NOVEMBER 1987

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

NOVEMBER 1987

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

Secretary of Labor, MSHA v. Mid-Continent Resources, Inc., Docket No. WEST 85-19. (Judge Lasher, October 15, 1987)

Local Union 1261, Dist. 22, UMWA v. Consolidation Coal Company, Docket No. WEST 86-199-C. (Judge Morris, October 22, 1987)

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

Ronald Tolbert v. Chaney Creek Coal Corporation, Docket No. KENT 86-123-D. (Motion to reopen case from Commission's June 22, 1987 Order denying Review)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 10, 1987

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

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

ORDER

BY THE COMMISSION:

In this discrimination case that arose under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), counsel for complainant Ronald Tolbert has filed a motion requesting the Commission to reopen the proceeding for purposes related to enforcement of the Commission's final decision. Respondent Chaney Creek Coal Corporation ("Chaney Creek") has opposed the motion. For the following reasons, the motion is denied.

This case was commenced by a discrimination complaint filed with the Commission by Mr. Tolbert pursuant to section 105(c)(3) of the Mine Act. 30 U.S.C. § 815(c)(3). On March 16, 1987, Commission Administrative Law Judge Gary Melick issued a decision concluding that Chaney Creek had discriminated against Tolbert in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), by refusing to rehire him from layoff status because he had testified on behalf of Odell Maggard in the latter's discrimination case before the Commission (Docket Nos. KENT 86-1-D, etc.). 9 FMSHRC 580 (March 1987)(ALJ). The judge also ordered Chaney Creek to offer Tolbert employment. On May 12, 1987, the judge issued a remedial order directing Chaney Creek to pay Tolbert $14,453 in back pay and interest through April 8, 1987, as well as any additional back pay and interest to date of reinstatement, and $16,900 in attorney's fees. 9 FMSHRC 929 (May 1987)(ALJ). The judge referred the case to the Secretary of Labor for the proposal of a civil penalty.

On June 8, 1987, Chaney Creek petitioned the Commission for review of the judge's decision. The Commission issued a notice on June 22, 1987, stating that review was not directed. Accordingly, pursuant to operation of the statute, the judge's decision became a final decision

of the Commission on June 22, 1987, 40 days after its issuance. 30 U.S.C. § 823(d)(1). Chaney Creek did not seek review of the judge's decision in a United States Court of Appeals. 30 U.S.C. § 816(a).

Tolbert's motion to reopen alleges that Chaney Creek reinstated Tolbert on May 28, 1987, but to date has paid him only $2,500 of the back pay and $1,000 of the attorney's fees owed under the Commission's final decision. The motion further alleges that Chaney Creek has claimed financial inability to pay and, on September 16, 1987, proposed settling the Commission's judgment by paying Tolbert 35-50 cents on the dollar. Tolbert asserts that two other mining corporations and John Chaney individually are successors and/or alter egos of Chaney Creek, possess the financial ability to satisfy the judgment debt, and should be brought into this proceeding as successors under the Commission's successorship doctrines as enunciated in Secretary on behalf of James Corbin et al. v. Sugartree Corp., et al., 9 FMSHRC 394 (March 1987), pet. for review filed, No. 87-3391 (6th Cir. April 29, 1987). Tolbert requests the Commission to remand this matter to the formerly presiding administrative law judge for further proceedings. The operator has filed an opposition.

The essential nature of the remedy sought by Tolbert is collection of a judgment debt. This relief involves, inter alia, enforcement and execution of the Commission's final decision in this matter. Such an enforcement request is properly directed to the Secretary of Labor. Under the Mine Act, the Secretary is empowered to seek compliance with Commission orders in the federal courts. See 30 U.S.C. §§ 816(b) & 818. We need not and do not express any opinion as to other avenues of relief that may be available to Tolbert.

Accordingly, Tolbert's motion to reopen is denied.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of BRYAN D. PACK	:	
v.	:	Docket No. KENT 86-9-D
MAYNARD BRANCH DREDGING COMPANY and ROGER KIRK	:	

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

ORDER

BY THE COMMISSION:

On September 29, 1987, the Commission granted the petitions for discretionary review filed by complainant Bryan D. Pack and the Secretary of Labor, who has prosecuted the discrimination complaint involved in this proceeding on Mr. Pack's behalf. On November 12, 1987, the Commission received a request from Pack that his petition for review be dismissed because the Secretary is representing him on review in this matter.

Pack's petition for review was received before that of the Secretary and was filed to protect his review rights before us. The Secretary's subsequently filed petition adequately preserves and presents Pack's position on review. Accordingly, upon consideration of Pack's request, his petition for review is dismissed. The Secretary's petition remains for disposition by the Commission.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 2 1987

EDDIE D. JOHNSON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 87-26-D
	:	MSHA Case No. PIKE CD 86-16
SCOTTS BRANCH MINE, Respondent	:	Scotts Branch Mine

DECISION

Appearances: Mr. James Boyd, International Representative, UMWA, District 30, Pikeville, Kentucky, for the Complainant;
Mr. Edward N. Hall, Robinson & McElwee, Lexington, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed on November 12, 1986, by the complainant Eddie D. Johnson pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Mr. Johnson filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and following an investigation of his complaint, MSHA made a determination that a violation of section 105(c) had not occurred, and informed Mr. Johnson of this finding by letter of October 16, 1986. Mr. Johnson then filed a timely complaint with the Commission pro se, but subsequently retained the United Mine Workers of America (UMWA), District 30, to represent him in connection with his complaint. A hearing on the merits of the complaint was held in Pikeville, Kentucky, and the parties appeared and participated fully therein. The parties filed posthearing briefs, and the arguments presented therein have been considered by me in the adjudication of this matter. I have also considered the arguments advanced by the parties during the course of the hearing, as well as the testimony presented in the depositions of the complainant, which are a matter of the record herein.

The complainant contends that he was transferred from a coal producing section (first right) of the mine where he was employed as a continuous-miner operator, and also served as a member of the mine safety committee, to a construction section in retaliation for withdrawing himself from unsafe places and for making complaints about certain unsafe conditions on the first right section. He also contends that mine management has harassed and intimidated him for making safety complaints, and for exercising his rights as a safety committeeman, and that mine management is still harassing him and interfering with his rights as a committeeman. Complainant's initial requested relief was to be transferred back to his job on the first right producing section, and an order prohibiting the respondent from further subjecting him to harassment because of his safety concerns and activities as a member of the safety committee.

The respondent filed a timely answer to the complaint, and it denies that it has discriminated against the complainant or harassed him because of his safety complaints and his activities as a member of the safety committee. The respondent asserts that the complainant's transfer from a coal producing section to a construction section was part of an overall work force realignment which took place on June 2, 1986, and that the realignment was the result of a management decision to realign its work force to increase production on its working sections, including the first right section, in preparation for the installation of a longwall mining machine. Respondent contends that even assuming that the realignment and transfer of the complainant could have been motivated in part by protected activity, which it denies, it nonetheless had a legitimate right and concern for increasing production on the complainant's section in order to retain its production schedule for the installation of the longwall mining machine. The respondent points out that although the complainant was admittedly transferred from a producing section to a construction crew as a continuous-miner operator, he was retained within his same union job classification as a miner operator, for the same working shift, and with the same rate of pay.

The record in this case establishes that since the filing of the complaint, and subsequent to the realignment of June 2, 1986, the first right producing section has been mined out and no longer exists. The complainant has conceded that any requested relief with respect to his return to that section is no longer available to him (Tr. 105). The record also establishes that the complainant is still gainfully employed by the respondent as a faceman on the longwall coal producing section, that he successfully bid on that job subsequent to the

realignment in question, and that he is still functioning as an active member of the mine safety committee (Tr. 106).

The complainant concedes that assuming a finding is made by me that the respondent discriminated against him in violation of section 105(c), the only available remedy, aside from such a finding, would be an order directing the respondent to cease and desist from any further discrimination or acts of harassment against him. Further, during the course of the hearing the complainant's representative indicated that the complainant also seeks an award of monetary costs and expenses incident to the complaint and the hearing, including lost wages for the witnesses who appeared and testified on his behalf (Tr. 107-109).

Issues

The critical issues in this case is whether or not the complainant's realignment and transfer from a producing section to a construction section was prompted or motivated in any way by his engaging in protected safety activity, whether the transfer was in retaliation for those safety activities, and whether or not the respondent harassed, or continues to harass, the complainant for those activities. Additional issues raised by the parties are identified and disposed of in the course of my adjudication of this case.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Pretrial and Bench Rulings

Respondent's pretrial motions for summary dismissal of the complaint on the ground that the complainant's complaint, when considered in conjunction with his pretrial depositions, did not establish a viable complaint of discrimination, particularly in light of the respondent's offer to reinstate the complainant to the coal producing section from which he was transferred (which was rejected by the complainant), and his admission that he did not consider his transfer as a form of management "punishment" WERE DENIED.

During opening statements at the hearing, respondent's counsel renewed his motion for summary judgment and dismissal of the complaint. In support of his oral motion, counsel stated that since the complainant successfully bid on a job as a longwall faceman on a coal producing section, and since the first right section has been mined out, his requested relief to be transferred back to the first right producing section is moot. Counsel pointed out that the complainant suffered no loss of pay or job status as a result of the transfer, and that he is still functioning as a member of the mine safety committee. Counsel further pointed out that in his pretrial depositions, the complainant admitted that mine management never indicated to him that he was being transferred because of his safety complaints, and that "the only thing the court could do--at least the only thing that seems plausible--would be just to say that the company discriminated against this individual" (Tr. 19-22).

Complainant's representative agreed that the first right section no longer exists. He stated that he intended to establish that the complainant was discriminated against, and that at the time he bid on the longwall faceman's job, the respondent "used discriminatory actions against him to keep him from getting the job," and that the mine manager stated that the realignment, which resulted in the complainant's transfer, was motivated by "chicken shit complaints." Complainant's representative further asserted that Mr. Johnson's transfer was made by management to keep him off the new longwall section because management considered him to be a "troublesome" safety committeeman (Tr. 28-30).

After consideration of the arguments presented on the record, the respondent's renewed motion for summary judgment and dismissal of the complaint was DENIED (Tr. 34). The parties agreed to incorporate by reference the deposition testimony of the complainant's pretrial depositions (Tr. 37).

At the close of the complainant's case presentation, the respondent renewed its motion for summary judgment and dismissal of the complaint (Tr. 109). The motion was again DENIED (Tr. 114, Vol. II).

Complainant's Testimony and Evidence

Burt Melton, Electrician and Chairman of the mine committee, testified that on May 27 or 28, 1986, he attended

a union-management meeting concerning the proposed realignment, and that when he returned to work the next Monday, June 2, 1986, the proposed realignment was not the same in that Mr. Johnny Damron, the union vice-president, Mr. Russell Ratliff, chairman of the safety committee, and Mr. Johnson were all taken off the first right section and assigned to the construction crew. Mr. Melton believed that none of these individuals were originally scheduled to be realigned as shown in the original posted realignment, and he believed that management had agreed not to move them off the production section (Tr. 41-44).

Mr. Melton stated that during a meeting with Mine Manager Herbert "Tubby" Kinder, on Monday, June 2, he asked Mr. Kinder why he had taken Mr. Damron off the production section, and Mr. Kinder responded "because they had made too many chicken shit complaints and the production was not what it should be up there" (Tr. 45). Mr. Melton confirmed that he also participated in a meeting with management 2-weeks later and Mr. Kinder stated that Mr. Johnson, Mr. Damron, and Mr. Ratliff had been realigned because "the section was not producing the way it should." Mr. Melton stated that Mr. Kinder again mentioned complaints, and while he did not specifically mention "safety complaints," Mr. Melton assumed and speculated that this is what Mr. Kinder had in mind (Tr. 48). Mr. Melton confirmed that he was involved in a grievance proceeding concerning Mr. Johnson's bid for a longwall faceman's job in March, 1987, and that Mr. Johnson was awarded the job (Tr. 48, exhibit C-1).

On cross-examination, Mr. Melton confirmed that he first learned about the realignment of Mr. Johnson, Mr. Ratliff, and Mr. Damron on Monday, June 2, and that based on a prior realignment list which he had seen, these individuals were not scheduled to be affected. Mr. Melton stated that he usually represents all employees on behalf of the union in such realignments, and Mr. John Hodges, the respondent's personnel director, represents the company (Tr. 58). Mr. Melton confirmed that when Mr. Hodges showed him the first list, Mr. Hodges did advise him that it was subject to change (Tr. 59-60). Mr. Melton identified exhibit R-7 as a list similar to the one he saw, but indicated that it was not the "original list" (Tr. 57).

Mr. Melton confirmed that the realignment was made in preparation of the installation of a longwall panel but that certain problems delayed the installation, setting it up, and that the realignment "mostly concerned producing coal on that panel" (Tr. 60). Mr. Melton also confirmed that management

was concerned about production on the third shift right panel, and that he had discussed this with James Ratliff, the assistant mine manager who no longer works for the respondent, in an attempt to resolve what management perceived to be a production problem on that section. Mr. Melton stated that Mr. Ratliff advised him that the senior men would be retained on the production section, and that less senior men would be realigned to the construction crew. Since Mr. Johnson, Mr. Ratliff, and Mr. Damron did not sign off the production section voluntarily, Mr. Melton was surprised to learn that they had been realigned (Tr. 60-64).

Mr. Melton confirmed that mine management had discussed with him a request that men work on Saturday to catch up with the work, and that discussions regarding production on the section had taken place for several weeks prior to the realignment of June 2 (Tr. 69). Thirty-five to 40 men on three shifts were affected by the realignment, and all of the men, except for Mr. Johnson, Mr. Ratliff, and Mr. Damron "were pacified and everything was fine so far as they were concerned" (Tr. 75).

Mr. Melton stated that Mr. Damron, Mr. Ratliff, and Mr. Johnson all filed discrimination complaints with MSHA, but that Mr. Damron and Mr. Ratliff settled their dispute when the respondent agreed to put them back on the production section and the complaints were not further pursued (Tr. 76). Respondent's counsel confirmed that the two cases were settled and that the terms of the settlements were identical to the one offered Mr. Johnson, which he refused (Tr. 77, exhibit R-9).

Mr. James Boyd, confirmed that no grievance was filed with respect to the realignment, and that management was informed of the union's decision to proceed with a section 105(c) discrimination complaint instead. Mr. Boyd stated that the union decided against a grievance because of the cost involved and its belief that it would have received an adverse ruling (Tr. 80). The union believed it could prove discrimination (Tr. 80).

Mr. Melton stated that when he first learned about the realignment on May 27 or 28, and posted a list, Mr. Damron, Mr. Ratliff, and Mr. Jackson were shown as being retained in their jobs on the production section, and he dealt with their cases because they were the only ones who complained to him about the subsequent realignment on June 2 in which they were realigned off the production section to the construction crew (Tr. 82). Mr. Melton confirmed that all three individuals in

question retained their pay and job classifications, and that the action taken by the respondent in this regard was legal (Tr. 84). Mr. Melton stated that he assumed and speculated that management "reached out to Damron, Johnson and Ratliff and proposed to switch them off one section to another because of the safety problems," and that is why the union decided not to file discrimination complaints (Tr. 85-86).

Mr. Melton stated that he decided to opt for the filing of discrimination complaints with respect to the realignment of Mr. Damron, Mr. Johnson, and Mr. Ratliff because he could think of no legitimate reason why management would seek to realign the men in question. He stated that Mr. Ratliff "had several safety complaints," but he had no first knowledge that Mr. Damron ever caused any "safety problems" for management, although Mr. Damron has advised him that he has had "run-ins with his foreman" (Tr. 87). Mr. Melton confirmed that while he has had disagreements with his foreman, none were related to safety matters (Tr. 88). He also confirmed that he has never observed any safety complaints at the mine and that he does not work on a section where coal is produced (Tr. 89). However, he has been involved in "safety issues" that others have complained about in his capacity as an alternative safety committeeman, but he was not affected by the realignment (Tr. 90).

Mr. Melton confirmed that the only other safety committeeman affected by the realignment was Mr. A. B. Thacker, but he lacked enough seniority to maintain his job. Mr. Melton also confirmed that after the realignment, his conclusion that Mr. Johnson, Mr. Damron, and Mr. Ratliff "were left out to dry by management because of their safety activities" was based on Mr. Kinder's statement about the "chicken shit complaints" (Tr. 92). Mr. Melton stated that he never discussed Mr. Kinder's statement with him (Tr. 93). However, when Mr. Boyd met with Mr. Kinder to discuss the reasons from the realignment, Mr. Kinder stated "If I put them back, you will make me put them back," and that Mr. Boyd advised Mr. Kinder that a section 105(c) discrimination complaint would be filed (Tr. 94).

Mr. Melton denied that he was attempting to "put mine management in its place," and he stated that his concern was trying to find out why management realigned Mr. Johnson, Mr. Damron, and Mr. Ratliff in the first place, and that management never gave him any legitimate reasons for their action in this regard (Tr. 95). Mr. Melton confirmed that in a statement which he gave to an MSHA investigator during the

investigation of Mr. Johnson's complaint he told the investigator that Mr. Hodges did advise him that the first realignment list which he saw on May 27 or 28 was "spur of the moment thing and that there could be a change" (Tr. 97). Mr. Melton had no independent recollection that Mr. Hodges told him that the list was subject to change by General Mine Foreman Charles Morley or Second Shift Foreman Otis Slone, but if he so testifies, Mr. Melton could not say he would be lying (Tr. 97). Mr. Melton confirmed that Mr. Donny Saunders, the day shift continuous miner operator placed on the first right section after the realignment was senior in job classification to Mr. Johnson (Tr. 97-98), but that it would have been customary for Mr. Saunders to have taken the lesser seniority miner operator's job on the second shift when he was transferred from the day shift (Tr. 102).

Mr. Melton stated that as a result of the realignment, Mr. Johnson contacted the union because he believed that he had "been put upon" by management, and that after mine manager Kinder indicated that he would not put Mr. Johnson back on his production section unless he was forced to, the union decided to file a section 105(c) discrimination complaint. Mr. Melton stated that during discussions with Mr. Kinder he was informed of the union's belief that Mr. Johnson was realigned because of his safety complaints. Mr. Melton also stated that in the past, Mr. Johnson had advised him that he "felt like he had had trouble with management," especially with Mr. Slone on the evening shift, and that Mr. Johnson had informed him of this "a year and a half ago, I guess." Mr. Melton stated that Mr. Russell Ratliff also informed him of a complaint he had made about water on the track, and that he did so "I guess it had to be a year and a half ago." However, he could recall Mr. Damron making no such complaints. Mr. Melton confirmed that the union and Mr. Johnson decided to file a discrimination complaint because Mr. Johnson felt that he was realigned because of his safety complaints (Tr. 105-111).

Denver Thacker, roof bolter operator, testified that in November, 1986, during job bids on the longwall panel, section boss Glen Matheny offered to put him on a shift paying time-and-one-half if he would put his name back on the bid list for a longwall job that Mr. Johnson had bid on. Mr. Thacker stated that Mr. Matheny told him that he had discussed this with the "old man," namely Mr. Kinder. Mr. Thacker stated that he had taken his name off the bid because of some gas in the panel, and that Mr. Matheny explained that he wanted him to get the job because "if the wrong man got up there, that he could knock us all out of the job" (Tr. 118). Although

Mr. Matheny gave no specific reasons for offering him the inducement of a time and one-half shift, Mr. Thacker speculated that Mr. Matheny did not want Mr. Johnson to get the job because "they did not want a safety man -- or him in particular up there on the longwall" (Tr. 118). Although Mr. Matheny did not specifically mention Mr. Johnson, Mr. Thacker stated that "I just took it he meant Eddie" (Tr. 118).

Mr. Thacker stated that he removed his name from the job bid because "I knowed Eddie could take better care of it than I could. He knows more about safety business," and "I just know I had knocked him out of the job. That is the reason I took my name off" (Tr. 119-120). Mr. Thacker confirmed that he testified in the arbitration proceeding in December 1986, concerning the job bid in question (Tr. 123).

Ricky Varner, roof bolter operator, stated that in December, 1986, he was working on a bolting machine with Mr. Thacker, and that Mr. Matheny came to the working place to speak with Mr. Thacker. After their conversation, Mr. Thacker told him that Mr. Matheny stated to him that he "was wanting him to sign the longwall job to beat Eddie out of it" (Tr. 126). Mr. Varner stated that Mr. Thacker told him that Mr. Matheny had stated that "one man could ruin the whole thing up there," but that he did not identify "the one man" (Tr. 127). Mr. Varner stated that Mr. Thacker also told him that Mr. Matheny spoke to him again the next day and offered him a Saturday shift if he would take the longwall job (Tr. 128). Mr. Varner stated that in response to a question by Mr. Thacker as to why the respondent would ask him (Thacker) to bid on the job, Mr. Varner told Mr. Thacker that because of gas on the section, the respondent did not want Mr. Johnson there because it thought Mr. Johnson would shut the section down (Tr. 129).

Mr. Varner was of the opinion that the respondent tried to persuade Mr. Thacker to bid on the longwall job to keep Mr. Johnson off that section because he would take care of safety problems. Mr. Varner stated that he has shut his bolter down because of methane on his section, and called it to the attention of management. Although he has been realigned in the past, he did not believe that this was done because of his complaints about methane. He was not part of the June 2 realignment involving Mr. Johnson (Tr. 132).

Mitchell Mullins, head drive man, testified that in April, 1986, he overheard section foreman Randy Smith call out on a mine phone to shift foreman Otis Slone and inform him that the men in the section wanted to exercise their

individual safety rights to be on the outby side before a shot was fired (Tr. 144). Mr. Mullins did not know whether the men proceeded outby before the shot was fired because he was too far away to even hear the shot (Tr. 145).

Representative Boyd introduced a copy of a grievance which was filed over this shot firing incident (Tr. 145; exhibit C-2). Respondent's counsel stated that the grievance was settled in order to avoid calling in Federal and state inspectors to determine whether the shot was accomplished in accordance with the regulations, and to avoid further interruption to production (Tr. 147). He took the position that the shot was legal, and the parties agreed that MSHA was not called in to resolve the matter (Tr. 148). Mr. Boyd confirmed that the shot was fired 1,000 feet outby where the men were working on the section, but took the position that the men were not given the opportunity to be outby and that Mr. Slone went ahead and fired the shot before the men had an opportunity to be outby. Mr. Boyd confirmed that the grievance was filed during the next shift and that no section 103(g) inspection was requested (Tr. 151), and that no safeguard notices were ever issued covering the shot (Tr. 155).

Mr. Mullins confirmed that he had no independent knowledge about the details of the shot, did not hear it, did not know whether the men actually left the mine, and that he did not leave. When asked whether he had any personal knowledge as to what this case is all about, Mr. Mullins responded "the harassment and trouble Otis Slone and the company has given Eddie on his job classification, if he is qualified to do the job or not or who is better qualified they want in there besides him." Mr. Mullins confirmed that he has no personal knowledge of any harassment of Mr. Johnson (Tr. 162).

Donald Robinson, general laborer, was called to testify as to his knowledge of an incident of January 8, 1986, referred to by Mr. Johnson in his complaint. Mr. Johnson stated that he filed a safety grievance over the alleged failure by shift foreman Otis Slone to follow a pillar plan.

Mr. Boyd stated that this incident is part of "a pattern of discrimination charges and of acts that have been committed against Mr. Johnson by the company" (Tr. 166). Mr. Boyd asserted that Mr. Slone tried to get Mr. Johnson to cut the left-hand side after the right-hand side had already been cut, but that this was not done and "they finally pulled away from it and went to another block. They backed up, timbered it off and started mining again" (Tr. 167). Mr. Boyd conceded that Mr. Johnson exercised his safety rights, refused to cut the

pillar, and withdrew himself. However, he was not assigned other work, and the crew simply backed out, set timbers, and continued mining in another area (Tr. 169). Mr. Boyd implied that Mr. Slone attempted to have Mr. Johnson cut a pillar which would have been in violation of the pillar plan (Tr. 169). Mr. Boyd suggested that Mr. Johnson "took a lot of ribbing" over that incident (Tr. 170).

Mr. Robinson stated that he recalled the incident and he confirmed that he and the rest of the crew exercised their safety rights and withdrew from the pillar area. However, he stated that Mr. Slone did not insist that the pillar be mined after they withdrew and that he could not recall "no big hassle" over the incident (Tr. 171).

On cross-examination, Mr. Robinson stated that Mr. Slone simply asked the crew to mine the pillar, but they believed it was unsafe and chose not to. The crew withdrew, and the area was timbered, and mining continued in another area (Tr. 174).

Lynville E. Johnson, general laborer, was called to testify about an incident which occurred during December, 1985 to January 1986, during which section foreman Earl Matheny asked Mr. Johnson to take some coal cuts from an area which Mr. Johnson believed was unsafe. Mr. Slone was called in, and was mad, and both Mr. Matheny and Mr. Slone stated that Mr. Johnson did not want to work (Tr. 176). Mr. Johnson stated that Mr. Slone stated "God damn it. Eddie don't want to work no way" (Tr. 177).

Mr. Boyd stated that this incident is another example of a section foreman asking men to do work in an area which they believed was unsafe (Tr. 189). Mr. Boyd also alluded to a rock fall which covered up a continuous-mining machine (Tr. 187).

On cross-examination, Mr. Johnson alluded to another work force realignment which occurred during December, 1985, and respondent's counsel asserted that this realignment resulted in a union grievance, but that the arbitrator rejected any notion that the realignment resulted from any safety complaints (Tr. 181).

Since it appeared that the men exercised their safety rights and withdrew from areas which they believed to be unsafe, Mr. Boyd was asked to explain the relevance of these incidents to Mr. Johnson's complaint of discrimination. He responded "I am trying to show the integrity of the mine

foreman, Otis Slone, and things he will do and the actions he has took" (Tr. 190). Mr. Boyd stated that he did not believe that Mr. Slone was involved in the realignment decision made by management that is in issue in this case (Tr. 190).

Jerry D. Hicks, continuous miner operator, was called to testify about an incident concerning the use of 5-foot glue for 6-foot roof bolts. Mr. Hicks stated that this occurred approximately 2 years ago, and after concluding that the use of 5-foot of glue for 6-foot bolts may have been unsafe, Mr. Johnson asked Mr. Slone to send a "safety man" in to make a determination. Mr. Slone came into the section and asked Mr. Hicks whether the use of the glue was safe. Mr. Hicks stated that he was of the opinion that additional "spot bolting" with 4-foot bolts, using 4-foot of glue, would make the area safe. Mr. Slone asked Mr. Johnson for his opinion, and Mr. Johnson told Mr. Slone that he was not qualified to make the decision and asked Mr. Slone "to have someone with a little more authority come in and check it out." No safety man was called in, but Mr. Slone proceeded to spot bolt with 4-foot bolts. Mr. Hicks confirmed that since it could not be determined how many breaks had been bolted with 5-foot glue, spot bolting was done for two breaks "to make sure they got it all" (Tr. 195-197).

Mr. Hicks stated that Mr. Slone "was wanting us to run coal" and asked each crew member whether it was safe to continue mining with the area bolted with 5-foot of glue. Mr. Hicks stated that the section "was awful low on production" and that Mr. Slone informed the crew that "he thought we ought to pick it up a little" (Tr. 197).

Mr. Hicks testified to an incident which occurred in September of 1985, when the men on the section were questioned in the mine office about low production on one evening. After listening to the explanations, foreman Charles Morley concluded that the low production resulted from "unsatisfactory work all the way across the board" and that everyone on the shift was given a warning. However, Mr. Eddie Johnson was given an unsatisfactory work slip (Tr. 198). Mr. Hicks recalled that on one Saturday evening shift Mr. Slone made a statement that Mr. Johnson "was trying to slow things down," but he could not recall whether it was the same evening when the warnings were given out. He also stated that Mr. Slone "may not have been talking totally to Eddie. He might have been talking to all of us. I really can't remember. It has been a long time" (Tr. 201).

