OCTOBER 2005

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

Unpublished from September 2005

OCTOBER 2005

No cases were filed in which Review was granted during the month of October

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

Daniel B. Lowe v. Southwest Division, Aggregate Industries, Docket No. WEST 2005-246-DM. (Judge Manning, September 8, 2005)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 25, 2005

MARK POLLOCK	:	
	:	
v.	:	Docket No. WEST 2003-182-DM
	:	
KENNECOTT UTAH COPPER CORP.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

On May 19, 2005, the Commission issued an order directing the formally appointed personal representative of Mark Pollock, deceased, to file within 120 days an amended motion to substitute himself in the place of Pollock in this proceeding. On September 22, 2005, having not received a motion to substitute, the Commission issued an order directing counsel for Pollock to show good cause for the failure of a personal representative of Pollock to file the motion and to do so within 30 days of the date of the order. The order stated that, absent a showing of good cause, this proceeding would be dismissed. The order was sent by certified mail and, according to the return receipt, it was delivered to Pollock's counsel on September 26, 2005.

Having received no response to the order, we hereby dismiss this proceeding.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

September 16, 2005

R & D COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. PENN 2005-213-R
	:	Order No. 7007782; 7/26/2005
	:	
	:	Docket No. PENN 2005-214-R
	:	Order No. 7007783; 7/26/2005
	:	
	:	Docket No. PENN 2005-215-R
	:	Order No. 7007784; 7/26/2005
	:	
v.	:	Docket No. PENN 2005-216-R
	:	Order No. 7007785; 7/26/2005
	:	
	:	Docket No. PENN 2005-217-R
	:	Order No. 7007786; 7/26/2005
	:	
	:	Docket No. PENN 2005-218-R
	:	Citation No. 70 07787; 7/26/2005
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. PENN 2005-219-R
	:	Citation No. 7007788; 7/26/2005
	:	
	:	Docket No. PENN 2005-223-R
	:	Citation No. 7007752; 7/13/2005
	:	
	:	Docket No. PENN 2005-224-R
	:	Citation No. 7007753; 7/13/2005
	:	
	:	Docket No. PENN 2005-225-R
	:	Citation No. 7007754; 7/13/2005
	:	
	:	Docket No. PENN 2005-226-R
	:	Citation No. 7007758; 7/14/2005
	:	
	:	Docket No. PENN 2005-227-R
	:	Citation No. 7007608; 7/14/2005
	:	
	:	R & D Coal Mine
	:	Mine ID 36-02053

DECISION

Appearances: Cindy Rothermel, Independent Miners Association, Tremont, PA for the Contestant;
Gale Green, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for the Secretary.

Before: Judge Weisberger

The issues in these consolidated proceedings are the validity of (1) citations issued to R & D Coal Company ("R & D") alleging violations of various mandatory standards set forth in Title 30 of the Code of Federal Regulations, and (2) Section 104(b)[1] orders that were issued based on the alleged failure of R & D to abate the cited violative conditions. The pertinent Notices of Contest were consolidated, and, pursuant to the parties' agreement, the cases were scheduled to be heard in Harrisburg, Pennsylvania on August 3, 2005. At the hearing, the Secretary withdrew Order Nos. 7007782, 7007783, 7007787, and 7007788, and vacated Citation Nos. 7007752, 7007753. The Secretary made a Motion to Dismiss, Docket Nos. PENN 2005-213-R, 214-R, 218-R, 219-R, 223-R, and 224-R, which relate to the vacated orders and citations. The motion was not opposed by Contestant, and was granted.

I. Docket No. PENN 2005-227-R (Citation No. 7007760), and Docket No. PENN 2005-217-R (Order No. 7007786)

At the hearing, a bench decision was made relating to the above citation and order. This decision is set forth below, except for changes of matters not of substance.

> Citation No. 7007760, alleges a violation of 30 C.F.R. §77.205(a), which provides that, "Safe means of access shall be provided and maintained to all working places." The working place at issue, was a platform used to obtain access to a certain wheel located adjacent to the shaker house, which was part of the tipple. A diagonal ladder-like structure was the exclusive means of access to the platform. This ladder was equipped with iron non-flexible handrails located approximately 20 inches above the rungs of the ladder, also referred to as angle irons, which were about two inches wide and approximately four feet long. The distance between the rungs or angle irons was approximately 20 inches.
>
> The Inspector opined, in essence, that in spite of the presence of handrails, there was not any safe access to the platform where workers would provide maintenance to the wheel, and change its oil. He indicated that the ladder could be hazardous in the presence of rain and/or ice, in which case a person could fall and sustain injuries. Also, he noted the lack of a guard to prevent slipping. He indicated

[1]Section 104(b) of the Federal Mine Safety and Health Act of 1977 ("The Act").

that his opinion was also predicated on the fact that if one would have to climb this ladder carrying objects in both hands, that a handrail would not be helpful, and hence using the ladder would be dangerous due to the width of the angle irons.

However, I place more weight on the testimony of the witness for the company, who has operated this mine for over 10 years. He indicated in testimony that was not impeached or contradicted, that access to the wheel was required only approximately three times a year in order to grease it. In that connection, it was his testimony that was not contradicted or impeached, that the only equipment carried by an individual who would access the wheel consists of a grease gun. He indicated that it could be carried in one hand, even in the non-dominant hand, due to its insignificant weight, and its comparatively small size. This testimony was not contradicted or impeached.

Based upon this record, I find that it has not been established that there was an unsafe means of access. In other words, it has not been established that the Operator was not in compliance with Section 77.205(a), supra. Therefore, I find that it has not been established that there was a violation of Section 77.205(a), supra, and accordingly the Notice of Contest is sustained, and the underlying Citation (No. 7007760) shall be dismissed.

Now, with regard to Order No. 7007786 that was issued for failure to abate the above-mentioned citation, that too shall be dismissed. The predicate for the Section 104(b) order was the failure to abate a validly issued citation, i.e., No. 7007760. In light of my decision, finding that citation not to have been properly issued, there then is no longer a predicate for the Section 104(b) order. Accordingly, the Notice of Contest, which is the subject of Docket No. PENN 2005-217-R is sustained, and Order No. 7007786 shall be dismissed.

II. Docket No. PENN 2005-225-R (Citation No. 7007754) and Docket No. PENN 2005-215-R (Order No. 7007784)

A. Violation of 30 C.F.R. § 1605(k)

MSHA Inspector, Jack McGann, inspected the subject mine on July 13, 2005. He observed that the right side of a roadway that ran from the main road to a parking lot and hoist house, did not have any berm for a distance of approximately 40 feet in length between a walkway to a shaker house and a coal stockpile. According to McGann, within a few feet of the edge of the right-hand side of the road, there was a twenty-five foot drop-off that sloped downward at a 75 ° angle. McGann opined that due to frequent fog on the roadway in the early morning, and lack of light in the winter, road traffic could be hazardous . He was concerned that, due to the lack of a berm, vehicles could fall off the road in these conditions, especially taking into account that the road slants toward the unbermed side. McGann issued a citation alleging a violation of 30 C.F.R. §77.1605(k) which provides as follows: "Berms or guards shall be provided on the outer bank of elevated roadways."

According to David Himmelberger, the Operator of the site in question, a natural rock strata that he measured as being 18 inches above the roadway, is located in the area where the Inspector said that a berm is to be provided . Accordingly, he was of the opinion that there was not any violation.

Based on the testimony and the parties' stipulation, I find that, for an approximately 40 foot section of the roadway in question, there were not any berms provided. Although Himmelberger testified to the presence of a "rock strata" 18 inches above the roadway, the record does not establish whether this height was uniform throughout the strata or just at one measured point. Nor is there evidence of the length, width, total area of the strata, or its precise location in relation to the approximately 40 feet of roadway that was above the drop-off. Thus, it can not be concluded that the rock strata constituted a sufficient berm in the cited area.

Since there were not any berms along an elevated road with vehicular traffic at the cited area, I find that the Secretary did establish a violation of Section 1605(k)

B. Negligence

According to the uncontradicted testimony of Himmelberger, he has operated the mine for ten years; over this period of time and in the twenty-five year history of the mine, there have not been any accidents or injuries due to the absence of a berm. Taking this into account, I find that the level of the Operator's negligence to have been very low.

C. Significant and Substantial

Within the framework of this record, and taking into account the Inspector's testimony that the violation was not significant and substantial, I find that the violation was not significant and substantial.

D. Order No. 7700760

On July 13, 2005, when McGann issued Citation No. 7007754, he discussed abatement with Himmelberger, and the latter told him that the cited condition had been in existence for twenty to twenty-five years, and it constituted a was a violation, it should have been cited in the past. According to the Inspector, Himmelberger did not ask for more time to abate the violation as he said he did not think it was a violation. McGann set the abatement time for the following day, July 14.

On July 14, McGann issued a modification to the initial citation by eliminating the significant and substantial finding, and lowering the level of negligence and the likelihood of an injury or illness. Also, the Inspector issued a modification extending the abatement time to July 20 to allow the Operator more time to build berms. According to McGann, after he informed Himmelberger of the extension, the latter told him that he did not consider the conditions to be a violation. When McGann returned to the site on July 26, he noted that there were not any berms on the cited roadway,

and the conditions were the same as on July 13. According to the Inspector, he did not consider a second extension of the abatement time because when he had asked Himmelberger if he intended to install berms the latter told him no, "... we'd go to court over it ... ." (Tr. 55) McGann then issued an order under Section 104(b) of the Act, which, as pertinent, provides as follows:

> (b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement shall not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the Operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

In contesting a Section 104(b) order the issues to be litigated are the reasonableness of the time set for abatement, or the Secretary's failure to extend that time. (Energy West Mining Co., 18 FMSHRC 565, 568 (Apr. 1996)) In analyzing these issues it must be considered "... whether the inspector abused his discretion in issuing the order." (Energy West, supra, at 569).

Within the context of the record herein, I find that it has not been established that there was an abuse of discretion on the part of the Inspector. When the Inspector initially set the abatement time the Operator did not seek additional time nor did it indicate that the abatement time was unreasonable. The Inspector then further extended the time and in discussing the extension with the Operator, the latter again did not request additional time or argue that the time set was unreasonable. When the Inspector returned on July 26, he observed that there was not any abatement, nor had effort been made to abate the violative condition. There is no indication that the Operator requested additional time. Therefore, within the context of this record, I find that the Inspector's discretion was not abused, and that, accordingly, the Notice of Contest to the Section 104(b) order is dismissed.

III. Docket No. PENN 2005-226-R (Citation No. 7007758) and Docket No. PENN 2005-216-R (Order No. 7007785).

A. Violation of 30 C.F.R. § 205(e)

On July 14, 2004, McGann observed a wooden platform approximately four feet by five feet that was located four to five feet above the ground. The platform served as the only access to a storage trailer. He indicated that there were not any hand rails on the platform. According to the Inspector, the lack of hand rails constituted a hazard since a person could fall off the platform, which would be more likely in the event of rain or the presence of snow or ice on the platform. Also, pieces of metal, beams, and pipes that were located on the ground in the vicinity of the platform could increase the likelihood of an injury. McGann concluded that it was reasonably likely that a

person could fall off the platform and break a bone. He termed the Operator's negligence moderate because the condition had been in existence for a number of years. McGann issued a citation alleging a violation of 30 C.F.R. § 77.205(e) which provides, as pertinent, that elevated walkways, and elevated ramps, "... shall be provided with handrails, ..."

Himmelberger did not deny that there were an absence of handrails. He argued that the installation of handrails would impede the loading of material from a truck to the ramp and then into the trailer which is the sole use of the ramp, i.e., as a loading dock. Based on the testimony of the Inspector, I find that a violation of Section 77.205(e) has been established.

B. Significant and Substantial

A "significant and substantial" violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 825 (April 1981).

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

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

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

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

Inc., 6 FMSHRC 1866, 1868 (August 1984); U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Based on the uncontradicted testimony of the Inspector, I find that the lack of a handrail did contribute to the hazard of a person falling off the ramp and injuring himself. According to the Inspector, such a accident was reasonably likely to have occurred. However, he did not explain in any detail the basis for the this conclusion aside from indicating that in general, the size of items carried by a employee on the ramp and the presence of rain, ice, or snow could affect the likelihood of a fall occurring.

On the other hand, it was the uncontradicted and unimpeached testimony of Himmelberger that in the time that he owned the mine, approximately 10 years, no one was hurt or injured while loading or unloading on the platform. Within this context I find that the third element of Mathies, i.e., the reasonable likelihood of an injury producing event, has not been established. Thus, I find that the violation was not significant and substantial.

C. Order No. 7007785

On July 14, McGann issued Citation No. 7007758 at 9:15, a.m., on July 14,and an abatement time was set for 1400 the same day. At approximately 2:00 p.m. McGann talked to Himmelberger about the citation but the latter did not ask for more time to abate the condition. Nor did he give any reason why he could not comply.

Due to a death in his family, McGann was unable to return to the site until July 26, at which time he discussed all outstanding citations with Himmelberger. The Inspector decided not to extend the abatement for the citation at issue, because 12 days had expired from the issuance of the citation on July 14 until July 26 when he revisited the mine and the condition still had not been abated. Also, Himmelberger had not indicated to him that he needed more time to abate. The Inspector then issued a Section 104(b) order.

Within the context of the above evidence, I find that it has been established that there was not any abuse of discretion on the Inspector's part in either setting the initial abatement date, nor in not extending it. In addition to the Inspector's testimony, I take into account the parties' stipulation that the company had not requested any additional time to abate nor did it contend that the time set for abatement was unreasonable.

Order

It is **Ordered** as follows: (1) that based on the Secretary's vacation of the following Citation Nos.: 7007752, 7007753, and withdrawal of the following Order Nos.; 7007782, 7007783, 7007787 and 7007788, these Citations and Orders shall be **Dismissed**; (2) that the following Docket Nos. be **Dismissed**: PENN 2005-213-R, 214-R, 218-R, 219-R, 223-R, and 224-R; (3) that Docket Nos. PENN 2005-215-R and 225-R be **Dismissed**; (4) that Citation No. 7007758 be **Affirmed**, except that

it shall be **Amended** to not significant and substantial; (5) that Docket No. PENN 2005-226-R be **Dismissed**; (6) that Order No. 7007785 be **Affirmed**, and Docket No. PENN 2005-216-R be **Dismissed**; and (7) that Notices of Contest PENN 2005-217-R and PENN 2005-227-R be **Sustained**, and Citation No. 2007760, and Order No. 2007786 be **Dismissed**.

