weighed 24.96 tons (Resp. Exh. 4 at 3; Tr. 122).

• September 22, 1994 -- Around 9:00 a.m., Estep called McClanahan via the CB radio and told him to stop at the shop. Estep, Fortner, and Gross were there. According to

Fortner, the meeting was prompted by the fact that McClanahan recurrently was hauling underweight loads (Tr. 286-287).

Estep stated:

> We were going to talk to . . . McClanahan and offer him an alternative job and give him the option . . . If he did not want to haul the required weight . . . [W]e had an alternative job that we could put him on and pay him by the ton (Tr. 448).

According to McClanahan, Fortner told him that he would be fired if he again hauled loads that weighed under the limit (Tr. 123). Fortner testified that this was the first time he discussed a weight limit with McClanahan (Tr. 285). He stated that he did not consider the limit to be unsafe and that he based his opinion upon the fact that company trucks frequently had hauled that much in the past (Tr. 304-305).

Fortner asked McClanahan if he would rather haul at the Wellmore No. 8 facility where he could be paid by the ton. (Tr. 306). In that way McClanahan could haul the tonnage with which he felt comfortable (Tr. 155). Fortner stated:

> I asked him if he would be interested in exercising his [contract] agreement . . . where he could go to Wellmore No. 8 and haul refuse by the ton so that he would not get in a problem of not hauling enough weight, and he said that he could not do that, that was crazy (Tr. 306-307).

Fortner stated that McClanahan also responded that at Wellmore No. 8 Mine he would have to haul more tons than he was hauling at Knox Creek in order to make what he was making at Knox Creek (Tr. 287). According to Fortner, at no point during the discussion did McClanahan raise any safety issues (Tr. 309).

Gross testified that McClanahan advised the group that if he went to Wellmore No. 8, he would have to haul heavier loads than at Knox Creek just to make the same money. Estep testified that McClanahan stated that he "hardly [could] make it hauling what he was hauling" (Tr. 449). Gross too insisted that McClanahan never raised the subject of safety (Tr. 417, 423).

McClanahan maintained that he rejected the suggestion because he heard that truck drivers at Wellmore No. 8 had exceeded the GVW by more than double "just to make a living," that the drivers were having "all kinds of problems" (Tr. 123).

• September 23, 1994 -- Around 1:00 p.m., McClanahan's load was weighed. It weighed 22.96 tons (Tr. 114; Resp. Exh. 4 at 3). McClanahan asked Gross, "Am I terminated?" and Gross responded, "Yes" (Tr. 248, see also Tr. 124). McClanahan left the property (Tr. 248-249).

Gross testified that aside from the instance involving Ling's truck, none of the other drivers who were weighed were found to be carrying loads of under 24 tons (Tr. 377). Knox Creek's records indicate that between the time when random weighing started, and September 22, when McClanahan was last weighed, six different drivers of eight different trucks were weighed 90 times (Resp. Exh. 4; see Tr. 391-392). McClanahan was weighed 20 times and Ling was weighed 15 times. The rest of the weighings were scattered among the others (Tr. 396). McClanahan's loads weighed under 24 tons on seven occasions (Exh. R-4).

• September 27, 1994 -- McClanahan went to the company's trucking office to get a copy of his termination papers. According to McClanahan, the receptionist called Fortner on the telephone. McClanahan and Fortner engaged in a conversation in which Fortner told McClanahan, "I'm sorry for firing you. It's nothing personal. I hate to do it. You didn't deserve it, but I was just doing what I was told" (Tr. 126). McClanahan stated that he responded that some day he and Fortner would talk about it. Fortner denied the conversation occurred (Tr. 288).

MCCLANAHAN'S PRACTICE PRIOR TO THE WEIGHT REQUIREMENT

Records introduced by McClanahan and by management indicate that prior to January 1994, McClanahan regularly hauled loads that weighed more than 24 tons. The weight of the loads was recorded on the company's work reports. The reports were completed and signed by McClanahan, and I credit the information they contain. (See Comp. Exh. 8 at 28-33; Resp. Exh. 2.)

On January 4, 1990, McClanahan hauled four loads whose

weights ranged between 25.91 tons and 32.31 tons (Tr. 138; Comp. Exh. 8 at 31).

On January 5, 1990, McClanahan hauled four loads whose weights ranged between 26.73 tons and 28.39 tons (Tr. 138; Comp. Exh. 8 at 33).

On October 12, 1990, McClanahan hauled two loads that weighed 27.57 tons and 27.59 tons (Comp. Exh. 8 at 54).

On December 20, 1990, McClanahan hauled two loads that weighed 24.35 tons and 28.93 tons (Tr. 219; Resp. Exh. 2 at 27).

On February 15, 1991, McClanahan hauled a load that weighed 28 tons (Tr. 147; Resp. Exh. 2 at 68).

On April 30, 1991, McClanahan hauled four loads that weighed 30.79 tons, 30.75 tons, 29.88 tons and 31.89 tons (Tr. 135-136, 148; Comp. Exh. 8 at 28, Resp. Exh 2 at 80).