Mr. Hicks identified the foreman in charge during the spot bolting-glue incident as Miles Robinson. He stated that Mr. Robinson was fired shortly after the spot bolting was done, and was replaced by foreman Randy Smith (Tr. 203). Although Mr. Robinson would make air readings and gas checks, Mr. Hicks stated that "he wasn't real thrilled about it," and that Mr. Smith would "shake his head and go ahead and take it" (Tr. 204).

Mr. Hicks stated that when he and Mr. Eddie Johnson had an equipment break down with their mining machine, Mr. Slone seemed to question Mr. Johnson more, and would say little to him, and that Mr. Smith would not say much about it (Tr. 205). Mr. Hicks stated that Mr. Slone told the men to cut out the "sweetie (coffee) breaks" and would sometimes get after the crew for waiting around for him to instruct them as to their work duties (Tr. 206).

On cross-examination, Mr. Hicks stated that it was perfectly appropriate for someone other than the shift foreman to fireboss the section before energizing the equipment, and that the spot bolting which took place came about as a result of the complaints concerning the glue (Tr. 211). Mr. Hicks confirmed that he heard "rumors" that Mr. Eddie Johnson received an unsatisfactory work slip because he had previously received a verbal warning (Tr. 212).

Tommy Tackett, electrician, was called to testify about an incident concerning a continuous-mining machine being worked on by Mr. Slone. Mr. Slone was working under the head of the miner attempting to replace a conveyor chain, and the miner head was supported by a scoop bucket rather than being adequately blocked or otherwise supported with wooden crib blocks. When Mr. Johnson observed Mr. Slone under the miner head, he told him that "it didn't look very safe," and that Mr. Slone replied to Mr. Johnson "If you got anything to say about this, Eddie, we will talk about it tomorrow. All you are wanting to do is hold up production" (Tr. 223). Mr. Tackett stated that the power was not disconnected, and in his opinion, Mr. Slone was engaged in an unsafe practice (Tr. 223-226). Mr. Boyd confirmed that the incident was not reported to MSHA, and no violation was issued (Tr. 233).

Mr. Tackett confirmed that he has worked in the mine for 7 years, and he indicated that during this time period Mr. Johnson was reluctant to work under roof conditions which he believed were bad and needed additional support and a section foreman would take the opposite view and try to convince

him or the crew that the roof was sound and work should continue (Tr. 234-236). Mr. Tackett stated that on one occasion he and foreman Randy Smith had a difference of opinion as to whether a roof area was sound. Mr. Smith thought the roof was sound and suggested that he continue bolting. Mr. Tackett refused, and after retreating from the area, the roof fell (Tr. 239). Mr. Tackett conceded that any time he and a foreman disagree as to whether work can proceed safety, he has exercised his safety rights to withdraw, and the foreman would assign him to some other work (Tr. 239).

Mr. Tackett stated that on one occasion 2-months before the realignment, bad top was encountered at the feeder and Mr. Slone was called in to look at the area. Mr. Slone assured the crew that the feeder top would be taken care of on the next shift, and assigned the crew to work on the top in the intake. The feeder top was not corrected by the next shift, and Mr. Tackett's crew had to correct the condition when they next went to work (Tr. 241-242).

Mr. Tackett testified about the incident concerning inadequate glue which was used in conjunction with resin roof bolts. Mr. Tackett confirmed that Mr. Slone was called into the section, and disagreed with Mr. Johnson's assessment that anything was wrong, and indicated that work should proceed. After arguments, Mr. Slone agreed to spot bolt the area, and assigned the crew to other work shoveling the belt (Tr. 244).

Mr. Tackett alluded to another incident in which Mr. Johnson complained to foreman Randy Smith about a missing handle on a continuous-mining machine fire suppression device, and after giving the respondent 24-hours to repair the device, it was repaired (Tr. 245). Mr. Tackett stated that he had previously reported the condition, but that it was not taken care of until Mr. Johnson complained (Tr. 248). Mr. Tackett also alluded to another incident in which Mr. Johnson asked him to calibrate a methane monitor on a continuous-mining machine, and that he did it. However, he indicated that materials were not always readily available on the section to do the calibration (Tr. 249). Mr. Boyd conceded that in this instance, the calibration was done and that the necessary materials was "probably there" (Tr. 255).

Mr. Tackett stated that anytime there was a safety problem or complaint on the section Mr. Slone would come in and always inquired of Mr. Johnson as to the problem (Tr. 257), and that this occurred at times when Mr. Johnson was not the safety committeeman (Tr. 258). Mr. Boyd suggested that this occurred because Mr. Slone may have thought that

Mr. Johnson was the spokesman for the men on the section (Tr. 259).

A. B. Thacker, continuous miner operator, and president of Local Union 2264, confirmed that he worked on the first right section with Mr. Johnson as a miner helper for approximately 6 months in 1984 and 1985. Mr. Thacker stated that there were safety complaints on first right "from the day it started from Eddie Johnson and the whole crew," and that the complaints dealt with "bad roof, methane gas. It was just that way all the time." Mr. Thacker confirmed that he was realigned on June 2, 1986, to the "hootowl" shift, but subsequently signed back to the evening shift (Tr. 266-267).

Mr. Thacker alluded to the feeder bad roof condition incident, and stated that after the condition was reported to the section boss, the men withdrew from the area and foremen Slone and Herald Mullins were summoned to the area, and they asked Mr. Johnson about the problem. Mr. Slone checked the roof test holes and agreed that the top was bad and assigned the men to other work. Although Mr. Slone assured the men that the roof condition would be subsequently taken care of, Mr. Tackett contended that this was not done and that the next shift did some work under the bad top (Tr. 270).

When asked about any "threatening statements" by Mr. Slone to Mr. Johnson over safety complaints, Mr. Thacker mentioned the incident concerning Mr. Slone doing some work under a continuous miner head which was propped up by a scoop bucket. Mr. Thacker described the encounter between Mr. Slone and Mr. Johnson as follows (Tr. 271-272):

> * * * And Eddie asked them -- to the best of my remembrance right now, he asked them, he said, "Do you all feel that this is a safe way to work on that miner? Don't you think you should put a crib under it to protect yourself?"
>
> That kind of got Otis peed off. He got back. He come up in Eddie's face. He told Eddie, He said, "I want to know who you think you are and what gave you the right to tell me and the mechanic that we are doing our job unsafe." He said, "I have worked in the mines a long time. I've never gotten nobody hurt; ain't going to get hurt."
>
> And I told Otis then myself, I said, "Otis, he is a safety representative for

United Mine Workers in this Local and he has got a right to ask that boy is he doing his job safe if he feels he is not. As a matter of fact, I think he ought to write you and Tommy Tackett both up for working in an unsafe condition."

And Otis, he got all over him. He just kept on. And then I told him, I said, "If you have got anything to say, we should wait till we get outside." And Otis more or less, he said, "yeah, we will take it up tomorrow evening." But it never was mentioned no more that I know of.

Mr. Thacker was of the opinion that Mr. Slone engaged in an imminently dangerous unsafe practice and violated the law by working under the miner head. Although he and Mr. Johnson observed him doing the work, Mr. Thacker admitted that no union safety committee complaint was filed, no imminent danger complaint or order was issued, no one complained about it, no one reported the matter to MSHA, the matter was not reported to mine superintendent Kinder, and no violation was ever issued (Tr. 274-276). Mr. Thacker stated further that Mr. Slone took the position that he was not in any danger and stated "I have been mining a long time before you fellows ever got here" (Tr. 276).

Mr. Thacker stated that when he worked with Mr. Johnson on the first right section in 1984 and 1985, Mr. Johnson made one or two safety complaints every day about the roof and ventilation problems (Tr. 276-277). Mr. Thacker stated that he was present many times when Mr. Johnson requested foreman Randy Smith to take air readings, and after doing so, Mr. Slone would appear on the section and would argue about the amount of air on the section. Mr. Thacker also stated that when Mr. Johnson asked Mr. Smith about the "mean air velocity," Mr. Smith would reply that "he didn't know what it meant" (Tr. 279).

Russell Ratliff, roof bolter, confirmed that he was realigned on June 2, 1986, from the first right section to the construction section (Tr. 283, 298). He stated that when he worked on that section for a period of approximately 8 months he often exercised his safety rights and made safety complaints to his section foreman Jerry Bentley, and that "the biggest part of the time, he wouldn't agree with me" (Tr. 285). Mr. Ratliff estimated that he made approximately "a couple of dozen" complaints, and in those instances where

Mr. Bentley disagreed with him, Mr. Bentley would call mine foreman Charles Morley and safety committeeman Charles Cantrell to the section to discuss the matters (Tr. 287).

Mr. Ratliff confirmed that when he complained to Mr. Bentley, he sometimes agreed with him, and sometimes disagreed with him, but that Mr. Bentley did take corrective action (Tr. 288). Mr. Ratliff also confirmed that after discussions with mine management and union safety committeeman about his complaints "we would work out a corrective means of fixing the roof conditions like putting collars up and cribs where it was needed" (Tr. 290). Mr. Ratliff stated that he never exercised his right to "walk off" the section because of his safety complaints and always waited for the arrival of mine management and a safety committeeman to resolve the question (Tr. 291). He confirmed that in those instances where disagreement still existed, Federal or state inspectors were called in (Tr. 292-293).

Mr. Ratliff stated that he was present during a union-management meeting concerning the June 2, 1986, realignment and that mine superintendent Kinder made a statement to him that he would not be put back on the first right section "because of our chicken shit complaints. That was his words" (Tr. 294). Mr. Ratliff further stated that Mr. Kinder also stated that "if he put me back on the section, he would be made to put me back" (Tr. 295).

Mr. Ratliff confirmed that he filed a section 105(c) discrimination complaint, and that the respondent settled the matter by putting him back on the first right section, and this was the only remedy that he sought (Tr. 295). When asked for his opinion as to why he was initially realigned off the section, Mr. Ratliff stated "I guess, you know, where we had so many problems and I would act on them. You know, where I was a roof bolter man, you know, the condition was extreme. That is the worst top I ever worked in" (Tr. 296). Mr. Ratliff confirmed that he lost no pay as a result of the realignment and worked the same shift and the same number of hours. He stated that he wanted to stay on the first right section because he knew the roof conditions and "I feel like I can take care of the men that was on the section better than anyone else could." He confirmed that he was not a safety committeeman at that time, but subsequently became one on June 11, 1986 (Tr. 298-299; 305).

Mr. Ratliff stated that he believed he was initially realigned because of his safety complaints, but conceded that other miners who were also working on his section, and who

made safety complaints, were not affected by the realignment (Tr. 307). In response to further questions in this regard, Mr. Ratliff stated as follows (Tr. 307-308):

> Q. Did you have any clues as to why that was? Had anybody ever threatened you, called you out or showed anger toward you?
>
> A. The statement Tubby Kinder made, the mine manager, was proof enough to me.
>
> Q. When was that?
>
> A. In that meeting.
>
> Q. I am talking about before this happened. Now, prior to this, had Mr. Kinder ever come to you and said, "Listen, what are you trying to do calling all the feds in, calling all the state people in. You are filing complaints left and right and most of these are chicken shit," as you put it -- or I mean as he put it. Did this sort of thing happen before the realignment?
>
> A. No.
>
> Q. Did Mr. Kinder explain what he meant about his comment? Did he indicate to you what kind of complaints he had in mind?
>
> A. No, he did not. I guess it was all complaints in general.
>
> Q. Excuse me?
>
> A. All the complaints in general.

Johnny Damron, longwall shearer operator, and union vice-president, testified that prior to the realignment he worked on the first right section for 6 months as a miner operator. He recalled one safety complaint he made concerning some unbolted roof places, and other complaints which were made by the roof bolters. The complaints were made to section foreman Jerry Bentley, and Mr. Damron stated that Mr. Bentley "always took the attitude, you know, we were trying to slow production" (Tr. 316). Mr. Damron stated that Mr. Bentley would get mad when a union safety committeeman was called into the section in response to the complaints,

and if the complaint was taken care of "it stopped at that point" (Tr. 316).

Mr. Damron could not recall any instances when a Federal inspector came to the section to inspect the roof, but did recall one occasion when a state inspector came in to look at a roof fall (Tr. 317). Mr. Damron stated that on one occasion when he questioned the adequacy of the ventilation on the section, Mr. Bentley "just took the attitude he didn't see it as a serious problem or something" (Tr. 317). On another occasion, when a scoop man refused to go under bad top, mine foreman Charles Morley was called to the section, and he assigned him and a mechanic to set collars and timbers and Mr. Morley "sat there and made smart remarks" (Tr. 318).

Mr. Damron recalled a meeting at which he was present along with Mr. Johnson, Mr. Ratliff, Mr. Boyd, Mr. Melton, and mine management personnel concerning the June 2, 1986, realignment. Mr. Damron stated that Mr. Kinder was informed that he, Mr. Johnson, and Mr. Ratliff believed that they were discriminated against because of their safety complaints. When asked about Mr. Kinder's responses, Mr. Damron stated "I can't recall exactly what he said, but he said there have been a lot of chicken shit complaints up there" (Tr. 319). Mr. Kinder specifically referred to a complaint about a trolley wire that came in contact with the mantrip, and Mr. Damron confirmed that the men refused to go under the wire and tried to get the foreman to move the track. Mr. Damron could not recall how that dispute was resolved, and stated that the section foreman "would try to get something to get back at you" (Tr. 320).

Mr. Damron stated that an initial realignment sheet did not reflect that he was being realigned, and when he found out on June 2, that he was to be realigned, he filed a discrimination complaint, but subsequently settled it when he was put back on his original section (Tr. 320-321). He believed that the company tried "to get back at him" be attempting to realign him (Tr. 322). Mr. Damron stated that roof bolter Russell Ratliff also made complaints, but that other than himself, Mr. Johnson, and Mr. Ratliff, he knows of no other complaining miners who were realigned (Tr. 324).

Mr. Damron had no knowledge that foreman Bentley had anything to do with his realignment, and Mr. Boyd confirmed that Mr. Bentley himself was also realigned (Tr. 327). Mr. Damron confirmed that production on his section was low, but he attributed it to bad top conditions (Tr. 326). Mr. Damron has no knowledge as to the number of complaints made by Mr. Ratliff on the section (Tr. 329). Mr. Damron

confirmed that at least 17 men were relocated to other shifts as a result of the 382 section closing down on June 2, 1986 (Tr. 330).

Mr. Damron stated that no management person ever instructed him to go out under unsupported roof to work, and that when bad top was encountered the men had to withdraw from the area "and that is why I felt we were harassed was because you have to go in and set extra support" (Tr. 334).

Mr. Damron claimed that during the 2 years he served as a safety committeeman, mine management, namely former assistant mine manager James Ratliff, was unhappy because of his safety complaints. When asked when this occurred, Mr. Damron replied "it has been some years back," but he could not recall seeking out the mine superintendent or anyone else higher in management than Mr. Ratliff to complain about the purported treatment accorded him by Mr. Ratliff (Tr. 343-344).

Complainant Eddie D. Johnson confirmed that he is presently employed by the respondent as a faceman on the longwall, and that prior to June 2, 1986, he was employed as a continuous-miner operator on the first right section (Tr. 13). Mr. Johnson's testimony included references to the safety complaints referred to in his discrimination complaint, as well as in prior depositions, which have been incorporated by reference in these proceedings. Mr. Johnson confirmed that a week or so before the realignment of June 2, 1986, he complained to section foreman Randy Smith about a missing handle on a fire suppression device and some bad top in the section. Mr. Johnson also confirmed that approximately 4 or 5 weeks before the realignment, he also complained to Mr. Smith about a methane buildup, and that he also had complained on prior occasions about additional levels of methane on the section. Mr. Johnson stated that Mr. Smith on occasion became angry with him over the complaints, and he confirmed that he did not complain to MSHA or the safety committee.

Mr. Johnson confirmed his prior statements made in his depositions that Mr. Smith had no knowledge of the impending realignment of June 2, 1986, and made no statements to him indicating that his realignment had anything to do with his complaints. However, Mr. Johnson was of the opinion that Mr. Smith "has an influence on realignments" (Tr. 20). Mr. Johnson also confirmed that in each instance when he complained to Mr. Smith, his complaints were addressed and the conditions complained of were corrected, or he was assigned to other work. Mr. Johnson also confirmed that

foreman Otis Slone was not present during these complaints made to Mr. Smith (Tr. 17-35; 45).

Mr. Johnson confirmed that approximately 1 month before the realignment he complained to Mr. Smith about respirable dust which was coming back on the continuous miner operator, and the need for more ventilation and water sprays. In this instance, the water sprays were checked and repaired, the adequacy of ventilation curtains was reviewed, and the complaint was taken care of by Mr. Smith within 35 minutes, and he said nothing to Mr. Johnson which would lead him to believe that he would be transferred for complaining (Tr. 41-43).

With regard to the incident concerning Mr. Slone's working under the miner head, Mr. Johnson stated that Mr. Slone became angry with him when he confronted him about the matter, and Mr. Johnson conceded that he may have provoked Mr. Slone (Tr. 51-52). Mr. Johnson confirmed that when he received an unsatisfactory work slip on September 28, 1985, he was not a member of the safety committee. Although conceding that the slip was issued because management believed he was "goofing off" and not doing his work, Mr. Johnson believed that it was indicative of management's attitude toward him because "they don't like me for what I stand for" (Tr. 66), and he viewed it as a continued form of harassment. Mr. Johnson confirmed that the incident was resolved after he filed a grievance and the matter was settled (Tr. 60-70). Mr. Johnson denied that he ever received any verbal warnings about his work prior to the issuance of the slip in question, but admitted that he and Mr. Slone "had talked several times" about equipment problems, coal production, and "about my work" (Tr. 72-73).

Mr. Johnson also testified about the incident concerning a premature shot which resulted in a grievance being filed, and he stated that after the shot was fired, Mr. Slone accused him of trying to slow down production (Tr. 74-82). He went on to testify about other complaints and confirmed that while he believed he was resented and not liked by management, management nonetheless addressed his complaints and took corrective action (Tr. 84-101). Mr. Johnson also believed that management had no legitimate right or reason for the realignment, and that it was done as a convenient way to get him off the producing section (Tr. 102-103).

Respondent's Testimony and Evidence

General Mine Foreman Charles Morley testified as to the circumstances surrounding the work force realignment which

took place on June 2, 1986. Mr. Morley confirmed that there have been several realignments during his tenure as mine foreman, and with regard to the June 2 realignment he stated that in preparation of that personnel action, Mr. John Hodges, respondent's supervisor of human resources (personnel director), prepared a list of mine personnel according to their union job classifications, and that this was given to him for the purpose of determining the composition and establishment of particular work crews which would be effected by the realignment.

Mr. Morley stated that the realignment came about in order to establish a crew to increase production so as to speed up the advancing of the first right section in anticipation of the completion of the installation of the longwall system. Mr. Morley stated that the decision to purchase the longwall system was made in approximately, 1985, that the decision was communicated to the union, and that the advancement of the first right section in anticipation of the longwall had been the topic of many discussions. The scheduled date for the longwall installation was September, 1986, and it was imperative that the first right and second sections be driven up and connected before the longwall could be installed and made operational (Tr. 116-122).

Mr. Morley confirmed that the respondent hired three consultants for the planning of the longwall installation, and that certain projections, including production and roof control problems, had to be addressed. He confirmed that production on the first right section had fallen behind, and he testified as to certain production data compiled on the sections (Tr. 122-127, exhibit R-1). He stated that production on the first and second right longwall sections was lower in comparison to production on the other sections (Tr. 130). Mr. Morley confirmed that the second right section had a three-entry system, and that the second right section began as a five-entry system, and then dropped to a four-entry system within the past 2 months. Although one would expect better production from a five-entry system, this was not the case (Tr. 131). Mr. Morley identified exhibit R-11 as a representation of mine production for all working sections, as of May, 1986, a month before the realignment, and he confirmed that it indicates lower cumulative coal production figures for the first and second right sections (Tr. 145).

Mr. Morley confirmed that the initial realignment list prepared by Mr. Hodges was not final, and that it was subject to his (Morley's) review and consideration, and that in compiling the crews, he would take into consideration the

personalities and work habits of the personnel to insure a good mix of people who could get along with each other (Tr. 129). He confirmed that in order to improve production, he determined that there should be a different mix of people on the first right section for both the day and second shifts, and this was discussed with Otis Slone, the second shift foreman, and changes were made not only for Mr. Johnson's shift, but also included the second right section. Mr. Morley denied any discriminatory intent in the shift changes, and he stated that they were made in order to pick up production and to get the mine back on schedule (Tr. 131-132). After further discussions with Mr. Slone and assistant mine manager Jim Ratliff, the realignment changes were made, effective June 2, 1986, and they are reflected on exhibit R-7 (Tr. 133-135). Mr. Morley confirmed that he had no idea what happened to the initial list compiled by Mr. Hodges (Tr. 137), and stated that it contained only names and occupations (Tr. 137, 144). He further explained the realignment information which appears on exhibit R-7, and confirmed that after making the necessary adjustments and changes, he returned it to Mr. Hodges who finally prepared it to show who would be on the sections in question (Tr. 144-145).

Mr. Morley confirmed that as continuous miner operators, Mr. Damron and Mr. Johnson filled critical positions with respect to the advancement of their sections in anticipation of the installation of the longwall system, and in his opinion their work performance was less than adequate. Mr. Morley was of the opinion that many union people were afraid that the longwall system would cost them jobs, when in fact it kept them working (Tr. 150). He confirmed that at the time of the realignment, the development of the first right section was at least one-third away from its final completion, and was at least 2 months behind in its anticipated completion (Tr. 153).

Mr. Morley conceded that Mr. Johnson's safety complaints caused delays in the anticipated completion of the first right section, and he believed that many of the roof control complaints were invalid. However, he insisted that all of Mr. Johnson's complaints were addressed, and if management agreed that they were legitimate, corrective action would be taken. Mr. Morley agreed that a safety committeeman has the right and obligation to make safety complaints, and he confirmed that Mr. Johnson never came directly to him with his complaints, and that they were usually made to section foremen Otis Slone and Randy Smith, or safety director Jerry Ratliff. Mr. Morley also confirmed that he never went into the section to look into the complaints, and that this responsibility was delegated to the section foremen (Tr. 153-156).

Mr. Morley confirmed that any information he had with respect to any frivolous or invalid complaints by Mr. Johnson would have come from the section foremen, and he stated that Mr. Slone believed that Mr. Johnson was slowing down the section by cutting slow, and that both Mr. Slone and Mr. Smith "couldn't get things going the way they should" (Tr. 157). Mr. Morley further confirmed that he was aware of this at the time of the realignment, and that he considered the fact that "the section is not moving like it should be and production is not like it should be" at the time he made his realignment decisions (Tr. 158).

Mr. Morley confirmed that he personally checked on some roof safety complaints made by Mr. Russell Ratliff, and that he did so in the company of safety committeeman Charles Cantrell, and at times they differed on the merits of the complaints, and in those cases where the roof was bad, corrective action was always taken (Tr. 161). Mr. Morley was not personally aware of any safety complaints made by Mr. Damron, and he confirmed that many times, he had no knowledge as to who was complaining (Tr. 162).

Mr. Morley denied that he ever harassed Mr. Damron with regard to the placement of roof cribs, and he confirmed that a complaint about a man trip trolley wire was corrected as soon as it came to his attention (Tr. 166-168). Mr. Morley denied that he ever contemplated moving or realigning Mr. Johnson because of any safety complaints, and it made no difference to him who worked on the sections as long as he was satisfied that he had a good mix of personnel to get the job done. He confirmed that union personnel, as well as section foremen, were moved during the realignment in an effort to "get a better chemistry or something going up there and get production going" (Tr. 169).

Mr. Morley stated that after the realignment, production "picked up some," but that subsequent problems and bad top conditions, including a roof fall, delayed matters further. With regard to the results of the realignment, Mr. Morley stated "I don't know if it accomplished a whole lot. It picked up some." However, he indicated that the intent of the realignment was aimed at an effort to pick up production (Tr. 172).

On cross-examination, Mr. Morley stated that he considered Mr. Slone to be a "pretty good" foreman, and he denied any personal knowledge of Mr. Slone ever committing any

unsafe acts (Tr. 180). He answered certain hypothetical questions concerning the incident involving Mr. Slone's work under the continuous miner head, including roof control violations and complaints on the section (Tr. 180-194).

Mr. Morley confirmed that he discussed the realignments made on the second shift with Mr. Slone, and that he and Mr. Slone made the decisions in that regard. Mr. Morley could not recall speaking with Mr. Ratliff with regard to the day shift realignments, and indicated that he (Morley) would have made the decisions alone in the absence of Mr. Ratliff (Tr. 195).

Mr. Morley stated that he was not present at any meeting held by the union with Mr. Hodges on May 28, or 29, 1986, and that any decision regarding job classifications would have been made by Mr. Hodges (Tr. 195-196). During the course of a colloquy with the parties, respondent's counsel indicated that the realignment shown on exhibit R-6 reflects the line-up prior to the actual effective date of the realignment, and that exhibit R-7 reflects the line-up after the realignment became effective on June 2, 1986. Complainant's representative Boyd contended that exhibit R-6 was presented to the union mine committee by mine management at the mine on either May 27 or 28, 1986, and the committee was informed that "This realignment will go into effect June 2nd" (Tr. 198). Respondent's counsel disagreed (Tr. 198). Mr. Boyd stated that R-6 was the list posted on the mine bulletin board, and Mr. Hall insisted that the list which was posted was similar to R-6, and that it cannot be located (Tr. 200).

Mr. Morley stated that exhibit R-6 was similar to R-7, and he confirmed that he was not aware that R-6 was given to the union committee by Mr. Hodges. Mr. Morley suggested that Mr. Hodges would have given the union such a list in order to let them know who was in any job classification, but he confirmed that Mr. Hodges could not align the particular crews, and that this was done by him (Morley) (Tr. 199).

Mr. Morley stated that his decision to realign Mr. Johnson, Mr. Damron, and Mr. Ratliff was made on Friday, May 30, 1987, and that Mr. Slone was present. Mr. Morley then advised Mr. Hodges as to his realignment decision, and Mr. Hodges compiled the realignment list shown on exhibit R-7 (Tr. 200), and he explained what was reflected on that list (Tr. 206-214).

Mr. Morley confirmed that during his discussions with Mr. Slone prior to the realignment, Mr. Slone advised him that

the miner operators should be changed because he believed this was necessary in order to increase production. At no time did Mr. Slone mention any safety complaints, and he did not mention that the complaints may have been slowing down production (Tr. 215).

Mr. Morley could not recall attending any meeting with members of the mine committee and mine management subsequent to the realignment, but that he was aware that such a meeting took place through "talk." Mr. Morley stated that he had to attend to his business of running the mine, rather than attending meetings concerning labor-management contractual matters (Tr. 219). Mr. Morley did recall being present at a meeting at which Mr. Boyd and Mr. Kinder were present when Mr. Boyd advised Mr. Kinder that a discrimination complaint would be filed, and he recalled Mr. Kinder commenting to Mr. Boyd to file the complaint "if he felt that way" (Tr. 220). Mr. Morley denied hearing Mr. Kinder make any statement to the effect that the realignment came about "because he was tired of the chicken shit complaints" (Tr. 221). Mr. Morley confirmed that Mr. Kinder did state that the realignment would be made in order to try and speed up production and the mining advance rate on the first right section so that the longwall could be set up (Tr. 222). Mr. Morley stated that Mr. Johnson, Mr. Damron, and Mr. Ratliff never indicated to him that they believed they were being realigned because of their safety complaints (Tr. 222).