Administrative Law Judge
Avram Weisberger

Distribution:

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Gale Green, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

/sb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

October 6, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2005-1-M A.C. No. 47-00219-36708
v.	:	
VULCAN CONSTRUCTION MATERIALS, L.P., Respondent	:	Sussex Quarry

DECISION

Appearances: Christine Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
Robert Stadler, Supervisor of Safety and Health, Vulcan Construction Co., Romeoville, Illinois, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Vulcan Construction Materials, L.P. (Vulcan). The petition seeks to impose a total civil penalty of $120.00 for two alleged non-significant and substantial (non-S&S) violations of the mandatory safety standard in section 56.12067, 30 C.F.R. § 56.12067, governing the installation of transformers. Generally speaking, a violation is properly designated as non-S&S if it is unlikely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

The hearing in this proceeding was conducted on May 18, 2005, in Milwaukee, Wisconsin. At the hearing page 2-2 of MSHA's Electrical Inspection Procedures Handbook was proffered by Vulcan and identified as Respondent's Exhibit 14. The record was left open for submission of Chapter 2 of the handbook in its entirety. Chapter 2 was admitted as "Resp. Ex. 14" on June 10, 2005, at which time the record was closed. The parties' post-hearing briefs are of record.

I. Statement of the Case

The issue in this proceeding is the applicability of section 56.12067 to two outside transformers at Vulcan's limestone quarry. The transformers are installed 4 feet above the

ground. The pertinent provision of section 56.12067 requires transformers installed less than 8 feet from the ground to be surrounded by a fence that is at least 3 feet from energized transformer wires. The cited wires are less than 3 feet from the fence. Section 56.12067 does not require energized transformer wires or other parts to be surrounded by a fence if the transformer is elevated at least 8 feet above the ground because of the unlikelihood of accidental contact. The question in this case is whether the subject energized wires that are 12 feet above ground level violate section 56.12067. For the reasons discussed below, the citations shall be vacated because the cited energized wires do not constitute a violation of the safety standard since they are not accessible to inadvertent contact.

II. Findings of Fact

Vulcan operates a limestone quarry located in Waukesha, Wisconsin. The quarry was inspected by Mine Safety and Health (MSHA) Inspector Frank Taylor on March 30, 2004. Taylor observed two outside transformers, also known as substations. A transformer converts high voltage energy into lower voltage that is used to energize mine operations. The transformers cited by Taylor were used to provide energy to the primary crusher and the C2 tower. The primary crusher is the site of the initial limestone crushing process. The C2 tower is a screening tower where the material is sized, and from which the product is conveyed to different stockpiles.

Section 56.12067 requires the transformers at both the primary crusher and the C2 tower to have perimeter fencing because they are installed less than 8 feet above ground level. Specifically, each transformer is situated on a flatbed trailer that is raised approximately 4 feet above the ground. The dimensions of both trailer beds are 16 feet long by 8 feet wide. Both transformers sit on the wood floor of the trailers. The transformer structures are secured to the metal frame of the trailers with metal bolts.

The transformers are surrounded by chain link fences on three sides that measure 8 feet high from the base of the trailers. The fences are grounded and contain warning signs reflecting "high voltage." The fourth side of the substations are the motor control centers within which the transformer on-off controls are located. The Secretary concedes the chain link fences are "substantial" and that the transformers are fenced in accordance with section 56.12067. (Tr. 78, 142).

The tops of the fences at both locations are approximately 12 feet above the ground. There are metal frames at the tops of the fences. There are six parallel energized "bus wires" that are attached to the frames that extend at the top of the fences over the width of the truck bed.[1] Thus, the bus wires extend approximately 8 feet above the trailer beds, or 12 feet above the ground. The bus wires are approximately 12 feet long at the primary crusher location, and approximately 10 feet long at the C2 tower substation. The bus wires are less than the 16 foot length of the trailer beds because there are insulators at both ends of each bus wire that are approximately 2 feet long.

[1] There was a seventh bus wire at the C2 tower substation that was not energized.

At both substations, the outermost overhead bus wires running parallel to the 16 foot long fence-sides are approximately 1 foot from the fence. At both locations, the bus wires are approximately 2 feet from the 8 foot long fence-sides separated by the insulators on the ends of each bus wire.

The incoming bus wires carry 4,160 high volts phase to phase that is converted to 480 volts phase to phase carried through the outgoing bus wires. (Joint Stip. 9, 10). The bus wires are shielded with a heavy outer layer of insulation. Physical contact with a properly shielded, insulated bus wire does not present an electrocution hazard. (Tr. 220-24).

The bus wires are firmly secured to the metal frames. In the unlikely event that energized bus wires became dislodged and touched the fence, the fence could only become energized if the insulation on the bus wire was defective. Grounding of the fence makes the possibility of electric shock even less likely. (Tr. 237-39). As discussed below, the purpose of section 56.12067 is to prevent inadvertent contact with energized parts by individuals standing at ground level.

III. Further Findings and Conclusions

As a result of his observations, Taylor issued Citation Nos. 6162084 and 6162085 on March 30, 2004, for alleged substation violations of section 56.12067 at the primary crusher and C2 tower, respectively. Both citations noted that, "[a] miner coming into contact with any of these energized pieces or parts energized by them could be shocked, burnt or electrocuted." (Gov. Ex. 2, 6). Both citations noted access to the transformer areas was "restricted." Taylor characterized the alleged violations as non-S&S, reflecting that it was unlikely that the hazard contributed to by the cited conditions will result in an accident causing serious injury.

Section 56.12067 establishes the standards for the installation of transformers. Section 56.12067 provides:

> Transformers shall be totally enclosed, or *shall be placed at least 8 feet above the ground*, or installed in a transformer house, *or surrounded by a substantial fence at least 6 feet high and at least 3 feet from any energized parts, casings, or wiring*.

(Emphasis added).

The Secretary asserts the evidence supports the occurrence of the violations of section 56.12067 by virtue of the close proximity of the 12 feet high bus wires to the outside fences, even though the standard permits energized wires that are 8 feet above ground level to be totally unprotected in appropriate circumstances. Obviously, the Secretary's theory in this case warrants further scrutiny.

The Secretary asserts that her "enforcement actions are consistent with the clear language of the standard." (*Sec'y br.* at p.14). While it is true that the language in section 56.12067 concerning "a substantial fence at least 6 feet high and at least 3 feet from any energized parts, casings, or wiring," is unambiguous, the analysis does not stop there. For it is well settled that application of a safety standard must harmonize with its intended purpose. *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). Moreover, the Secretary's attempt to enforce a regulatory standard that is unambiguous should be precluded if such enforcement would lead to an absurd result. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987), see also *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

While a literal reading of section 56.12067 might suggest a violation based on the facts of this case as the bus wires were within 3 feet of the fence, a regulation's intended purpose must be considered before blind application of its provisions. Unfortunately, that is not what happened in this case:

The Court:	So what you're saying in essence [is] that the mandatory standard made you do it?
Inspector Taylor:	That's my job.

(Tr. 88).

In the final analysis, the weight accorded to an agency's application of its regulation depends "upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier . . . pronouncements . . . ." *Unites States v. Mead Corp.*, 533 U.S. 218, 228 (2001) *quoting Skidmore v. Swift*, 323 U.S. at 140.

Although the Secretary suggests otherwise, it is clear that section 56.12067 is not intended to ensure that energized parts do not contact perimeter transformer enclosures. In this regard, there are no clearance requirements in section 56.12067 for energized parts if transformers are located in a transformer house, or, if they are totally enclosed. Although Taylor opined that "things can go wrong" with a ground fault system, he conceded "the logic behind" section 56.12067 was to prevent persons from inadvertent contact with energized parts. (Tr. 77-78).

Significantly, Chapter 2 of the MSHA "Electrical Inspection Procedures Handbook" (Handbook) also reflects the purpose of section 56.12067 is to protect against inadvertent contact. The Handbook states:

C. Surface Transformer Station Guidelines

The interior of transformer stations, both in a fenced enclosure or transformer vault or house, must be designed to prevent any person from inadvertently contacting energized parts. Therefore, all wiring and other exposed energized parts must be installed at least 8 feet above the work area or walking surface.

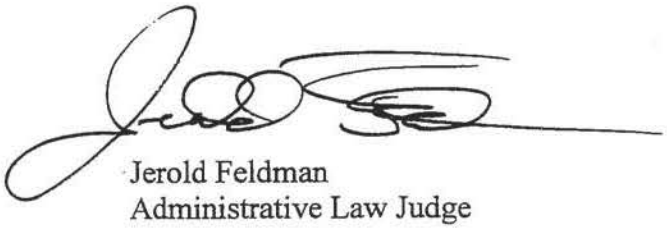
> Otherwise the wiring, transformer bushings, or other exposed parts must be properly guarded to prevent accidental contact . . . .
>
> Shock Hazards, such as exposed energized parts or conductors that a person could accidentally contact in a high-voltage substation, are a violation of 30 C.F.R. 509(b).[2]

(Resp. Ex. 14, p.2-2).

The suspension of bus wires 12 feet above the ground precludes inadvertent contact. Consequently, the Secretary has failed to carry her burden of demonstrating that the facts in this case constitute a violation of the cited mandatory standard.

ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 6162084 and 6162085 **ARE VACATED**. Accordingly, **IT IS FURTHER ORDERED** that this civil penalty matter **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

Christine M. Kassak Smith, Esq., U.S. Department of Labor, Office of the Solicitor, 230 S. Dearborn Street, 8th Floor, Chicago, IL 60604

Robert Stadler, Supervisor of Safety and Health, Vulcan Construction Materials Company, 1361 North Joliet Road, Romeoville, IL 60446

/mh

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[2] Section 77.509(b), which applies to surface coal mines, is similar in scope to section 56.12067. It requires transformer stations to be enclosed "to prevent persons from unintentionally or inadvertently contacting energized parts."

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 12, 2005

	:	CONTEST PROCEEDINGS
D&D ANTHRACITE,	:	
	:	Docket No. PENN 2004-221-R
Contestant	:	Citation No. 7006460; 8/11/04
v.	:	
	:	Docket No. PENN 2004-227-R
	:	Citation No. 7006487; 8/11/04
SECRETARY OF LABOR,	:	
MINE SAFETY & HEALTH	:	Docket No. PENN 2004-230-R
ADMINISTRATION	:	Citation No. 7006490; 8/11/04
Respondent	:	
	:	Primrose Slope Mine:
	:	ID 36-08341
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY & HEALTH	:	
ADMINISTRATION	:	Docket No. PENN 2005-113
Petitioner	:	A.C. No. 36-08341-49183
v.	:	
	:	
D&D ANTHRACITE	:	Primrose Slope
Respondent	:	

DECISION

Appearances: Earl W. Kieffer, 290 Swartara Road, Tremont, Pennsylvania, for the Operator; Brian J. Mohin, Esq., United States Department of Labor, Office of the Solicitor, Region III, Suite 630E, The Curtis Center, 170 South Independence Mall West, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

These consolidated proceedings are before me based upon Notices of Contest filed by D&D Anthracite ("D&D") contesting citations issued by the Secretary of Labor ("Secretary") alleging violations of various mandatory safety standards set forth in Title 30, Code of Federal Regulations. In addition, the Secretary filed a petition seeking the imposition of a civil penalty based on D&D's alleged violation of the standards at issue. The cases were heard on September 14, 2005 in Harrisburg, Pennsylvania.

I. Citation No.s 7006726 and 7007496 and Order No.s 7006487 and 4371417

At the hearing, the Secretary indicated that it had vacated Citation No.s 7006726 and 7007496 and Order No.s 7006487 and 4371417. Accordingly, these Citation and Order No.s are dismissed, and Docket No. PENN 2004-227, is **Dismissed.**

II. Citation No. 4371411

At the hearing, after both parties rested, a bench decision was rendered which is set forth below, with the exception of corrections not relating to matters of substance.

> D&D Anthracite Mine is an underground coal mine. The operator is David A. Lucas.
>
> On August 11, 2004, the mine was inspected by MSHA Inspector, Ronald Pinchorski accompanied by his supervisor, Lester Coleman. According to the Inspector, he and his supervisor arrived at the mine at approximately 9 a.m., at which time they observed some men at the portal. At approximately 9:15 a.m., Pinchorski and Coleman met with Lucas in the latter's office. According to the Inspector, he asked Lucas if he had done a pre-shift examination. Pinchorski testified that he was positive that Lucas said "not yet". (Tr. 14, 36) According to Pinchorski, he thought Lucas had also said, "[s]omething about going down and doing it now or something like that." (Tr. 15) According to the Inspector, Lucas then stood up, put on his gear and went underground. Pinchorski assumed that Lucas went underground to make an inspection, that he went underground alone, and that the other men were already underground. While Lucas was underground, the Inspector checked the pre-shift examination book and saw that there was not any notation with regard to a pre-shift examination having been performed on August 11, 2004.
>
> At approximately 9:45 a.m. after Lucas returned, the Inspector went underground to the working areas of the mine along with Lucas and Coleman. They went below in a buggy that was operated from above by the hitch operator, Darryl Lucas. When the Inspector arrived below ground, he observed two men digging hitches. The Inspector opined that these men had been working prior to Lucas' inspection. He indicated that this opinion was based upon the fact their clothing were dirty and they had been underground before Lucas had gone underground to perform his inspection.

The Inspector indicated that when he was underground, he did not observe any markings of any pre-shift examination having been made on August 11, 2004.

On cross examination, the Inspector indicated that he had difficulty remembering the statements that Lucas made to him because the incidents at issue occurred over a year ago. Pinchorski indicated that Lucas, who was approximately 10 feet away, during the conversations, was not directly facing him. Also, the Inspector indicated that he did not understand every word spoken by Lucas due to a combination of factors, including Lucas' accent, the speed of his speech, and the fact that there were times that he did not talk with his mouth open. Pinchorski indicated that, on a scale of one to ten, with ten able to understand every word and one being unable to understand any word at all, his understanding of the words enunciated by Lucas were at the level of seven.

Coleman testified and confirmed that he was present during the conversation between Lucas and the Inspector. He also confirmed that in response to a question as to whether a pre-shift examination had been performed, Lucas responded "[n]ot yet," (Tr. 49) and that he was going to do it shortly. Coleman indicated that he did not have any difficulty understanding Lucas. Coleman also corroborated the Inspector's testimony that he did not observe any markings of a pre-shift having been performed on August 11, 2004.

On the other hand, Lucas testified that when he arrived at the mine early in the morning of August 11, there was no one else there. According to Lucas, at approximately 8:15 a.m, he. entered the mine by being lowered with the hoist. The only other person at the mine was the hoist operator, Darryl Lucas. Lucas[1] indicated that he checked the gangway overcast, measured the air flow, checked ribs, top rock, and checked for the presence of methane and black damp.

Lucas placed his initial in markings that he made at four locations. He indicated that he also placed a marking on a diagonal set of timbers at the gangway face. According to Lucas, there were approximately 40 to 50 markings that had been placed at that location. He testified that he made a marking on a set of column lines approximately 1 inch x 8 inches x 10 feet, which were

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[1]In this decision, David Lucas is referred to as "Lucas".

diagonal, and indicated that this area was also filled with markings. According to Lucas, he made markings on timbers that also were slanted diagonally, at a pump, by the switch boxes that were 30 to 40 other markings at that site. He indicated that the last marking that he made was on a board (that was approximately 1 inch x 6 inches and 1 foot long, that was at approximately a 15-degree pitch) was laying on the floor. Lucas further explained that he completed his inspection at approximately 8:45 a.m., when he arrived back on the surface from the hoist. According to Lucas, he did not make any entry in the pre-shift book because he had just learned of the presence of inspectors, which caused him some anxiety, and he decided to deal with them first. Lucas indicated that subsequently, at approximately 9:15 a. m., he took Gurney Bixler and Jeff Dinger underground.