On July 27, 1992, McClanahan hauled six loads, four of which weighted more than 24 tons (Tr. 150; Resp. Exh. 2 at 46).

In addition, on numerous instances, McClanahan estimated the weight of his loads at 25 tons (e.g., January 25, 1990, January 26, 1990, June 1990, July 1990, August 1990, September 1990, April 9, 1992 (see Comp. Exh. 8 at 29-30, 32; Resp. Exh. 2 at 1-14).)

THE LAW

Section 105(c)(1) of the Act protects miners from retaliation for exercising rights protected under the Act, including the right to report a safety hazard. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" because, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S.Rep. No. 95-181, 95th Cong. 1st Sess., at 35 (1977), reprinted in 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 at 623. 2nd Sess.(1978)).

A miner alleging discrimination under the Act establishes a prima facie case by proving that he or she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity (Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981)). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity (Pasula, 2 FMSRHC at 2799-2800). If the operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone (Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-818; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987; Donovan v. Stafford Const. Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F. 2d 194, 195-196 (6th Cir. 1983 (specifically approving the Commission's Pasula-Robinette test)).

It is settled that a miner has a right under the Act to make safety complaints to his or her employer. It is likewise settled that a miner has a right to refuse to abide by an unsafe work rule. However, in order to be protected by the Act, the safety complaint and work refusal must reflect the miner's good faith, reasonable belief that a hazard exists (Robinette, 3 FMSHRC at 810-812).

When a miner has expressed a good faith, reasonable belief in a hazard, an operator has an obligation to address the danger perceived by the miner "in a way that his [or her] fears reasonably should have been quelled" (Gilbert v. FMSHRC, 866 F.2d 1433, 1441 (D.C. Cir. 1989); see Secretary on behalf of Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1520, 1534 (September 1983); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984) aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985)). A miner's continuing complaint after an operator has taken reasonable steps to dissipate fears and to ensure the safety of the challenged task or condition may make the complaint and any related work refusal unreasonable and withdraw them from the

Act's protection (Boswell v. National Cement Company, 14 FMSHRC 253, 258 (February 1992)).

MCCLANAHAN'S PRIMA FACIE CASE

To prove the allegation that he was a victim of unlawful discrimination, McClanahan must first establish that he engaged in protected activity and as a result suffered an adverse action.

McClanahan's contention that he engaged in protected activity is based upon his claims that he complained about the safety of the minimum load requirement at Knox Creek. The complaints fall into two categories: occasional complaints about having to dump refuse weighing the required amount or more into the slurry basins, and general and repeated complaints about how unsafe it was to haul loads weighing the required amount or more. (At the hearing, McClanahan also contended that he complained on several instances about the condition of the haulage road at Knox Creek. However, these complaints are outside the scope of this proceeding. McClanahan's complaint of discrimination did not allege complaints about the road to be a cause of his termination -- "[T]hey fired me for my fear of hauling excessive weight" (Complaint, Exh. 1 at 5) -- and the record fully supports finding that the adverse action -- i.e., his termination as a contract hauler -- was because he did not haul the weight required and was in no way connected to complaints about the road.)

The first question is whether McClanahan made the complaints. If he did, the second question is whether he made them in good faith and whether they were reasonable, recognizing that the answer to the latter question may involve an analysis of management's response, if any, to the complaints.

DUMPING INTO THE SURRY BASINS

McClanahan believed that he "probably" complained about hauling at least 24 tons of refuse and dumping the loads into the slurry basins because he feared the weight of the loads could cause the walls of the basins to give way and the truck to slide in (Tr. 163). The evidence supports finding that McClanahan in fact expressed such fears to mine management. Gross, who at the time was the supervisor at Knox Creek, testified that McClanahan complained about the situation via the CB radio (Tr. 380), and

Hess, the water truck operator and former haulage truck driver confirmed that he heard McClanahan state something to the effect that he did not believe that it was safe to back up to the basins to dump (Tr. 487-488). McClanahan also shared the same concerns with Odum when Odum came to the mine (Tr. 33, 35, 45). I conclude from this testimony that concerns about dumping 24 tons or more into the basins were on McClanahan's mind and that he in fact raised the concerns with management.

I also conclude that the evidence supports finding that management responded to McClanahan's fears. Gross and Hess maintained, and McClanahan agreed, that Gross told McClanahan if he was afraid of the truck sliding or sinking into the basins while he was dumping, he should dump the refuse in front of the particular basin involved and the bulldozer operator would push it in (Tr. 163, 380, 488).

McClanahan acknowledged that this addressed his concern regarding slate, but he maintained that it did not address his concern regarding the dumping of filter cake. "We never dumped [filter cake] and let the dozer push it . . . . If you dump the [filter cake] out[,] it's like water and it runs everywhere" (Tr.163-164).