During the course of the hearing, complainant's representative Boyd asserted that the only three employees affected by the realignment whose job classifications were not changed, but nonetheless realigned on their shift, were Mr. Johnson, Mr. Ratliff, and Mr. Damron. However, Mr. Boyd conceded that all three suffered no changes in their job classifications as a result of the realignment, and suffered no loss in pay. They were simply moved to different mine locations (Tr. 223-225). Mr. Boyd further contended that everyone else shown on the realignment lists (exhibits R-6 and R-7) remained within their job classifications and same work locations. However, he subsequently conceded that everyone from the section as shown on the lists were affected by the realignment, and either had their job classifications changed or were physically assigned to other locations in the mine (Tr. 225-228).

Mr. Morley testified as to the work being performed by the construction crew on the construction section after the realignment, and he confirmed that hazardous conditions could be encountered anywhere in the mine, including the construction area, and he could not state that the construction area

exposed miners to more hazards than on a producing section (Tr. 239).

Mr. Morley again denied that Mr. Johnson was moved to the construction section because of his safety complaints, and he confirmed that Mr. Johnson has filed safety complaints since the realignment and that "we try to take care of them as quick as we can" (Tr. 242). Mr. Morley denied that he has ever harassed Mr. Johnson, and he confirmed that Mr. Johnson is still serving as a safety committeeman. Mr. Morley denied any knowledge of any offers made to anyone to bid on a job for which Mr. Johnson had bid (Tr. 243).

Gary Puckett, respondent's office supervisor, confirmed that part of his duties include the tabulation and maintenance of certain mine production records. Mr. Puckett confirmed that he was familiar with the production records as reflected by exhibits R-1, R-2, and R-11, and he explained the data reflected therein (Tr. 253-258). He confirmed that the differences in production could be caused by adverse roof conditions or other factors not reflected in the production information, and that any differences in production with regard to the first and second right sections, as reflected in the data, may not be conclusive unless one knows or takes into account the prevailing mining conditions in those sections (Tr. 259).

Mr. Puckett testified as to certain daily carload production data maintained in his notebooks, and respondent's counsel confirmed that this data does not take into account any prevailing conditions on the sections. Based on his review of the production information as recorded in his books, Mr. Puckett concluded that for the period February 28, 1986, to May 30, 1986, the first right section had less than half of the production as compared with all the other sections noted (Tr. 260-261). For the period June 2, 1986, to July 30, 1986, the data reflects that mine production did not pick up (Tr. 261-265).

Jerry Ratliff, mine safety director, confirmed that he has worked at the mine 10 years, and he stated that he has daily contact with the mine safety committee, and that he can work with Mr. Johnson, who makes safety complaints on a regular basis. Mr. Ratliff confirmed that he has no reason to believe that mine management was motivated to realign the work force in order to punish Mr. Johnson for making safety complaints, and he was never at any meetings or heard any discussions among management that Mr. Johnson was realigned because of his complaints (Tr. 266-268, 273).

With regard to an incident in which Mr. Slone fired a shot to clear hanging draw rock from the roof, Mr. Ratliff stated that when Mr. Johnson brought this to his attention, he (Ratliff) called the state and Federal regulatory agencies to determine whether any laws may have been violated. He confirmed that there was no violation in this instance (Tr. 269), and he assumed that what Mr. Slone did was correct (Tr. 270).

Mr. Ratliff confirmed that Mr. Johnson regularly calls to his attention mine conditions which he observes on his shift, including any violations, and that he addresses these matters and takes Mr. Johnson to the appropriate mine production or maintenance departments to ascertain the facts "so they get something done about it" (Tr. 279, 282). Mr. Ratliff stated further that he has never refused any safety complaints from Mr. Johnson or any other miner, nor has he ever refused to immediately communicate any such complaints to the appropriate mine departments (Tr. 293). He also confirmed that he has many times personally taken Mr. Johnson to the places he complained about, and while he sometimes disagrees with Mr. Johnson's assessment of the situation, he and Mr. Johnson resolved the matters (Tr. 294).

Mr. Ratliff stated that he had no knowledge concerning Mr. Denver Thacker's allegation that a section foreman tried to bribe another employee to bid on a job that Mr. Johnson had bid on, and Mr. Ratliff confirmed that he had some reservations about Mr. Thacker's credibility, and he explained why (Tr. 298-302).

Mr. Ratliff confirmed that he had nothing to do with the realignment in question, was in no way connected with that decision, and that Mr. Morley and Mr. Slone never consulted with him in this regard (Tr. 311). Mr. Ratliff discounts any "conspiracy theory" that the realignment was in some way designed to isolate Mr. Johnson as a safety committeeman, and he stated as follows in this regard (Tr. 312):

> A. * * * I have personally not had any problems with Eddie other than -- heck, we're going to disagree on things. But I've never sat in -- I've spent a lot of my time with Charles Morley, Herbert Kinder, Otis Slone, Gerald Mullins. I've never heard anybody say, "hey, we're going to screw Eddie and move him because of a safety complaint." I've never heard that.

Otis Slone testified that he has worked in underground mines for 34 years, has served as a second shift foreman at the mine for over 10-1/2 years, and has known Mr. Johnson most of his life "since he was a kid" (Tr. 313). Mr. Slone confirmed that he participated in the determination as to the make-up of the work crews in connection with the June 2, 1986, realignment, and that he discussed the matter with Mr. Morley as is the usual practice during such realignments. Mr. Slone stated that he absolutely did not suggest to Mr. Morley that Mr. Johnson should be reassigned because of his safety complaints, and indicated that he has worked closely with Mr. Johnson since he became a safety committeeman. Mr. Slone was of the opinion that some of the complaints made by Mr. Johnson were not legitimate, and he confirmed that at times during their discussion on safety matters they became heated and he became upset with Mr. Johnson (Tr. 317).

Mr. Slone stated that on a day-to-day basis, the first right section was "way behind" in production, and that the realignment was made in an effort to increase production. Mr. Johnson's safety complaints had nothing to do with that decision, and safety complaints were made by individuals other than Mr. Johnson (Tr. 318).

Mr. Slone testified as to the circumstances under which he fired the shot which has been testified to in this case, and he confirmed that no violation of any safety law resulted from the manner in which he conducted that shot (Tr. 318-323). He also testified about the incident in which he performed work under a continuous miner head, and concluded that it was not unsafe (Tr. 326-328).

Mr. Slone testified as to the circumstances surrounding his issuance of an "unsatisfactory work slip" to Mr. Johnson sometime in 1985, and indicated that the entire production crew was taken out of the mine so that he could talk to them about production and his belief that they "were all laying down." A day or two later, he spoke with Mr. Johnson and issued the slip, and he did so because he believed that Mr. Johnson was "goofing off." He confirmed that he had previously spoken to Mr. Johnson at least one time about not doing his job (Tr. 331). Mr. Slone confirmed that he has stated from time-to-time that "Eddie Johnson just doesn't want to work anywhere," and that he made that statement to Mr. Johnson on at least one occasion (Tr. 335).

Mr. Slone confirmed that he recommended that Mr. Johnson be moved off the first right section, but denied that he made any recommendations with respect to Russell Ratliff, who

worked on a different shift. Mr. Slone confirmed that Mr. Johnson has made quite a few safety complaints, and has been "a burr in his saddle." Mr. Slone further confirmed that if Mr. Johnson observes something on his section that needs to be done, he will contact him and he will then go into the section to take care of the problem. Mr. Slone stated that "sometimes I may not take care of all he wants done, but we work on it" (Tr. 355).

Mr. Slone confirmed his belief that Mr. Johnson has made quite a few so-called "chicken shit complaints," and he cited several examples (Tr. 357). He also confirmed that coal production picked up "very little" after the realignment, and he attributed this to bad top and draw rock conditions encountered in the section (Tr. 357).

Randy Smith, stated that he has served as a section foreman in the mine for approximately 2 years, and that he has 16 years of mining experience. He confirmed that he was Mr. Johnson's foreman on the first right section for approximately 9-months prior to the June 2, 1986, realignment. He also confirmed that he had many occasions to discuss mining conditions and safety matters with Mr. Johnson and that at times he disagreed with Mr. Johnson's evaluation of the mining conditions. Attempts were always made to resolve any differences, and Mr. Smith indicated that if he could not resolve them "I would always contact the mine foreman" (Tr. 361).

Mr. Smith stated that he has discussed Mr. Johnson's work and slow production with him, as well as with his entire crew, and that he was receptive to Mr. Johnson's complaints in his attempts to address them and take corrective action. Conceding that he may have sometimes overlooked some complaints which he characterized as "little" or "nothing," Mr. Smith confirmed that "we would take care of them as we could" (Tr. 363).

Mr. Smith stated that at no time did he ever suggest to Mr. Slone or Mr. Morley that Mr. Johnson should be transferred to some other section because of his safety complaints, or because he "was a problem." Mr. Smith stated that "me and Eddie had between ourselves--I thought we done all right about working them out between us" (Tr. 364). Mr. Smith stated that he holds no animosity towards Mr. Johnson and he confirmed that Mr. Johnson no longer works with him (Tr. 366).

Mr. Smith denied that Mr. Slone ever indicated to him directly or indirectly that "if we had Eddie off the section,

we could do better" (Tr. 371-372). Mr. Slone did mention that he and Mr. Johnson sometimes had differences of opinion about roof conditions, and he confirmed that production continued "about the same" after Mr. Johnson left the section because the conditions worsened (Tr. 372).

Glen Matheny, section foreman, stated that at one time he served as president of the local union at another mining operation. He denied that he was sent to speak with Denver Thacker about re-bidding for a job as a faceman on the longwall machine in order to insure that Mr. Johnson would not be afforded an opportunity to take that job. He also denied that he had ever offered anyone an opportunity to work a shift and a half to re-bid the job that Mr. Johnson desired, or that he had any discussions with anyone which could be interpreted that such an offer was made (Tr. 374-375).

Mr. Matheny had no idea as to why Mr. Thacker would make up "this big story." Mr. Matheny further stated that he is familiar with the union contract, and he confirmed that once Mr. Thacker had removed himself for consideration for the faceman's job, it was not possible under the contract to re-bid for that job, and that this would be prohibited under the contract. Mr. Matheny confirmed that he had Mr. Thacker take his name off the bid for the faceman's job in the first place because he discussed the matter with him and advised him that he wished to keep him on the section as a roof bolter operator since pillaring work was anticipated (Tr. 377-378). He confirmed that Mr. Thacker remained on the section as a roof bolter (Tr. 378).

Mr. Matheny denied that he ever took Mr. Thacker aside underground at his working place in the presence of Mr. Varney to speak with him, and indicated that "I've never had anything to say to Denver that I wouldn't have to say to Rick," and that they were both roof bolters. Mr. Matheny also denied that he spoke with Mr. Thacker in the bath house about re-bidding for the faceman's job (Tr. 379). Mr. Matheny stated that there is no truth in any statement by Mr. Thacker that he (Matheny) told Mr. Thacker that any offer to re-bid the faceman's job had been "cleared by the old man," namely mine manager "Tubby" Kinder (Tr. 381).

Herbert E. "tubby" Kinder, testified that he has served as mine manager for approximately 3 years and has been involved in mining for 47 years. He stated that he did not participate to any great extent in the realignment of June 2, 1986, and that the realignment was the general mine foreman's responsibility. Mr. Kinder confirmed that mine production

was down on the first right section and that he discussed this with Mr. Morley, but did not indicate to him that "the mix of people needed to be changed or looked at." Mr. Kinder denied that he ever indicated to anyone that Mr. Johnson should be transferred to another section because he had made safety complaints or because he was a safety committeeman (Tr. 386).

Mr. Kinder stated that Mr. Hodges takes care of personnel grievances, and with respect to Mr. Russell Ratliff, he confirmed that he had been suspended with intent to discharge on two occasions because of absenteeism (Tr. 387).

Mr. Kinder denied that he ever instructed Glen Matheny or anyone else to bribe Denver Thacker to re-bid a longwall job so that Mr. Johnson would not get it. Mr. Kinder stated that while he might know Mr. Thacker, he could not recall who he is (Tr. 390). Mr. Kinder could not recall any realignment list which may have been posted in the bathhouse on May 29, 30, and June 2, 1986, and he confirmed that Mr. Hodges handles such matters (Tr. 398).

Mr. Kinder recalled meeting Mr. Melton, Mr. Damron, Mr. Hodges, and safety committeeman Charles Cantrell in the hallway outside the mine foreman's office after the realignment on June 2, 1986, and he confirmed that he did make the comment that "I was tired of those chicken shit complaints" (Tr. 385, 399). He also recalled a subsequent meeting 2 weeks later with members of the union when the realignment was discussed, and that Mr. Johnson, Mr. Damron, and Mr. Ratliff stated that they believed they were realigned because of their safety complaints. Mr. Kinder denied stating that before putting these individuals back on their sections "somebody will make me do it." He did recall remarking that "everything you do at Scotts Branch, if you ask somebody to do something, was discrimination or harassment" (Tr. 400).

Mr. Kinder confirmed that he made the decision that a realignment was necessary, and did so in order to provide a third shift made up of personnel from the other two shifts to speed up the advance rate on the two sections. Mr. Kinder denied that he had anything to do with the details of the realignment regarding actual shift or job selections, and he confirmed that these details were left to Mr. Hodges and the shift and mine foreman. Mr. Kinder denied that any management personnel ever discussed with him that Mr. Johnson or Mr. Ratliff would be realigned "to keep the old man happy," and that he never discussed such a matter with anyone (Tr. 403-404).

John E. Hodges, respondent's Supervisor of Human Resources, testified that he has been so employed since 1980, and that prior to this time, he served as chairman of a UMWA mine committee and a field representative for District 19. Mr. Hodges stated that the decision to install the longwall was made in early 1985, and a longwall coordinator was hired in August of that year. The decision was communicated to the union in approximately June, 1985. On March 27, 1986, he discussed with the union the need to increase production on the first and right panels, and asked it to speak to its membership about working the first and right panels on Saturdays so as to speed up the advance of those panels for the installation of the longwall (Tr. 409-410). Another meeting was held on May 1, 1986, and the union was advised that unless it agreed to work the two panels on Saturdays, the entire 382 working section would be eliminated in order to put another crew on the third shift to operate the first and second right panels. However, the membership would not agree (Tr. 411).

Mr. Hodges stated that 35 to 40 people were affected by shift changes and reassignments resulting from the June 2, 1986, realignment, and the elimination of the 382 section affected the job classifications of 18 people (Tr. 412). Mr. Hodges confirmed that he gave mine committee chairman Melton a list similar to exhibit R-7 to let him know who was going to be realigned, but that he made it clear to Mr. Melton there may be some changes as to the placement of personnel because he (Hodges) had not spoken to Mr. Slone or Mr. Morley at the time he gave Mr. Melton the list (Tr. 414).

Mr. Hodges confirmed that he lacks the authority to make actual crew assignments, and that in past alignments and realignments sufficient time was allowed so that he could communicate the assignment of personnel to Mr. Melton. However, in the case of the June 2, 1986, realignment, he did not have enough advance notice, and made that clear to Mr. Melton when he gave him the list. He also made it clear to Mr. Melton that the list was subject to change because he had not met with Mr. Morley or Mr. Slone (Tr. 414, 416).

Mr. Hodges indicated that he first learned about the final decision to make the realignment on May 28, 1986, when Mine Manager Kinder and Frank McGuire, Division Manager of Mines, informed him of their decision to eliminate the 382 section and put a crew on the third shift. They informed him that they would need 10 miner operators, and informed him of the positions which had to be eliminated and others which

needed to be filled. Mr. Kinder explained that he then prepared some sheets similar to R-7, "slotting" the necessary positions, but that he did not make the actual crew assignments. Mr. Hodges denied that he delivered exhibit R-6 to Mr. Melton before the crew selections were made by the production people, and respondent's counsel pointed out that this was the case because the 382 section was still shown on that list (Tr. 416). Mr. Hodges confirmed that the R-6 list is his work product, but that it was prepared by his secretary at his direction. He confirmed that he did give Mr. Melton another list similar to R-6 and that Mr. Melton put it up on the mine bulletin board (Tr. 417).

Mr. Melton confirmed that the "lists" he put up on the bulletin board in the bathhouse were roughly eight or nine sheets of paper which he taped individually on the board to inform the men in the event they were affected by the realignment. Mr. Melton confirmed that the list was torn down by the bathhouse man, and he did not keep a copy. Mr. Hodges was not sure that he saw the list posted on the board, and he explained that following his normal procedure, after such lists are finalized, and any problems concerning reassignments are resolved, he makes out a final list which he personally posts on the board (Tr. 420).

Mr. Hodges stated that he gave lists similar to the ones he gave to Mr. Melton to Mr. Slone and to Mr. Morley, and that the only thing he attempted to do was to list personnel in their proper job titles. Mr. Morley and Mr. Slone made the actual crew assignments because he (Hodges) had no authority to make those assignments (Tr. 421). Mr. Hodges denied that Mr. Morley ever said anything to him about an assignment for Mr. Johnson or that he wanted to get rid of him (Tr. 421).

Mr. Hodges confirmed that he did object to Mr. Morley's original placement of Mr. Ratliff on the fourth left section working with foreman Paul Fouts, because they had a prior personality "run-in," and Mr. Ratliff received a 15-day suspension for refusing to obey orders and threatening and abusing Mr. Fouts. Mr. Hodges confirmed further that Mr. Ratliff had previously received another suspension for threatening another supervisor and himself, and was also suspended for absenteeism. As a result of these incidents, and after several meetings with him, Mr. Ratliff was given "a last chance agreement" (exhibit R-12), and Mr. Hodges did not consider him to be a credible individual (Tr. 426-428).

Mr. Hodges identified exhibit R-5, as a part of the realignment sheets showing how various people were affected

by the realignment (Tr. 429, 431). He confirmed that at least 16 hourly employees on the 382 section were affected by the realignment, and that most of them stayed in the same job title (Tr. 432). Mr. Hodges denied that Mr. Johnson, Mr. Ratliff, and Mr. Damron were the only three people, other than the 382 section, that were moved from their jobs on their shift (Tr. 433), and referring to exhibits R-6 and R-7, he named several (Tr. 433-434).

Mr. Hodges confirmed that he met with Mr. Melton on May 28 or 29, 1986, during a "24/48 hour meeting" and gave him a list of the personnel who would be moved out of their job classifications, and he explained the purpose of the meeting (Tr. 447-449).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir.(April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, ___ U.S. ___, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

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

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

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

Mr. Johnson's Protected Activities

It is clear that Mr. Johnson enjoys a statutory right to serve on the mine safety committee, and the respondent may not discriminate against him because of his safety duties as a committeeman. Mr. Johnson also has a right to file safety complaints, request MSHA to perform section 103(g) safety inspections, to inform state or Federal mine inspectors of conditions which he believes are hazardous, and to complain or inform mine management of mine conditions which he believes present hazards to himself or to his fellow miners. Mr. Johnson's safety complaints and related duties incident to his service as a safety committeeman are protected activities which may not be the motivation by mine management for any adverse action against him. Further, management is prohibited from interfering with Mr. Johnson's protected safety activities, and it may not harass, intimidate, or otherwise unduly impede his participation in those activities. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786

(October 1980), rev'd on other grounds sub nom. Consolidation Coal Co v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. However, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

The record in this case establishes that Mr. Johnson frequently made safety complaints to his section foremen about mine conditions which he believed constituted hazardous conditions or violations of certain mandatory standards. As a matter of fact respondent's safety director Jerry Ratliff confirmed that Mr. Johnson has made safety complaints to him on a regular basis in his capacity as a member of the safety committee, and that Mr. Johnson rather routinely brings to his attention mining conditions on his shift which he believes are either questionable, hazardous, or violations. The record also establishes that the complaints often resulted in a foreman being called to Mr. Johnson's section to discuss the conditions, and that they sometimes had heated discussions or differences of opinions as to whether or not the conditions were in fact hazardous or not in compliance with the applicable safety regulations.

The record also establishes that Mr. Johnson has filed union safety and other job-related grievances against the respondent during his employment, some of which went to formal arbitration, and others which were settled by the parties pursuant to the labor-management agreement (Exhibits C-1, C-2, C-4, C-5, C-11, R-3, R-4).

Although there is no direct evidence that Mr. Johnson made any specific complaints to any MSHA or state mine inspectors, the testimony presented on his behalf, as well as his deposition, suggests that on occasions, MSHA inspectors may have been called to the mine to resolve safety questions or "disputes" resulting from Mr. Johnson's safety involvement with the union and/or the mine safety committee. Some of Mr. Johnson's complaints to management resulted in refusals by Mr. Johnson or his crew to work in the areas deemed by

them to be hazardous, thereby necessitating their reassignment to other work while management addressed their safety concerns.

In view of the foregoing, I conclude and find that Mr. Johnson has established that both in his capacity as a miner, and as a member of the mine safety committee, he made and communicated safety complaints to mine management prior to the June 2, 1986, realignment which resulted in his transfer from a producing section to a construction section. Further, under all of these circumstances, it seems clear to me that Mr. Johnson's safety complaints and safety-related activities in bringing these complaints to the attention of management in his capacity as a miner or safety committeeman are protected activities under section 105(c) of the Act, and that the respondent is prohibited from retaliating against Mr. Johnson for making the complaints.

Management's Alleged Harassment and Intimidation of Mr. Johnson

Mr. Johnson's original complaint makes no mention of any specific instances of harassment or intimidation by management because of his safety complaints. Mr. Johnson's pretrial depositions of January 16, and June 9, 1987, are also devoid of any credible references concerning instances or acts of management harassment or intimidation toward Mr. Johnson because of his safety activities. Quite the contrary. The record in this case, including past grievances filed by Mr. Johnson on safety and non-safety matters, reflects that he was a rather active and combative safety committeeman who did not shy away from confrontations with his supervisors over safety issues. As a matter of fact, after the realignment, Mr. Johnson continued, and still continues, to function as a viable safety committeeman on a coal producing section, and he still brings his safety concerns and complaints to the attention of the mine safety director.

The record in this case establishes that in each instance when Mr. Johnson or other safety committeemen brought their safety complaints or concerns to the attention of their foremen, they and their fellow miners were allowed to withdraw from the affected areas and were assigned other work while management ultimately addressed their concerns and took corrective action. While it may be true that in some instances, management disagreed with Mr. Johnson's safety assessments and opinions and the discussions may have been rather heated, I find no credible basis for concluding that management ignored Mr. Johnson's complaints or retaliated against him because of

his complaints. While it may also be true that some foremen may have initially attempted to convince a working crew that certain conditions were not unsafe and suggested that they should continue working, the issues were either resolved through further involvement of management and the safety committee, or the miners were allowed to withdraw and were assigned other work. I find no credible evidence that miners were ever forced or coerced to work under unsafe conditions.

In his deposition of January 16, 1987, Mr. Johnson conceded that he did not consider his realignment transfer to be a form of "punishment" because of his safety complaints (Tr. 13). In his June 9, 1987, deposition, Mr. Johnson confirmed that no one from management has ever made any statements to him, or suggested to anyone else, that his transfer resulted from his safety complaints (Tr. 55). Mr. Johnson alluded to a complaint concerning roof bolts which he made to safety director Jerry Ratliff, and indicated that Mr. Ratliff expressed some dissatisfaction with his filing a grievance. Mr. Johnson conceded that Mr. Ratliff never abused him verbally, and never threatened him because of his complaints, but that he did give him some "dirty or hateful looks" (Tr. 87-89).

Mr. Ratliff's unrebutted testimony, which I find credible, reflects that while he and Mr. Johnson sometimes had differences of opinion over the substance and merits of Mr. Johnson's complaints, Mr. Ratliff always addressed them in any effort to take corrective action, and that Mr. Johnson still brings safety matters to Mr. Ratliff's attention in his capacity as a safety committeeman. Further, Mr. Ratliff's unrebutted testimony establishes that he had nothing to do with the realignment, and took no part in that decision.

In his deposition of June 9, Mr. Johnson alluded to a complaint he made to section foreman Randy Smith concerning a bad roof condition. While he asserted that Mr. Smith had a "bad attitude" against him, Mr. Johnson confirmed that Mr. Smith allowed him to withdraw his mining machine from the bad top area and assigned him to work in another area until the roof conditions were subsequently corrected. Conceding that Mr. Smith disagreed with his safety assessment of the bad top, Mr. Johnson confirmed that Mr. Smith displayed no anger towards him, did nothing to suggest that "he would get back to him," or in any manner suggested that he would transfer him because of his complaint (Tr. 26-27).

With regard to his encounter with foreman Otis Slone when Mr. Johnson confronted Mr. Slone and questioned the

wisdom of his working under the ripper head of a mining machine, Mr. Johnson stated in his deposition that Mr. Slone displayed his anger towards him. However, he conceded that neither Mr. Slone, Mr. Ratliff, or Mr. Gerald Mullins ever threatened him, or in any manner indicated that they would transfer him because of this complaint (Tr. 52-53). As a matter of fact, during the course of the hearing, Mr. Johnson admitted that he may have provoked Mr. Slone during this encounter (Tr. 51-52). Mr. Johnson also admitted that he too is prone to anger and that he sometimes loses his temper when dealing with his foremen (Tr. 33).

Mr. Johnson alluded to his 1985 receipt of an "unsatisfactory work slip" from Mr. Slone as an example of past harassment. The record shows that when the slip was issued Mr. Johnson was not a safety committeeman, and that the slip was issued because Mr. Slone believed that Mr. Johnson was "goofing off" and that he and his entire work crew were slowing down production. Mr. Johnson filed a grievance, and it was subsequently withdrawn after Mr. Johnson showed improvement in his work (Exhibits C-11, C-12). Mr. Slone testified that Mr. Johnson had previously been warned about his work, and Mr. Johnson denied that was the case, but did admit that Mr. Slone had previously "talked to him" about his work performance. Upon review and consideration of the facts surrounding this "work slip" incident, I cannot conclude that the slip was issued by Mr. Slone to harass Mr. Johnson.

During the course of the hearing, when pressed for details concerning any acts of harassment, threats, or hostility exhibited by management towards him, Mr. Johnson responded with his conclusory beliefs that management did not like him "for what I stand for" (Tr. 66), and that it displayed resentment, anger, and rejection because of his safety concerns (Tr. 95-96). Mr. Johnson stated that "nine times out of ten, with myself, you end up with a big argument" over his safety complaints (Tr. 93-94). Notwithstanding these beliefs of resentment by management, Mr. Johnson conceded that it nonetheless addressed his safety complaints and took appropriate corrective action (Tr. 84-101).

Although not specifically pleaded as incidents of alleged management acts of harassment, during the course of the hearing Mr. Johnson and Mr. Boyd implied that management's harassment of Mr. Johnson resulted in, or forced Mr. Johnson to file formal safety and other grievances. A discussion of these grievances follows.

In a prior grievance arbitrated in August, 1985, in connection with a job posting issue, the arbitrator noted that when Mr. Johnson expressed fear in operating his mining machine in a pillar section to which he was being transferred, the respondent accommodated his concerns and reassigned him elsewhere. The arbitrator found that by virtue of a company favor, rather than a contractual right, Mr. Johnson was transferred from normal work of which he had a fear to temporary duties while awaiting an appropriate opening to which he could be assigned on a permanent basis (Arbitration Decision, pg. 7, exhibit R-4).