Regarding the conversation that he had with the Inspector that morning, Lucas indicated that when he was asked whether he had done a pre-shift examination, he answered, "You bet." (Tr. 73) Lucas indicated that when he was asked whether he had filled out a pre-shift report entry in the pre-shift book, he answered, "Not yet." (Tr. 74) According to Lucas, at approximately 10 a.m., he entered the mine with the Inspector.

Darryl Lucas testified and, in essence, corroborated David Lucas' testimony that at approximately 8:15, he lowered David Lucas in the buggy or hoist; that there was no one else there; that in lowering the hoist with David Lucas, he made three stops going down and three stops coming back from the lowest level, and that the total time that elapsed was approximately 45 minutes. Dinger also corroborated Lucas' testimony that he went on the hoist underground with Bixler and Lucas at approximately 9:15 a.m.

The Inspector issued a citation under 30 C.F.R, Section 75.360(a)(1), which in essence provides that a pre-shift examination must be performed, and that no persons are allowed underground unless the pre-shift examination has been completed.

The Secretary appears to assert the position that this standard has not been complied with; that an inspection had not been done prior to employees going underground. This appears to be based on statements attributed to Lucas by the Inspectors that when asked whether a pre-shift examination had been performed, he told them "Not yet." This was the testimony by the Inspector

and corroborated by Coleman. Also, the Secretary's position appears to be based upon the fact that the Inspector and Coleman did not observe any examiner markings which indicated to them that a pre-shift examination had not been done on August 11 and that there was not any entry in a pre-shift examination report. Also, the Secretary appears to infer that when Lucas left, after discussing the pre-shift examination with the Inspector, he went to do a pre-shift examination. Also, the Secretary would infer that men were already underground. This appears to be based upon two factors, 1) that when they were observed later on, they were working and were dirty, and 2) that when the Inspectors saw the men at 9 a.m., they were at the portal, which would appear to raise an inference that they were ready to go underground at that time.

The Secretary's case appears to be, in large part, based upon inferences to be drawn regarding the critical issues here and a time line relating inspections to men below. I considered the Secretary's case, but I place more weight on the testimony of the Company's witnesses. I note, first of all, that with regard to the critical issue as to the time line or relationship between a pre-shift examination and employees being below, neither of the Secretary's witnesses had any personal knowledge of these events. They did not observe the employees in question going down to the mine. Instead, I place most weight on the Company's witnesses with regard to the time line of events, as their testimony is based upon their actions, and, hence, based upon personal knowledge. In this sense, I note that the testimony of Lucas with regard to the time line and the performance of a pre-shift examination between approximately 8:15 and 9 a.m., that morning was based upon his personal knowledge. I observed his demeanor, and found him to be a credible witness in this regard. Also, his testimony was corroborated by Darryl Lucas, relating to the question as to when the men went below in relation to this pre-shift examination. Lucas' testimony was corroborated by Dinger. Also, although Lucas testified as to having made some markings with his initials and the Inspectors testified that they did not observe any markings for August 11, I do not find the general testimony of the Secretary's witnesses to outweigh the specific testimony of Lucas. In this regard, I note the detailed testimony of Lucas with regard to the positions where he made the markings.

For all these reasons, I find that the Secretary has not established that there was not a timely pre-shift examination done

in this case. I find, therefore, that the Secretary did not establish a violation of Section 75.360(a)(1), and that accordingly, the Order No. 70060071 shall be **Dismissed.**

III. Citation No.s. 7006460, 7006490 and 4371416

At the hearing the parties negotiated a settlement regarding these citations. Subsequent to the hearing, the Secretary filed a Motion to Approve the Settlement. These citations were originally assessed at $2, 635 and the parties propose to have the penalties reduced to $825. Based on the representations in the Motion, and the record in these matters, I find that the settlement is appropriate and within the framework of the Federal Mine Safety and Health Act of 1977, and I **Grant** the motion.

Order

It is **Ordered** that 1) Citation No.s 7006726 and 7007496 and Order No.s 7006487 and 4371417 are **Dismissed,** and Docket No. PENN 2004-227 is **Dismissed**, that 2) Citation No. 4371411 is **Dismissed.** It is further **Ordered** that 3) Respondent pay a total civil penalty of $825 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution List:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

October 18, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2004-147 A.C. No. 11-00877-34581
v.	:	
WABASH MINE HOLDING CO., Respondent	:	Wabash Mine

DECISION

Appearances: Christine Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent;

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Wabash Mine Holding Company (Wabash). The petition seeks to impose a total civil penalty of $100,000.00 for two alleged significant and substantial (S&S) violations[1] of mandatory safety standards in 30 C.F.R. Part 75 of the Secretary's regulations governing underground coal mines. The citations were issued following a February 15, 2003, fatal rib fall accident that occurred at the Wabash Mine. The accident occurred when the victim, Jerry W. Neese, a roof bolting machine operator, was in the process of installing rib bolts as required by the existing roof control plan approved by the Mine Safety And Health Administration (MSHA).

I. Statement of the Case

As a result of MSHA's accident investigation, 104(a) Citation No. 7577188 was issued on April 11, 2003, for an alleged violation of the mandatory safety standard in section 75.220(a)(1), 30 C.F.R. § 75.220(a)(1), that requires each mine operator to follow its approved roof control plan. Although the Secretary does not allege a violation of a specific roof control provision, she relies on the language of the general obligation placed on mine operators

[1] A violation is properly designated as significant and substantial if there is a reasonable likelihood that the hazard contributed to by the violation will result in a serious injury. *Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

in section 75.220(a)(1) that, "[a]dditional measures shall be taken to protect persons if unusual hazards are encountered."

Citation No. 7577189 also was issued on April 11, 2003, alleging a violation of the mandatory safety standard in section 75.362(a)(1), 30 C.F.R. § 75.362(a)(1), because adequate on-shift examinations were not conducted in the B-2 working section during the two weeks preceding the fatality. The citation alleges that deteriorating mining conditions, as well as specific conditions prohibited by the roof control plan, were not noted by on-shift examiners. The Secretary proposed a $50,000.00 civil penalty for each citation on August 16, 2004.

With respect to the issue of the timeliness of the proposed penalty, Wabash relies on the Commission's finding of an untimely proposed penalty in *Twentymile Coal Company* (*Twentymile*), although the Commission's decision on the timeliness issue was reversed on appeal. *Twentymile Coal Co.*, 26 FMSHRC 666, 681-88 (August 2004), *rev'd*, 411 F.3d 256 (D.C. Cir. 2005). Wabash contends the D.C. Circuit's decision "[did] not fundamentally affect the Commission's reiteration of the existing law in *Twentymile*." (*Wabash br.* at p.30). Thus, Wabash argues the civil penalty should be vacated if either citation is affirmed because it was not proposed within a reasonable time after the April 11, 2003, issuance of the subject citations.[2]

This matter was heard on May 11 and May 12, 2005, in Evansville, Indiana. The parties' post-hearing briefs and reply briefs have been considered. As discussed below, Citation No. 7577188 shall be vacated because the Secretary has failed to demonstrate the fact of occurrence of the cited violation. Citation No. 7577189 shall be affirmed. As the Court's decision in *Twentymile* is the law of the case, for the reasons discussed below, I shall defer to the Secretary's interpretation of the "reasonable time" provision in section 105(a) of the Mine Act, 30 U.S.C. § 815(a). *See* 411 F.3d at 262, n.1. Moreover, setting aside the Secretary's proposed penalty is inappropriate in this instance where Wabash has failed to demonstrate any meaningful prejudice caused by any delay by the Secretary. *See id.* at 262. Consequently, a civil penalty of $10,000.00 shall be assessed for Citation No. 7577189.

II. Findings of Fact

a. Background

Wabash Mine Holding Company is a subsidiary of RAG Midwest Holding Company. The Wabash Mine is an underground coal mine located in Wabash County in Keensburg, Illinois. The coal seam in this mine is approximately 84 inches thick.

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[2] On February 14, 2005, Wabash filed a Motion to Vacate the civil penalty based on its assertion that it was not proposed within a reasonable period of time as required by the Mine Act. The Secretary opposed Wabash's motion. By Order dated March 4, 2005, the parties were advised that I would defer ruling on the motion until after the hearing. As discussed herein, the motion is denied.

The roof control plan in effect in February 2003 was approved by MSHA on April 24, 2002. (Resp. Ex. 8). The plan required 4-foot mechanical bolts to be installed on a maximum of five-foot centers, with bolts nearest the ribs to be installed a maximum of four feet from the rib. A mechanical bolt has a shell that expands as the bolt is drilled into the roof firmly grabbing the coal and surrounding rock.

An MSHA Safety and Health inspection (an "AAA inspection") of the Wabash Mine that began on January 2, 2003, was in progress at the time of the accident. The previous AAA inspection was completed on December 24, 2002. (Gov. Ex. 10).

In February 2003, Wabash was using 5-foot resin roof bolts instead of 4-foot mechanical bolts. A resin bolt is installed with glue that quickly hardens as the bolt is drilled into the roof. In adverse roof conditions, resin bolts are considered to be superior to mechanical bolts. (Tr. 170-71).

The maximum entry width specified in the roof control plan was 20 feet. Entry centers may be from 50 to 120 feet, and crosscut centers were permissible from 60 to 120 feet. The maximum dimension allowable for a four-way diagonal intersection was 70 feet.

The pre-shift examinations are conducted by hourly United Mine Worker (UMW) member employees. On-shift examinations are performed by the section foreman. (Tr. 260). Adverse rib conditions characterized by rib rashing, also known as sloughing, was common in the Wabash Mine. For example, Joe Hamilton, the hourly examiner who performed the pre-shift for the midnight shift during the weeks preceding the fatal accident, testified:

> "Wabash has got (sic) soft coal, and quite a bit of overburden, and they kind of have that situation all through the mines. . . . [The B-2 section] was probably - - probably a little worse."

(Tr. 255).

In recognition of the mine's adverse rib conditions, Wabash's roof control plan, unlike other mines in MSHA's District 8, included provisions for mine-wide bolting of ribs. A form of the plan's rib bolting requirements had been in effect since the 1970's. Rib bolting was performed until 1995 with a hand-held drill powered off a "work-beside" roof bolter. Since 1995 rib bolting has been performed using hand-held drills beside the roof bolter, or by using the drillhead on a "walk-thru" bolter. As discussed below, the "walk-through" bolting machine provides miners who are bolting ribs superior protection from a rib fall than a "walk-beside" bolter.

The roof control plan's minimum rib bolting requirements varied depending upon the height of the entry. When the entry was less than 8 feet high, the plan required the installation of a minimum of four bolts on five-foot centers on the rib corners. When entry height exceeded 8 feet, full rib bolting around the entire perimeter of the rib was required on five-foot centers.

Rib support was accomplished by using a minimum 48-inch conventional roof bolt and a 36-inch rib board used for bearing surface.

In February 2003 Wabash was developing a panel in the B-2 section in the southern portion of the mine that was located in the vicinity of an old B-2 worked out panel. The active panel initially consisted of eight entries with crosscut centerline spacing of 80 feet. Mining of the No. 1 and No. 8 entries was discontinued in January 2003 due to ventilation problems. Thus, at the time of the fatality, Wabash was advancing six entries, numbered 2 to 7. (Gov. Ex. 2). In an effort to maintain good roof conditions despite proximity to the worked out section, entries initially were driven in a southeasterly direction rather than mining the entries parallel to the worked out entries (in an easterly direction). However, after experiencing adverse roof conditions, mining was redirected in a northeasterly direction.

It is unusual to mine into abandoned or worked-out areas. (Tr. 453). Wabash's purpose of mining towards the worked-out panel was to provide ventilation into the panel to avoid the necessity to seal-off the abandoned area. (Tr. 545-46, 588).

In the weeks preceding the February 15, 2003, fatal accident, rib and roof conditions in the B-2 section became progressively worse as evidenced by the frequency and degree of rib rashing and roof falls, particularly as mining approached the work-out area. (*See, e.g.*, Tr. 149, 151, 159, 197, 237, 255, 455). The deteriorating conditions were attributable to the increased pressure and stress on the ribs from the weight of the overburden on top of the pillars. (Tr. 456). A mined-out area affects stresses on the roof and ribs of an adjoining working section because there is less support on the overburden because of the removal of coal from the abandoned area. (Tr. 456). This phenomenon was exacerbated by a band of draw rock, approximately 18 inches to two feet thick, that was sandwiched between the coal seam and the overburden in the B-2 section. (Gov. Ex. 8; Tr. 150, 337, 413). The pressure of the overburden on the pillars, in proximity to the worked-out area, caused "machine size" chunks of rock to fall in the B-2 section. (Tr. 291, 293). The fatality occurred approximately 140 to 160 feet from the old B-2 worked-out panel. (Tr. 431).

Wabash disputes MSHA's theory that stresses from the abandoned B-2 panel contributed to the adversity of the rib conditions. In this regard, Wabash argues that other panels in the B-1 and B-2 sections were mined in close proximity to worked-out areas without significant degradation of rib conditions. (Tr. 550, 605-06). Rather, Wabash contends the ribs at the Wabash Mine generally are prone to rashing because of the soft nature of the coal deposits.

Regardless of the cause, the overwhelming weight of the evidence reflects that there were adverse rib conditions in the B-2 section in the days preceding the accident. Everyone, including Wabash management, knew the conditions in the B-2 section were bad because coal was sloughing out and rashing. (Tr. 160, 255, 300). For example, Ray Evans, the midnight supervisor, was aware of the conditions through personal observation. (Tr. 311). Evans told the crew to "just keep a watchful eye and work careful." (Tr. 151-52, 238). Wabash kept promising

the miners they would be transferred out of the B-2 section but they kept getting delayed as the next unit was not ready for mining. (Tr. 153, 160, 248). In fact, miners had been told that they would be moving out of the B-2 section since approximately two weeks before the fatality. (Tr. 248).

The B-2 section is divided approximately in half by a belt line located in the No. 5 entry. There were two roof bolting machines in the B-2 section. (Gov. Ex. 2). A "walk-through" bolter was used on the left side of the belt line. The controls on a "walk-through" bolter are on the inside which provides protection to a miner who is rib bolting from rib rolls or falls because the boom is located between the miner and the ribs.

In contrast, the bolting machine on the right side was a Fletcher Roof Ranger ("Roof Ranger"), which was a "work-beside" also known as a "walk-beside" bolter. The Roof Ranger's controls are located on the outside of the bolter exposing the miner who is rib bolting in a position next to the rib. Thus, the "walk-through bolter" on the left side provided superior protection to persons performing rib bolting than the Roof Ranger on the right side. The roof control plan in effect in February 2003 recognized Wabash's use of both the "walk-through" and "walk-beside" bolters. (Resp. Ex. 8, p.3.4).