However, I find that Gross addressed McClanahan's fears about dumping filter cake in another manner, one that was equally as effective as dumping other refuse in front of the basins. McClanahan's concern about getting too near the basins was conditioned upon the fact that a berm was sometimes lacking when he had to dump the filter cake and that he therefore might back too near the edge. This was especially true when Odum came to Knox Creek on March 7. McClanahan described it: "[T]here was no berm around that filter cell. The only berm that you have is when you backed up and your truck sank, you kind of made your own berm" (Tr. 100). Gross responded to this concern, in that he told McClanahan that if he was apprehensive about the berm to "get the dozer operator, contact him on the radio and get him up here and let him fix the berm for you" (Tr. 380). I credit this testimony. It was consistent with the testimony of Odum, a disinterested witness, that Gross and "anyone up there" (i.e., anyone at the refuse dump) were usually fully responsive to requests regarding work that needed to be done (Tr. 34).

Thus, I conclude that while McClanahan may have expressed a good faith, reasonable belief that dumping refuse at the slurry basins was hazardous, his concerns were met with a response that reasonably should have dissipated them. To the extent McClanahan persisted in his concerns he did not do so in good faith, and they were not protected.

GENERAL HAZARDS OF THE WEIGHT REQUIREMENT

McClanahan testified that from its inception he repeatedly protested the weight limit because it was unsafe. He maintained that on January 27, 1994, he told Estep that it was dangerous to haul loads of 25 tons (the limit at that time) because the weight would damage the trucks and roads (Tr. 73-73); that on January 31, he told Estep it was unsafe and unfair to require drivers to take a chance of getting injured (Tr. 77-78); that on February 1, he told Estep via the CB radio that the weight requirement was unsafe and the company should not put drivers in a situation where they had to haul unsafe loads (Tr. 78-79); that on February 4, he complained via the CB radio about "overloading being so hazardous" (Tr. 80); that on February 27, he told Carter that he was afraid to haul the required weight because of the hazards (Tr. 87); that on March 2, he expressed his fears to Estep again; that on March 3, he complained to Wampler that hauling at least 24 tons scared him (Tr. 97); that on May 25, 1994, he complained again to Carter (Tr. 111); that on September 22, 1994, at a meeting with Estep, Fortner and Gross, he stated again that he regarded the weight limit requirement to be hazardous.

Gross, Estep and Wampler all stated that McClanahan never discussed the safety of the weight limit with them (see e.g., Tr. 324, 417, 423, 437, 497). Rather, they maintained that his concern was for the wear-and-tear the requirement put on his truck. I do not fully credit their testimony. As I have previously noted, McClanahan carefully documented the dates and substance of his purported complaints (Comp. Exh. 4). Indeed, he showed such an aversion to the weight requirement once he became a truck owner that I find it entirely likely he raised both kinds of objections -- objections based on safety and objections based on wear-and tear -- in order to get out from under the requirement.

In any event, there is no question that by September 22, at the latest, management understood that McClanahan was using safety as at least one basis for objecting to the weight requirement. Fortner, who was at the September 22 meeting with McClanahan and the others, stated that he explained to McClanahan that the weight requirement was not unsafe (Tr. 304-305). Fortner's explanation did not come out of the blue, and I infer it was elicited by McClanahan's expression of his safety concerns.

Having concluded that McClanahan expressed his general safety concerns regarding the weight limit, the next question is whether they were based on a good faith belief that hauling loads of 24 tons or more was, in fact, hazardous. I find that they were not.

In my view, McClanahan's purported good faith belief in the hazards of the weight limit is completely discredited by his documented history of repeatedly hauling loads that were as heavy or heavier than the limit when he was a salaried employee, and of doing so without meaningful complaint. I conclude that while McClanahan may indeed have had concerns, they were those of a truck owner for the cost of the requirement to his business and not those of a driver for his and others' safety.

To me, it speaks volumes that prior to becoming a truck owner McClanahan repeatedly hauled loads weighing more than 24 tons without making known his supposed safety concerns to either management or to MSHA. McClanahan's own carefully kept records indicate that the first time he complained to management about hauling 24 tons or more was in late January 1994, shortly after the weight limit went into effect and after he had purchased the truck (Comp. Exh. 4). Yet, the record is replete with previous instances when McClanahan hauled more than 24 tons.

As I have already noted, on January 4, 1990, he hauled four loads that weighed between 25.91 tons and 32.31 tons (Tr. 138; Comp. Exh. 8 at 31); on January 5, 1990, he hauled four loads that weighed between 26.73 tons and 28.39 tons (Tr. 138; Comp. Exh. 8 at 33); on October 12, 1990, he hauled two loads that weighed 27.57 tons and 27.59 tons (Tr. 217; Resp. Exh. 8 at 54); on December 20, 1990, he hauled two loads that weighed 24.35 tons and 28.93 tons (Tr. 219; Resp. Exh. 2 at 27); on February 15,

1991, he hauled one load that weighed 28 tons (Tr. 147, Resp. Exh. 2 at 68); on April 30, 1991, he hauled four loads that weighed between 29.88 tons and 31.89 tons (Tr. 135-136, 148; Comp. Exh. 8 at 28, Resp. Exh 2 at 80); on July 27, 1992, he hauled four loads that weighed between 24.32 tons and 27.77 tons (Tr. 150; Resp. Exh. 2 at 46). (While some of these loads were hauled in a truck other than the one he purchased and at different sites, McClanahan did not maintain that the trucks or the sites essentially differed.)