In a grievance filed on January 15, 1984, Mr. Johnson protested his assignment to a "floater job" after the respondent assigned an employee junior to him as a permanent equipment operator while Mr. Johnson was designated a "floater." Mr. Johnson contended that his assignment as a "floater" was made in retaliation for safety complaints he had lodged. The arbitrator rejected this contention and found no evidence of retaliation by management because of Mr. Johnson's safety complaints (exhibit R-3, pg. 5). Citing numerous instances where Mr. Johnson was reassigned during January and February, 1984, the arbitrator further found no evidence of a pattern of abuse and concluded that management acted within its contractual authority in making the reassignments (pgs. 11-13).

After consideration of all of the testimony and evidence adduced in this case, I find no probative or credible evidence to support Mr. Johnson's assertions that mine management harassed or intimidated him because of his complaints or the exercise of any protected safety rights incident to his service as a safety committeeman, and Mr. Johnson's assertions in this regard ARE REJECTED.

Mine Management's Motivation for the Realignment of June 2, 1986

In my view, the thrust of Mr. Johnson's complaint is the claim that shift foreman Charles Morley and mine foreman Otis Slone exhibited a disregard for safety through their "attitude" towards him as the safety committeeman, and by their efforts to transfer him from a producing section to a nonproducing construction area, thereby effectively restricting the area of the mine where he could effectively function as a safety committeeman on behalf of his fellow miners who looked to him as their leader.

In support of the claimed discrimination in this case, Mr. Johnson believes that Mr. Morley and Mr. Slone, the two

key principals who made the realignment decision with respect to the make-up of the newly aligned work crews, aided and abetted by other key management officials, conspired to transfer Mr. Johnson in order to isolate him and to restrict his safety activities.

In his posthearing brief, and in further reliance on his claims of past and ongoing discrimination, Mr. Johnson's representative Boyd points to the fact that after the realignment, production on the longwall section showed no improvement, and that this does not support the respondent's assertion that the realignment was prompted out of management's concern for production. Mr. Boyd further relies on the testimony of Mr. Thacker and Mr. Varner in support of his argument that mine management, through Mr. Matheny, and with the "blessing" of mine manager Kinder, attempted to "bribe" Mr. Thacker to bid on the longwall faceman's job with an offer of extra shift work, in order to prevent Mr. Johnson from getting the job. Conceding the fact that this purported "bribe" came well after the realignment, Mr. Boyd concludes that this was simply another discriminatory management attempt to prevent Mr. Johnson from effectively functioning as a safety committeeman. Finally, Mr. Boyd points to the statement by Mr. Kinder after the realignment, that the realignment was the result of "too many chicken shit complaints," in support of his conclusion that the realignment was retaliatory.

Mr. Kinder's statement must be taken in context. Mr. Melton testified that during one meeting with Mr. Kinder and the union concerning the realignment, and in response to a question from Mr. Melton as to why Mr. Damron was realigned, Mr. Kinder responded "because they had made too many chicken complaints and the production was not what it should be up there" (Tr. 45). In a subsequent meeting with Mr. Kinder, and in response to a question from Mr. Melton as to why Mr. Johnson, Mr. Damron, and Mr. Ratliff had been realigned, Mr. Melton testified that Mr. Kinder responded "because the section was not producing the way it should" (Tr. 48). Mr. Melton admitted that at no time did Mr. Kinder mention safety complaints, and he conceded that he simply assumed and speculated that Mr. Kinder had in mind safety complaints (Tr. 48). Further, there is absolutely no testimony or evidence that Mr. Kinder ever mentioned safety complaints as the basis for the realignment.

Mr. Russell Ratliff confirmed that at the time of the realignment, he was not a safety committeeman, and while he was of the opinion that his prior safety complaints resulted in his realignment, he conceded that other miners who made

safety complaints were not affected by the realignment. Mr. Ratliff also confirmed that at no time prior to the realignment did Mr. Kinder ever mention anything to him about making any "chicken shit complaints," and when asked about the types of complaints Mr. Kinder may have had in mind when he made his statement, Mr. Ratliff replied "all the complaints in general."

Mr. Damron, who also serves as union vice-president, stated that he heard Mr. Kinder's comment, but indicated that "I can't recall exactly what he said, but he said there have been a lot of chicken shit complaints up there." Mr. Damron confirmed that other miners also made complaints, but he could think of no other complaining miners who were realigned, and he confirmed that 17 others were relocated to other work shifts as a result of the section closing down and the realignment.

The record in this case shows that both prior to, and after the realignment, the union met with management to discuss the proposed realignment. The record also shows that management's concern to increase production on the first and second right sections in anticipation of placing the longwall section in production prompted it to seek help from the union by having the men agree to work extra shifts on Saturdays, but that this suggestion was rejected by the union. Mr. Kinder testified that he made the decision that the realignment was necessary in order to add a third shift composed of personnel from the other two shifts in order to speed up the production rate of those sections in preparation for the longwall.

Mr. Kinder testified that he had nothing to do with the selection or make-up of the realigned crews, that such decisions are made by Mr. Hodges and the respective foremen, and he denied that he ever discussed the particular make-up of the crews with his foremen or Mr. Hodges. Having viewed Mr. Kinder during his testimony at the hearing, he impressed me as a candid and straightforward individual, and I find him to be a credible witness. Given the fact that the initial purchase of the longwall, and the anticipated realignment, was the subject of much debate among management and the union, and given the obvious past and ongoing tensions that existed and still exists between management and the union over past grievances, complaints, and controversies as reflected by the record in this case, I am convinced that Mr. Kinder, as the mine manager responsible for the overall operation of the mine, found himself frustrated over his attempts to solve his production problems. In this setting, I am further convinced that Mr. Kinder's statement concerning

"chicken complaints," which was made in conjunction with his stated concerns over the lagging production rate of the two sections which were driving towards completion in anticipation of the longwall, and which was made subsequent to the realignment in a rather off-handed fashion, was the result of his legitimate concern and frustration over production, rather than any concern over past safety complaints.

I conclude and find that Mr. Kinder's decision to implement the work force realignment in question was well within his management prerogative, and that his decision in this regard was prompted by his intent to attempt to increase production rather than to isolate Mr. Johnson as a safety committeeman, or to otherwise retaliate against him for his activities as a safety committeeman.

The record in this case establishes that the realignment affected miners other than Mr. Johnson, and that rank-and-file miners, as well as foreman were moved. Miners other than Mr. Johnson were moved from their jobs on the second shift production section to the construction section, and the entire 382 working section was eliminated. Mr. Melton conceded that at least 25 to 40 miners were affected by the realignment; Mr. Damron believed that at least 17 miners were relocated to other shifts as a result of the elimination of the former producing section; and Mr. Boyd conceded that miners working with Mr. Johnson on the second shift producing section were affected by the realignment. Given these circumstances, and the fact that Mr. Johnson is still serving as a safety committeeman, with no loss of pay or other job rights on the same work shift, I find it most difficult to believe that mine management would have conspired to engineer the realignment simply to restrict Mr. Johnson's safety activities. I find no credible evidence of any disparate treatment of Mr. Johnson.

Mr. Boyd argued that as a result of the realignment, everyone else affected with the exception of Mr. Johnson, Mr. Ratliff, and Mr. Damron, were realigned by seniority and job classification. Mr. Boyd took contradictory positions on this issue during the hearing. On the one hand, he insisted that the realignment was illegal because seniority was not followed, and he asserted that the union had prevailed in prior grievances on the issues of realignment, job classification, and seniority rights. On the other hand, Mr. Boyd confirmed that there was no requirement for seniority and job classification considerations during such realignments. Mr. Boyd was invited to present further arguments in his post-hearing brief with regard to these issues, as well as the

contractual implications of the realignment, but he did not do so.

Mr. Hodges confirmed that the respondent need not consider seniority when making work force realignments, and that numerous arbitration decisions have sustained management's prerogative to make job assignments (Tr. 441-442). Respondent's counsel introduced two such arbitration decisions, (exhibits R-3 and R-4), and he indicated that one such case (R-3), concerned the precise issue as to whether the respondent may align by seniority, and that the arbitrator rejected Mr. Johnson's contentions that he was realigned because of his safety complaints (Tr. 441-442).

Mr. Melton confirmed that Mr. A. B. Thacker, was the only other safety committeeman affected by the realignment. Yet, there is no suggestion that Mr. Thacker believed his realignment resulted from his service as a safety committeeman. Mr. Melton explained that Mr. Thacker lacked enough seniority to maintain his job after the realignment. One may conclude from this that the Union's position with respect to the realignment, focused on the seniority rights of those affected, rather than on any safety complaints. Further support for this conclusion may also be found in the position taken by Mr. Johnson's representative Boyd with respect to the merits of the realignment. Although he first indicated that there was no requirement that seniority be followed in the realignment, he insisted that the entire realignment was illegal because the respondent failed to follow the applicable contractual seniority and job classification requirements. Given this position, I find it rather strange that the union failed to file a grievance challenging the purported illegality of the realignment.

In his posthearing brief, Mr. Boyd suggested that coal production on the first right section was low because of adverse roof conditions, and that subsequent to the realignment, production did not pick up. While this may be true, I am not convinced that production was consistently low on the section because of roof conditions. Although the respondent stipulated that shortly before and after the realignment, the top in the first right section was bad (Tr. 139), the record reflects that management's concern for lagging production had been a long-standing concern for at least a year or so prior to the realignment, and it was out of this concern that Mr. Slone took the entire crew out of the mine in 1985 at the time he gave Mr. Johnson an unsatisfactory work slip.

Miner operator Jerry Hicks, who worked on Mr. Johnson's section, confirmed that the section "was awful low on production," and that Mr. Slone spoke to the crew about picking up their production rate. He also confirmed that Mr. Slone mentioned eliminating the coffee breaks, and would sometimes admonish the crew about "waiting around" for their work instructions.

Mine foreman Morley's unrebutted testimony was that the first right section was at least 2 months behind its anticipated completion, and that at the time he realigned the crews, production was not moving like it should have (Tr. 153-156). Section foreman Slone testified that the production on the section was "way behind" on a day-to-day basis (Tr. 318).

Mr. Damron confirmed that production was low on his section, and he too attributed it to the roof conditions (Tr. 326). However, he confirmed that he only made one complaint about the roof conditions, and that this occurred several weeks before the realignment (Tr. 328).

Although Mr. Melton initially indicated that he could find no legitimate reason for the realignment, he subsequently conceded that it was made in preparation for the longwall, that management was concerned with production, and that he had discussed management's concern over the low production on the advancing section with management several weeks before the realignment, including management's request for Saturday work by the crew to pick up their production rate in anticipation of the longwall installation. I find nothing in Mr. Melton's testimony to suggest that low production was the result of adverse roof conditions. While it is true that Mr. Melton did not work on a producing section and may not have been aware of any adverse roof conditions, I find it hard to believe that in his capacity as chairman of the mine committee, he would not have been aware of any consistently bad top conditions or complaints from miners in this regard.

In response to a hypothetical bench question as to whether or not mine management, believing that Mr. Johnson, Mr. Damron, and Mr. Ratliff were "non-producers," could legally and contractually reassign them to a non-producing section, Mr. Melton responded in the affirmative so long they were retained in their job classification at the same rate of pay. In Mr. Johnson's case, Mr. Melton conceded that Mr. Johnson was realigned with his pay and job classification intact, on the same work shift, and that he still remained a safety committeeman (Tr. 83-84).

I have carefully reviewed the testimony of the miners who testified in this case, and while it was true that adverse roof conditions were encountered from time-to-time, I find nothing to suggest that such conditions prevailed for any long period of time, or that any such adverse roof conditions regularly impacted to any great degree on the low production rate or low advance rate which was of concern to management.

The testimony of mine management personnel Hodges, Kinder, Morley, and Slone, which I find credible, corroborates management's production concerns, and reflects management's concern that the production on the first right section needed to be addressed and speeded up so as to insure its timely completion and connection with the anticipated longwall. I conclude and find that the realignment of June 2, 1986, resulted from management's legitimate concern that the production needed to be improved, and that in deciding to proceed with the realignment, management was motivated by its intentions to increase the rate of speed at which the production section was advancing, rather than to attempt to isolate any safety committeemen because of their complaints.

With regard to the actual implementation of the realignment and the role played by Mr. Slone and Mr. Morley in the selection and assignment of the crews, the record establishes that they alone made the crew selections on Friday, May 30, 1986, and Mr. Boyd confirmed that they had the authority to make such decisions (Tr. 451). Mr. Hodges testified that when he gave Mr. Melton the list, it was not a list showing the actual realigned work force, and that he informed Mr. Melton that the list was subject to changes after Mr. Slone and Mr. Morley reviewed it for the purpose of "slotting" employees into their realigned positions. Mr. Melton admitted that Mr. Hodges advised him in advance of the actual realignment that the list was subject to change. Although the list in question no longer exists and was apparently destroyed after Mr. Melton posted it, I accept as credible and plausible Mr. Hodges' explanation with regard to his role in the realignment, including the use of the personnel data and "lists" reflected by exhibits R-5 through R-7).

All of the management individuals who were either directly or indirectly involved in the realignment (Hodges, Morley, Slone), testified that no effort was made to assign Mr. Johnson to the construction crew because of his safety complaints or service as a safety committeeman. Mr. Kinder testified that he made his realignment decision without regard to personalities, did not discuss the make-up of the crews with Mr. Slone or Mr. Morley, and that his realignment decision was in no way

motivated by any desire to get rid of Mr. Johnson. Likewise, section foreman Randy Smith denied that he ever spoke with Mr. Slone about transferring Mr. Johnson, or that he harbored any animosity toward Mr. Johnson, or sought to retaliate against him because of his safety complaints. Safety Director Jerry Ratliff, who has had, and continues to have, regular contact with Mr. Johnson, testified that he was unaware of any discussions or suggestions that Mr. Johnson be transferred to the construction section because of his safety complaints, or that mine management sought to punish Mr. Johnson for his safety complaints.

Although it is true that Mr. Morley and Mr. Slone were aware of Mr. Johnson's past safety complaints at the time they made up the realigned work crews, they both denied that Mr. Johnson's safety activities influenced them, or played any part in their decision to transfer him to the construction section. The record reflects that both Mr. Morley and Mr. Slone had in the past, experienced differences of opinions with Mr. Johnson's asserted safety concerns and complaints. Mr. Slone readily admitted that some of his discussions with Mr. Johnson were "heated" and that he became upset over some of Mr. Johnson's complaints which Mr. Slone believed were invalid. Likewise, Mr. Morley considered some of Mr. Johnson's complaints to be invalid, and he conceded that Mr. Johnson's complaints did cause delays in production. Given these circumstances, and notwithstanding Mr. Morley's and Mr. Slone's denials to the contrary, there is an inference that Mr. Johnson's safety activities did influence Mr. Morley and Mr. Slone in their collective decision to transfer Mr. Johnson to the construction section. Nevertheless, if it can be shown by a preponderance of the evidence that the decision by Mr. Morley and Mr. Slone with respect to the make-up of the work crews was motivated by their legitimate concern to increase production, the motivational factor behind management's initial decision for the need of a realignment, any inference of discriminatory intent may be successfully rebutted.

Mr. Morley testified that his primary concern in assigning miners to particular work crews was to insure a good mix of productive people who could work together harmoniously in order to achieve mine management's production objectives. Mr. Morley candidly conceded that he considered the personalities and work habits of all available personnel, concluded that there should be a different mix of people, including foremen, in order to improve production, and that he freely discussed this with Mr. Slone. With regard to the slotting of Mr. Johnson, as well as Mr. Damron, Mr. Morley believed

that their past work performance was less than adequate. Mr. Morley further believed that the continuous miner positions in the realigned section would be most critical to any attempts to increase production and he concluded that those positions which had previously been occupied by Mr. Johnson and Mr. Damron should be filled by someone else on the newly created production section.

Mr. Morley stated that Mr. Slone shared his view with respect to the past work performance of Mr. Johnson, and in fact it was Mr. Slone who suggested that changes should be made in the crew assignment of continuous miner operators, and it was Mr. Slone who informed Mr. Morley that Mr. Johnson was a slow machine operator and that he and section foreman Smith had problems keeping Mr. Johnson's section moving at a pace to suit him. Further, as indicated earlier, Mr. Slone had previously warned and spoken to Mr. Johnson about his work, issued him an unsatisfactory work slip, and had made previous statements to Mr. Johnson that he did not want to work. Mr. Morley was directly involved in the prior warning to Mr. Johnson, and miner operator Jerry Hicks corroborated the fact that Mr. Morley believed that the low production on the section was the result of unsatisfactory work by the entire crew, and that Mr. Morley gave them all a warning in this regard. Mr. Slone confirmed that he recommended to Mr. Morley that Mr. Johnson be moved off the first right section, and he corroborated the fact that he discussed the make-up of the crews with Mr. Morley.

Mr. Morley asserted that his decision with respect to his desire to obtain a different mix or personalties on the newly aligned work crews was equally applied to personnel on the second right section shift, as well as Mr. Johnson's shift, and that foremen, as well as union personnel were moved in his attempts to "get a better chemistry or something going up there an get production going" (Tr. 169). Conceding that production did not substantially increase after the realignment, Mr. Morley insisted that his intent in making up the particular work crews was aimed at increasing production.

I conclude and find that Mr. Morley and Mr. Slone were simply carrying out their management responsibilities in implementing the realignment decision made by Mr. Kinder. There is nothing to suggest that Mr. Morley or Mr. Slone initiated the realignment or made any suggestions to Mr. Kinder that a realignment was necessary in order to isolate Mr. Johnson. As a matter of fact, Mr. Boyd conceded that he had no reason to believe that Mr. Slone had anything to do with the initial realignment decision (Tr. 190).

Having viewed Mr. Morley and Mr. Slone during their testimony at the hearing, I find them to be credible individuals. I find no credible basis for concluding that Mr. Johnson was treated any differently from other miners with respect to the selections and decisions made by Mr. Morley and Mr. Slone in realigning the available work force. The record clearly establishes that one entire section was abolished, and that foremen as well rank-and-file miners, including other miners on Mr. Johnson's shift, were affected by realignment, and that some miners who had complained about safety were not realigned. Mr. Melton confirmed that with the exception of Mr. Johnson, Mr. Ratliff, and Mr. Damron, the remaining miners affected by the realignment were "pacified and everything was fine as far as they were concerned" (Tr. 75).

With regard to the purported "adverse" decision by management to realign the work force, I take note of the Commission's decision in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982). Citing its Pasula and Chacon decisions, the Commission stated in pertinent part as follows at 4 FMSHRC 993: "* * * Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

I conclude and find that Mr. Morley and Mr. Slone acted well within their managerial and discretionary authority in deciding upon which particular personnel at their disposal would be transferred or realigned. Acting within their authority as managers, they were free to make judgments and decisions with respect to the relative work performance levels of the available personnel, including any personality traits or work habits which they believed were required to assure that a productive and harmonious group of workers were available to achieve management's production objectives.

I find Mr. Morley's explanation as to the factors which he and Mr. Slone chose to follow in making their crew selections to be reasonable and plausible, and that their selection decisions were motivated by their good faith intentions to attempt to increase production in anticipation of the longwall, rather than to discriminate against Mr. Johnson or to isolate him for his safety complaints or his activities as a safety committeeman. I reject Mr. Johnson's assumptions and conclusions that management somehow conspired to realign him out of retaliation for his safety activities. Mr. Johnson's service as a safety committeeman does not insulate him from legitimate managerial business-related non-discriminatory

personnel actions, UMWA ex rel Billy Dale Wise v. Consolidation Coal Company, 4 FMSHRC 1307 (July 1982), aff'd by the Commission at 6 FMSHRC 1447 (June 1984); Ronnie R. Ross, et. al v. Monterey Coal Company, et. al., 3 FMSHRC 1171 (May 1981).

With regard to the issue raised for the first time at the hearing by the union concerning an alleged "bribe" by management as an indication of its purported attempt to keep Mr. Johnson off of the producing longwall section, I take note of the fact that this alleged incident occurred well after the realignment, and there is absolutely no evidence to suggest that Mr. Morley or Mr. Slone were involved in that alleged incident.

The issue concerning the bidding for the longwall faceman's job which Mr. Johnson now occupies was the subject of arbitration. The record establishes that after a formal arbitration hearing held on February 18, 1987, Mr. Johnson was awarded the job (exhibit C-1). In that proceeding, Mr. Hodges and Mr. Matheny appeared on behalf of management, and Mr. Melton, Mr. Johnson, Mr. Thacker, and Mr. Varney appeared on behalf of Mr. Johnson.

The union's position with respect to Mr. Johnson's grievance, as reflected by the arbitrator's decision, was that the respondent was attempting to circumvent the contract and not award the job to Mr. Johnson because he was a safety committeeman. In sustaining Mr. Johnson's grievance and awarding him the job, the arbitrator based his decision on a finding that the respondent failed to follow established company policy prohibiting anyone but the actual job bidder from adding or deleting a bidder's name from the bid sheet. The arbitrator rejected the claim that the respondent attempted to bypass Mr. Johnson because he was a safety committeeman. In doing so, the arbitrator found that there was no evidence which even suggested that this was the case (exhibit C-1, pg. 5).

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

I take particular note of the arbitrator's comments at page four of his decision that a full and complete hearing was conducted and that the parties had an ample opportunity to present evidence in support of their claims. I note the arbitrator's comment that the union's assertion that Mr. Johnson was bypassed because he was a committeeman was made in closing arguments, and his conclusion that the union submitted no evidence to even suggest that Mr. Johnson's status as a safety committeeman had anything to do with the job bid in question.

Neither party presented any posthearing discussion with regard to the prior arbitration hearing. The respondent simply characterized the alleged "bribe" as an "incredible" pretexual fabrication by the union to discredit management. The complainant simply concludes that the arbitrator's ruling that the bid made by the employee in competition with Mr. Johnson was too late, and that a foreman could not add a bidder's name on the job bid, "shows true signs of discrimination on the company's part."

In this case, Mr. Thacker's testimony is devoid of any credible statements to indicate or even suggest that at the time Mr. Matheny may have discussed the job bids with him, Mr. Matheny said anything directly or indirectly that would lead Mr. Thacker to conclude that Mr. Matheny made any job overtures to him with the intent to isolate or get rid of Mr. Johnson. Mr. Thacker admitted that his belief that Mr. Matheny did not want Mr. Johnson to get the longwall faceman's job was based on speculation, and that Mr. Matheny did not mention Mr. Johnson by name.

Mr. Varner first testified that Mr. Thacker told him that Mr. Matheny wanted him to bid for the faceman's job in order "to beat Eddie out of it." He later stated that Mr. Thacker indicated to him that Mr. Matheny did not identify Mr. Johnson as the individual who he was trying to keep out of the section. Thus, Mr. Varner not only contradicts himself, but he contradicts Mr. Thacker's testimony that Mr. Johnson did not mention Mr. Johnson's name at all.

Mr. Varner also testified that it was he who suggested to Mr. Thacker that Mr. Matheny was trying to keep Mr. Johnson off the section for fear he would shut it down because of methane. Mr. Varner confirmed that he made the suggestion in response to an injury from Mr. Thacker as why anyone would ask him to bid for the job. This also contradicts Mr. Thacker's statement indicating that it was he who told Mr. Varner that Mr. Matheny wanted to get Mr. Johnson off the section.

After careful consideration of the testimony of Mr. Thacker and Mr. Varner, which I conclude is contradictory, and lacking in credibility, and taking into consideration the arbitrator's finding with respect to the merits of the alleged "bribe," I reject the complainant's assertion that Mr. Matheny, or anyone else, made an offer to Mr. Thacker with the intent to exclude Mr. Johnson from the longwall section in order to prevent him from functioning as a safety committeeman or to prevent him from making complaints.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that the complainant has failed to establish that the realignment of June 2, 1986, was in any way discriminatory, or was motivated by the respondent's intent to prevent him from exercising any protected rights with respect to his employment as a miner or in his capacity as a member of the safety committee. Even had the complainant established a prima facie case, I conclude that it was clearly rebutted by the respondent's credible evidence which established that the realignment constituted a reasonable and plausible business-related and non-discriminatory effort by management to increase production in order to facilitate and expedite the installation of the longwall. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief, including costs, ARE DENIED.

George A. Koutras

George A. Koutras
Administrative Law Judge

Distribution:

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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 2 1987

EMERALD MINES COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	
	:	Docket No. PENN 85-298-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 2401863; 8/8/85 Emerald No. 1 Mine
and	:	
LOCAL UNION 1889, DISTRICT 17 UNITED MINE WORKERS OF AMERICA, Intervenor	:	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania for Emerald Mines Company;
Edward H. Fitch, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia for the Secretary of Labor;
Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C. for the Intervenor

Before: Judge Gary Melick

This case is before me upon remand by a majority of the Commission for further proceedings consistent with its decision dated September 30, 1987. On October 27, 1987, the following stipulations were filed with the undersigned:

1. On August 8, 1985, at 8:00 a.m., Inspector Koscho issued Citation No. 2401863 ("Citation") purportedly pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 814(a), alleging a violation of 30 C.F.R. 75.308.

2. Under the heading and caption "Condition or Practice," the Citation alleged as follows:

During a 103(G)(1) investigation it is determined that power from the continuous miner Serial No. JM 2567 was not immediately de-energized when 2.5% to 2.6% methane was detected; also changes were made in the ventilation in the working places before the continuous miner in the working place was de-energized. The incidence [sic] took place in No. 1 Haulage 002 section in a crosscut being driven from 3 Room to 2 Room on 7/29/85.

3. The Citation alleged that the alleged violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard.

4. On August 23, 1985, at 8:15 a.m., Inspector Koscho modified the Citation to a Section 104(d) citation, thereby alleging an unwarrantable failure to comply with the mandatory standard.

5. On September 6, 1985, Emerald filed a Notice of Contest challenging the Citation and the modification of the Citation to a Section 104(d) citation and the special finding of "unwarrantable failure."

6. A proposed penalty was issued for the 104(a) Citation in September, 1985, and was paid by Emerald on October 11, 1985.

7. On November 18, 1985, the Secretary filed a Motion to Dismiss Proceedings on the basis that the Notice of Contest was moot because Emerald paid the proposed penalty. Emerald filed a response to the Secretary's Motion to Dismiss.

8. On November 15, 1985, Emerald filed a Motion for Partial Summary Judgment as to the unwarrantable failure allegation. The principal ground for this Motion was that the Citation was based upon an after-the-fact investigation and, therefore, could not properly be based upon Section 104(d) of the Act. The Secretary filed a response to Emerald's Motion.

9. A hearing was held before the Administrative Law Judge on January 22, 1986. The hearing was limited to the issues raised by the parties' Motions.

10. On March 5, 1986, the Administrative Law Judge issued his decision. He granted the Secretary's Motion to Dismiss as to the fact of the violation and the significant and substantial finding but denied it as to the unwarrantable failure allegation and the allegation of a violation of

Section 104(d)(1) of the Act. He also granted Emerald's Motion for Partial Summary Judgment, modified the Citation to a Section 104(a) Citation and deleted the unwarrantable failure finding.

11. Intervenor, the United Mine Workers of America, petitioned the Federal Mine Safety and Health Review Commission for discretionary review of the Judge's decision granting Emerald's Motion for Partial Summary Judgment, and the Commission granted review on April 14, 1986.

12. After briefing and oral argument, the Commission issued a decision on September 30, 1987, reversing the Administrative Law Judge's decision as to Emerald's Motion for Partial Summary Judgment and vacating his modification of the Section 104(d) Citation to a Section 104(a). The Commission remanded the case to the Administrative Law Judge for further proceedings.

13. Emerald wishes in the near future to seek review by the United States Court of Appeals of the Commission's decision on the issue of whether a Section 104(d) violation and unwarrantable failure finding may be based on an after-the-fact investigation. It is unable to do so until a final order is issued in this matter, and, for that reason, it has entered into this Stipulation to facilitate and expedite such review.