On Saturday, February 15, 2003, the midnight shift crew for the B-2 working section entered the mine at approximately 12:00 a.m. Evans was the midnight B-2 section foreman. Jerry Neese and Lee McCray normally were the left side roof bolt operators. Janice Davidson and John Garner were the right side roof bolting machine operators. Al Mason was the continuous mining machine operator.

Evans determined that a power move begun on the previous shift was not completed on the left side because additional high voltage cable was needed. Since the left side "walk-through" bolter normally operated by Neese and McCray could not be energized, Evans directed Neese and McCray to help with ventilation, load supplies, and then rib bolt behind the right side Roof Ranger.

When mining operations began on the midnight shift, the No. 7 entry had already been partially cut approximately 15 feet in depth. Mason began operating the continuous miner in the No. 7 entry. Mason cleaned the ribs from the residuals of rib rash and then he resumed driving the entry. As Mason advanced approximately 20 feet, a section of mine roof fell on the mining machine. Mason decided not to advance the full 40-foot cut and he backed out of the entry dragging the head of the continuous miner along the roof and the rib to knock down loose material. Mason then trammed the miner from the No. 7 entry to the No. 6 entry.

The No. 7 entry was driven to a width of 17 feet wide rather than the maximum 20 feet width permitted by the roof control plan. Mason had been instructed to cut the entry no more than 18 feet wide. The entry was cut to a height of "almost 8 feet." (Tr. 366). Mason opined that the conditions in the No. 7 entry looked as good as anywhere in the section after he

completed the cut in the No. 7 entry. (Tr. 325-26).

Garner and Davidson moved the right side Roof Ranger into position in the No. 7 entry to start roof bolting. They surveyed the area and decided to install additional bolts before roof bolting the cut. The mine roof was smooth and the rib line was in good condition. Garner and Davidson continued roof bolting while Neese and McCray started rib bolting behind the bolter on the left inby corner. Neese and McCray were using a hydraulically operated two-person hand drill to drill the rib holes. They had drilled one hole in the rib and were starting to drill a second hole when a small portion of mine roof fell in front of them. At approximately 2:30 a.m., Neese observed a crack that went all the way down the rib. Neese told McCray that he was going to get a pry bar to pull down the rib.

At that time, Garner and Davidson had just completed the fourth row of bolts and they were in the process of advancing the machine to the fifth row. Neese walked between the left rib and the left side of the bolting machine. Garner noticed Neese walking along the left side of the machine when the rib fell, fatally striking Neese as he approached the front of the machine.

b. The Accident Investigation

Shortly after the accident, at approximately 3:25 a.m., Wabash Mine Manger Terry W. Theys advised the MSHA Benton, Illinois Field Office that a fatal rib fall had occurred. Dennis R. Plab, a roof control specialist, and Mark A. Odum, a roof control supervisor, were dispatched to the mine site to secure the accident scene and to initiate the accident investigation. Plab and Odum later were joined by MSHA inspector Michael D. Rennie who arrived at the mine several hours after the fatality. (Tr. 56, 347).

On February 17, 2003, during the course of the accident investigation, Rennie took measurements in the B-2 section that revealed non-compliance with Wabash's roof control plan. For example, he determined locations where there were excessive entry widths ranging from slightly in excess of 20 feet to approximately 25 feet, diagonal measurements exceeding by several feet the maximum permissible 70 foot diagonal, and bolts located approximately 5½ feet from ribs exceeding the 4 foot maximum spacing required by the roof control plan. The violative conditions were attributable to rib rashing. (Gov. Ex. 5). None of these conditions were in close proximity to the accident scene and they did not contribute to the accident. Since the conditions were due to rib rashing, there may have been changes in dimensions between the time of the accident on February 15, 2003, and the measurements taken by Rennie two days later. (Tr. 349).

As a result of the accident investigation, Rennie issued section 104(a) Citation Nos. 7577188 and 7577189 on April 11, 2003. (Gov. Exs. 3, 4). Citation No. 7577188, alleges a significant and substantial (S&S) violation of the mandatory safety standard in section 75.220(a)(1), 30 C.F.R. § 75220(a)(1), that requires mine operators to take additional measures beyond those required by the approved roof control plan if unusual hazards are encountered. Citation No. 7577188 was terminated the same day it was issued as mining in the

B-2 section was discontinued after the February 15, 2003, accident. (Gov. Ex. 3).

The existing April 10, 2002, roof control plan was superseded effective April 8, 2003. (Resp. Exs. 8, 9). The post-accident revised plan addressed the hazards associated with miners walking between ribs and the Range Rover "walk-beside" bolting machine. It also prohibited use of the "walk-beside" bolter to bolt the ribs. The revised plan provides:

> Additional safety precautions when using walk beside roof bolting machines will include: Operators sounding roof and rib before entering the area to be bolted and reducing travel between the rib and the machine while bolting a cut. Other personnel shall restrict entry between the rib and walk beside machine during the bolting operation.
>
> * * * * * * * * * * *
>
> With walk beside machines, rib bolting will not be performed between the rib and the machine.

(Resp. Ex. 9, p.3.3, 3.10).

As a result of the deteriorating roof and rib conditions in the B-2 section in the weeks preceding the accident, as well as measurements reflecting non-compliance with roof control specifications not related to the accident, Rennie also issued Citation No. 7577189 on April 11, 2003, alleging an S&S violation of the safety standard in section 75.362(a)(1), 30 C.F.R. § 75.362(a)(1). (Gov. Ex. 4). This mandatory standard requires adequate on-shift examinations by mine management at least once each shift to check for hazardous conditions. Citation No. 7577189 was also terminated on April 11, 2003, as mining had ceased in the B-2 section.

c. Timeliness of the Proposed Civil Penalty

The fatal accident occurred on February 15, 2003. The subject citations were issued on April 11, 2003, upon completion of MSHA's accident investigation. The final accident report was released on April 29, 2003. (Resp. Ex. 10). Wabash received notice of the Secretary's proposed penalty of $50,000 for each of the two citations on August 16, 2004. (Stip. 10). Wabash contested the civil penalty on September 10, 2004. (Stip. 11). The Secretary filed her Petition for Civil Penalty on October 7, 2004. (Stip. 12). Wabash contends that Secretary did not propose the civil penalty within a reasonable period of time after termination of her investigation as required by section 105(a) of the Mine Act because the August 2004 notification of the proposed penalty occurred approximately 16 months after MSHA issued the citations and 15½ months after the release of the accident report.

III. Further Findings and Conclusions

a. Citation No. 7577188 - Fact of Occurrence of Violation

As a result of the accident investigation, Rennie issued section 104(a) Citation No. 7577188 on April 11, 2003. (Gov. Ex. 3). Citation No. 7577188 alleges an S&S violation of the mandatory safety standard in section 75.220(a)(1).

Citation No. 7577188 states:

> During the period of at least two weeks prior to February 15, 2003, unusual and hazardous roof and rib conditions were encountered on the B-2 working section, 022 MMU. During this period excessive rib popping and sloughing occurred due to increased pressures. *Additional measures* beyond the minimum specified in the roof control plan were not taken to protect persons from *the unusual hazards*. The mine experienced a fatal fall of rib accident on the B-2 working section, 022 MMU, on February 15, 2003.

(Gov. Ex. 3) (emphasis added).

Section 75.220(a)(1), the cited safety standard, provides:

> Each Mine operator shall develop and follow a roof control plan, approved by the [MSHA] District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional Measures shall be taken to protect persons if unusual hazards are encountered.

Analyzing whether the Secretary has satisfied her burden of proving the fact of occurrence of the cited violation requires an examination of the allegations in the citation. With respect to gravity, Citation No. 7577188 reflects that a fatal injury occurred as a result of the hazard caused by the alleged violation. Significantly, the citation also notes that the alleged violation was not abated as a result of any roof control measures taken by Wabash. The citation was terminated after Wabash ceased mining operations in the B-2 section immediately after the accident.

As a threshold matter, Citation No. 7577188 does not allege that the hazardous roof and rib conditions in the B-2 section were attributable to Wabash's failure to abide by any *specific provision* of its roof control plan. Rather, the Secretary relies on the general provision in section 75.220(a)(1) requiring operators to take "*[a]dditional measures* beyond the minimum specified in the roof control plan to protect persons if *unusual hazards* are encountered." (Emphasis added).

Consequently, we must focus on the operative terms "additional measures" and "unusual

hazards." Here, the unusual hazard identified by the Secretary is not a discrete hazard such as a crack in a rib, or a sag in a particular area of the roof. Rather the Secretary relies on the general poor rib conditions in the B-2 section as the "unusual hazard" to be addressed. While a matter of degree, it is undisputed that rib sloughing was a common condition as evidenced by the rib bolting required by the roof control plan.

Moreover, MSHA inspectors performing AAA inspections were present at the mine on a continuing basis prior to the accident. There is no evidence that they believed that rib conditions in the B-2 section required extraordinary measures beyond that provided in the roof control plan, such as the installation of wire mesh or metal cable around *all* coal pillars. Thus, the "unusual hazard" relied upon by the Secretary was not unusual in the Wabash Mine. As pre-shift examiner Hamilton explained, there was rib rashing "all through the mines." (Tr. 255).

Hamilton's testimony concerning his view, as a pre-shift examiner, of the general mine conditions in the B-2 section is instructive:

The Court: Now, you didn't note bad roof or bad ribs as a general proposition in the [B-2] area, and essentially why was that? Was that because you didn't consider the area to be poor or what?

Hamilton: Right.

The Court: Okay. But the conditions were generally bad, right? I mean, in other words, they were bad, but they were . . . known to be bad as a general proposition. I guess on a spectrum of perfect to bad, where would you draw the line in terms of when you would note them. That's what I mean, specifically in the context of your testimony that the coal was soft and the ribs would commonly slough off or you'd have rib rash. So at what point would you not[e] in the book and in [the] examination?

Hamilton: If it was out of compliance with the plan, with the law.

The Court: If the bolts - -

Hamilton: It's kind of - - It's kind of like living in a bad neighborhood. If you're there all the time, you get used to it, I guess, or it's home. You know.

The Court: Uh-huh. So you're - -

Hamilton: That's the best I could explain it.

The Court: No, I understand. Things are hard to articulate, so in other words, . . . your examination would be focused on whether or not the bolting and pinning of the ribs were done in compliance with the plan?

Hamilton: Right.

The Court: And that's a good analogy I think you made about the bad neighborhood.

Hamilton: If I see any bad order of roof bolts, you know, I'd write those up, tag them and write them up, or if they'd rashed off where they'd gotten too wide, we would have wrote (sic) that up. Any of the examiners would.

The Court: Okay. Thank you.

(Tr. 280-82).

Even if the general rib conditions were construed as an "unusual hazard," Wabash was taking additional measures such as cutting entries 18 feet rather than the 20 feet width permitted by the roof control plan in anticipation of spalling or rib rashing. Additionally, Wabash was installing additional roof bolts as the need arose. It was only through the benefit of hindsight that these measures proved to be unsuccessful.

While the Secretary has speculated about additional measures that Wabash could have undertaken, she has not adequately articulated the specific "additional measures," short of a cessation of mining operations, that should have been taken to alleviate the hazard. Significantly, none of the roof control measures suggested by the Secretary would have prevented the fatal accident. For example, the Secretary suggests increasing the size of the pillars. However, inspector Rennie conceded that, short of withdrawing from the section, there was no guarantee that any additional measures taken by Wabash could make the section safe given the pressures from the worked-out area. (Tr. 118-19). Although MSHA roof control specialist Dennis Plab opined that there were "many options" that Wabash could have taken, he also conceded, "I don't know that I can specifically explain what they should have done." (Tr. 429).

The Secretary also proffered installation of wire mesh on all ribs, or installation of metal cable around coal pillars, as examples of "additional measures." However, these measures would be undertaken *only after* a miner pinning a rib with a "walk-beside" machine was exposed to a rib fall. Thus, such measures would not have prevented the fatal accident.

Finally, the Secretary's assertion that Citation No. 7577188 concerns general mine conditions rather than the circumstances surrounding the fatality is belied by the fact that the

citation was issued as a result of the Secretary's accident investigation. Moreover, the citation specifically refers to "rib popping" and "sloughing" as factors in the February 15, 2003, fatal rib accident.

In the final analysis, in effect, the Secretary seeks to rely on the general provisions of section 75.220(a)(1) to require mine operators to cease mining when roof and rib conditions become too hazardous. Of course operators should err on the side of caution and withdraw miners when conditions warrant. However, if the Secretary desires to explicitly prohibit continued mining under such circumstances she may wish to initiate a rule making procedure if her mandatory safety standards do not adequately address this issue. While the evidence reflects that cessation of mining in the B-2 section prior to February 15, 2003, may have been prudent, the failure to do so does not support a violation of the provisions of section 75.220(a)(1) governing roof control plans. **Thus, Citation No. 7577188 shall be vacated.**

I note parenthetically, the evidence reflects the primary contributing cause of the accident was not Wabash's failure to take additional measures beyond that required by its roof control plan. Rather, the accident occurred because the "walk-beside" roof bolting machine does not adequately protect miners while they are bolting ribs.[3] That is why the existing roof control plan was superseded shortly after the accident to include safety precautions limiting the exposure of miners walking between the "walk-beside" bolter and the ribs, and to explicitly prohibit using the "walk-beside" machine to bolt ribs. (Resp. Ex. 9, p.3.3, 3.10). However, MSHA does not contend that Wabash was prohibited from using the "walk-beside" Roof Ranger at the time of the accident, or that the Roof Ranger was otherwise misused.

b. Citation No. 7577189 - On-Shift Examinations

As a result of the accident investigation, Rennie also issued section 104(a) Citation No. 7577189 on April 11, 2003. (Gov. Ex. 4). Citation No. 7577189 alleges an S&S violation of the mandatory safety standard in section 75.362(a)(1).

Citation No. 7577189 states:

> Adequate on-shift examinations were not conducted on the B-2 working section. Hazardous roof and rib conditions as evidenced by excessive popping and sloughing of the ribs due to increased pressures and stresses, existed but were not

[3] The Secretary asserts that a significant cause of the accident was an unbolted partial cut made in the No. 7 entry during the day shift on February 14, 2003. (*Sec'y reply br.*, p.2-3; Tr. 269, 365-66; Gov. Ex. 10, p.6, Resp. Ex. 2). The Secretary contends that the failure to bolt this partial cut, until shortly before the accident on the midnight shift, further destabilized the roof and ribs. Notwithstanding the speculative nature of this assertion, it has not been shown that the partial cut violated the roof control plan or otherwise supports the fact of occurrence of a section 75.220(a)(1) violation. Nor was the partial cut cited as a contributing cause of the fatality in the Secretary's accident investigation. (*Wabash reply br.*, p.3).

> identified by the person conducting the examinations. Miners on the B-2 working section indicated that these conditions existed for approximately 2 weeks prior to a fatal fall of rib accident that occurred on February 15, 2003.
>
> Additional hazardous conditions, which were not contributory to the accident, were also present on the B-2 working section. These hazardous conditions constituted violations of the regulations and were cited in [Citation] Nos. 7576446, 7577172, 7577187 and 7575479. The certified person's failure to recognize and correct obviously hazardous conditions further demonstrates that adequate examinations were not conducted.