McClanahan testified that on October 2, 1990, when he was recorded as hauling loads of 27.57 tons and 27.59 tons, he told a company official it was "too much weight" (Tr. 144-145; Resp. Exh. 2 at 54) and that later he told Estep to try to get the person loading the trucks to "lighten up" (Tr. 218)). Even if I credit this testimony, it will at most establish that on these two occasions McClanahan complained about the weight he was hauling. However, there is no indication he linked the complaints to fears for his or others' safety.

Likewise, McClanahan maintained that on December 20, 1990, when he hauled loads of 24.35 tons and 28.93 tons, he told Clifford Hurley, who was then a supervisor, that the load was too heavy, but, again, there is no testimony that this statement was linked to safety concerns (Tr. 219, Resp. Exh. 2 at 27).

Moreover, and equally compelling, McClanahan's lack of a genuine safety concern is shown by the fact that without complaint on occasion he signed work reports estimating the weight he was hauling to be 25 tons (Tr. 140; see Comp. Exh. 8; Resp. Exh. 2). McClanahan maintained that when he estimated a weight of 25 tons, the actual tonnage always was less, but I do not believe him (Tr. 215). The numerous records of loads that were weighed and were over 25 tons indicates the contrary.

In any event, it strikes me as completely incongruous to McClanahan's purported belief in the inherent hazards of hauling more than 24 tons, that he would have indicated he was engaging consistently in hazardous work.

I believe it is more than a coincidence that McClanahan's complaints concerning the hauling of 24 tons or more are definitely documented as linked to safety only after he became the owner of the truck. The financial burden of upkeep and maintenance was suddenly his, not the company's. Obviously, if

the truck was going to have to haul 24 tons or more each time it was loaded, there was going to be wear and tear on the truck and hence expense to McClanahan. Once he became an owner he had a decided financial incentive for protesting the weight requirement, an incentive that was quite apart from safety.

Finally, I view McClanahan's failure to complain to MSHA about the purported hazards of the weight limit also as indicative of his lack of good faith.

Section 105(c) does not provide the only path a miner may follow to protest against working conditions he or she believes hazardous. A miner may also pursue a parallel path by invoking section 103(g) (30 U.S.C. § 813(g)). The provisions of section 103(g) authorize a miner who reasonably believes a violation of the Act or any mandatory health or safety standard exists or an imminent danger exists to request and to obtain an immediate inspection by notifying MSHA of the violation or danger. In addition, the law requires the name of the miner requesting such an inspection to be kept confidential and to not be revealed to the operator. McClanahan did not avail himself of this option.

McClanahan testified that on March 4, 1994:

> I ... called MSHA about the hazardous conditions and at the time I didn't write down who I talked to or anything. They just said they couldn't help (Tr. 98; see also Tr. 162).

I do not credit this testimony for three reasons. First, McClanahan later modified his testimony and stated that either he or his wife called -- he could not recall who (Tr. 257-258). Second, and as counsel for Wellmore pointed out at the hearing, the fact that McClanahan could not remember who placed the telephone call or to whom he or his wife talked is entirely at odds with the carefully written records he kept of all of the conversations and incidents that related to his ultimate termination (Comp. Exh. 4). Third, if in fact either of the McClanahans reported to MSHA on-site hazardous conditions or practices, I find it highly unlikely that either would have been told there was nothing MSHA could do. MSHA does not operate like that. While complaints about on-site hazards must be in writing, they may be received orally and later reduced to writing.

Moreover, it is the policy of the agency to advise miners of their rights and how they may proceed in conformance with those rights. It simply does not ring true that a miner would call MSHA, report what he or she believed to be a work place hazard and be told the agency was powerless.

It may be that Mrs. McClanahan called to complain about the use of trucks weighing more than their licenses permitted on state roads. McClanahan's testimony that "she had called and related the weight problem, and . . . they said they just couldn't help because it was off road or not an issue" suggests as much (Tr. 257). However, if in fact she had complained about hazardous work conditions at the mine, it is not credible to me that she would have been told the agency could not help her husband. As I stated, the agency does not work like that. (In this regard, I find McClanahan's apparent assertion that it was inherently dangerous to haul loads that put the truck over the manufacturer's recommend GVW to be totally unsupported by the record. Not only did McClanahan himself consistently haul loads that weighed more than that recommended by the manufacturer, the Commonwealths of Kentucky and Virginia licensed the truck to haul loads beyond the manufacturer's recommended GVW (Tr. 169-179, 233-234, 250, 432).)

Further, McClanahan also stated that he did not file a formal complaint with MSHA because he was "fearful for [his] job" (Tr. 257). When I asked him whether he was aware that under the Act he had the right of confidentiality, he responded "I know I have that right, but it [isn't] the way it always works" (Id.). Undoubtedly, it is true that there have been instances when confidentiality has not been protected. However, it also is true that those instances are few and far between. The agency takes the right very seriously. It has codified it in its regulations (30 C.F. R. § 43.2, § 43.4) and emphasized it in its official policy manual (Program Policy Manual, III.43-1 at 3). MSHA goes to great lengths to protect from disclosure the identity of miners who report hazards. While McClanahan's skepticism of the efficacy of MSHA efforts in this regard provides him with a convenient excuse, it raises an equal skepticism on my part of his good faith belief in the purported hazards he encountered.