14. Emerald withdraws all its allegations challenging the modification of the Citation to a Section 104(d) citation except insofar as it has challenged such modification as improperly based upon an after-the-fact investigation, rather than an inspection and actual observance of the conditions described in the Citation. Emerald now limits its challenge of the unwarrantable failure finding and the allegations of a violation of Section 104(d) to those issues which the Administrative Law Judge addressed in deciding its Motion for Partial Summary Judgment and which were involved in the Commission's review of such decision, i.e., whether a Section 104(d) violation can properly be based upon an after-the-fact investigation rather than an inspection and actual observance of the cited conditions.

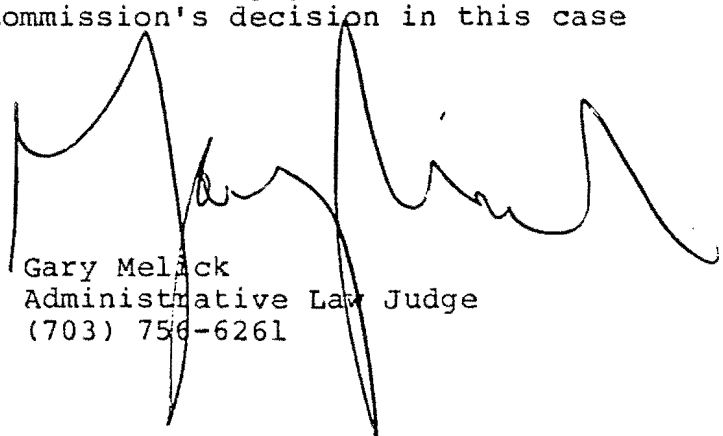
15. With this limitation of the basis of Emerald's challenge to the modification of the Citation, the Commission's resolution of the issues raised by Emerald's Motion for Partial Summary Judgment as to whether a Section 104(d) violation may be based upon an after-the-fact investigation is dispositive of Emerald's Notice of Contest and, on that basis, it is stipulated that it would be

appropriate that a finding be entered denying Emerald's Notice of Contest on the basis of the Commission's decision in this matter.

16. No further hearings are necessary in this matter.

17. An order may be entered denying Emerald's Notice of Contest on the basis of the Commission's decision in this matter since there are no other issues to be addressed in this matter.

The above stipulations are accepted for purposes of these proceedings. The Contest herein is accordingly denied and dismissed on the basis of the Commission's decision in this case rendered September 30, 1987.



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

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

NOV 2 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 86-191
	:	A.C. No. 48-00086-03508
v.	:	Kemmerer Mine
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
John A. Bachmann, Esq., The Pittsburg & Midway Coal Company, Denver, Colorado, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges Pittsburg and Midway Coal Company, (P & M), with violating three safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

A hearing on the merits took place on January 6, 1987 in Salt Lake City, Utah. The parties filed post-trial briefs.

Issues

The issues presented are whether the violations occurred; if so, what penalties are appropriate.

Citation No. 2831954

This citation alleges a violation of 30 C.F.R. § 77.603 which provides:

§ 77.603 Clamping of trailing cables to equipment.

Trailing cables shall be clamped to machines in a manner to protect the cables from damage and to prevent strain on the electrical connections.

The violative condition is described in the subject citation as follows:

The junction box located in pit #1-VD supplying power to the #809 overburden shovel does not have a straining clamp on the 7200 Volt A.C. trailing cable. The cable is very tight and not preventing a strain on the electrical connections.

Summary of the Evidence

Melvin Potter, a person experienced in mining, has been an MSHA electrical inspector for eight years. On May 6, 1986, he inspected the Kemmerer Mine operated by P & M (Tr. 5-7).

During the course of his inspection, as he went by a junction box in the 1-VD pit, he could not see a straining clamp 1/ on it (Tr. 7). The restrained cable was the trailing cable for the shovel. The voltage in the cable was 7200 AC (Tr. 7, 8).

A company electrician opened the junction box. Inside the box he observed a wooden clamp, but it was not fastened and it was loose from the cable (Tr. 8, 9). If it had been fastened it would have served as a straining clamp for the 1000 or more foot cable. When the inspector observed the trailing cable it was taut and there was strain on it (Tr. 10).

Failing to secure the trailing cable could cause a phase to ground fault or a phase to phase fault. A phase to phase would energize the junction box and the rest of the system with 7200 volts (Tr. 13-15). If a miner touched the box he would be electrocuted (Tr. 14).

In the inspector's opinion, it was reasonably likely that an injury could occur if the condition was not remedied.

In cross examination the inspector agreed that the citation, as written, states there was no straining clamp on the cable (Tr. 40).

However, there was a wooden block clamp in the box. But the clamps were laying down in the box and not around the cable (Tr. 42).

When the inspector pointed out the failure to have a restraining clamp in the box the electrician immediately put on a wooden clamp (Tr. 56-58). The electrician said they had worked on the box before the inspection and had apparently left the clamp off.

Photographs, Exhibits R1 and R2, were not taken at the time of the inspection (Tr. 56).

1/ A straining clamp goes on the cable to prevent strain on the cable inside the box itself (Tr. 7).

Called as a rebuttal witness, Inspector Potter identified his notes made at the inspection. They indicated there was no clamp on the cable (Tr. 242).

Richard Dovey, testifying for respondent, serves as P & M's manager of safety and training (Tr. 60, 61).

The witness accompanied the inspection team. They initially discussed the necessity of P & M placing firefighting equipment on a utility's substation.

On two occasions the morning of the inspection the inspector had driven by the 1-VD area. There was no external clamp on the box. They called the electricians to shut down the shovel. A photograph was taken on a identical junction box (Tr. 65, 55; Ex. R3). The witness, Dave Ravnikar, Rex Playstead and Inspector Potter were present at the time of the inspection.

When we approached the box Mr. Potter directed the inspection party to stop because he could not see a strain clamp. However, when the box was opened he observed the wooden blocks were located in their proper place. That is, two wooden blocks with a hole cut in them held the cable (Tr. 68). The blocks measure 8 inches by 8 inches with a hole approximately two and one eighth inch (Tr. 69). The blocks cannot come out when the lid is closed.

Company policy requires the shock blocks and straining clamps on the trailing cables. This protects strain from the inner mechanism of the box and it protects the cable against scuffing on the metal edges of the boxes (Tr. 71).

In the opinion of the witness the clamp qualifies as a trailing clamp under § 77.603. The connectors inside the box were protected from strain as a result of the clamp (Tr. 71, 72). After the inspection an external Clellen grip was installed. The company representatives didn't tell the inspector they already had a clamp in place because they hadn't decided if the inside clamp in place was a legitimate cable strain (Tr. 73).

Witness Dovey's basic statements to MSHA's supervisory mine inspector in Sheridan, Wyoming was the same as his testimony (Tr. 182-185). However, the supervisor indicated that all of the citations would stand as written (Tr. 185, Ex. R7).

Dovey didn't disagree that the screws in the restraining clamps were missing (Tr. 186).

Discussion

The evidence is conflicting as to whether a violation of the regulation occurred.

Inspector Potter testified the junction box did not have an external straining clamp. He agrees the citation was written in this fashion. But when the junction box was opened it was found the box contained wooden blocks around the cable. These blocks suffice as a straining clamp. Since the wooden blocks serve as a restraining clamp it follows that P & M did not violate the regulation.

I credit respondent's evidence that the cable was resting on the two wooden blocks. I disregard the inspector's evidence that blocks were unfastened and loose from the cable. Blocks measuring 8" x 8" in a junction box are not likely to become loose in a box of this type. In addition, it was not shown how any screws, even if missing, would affect the ability of the blocks to serve as a straining clamp when the junction box was closed.

Citation No. 2831954 should be vacated.

Citation No. 2831955

This citation alleges a violation of 30 C.F.R. § 77.701 which provides:

> § 77.701 Grounding metallic frames, casings, and other enclosures of electric equipment.
>
> Metallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary.

The violative condition is described in the citation as follows:

> A 110 volt AC space heater located in the electrical supervisor's office is not equipped with a proper ground. The heater was energized and in use.

Summary of the Evidence

On the same inspection Mr. Potter found an ungrounded 110 volt AC metal-cased heater in the electrical supervisor's office. It had two phase wires plugged into a 110 volt outlet. It lacked a third wire for grounding (Tr. 16). In addition, there was no solid connection to any metal water lines having a low resistance to earth. Further, there was no grounding of any other type (Tr. 17). Failure to ground this type of heater could cause shock, serious burns or a fatality. If this condition continued and a fault occurred you could reasonably expect a shock or serious burn (Tr. 18, 19).

The inspector did not check the inside of the heater to see whether or not it was double insulated (Tr. 43). The back of this appliance had a "UL" stamp of approval on it (Tr. 43).

The methods approved by the Secretary for grounding equipment (30 C.F.R. 77.701-1) are the methods to be used for AC equipment (Tr. 43, 44).

The inspector did not check to see whether the power system from which this heater received its power was ungrounded. However, he explained that the heater itself was not grounded. And if a fault occurred on the heater, the fault could not go to ground (Tr. 46, 48).

The inspector was not sure if MSHA has a policy concerning the grounding of appliances (Tr. 49).

In the inspector's opinion, the metal heater could have been grounded by an extra wire back into the wall socket. Also a three prong plug would have grounded it (Tr. 50, 51).

Witness Dovey, testifying for respondent, confirmed that the heater lacked a three prong plug. However, the building where the device was plugged was grounded and equipped with circuit breakers (Tr. 111).

Witness Dinkel, called as an expert witness for the Secretary in rebuttal, indicated that equipment of this type must be grounded regardless of UL approval (Tr. 220-222).

Witness Veneskey, testifying for P & M, expressed the opinion that § 77.701 applies to appliances (Tr. 159). The witness expressed his views as to the § 77.516 and the National Electrical Code (Tr. 160-162). The heater fits into the NEC criteria (Tr. 162). The witness was not aware of any MSHA requirement that appliances when brought out to the mine be modified to include a ground plug if they do not have one from the manufacturer (Tr. 163).

In cross examination, the witness agreed the possibility existed that the metal frame might become alive through a failure of insulation or a contact or an energizing of the parts (Tr. 164, 165, 168).

Discussion

Section 77.701 is not applicable or that it applies only to electrical equipment from ungrounded AC power system. P & M, in

support of its position, cites the Secretary's regulations, § 77.516 and 77.701-1. 2/

An analysis of relevant regulations indicates that § 77.516 was enacted under "Subpart F - Electrical Equipment - General". I would be inclined to agree with P & M's views but § 77.701, violated here, was enacted in "Subpart H - Grounding". In sum, the Secretary has enacted general regulations relating to equipment as he did in Subpart F and he may generally require that such equipment meet the NEC. He may then impose stricter limitations, as he did, in relation to the grounding of such equipment as in § 77.700.

P & M further states that § 77.701-1 controls the scope of § 77.701. It contends that § 77.701-1 by its terms limits § 77.-701 to ungrounded equipment. I do not agree. Section 77.701 by its terms generally covers grounding. There is no indication the subsequent regulation was enacted so as to limit § 77.701.

The cases and textbook cited by P & M deal with general rules of statutory construction and they are not inopposite the views expressed herein.

P & M's final argument is that MSHA has issued no policy or interpretation requiring the replacement of two-prong plugs.

2/ § 77.516 Electric wiring and equipment; installation and maintenance.

In addition to the requirements of §§ 77.503 and 77.506, all wiring and electrical equipment installed after June 30, 1971, shall meet the requirements of the National Electric Code in effect at the time of installation.

§ 77.701-1 Approved methods of grounding of equipment receiving power from ungrounded alternating current power systems.

For purposes of grounding metallic frames, casings and other enclosures of equipment receiving power from ungrounded alternating current power systems, the following methods of grounding will be approved.
(a) A solid connection between the metallic frame; casing or other metal enclosure and the grounded metallic sheath, armor or conduit enclosing the power conductor feeding the electric equipment enclosed;
(b) A solid connection to metal waterlines having low resistance to earth;
(c) A solid connection to a grounding conductor extending to a low-resistance ground field; and,
(d) Any other method of grounding, approved by an authorized representative of the Secretary, which insures that there is no difference in potential between such metal enclosures and the earth.

Therefore, the inspector's abatement requirements amount to nothing more than his personal preference.

The regulation, in effect, provides that potentially energized parts shall be grounded by methods approved by the duly authorized representative of the Secretary, that is, the inspector.

Several methods of grounding were available but in the instant case a three way plug was required. It was not shown in this case that the inspector exceeded his authority.

Citation No. 2831955 should be affirmed.

Citation No. 2831956

This citation alleges a violation of 30 C.F.R. § 77.502 which in its entirety provides:

> § 77.502 Electric equipment; examination, testing, and maintenance.
>
> Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

The violative condition is described in the citation as follows:

> The electrical equipment located in the Sorenson Draw tunnel is not being properly inspected and maintained, in that the 24 volt telephone system has electrical wires exposed and a toggle switch added allowing coal dust to enter inside the telephone.

Summary of the Evidence

Inspector Potter inspected the 24-volt telephone in the Sorenson Draw tunnel. He found the metal encased battery powered system had a switch and two connectors on the outside of the phone. It also had external connecting terminals that run to the surface (Tr. 19, Ex. R1, R2). There was coal dust on the terminals and on the batteries (Tr. 20, 32). The external bare clamps which carry 24-volt current and the toggle switch were not on the phone. This allowed coal dust to enter the phone where the wires were located. The bare wires were attached to a bare clamp on the outside of the phone (Tr. 21, 22). There was also coal dust in and around the clamps. The terminals, an inch and half apart, could have provided a source of ignition (Tr. 22). Coal dust would provide the fuel for the explosion. Small explosions can keep expanding throughout an area (Tr. 24).

The tunnel has conveyor belts; also one or two maintenance people work there (Tr. 24).

The toggle switch was on the outside of the phone (Tr. 24, 25). It was not dust tight. You could see through to the switch when you opened the door of the telephone (Tr. 25).

In the inspector's opinion, there was sufficient coal dust on the interior of the phone to create a hazard (Tr. 26). The opening in the phone could create a flame path to the exterior of the phone (Tr. 27). Most phones have a sealed rubber type boot over the switch (Tr. 27, 28). The boot prevents dust from entering into the electrical components of the phone. The inspector had never seen a telephone with an unprotected toggle switch (Tr. 28). The telephone was tagged "approved for methane only". Approval for methane is not equivalent to approval for dust (Tr. 29). Coal dust is more violatile than methane. Methane will burn itself out but coal dust just "keeps going" (Tr. 30).

This was a permanently installed phone and the tunnel was always dusty (Tr. 30, 31). In view of these conditions you could reasonably expect a mine explosion. This tunnel has been cited for coal dust in the past (Tr. 31).

In cross examination, the inspector read from the definition § 30 C.F.R. Part 23(d) (Tr. 34). Under the definition a permissible phone could or could not be permissible in both gassy and dusty locations (Tr. 36, 37). This particular phone was methane proof, a higher standard than dust proof.

Witness Dovey, testifying for respondent, described the use of the telephone. During the inspection Dovey did not see any light coming through the toggle switch hole. Further, there was no hole at the toggle switch (Tr. 91).

After the citation was issued Dovey researched the telephone. He produced the maintenance manual for the telephones in the tunnel. The manual had been obtained from the electrical department. Dave Ravnikar also stated that the toggle switch had not been added (Tr. 93, 94). Dovey copied the identifying number from the telephone. But he didn't recall the manufacturer (Tr. 96). Further, he didn't recall the ID number. In addition, he couldn't say if it was the number that appears on the front page of the exhibit. However, he took the document down to compare it to see if he had exactly the same phone (Tr. 96). Dovey didn't know who published the exhibit (R5). The maintenance department maintains manuals for the equipment at the mine (Tr. 97). Such records are generally maintained with a mine issuance number but there is no such number on the phone (Tr. 97, 98). But he had taken the information from the door on the phone (Tr. 98). A manufacturer's name was present but Dovey did not recall it (Tr. 98). Dovey also didn't know if there had been any after acquired phones (Tr. 98).

Comparisons between Exhibit R5 and photographs of the telephone previously received in evidence indicates there was no speaker, nameplate or labels on the telephone as depicted in the offered exhibit 3/ (Tr. 94-102, Ex. R5).

Dovey is familiar with the concept of permissible communication systems in coal mines. Such a system can be placed in a dusty, gaseous area. This particular tunnel has never been classified (Tr. 106). According to the company brochure the phone system was permissible (Tr. 107). This particular phone has a sticker saying it is "MESA - approved permissible." Permissible equipment is sealed to prevent dust or gas from entering (Tr. 108). It is, accordingly, dust ignition proof.

The telephone was maintained in a proper operating condition (Tr. 109). The connectors on the telephones were in the proper holes (Tr. 109, 110). The toggle switch was intact and tight. There was no dust in the telephone. It was a 12 volt phone and the batteries were connected in parallel (Tr. 110).

TERRANCE DINKEL, called as an expert rebuttal witness by the Secretary, was identified as an electrical engineer for MSHA (Tr. 193-195).

In Dinkel's opinion the telephone system was not intrinsically or inherently safe. Intrinsically safe means a device has insufficient energy to ignite the atmosphere present. A 24-volt or a 12-volt, or a flashlight battery can ignite coal. The light coming through the switch indicates the units were not sealed (Tr. 197, 198, 203). Section 27-7(d) of C.F.R. 30 requires batteries to be in sealed containers. Since there was dust inside the cabinet it was not sealed (Tr. 199, 201).

The telephone, as inspected by Mr. Potter, was potentially dangerous. It is a matter of time before moisture and dust accumulate and cause a short (Tr. 205).

Protection from methane does not constitute protection from coal dust. Coal can conduct current from one terminal to another (Tr. 211). Even though approved for methane a faulted circuit could ignite the coal dust lying in its path (Tr. 219).

Witness Dinkel further stated that a device designated permissible by MSHA is permissible in both dusty and gassy locations (Tr. 226).

In rebuttal Inspector Potter testified the telephone was tagged as "permissible MESA for methane only" (Tr. 240).

3/ The judge sustained the Secretary's objection and excluded Exhibit R5 (Tr. 103, 105, 191-192, 248).

The inspector's notes made at the time of the inspection stated there was dust on the inside of the compartment. You could rub your fingers and they would come up black (Tr. 242, 243, Ex. P2). However, the wind and coal dust was blowing in the tunnel but the dust in the telephone did not go into suspension (Tr. 245). There was some coal dust in suspension in the tunnel (Tr. 246).

James T. Veneskey, a person experienced in mining, serves as the director of safety for P & M (Tr. 152-154).

In the opinion of the witness a 12 or 24 volt system will not ignite coal dust. Coal dust must be in suspension before it will explode (Tr. 157). With the MSHA approval label the telephones were intrinsically safe but not designed to be totally dust proof. But they were to be used in a dusty and gassy atmosphere (Tr. 157-159). The enclosure was not permissible so as to reduce a flame path (Tr. 158).

Witness Dovey testified there was a sticker on the telephone stating "MESA permissible" (Tr. 239).

Discussion

The pivitol issue here concerns whether the telephone was "potentially dangerous" within the meaning of § 77.502.

In connection with this citation I credit the testimony of Inspector Potter and witness Dinkel. Briefly, the inspector found coal dust on the terminals and on the batteries in the telephone. In addition, bare wires were attached to a bare clamp on the outside of the phone. Both witnesses concluded the terminals, an inch and a half apart, could provide a source of ignition for the coal dust. The telephone, with a hole at the toggle switch, in a coal dusty tunnel, was "potentially dangerous" within the meaning of the regulation.

P & M contends MSHA is attempting to penalize it through the use of conjecture and deceit. Specifically, it contends MSHA's case is based on the failure to maintain electrical equipment, i.e., exposed electrical wires and a defective toggle switch. But at the trial MSHA mutated the case into allegations of a dangerous accumulation of coal dust.

I disagree with P & M's claim. The facts presented at the hearing are fairly within the allegations of the citation. The violative condition is described as follows:

> The electrical equiptment [sic] located in the Sorenson draw off tunnel is not being properly inspected and maintained, in that the 24 volt telephone system has electrical wire's exposed and a toggle switch added allowing coal dust to enter inside the telephone.

P & M states that, in any event, MSHA's evidence is woefully lacking of proof to establish the conditions necessary to create a hazardous condition. P & M cites The Pittsburg and Midway Coal Mining Company, 7 FMSHRC 2072 (1985). It is true that in the above case Judge Koutras concluded that accumulations of coal dust which are merely black in color are not dangerous. 7 FMSHRC at 2104.

The evidence in the instant case shows a minimal amount of coal dust accumulation. Inspector Potter saw dust over the inside of the phone. You could rub your fingers across the compartment and they would come up black (Tr. 242, 243). However, the potentially dangerous condition consisted of all of the facets involved here. These were the hole at the toggle switch, the coal dust between the terminals of the batteries (an ignition source) and the coal dust blowing in the 14 foot by 20 foot tunnel (Tr. 245, 246).

More persuasive than Judge Koutras' decision is the Commission decision in Pittsburg and Midway Coal Mining Company 8 FMSHRC 4 (1986). In this case the Commission was dealing with a related standard, 30 C.F.R. § 77.202 4/

Specifically, the Commission stated as follows:

> P & M argues on review that the judge erred in finding a violation because the judge did not require the Secretary to establish the existence of a present, actual ignition source in the vicinity of the accumulation at the time of the inspection. Rather, the judge concluded that under section 77.202, if a "potential" ignition source is present in the vicinity of an accumulation, the accumulation is dangerous within the meaning of the standard. 6 FMSHRC at 1349. We agree with the judge's conclusion. It is well established that the Mine Act and the standards promulgated thereunder are to be interpreted to ensure, insofar as possible, safe and healthful working conditions for miners.

Further, the Commission observed that:

> Section 77.202, like most coal mine safety standards, is aimed at the elimination of potential dangers before they become present dangers.
>
> 8 FMSHRC at 6.

In sum, in the instant scenario, the telephone was "potentially dangerous".

4/ The standard reads: Coal dust in the air of, or in or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts.

P & M also contends the telephone was permissible for this location and therefore complied with 30 C.F.R. § 23.2(d). 5/

On this issue the credible evidence shows that the telephone was marked as "approved for methane only" (Tr. 28, 29). Further, according to MSHA's electrical engineer, Dinkel, methane gas is not a conductor but coal dust can be (Tr. 210, 211, 217). Even though permissible for methane the presence of coal dust would still present a potentially hazardous situation (Tr. 218, 219). In addition, to the above factors, the telephone was obviously not permissible in view of the hole at the toggle switch.

P & M further argues that it was impossible for Inspector Potter to see a hole at the toggle switch. He did not have a flashlight and the location of the telephone and its position in the tunnel preclude such an observation.

I disagree. Witness Davey indicated there was light in the tunnel behind the telephone as well as directly overhead (Tr. 89, 90). Inspector Potter indicated there were lights on the ceiling, sides and behind (Tr. 39, 40). When the telephone door was opened you could see through the hole at the toggle switch (Tr. 39).

For the foregoing reasons Citation 2831956 should be affirmed.

Civil Penalties

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Act.

The evidence establishes that P & M has a minimal adverse prior history. The company has three violations for the two year period ending May 5, 1986 (Ex. P1). The record fails to disclose the size of the operator. The record does not present any information concerning the operator's financial condition. Therefore, in the absence of any facts to the contrary, I conclude that the payment of penalties will not cause the operator to discontinue its business. Buffalo Mining Co., 1 IBMA 226 (1973) and Associated Drilling, Inc., 3 IBMA 164 (1974). The operator was negligent as to the ungrounded space heater inasmuch as this condition was open and obvious. The operator also was negligent as to the telephone equipment. Periodic checks, such as are required by § 77.502, would have disclosed these defects. The gravity of each violation was high. A miner could have been

5/ The cited definition reads:
(d) "Permissible" as used in this part means completely assembled and conforming in every respect with the design formally approved by MSHA under this part. (Approvals under this part are given only to equipment for use in gassy and dusty mines.)

burned or electrocuted by the electrical space heater. The defective telephone could have caused an explosion. The operator is to be credited for statutory good faith since the violative conditions were abated.

On balance, I deem that a civil penalty of $150 is proper for each citation affirmed herein.

Briefs

The parties have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent did not violate 30 C.F.R. § 75.603 and Citation No. 2831954 should be vacated.

3. Respondent violated 30 C.F.R. § 77.701 and Citation No. 2831955 should be affirmed.

4. Respondent violated 30 C.F.R. § 77.502 and Citation No. 2831956 should be affirmed.

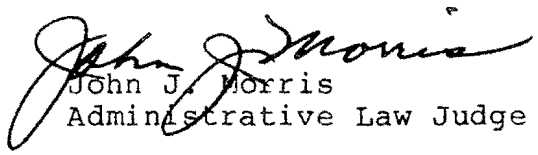
Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation No. 2831954 and all penalties therefor are vacated.

2. Citation No. 2831955 is affirmed and a civil penalty of $150 is assessed.

3. Citation No. 2831956 is affirmed and a penalty of $150 is assessed.



John J. Morris
Administrative Law Judge

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 6 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BRIAN S. OUSLEY Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 87-85-DM
	:	MD 86-18
v.	:	C.P.L. Plant
METRIC CONSTRUCTORS, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

The Parties, on November 2, 1987, filed a Motion for Decision and Order Approving Settlement which was signed by Complainant and the Attorney for Respondent. A Settlement Agreement signed by the Parties was attached to the Motion.

I find that the terms of the settlement agreement are just to both Parties.

Accordingly, the Motion Approving Settlement is GRANTED, and it is ORDERED that the settlement agreement of October 15, 1987, is APPROVED, and the Parties shall be bound by all its terms.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 6 1987

H. D. ENTERPRISES, LTD., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 87-183-R
v.	:	Order No. 2909306; 4/15/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Birchfield No. 1 Mine

DECISION

Appearances: William D. Stover, Esq., Beckley, West Virginia, for Contestant;
Jack E. Strausman, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the application for review filed by H. D. Enterprises, Ltd. (H.D.) pursuant to section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act" to challenge an "imminent danger" withdrawal order issued by the Secretary of Labor pursuant to section 107(a) of the Act.[1/]

1/ Section 107(a) of the Act provides in part as follows:

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

The order at bar, No. 2909306, issued April 15, 1987, charges as follows:

> The boom and masts of the Grove IMS475A crane was [sic] being swung back and forth underneath the energized high voltage power lines in order to lift cement to the top of the Fan building. It was raining and the boom could easily contact the power linès. When measured with range finder the masts was [sic] 13 feet below the line. Men were also working on top of this building and contacting crane to empty cement.

Section 3(j) of the Act defines "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The limited issue before me in this case is whether such a condition or practice existed at the time the order at bar was drafted.[2/]

According to Ernest Thompson, a coal mine inspector for the Federal Mine Safety and Health Administration (MSHA), H. D. Enterprises, a contractor at the Birchfield No. 1 Mine, was in the process on pouring cement on the roof of a new fan building on the morning of April 15, 1987. Thompson observed that a crane was swinging a cement bucket beneath and at "close clearance" to what he presumed were high voltage powerlines. The crane itself was positioned under the powerlines and three workmen were standing on a metal decking onto which the concrete was being poured. The workmen would contact the cement bucket lever as they unloaded the bucket. The metal bucket was, in turn attached to metal ropes suspended from the boom of the crane.

Thompson testified that he did not know the distance between the boom and the powerlines at the time he issued the order but subsequently measured the distance and found that the boom came no closer than 13 feet to the closest powerline. Thompson also acknowledged that he did not know the voltage in the powerlines at the time he issued the order but presumed that there was sufficient voltage to cause electrocution to the workers on the roof should the boom contact the powerlines while someone was touching the lever on the cement bucket. Thompson also believed that an electrical "arc" could occur so that electric current

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[2/] While the order was terminated shortly after its issuance, questions regarding the validity of that order are not moot. See Zeigler Coal Co., 1 IBMA 71 (1971).

sufficient to cause electrocution could jump 8 to 10 feet through the air.