(Gov. Ex. 4).

With respect to gravity, Citation No. 7577189 reflects that a fatality occurred. The degree of negligence attributable to Wabash is characterized as "high."

> The cited standard in section 75.362(a)(1) provides:
>
> At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

As a general proposition, the preamble to the latest rulemaking for section 75.362(a)(1) summarizes the purpose of an on-shift examination:

> Like the pre-shift examination, the on-shift examination of working sections is a long accepted safety practice in coal mining. As coal is extracted, conditions in the mine continually change and hazardous conditions can develop. Because the mining environment changes constantly during coal production, this examination identifies emerging hazards or verifies that hazards have not developed since the pre-shift examination. . . . The on-shift examination is intended to address hazards that develop during the shift.

(Resp. Ex. 1; 61 Fed. Reg. 9797 (March 11, 1996)).

Citation No. 7577189 concerns the adequacy of on-shift examinations during the two weeks preceding the accident. However, given its reference to the fatality as a reflection of the degree of gravity, it is helpful to initially focus on Hamilton's pre-accident, pre-shift examination that occurred from approximately 9 p.m. until 11:42 p.m. on February 14, 2003, to evaluate the conditions on the midnight shift. Hamilton's February 14, 2003, pre-shift examination report

noted a partial cut in the No. 7 entry. (Resp. Ex. 2). Hamilton also noted that the No. 4, No. 5 and No. 6 entries needed roof bolting, and that entry No. 5 needed additional rib support on the corner. (Resp. Ex. 2; Tr. 267-68). Finally, Hamilton's pre-shift examination reflected danger signs were posted at several locations in the B-2 section. (Resp. Ex. 2)

The Secretary did not proffer any on-shift examination reports to support her assertion that the examinations were inadequate. In this regard, the Secretary has not identified any specific identifiable hazard that evolved after Hamilton's pre-shift examination that required additional measures that subsequently should have been noted by Evans in his February 15, 2003, midnight on-shift examination. On the contrary, the Secretary relies on the general rib conditions in the B-2 section as a basis for concluding Evan's on-shift examinations were inadequate and that they were a material factor in the accident.

Mining is inherently dangerous. Consequently pre-shift and on-shift examinations are methods of identifying specific hazards and of ensuring corrective actions are taken. They are not intended as vehicles for expressing opinions about general mine conditions. As Hamilton testified, "[i]f I see any bad order of roof bolts, you know, I'd write those up, tag them and write them up, or if they'd rashed off where they'd gotten too wide, we would have [written them] up." (Tr. 282). Mine examinations are not intended to document general rib conditions, particularly in this case, where rib rashing was common in the mine.

In the final analysis, the Secretary has failed to identify a discrete hazard that contributed to the fatal accident that should have been noted by on-shift examiners. Thus, the Secretary has failed to carry her burden of demonstrating that the thoroughness, or lack thereof, of on-shift examinations contributed to the fatality.

Wabash does not dispute its failure to note specific hazards that did not contribute to the accident that were the subjects of other citations not in issue in this proceeding. These hazards include intersections exceeding the maximum allowable four-way diagonal intersection measurement of 70 feet; entry widths in excess of the maximum allowable 20 feet; and roof bolts located more than four feet from several ribs. (Resp. Ex 5). These conditions initially were not violations of the roof control plan but evolved as a consequence of changes in the B-2 working section that occurred as a result of rib rashing.

Although the cited violations of the roof control plan were discovered by Rennie on February 17, 2003, I am not persuaded by Wabash's assertion that all of the subject conditions occurred as a result of rib rashing that happened after the February 15, 2003, on-shift examination. Although the exact measurements obtained by Rennie may reflect additional post-accident rib sloughage, it is reasonable to conclude at least most, if not all, of the cited violations were present to some extent but not noted during the on-shift examinations. Thus, on balance, the evidence supports the conclusion that the on-shift examinations were inadequate. It is not clear whether any of the hazards uncovered by Rennie were noted by pre-shift examiners. On-shift examinations are a fail-safe method of noting hazards that have been overlooked

by the pre-shift examiner. Thus, the failure to cite an operator for inadequate pre-shift examinations is not a defense with respect to a citation for inadequate on-shift examinations. **Accordingly, Citation No. 7577189 shall be affirmed.**

Having determined that the subject violation in Citation No. 7577189 did not contribute to the accident reduces the degree of gravity. However the degree of negligence attributable to Wabash remains high. In reaching this conclusion I am cognizant that the violative distances of the cited entry and intersection widths and the bolt spacing, were relatively small and attributable to a continuing process of rib changes. While the specific hazards that were not noted by on-shift examiners were not obvious in the absence of actual measurement, specific measurements should have been taken to ensure that degradation of the ribs did not create roof control problems. In the final analysis, the poor mining conditions warranted a higher degree of diligence on the part of on-shift examiners.

Wabash did not specifically address the S&S issue. (*Wabash br.* at n.6). However, it is reasonably likely that the hazards contributed to by a failure to ensure continuing compliance with the roof control plan by means of adequate on-shift examinations will result in a roof or rib accident that causes serious injury. Thus, the evidence reflects the violation was properly designated as S&S.

Wabash is a large operator whose ability to continue in business will not be jeopardized by imposition of a modest civil penalty. The citation was promptly abated by withdrawal from the B-2 working section. The Secretary proposed a civil penalty of $50,000.00 for Citation No. 7577189. Given the reduction in the gravity and high degree of negligence associated with the subject violation, **a civil penalty of $10,000.00 shall be assessed for Citation No. 7577189.** The $10,000.00 civil penalty reflects the high degree of negligence demonstrated by inadequate on-shift inspections despite irrefutable evidence of deteriorating mining conditions.

c. Timeliness of the Proposed Civil Penalty

Having concluded that a penalty should be assessed for Citation No. 7577189, we turn to the issue of whether the Secretary proposed the penalty within a reasonable period of time as contemplated by section 105(a) of the Mine Act. Section 105(a) provides:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, [she] shall, within a reasonable time after the termination of such inspection or investigation, notify the operator . . . of the civil penalty proposed . . . .

30 U.S.C. § 815(a).

The statutory scheme authorizing the Secretary's imposition of a civil penalty is a major means by which operator compliance is achieved. The purpose of section 105(a) is to encourage

operator compliance through timely penalty proposals rather than to create an escape mechanism through which an operator can avoid payment. The legislative history of section 105(a) explains, "there may be circumstances, although rare, when prompt proposal of a civil penalty may not be possible, and the *[Senate] Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding*." (Emphasis added). S. Rep. No. 95-181, at 34, reprinted in Legis. Hist. at 622.

Citation No. 7577189 was issued on April 11, 2003. MSHA's Report of Investigation of the subject February 15, 2003, fatal rib fall was released on April 29, 2003. The civil penalty for Citation No. 7577189 was initially proposed by the Secretary On August 16, 2004. Wabash asserts the Secretary did not propose the civil penalty for Citation No. 7577189 within a reasonable period of time.

In seeking to void the civil penalty, Wabash relies on the Commission's *Twentymile* decision that explicitly addressed whether a 17-month penalty proposal period violated the reasonable time provisions of section 105(a). In *Twentymile*, the Commission, in essence, bifurcated the civil penalty proceeding by separating it into a fact of violation component, and a proposed penalty component. 26 FMSHRC at 682. In this way, while affirming the fact of the subject violation, the Commission concluded a 17-month delay, absent a showing of extenuating circumstances, was so unjustifiable as to warrant "the extraordinary remedy " of "vitiating the imposition of the penalty itself." *Id.* at 682, 685.

In so doing, the Commission reasoned, "the Commission, not the Secretary, is ultimately responsible for determining whether a proposed penalty assessment has been made 'within a reasonable time.'" *Id.* at 685. In analyzing previous precedent concerning whether prejudice was a prerequisite to avoiding civil penalty liability, the Commission concluded an operator can avoid payment upon a showing of *either* that the Secretary's delay in proposing a penalty was unreasonable *or* that the delay resulted in prejudice to the operator. *Id.* at 682.

The Court of Appeals indirectly reversed the Commission's unwillingness to defer to the Secretary's interpretation of "reasonable time" in section 105(a). Specifically, the Court adopted the Secretary's "reasonable" interpretation that it was the termination of the accident investigation rather than the issuance of the citation that was the reference point for determining whether the penalty was reasonably proposed. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d at 261, 262. Although the Court did not expressly defer to the Secretary's view on what was a reasonable period for penalty proposals under section 105(a), it did note that Courts are reluctant to void agency action based on an agency's failure "to observe a procedural requirement." *Id.* at 261. The Court also noted that statutory processing guidelines generally are intended to "spur the Secretary to action" rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Id.* (citations omitted).

Consequently, a fair reading of the Court's *Twentymile* decision leads to the conclusion that the Court deferred to the Secretary's interpretation, and, thus, the applicability, of the "reasonable time" provision of section 105(a). In this regard, the Court, citing *Martin v. Occupational Safety & Health Review Comm'n,* 499 U.S. 144, 158 (1991), noted that [w]here the Secretary and the Commission conflict in their interpretations of the statute, the Court defers to the Secretary . . . .[4] *Id.* 262, n.1.

In view of the above discussion of the Court's decision, I shall defer to the Secretary's interpretation of section 105(a) that the approximate 15½-month time period for proposal of the civil penalty in this case, beginning on the date of the issuance of the accident report, is "reasonable." The proposal of a civil penalty, like the adjudication in this proceeding, is a deliberative process. I am mindful of the myriad of circumstances, uniquely known to the Secretary, that can effect deliberations such as resolution of policy differences, or personnel issues related to retirements or reassignments.

Clearly, the oversight by this Commission of the efficacy of the Secretary's processing procedures is a slippery slope to be avoided. Only the Secretary knows the number of personnel, and the levels of review, that are involved in her deliberative process. Absent a Commission imposed *per se* deadline that strips the Secretary of flexibility, a case-by-case approach would require a qualitative appraisal of the propriety of the Secretary's procedures for each proposed penalty that can only be resolved at an evidentiary hearing, a result never intended by the Mine Act.

Moreover, such oversight would place the Commission in a quasi-supervisory role that conflicts with the Commission's mission as an independent adjudicator. While the Secretary's proposed penalty process my have been inefficient, in light of the Court's *Twentymile* decision, absent Commission direction to the contrary, I will not substitute my judgement for the Secretary's regarding whether her processing time is reasonable, or, whether she has achieved the desired deterrent effect. In reaching this conclusion, I am not suggesting that an unconscionable delay, not present here, should never be construed as a violation of section 105(a).

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[4] Following *Martin*, the Supreme Court recognized the "expertise" of the Commission as an independent-review body with the statutory mandate of developing a uniform and comprehensive interpretation of the Mine Act. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994). Thus, it may sometimes be appropriate for the Commission, an independent appellate body of limited rather than general jurisdiction, to decline to defer to the Secretary on matters of interpretation of the parties' statutory rights. *See Cyprus Cumberland Res. Corp.*, 20 FMSHRC 285, 289-94 (ALJ) (Mar. 1998), *rev'd on other grounds*, 22 FMSHRC 1066 (Sept. 2000), *aff'd, Rag Cumberland Res. v. FMSHRC*, 272 F.3d 590 (D.C. Cir. 2001); *see also W-P Coal Co.*, 16 FMSHRC 1407, 1410 (July 1994) (distinguishing the deference owed the Secretary's interpretations of her OSHA and MSHA regulations under the *Martin* and *Thunder Basin* decisions).

Finally, even if the 15½-month time period was considered to be an unreasonable delay, the Court's *Twentymile* decision noted it is "particularly inappropriate to set aside the Secretary's recommendation for penalty . . . given [an operator's failure] . . . to show any prejudice to itself from whatever delay in fact occurred." 411 F. 3d at 262. I am unpersuaded by Wabash's contention that it was prejudiced by the Secretary's delay because mining conditions have changed since February 15, 2003. Specifically, Wabash contends it was precluded from proving it was unable to connect the "walk-through" bolter to the energized load center for operation on the right side. (*Wabash br.*, p.29). In addition, Wabash contends it is unable to demonstrate the additional support measures beyond those required by the roof control plan that were installed on February 15, 2003, because of the passage of time. *Id.* Resolution of these questions of fact is not material to disposition of the issue of the fact of occurrence of the cited violations in this case. Moreover, evidentiary problems caused by mine condition changes prior to a hearing on the merits are inherent in the fact finding process and can be overcome by photographs or testimony.

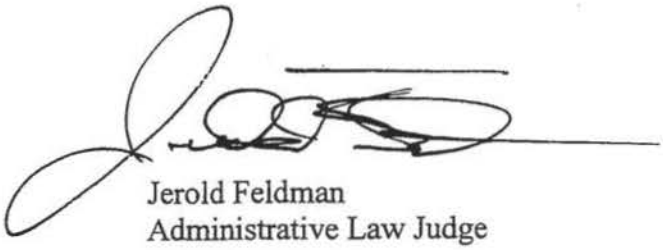
In sum, I shall defer to the Secretary's interpretation of section 105(a) that her processing time in this case was reasonable. Even if the Secretary's actions constituted an unjustifiable delay, Wabash has failed to demonstrate any meaningful prejudice that would warrant the extraordinary relief of voiding the civil penalty justifiably imposed in this matter. Accordingly, a civil penalty of $10,000.00 shall be imposed for Citation No. 7577189.

ORDER

In view of the above, **IT IS ORDERED** that Citation No. 7577188 **IS VACATED.**

IT IS FURTHER ORDERED that Citation No. 7577189 **IS AFFIRMED** as modified.

IT IS FURTHER ORDERED that Wabash Mine Holding Company shall, within 40 days of the date of this Decision, pay a civil penalty of $10,000.00 in satisfaction of Citation No. 7577189. Upon receipt of timely payment of the civil penalty, Docket No. LAKE 2004-147 **IS DISMISSED.**



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

October 21, 2005

SECRETARY OF LABOR, MSHA,	:	DISCRIMINATION PROCEEDINGS
ON BEHALF OF WENDELL McCLAIN,	:	
COY McCLAIN, WADE DAMRON,	:	Docket No. KENT 2005-96-D
AND GARY CONWAY,	:	PIKE CD 2004-07
Complainants	:	
	:	Docket No. KENT 2005-97-D
v.	:	PIKE CD 2004-08
	:	PIKE CD 2004-12
	:	PIKE CD 2005-01
	:	
MISTY MOUNTAIN MINING, INC.,	:	Docket No. KENT 2005-98-D
STANLEY OSBORNE AND	:	PIKE CD 2004-09
SIMON RATLIFF,	:	
Respondents	:	Docket No. KENT 2005-99-D
	:	PIKE CD 2004-10
	:	
	:	Mine ID 15-18663

DECISION

Appearances: Marybeth Zamer Bernui, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Complainants;
Wes Addington, Esq., Appalachian Citizens Law Center, Inc., Prestonsburg, Kentucky, for Miner Complainants;
Stanley Osborne, Vice President, Misty Mountain Mining, Inc., Jonancy, Kentucky, *Pro Se* and for Misty Mountain Mining, Inc.;
Simon Ratliff, Lookout, Kentucky, *Pro Se*.