ORDER

For the reasons set forth above, I conclude McClanahan's safety complaints were either addressed so that their continuation was unreasonable or were not made in good faith. Therefore, his complaint of discrimination is **DENIED** and this proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge

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OCT 3 1 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KEITH D. JAMES, Petitioner	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 95-226-D
v.	:	Cordero Mine
	:	48-00992
CORDERO MINING COMPANY, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Charles W. Newcom, Esq., Denver, Colorado, for Respondent.

Before: Judge Cetti

This case is before me upon the complaint by the Secretary of Labor on behalf of Keith D. James pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act".

I

The Secretary alleges that Cordero Mining Company (Cordero) discharged the Complainant on October 6, 1994, in violation of section 105(c)(1) of the Act [1] because of his protected activi-

[1] Section 105(c)(1) of the Act provides as follows: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard

ties. The alleged protected activity includes safety complaints at several company meetings concerning dust on the roadway, complaints to MSHA which resulted in inspections (but no citations), distribution of Miners' Rights Handbooks and use of the communication system in his assigned company vehicle to make other employees aware of safety hazards.

Cordero, while not disputing that Mr. James may have engaged in some protected activity, asserts Mr. James was properly disciplined for his own misconduct and ultimately discharged after exhausting the formal steps of the progressive disciplinary procedure in place at the Cordero Mine. Cordero further asserts there is a total lack of evidence of discriminatory intent against Mr. James, or knowledge of asserted safety complaints by Mr. James on the part of those who made the decision to discharge him after Complainant had exhausted the formal steps of the company's formal steps of progressive disciplinary procedure. The final decision was made by the Production Supervisor Rick Woodard, Production Manager Dean Dvorak, Human Resource Manager Chad Anderson, and the company General Manager Dave Salisbury.

II

STIPULATIONS

A. Cordero Mining Company is engaged in mining and selling of coal in the United States and its mining operations affect interstate commerce.

B. Cordero Mining Company is the owner and operator of Cordero Mine, MSHA I.D. No. 48-00992.

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

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

E. Keith D. James was employed as an equipment operator for the Cordero Mine in Gillette, Wyoming, from January 7, 1985, until he was terminated on October 6, 1994.

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published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

F. At the time of his termination, Keith James was earning $19.60 per hour and was working 40 hours each week plus an average of 6 hours of overtime.

G. Mr. James seeks back pay from the time of his discharge on October 6, 1994, until the present, less credit for payment received pursuant to agreed economic reinstatement beginning in February 1995.

H. 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.

I. There is no history of discrimination complaints at this mine.

III

It is clear from the stipulations, as well as from the evidence, that Cordero is an operator as defined by section 3(d) of the Act and that Keith James, at all relevant times, was employed by Cordero as an equipment operator and was, therefore, a miner as defined in section 3(g) of the Act.

The evidence presented established that Cordero Mine, at all relevant times, had in place a progressive employee disciplinary policy. That policy provides for a four-step disciplinary procedure. The steps are: (1) verbal warning, documented in writing; (2) documented written warning; (3) written, formal probation notice stating correction measures; and (4) termination. (Tr. 40; Resp. Ex. 1) [2]

The progressive four-step disciplinary procedure applies only to regular employees. It does not apply to temporary employees. Under the mine's established disciplinary policy, infraction of work rules by a temporary employee results in either counseling or termination. The temporary employees are not given the progressive four-step disciplinary procedure.

Mr. James was not a temporary employee. He was a regular employee and thus subject to the four-step disciplinary procedure as were all regular employees. The evidence presented established that Mr. James was properly disciplined and finally discharged when he exhausted the mine's progressive four-step disciplinary procedure.

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[2] In addition, the disciplinary policy provides that a serious violation of work rules such as "safety violations endangering others" may warrant immediate suspension or termination without proceeding through the positive four-step disciplinary procedure.

Step 1 discipline resulted from James' failure to come to work for a scheduled overtime shift. This was a violation of established company rules.

Step 2 discipline was for an accident early in February 1994 involving a mobile shovel. In this accident, James was admittedly at fault. James asked a shovel operator to swing out before making sure that he (James) was clear of the shovel. James' dozer was struck by the swinging counterweight of the shovel.

A second step 2 discipline was given to James for an accident resulting in property damage issued for improper operation of a dozer. James was found to be at fault.

A third step discipline was given to Mr. James in May 1994 when James backed the dozer he was operating into another dozer, striking it near the middle, below the operator's compartment and causing damage which included breaking off the fuel tank nozzle and causing a spillage of fuel.

This incident occurred only four days after James was involved in another property damage incident for which he received no discipline.