Wayne Milan, a graduate electrical engineer and MSHA electrical inspector, testified however that the lowest in height of the series of powerlines at issue was a low voltage ground wire transmitting no more than 40 volts and which could not cause electrocution if contacted. The MSHA expert also opined that electrical arcing could not occur over à distance of more than a few inches. In view of Milan's qualifications I find his testimony to be entitled to significant weight.

Considering Milan's testimony along with the uncontested evidence that the distance between the lower low-voltage ground wire and the high voltage wires was four feet, it is apparent that in reality the hazard about which Inspector Thompson was concerned i.e. the crane boom contacting the high voltage lines and electrocuting the workmen, was not as imminent as first thought. The closest distance between the boom and the high voltage lines was actually some 17 feet and the applicable regulatory standard (30 C.F.R. § 77.807.2) permits that distance to be as little as 10 feet. It is also apparent that the inspector was operating under the erroneous belief that electrical arcing could occur over a distance of 8 to 10 feet. The credible testimony of MSHA's electrical expert was that such arcing can occur over a distance of only a few inches. With the benefit of this additional information, which was not known to Inspector Thompson when he issued the order, I cannot find, that the Secretary has met his burden of proof that an "imminent danger" did in fact exist.

I also note that in abating the order, the inspector permitted the crane to continue operating in the same location which he had just found to be "imminently dangerous" (See Government Exhibit 2). This is confirmed by the testimony of crane operator Clinton Stover. The evidence also shows that during this stage of abatement Inspector Thompson was himself standing atop the metal roof of the fan building while the crane was operating in the noted manner. This evidence is not consistent with an "imminent danger".

ORDER

Order No. 2909306 is hereby VACATED.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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NOV 6 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-124-M A.C. No. 04-03821-05506
v.	:	Azusa Plant
OWL ROCK PRODUCTS COMPANY, Respondent	:	

DECISION

Before: Judge Morris

The Secretary of Labor on behalf of the Mine Safety and Health Administration, charges respondent with violating 30 C.F.R. § 56.9087, a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq., (the Act).

The parties waived their right to a hearing and submitted the case for a decision on stipulated facts.

Issues

The issues are whether respondent violated the regulation, if so, what penalty is appropriate.

Stipulation

The parties stipulated as follows:

1. Respondent is subject to the Federal Mine Safety and Health Act of 1977 (hereinafter called the Act) and the Federal Mine Safety & Health Review Commission (FMSHRC) has jurisdiction over the subject matter of this action and over the parties.

2. A citation was issued to Respondent alleging a violation of 30 C.F.R. § 56.9087 in that a number 8247 service repair truck, (a one-ton Ford pickup), which had a partially obstructed rear view was operated without an audible reverse signal alarm on the day of the inspection. A proposed civil money penalty of $56.00 was assessed and timely contested.

3. The standard allegedly violated, 30 C.F.R. § 56.9087 provides as follows:

§ 56.9087 - Audible warning devices and back-up alarms.

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

4. The payment of $56.00 civil money penalty will not affect respondent's ability to stay in business.

5. The size of respondent's company was 233,367 production tons or hours worked per year at the time of the citation.

6. The size of respondent's mine was 29,526 production tons or hours worked per year at the time of the citation.

7. In the 24 months preceding the issuance of the instant citation the total number of assessed violations against respondent is one.

8. Respondent abated the instant citation by installing an electric back-up alarm on the truck.

9. The truck in issue which is equipped with extended side mirrors on both sides, is a number 8247, Ford one-ton pickup truck.

10. Respondent uses this truck as a service repair vehicle. As such it loads and carries service equipment where needed throughout the mine. The majority of the time it is parked by the mechanics' shop.

11. The vehicle is not used for loading, hauling or dumping activities.

12. The drivers' tools are carried in the bed of the pickup. The bed is in the back. The driver can observe hazards to the rear prior to moving the pickup, when he replaces the tools, after completing whatever job he was performing.

13. The judge may consider MSHA's policy memorandum (Exhibit R1) in ruling on respondent's position.

14. The Mesa Health and Safety report, Exhibit P2, may be considered by the judge concerning the issue of gravity if a violation is established.

Discussion

The issue in this case focuses on whether a one-ton Ford pickup truck qualifies as heavy-duty mobile equipment within the meaning of 30 C.F.R. § 56.9087.

I conclude it does. In King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981) the Commission construed a similar regulation, 30 C.F.R. § 77.410. 1/ In that case the Commission ruled that ["t]ruck is a generic term and, of course, pickups are a familiar type of light truck." Further, the Commission observed that

> "the obvious purpose of §77.410 is to protect miners from vehicles of various size moving in reverse. The standard is premised on the general recognition that a driver's rear view is ordinarily not as good, and hence as safe, as the forward view. Even if their role at a mine is primarily auxiliary, three-quarter ton pickups are nevertheless medium-sized vehicles whose relative speed compared with heavier vehicles constitutes a hazard in the busy mine setting."

1/ The standard reads:

Mobile equipment; automatic warning devices.

Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse.

Respondent argues that MSHA's policy memorandum excludes the necessity of compliance. The policy memorandum provides as follows:

> § 12,258 MSHA Policy Memorandum Explains Mobile Equipment Reverse Alarm Requirements for Metal and Non-Metal Mines
>
> Mobile equipment engaged in "loading, hauling and dumping" at surface mines or surface areas of underground mines must have either back-up alarms or signalmen to comply with 55/56/57.9-87 if rear view is obstructed, according to the March 26, 1981, MSHA Policy Memorandum No. 81-3 MM. Text is as follows:
>
> Subject: Program Directive: Citation of Standard 55/56/57.9-87, Audible Reverse Alarms
>
> This document provides guidance for the uniform application of standard 55/56/57.9-87 and reflects recent Administrative Law Judge decisions which relate to the subject matter.
>
> The standard is applicable only to surface mines and surface operations of underground mines. The heavy duty mobile equipment addressed by the standard must be engaged in "loading, hauling, dumping" activites and must present an obstructed view to the rear.
>
> (Exhibit R1)

In King Knob the Commission noted that MSHA's policy is not binding on the Commission, 3 FMSHRC at 1420.

Respondent's further argument is that the pickup was not engaged in any "loading, hauling or dumping." Particularly, respondent relies on the scope-note containing 30 C.F.R. § 56.9087. Specifically, the scope-note reads, "Subpart H - - Loading, Hauling and Dumping."

As a general rule of statutory construction a scope-note does not prevail over the text of a regulation.

Finally, respondent argues that the truck driver can "observe" hazards to the rear prior to moving the pickup when he replaces the tools after completing whatever job he was performing.

Respondent's argument on this issue arises from paragraph 12 of the stipulation. However, observations by the truck driver prior to moving the truck do not assist him when he is actually moving the vehicle to the rear. It is at that point that his vehicle must have an unobstructed view to the rear or a backup alarm.

For the foregoing reasons, Citation No. 2671370 should be affirmed.

Civil Penalty

The statutory authority to assess a civil penalty is contained in Section 110(i) of the Act.

The stipulation of the parties addresses most of the statutory criteria. However, the issues of negligence, gravity and abatement should be considered.

The operator's negligence is minimal since it relied on MSHA's policy memorandum in determining potential liability. The gravity is high. Exhibit P2 focuses on a MESA investigation of a fatality involving the failure to have an audible backup alarm on an International "Cargo-Star" Model 1950 maintenance truck. The operator is to be credited with statutory good faith in promptly abating the violative condition.

Considering all of the statutory criteria, I conclude that a civil penalty of $25 is appropriate.

Conclusions of Law

Based on the entire record and the stipulation of the parties the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 56.9087 and Citation No. 2671370 should be affirmed.

Based on the stipulation of the parties and the conclusions of law I enter the following:

ORDER

Citation No. 2671370 is affirmed and a civil penalty of $25 is assessed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 10 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 86-262 A. C. No. 36-02405-03501 B70
v.	:	Greenwich No. 1 Mine
OTIS ELEVATOR COMPANY, Respondent	:	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Gary L. Melampy, Esq., Reed, Smith, Shaw & McClay, Washington, DC, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., (the "Act") for an alleged violation of the regulatory standard found at 30 C.F.R. § 75.1725(a). 1/

The issues before me are the respondent's status as an "operator" under the Act, the alleged vagueness of the cited standard, whether the respondent, if properly charged as an operator in this instance with violating a valid regulation, violated that regulation as alleged, and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e., whether the violation was "significant and substantial." If a violation is found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The case was heard in Pittsburgh, Pennsylvania, on March 31, 1987. The parties have filed post-hearing briefs and proposed findings and conclusions, and they have been considered by me in the course of this decision.

1/ § 75.1725(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Section 104(a) "S&S" Citation No. 2689913, issued on March 3, 1986, cites a violation of 30 C.F.R. § 75.1725(a) and the cited condition or practice is described as follows:

> Gary Belks and John Namestrik employees of the Otis Elevator Co. installed a govenor (sic) rope on the North Portal Elevator that created a hazard to the employees at this mine because this govenor (sic) rope was not installed properly. The smelter socket termination and Crosby Clamp termination were not properly made because the basket was not poured with smelter to the top of the small end of this basket and holes in the smelter existed on the wide end of this basket. The Crosby Clamp termination was made with the (2) 1/2" saddles on the dead end of this wire rope and there should be (3) three Crosby Clamps used on this 1/2" wire rope termination.

RESPONDENT'S STATUS AS OPERATOR

All during 1986 the Otis Elevator Company (Otis) had a contract with the Pennsylvania Mines Corporation (PMC) to furnish and provide supervision, labor, equipment, tools, materials and spare parts to inspect and maintain two elevators, including the North Portal Elevator, at PMC's Greenwich No. 1 Mine. This maintenance and service contract provided that Otis would maintain the elevator equipment in safe operating condition and more specifically that Otis would regularly and systematically examine, adjust, lubricate, repair or replace elevator parts, as required. Under the terms of this contract, Otis was further obliged to examine periodically all safety devices and governors and make periodic no load and full load safety tests. As a practical matter, this amounted to Otis conducting weekly inspections of the elevators, performing bimonthly safety tests and responding to trouble calls and repairing the elevators on an as-required basis. In consideration for the performance of this service, Otis received $2,600.60 per month for the North Portal Elevator and $2,646.64 per month for the other elevator at the Greenwich No. 1 Mine.

Interestingly, an attachment to this contract, signed for Otis by one Carl M. Dick as Branch Manager, arguably registers Otis as an independent contractor, including providing an address for service of MSHA citations.

The Act contains a rather broad definition of "operator" at section 3(d):

For the purpose of this Act, the term--

* * *

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

Against the background that Otis is an elevator service company whose employees, pursuant to a service contract between Otis and PMC performed inspections and conducted safety tests on a regular basis on the two elevators at the Greenwich No. 1 Mine as well as performing more extensive maintenance and repair work on those elevators on an as-needed basis, it seems patently clear to me that the language of section 3(d) of the Act intended to include them within the definition of "operator."

Otis, however, contends that, on average, their employees are only in the mine once a week, for an average visit of 1.5 hours. The argument being that this is a minimal presence which is insufficient to bring them under the Mine Act. I note, however, that the very citation at bar was issued as a result of elevator repair work done by their employees on one of those visits. Otis also alleges and I am satisfied that they do not perform construction work at the mine nor control any area of the mine. Contrary to their assertion, however, that they do not maintain a continuing presence at the mine, I disagree and find that in the performance of their contractual obligations to PMC at Greenwich No. 1, they did indeed have a continuing presence at the mine for all of 1986.

For legal authority, Otis cites National Industrial Sand Association v. Marshall, 601 F.2d 689 (3rd Cir. 1979), and Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985).

Both cases are distinguishable. In National Industrial Sand Association, the issue the court was faced with was substantially different. The issue before the Third Circuit was whether the Secretary was statutorily authorized to include fewer than all independent contractors as operators for purposes of the training regulations. The Court, however, at the beginning of its analysis did set forth some general guidance:

'Operator' is defined in the Mine Act as 'any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or

> construction at such mine.' As this definition indicates, some, if not all, independent contractors are to be regarded as operators. The reference made in the statute only to independent contractors who 'perform[] services or construction' may be understood as indicating, however, that not all independent contractors are to be considered operators. There may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed. 601 F.2d at 701 (footnote omitted).

Old Dominion, supra, while an enforcement proceeding similar to the instant case, presents a very different situation factually. In Old Dominion, the utility's contacts with the mine were truly de minimis.

> The sole revenue derived by Old Dominion from its relationship with Westmoreland is for the sale of electric power. Old Dominion does not perform any maintenance at the substation, or of the transmission or distribution lines leading to and from the substation. Old Dominion's employees install equipment to measure voltage and amperage for its meter, maintain the meter and read it approximately once per month for purposes of billing. 772 F.2d at 93.

In holding that the MSHA regulations do not apply and were not intended to apply to electric utilities whose sole relationship to the mine is the sale of electricity, the Court stated that:

> Old Dominion's only contact with the mine is the inspection, maintenance, and monthly reading of a meter for the purpose of sending a bill to a mine company for the sale of electricity. Petitioner's employees rarely go upon mine property and hardly, if ever, come into contact with the hazards of mining.
>
> * * *
>
> MSHA seeks to regulate those few moments every month when electric utility workers read or maintain meters on mine property.
>
> * * *

> Plainly, Congress intended to exclude electric utilities, such as Old Dominion, whose only presence on the site is to read the meter once a month and to provide occasional equipment servicing. 772 F.2d at 96-97.

In stark contrast to the Old Dominion factual situation, I find as a fact that Otis's contractual obligations and performance thereof constituted a substantial, as opposed to a de minimis continuing presence at the Greenwich No. 1 Mine. Further, although the elevator is not used to transport coal and is not per se a part of the coal production or extraction process, I nonetheless find and conclude that because the North Portal elevator transports approximately 20% of the work force into and out of the mine on a daily basis and is additionally a designated escapeway, it is an essential ingredient involved in the coal extraction process.

I also find and conclude that the party responsible for the cited condition and who was in fact in the best position to eliminate the hazard, if there was a hazard, and prevent it from recurring was none other than the Otis Elevator Company. Inspector Niehenke, in his discretion, exercised his judgment and cited Otis for the alleged violation as the operator responsible for the installation of the governor rope on the North Portal elevator. I concur in at least that portion of his decision.

VAGUENESS OF THE CITED REGULATION

Respondent Otis also asserts that 30 C.F.R. § 75.1725(a) is unconstitutionally vague because it does not establish any standards by which a person can determine what the regulation requires of them in order to comply with its terms. There is no doubt that the regulation is a very subjective standard which on its face simply requires that machinery and equipment "be maintained in safe operating condition."

Broadness, however, is not necessarily a fatal defect in a safety standard. The Commission has previously held that many such standards must of necessity be "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (1981). Furthermore, in a case involving this very same regulation, Alabama By-Products Corp., 4 FMSHRC 2128 (1982), the Commission rejected the operator's contentions of unconstitutional vagueness and stated the following test:

> [I]n deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately

measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. 4 FMSHRC at 2129.

Applying this test to the facts of this particular case, I specifically reject Otis' argument that this standard is so overbroad and/or vague so as to be unenforceable, and so will instead decide the fact of violation of the cited standard in this case on the merits.

FACT OF VIOLATION-30 C.F.R. § 75.1725(a)

MSHA electrical Inspector Leroy Niehenke testified as to his training and experience, and he confirmed that he had conducted an inspection of the North Portal elevator at the Greenwich No. 1 Mine on February 27, 1986. As a result of this inspection, he felt that the governor rope should be replaced, and it subsequently was, by Otis Elevator Company personnel.

On March 3, 1986, Inspector Niehenke returned to see to it that the governor rope had been replaced, and he determined that it had. He got on top of the elevator car and checked the suspension rope and governor rope terminations. He noticed that the newly babbitted socket termination on the governor rope attached to the safety linkage on the top of the elevator car had several holes in the babbitt material on the larger end of the basket termination. He testified further that the babbitt material was not adhering to the wires that came through the socket and there was also no babbitt visible from the small end of the basket, which indicated to him that there was a void of babbitt material inside the basket, adversely affecting the efficiency of the termination.

The governor is attached to the elevator car by a one-half inch diameter steel governor rope attached at the top and bottom of the car. At the top of the car, the rope is attached by means of a babbitted socket termination. This socket is a tapered basket approximately 2 1/2 inches long with a small end and a larger end. The small end of the socket is provided with an opening that is slightly larger than one-half inch in diameter so that the 1/2-inch rope can pass through it. The socket termination is made by unravelling approximately five inches of the rope at one end to spread out the lays of the rope, turning them inward to form

a rosette, and pulling them into and towards the small end of the tapered socket. Once the rosette is pulled into the socket, a molten alloy of tin, copper and antimony ("babbitt") is poured into the socket. At the bottom of the car, the governor rope is attached to the car by means of U-bolts known as "Crosby clamps."

Inspector Niehenke found fault with this lower termination of the governor rope also because he felt there should be three (3) Crosby clamps on the termination vice the two (2) he found there and they were installed with the U-bolts on the live-end of the rope as opposed to the dead-end as he stated they are supposed to be installed. The "live-end" of the rope being the end of the rope that is attached to the equipment as opposed to the "dead-end" where the rope is merely turned around and cut off. There is nothing attached to the "dead-end." The problem being, according to the inspector, that the U-bolts will crush these wires and the termination can fail. Even the Otis expert testified that the U-bolts should be placed on the dead-end of the rope to prevent kinking the live-end, damaging the rope lays and losing strength in the rope.

The basic facts concerning the top and bottom terminations as testified to by Inspector Niehenke have not been rebutted in any manner by Otis. The more difficult issue is what do those now established facts mean vis-a-vis the safety of the elevator or any component of it. In order to establish the regulatory violation cited herein, the Secretary bears the burden of proof that the equipment, the elevator or some part of it, was rendered "unsafe" by Otis' installation of the governor rope.

The elevator in question is supported by nine suspension ropes during normal operation, any one of which is capable of supporting the entire weight of the car. The governor rope performs no hoisting or suspension function. It is attached at the top of the car to a lever which activates the mechanical safeties for the elevator if the car exceeds 125% of its rated speed. The governor senses the speed of the elevator through the governor rope. As the elevator moves up and down, the governor rope runs over two sheave wheels located at the top and bottom of the elevator shaft. This movement of the rope causes the wheels to turn and the flyballs on the governor to spin. As the elevator speed increases, the centrifugal force on the flyballs causes them to rise. If and when the elevator speed would exceed 125% of its rated speed, it would cause the flyballs to rise to the point where two metal jaws in the governor mechanism would release and clamp down on the governor rope, causing the rope to pull up the governor rope lever situated on top of the elevator car, activate the safeties, and stop the car.

During normal operations, the load on the lower termination (the Crosby clamps) is the weight of the lower sheave wheel and the weight of the rope. In the event the safeties are activated in an overspeed condition, there is no load on the rope termination on the bottom of the car because the tension on the governor rope at that time would be exerted between the governor jaws and the safety lever on the top of the car (the socket termination). The load exerted on the socket termination on the top of the car to set the mechanical safeties is on the order of 250-300 pounds of pull (force). That is the force required to pull up the governor rope lever on top of the car, which in turn activates a spring which applies the safeties and stops the car. The maximum possible tension on the socket termination would be approximately 1000 pounds, as the governor jaws are designed to release the rope when the level reaches 1000 pounds, by which time the safeties should have been activated. I find that if it were possible for either end termination to fail under any load it would ever be subjected to in normal or emergency conditions, I would find that condition to be an "unsafe" one, and in violation of 30 C.F.R. § 75.1725(a).

Inspector Niehenke uses the American National Standard for Wire Rope for Mines as a guideline for inspecting mine elevators. More specifically, in this case, he used portions of these ANSI standards to check and ultimately reject as unsatisfactory the two terminations made on the governor rope. Neither of the terminations were done in accordance with the ANSI standards, as the unrebutted testimony of the inspector clearly establishes.

There are no objective mine safety regulations establishing standards for elevator governor rope terminations. Neither are the ANSI standards incorporated by reference therein. Therefore, non-compliance with the ANSI standards does not in and of itself establish either a violation of the regulations or a finding that an unsafe condition exists on a piece of machinery or equipment. However, the ANSI standards do provide some guidance for the inspector and myself as to the proper configuration of wire rope terminations.

The ultimate issue in this case is, however, did those terminations render the governor rope assembly unsafe. The fact that the terminations did not comply with the ANSI standards is but a single piece of the equation.

Two individuals testified as expert witnesses in this case. Mr. Ronald Gossard, an MSHA engineer, testified for the Secretary. In response to a hypothetical question framed based on the facts in evidence, he opined that the elevator as it existed at the time the citation was written would operate safely until

such time as the governor was needed to apply the safeties. At that point, the terminations, especially the one at the top of the car, could fail. He testified that because the small end of the socket termination basket was not filled with babbitt material and since that is the end of the rope termination that faces upward in the shaft, moisture could collect inside the termination and quickly corrode the rope at that point. He further testified that the way the socket termination was described in the record, if and when the elevator car ever went into an overspeed condition and the governor jaws clamped down on the governor rope, the shock load on the poorly made termination could cause it to fail in service. With regard to the lower termination made with Crosby clamps, his concern was that if the clamps came loose prior to an overspeed operation of the governor, you would have a loose rope dangling in the hoistway which could become entangled with the suspension ropes or the elevator counterweight.

Mr. James Beattie, a maintenance supervisor for Otis, testified as an expert for the respondent. He stated unequivocally that it is impossible to pull a rope such as the one in question that has been "rosetted" back through a socket termination like the one at bar, even if that termination has no babbitt poured into it at all. He stated that when you turn the lays of the rope back and make the rosette, you increase the diameter of the rope. Thereafter, if you pull on that rope to attempt to force it back through the basket, all you accomplish is to wedge it tighter into the socket. Once it tightens up in the socket, that is all the further it will move. He further opined that before you would pull the rope back through the socket, you would either first break the rope or the socket.

Mr. Beattie backed up his opinion with a test which essentially confirmed his opinion. The test was not, however, performed on the installation that Inspector Niehenke cited as unsafe. The test was performed in controlled conditions at a machine shop in Pittsburgh. He made up a 1/2-inch wire rope installation with a socket termination on one end and a single Crosby clamp on the other end. At the socket end, he unraveled and looped the wire lays into a rosette and pulled it handtight into the socket. No babbitt was poured into the socket to secure the rope. On the other end, a single Crosby clamp, correctly installed, however, was used to secure the rope. He then imposed a load of approximately 3200 pounds on this assembly, with no slippage once the rosette fully tightened up inside the socket termination. There was no slippage noted whatsoever at the Crosby clamp end. From this test he concluded that an unbabbitted socket termination would sufficiently withstand the load required to activate the governor rope lever and therefore the safeties on the elevator car.

On cross-examination, however, Mr. Beattie allowed that to do a quality job on the socket termination you would have to use babbitt in the socket termination and you should fill it to the top of the shackle and be able to see babbitt in the small end of the basket. He also conceded that if the job was as Inspector Niehenke testified, and that is unrebutted, he would recommend that it be changed out. On redirect-examination, he reiterated that even so, it was not unsafe.

Weighing the totality of the evidence in this record, I find that the elevator governor assembly and therefore the elevator, should the governor ever have been needed at some future time, were in an unsafe condition within the meaning of 30 C.F.R. § 75.1725(a). In so holding, I find that the condition of the wire rope terminations at both the babbitted and clamped ends of the governor rope were as Inspector Niehenke described them. This factual evidence was unrebutted by Otis. I credit the expert testimony of Mr. Gossard concerning the hazards he associated with the condition as described, particularly the likelihood of corrosive damage to the rope because of the poorly made socket termination in an area where acidic moisture could quickly corrode the rope, and his opinion that the emergency operation of the governor would introduce an initial shock load on the babbitted termination that could fail a poorly made one. These points were unrebutted by Otis as well. Also persuasive is the fact that although respondent's expert did not think the situation as described in the record was "unsafe" he nevertheless would recommend that it be changed out.

The respondent's case consisted of the expert testimony of Mr. Beattie and video-taped evidence of a stress test performed on a wire rope with an unbabbitted socket termination on one end and a single Crosby clamp termination on the other. This test demonstrated that the assembly as configured should withstand a force on the order of ten times as great as the force necessary to pull the lever that activates the safeties. However, neither Mr. Beattie or the stress test dealt with the corrosion issue or the effect that the imposition of an initial shock load would have on the poorly babbitted termination. I agree with the Secretary that the stress pull test performed under what might be considered laboratory or "ideal" conditions is an entirely different situation than what actually exists in the mine given the environmental conditions that the equipment must operate in there.

The Commission has stated in Mathies Coal Co., 6 FMSHRC 1 (1984), that to establish a significant and substantial violation the Secretary must show that the violation contributed to a hazard, and that the hazard contributed to would, with

reasonable likelihood, result in an injury of a reasonably serious nature. The inspector and the Secretary's expert were of the opinion that the hazard contributed to here was ultimately the failure of the elevator governor assembly to halt an overspeeding car because of the failure of one or the other of the governor rope terminations. Of particular concern was the babbitted socket termination on top of the car. Had the governor failed to halt the car in such an emergency, the inspector would expect fatal injuries to the miners on board the elevator. I find the evidence establishes that if the violative condition had been allowed to continue unabated, the defects found in the terminations by Inspector Niehenke combined with the corrosive environmental factors the equipment would be exposed to over time would indeed contribute to a hazard reasonably likely to result in injury and/or death should the elevator's governor assembly system be needed in an emergency to halt an overspeeding car. Therefore, I find the violation to be a "significant and substantial" one and serious.

Furthermore, the violation clearly resulted from the respondent's negligence since it was their employee who was directly responsible for the inadequate and as found herein, unsafe, installation of the governor rope. Considering all of the above and the rest of the statutory criteria enumerated in section 110(i) of the Act, including the respondent's good history of prior violations and good faith abatement of the violation herein, I find that an appropriate penalty for the violation is $750, as proposed.

ORDER

It is therefore ORDERED that Citation No. 2689913 IS AFFIRMED. It is further ORDERED that Respondent pay the sum of $750 within 30 days of the date of this decision as a civil penalty for the violation found herein.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 13 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 87-39-M
	:	A.C. No. 41-00035-05503
v.	:	
	:	Crusher No. 9101
HELDENFELS BROTHERS, INC., Respondent	:	

DEFAULT DECISION

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of $80 for four alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The citations and proposed civil penalty assessments are as follows:

Citation No.	Date	30 C.F.R. Section	Assessments
2868074	12/04/86	56.6042	$ 20
2868076	12/04/86	56.9022	$ 20
2868077	12/04/86	56.14007	$ 20
2868078	12/04/86	56.1800(a)(b)	$ 20

On October 2, 1987, I issued an Order to Show Cause directing the respondent to state why it should not be held in default and a summary order entered in accordance with the applicable Commission rules because of its failure to file a timely answer in this case. The order directed the respondent to respond by October 17, 1987. On October 21, 1987, respondent's counsel contacted me by telephone, and after explaining the circumstances concerning the respondent's failure to file

a timely response, counsel indicated that he was contemplating paying the proposed civil penalty assessments in full, or in the alternative, would attempt to settle the matter with the petitioner's counsel. Respondent's counsel was advised that he would have an additional week within which to decide how to proceed further, but that any decision in this regard should be made within that time frame, and that he was to communicate his decision to me in writing, with a written response to my show-cause order. On November 9, 1987, petitioner's counsel advised me that the respondent has not further communicated with his office, and the respondent's counsel has not communicated with me, nor has he filed any written response to my show cause order.