Before: Judge Hodgdon

This case is before me on Discrimination Complaints brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Wendell McClain, Coy McClain, Wade Damron and Gary Conway against Misty Mountain Mining, Inc., Stanley Osborne and Simon Ratliff pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A trial was held in Pikeville, Kentucky. For the reasons set forth below, I find that the Complainants were discharged by Misty Mountain Mining because they engaged in activities protected under the Act.

Background

Misty Mountain Mining, Inc., owned and operated Mine No. 5, located near Jenkins in Letcher County, Kentucky, from July until November 13, 2004. Misty Mountain Mining, Inc., is owned by Stanley Osborne. From July through October 14 the Mine Superintendent was Simon Ratliff, who was in charge of the day-to-day operation of the mine. During the time the mine was open, entries were mined through three lines of breaks and 8,297 tons of raw coal, resulting in 2,883 tons of clean coal, were produced.

Gary Conway was hired by Ratliff as an equipment operator on August 1, 2004. After three days of operating a shuttle car, he was reassigned to operate a roof bolter. Wade Damron was hired in mid-August to assist Conway on the roof bolter. Coy McClain was hired in mid-August to operate a shuttle car and scoop. His brother, Wendell McClain, was hired a week later to operate a shuttle car.

On August 30, 2004, Ratliff removed Conway and Damron from the roof bolter and assigned Coy and Wendell McClain to operate it. Damron was told to operate the scoop. When the roof bolter became stuck in the No. 3 entry, Damron brought the scoop into the mine to try to free the roof bolter. As he was going down an incline in the No. 3 entry, the scoop began "freewheeling" and Damron was not able to stop it with the brakes. He began yelling "no brakes, no brakes" and shaking his helmet light to warn Ratliff, Coy and Wendell McClain, who were standing in the entry, of his problem. Damron was finally able to stop the scoop by steering it into the rib about 20 feet from where the three were standing. Wendell McClain exclaimed to Ratliff that someone was going to be killed if they did not get the brakes on the scoop fixed.

Ratliff responded that he was not going to let anyone disrespect him like that and told Wendell that he would not be needing him anymore. He told Coy to go with him. Wendell and Coy understood this to mean that they were fired.

That same afternoon, Ratliff told Damron and Conway that they were "deadbeats" and to get their buckets and leave. Damron and Conway understood this to mean that they were fired.

Coy and Wendell McClain filed discrimination complaints with MSHA on August 30, 2004. In his complaint, Wendell stated that: "I was discharged on August 30, 2004, by Simon Ratliff, Supt., because I complained about the battery scoop not having brakes. I was told I was no longer needed and fired." (Govt. Ex. 7.) Coy said: "I was discharged on August 30, 2004, because my brother complained about the battery scoop not having brakes. Simon Ratliff, Supt., discharged me because he said he wasn't going to put up with my brother complaining about safety concerns." (Govt. Ex. 5.)

Damron and Conway filed discrimination complaints with MSHA on August 31, 2004. Conway stated that: "I was discharged on August 30, 2004, by Simon Ratliff, Supt., because I was operating a scoop which had bad brakes. I had complained about the brakes being bad for

several days prior." (Govt. Ex. 1.) Damron asserted that: "I was discharged on August 30, 2004, by Simon Ratliff, Supt.[,] because I complained about the bad brakes on the battery scoop I was operating. I had complained for several days." (Govt. Ex. 3.)

Coy McClain returned to the mine on August 31 and was permitted to continue working. The Secretary, on behalf of Conway, Damron and Wendell McClain, filed applications for the miners' temporary reinstatement on September 27, 2005.[1] Rather than holding a hearing on the applications, the parties agreed that the three complainants would be reinstated on October 4, 2004, at the same rate of pay and with the same or equivalent duties assigned to them. Wendell returned to work on October 4, but Conway and Damron did not return until October 11.

The four miners were only permitted to work a few hours each day before Ratliff would send them home for the day. At the same time, other employees remained working at the mine.

On October 14, 2004, Ratliff told the four complainants that he could not work with them anymore. Believing that they had been fired again, the four left the mine. Ratliff quit the same day and the mine was closed until October 25, 2004, while Osborne hired a new superintendent.

The Secretary filed an Application for Temporary Reinstatement on behalf of Coy McClain on October 22, 2004. Wendell McClain returned to work at the mine when it reopened on October 25 and continued to work there until the mine closed on November 14, 2004. When the mine closed, Osborne offered Wendell a job at the Misty Mountain Mining Mine No. 2, but he declined the offer claiming that it was too far from his home and that he had no money for gas to drive there.

Osborne told Rick Hamilton, the MSHA Special Investigator investigating the discrimination complaints, on October 22, that Coy McClain, Conway and Damron could return to work on the 25th when the mine reopened. Coy called Osborne at home on October 24 and told him that he had another job. Neither Conway or Damron returned on October 25. On October 26 and 27, Osborne told Hamilton that he could place one of the miners at another mine. On October 28, he was advised by Hamilton's secretary that both men had other jobs. On November 16, the Secretary moved to dismiss Coy McClain's temporary reinstatement application because he was working at another mine.[2]

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[1] Section 105(c)(2), 30 U.S.C. § 815(c)(2), provides, in pertinent part, that when the Secretary receives a discrimination complaint she will begin an investigation of the complaint within 15 days, "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint."

[2] Docket No. KENT 2005-28-D, Unpublished Order (December 6, 2004).

Discrimination Complaints were filed on behalf of the four miners on December 3, 2004. The miners seek reinstatement, back pay and other ancillary damages. The Secretary also seeks civil penalties totaling $20,000.00 against Misty Mountain Mining, $10,000.00 against Stanley Osborne and $10,000.00 against Simon Ratliff.

Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he 'has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "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 (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

In order to establish a *prima facie* case of discrimination under section 105(c)(1), a complaining miner must show: (1) That he engaged in protected activity; and (2) That the adverse action he complains of was motivated, at least partially, by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The evidence, as discussed below, establishes that the Complainants engaged in protected activity and that they were discharged as a result of the protected activity. For this violation of their rights under the Act, they are entitled to limited back pay, but not to reinstatement or other monetary damages. Misty Mountain Mining, Inc., and Stanley Osborne are jointly and severally liable for these damages. However, contrary to the proposal of the Complainants, neither Simon Ratliff nor Midguard Mining Company have any responsibility regarding damages in these cases.

Protected Activity

There is no doubt that all four complainants engaged in protected activity while working at Mine No. 5. Conway testified that he complained about the lack of brakes on the shuttle car, the fact that the dust filter on the roof bolter did not work and the failure of the automatic

temporary roof support (ATRS) on the roof bolter to reach the roof. (Tr. 25-26, 29-31, 35-36, 58-60.) Damron reported to Ratliff that the dust filter on the roof bolter did not work and told him, after having to stop it by driving it into the rib, that the scoop did not have any brakes and he was not going to drive it anymore. (Tr. 69, 77, 90-91.) Coy McClain complained about the lack of brakes on both the scoop and the shuttle car and the failure of the ATRS to reach the roof in some places. (Tr. 111-113, 116-117.) Finally, Wendell McClain testified that he informed Ratliff that the shuttle car did not have any brakes and that the ATRS did not reach the roof. (Tr. 191-92, 195-96.) He also made the statement in the presence of Ratliff, when Damron drove the scoop into the rib, that "somebody's going to get killed if Simon and them don't get some brakes fixed on the scoop." (Tr. 32-33, 76, 120, 201.)

Ratliff admitted that the men raised issues about the equipment. (Tr. 494-98.) He called it making a "report," however, and maintained that there was "a difference in complaining and getting a report." (Tr. 494.) Whatever they are called, the four miners raised safety issues which are clearly protected under the Act. Accordingly, I conclude that Damron, Conway, and both McClains engaged in protected activity.

Adverse Action

The miners claim that they were discharged on August 30, 2004, as a result of their complaints. Osborne and Ratliff maintain in their briefs that only Wendell McClain was fired, that Damron and Conway quit and that Coy McClain was not fired. (Osborne Br. at 4-5, Ratliff Br. at 1.) The preponderance of the evidence supports a conclusion that all four were fired.

There is no dispute that Wendell McClain was discharged. After making his statement about the brakes on the scoop, he testified that Ratliff told him "to get my bucket and that I was fired. He said because nobody's going to come in my mines [*sic*] and tell me that somebody's going to get hurt with a piece of my equipment." (Tr. 202.) Ratliff testified that Wendell said "you stupid SOBs are going to get somebody killed" and that "I told Wendell that I wouldn't be needing him anymore, that I wasn't going to let him cuss me and disrespect me and try to destroy the name I had as a miner." (Tr. 477.) Damron, Conway and Coy corroborated Wendell's version of the event. (Tr. 32, 76, 121.)

Despite Ratliff's testimony that he told Wendell that he was not going to let Wendell "cuss" him and "disrespect" him, neither Ratliff nor Osborne assert in their briefs that that was the reason Wendell was fired. Further, if that were the reason, neither of the Respondents has shown that Misty Mountain had a policy prohibiting swearing, had previously admonished Wendell about swearing or had fired other miners for similar statements. *Sec. of Labor on behalf of Cooley v. Ottowa Silica Co.*, 6 FMSHRC 516, 521 (Mar. 1984). Rather, I find that Ratliff's testimony was an after the fact attempt to justify his firing Wendell, and that Wendell was clearly fired for his remarks about the lack of brakes on the scoop.

With regard to Coy McClain, he testified that after Ratliff fired Wendell, Ratliff told him to get his bucket and go home with his brother, which he took to mean he was also fired. (Tr. 121.) Conway, Damron and Wendell likewise thought Coy had been fired. (Tr. 34, 76-77, 202-03.) Ratliff testified that when he fired Wendell, Coy "was standing there and Coy had rode to work with Wendell that day and I told him, I said, get your bucket and go home with your brother and be back out in the morning at 6:00." (Tr. 477.) Coy testified that he did return to the mine the next day and "asked Mr. Ratliff, could I have my job back." (Tr. 126.)

I conclude that Coy McClain was discharged on August 30. I base this finding on these facts: (1) he filed a complaint with MSHA the same day that he was fired; (2) the other three miners believed that he had been fired; and, (3) the phrase "get your bucket and go home" or "go to the house" is commonly used in the coal fields as a synonym for "you're fired." (Tr. 541.) *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982). Furthermore, Ratliff's testimony that he told Coy to return the next morning is self serving and, given the heat of the moment, incredible. He implicitly admitted that he fired Coy when he testified concerning Coy's return the next day, that: "Coy had said he mistakenly thought he was fired, went over there and told them he thought he'd been fired. And when he came back out to work the next morning, I asked him if he was going to take care of the complaint that he had made against me." (Tr. 506.)

Concerning the other two Complainants, Conway testified that on the afternoon of August 30, he was having trouble keeping the parked scoop from rolling back on an aluminum cable because the parking brakes did not work. (Tr. 36.) He related that Ratliff, on observing the scoop parked on the cable, said "we was a bunch of deadbeats." (Tr. 36.) Conway further testified that he responded "is that really what you think of us? [W]e're deadbeats [?]" (Tr. 36.) He said that Ratliff replied: "[Y]eah, I do. [Y]ou boys get your buckets and get off the hill." (Tr. 36.) Conway stated that he understood this to mean he had been fired. Damron, who was also present, believed that he had been fired too. (Tr. 78.)

Ratliff's version of the incident was as follows:

> I told him that I wasn't going to put up with people not helping us work, deadbeats. I wasn't going to work with no deadbeats. I wasn't going to put up with that. So what time I was talking to Wade, Gary spoke up and said, is that what you think about us, Simon? And I wasn't talking to Gary at this time. And I said, well, yeah, I guess it is, Gary. So Gary instructed Wade to get their buckets and they left at that time.

(Tr. 478-79.)

Mike Childress, the mine foreman, was also present during this exchange. He testified that:

We quit at 2:00, at five minutes 'til 2:00. And me and Wade was walking past the head drive and Simon hollered out and said, called them knuckleheads or something like that. I thought he was kidding around and joking, you know, he's all the time doing stuff like that. And anyway, me and Wade walked up to the office and Gary jumped up and said, is that what you think of us, Simon, and he said yeah. And Gary said something else about, you know, didn't have to take that or what, something like that and said, come on, Wade, let's go.

Q. And what did Simon say?

A. He said, well, just go home. Just get your buckets then and go on.

Q. Okay. And what did you think that meant?

A. Fired.

Q. They were fired?

A. Yeah. To me, that would mean that.

Q. And why did you think they were fired?

A. Well, just by the — get you clothes, you know, if you ain't going to do nothing, just get your buckets and go to the house.

Q. Is that term commonly used in the mining industry when someone's fired?

A. Yeah, pretty much.

(Tr. 540-41.) Childress later reiterated that based on the events, he "took it as they was fired, yeah." (Tr. 544.) However, when asked by Osborne if Conway and Damron quit before Ratliff told them to go, he answered, "possibly, yeah." (Tr. 545.)

Based on a preponderance of the evidence, I conclude that Conway and Damron were fired. Childress plainly testified that he thought they had been fired. The fact that he later equivocated under pressure from the examination of his employer does not render his direct testimony unreliable. Furthermore, Conway and Damron's subsequent going to MSHA to file a complaint for being fired is consistent with their belief that that was what had happened.

Adverse Action - the Result of Protected Activity

Having concluded that the miners suffered the adverse action of being discharged, the next issue is whether they were discharged because of their safety complaints. Resolution of that question rests with Ratliff's intent or motivation. As it is obviously hard to discern what a person is thinking, the Commission has set out some guidelines for determining motivation. Thus, it has stated:

> We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.*

Secretary on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (Sept. 1999).

In these cases, all of the circumstantial indicia lead to the conclusion that the four miners' discharge was motivated by their safety complaints. First, the safety complaints were made directly to Ratliff, an agent of the company. Indeed, as noted above, he admitted that he was aware of them. Thus, he had knowledge of the protected activity.

Second, Ratliff showed hostility toward the protected activity. For instance: (1) He acknowledged that when Conway asked him for a filter for the roof bolter's dust collection system he told Conway that he was saving the filters for when the inspectors came, although he claimed he was just joking. (Tr. 498.) (2) When Conway and Damron asked for crib blocks to place between the roof and the roof bolter's ATRS because the ATRS would not reach the roof, Ratliff refused and told them to keep bolting. (Tr. 30.) (3) After the incident where Damron had to run into the rib to stop the scoop, when Conway tried to discuss the lack of brakes on the equipment with Ratliff, Ratliff told Conway that it was not his concern, that he was the one making the calls. (Tr. 34-35.) (4) When Conway explained that the scoop had come to a stop on an aluminum cable because the parking brakes did not work, he said that Conway and Damron were a bunch of "deadbeats." (Tr. 36, 78.)

Third, the protected activity and the adverse action occurred one right after the other. Ratliff fired Coy and Wendell McClain as a direct result of Wendell's exclamation. He fired Conway and Damron at the end of a day on which he had fired the McClains, had received several safety complaints and almost directly after Conway told him the parking brakes on the scoop did not work.