Mr. James' fourth step discipline and termination occurred in October 1994. James was operating his dozer to help pull out a haulage truck that had become stuck in mud in a pit. Mr. James failed to hold tight the cable that was tied from the back of the dozer to the front of the stuck truck due to his failure to keep his dozer in gear and his foot on the brake. The tracks of the dozer rolled backwards which resulted in the front wheels of the truck to raise up from the ground. The fact that the tracks of the dozer rolled backwards showed that the dozer was in neutral and the operator's foot was not on the brake.

Following this incident there was a fact-finding meeting to review the accident; Messrs. Chad Anderson, Rick Woodard and Dean Dvorak participated. Mr. James testified that they told him that he had allowed the dozer he was operating to "roll backward which, in turn, allowed the haulage truck's wheels to come off the ground which could have caused a serious accident." (Tr. 58).

It is not disputed that James engaged in protected activity. James testified that during the time period from 1990 to 1994 he made safety-related complaints over the two-way radio in the truck and other equipment he operated. He made complaints about "different items, like road widths, road conditions, too much dust, high wall conditions and equipment failures." When asked how often he voiced these concerns, he testified as follows:

A. It would probably happen three to five times a month.

Q. And were you satisfied with the results after you made a complaint?

A. In most cases.

James also testified that during the time period 1990 to 1994 he made three phone calls to the Denver number of MSHA but never found out what happened as a result of those complaints. (Tr. 25, 26).

Petitioner presented evidence purporting to show disparity of treatment between Mr. James and other employees. The evidence presented is not persuasive. Petitioner's exhibit 2 does not reflect which employees were temporary and, therefore, not subject to the formal four-step disciplinary procedure and which were regular employees who were subject to the progressive four-step disciplinary procedure. (Tr. 168-169). It satisfactorily appears from the record that the accidents and incidents for which Mr. James received discipline were only those incidents where the employer found Mr. James was at fault. Neither Mr. James nor any other regular employee was disciplined for accidents that were not the employee's fault.

APPLICABLE LAW AND ANALYSIS

Section 105(c) of the Act was enacted to ensure that miners will play an active role in the enforcement of the Act by protecting them against discrimination for exercising any of their rights under the Act. A key protection for this purpose is the prevention of retaliation against a miner who brings to an operator's attention hazardous conditions or practices in the workplace or engages in other protected activity.

The basic principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that he engaged in protected activity and that the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642

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

It has been stated many times that direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-1399 (June 1984).

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator. Chacon, supra at 2510. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983).

In Chacon the Commission also explained the proper criteria for analyzing an operator's business justifications for an adverse action:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views of "good" business practice or on whether a particular adverse action was "just" or

"wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with judge's or our sense of fairness or enlightened business practices. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that the operator to have disciplined the miner. Cf. R-W Service System Inc. 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

DISCUSSION AND CONCLUSION

The issue in this case is not whether the adverse action was just or wise or comported with my sense of fairness or enlightened business practice.

The record clearly demonstrates that the reasons given by the employer for the adverse action were not "plainly incredible or implausible." I conclude and find that the stated reasons for the adverse action taken by Cordero were not pretextual.

While it is undisputed that James engaged in protected activity, I find that Cordero in terminating James' employment was motivated by James' unprotected activity and would have taken the adverse action in any event on the basis of James' unprotected activity alone. I therefore find that discharge of James was not in violation of section 105(c) of the Act.

ORDER

This case is **DISMISSED.**

August F. Cetti

August F. Cetti
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 26, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 95-343 A. C. No. 15-17077-03539
v.	:	RB #5 Mine
R B COAL COMPANY, INCORPORATED, Respondent	:	

ORDER ACCEPTING APPEARANCE
ORDER ACCEPTING LATE FILING
ORDER DIRECTING OPERATOR TO ANSWER

It is ORDERED that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. Cyprus Emerald Resources Corporation, 16 FMSHRC 2359 (November 1994).

On April 24, 1994, the CLR filed a motion to accept late filing of the penalty petition along with an affidavit. As I have previously recognized, the CLR program is a new approach by the Secretary to have non-lawyer MSHA employees appear before the Commission in less complicated cases. I have approved the practice. Cyprus Emerald Resources Corporation, supra. As set forth in an affidavit of the CLR, there was some confusion over the computation of the 45 day period allowed for filing the penalty petition and therefore, the penalty petition was filed 16 days late. I take judicial notice of the fact that as a general matter pleadings and motions filed by CLRs with the Commission are most prompt.

The operator has not filed an objection to the CLR's motion. 29 C.F.R. § 2700.10. There is no allegation of prejudice

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of the penalty petitions upon a showing of adequate cause by the Secretary where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989). I find the circumstances as stated above constitute adequate cause for the short delay in the filing of the penalty petition.

In light of the foregoing, it is ORDERED that the CLR's motion to accept late filing of the penalty petition be GRANTED.

It is further ORDERED that the operator file an answer to the penalty petition within 30 days of the date of this order.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 19, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 95-171-M A. C. No. 23-02068-05507
v.	:	
	:	Journagan Portable #12MC
LEO JOURNAGAN CONSTRUCTION COMPANY, Respondent	:	

ORDER TO ANSWER OR SHOW CAUSE
ORDER TO ADVISE

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On May 5, 1995, the Solicitor filed a penalty petition for this case. On July 14, 1995, an order to show cause was issued directing the operator to file its answer to the penalty petition. The operator has not filed an answer. It must do so or be held in default and liable for the full amount of the assessed penalties.