Discussion

The applicable Commission Rules in this case provide as follows:

29 C.F.R. § 2700.27

> § 2700.27 Proposal for a penalty.
>
> (a) When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

29 C.F.R. § 2700.28

> § 2700.28 Answer.
>
> A party against whom a penalty is sought shall file and serve an answer within 30 days after service of a copy of the proposal on the party. An answer shall include a short and plain statement of the reasons why each of the violations cited in the proposal is contested, including a statement as to whether a violation occurred and whether a hearing is requested.

29 C.F.R. § 2700.63

> § 2700.63 Summary disposition of proceedings.
>
> (a) Generally. When a party fails to comply with an order of a judge or these

rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.

(b) Penalty proceedings. When the judge finds the respondent in default in a civil penalty proceeding, the judge shall shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

The pleadings in this case reflect that the respondent was served with a copy of the petitioner's complaint proposing the assessment of civil penalties for the alleged violations in question on April 1, 1987. Respondent's answer was received by the petitioner on July 27, 1987. As a result of the untimely answer, petitioner filed a motion for default judgment, and my show-cause order followed.

The respondent has failed to respond in writing to my show-cause order, and its counsel has not further communicated with me in this matter. Under the circumstances, I conclude and find that the respondent is in default and has waived its right to be further heard in this matter. I see no reason why the petitioner's proposed civil penalty assessments should not be made the final order of the Commission, and the motion for default judgment IS GRANTED.

ORDER

Pursuant to Commission Rule 63, 29 C.F.R. § 2700.63, judgment by default is herewith entered in favor of the petitioner, and the respondent IS ORDERED to immediately pay to the petitioner the sum of $80, as the final civil penalty assessment for the violations in question.

George A. Koutras
Administrative Law Judge

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NOV 13 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JERRY RIFE	:	DISCRIMINATION PROCEEDING
	:	Docket No. VA 87-29-D
	:	Sol. No. 87-29617
Complainant	:	No. 1 Mine
v.	:	
ADKINS COAL CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a Complaint of Discrimination filed by the Secretary of Labor on behalf of Jerry Rife. The parties including the individual Complainant have agreed to settle the case.

WHEREFORE, the motion for approval of settlement are GRANTED, and this case dismissed.

Gary Melick
Administrative Law Judge
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NOV 16 1987

LEONARD W. MILLER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 87-183-D
v.	:	
	:	Florence No. 2 Mine
THE FLORENCE MINING CO., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On November 13, 1987, Complainant moved to withdraw his complaint because he has amicably resolved the matter with Respondent.

The complaint, filed under 105(c)(3) of the Act, alleges that Complainant received a verbal warning for not operating his shuttle car fast enough. The relief he sought was an apology from his foreman.

I have considered the motion in the light of the purposes of section 105(c) and conclude that it should be approved.

Accordingly, the motion to withdraw is GRANTED, and this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 16 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 87-42 A.C. No. 46-01453-03735
v.	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

The only citation remaining in this docket, 2703915, was transferred to Docket WEVA 87-42(B) and is included in a decision approving settlement and dismissing the proceeding, issued today.

Therefore, this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 16 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 87-42(B) A.C. No. 46-01453-03735
v.	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
AND DISMISSING PROCEEDING

Before: Judge Broderick

Two citations remain in this docket, 2703915 and 2713101. Citation 2713124, transferred to this docket from WEVA 87-42(A) by order of May 19, 1987, was actually a part of the settlement approved by order of May 20, 1987, in Docket WEVA 87-42(A). See letter from Michael Peelish, Esq., dated October 30, 1987, together with copies of the payments made for the approved settlement. Docket WEVA 87-42(A) is closed.

The Secretary moved to withdraw this civil penalty petition with respect to citation 2713101 and to vacate the citation. The citation alleged a violation of 30 C.F.R. § 50.10 because Consol did not immediately contact MSHA upon the occurrence of an "accident." The term accident is defined as an injury which has a reasonable potential to cause death. It was originally assumed that the injury involved here was a serious electrical shock. Further investigation, including hospital and medical reports and a written statement from the injured employee, disclosed that grease burns to his hands were the only injuries he sustained and that he did not suffer electrical shock. Therefore, the motion contends that the injury involved was not life threatening. Based on the representations in the motion, it is GRANTED. The penalty proceeding is DISMISSED as it relates to citation 2713101 and the citation is VACATED.

Citation 2703915 alleges a violation of 30 C.F.R. § 75.1003 because a trolley wire was not adequately guarded. The violation was originally assessed at $1000, and the parties

propose to settle for $800. The motion states that the employee who was injured, a certified electrician, was directed to guard the wire before performing the work on the track, but he failed to do so. This mitigates Consol's negligence. I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, the settlement agreement is APPROVED, and subject to the payment by Consol of the $800, this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 19, 1987

NACCO MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. LAKE 85-87-R
v.	:	Citation No. 2330657; 6/5/85 Modified to
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 2330657-02; 6/24/85 Powhatan No. 6 Mine
and		
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor		
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 86-2 A. C. No. 33-01159-03668
v.		
NACCO MINING COMPANY, Respondent		Powhatan No. 6 Mine
and		
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor		

DECISION

Appearances: Thomas C. Means, Esq., Crowell & Moring, Washington, D. C. for Contestant/Respondent; Patrick M. Zohn, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio for Respondent/Petitioner; Thomas M. Myers, Esq., United Mine Workers of America, Shadyside, Ohio for Intervenor.

Before: Judge Merlin

This case is before me pursuant to the Commission's decision and order of remand dated September 30, 1987. 9 FMSHRC 1541. A subsequent conference in chambers was held with counsel for all parties on October 22, 1987, at which time counsel advised they wished to submit stipulations covering the issues which had been remanded for further consideration. Permission to submit stipulations was granted.

The stipulations were received on November 16, 1987 and they read as follows:

> 1. Because NACCO Mining Company ("NACCO") wishes to obtain prompt review of the Commission's September 30, 1987 decision but is unable to do until a final order is issued in this matter, it has entered into this Stipulation to eliminate the less important issues which remain in order to facilitate and expedite such review.
>
> 2. NACCO hereby agrees to withdraw its Notice of Contest to the extent that NACCO no longer challenges the finding of unwarrantability.
>
> 3. NACCO no longer alleges that MSHA Subdistrict Manager William H. Reid improperly modified Citation No. 2330657 from a § 104(a) citation to a § 104(d)(1) citation based solely upon a general policy consideration.
>
> 4. Subdistrict Manager William H. Reid modified the citation in light of his view of applicable legal standards after he reviewed the facts as recited in the citation and the memorandum summarizing the events upon which the citation was based and considered prior meetings that he conducted with NACCO officials concerning prior alleged violative incidents such as the one contained in the citation.
>
> NACCO, despite the Commission's September 30, 1987 decision in this case, continues to contest the § 104(d) citation on the grounds that it was based on an investigation of a past already abated violation instead of an inspection of an existing

violation as NACCO contends § 104(d)(1) requires.

A voluminous record, including the transcript of a de novo hearing of substantial duration, has been compiled in the instant matter. Because of this and in light of the Commission's remand, I believe it incumbent upon me to review the stipulations in order to determine whether they are in accordance with the record. Cf. 30 U.S.C. § 820(k) and 29 C.F.R. § 2700.30(c). Such review is particularly called for with respect to the issue of the sub-district manager's actions because after vigorously challenging this conduct at the trial level, the operator now has done a complete volte face by not only seeking to drop its protest (Paragraph No. 3), but further by endorsing with great particularity the sub-district manager's behavior (Paragraph No. 4).

Accordingly, I have again reviewed the record to determine whether the sub-district manager acted correctly within the statutory framework. Upon such additional consideration, I now conclude that the sub-district manager's mode of action in modifying the citation was proper. I accept his testimony that after he scrutinized the citation he telephoned the supervisory inspector and went through with him the violation and its particulars (Tr. 350-351). This telephone conversation was confirmed by the supervisory inspector (Tr. 215, 224). The sub-district manager further stated that his finding of unwarrantable failure was based upon prior meetings with mine management and the violation itself (Tr. 359). From reading the citation he concluded the continuous miner operator had to have known he was under unsupported roof (Tr. 372). The sub-district manager stated he would have ordered the modification even if there were no policy considerations (Tr. 376). In his opinion, the facts in the citation met the criteria for unwarrantable failure (Tr. 390-391). In light of this evidence, I believe a substantial basis exists to support the conclusion that the sub-district manager's modification action was based upon the specific facts of this case, as the operator now admits. In addition, I believe it was appropriate for the sub-district manager to evaluate the facts of this citation in light of the prior meetings he had held with mine management regarding the problem of deep cuts (Tr. 353-354, 357-358, 367, 376). Finally, when the sub-district manager's statement that he did not know what the section foreman was doing at the time of the violation is viewed in context, it becomes clear that this statement does not mean the manager acted without reference to the facts of the case. This remark concerned the brief period the foreman was absent because he was performing the pre-shift examination (Tr. 399). The sub-district manager testified that the foreman could have been legitimately absent because of his pre-shift responsibilities, but that he nevertheless should have known what was going on in his section especially since he had only five entries

(Tr. 373, 398-399). In this respect also, therefore, the conclusions of the sub-district manager were premised upon the circumstances of the violation.

In view of the foregoing, the agreement of the parties that the sub-district manager acted correctly is accepted.

In Paragraph No. 1 the operator advises it no longer challenges the finding of unwarrantable failure. I conclude the record supports a finding of unwarrantability and that therefore, the operator's present stance regarding this issue is in accordance with the evidence and consistent with governing interpretations of the term "unwarrantable failure" in effect at this time. In Zeigler Coal Corporation, 7 IBMA 280, 295-296 (1977), unwarrantable failure was cast in terms of what the operator "knew or should have known" or a failure to abate because of "a lack of due diligence, or because of indifference or lack of reasonable care". More recently, it has appeared that the Commission is engaged in a process of refining the concept of unwarrantability and perhaps moving towards a higher level of fault. In U. S. Steel Corporation, 6 FMSHRC 1423, 1437 (1984) the Commission noted that the Zeigler interpretation had been specifically approved in the legislative history of the 1977 Mine Act. However, the Commission stated that an unwarrantable failure to comply could be proved by a showing that the violative condition or practice was not corrected or remedied, prior to issuance of a citation or order because of "indifference, willful intent, or a serious lack of reasonable care" (emphasis supplied). Subsequently, in Westmoreland Coal Company, 7 FMSHRC 1338, 1342 (1985) the Commission again spoke of the degree of "aggravated conduct" intended to constitute unwarrantable failure as "indifference, willful intent, or serious lack of reasonable care" (emphasis supplied). Assuming that the Commission's recent decisions embody something more than the Zeigler standard which was akin to ordinary negligence, there can be no doubt that the operator's conduct here falls well within the concept of "aggravated conduct" as it has been articulated thus far by the Commission.

In my original decision, I reviewed the evidence of record and concluded as follows:

> It was to such an individual [Palmer, a fast and careless continuous miner operator] that Sikora [section foreman] assigned the task of cutting coal in the crosscut near the end of the shift. But Sikora turned his back on the time element and on the off sight nature of the pre-existing first cut, both of which increased the pressure on the continuous miner operator to complete the crosscut on that shift in one cut. When the circumstances under which this task was assigned

> are combined with the nature of the individual to whom the job was given, what happened was all but inevitable, i.e. the taking of all coal on one cut and the continuous mine operator in violation by going far beyond supported roof. The union safety committeeman testified the circumstances made it "tempting" to take all the coal on one cut (Tr. 329). To an individual like Palmer it would be virtually irresistible to get the extra 10 tons in the one cut (Tr. 720). Sikora must have realized this. He knew Palmer and he knew the conditions under which he was assigning him this task. Sikora's conduct is far worse than mere lack of supervision. It was he who created the circumstances under which the violation was all but bound to happen. And it was he whose first priority was not safety but getting home as fast as he could at the end of the shift. The operator put Sikora in his position of supervisory and managerial responsibility. His careless, reckless and wilful behavior is attributable to the operator which must bear the consequences. Southern Ohio Coal Company, 4 FMSHRC 1459 (1982). ***

It is clear therefore, that the section foreman's conduct in this case not only constituted, but indeed far exceeded, "unwarrantable failure" under any of the descriptive terms used by the Commission to define that concept. His extraordinary and egregious departure from what reasonably could be required of one in his position clearly justified issuance of a § 104(d)(1) citation with its attendant serious sanctions.

In light of the foregoing and pursuant to the Commission's decision that a § 104(d)(1) citation could be issued under the circumstances presented here, the subject citation is AFFIRMED and the operator's notice of contest is DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 20 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROGER LEE WAYNE, SR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 87-89-D
	:	MORG CD 86-13
v.	:	Ireland Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Complainant; Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed by the Secretary of Labor on February 9, 1987, on behalf of Roger Lee Wayne, Sr., alleging discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 185(c) (the Act). The United Mine Workers of America filed a Notice of Intervention on February 12, 1987. Consolidation Coal Company (Respondent) filed, on February 25, 1987, its Answer and a Motion to Dismiss on the ground that the complaint was untimely filed. An Order was entered denying Respondent's Motion to Dismiss on March 17, 1987.

The Complainant filed a Motion for Leave to Amend Complaint on March 23, 1987. This motion was not opposed. Complainant's Amended Complaint seeks an Order assessing a civil penalty against Respondent in the amount of $300 to $500.

Pursuant to notice, this case was scheduled for trial for June 9, 1987. Respondent filed a Motion for Continuance of the trail on June 2, 1987. This Motion was not opposed and pursuant to notice the case was rescheduled for August 4, 1987, in Wheeling, West Virginia. At the hearing, David Wolfe, Roger Lee Wayne, Sr., David Miller, Leo Connor, and Billy Wise testified for the Complainant. Hestel B. Riggle, Jr., and George Carter testified for the Respondent. Respondent filed its Posthearing Brief on October 27, 1987. Petitioner filed its proposed Findings of Fact and Memorandum on October 28, 1987.

Stipulations

At the hearing, the following stipulations were entered into:

> ...[T]hat the Federal Mine Safety and Health Administrative Law Judge has jurisdiction over the matter; the size of the operator, Consolidation Coal Mine as reflected on the proposed Complainant's Exhibit Number 82 was 37,808,900 and the size of the mine at the Ireland Mill was 1,962,774 tons; that the proposed assessment of the specific penalty is $3,500.00 and will not affect the operator's ability to stay in business. ...[T]hat the complaint in this matter was timely filed; that Roger Wayne, Complainant, is an employee of the Ireland Mine and-that Consolidation Coal Company operates in this case. (Tr. 3)
>
> ...[T]hat the Committeemen or Safety Committeeman who was on the shift of an MSHA Inspector present as possible inspection conferences as defined by the Act would be the first choice as the authorized representative of the miners on that shift. (sic) ...[T]hat it is the responsibility of the safety committeeman to communicate to the other miners, to other members of the Union, safety problems at the mine, results of any conferences or communications with the Federal Mine Safety and Health Administration, and the results of inspections. (sic) (Tr. 100-101).

Findings of Fact

The ventilation plans at the Respondent's Ireland Mine are reviewed every 6 months by MSHA Inspectors and Respondent. Prior to the review, MSHA conducts an on-site inspection to determine if the mine conditions are suitable to the plan and if the mine is adequately ventilated. MSHA Inspector David Wolfe conducted an on-site ventilation inspection on March 3, 4, 5, and 6. Subsequently, Wolfe contacted Respondent's superintendent of mines

to arrange for a review of the ventilation plan on March 25, 1986. According to Wolfe, in general, in a 6 month review of the ventilation plan MSHA officials meet with Respondent's personnel and miners to review the compliance record of Respondent in the past 6 months, review revisions of the ventilation plan proposed by Respondent, and discuss comments by those present as to the plan.

Roger Lee Wayne, Sr., a first class mechanic employed by Respondent, was a member of the safety committee in March 1986. Hestel Riggle told Wayne on March 24, 1986, that the following day there would be a ventilation plan review meeting. Wayne informed Riggle that he would probably go with him to the meeting as he (Wayne) was working the day shift. Prior to the commencement of the day shift at 8:00 a.m., on March 25, 1986, according to Riggle, Wayne informed him that he was to be the Union Representative at the meeting at 9:00. Riggle told Wayne to go to his work section and that if he was needed at the meeting he will be called.

When Wolfe met with Respondent's representatives on the morning of March 25, 1986, to conduct a 6 month review of the ventilation plan, David Shreve of the United Mine Workers of America was present, along with David Miller and Leo Conner, both miner members of the safety committee, and both of whom were not on the day shift. Also in attendance was Billy Wise, another miner and member of the safety committee, who according to the uncontradicted testimony of Miller was not on the day shift.

Riggle asked Wolfe if a walkaround was needed and Wolfe said that one was not needed at the meeting, as the miners had sufficient representatives. Miller requested of George Carter, Respondent's Supervisor of Industrial and Employee Relations, that Wayne attend the meeting as he was the designated representative of the miners. Wolfe said that a representative was not necessary at the meeting as the meeting was not an inspection. Carter told Miller that Wayne could be brought out to the meeting on Union business. Miller insisted that Wayne be called and the dispatcher notified Wayne to go to the meeting. Subsequently, Respondent asked that the meeting be postponed for a day so they could have a corporate representative inasmuch as Shreve from the UMWA was present. Miller requested a postponement of 10 days to allow the safety committee to study the revision to the ventilation plan. The meeting was then adjourned, and when Wayne arrived, he was told by Carter that he was on Union business and could not go back to the mine.

Issues

The issues are whether the Respondent discriminated against Wayne, in violation of Section 105(c) of the Act, and, if so, what is the appropriate relief to be awarded Wayne, and what are the appropriate civil penalties to be assessed against the Respondent for such discrimination.

Laws

Section 105(c)(1) of the Act provides, in essence, that no person shall in any matter discriminate against or cause discrimination against, or other wise interfere with the exercise of the statutory rights of any miner or representative of miners because of the exercise by such miner of any statutory right forded by the Act. In essence, Section 103(f) of the Act, provides that "....a representative authorized by his miner shall be given an opportunity to ....participate in pre-or post-inspection conferences held at the mine."

Discussion

Complainant and Respondent are protected by, and subject to, the provisions of the Mine Safety Act, and specifically Section 105(c) of the Act. I have jurisdiction to decide this case.

The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff, Supra, at 1863, stated as follows:

> A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

Protected Activities

Wolfe's uncontradicted testimony established that, in general, a 6 month review of Respondent's ventilation plan, is preceded by an on-site inspection to see if the mine is being properly ventilated. Indeed, Wolfe conducted such an inspection on March 3, 4, 5, and 6, 1986. According to the uncontradicted testimony of Wolfe, the 6 month meeting to review the ventilation plan is held to review the compliance record of the Respondent and review revisions proposed by Respondent to the ventilation plan. Accordingly, I find that the meeting scheduled for March 25, 1986, was a "post-inspection conference," within the purview of Section 103(f) of the Act, inasmuch as it is likely that conditions observed in the on-site inspection of March 3, 4, 5, and 6, would have been discussed. It is also clear, based upon the testimony of Wolfe, that miner attendance and participation at this meeting is critical to further safety at the mine, as the latter would have an opportunity to discuss the revision to the ventilation plan, and then to inform other miners of these changes.

Based upon all the above, I conclude that Wayne's participation in the March 25 conference, as an authorized representative of the miners, is to be considered a protected activity within the purview of Section 105(c) of the Act.

In essence, the uncontradicted evidence presented by Complainant establishes that Wayne, on March 25, 1986, was a safety committeeman, and that Miller had requested that the latter, as the designated representative of the miners, be present at the March 25 conference concerning the revision of the ventilation Plan. Further, I note that the Parties at the hearing stipulated that the safety committeeman who was on the shift at the time of a post inspection conference would be the first choice as the authorized representative of the miners on that shift. I thus conclude that, although three other safety committeemen were already present at the conference, that Wayne, was the "authorized" representative within the purview of Section 103(f) of the Act, as he was working on the shift during which the conference occurred.

In this connection, I find that there is no relevance to the comments that MSHA Inspector David Wolfe made at the March 25 conference that, in essence, a "walkaround" was not required by him and that the miners were already represented by the three safety committeemen who were present.

Adverse Action

Respondent, in essence, argues that it had no legal obligation to provide Wayne with an opportunity to attend the March 25, 1986 conference. In this connection, Respondent maintains that it reasonably relied upon the statements by Wolfe that a walkaround was not needed inasmuch as the miners already had three safety committeemen present. However, the critical issue is not Respondent's good faith in asserting that it had no obligation to allow Wayne to participate in the meeting, but rather, its actions against Wayne, when confronted with the request that he attend the meeting. Respondent argues, in essence, that Miller, in asking for Wayne to be present at the meeting, placed the latter on Union business, and thus Wayne did not suffer any loss of pay. Wolfe testified that Miller initially requested of Respondent that Wayne be placed on Union business (Tr. 23, 24). However, I accept Miller's version, as it was essentially corroborated by Riggle and Carter (Tr. 141, 158), that George Carter, Respondent's Supervisor of Industrial and Employee Relations told him that Miller would not be brought out of the mine unless he went on Union business (Tr. 105, 106).

Miller then insisted that Wayne be brought out of the mine to attend the meeting. When Wayne arrived the conference had been adjourned, but Carter told Wayne that he could not go back to the mine as he was on Union business. This had the effect of causing Wayne to loose his pay for the balance of the day. Accordingly, it is clear that Respondent's refusal to allow Wayne to return to the mine after the March 25 conference had been adjourned, constitutes an adverse action.

Motivation

The record tends to support a conclusion that Respondent did not have any improper motive in concluding, in essence, that it did not have any obligation to have Wayne attend the March 25 conference, as it relied upon the comments by Wolfe that such attendance was not necessary. However, once the conference was adjourned, there does not appear to be any basis for Carter's action in refusing to allow Wayne to return to the mine, other than to punish him for attempting to attend the meeting. Accordingly, it is concluded that Respondent's action in not allowing Wayne to return to the mine, was motivated solely by Wayne's asserting his rights under Section 105(c) and attempting to attend the March 25 conference. Accordingly, it is concluded that Respondent did violate Section 105(c) of the Act, as it did commit an act of discrimination against Wayne within the purview of Section 105(c) of the Act.

In assessing a penalty to be imposed against Respondent, I have considered the size of Respondent's mining operation as stipulated to by the Parties. I have also taken into account the gravity of the violation committed wherein. Also, although it might be concluded that Respondent acted in good faith in initially refusing to permit Complainant to attend the March 25 conference, I find that the adverse action committed by Carter against Wayne in not allowing him to return to the mine, was intentional. Based on these factors, I find that a penalty of $300 is appropriate.

ORDER

It is ORDERED that.

1. Respondent shall, within 15 days from the date of this Decision, post a copy of this Decision at the Ireland Mine where notices to miners are normally placed, and shall keep it posted there for a period of 60 days.

2. Respondent, shall within 15 days from the date of this Decision, pay Complainant for the 6 1/2 hours he would have worked on March 25, 1986, had he not been refused permission to return to work.

3. Respondent shall pay a penalty of $300 within 30 days of this Decision.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 23 1987

GLADYS B. JOHNSON, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 87-53-D
	:	VINC CD 87-04
FREEMAN UNITED COAL MINING COMPANY, Respondent	:	Orient No. 4 Mine

ORDER OF DISMISSAL

Before: Judge Melick

Complainant requested to withdraw her Complaint of Discrimination in the captioned case on the grounds that she is unable to pursue the matter because of financial and other problems. She states that she understands the consequences of withdrawal and dismissal and that it is a final disposition of these proceedings. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed with prejudice and the hearing scheduled for November 24, 1987, is cancelled.

Respondent's request for costs, attorney's fees and other sanctions for the Complainant's failure to appear at scheduled depositions is denied for failure to meet the conditions set forth in FED. R. CIV. P. 37.

Gary Melick
Administrative Law Judge
(703) 756-6261

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NOV 23 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 87-158
	:	A. C. No. 36-06289-03522
v.	:	
	:	No. 10 Mine
SOLAR FUEL COMPANY, INC., Respondent	:	

DECISION

Appearances: James E. Culp, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
David C. Klementik, Esq., Windber, Pennsylvania for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act", charging Solar Fuel Company, Inc. (Solar Fuel) with three violations of regulatory standards. The general issues before me are whether Solar Fuel violated the cited regulatory standards as alleged, and, if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 2695362 charges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 75.1725(a) and alleges as follows:

> The top and bottom belt rollers of the No. 1 main belt were not maintained in a safe operating condition in that from station spad No. B-71 and extending inby to station spad No. 193, 9 bottom rollers were found frozen and worn into the rollers from the bottom belt and seven top rollers were worn, broken and badly damaged. Coal dust, float coal dust and combustible material was present on, under and around

the bottom rollers. This belt was in operation at the time. This citation was one of the factors that contributed to the issuance of imminent danger order No. 2695361 dated 12-30-86; therefore, no abatement time was set.

The cited standard, 30 C.F.R. § 75.1725(a), provides that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately".

Citation No. 2695363 charges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 75.400 and alleges as follows:

> Coal dust, including float coal dust, loose coal, and combustible material, in the form of empty rock-dust bags are present on, under, and around bottom belt rollers, the jabco power cable and belt structures beginning at spad No. B-71 and extending inby a distance of approximately 1,200 feet to the belt tail (spad No. 193) of the No. 1 main belt. These accumulations measured from 1 to 12 inches in depth and from 12 to 72 inches in width under this belt. Coal float dust accumulations also existed on the mine floor from No. 2 main belt inby to the tail of No. 1 main belt. This area measured approximately 10 feet wide for a distance of approximately 360 feet. This belt was in operation at the time. Measurements were made with a six foot standard rule and 50 foot tape measure.

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

Vincent Jardina, a Coal Mine Safety and Health Inspector for the Federal Mine Safety and Health Administration (MSHA), was conducting a regular inspection of the Solar Fuel No. 10 Mine on December 30, 1986, when he observed float coal dust accumulations and combustible materials consisting of empty rock dust bags, beginning at spad B-71 and continuing for some 1,200 feet. The accumulations were dry, mostly dark in color and from 1 to 12 inches deep and from 12 to 72 inches wide. The area had not been rock dusted. According to Jardina the accumulations were more than normal and most likely were caused by excess air flow through an air lock door frozen open. Excessive coal dust was thus blown off the conveyor belt causing rapid accumulation of the dust.

Jardina believed the condition to be dangerous and could contribute to a fire or explosion. In particular he observed that the conveyor belt was operating with 16 damaged and/or frozen rollers within close proximity to the coal dust. (See discussion of Citation No. 2695362) According to Jardina, seven top rollers were damaged (some of which were not rotating) and nine bottom rollers were "frozen". Indeed one of the "frozen" bottom rollers had been rubbed flat from the belt. In addition the area of the conveyor structure near one of the suspect rollers felt "very warm" to Jardina. Under these conditions Jardina thought it likely that the heat generated by friction from the damaged rollers would ignite the coal dust causing a fire or explosion. Energized power cables and electrical installations also provided ignition sources. The fire hazard was further aggravated by the undisputed fact that if the conveyor belt itself caught fire it would give off carbon monoxide and toxic phosgene gases even before smoke appeared.

The noted hazard was even further aggravated by the fact that the belt air was vented directly into the return aircourse--the secondary escapeway. Thus fire, toxic fumes and smoke could very well bar the safe use of that escapeway. If an explosion should blow out critical stoppings the entire work area would also likely be contaminated with smoke and toxic gases. Jardina also observed that the primary escapeway had been rendered impassible to vehicles because of icing conditions. Miners attempting escape would thus be forced to crawl over ice in a coal height of only 30 to 32 inches in the last 150 to 200 feet of the primary escapeway. With eight miners working inby at the time it may reasonably be inferred that fatalities would occur.