Accordingly, I conclude that Conway, Damron, Coy and Wendell McClain were discharged because of their protected activity in violation of the Act.

The Second Discharge

After the miners had filed discrimination complaints with MSHA, Conway, Damron and Wendell McClain filed applications for temporary reinstatement. The parties settled the applications for temporary reinstatement by agreeing that the miners would return to work on October 4 at the same, or similar positions, and at the same pay. Docket Nos. KENT 2005-2-D, KENT 2005-3-D and KENT 2005-4-D, Unpublished Order (October 13, 2004). Wendell returned to work on the 4th, but Conway and Damron, for unexplained reasons, did not return until the 11th.

During the week of October 11, the Complainants were sent home each day after working only a few hours, even though other miners continued working. (Tr. 42-43, 82-83, 128, 208-10.) On October 14, Ratliff called all of the employees into the office and, according to Wendell,

> he had set up on the table there and there was some wasps a-flying around. And he started, you know, a-killing them. He said I can kill these SOBs, but I can't the men that brought this complaint on me. And he said, you boys, he said, I'm not going to work with you[']ns and you all might as well get your stuff and go on home.

(Tr. 211-12.) Ratliff testified that what he meant was that he was quitting, "that I couldn't work with them boys no more and I had to quit." (Tr. 481.) The complainants, however, all thought that they had been fired again. (Tr. 44, 85, 131, 212.)

I find that the four miners reasonably believed that they had been fired again. Furthermore, there is no evidence that anyone told them to come back when they left or tried to explain to them that they had misunderstood Ratliff. Consequently, I conclude that the Complainants were fired a second time. Since the second discharge was the result of their discrimination complaints, I conclude that it was also in violation of section 105(c) of the Act.

Remedies

In their complaints, the Complainants request the following remedies: (1) reinstatement to the same, or similar, position at the same rate of pay; (2) back wages with interest until the date of payment; (3) the value of all employment benefits, all medical and hospital expenses and

all other damages incurred as a result of the discharges; and (4) expungement from their employment records of all references to the discriminatory discharges. As detailed below, I conclude that the Complainants are entitled to back pay, but not to reinstatement or other damages.

Reinstatement

At the trial, the Complainants all maintained that they desired to be reinstated. (Tr. 45, 88-89, 131, 214.) Conway, Damron and Coy McClain all answered "yes," without elaboration, when asked if they would "have accepted transfer to another Misty Mountain Mine." (Tr. 45, 88, 131.) The facts, however, contradict those answers. All four were offered a chance to return to Mine No. 5 or to transfer to other Misty Mountain mines and all four turned them down.

The mine was shut down from October 15 until October 25 so that Osborne could hire a new superintendent. Wendell McClain returned to work at the mine on October 25 and continued working there until the mine was finally closed on November 13. When the mine closed, Osborne offered to transfer him to another Misty Mountain mine. (Tr. 212.) Wendell told Osborne that he would take the job, but did not report for work. He claimed that he could not take the job because it was two and one half hours from his home and he did not have money for gas. (Tr. 213.) He maintained that he did not have money for gas because he did not have a job. (Tr. 213.) Nonetheless, he averred that if he did have money for gas he would have driven to the job. (Tr. 214.)

His excuses are inconsistent and nonsensical. In the first place, he would have had a job and, therefore, money for gas if he had gone to work. Furthermore, the mine shut down November 13, a Saturday, and his new job was to start on the following Monday, so he was only out of work for one day (Sunday). (Tr. 241-42.) In the second place, his estimate that the mine was two and one half hours from his house is not credible. When questioned about it, he refused to even guess how many miles the trip would be and, indeed, indicated he had no idea how far away the mine was. (Tr. 242-43.) Finally, and most significantly, Osborne gave Wendell $800.00 on November 13, but Wendell claimed that he could not use it for gas because he was "discharged from my job" and had to use the money for his children's Christmas gifts that he had on lay away. (Tr. 244.) As has already been noted, he was only out of work, if it can be called that, for a Sunday and if he had used the money for gas, he would have had a job to pay for the gifts. Therefore, I conclude that Wendell McClain's failure to report to work at Mine No. 2 was not justified.

With regard to the other three Complainants, Osborne testified that: "On October 22nd, I told all four employees that there will be work for them on Monday morning at 7:00 a.m." (Tr. 528.) He stated that he did not tell the miners directly, but told them through Hamilton and their attorney. (Tr. 529.) While he was not sure of the date, Hamilton testified that Osborne and he had a conversation "about the guys coming back to work." (Tr. 403.) Accordingly, I find that such an offer was made.

Osborne further testified that:

> On the 24th, Coy McClain called my home and told me that he had a better job, that he was quitting and wanted me to meet him at the mine site to get his training papers and his — any other thing else he had there. Of course, you have to have that to go to another job. And I did that. On October the 25th, Wendell was the only employee that showed up for work.

(Tr. 529.) Coy professed not to recall this incident and, in fact, was very evasive when questioned about it. (Tr. 173-75.) Hamilton, however, recalled that Osborne told him that Coy had quit because he got a better job. (Tr. 397-98.) In addition, the evidence shows that Coy worked at McPeaks Energy from October 17 through November 12 at $17.00 per hour, more than the $14.00 per hour he was making at Misty Mountain. (Govt. Ex. 24.)

Concerning Conway and Damron, Osborne further testified that on October 25: "I talked to Rick and he told me that Gary and Wade told [their attorney] that they were going to find another job . . . ." (Tr. 529.) He went on to state that:

> On October the 26th, I called Joan, Rick's Secretary, and I told her that I could place one of these two men if they wanted a job. . . . She said she would call Rick and tell him what I said . . . . On October 27th, Joan called me and told me that Rick said if I wanted to place those men at another mine site that I could get in touch with them. [I] called Joan back, she told me that Gary and Wade both had gotten a job, they were not interested in going back to work Rick had told her.

(Tr. 529-30.) While this testimony contains a great deal of hearsay, it was not disputed by the other parties involved, nor was Osborne cross examined about it. Furthermore, the testimony was corroborated by Hamilton, who testified that: "I'm not sure of the dates, but I do remember these conversations taking place, that you had called Joan to relay the information to me and I gave her an answer to give back to you that you could have placed the guys at another mine. And I also remember that the guys had found another job." (Tr. 402.)

The Commission has held that: "If a suitable offer [of reinstatement] was made and refused, then the need to offer reinstatement now is moot." *Munsey v. Smitty Baker Coal Co., Inc.*, 2 FMSHRC 3463, 3464 (Dec. 1980). I find that Osborne made a suitable offer of reinstatement to the four Complainants. In this connection, the fact that the offer was first made to settle the temporary reinstatement applications does not mean the offer was not suitable. The miners went back to work in the same positions and at the same pay as they originally had. When they were fired a second time, Osborne made it known to them that they could return to Mine No. 5 or to other mines that he operated. Furthermore, after October 14, Ratliff, who seems to have

been the catalyst for all of the problems at the mine, had resigned. Instead of accepting the offers, Coy McClain, Conway and Damron opted to get other jobs. Wendell McClain worked at Mine No. 5 until it closed and then chose not to accept the offer of work at another mine without articulating a legitimate reason for doing so.

Since Osborne made all of the miners suitable offers of reinstatement, which they elected not to accept, I conclude that they are not now entitled to reinstatement.[3]

Back Pay

Turning next to the issue of back pay, the Commission has stated that:

> Generally, when a discriminatee is unconditionally and in a bona fide fashion offered reinstatement, the running of back pay is tolled. B. Schiel and P. Grossman, *Employment Discrimination Law*, at 1432 2d ed. (1983); at 279-80 (2d ed. 1983-84 Supp. 1985); *see Munsey v. Smitty Baker Coal Company, Inc.*, 2 FMSHRC 3463, 3464 (December 1984) (suitable job offer tolls back pay due discriminatee).

Bryant v. Dingess Mine Service, 10 FMSHRC 1173, 1180 (Sept. 1988). Consequently, for the same reason that the Complainants are not entitled to reinstatement, I conclude that they are only entitled to back pay up to the time that they refused reinstatement.

Coy McClain, although fired on August 30, actually worked at the mine from August 31 until he was discharged again on October 14, a Thursday. His pay record shows that he was paid $238.00 for 17 hours work that week. (Govt. Ex. 18.) However, the evidence is that he was sent home early every day that week. The pay record of Gordon Stanley was put into evidence and used by the Secretary as a guide to determine the number of hours worked at the mine on a given week. (Gt. Ex. 20, Tr. 408-09.) Stanley's pay stub for the week of October 10-16 shows that he worked 34 hours. Therefore, I find that Coy McClain is entitled to another 17 hours of pay for that week, or $238.00. Coy went to work for McPeak's Energy on October 17 and told Osborne on October 24 that he was quitting because he had found a better job. Thus, he is not entitled to

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[3] The Complainants' statements that they desire to be reinstated appear somewhat disingenuous inasmuch as after leaving Misty Mountain they all got jobs paying $17.00 per hour, as opposed to the $14.00 per hour they received at Misty Mountain, Mine No. 5 is closed, Misty Mountain Mining has gone out of business and they testified that Mine No. 5 was a very unsafe mine. All of the miners have work histories that can only be described as sporadic and they were apparently not working at the time of the trial. However, the fact that they were discriminated against does not afford them lifetime re-employments rights with Misty Mountain any time they are fired, get laid-off, or quit a job. Once they refuse reinstatement, they are not again entitled to it.

any other back pay. I conclude that Coy McClain is due back pay of $238.00 plus interest until the date of payment.

Wendell McClain was fired on August 30 and returned to work on October 4. He was fired again on October 14. The mine was closed from October 15 until October 25, at which time he returned to work and worked until the mine closed for good on November 13. He turned down, by not showing up, Osborne's offer of work at another mine beginning on November 15. Therefore, he is entitled to back pay from August 31 until October 3 and for an additional 17 hours for the week of October 10-16.

Wendell's brother, Coy, earned $560.00 for 40 hours work the week of August 29 through September 4, $462.00 for 33 hours work the week of September 5 through September 11, $448.00 for 32 hours work the week of September 12 through September 18, $504.00 for 36 hours work the week of September 19 through September 25, and $448.00 for 32 hours work the week of September 26 through October 2. (Govt. Ex. 18.) Unlike the Secretary, I find Coy McClain's hours more representative of what Wendell would have worked during that period than the hours put in by Gordon Stanley, who was clearly a senior employee, while the McClains were very new. Therefore, I conclude that Wendell McClain is entitled to back pay of $2,422.00 for the period from August 30 through October 3 and $238.00 for the week of October 10 through October 16, for a total of $2,660.00.

This $2,660.00 must be offset by the $800.00 given to Wendell McClain by Osborne on November 13. On November 19, 2004, Wendell McClain and his wife, Cynthia, entered into a written agreement with Stanley and Wayne Osborne which states:

> I, Wendell McClain, in exchange for the sum of $800.00 paid in full by check number 6541 hereby agree to drop any and all litigation brought through the U.S. Department of Labor and brought personally against Stanley Osborne, Wayne Osborne and Misty Mountain Mining, Inc. regarding my employment at Misty Mountain Mining, Inc. I also affirm that neither I nor any of my dependents have any further claims against Stanley Osborne, Wayne Osborne, or Misty Mountain Mining, Inc.

(Resp. Ex. A.) Wendell claimed that he just glanced over the document and did not know what he was signing. (Tr. 250.) He asserted that he thought he was signing for money that Osborne owed him. (Tr. 258.) His testimony on what he thought this document was for was evasive and inconsistent at best. (Tr. 250-60.) However, since he did not consult an attorney, since he is only entitled to back pay through October 16 and since this case was brought by the Secretary, who was not advised of the transaction at the time, I will give him the benefit of the doubt that he did not understand what he was signing and hold that the $800.00 and the document will only be considered to offset any back pay he is due. Accordingly, I conclude that Wendell McClain is entitled to back pay of $1,860.00 plus interest until date of payment.

Gary Conway and Wade Damron were fired on August 30 and did not return to work, for reasons of their own, until October 11. They were discharged again on October 14 and turned down Osborne's offer of work on October 25. Therefore, they are entitled to back pay from August 31 through October 3, but not for the week of October 4-8 since their failure to work was voluntary on their part, and for an additional 17 hours for the week of October 10-16. As with Wendell McClain, I find that they would have worked the same hours as Coy McClain. Therefore, I conclude that Gary Conway and Wade Damron are each entitled to back pay of $2,660.00 plus interest until the date of payment.

Employment Benefits, Medical Expenses and Other Damages

The only evidence of other damages offered at the trial was Coy McClain's claim that he lost his house as a result of his discharge. The amount of damages he is claiming was not specified. Coy testified that he was purchasing a home on a rent-to-buy contract in July 2004. (Tr. 152-53.) He said that the monthly payment was $350.00. (Tr. 137.) He testified that he was up to date with his payments until October 2004 at which time he missed a payment. (Tr. 137.) He offered into evidence an undated statement from his landlord, Diane Addington, which stated: "Coy McClain intered [*sic*] in a rent to own land contract for the amount of 17,000.00[,] paying the amount of 350 per month in July of 2004 and was evicted Nov. of 2004[.] Left owing 850 still due and payable now. The contract was void due to non payment of rent." (Comp. Ex. 1.)

Coy could not explain how, if he had made the July, August and September payments, he owed $850.00 when he was evicted in November. (Tr. 154-55.) His testimony was inconsistent and evasive on the issue of losing the house. Furthermore, the evidence is that he was working at least through November 12 and, at most, was not paid $238.00 he would have earned for the week of October 10-16. Therefore, I conclude that Coy may indeed have lost his house, but if he did, it was not because of his discharges. Accordingly, I will not award him damages for the loss of his house.

Liability

Misty Mountain Mining, Inc., is a Kentucky corporation. (Govt. Ex. 21.) The MSHA Legal ID Report for Mine No. 2 shows that Misty Mountain's President is Wayne Osborne and Stanley Osborne is listed as Vice-President. (Govt. Ex. 21.) Wayne Osborne is apparently Stanley Osborne's son. (Tr. 334.) Stanley Osborne testified that he owned three Misty Mountain mines, none of which were in operation on the date of the trial. (Tr. 329.) However, the Secretary has put into evidence Assessed Violation History Reports for four Misty Mountain mines, No. 1, No. 2, No. 4 and No. 5. (Govt. Ex. 9.) Those documents show that Misty Mountain's ownership of the mines was as follows: (1) Mine No. 1 from May 8, 2003, until July 20, 2004; (2) Mine No. 2 from May 8, 2003, until April 10, 2005; (3) Mine No. 4 from March 9,

2004, until December 31, 9999;[4] and (4) Mine No. 5 from June 29, 2004, until January 17, 2005.

Stanley Osborne also testified that he owns Sister Bear Mining. (Tr. 339.) Further, there is some indication that Sister Bear Mining owned the Misty Mountain Mines before Misty Mountain. (Tr. 348.) However, no further evidence was adduced or offered about Sister Bear Mining.