On August 28, 1995, a Conference Litigation Representative (CLR) filed with the Commission a copy of an unsigned joint motion to approve settlement which was being sent to the operator for its signature.[1] The motion provides that the operator would agree to pay the originally assessed penalty.

On September 22, 1995, the CLR filed a copy of another unsigned joint settlement motion it was sending to the operator for signature. According to this motion, the parties would settle this case by having the operator provide training in lieu of the proposed assessed penalty.

It is well established that the Act mandates assessment of a

[1] The CLR has failed to enter an appearance before the Commission.

monetary penalty for any violation of a mandatory safety standard. Island Creek Company, 2 FMSHRC 279, 280 (February 1980); Van Mulvehill Coal Co., Inc., 2 FMSHRC 283, 284 (February 1980); Tazco, Inc., 3 FMSHRC 1895, 1896 (August 1981). The most recent unsigned settlement motion should not, therefore, be pursued. It is impermissible under the Act.

Because of the foregoing circumstances participation by the Solicitor would be helpful.

In light of the foregoing, it is ORDERED that the operator file an answer in this case within 30 days of the date of this order or show cause why it should not be held in default.

It is further ORDERED that within 45 days of the date of this order the Solicitor submit a settlement motion or advise whether a hearing will be necessary.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 20, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. LAKE 94-72, etc.
v.	:	
BUCK CREEK COAL, INC., Respondent	:	

ORDER GRANTING OBJECTION TO DEPOSITION
ORDER TO PRODUCE DOCUMENTS FOR *IN CAMERA* INSPECTION

The Secretary, by counsel, has filed a motion objecting to the Respondent's taking the deposition of MSHA Supervisory Special Investigator Michael G. Finnie. Buck Creek has filed an opposition to the Secretary's motion and, further, requests that the cases against Buck Creek be dismissed for the Secretary's failure to make Mr. Finnie and MSHA District Manager Rexford Music available for deposition. In addition, Buck Creek has filed a motion to compel production of documents which the Secretary opposes.[1]

Objection to deposition

The Secretary originally objected to Mr. Finnie's deposition in May 1995 solely on the grounds that he was a manager without first-hand knowledge of the facts underlying these cases. I denied the motion holding that "[t]he fact that these individuals are managers does not mean that they do not have knowledge of the facts underlying these cases or information that might lead to

[1] Buck Creek filed the original of its opposition and motion at the Commission office in Washington, D.C. Commission Rule 5(b), 29 C.F.R. § 2700.5(b), provides that after a judge has been assigned to a case and before he issues a decision, "documents shall be filed with the Judge."

the discovery of admissible evidence." *Buck Creek Coal, Inc.*, 17 FMSHRC 845, 849 (Judge Hodgdon, May 1995).

In renewing his objection, the Secretary now asserts that Mr. Finnie is a supervisory special investigator who is an agent of two grand juries, one investigating Buck Creek and the other investigating Pyro Mining Co., and as such he has been instructed by the U.S. Attorney, pursuant to Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure, that he cannot disclose anything learned in the criminal investigations. The Secretary further avers that:

> Mr. Finnie's only knowledge of Buck Creek that could be relevant to the matters before the ALJ is based upon the criminal investigation of Buck Creek Coal, Inc., and the civil special investigations that are ongoing or have been completed by other inspectors. The special investigation cases are not before this court and involve individuals employed by Buck Creek Coal, Inc. Mr. Finnie supervises the investigations and does not conduct the investigations.

(Sec. Mot. at 2.)

Buck Creek implies that since a ruling has already been issued permitting the deposition of Mr. Finnie, the Secretary cannot object again. Furthermore, it contends that the discovery it seeks through the deposition is relevant because:

> Buck Creek intends to explore the Petitioner's enforcement policies pertaining to Buck Creek's mine or similar types of mines, including communications between Buck Creek's and Petitioner's personnel relative to the citations at issue. Also, Buck Creek intends to inquire about the bases of and underlying policies for the Petitioner's actions. Ultimately, Buck Creek expects to show a lack of factual foundation for the citations and the Petitioner's bias and actual motivation in this entire matter.

(Resp. Opp. at 4.) Buck Creek does not explain what it specifically expects to find out from Mr. Finnie nor does it address the Secretary's new arguments.

The Commission has noted that "courts do not permit criminal defendants to employ liberal civil discovery procedures to obtain evidence that would ordinarily be unavailable in the parallel criminal case" and stated that the "judge has the power to impose limitations on the time and subject matter of discovery, which would permit the civil matter to proceed without harming the criminal case." *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 504 (April 1995) (citations omitted). In this connection, the Fifth Circuit Court of Appeals has admonished that "the trial judge in the civil proceeding should [not] ignore the effect discovery would have on a criminal proceeding that is pending or just about to be brought." *Campbell v. Eastland*, 307 F.2d 478, 487 (1962). Some courts have gone so far as to stay *all* discovery proceedings until the criminal case is concluded. *United States v. One 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352 (S.D.N.Y. 1966).

In his response to Respondent's opposition to the renewed objection to Mr. Finnie's deposition, the Secretary states that Mr. Finnie was scheduled to be deposed on June 19, 1995, along with several other individuals, and that the "depositions of all the individuals could not be taken due to a lack of time and not the refusal of the Secretary to cooperate." (Sec. Resp. at 3.) Another round of depositions was apparently scheduled for the week of August 21, but Mr. Finnie was not among those scheduled. On September 14, counsel for the Respondent advised that he desired to take Mr. Finnie's deposition on September 18 and 19. It was at this point that the Secretary raised his renewed objection.

There does not appear to be any lack of cooperation or bad faith on the part of the Secretary in scheduling Mr. Finnie's deposition. Nor does there appear to be any reason why the Secretary cannot renew his objection to the deposition based on new information. Further, I note that numerous MSHA officials have already been deposed by the Respondent and the Secretary has only renewed an objection to one individual.

When the objection to taking Mr. Finnie's deposition was

denied previously, it was because the Secretary had not provided an adequate reason for not permitting the deposition. This time he has. Mr. Finnie did not issue any of the citations in the cases before me and apparently did not participate in the investigation leading to the issuance of the citations. He is, however, heavily involved in the criminal investigation. Therefore, I find that the conjectural possibility that he may be able to provide some information on the citations in issue is far outweighed by the harm that could result to the criminal case if his deposition is permitted.

Accordingly, I **GRANT** the Secretary's motion objecting to the taking of Mr. Finnie's deposition and **ORDER** that he may not be deposed until after the disposition of the criminal matters. In view of this ruling, the Respondent's motion to dismiss is **DENIED**.[2]

Motion to Compel

Buck Creek requests that the Secretary be compelled to provide: (1) "inspectors' notes prepared during Buck Creek inspections in which no citations were issued by that inspector," (2) "eleven (11) pages of conference worksheets," (3) "twenty-five (25) memoranda relating to special investigations and potential Section 110(c) civil knowing/willful violations" and (4) the investigative files in eight Section 110 cases. In his response to the motion, the Secretary states that the inspectors' notes were produced on October 10, 1995, "except those documents which relate to the criminal investigation of Respondent." With respect to the remaining documents, the Secretary asserts that they come within the "work-product privilege" set out in Rule 26(b)(3) of the Federal Rules of Civil Procedure and that, in addition, 12 of the 25 memoranda and six of the eight Section 110 case files relate to the criminal investigation.

[2] It appears that the deposition of Mr. Music is scheduled for October 26 and 27, 1995.

The Secretary's claims cannot be properly considered without an inspection of the documents in question. Accordingly, counsel for the Secretary is **ORDERED** to provide me with a copy of each contested document for my *in camera* consideration by **November 3, 1995**. After I have inspected the documents I will issue a ruling on the Respondent's motion to compel.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

October 23, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-385-M A. C. No. 04-01950-05531 A
v.	:	
	:	Lang Station
BENNIE WAYNE CURTIS, EMPLOYED BY CANYON COUNTRY ENTERPRISES, D.B.A. CURTIS SAND & GRAVEL, Respondent	:	

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 110(c) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlements for the two violations in this case. A reduction in the penalties from $700 to $100 is proposed.

The Secretary has assessed penalties against Bennie Wayne Curtis as an agent of the operator alleging that he knowingly authorized, ordered, or carried out violations of the mandatory standards of 30 C.F.R. 56.14107(a) and 56.2003(a) which were issued against the operator and are contained in Order Nos. 3932662 and 3932663.

Order No. 3932662 was issued as a 104(d)(1) order for a violation of 30 C.F.R. § 56.14107(a) because the guard for the v-belt drive for the vibrating screen had the top part removed. An open space ten inches wide and eighteen inches across was present next to the walkway of the screen deck. The inspector noted that the appearance of the guard indicated that it had been cut with a torch and that this area was traveled at least once a day.

Order No. 3932663 was issued as a 104(d)(1) order for a violation of 30 C.F.R. § 56.20003(a) because the walkway around the vibrating screen deck was covered with sand and gravel two

feet in depth along with a piece of metal and screen causing a slip or trip hazard. The inspector noted that the material was next to the open place in the v-belt drive identified in the previous order.

The settlement motion submitted for these violations cannot be approved. The Solicitor is reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). A proposed reduction must be based upon consideration of these criteria.

The Solicitor offers no basis for the large reductions in the penalties. The only explanation offered by the Solicitor is that the number of individuals exposed to the alleged violations was very low. This contradicts the findings made by the inspector in the orders. Moreover, the $50 penalty which is proposed for each of these violations is normally reserved for non-serious violations. The narrative findings attached to the penalty petition state that these violations are serious.

In light of the foregoing, it is ORDERED that the motion for approval of settlement be DENIED.

It is further ORDERED that within 30 days of the date of this order the Solicitor submit appropriate information to support his settlement motion. Otherwise, this case will be set for hearing.

Paul Merlin
Chief Administrative Law Judge

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