Finally, Stanley Osborne testified that his son, Josh Osborne, owns Midgard Mining Company which operates two mines, No. 1 and No. 2, and that the No. 2 mine is the former Misty Mountain No. 2 mine. (Tr. 337, 342.) Stanley Osborne further testified that Misty Mountain owned Mine No. 2 until December 1, 2004, "after that it was owned by Foggy Mountain Mining before it was owned by Josh." (Tr. 342.) The MSHA Legal ID Report for Mine No. 2 shows that Midgard Mining Company is a limited liability corporation. (Govt. Ex. 22.)

The Secretary asserts that the Complainants should be reinstated and paid back pay by Midgard Mining Company, as a successor operator to Misty Mountain Mining. She bases this proposition on *Terco, Inc. v. FMSHRC*, 839 F.2d 236 (6th Cir. 1987), wherein the Sixth Circuit Court of Appeals upheld the Commission's nine factor test for establishing successor liability. While the Sixth Circuit did indeed approve the Commission's nine factor test, the Secretary has neglected to show how it applies in this case.

Moreover, the Complainants have a bigger problem than applying the test. In every case in which the nine factor test has been used to establish successor liability, the successor has been a party to the proceeding. *See, e.g. Meek v. Essroc Corp.*, 15 FMSHRC 606 (Apr. 1993); *Secretary on behalf of Corbin et al v. Sugartree Corp., Terco Inc. and Randal Lawson*, 9 FMSHRC 394 (Mar. 1987); *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980). In this case, neither Midgard Mining Company nor Josh Osborne were made parties to the proceeding and given a chance to defend themselves against the claims. Furthermore, I am not aware of any authority I have to order a company or an individual *not before me* to pay the Complainants back pay or put them to work.

Accordingly, I conclude that Misty Mountain Mining, Inc., is liable for the Complainants back pay, but decline to follow the Complainants' suggestion that Midguard Mining also be held liable. I also hold that Stanley Osborne is jointly and severally liable for the Complainants' back pay. All of the evidence, including his own testimony, shows that he was the operator of the mine, the person in control, and he cannot avoid liability by hiding behind the "corporate veil." *Simpson v. Kenta Energy, Inc. and Jackson*, 11 FMSHRC 770, 780 (May 1989).

On the other hand, I do not find Simon Ratliff liable since he was merely an agent of the

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[4] I take this to mean that the mine was still in operation on April 18, 2005, the date the report was requested, although the most recent citation listed in it was issued on June 29, 2004.

corporation and not a *de facto* operator. There is no evidence he had any ownership interest in the company. Nor is there any evidence that he was acting outside the scope of his authority as superintendent when he fired the Complainants.

Credibility of Witnesses

On the whole, I found the main protagonists in this episode, Simon Ratliff, the McClains, Conway and Damron, to be of doubtful credibility. Not only did they have obvious interests in the outcome of these cases, but their testimony, in addition to the specific instances already noted, was characterized by selective memory, inconsistencies and self-serving statements. I have tried to rely on their testimony only when it was supported or corroborated by other evidence.

Conclusion

I find that the Complainants were fired on August 30, 2004, because they complained about the lack of safety at the mine and were fired on October 14, 2004, because they had filed discrimination complaints. Thus, they were discriminated against in violation of section 105(c) of the Act. They are entitled to back pay up until the time that they turned down reinstatement, but not thereafter. They are not entitled to reinstatement having once declined it, nor are any of them entitled to any special damages. Misty Mountain Mining, Inc. and Stanley Osborne are jointly and severally liable to the Complainants for their back pay, but there is no basis on which to hold any other entity or individual so liable.

Civil Penalty Assessment

The Secretary has proposed penalties of $20,000.00 against Misty Mountain Mining and $10,000.00 each against Stanley Osborne and Simon Ratliff. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

Section 105(c)(3), 30 U.S.C. § 815(c)(3), states that: "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a)." Section 108, 30 U.S.C. § 818, has to do with obtaining injunctions and is not applicable to this proceeding. Section 110(a), 30 U.S.C. § 820(a), provides that: "The operator of a coal . . . mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty . . . ." Thus, Misty Mountain Mining and Stanley Osborne, as the "real operator" of the mine, are jointly and severally subject to a civil penalty for these violations of the Act.

Notwithstanding, that Stanley Osborne is subject to a penalty as an operator, he is not also

subject to an additional penalty as an individual. Simon Ratliff is also not subject to a civil penalty. The only way that Osborne or Ratliff could be personally liable would be under section 110(c) of the Act, 30 U.S.C. § 820(c). That section provides that:

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

(Emphasis added.) Clearly, as shown by the italicized text, this provision only involves violations of mandatory health or safety standards or violations of orders issued under the Act. This case involves a violation of the Act, not of a mandatory health or safety standard or an order issued under the Act. Therefore, section 110(c) does not provide a basis for assessing civil penalties against Osborne or Ratliff.

I am not aware of any other authority in the Act upon which Osborne or Ratliff can be individually subjected to a civil penalty. Accordingly, no civil penalty will be assessed against either as an individual.

Turning to Misty Mountain Mining and Osborne, as the operator, I make the following findings under section 110(i). There is no evidence of any previous violations of section 105(c) by either Misty Mountain Mining or Stanley Osborne. Misty Mountain Mining and Stanley Osborne are, or were, a very small business. The operator was negligent in not monitoring the actions of Simon Ratliff, particularly after the discrimination complaints were filed. There is no evidence that the assessment of a civil penalty will have any effect on Misty Mountain Mining or Stanley Osborne continuing in business.[5] These violations were very serious in that they reflect a disregard of the safety complaints of miners, an opposite reaction to such complaints than the one envisioned by the Act and a reaction which would tend to have a chilling affect on other miners making safety complaints. On the one hand, the operator demonstrated good faith in attempting to abate the violations by agreeing to temporary reinstatement and offering other job opportunities. On the other hand, he took no action against Simon Ratliff after learning of the violations and the problem was not resolved until Ratliff quit.

Taking all of these factors into consideration, I conclude that a $10,000.00 civil penalty against Misty Mountain Mining and Stanley Osborne is appropriate.

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[5] Misty Mountain Mining is apparently no longer in business and Stanley Osborne is apparently not operating any other mines.

Order

Having found that Gary Conway, Wade Damron, Coy McClain and Wendell McClain were discharged by Misty Mountain Mining, Inc. and Stanley Osborne in violation of section 105(c) of the Act, and that Misty Mountain Mining, Inc., and Stanley Osborne are **JOINTLY AND SEVERALLY LIABLE** for each of the following, it is **ORDERED** that:

1. Misty Mountain Mining, Inc., and Stanley Osborne **EXPUNGE** from Gary Conway's, Wade Damron's, Coy McClain's and Wendell McClain's personnel files and company records the discharges and all references to the circumstances involved in them.

2. That Misty Mountain Mining, Inc., and Stanley Osborne **PAY** Gary Conway back pay of **$2,660.00** plus interest until the date of payment.[6]

3. That Misty Mountain Mining, Inc., and Stanley Osborne **PAY** Wade Damron back pay of **$2,660.00** plus interest until the date of payment.[6]

4. That Misty Mountain Mining, Inc., and Stanley Osborne **PAY** Coy McClain back pay of **$238.00** plus interest until the date of payment.[6]

5. That Misty Mountain Mining, Inc., and Stanley Osborne **PAY** Wendell McClain back pay of **$1,860.00** plus interest until the date of payment.[6]

6. That Misty Mountain Mining, Inc., and Stanley Osborne **PAY** a civil penalty of **$10,000.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Marybeth Zamer Bernui, Esq, Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37215

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[6] The proper method of calculating interest on back pay is: *Amount of interest = the quarter's net back pay x number of accrued days of interest* (from the last day of that quarter to the date of payment) *x the short-term federal underpayment rate. Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (Nov. 1988).

Mr. Stanley Osborne, VP, Misty Mountain Mining, Inc., P.O. Box 165, Jonancy, KY 41538

Mr. Simon Ratliff, P.O. Box 343, Lookout, KY 41542

Wes Addington, Esq., Appalachian Citizens Law Center, Inc., 207 W. Court Street, Suite 202, Petersonburg, KY 41653

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601New Jersey Ave., N.W., Suite 9500
Washington, DC 20001-2021

October 31, 2005

MARK W. GIBSON	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. LAKE 2005-84-D
v.	:	VINC CD 2005-01
	:	
TRIPLE C TRUCKING, INC.,	:	Craney Mine
Respondent	:	Mine ID 12-01732 FIK

DECISION

Appearances: Mark W. Gibson, Washington, Indiana, *Pro Se*;
Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Mark W. Gibson against Triple C Trucking, Inc., pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A trial was held in Washington, Indiana. For the reasons set forth below, I find that the Complainant was not discharged by Triple C because he engaged in activities protected under the Act.

Background

Triple C Trucking, owned and operated by Michael Childers, has been in the coal hauling business for almost 29 years. It began operating in eastern Kentucky and moved into southern Indiana about three and one half years ago. The company now operates 18 or 19 trucks a day hauling coal from two sites.

Mark Gibson was hired as a truck driver by Triple C in late October 2004. He had on-the-job training on November 4, and began working on November 5, 2004. He worked six days a week, except for Thanksgiving and some other days off, through December 11, 2004. He was discharged on December 11.

Alleging that he was terminated for engaging in activity protected under the Act, Gibson filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA), under section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on January

10, 2005.[1] On March 24, 2005, MSHA informed him that, on the basis of a review of the information gathered during its investigation, "MSHA has determined that facts disclosed during the investigation do not constitute a violation of section 105(c)." Gibson then instituted this proceeding with the Commission, under section 105(c)(3), 30 U.S.C. § 815(c)(3), on March 30, 2005.[2]

Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides that, a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "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 (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

In order to establish a *prima facie* case of discrimination under section 105(c)(1), a complaining miner must show: (1) That he engaged in protected activity; and (2) That the adverse action he complains of was motivated at least partially by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

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[1] Section 105(c)(2) provides, in pertinent part, that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

[2] Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

In his complaint to MSHA, Gibson claimed that he was discriminated against by Triple C because: "I was discharged by the Shop Supervisor (Merle) and (Owner) Mike Childers for reporting unsafe conditions on the trucks I was assigned to operate. I reported these conditions on the Vehicle Inspection Report." (Comp. Ex. 4.) The termination notice given Gibson stated that he was being discharged for "insubordination" and recited as justification:

> Not following a direct order from Shop Supervisor. Pre-trip inspection that you filled out stated that rear tires was [*sic*] worn excessively. Shop Supervisor told you that this truck was parked until new tires could be put on. Mark started the truck and was going to drive it even though he had been told not to. During probation period your performance does not meet our requirements."

(Comp. Ex. 3.) As discussed below, I find that Gibson did engage in protected activity, but that his discharge was not related to that activity.

There is no dispute that Gibson engaged in protected activity. He did so by filling out a pre-trip inspection report indicating that truck 567 had three worn tires. Nor is there any doubt that he was fired. The question in this matter, as it frequently is in discrimination cases, is whether Gibson was fired because he wrote up the truck. The answer is that the evidence is clear that he was fired as the culmination of several instances of failure to follow instructions, bad attitude and insubordination, not because he caused truck 567 to be taken out of service.

Gibson said that he first filled out an inspection report on truck 567 on November 30. He testified that on December 11, at the start of work:

> I was standing up on the running board [of truck 567] and [Merle Covert] was screaming and hollering at me, something. And so, I got down off the side of the truck and went over to him. And he said, you're not supposed to be operating that truck because you wrote up on the inspection sheet the tires were bad.

(Tr. 17-18.) Gibson testified that he did not drive truck 567, but drove trucks 780 and 763 that day. (Tr. 18.) He related that when he returned at the end of the day, he was given his termination notice. (Tr. 18-19.) He claimed that he had no argument with Merle Covert, the shop supervisor, nor did he cuss at him. (Tr. 56.)

The company's version of this incident is contrary to Gibson's.[3] Jeremy Bell testified that on the morning of December 11, he went in to talk to Covert, while his truck was being fueled. Covert told him he wanted to see Gibson to let him know not to drive truck 567. Bell testified

[3] Covert died prior to the hearing. (Tr. 64.)

that:

> I went out and was looking around, walking around my truck, you know, looking to see if he's out in the parking lot or out at one of the trucks. And, I seen him, and I told him Merle wanted to talk to him. And, he said, what about.
>
> And, I told him that it was, 567 was being shut down because of the tires that had been wrote up on them, that Merle said to go ahead and drive 797. And, whenever I told him that, he said he wasn't driving, you know, F'ing 797, he was driving F'ing 567 and walked off.

(Tr. 83-84.)

Childers testified that on the afternoon of December 11, Covert told him that he had had a confrontation with Gibson over truck 567. He stated that: "It was related to me that Merle seen Mark start the truck, and he went out and he told Mark that he could not drive that truck that day, and Merle told me that Mr. Gibson told him that he was going to drive that truck . . . ." (Tr. 102.) Childers said that after hearing this, he started doing some investigating. He testified that:

> I called the lady at the scale house who weighs the trucks. And, she also told me she had had problems with Mr. Gibson. And, a couple of other guys, the loader guys there in the coal yard.
>
> And then I talked with Jeremy B[e]ll, the lead driver. He said he had had a confrontation with him. And, the other lead driver at the time which was Mark Winager, he had said he had a confrontation with him. And, I just thought it was time to cut our losses, before he got someone hurt.

(Tr. 102.) He went on to state that he learned of other problems with Gibson, such as: "Other issues like not being on the right channel, not communicating with the guys. You know there's intersections, they run end dumps on the same roads we run scrapers. You know it's imperative that these guys stay on the right channel, so they know about traffic and communication." (Tr. 103.)

When specifically asked if he fired Gibson for reporting the tires on truck 567, Childers responded: "Has nothing to do with that. If I fired every guy that wrote up a safety issue, I wouldn't have a man out there." (Tr. 109.) Glendon Hayes, the truck supervisor, testified that pre-shift inspection reports are filled out daily on the trucks, that they deal with safety issues on a regular basis as a result of the reports and that no one had ever been discharged for filling out such a report. (Tr. 74.) Bell concurred. (Tr. 88.)

Conclusion

Gibson engaged in protected activity when he reported three tires that he believed needed to be replaced on truck 567. His discharge was precipitated by his confrontation with Covert over truck 567, but he was not fired because he filed the pre-shift inspection report. Rather, the unrebutted evidence conclusively demonstrates that he was fired because he failed to follow directions and he had encounters with both lead drivers, the woman at the scale house, loaders at the coal piles and finally with the shop supervisor. In addition, I did not find Gibson to be a credible witness. His testimony was characterized by evasiveness and inconsistencies. Further, he was argumentative throughout the trial and evidenced a temper which makes reports of his confrontations very believable. Consequently, I conclude that the Complainant was not discharged for engaging in protected activity, but discharged for reasons completely unrelated to the protected activity.

Order

Gibson has not established that he was fired for engaging in activity protected under the Act. Accordingly, his Discrimination Complaint filed against Triple C Trucking, Inc., under section 105(c) of the Act, is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

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/sb

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