Within the framework of this undisputed evidence I am convinced that a disaster of major proportions was imminent. The violations were unquestionably of the highest gravity and "significant and substantial". Secretary v. Mathies Coal Co. 6 FMSHRC 1 (1984). In reaching these conclusions I have not disregarded the evidence that an increased number of fire sensors had been placed along the subject beltline and indeed were on 40-foot centers. Thus in the event of a fire an alarm would more likely be triggered. I have also considered the evidence that Solar Fuels had provided self rescuers and personal oxygen supplies. In addition I recognize that the subject coal was of "low volatility" Nevertheless these factors are not of a magnitude to significantly impact on the overall severity of the cited violations.

Inspector Jardina also concluded that the violations were the result of high negligence. He opined that the accumulations had developed over one complete work shift and the last work

shift had been from 3:00 p.m. to 11:00 p.m. the night before. The conditions were cited around 6:41 a.m. shortly after the beginning of the 6:00 a.m. to 2:00 p.m. work shift. In addition the mine examiner's book showed that the belt had been examined between 9:00 a.m. and 10:45 a.m. and again between 3:00 p.m. and 6:00 p.m. the day before but the examiners had not reported any accumulations. Jardina also noted that the examiners had reported that the belt rollers "should be replaced" but in fact defective rollers still remained at the time of his inspection.

Solar Fuel Safety Director Alvy Walker also told the inspector that they were having difficulty obtaining a type of roller needed for the belt. Walker said that in any event he would not stop the belt to replace any single defective roller. At the same time Walker admitted to the danger of accumulations of "fine coal" near a frozen roller and acknowledged that they had problems with dust accumulating because of the high air velocity. Indeed in certain locations they had found it necessary to clean up the dust twice a day. He also acknowledged that they had only one man responsible for cleaning up 5,000 feet of belt line and that no one was working on the subject belt at the time of the citation even though it had been operating for at least 40 minutes before he met with the inspector.

Solar Fuels argues in defense that they had a "clean up" plan that, in essence, permitted them to clean up accumulations during the following shift. The alleged clean-up plan, which had been submitted by a predecessor company to the Mine Safety and Health Administration on May 12, 1982, provided that accumulations would be "cleaned up during the shift or the following shift". However, while it is true that the regulatory standard at 30 C.F.R. § 75.400-2 does require that a program for regular clean up and removal of accumulations of coal and float coal dust, loose coal and other combustibles be established and maintained there is no process set forth for the approval of such a plan by the Secretary of Labor. The regulatory requirement for a clean up program thus cannot provide a basis to estop the Secretary from enforcing the requirements of the standard at 30 C.F.R. § 75.400. The Secretary is in any event not subject to the doctrine of equitable estoppal. See Secretary v. King Knob Coal Company Inc. 3 FMSHRC 1417 (1981). Solar Fuel's argument, therefore, that it was not subject to the cited standard because it had a clean-up plan, is devoid of merit.

Within this framework of evidence I find therefore that the violations are proven as charged, that the violations were serious and "significant and substantial" and were the result of high operator negligence.

Citation No. 2695425 alleges a non-significant and substantial violation of the standard at 30 C.F.R. § 70.508 (a) and charges as follows:

> A periodic survey of the noise exposure to which each miner in the active workings of the mine is exposed was not received by the Mine Safety and Health Administration. The survey was required to be conducted during the three month period ending December 31, 1986.

The citation was issued January 16, 1987, by Inspector Jardina and the operator was given until January 30, 1987, to abate the violation. However, on February 19, 1987, the condition had still not been abated and Inspector Jardina therefore issued a withdrawal order under section 104(b) of the Act. The survey was finally conducted and the order terminated on the following day. According to Jardina the violation was not serious and he considered that the operator could have forgotten to have completed the survey prior to the initial citation. The operator furnished no excuse however for to failing to abate the violative condition within the period set for abatement in the initial citation. Solar Fuels admits to the violation and provided no satisfactory reason for its failure to abate the violation in a timely manner.

In assessing penalties herein, I have also considered that the operator is relatively small in size and has a modest history of violations. I have also considered that the operator abated the violations charged in Citations No. 2695362 and 2695363 in a good faith manner.

ORDER

Citations No. 2695362, 2695363 and 2695425 are affirmed and Solar Fuel Company Inc., is directed to pay civil penalties of $500, $500, and $100 respectively for the violations charged therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 24 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 86-128-M
	:	A.C. No. 54-00271-05501 J7Y
v.	:	
	:	Cantera Metro
DRILLEX, INCORPORATED, Respondent	:	

DECISION

Appearances: Jane Brunner, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for the Petitioner;
Antonio Garcia-Soto, Esq., Santurce, Puerto Rico, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $68 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.6047, as stated in a section 104(a) "S&S" Citation No. 2655924, served on the respondent by an MSHA inspector on May 28, 1986.

Issues

The issues presented in this proceeding are as follows:

1. Whether the respondent violated the cited mandatory safety standard, and if so, the appropriate civil penalty to be assessed for the violation based on the criteria found in section 110(i) of the Act.

2. Whether the inspector's "significant and substantial" (S&S) finding concerning the violation is supportable.

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

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 3-6):

1. The respondent is a contractor engaged in a business performing blasting and drilling services for mine operators engaged in the business of mining aggregates.

2. The respondent is subject to the jurisdiction of the Mine Act.

3. For purposes of the Mine Act, the respondent is a small operator, employing four to five people in its operations covered by the Act, and its annual blasting and drilling activities consists of 557 man-hours.

4. Respondent's history of prior violations consists of one order issued in May 1985, for which the respondent paid an uncontested civil penalty assessment of $180. Two citations issued in February 1987, have not been assessed as yet by MSHA, and the respondent confirmed that it will not contest the citations and will pay the civil penalty assessments.

5. Payment of the proposed civil penalty assessment for the alleged violation in this case will not adversely affect the respondent's ability to continue in business.

Discussion

Section 104(a) "S&S" Citation No. 2655924, issued on May 28, 1986, cites a violation of mandatory safety standard 30 C.F.R. § 56.6047, and the condition or practice is described as follows: "Company, Drillex, Inc., transported 565 electrical blasting caps from the dealer to Cantera Metro (54-00271), inside the pick-up cab, mark Isuzu, tag no. 299879, where blasting caps were exposed to sparking metal. A person was driving the pick-up."

MSHA Inspector Juan Antonio Perez, testified that he has been employed as an inspector since 1975, and that he is a professional licensed engineer with a background in chemical and metallurgical engineering. He confirmed that his duties include compliance inspections of sand and gravel quarries and cement plants, and that he has conducted approximately 2,000 inspections during his tenure with MSHA.

Mr. Perez confirmed that he issued the contested citation during the course of an inspection he was conducting at the Cantera Metro quarry operated by Metro Industry, Inc. During the course of that inspection, he observed a pickup truck arriving at the mine site, and upon observation of the truck he determined that it was carrying a load of blasting caps in the driver's compartment or cab. Upon questioning the driver of the truck, Mr. Perez learned that the truck was owned by the respondent and that the driver was one of the respondent's employees.

Mr. Perez stated that he determined the number of electrical blasting caps present in the cab of the truck by reviewing the delivery documents produced by the driver. Mr. Perez believed that the blasting caps presented a hazard in that they were exposed to the "sparking metal" of the cab of the truck, including the doors, and that is why he cited section 56.6047 of the regulations. He confirmed that he observed ammonium nitrate in the cargo bed of the truck.

Mr. Perez believed that the respondent was negligent in that the detonator caps in question were readily observable in the cab of the truck. He also believed that the caps presented a hazard in that they are considered to be explosive. He believed that an accident was reasonably likely to occur because all of the ingredients for such an event were present, namely, explosive caps, sparking metal, and the driver in the cab of the truck.

Mr. Perez confirmed that the electrical blasting caps in question are considered to be explosives under MSHA's regulations, and were not "blasting agent's" within the exception found in section 56.6047.

On cross-examination, Mr. Perez stated that ammonium nitrate, in its natural state, is a fertilizer and not an explosive. In order to be considered an explosive, it must be combined with a fuel oil. He conceded that his citation makes no reference to any such explosive material being transported in the back cargo area of the truck.

Mr. Perez confirmed that abatement was achieved by transferring the remaining cited detonator caps to another truck after the initial delivery, and that the citation was terminated approximately an hour after it was issued. Mr. Perez further confirmed that his enforcement jurisdiction over the respondent is limited to any trucks actually found on quarry or mine properties, and that in the instant case, he inspected the truck after it was driven onto the mine site in question.

Mr. Perez confirmed that he has no particular expertise or knowledge with respect to the use of explosives or blasting materials, and that his general knowledge of explosives is from his "on the job" work experience as an inspector and from his attendance at MSHA training sessions and seminars. He agreed that the manner in which the cited detonator caps were being transported did not violate any local explosive laws or regulations or other Federal laws or regulations.

The parties agreed that at the time the citation was issued, the driver of the pickup truck, who was an employee of the respondent, was delivering electrical detonator caps to a mine quarry operated by Metro Industries Inc. The pickup used to deliver the detonators was owned by the respondent, and the driver was making the first of two deliveries scheduled for that day. The first delivery consisted of 245 detonators, and the scheduled second delivery to another site consisted of 320 detonators, thus accounting for the total of 565 detonators cited by the inspector.

Respondent produced copies of a form issued by the local police department dated May 28, 1986, granting permission to one Jose Collazo Bonilla, the driver of the truck in question, to transport two loads of electrical detonators along a designated route specified on the face of the forms. The forms reflect that they were issued at 6:58 and 7:06 a.m., and the information describing the pickup truck in question, including

the tag number, is identical to that stated by the inspector on the face of the citation (exhibit R-1).

Although the police permit in question is in Spanish, respondent's counsel translated it for the benefit of the Court and petitioner's counsel, and upon review of the form by Inspector Perez, he confirmed that the permits are in fact as represented by the respondent.

Mr. Perez explained the general procedures normally followed in the transportation of explosives, and he conceded that he made no determination as to whether those procedures were in fact followed in this case. He explained that it was his understanding that local police regulations required separate trips when multiple deliveries of detonators are made to local mine sites. He confirmed that his principal concern in issuing the citation was his belief that the detonators were exposed to the truck "sparking material," namely, the interior metal cab framing.

Mr. Perez stated that the detonators in question were packed inside their original manufacturer's cardboard containers and that the boxes were stacked in the cab of the truck from the floor to halfway up the front cab window. He could not state how many containers he observed, and denied that the boxes were stored inside another container. However, he later stated that they were inside another non-conductive container as required by section 56.6057, but that it had no top. Petitioner's counsel asserted that the detonator containers were inside the type of container required by section 56.6057, and if they were not, the inspector would have cited a violation of that standard. Mr. Perez conceded that this was true.

Mr. Perez admitted that he did not inspect the interior of the truck cab to determine the actual composition of the metal interior framework and did not determine whether it was aluminum or painted with a "non-sparking" paint. He also admitted that he had no knowledge as to whether or not the truck ignition key was aluminum and did not inspector or look at the key. He admitted that aluminum material is "non-sparking."

Mr. Perez stated that the electrical detonators were classified as a "class C explosive," but he conceded that they could not explode while packed inside the manufacturer's original boxed containers.

At the close of MSHA's case, respondent's counsel made a motion for summary dismissal of the citation on the ground that MSHA had failed to produce any evidence, or to otherwise establish, that the interior of the truck cab where the electrical detonators were located and observed by the inspector was composed of sparking metal, or that the detonators were otherwise exposed to any sparking metal (Tr. 65-66). The motion was initially taken under advisement, subject to any re-dirct or rebuttal testimony by MSHA (Tr. 66). Respondent's motion was again renewed (Tr. 83, 99), and it was tentatively granted from the bench, subject to the filing of a posthearing brief by MSHA, and the receipt of the final hearing transcript (Tr. 99-102, 107). Respondent was also afforded an opportunity to file a brief (Tr. 107).

MSHA's Arguments

In its posthearing brief, MSHA views the single issue in this case to be whether or not its mandatory standards permits the carrying of explosives in the passenger cab of a truck. MSHA submits that such a practice is prohibited by 30 C.F.R. § 56.6047 and by its overall regulatory scheme pertaining to the transportation of explosives. MSHA points out that section 56.6047 plainly requires that there be no sparking metal exposed "in the cargo space," that the cargo space be equipped with "suitable sides and tail gates," and that the explosives "shall not be piled higher than the side or end enclosures." MSHA asserts that if the standard is construed to permit the transportation of explosives in the cab of a vehicle, or in any area other than the acknowledged cargo space, the quoted provisions of the standard would be rendered meaningless. MSHA maintains that the standard obviously contemplates that the "cargo space" of the vehicle is only that area which is enclosed by the sides and tailgate of the vehicle, and not the area within the passenger cab. MSHA concludes that the standard only addresses the presence of exposed sparking metal in the cargo space because that is the only area of the vehicle where it is permissible to place explosive materials, and to hold otherwise would authorize the placement of explosives in the passenger cab, which is not a cargo space, where the explosives could indeed be exposed to sparking metal. Consequently, MSHA believes that the placement of explosives in the cab of a pickup truck constitutes a clear violation of the cited standard.

With regard to its overall regulatory scheme concerning the transportation of explosives, MSHA cites section 56.6050, which provides as follows: "Other materials or supplies shall

not be placed on or in the cargo space of a conveyance containing explosives, detonating cord or detonators, except for safety fuse and except for properly secured, nonsparking equipment used expressly in the handling of such explosives, detonating cord or detonators." (Emphasis added).

MSHA argues that the presumptive placement of explosives in the cargo space of a vehicle forms the only conceivable basis for excluding other materials or supplies "on or in the cargo space." Similarly, the standard's exception for "nonsparking" equipment would serve little purpose if there was no requirement to transport explosives in the same cargo space. MSHA concludes that a contrary interpretation of the standard would curiously subject covered employers to possible citations in circumstances where sparking equipment was present in the cargo space of a vehicle while explosives were present in the passenger cab, and submits that the standard has no such intent.

MSHA also cites section 56.6040, which provides as follows: "Explosives and detonators shall be transported in separate vehicles unless separated by 4 inches of hardwood or equivalent."

MSHA argues that section 56.6040 contemplates that all explosives and detonators are to be transported in the cargo space where they are to be separated as specified. MSHA points out that the standard does not mention, or imply, that these materials may be separated merely by placing the explosives or detonators in the passenger cab of a vehicle, and that absent the required separation inside of the cargo space, employers are required to utilize separate vehicles. Since this standard sets forth the only alternative available to employers engaged in the transportation of explosives and detonators, MSHA concludes that the standard would indeed reference the use of the passenger cab if such a practice was deemed appropriate. MSHA maintains that the respondent in this case was engaged in transporting explosives and detonators in the same vehicle. Since the cargo space was full, MSHA suggests that the respondent was attempting to avoid having to make two trips or the use of two vehicles.

At the hearing, MSHA's counsel took the position that while the cited standard section 56.6047, makes reference to sparking metal exposed in the cargo space of vehicles used to transport explosives, since the detonators in question were in the passenger cab of the truck, rather than the normal rear truck cargo bed, the cab of the truck would be considered the cargo space for purposes of the standard. At the close of the

hearing, counsel conceded that the essence of the alleged violation is whether or not the truck cab contained sparking metal, and whether the blasting caps were exposed to any such sparking metal (Tr. 103).

Findings and Conclusions

Fact of Violation

The respondent is charged with an alleged violation of mandatory safety standard 30 C.F.R. § 56.6047, which provides as follows:

> 56.6047 Vehicle construction
>
> Vehicles used to transport explosives, other than blasting agents, shall have substantially constructed bodies, no sparking metal exposed in the cargo space, and shall be equipped with suitable sides and tail gates; explosives shall not be piled higher than the side or end enclosures.

Respondent produced copies of two permits issued by the local police department on the day the citation was issued, attesting to the fact that the transportation of the electrical blasting caps in question satisfied local police regulatory requirements, and MSHA did not dispute this fact (exhibit R-1, Tr. 52).

MSHA's conclusion that the respondent was transporting explosives in the rear of the truck in question is unsupported by any credible or probative evidence, and it is rejected. The record reflects that Inspector Perez was not sure what he observed in the rear of the truck. Although he alluded to "other explosives" in the back of the truck, he obviously made no effort to identify them. Although he further alluded to ANFO, an explosive brand name, he stated that "I cannot testify as to anfo" (Tr. 22, 26).

The only specific "explosive" material referred to by Mr. Perez were bags of ammonium nitrate (Tr. 22). However, he conceded that this material was not an explosive (Tr. 23). He also conceded that the citation he issued makes no mention of any explosives being carried in the rear of the truck (Tr. 23). Mr. Perez explained that ammonium nitrate, in its natural state, was a fertilizer and not an explosive, and in order to

make it an explosive, one must add diesel fuel oil. He reiterated that the ammonium nitrate he may have observed was not an explosive (Tr. 26).

Mr. Perez confirmed that ammonium nitrate is considered a "blasting agent," under MSHA's regulations. However, he conceded that section 56.6047 provides for an exception for blasting agents, and that the transportation of such materials in the truck in question was not prohibited by that standard (Tr. 25, 28). He also confirmed that the transportation of the blasting caps in question in the cab of the truck did not violate any local laws or any regulations of the Federal Treasury Department, Alcohol, Tobacco and Firearms (ATF) Agency (Tr. 37-38). Mr. Perez suggested that the reason the blasting caps were carried in the cab of the truck was that there was no room in the back of the truck (Tr. 28).

Mr. Perez confirmed that the detonators in question were not exposed, but were packed in their original manufacturer's cartons. The cartons were in turn located in non-conductive containers as required by section 56.6057, and both Mr. Perez and MSHA's counsel conceded that the manner in which they were stored was in compliance with that mandatory standard (Tr. 76, 77).

Although one may conclude that it may have been imprudent for the respondent to transport electrical detonator caps in the cab of the truck, I find no regulatory or evidentiary basis for finding a violation in this case. Aside from the fact that MSHA produced no evidence to establish that the cab of the truck was constructed of non-sparking metal, MSHA's posthearing arguments, which I find to be rather strained, and which I reject, would require the respondent to consider two or three mandatory standards together before reaching any rational conclusion that transporting blasting caps in a cab of a truck was or was not prohibited.

In my view, the regulatory intent of section 56.6047 is to establish minimum construction standards for vehicles used to transport explosives. Contrary to MSHA's arguments, I cannot conclude that the standard is intended to prohibit the transportation of explosives in the cab of a truck. As a matter of fact, as pointed out earlier, MSHA's position during the hearing was that the cab of the truck was in fact the cargo space since the explosives were located there, and since the interior of the cab was of metal construction, which MSHA assumes was exposed sparking metal, a violation was established. MSHA's counsel stated that "once you put the cargo in the cab of the truck, then you've by definition made the cab

of the truck the cargo space" (Tr. 61). When asked to define the term "sparking metal," Inspector Perez replied "I don't know, its zinc, iron, . . . whatever the truck is made of" (Tr. 60). When asked whether or not the inspector had in mind the phrase "no sparking metal" as stated in section 56.6047, when he issued the citation, MSHA's counsel replied in the affirmative (Tr. 62).

Although Mr. Perez indicated that he was a licensed metallurgical engineer, his experience in explosives was limited to several seminars, and his experience and training in applying MSHA's mandatory standards (Tr. 30-31). MSHA's counsel conceded that Mr. Perez failed to inspect the interior of the truck cab to determine whether it was in fact constructed of sparking metal. Counsel further conceded that Mr. Perez simply assumed that the interior of the truck was constructed of sparking metal, and took the position that this was common knowledge. Counsel acknowledged that aluminum metal, and metal which is treated or painted with non-sparking paint, would be considered non-sparking and in compliance with the standard. However, counsel took the position that the burden was on the respondent to establish this (Tr. 81-82). I disagree. In my view, the burden of proof here lies with MSHA and not the respondent. MSHA must establish all elements of the cited standard, particularly the fact that the interior of the truck was constructed of sparking metal.

On the facts of this case, MSHA's evidentiary proof is totally lacking to support any conclusion that the interior of the truck was constructed of sparking metal. Mr. Perez considered "sparking metal" to be any metal that can heat and produce a spark. As an example, he explained that if a truck driving down a road hit a stone, and the stone hit the truck body and produces a spark, then he would consider the metal to be sparking metal (Tr. 78-79). Yet, he simply looked at the metal door, and in a less than cursory way, determined that it was constructed of sparking metal. He made no inspection of the cab interior to determine whether it was constructed of aluminum, or whether it was coated or painted with non-sparking paint. As for the door, he candidly admitted that "I didn't prove that it can produce a sparking material on that" (Tr. 81). He also made no determination as to whether or not the truck ignition key was made of aluminum, and acknowledged that he has heard of such keys (Tr. 98). Given his asserted metallurgical background, I would think that it would have been a simple matter for Mr. Perez to make a determination as to the composition of the interior of the truck to determine whether it was constructed of sparking metal. The fact is that he did not do so.

Under all of the aforesaid circumstances, I conclude and find that MSHA has failed to establish a violation of section 56.6047. Accordingly, the respondent's motion to dismiss, made at the hearing, IS GRANTED, my previous tentative bench ruling in this regard IS AFFIRMED, and the citation IS VACATED.

ORDER

In view of the foregoing findings and conclusions, section 104(a) Citation No. 2655924, issued May 28, 1986, citing an alleged violation of 30 C.F.R. § 56.6047, IS VACATED, and MSHA's proposal for assessment of civil penalty IS DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 27 1987

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. SE 87-49-R
v.	:	Order No. 2842983; 1/7/87
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Matthews Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 87-86
	:	A.C. No. 40-00520-03620
v.	:	Matthews Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER OF DISMISSAL

Before: Judge Broderick

On October 27, 1987, the parties filed a joint motion to approve settlement together with exhibits. On November 9, and November 19, 1987, the Secretary filed supplements to the motion at my request.

In the contest proceeding, Consol seeks review of an imminent danger withdrawal order issued under section 107(a) of the Act. The penalty case seeks penalties for four alleged violations of 30 C.F.R. § 75.1704, each originally assessed at $500. The motion states that the parties agree to settle each violation for $300. The 107(a) order was issued because the Inspector concluded that the four violations collectively constituted an imminent danger.

The violations resulted from rock falls which blocked four separate areas in the intake escapeways in the subject mine. The motion states that the Secretary now believes that the 107(a) order was issued in error, and that the gravity of the violations was not as serious as originally thought because there were two travellable escapeways for all persons to exit the mine.

I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $1200 within 30 days of the date of this order.

IT IS FURTHER ORDERED that Order No. 2842983 is VACATED, and the review proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 87-76-M A. C. No. 11-02707-05510
v.	:	Elmhurst Underground No. 1
ELMHURST-CHICAGO STONE COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Broderick

The Solicitor has filed a motion to approve a settlement of the one violation involved in this case. The original assessment was $7,000 and the proposed settlement is for $4,500.

The Solicitor's motion discusses the violation in light of the six statutory criteria set forth in section 110(i) of the Act. The subject citation was issued for a violation of 30 C.F.R. § 57.3022 because loose ground was not taken down or supported before other work was done in drift EE east. An MSHA investigation concluded that this violation caused a fatal fall-of-face accident when two miners entered the area to survey for the center line to be used by the drillers to establish a drilling pattern. A slab of rock, 12 feet by 7 feet and 30 to 36 inches thick, fell from the face and struck both miners. One miner received fatal injuries, and the other was seriously injured. The Solicitor represents that a reduction from the original assessment is warranted because the cited area had been marked off following a blast, but the scaling crew had not barred the loose material. Thus, the miners should not have entered the area, especially in light of the operator's rule against working in unscaled areas and the fact that the cited area was marked. I accept the foregoing representations and approve the recommended settlement.

Accordingly, the motion to approve settlement is GRANTED and the operator is ORDERED TO PAY $4,500 within 30 days from the date of this decision.

James A. Broderick
Acting Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

NOV 30 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 87-219 A.C. No. 05-04184-03504
v.	:	Orchard Valley West Mine
COLORADO WESTMORELAND INCORPORATED, Respondent	:	

ORDER GRANTING PETITIONER'S MOTION TO VACATE CITATION AND PROPOSAL FOR PENALTY AND ORDER OF DISMISSAL

Before: Judge Cetti

On March 19, 1987, respondent was issued an order (later modified to a citation) for a violation of 30 C.F.R. § 75.400. That standard required combustible materials be cleaned up and not permitted to accumulate. Respondent cleaned up the combustible material based on its understanding of what was acceptable to MSHA.

Because of respondent's reliance on its understanding of MSHA's requirements, petitioner moves that the citation and proposed penalty be vacated.

Good cause having been shown, petitioner's motion that the citation and the proposed penalty be vacated is granted and this proceeding is dismissed.

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

NOV 30 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DAVID WILLIS, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEVA 87-106-D HOPE CD 86-24 HOPE CD 87-2
v.	:	
BABCOCK MINING CO.; HENRY McCOY, Individually and as Operator of Babcock Mining Co.; VIRGIL McMILLION, Individually and as Operator of McMillion Enp., Inc., McMILLION ENP., INC., Respondents	:	No. 1 Mine

CORRECTION OF CLERICAL ERROR IN DECISION

Before: Judge Fauver

The Supplemental Default Decision dated November 20, 1987, is amended to correct the following clerical error: the Complainant's name in Finding of Fact No. 1 is changed to "David Willis."

William Fauver
Administrative Law Judge

Distribution:

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Virgil McMillion, President, McMillion Enp., Inc., Box 13, Renick, WV 24966 (Certified Mail)

R.S. Bailey, President, Craft Coal Company, State Route 15, Monterville, WV 26282 (Certified Mail)

Babcock Mining Company, c/o Drew Hunter, Secretary, P.O. Box 2057, Ashland, KY 41105 (Certified Mail)

Mr. Henry McCoy, Babcock Mining Company, P.O. Box 2857, Ashland, KY 41105 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

November 30, 1987
(originally dated Nov. 20, 1987)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DAVID WILLIS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 87-106-D
	:	HOPE CD 86-24
v.	:	HOPE CD 87-2
	:	
BABCOCK MINING CO.; HENRY McCOY, Individually and as Operator of Babcock Mining Co.; VIRGIL McMILLION, Individually and as Operator of McMillion Enp., Inc., McMILLION ENP., INC., Respondents	:	No. 1 Mine

SUPPLEMENTAL DEFAULT DECISION

Before: Judge Fauver

Pursuant to the Default Decision entered on October 20, 1987, and the affidavits filed with Complainant's proposed order for relief, the following further Findings of Fact, Conclusions of Law and Order are entered herein:

FINDINGS OF FACT

1. Complainant David Willis worked an average of 44 hours per week at Babcock Mining Co., and earned a regular rate of $10.00 per hour, and an overtime rate of $15.00 per hour.

2. Mr. Willis was discriminatorily fired from Babcock Mining Co. on September 29, 1986, and subsequently reinstated on October 1, 1986. Mr. Willis was again discriminatorily fired from Babcock Mining Co. on October 20, 1986. Babcock Mining Co. ceased operations on December 10, 1986.

3. McMillion Enp., Inc., began operating the subject mine on January 5, 1987, and ceased operations on February 13, 1987.

4. Mr. Willis was not successful in finding employment between October 20, 1986 and February 13, 1987.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondents violated § 105(c) of the Federal Mine Safety and Health Act, 30 C.F.R. § 801 et seq. as alleged in this proceeding. They are jointly and severally liable for back pay due David Willis totalling $6,340.00, together with interest of $570.60, which has been computed in accordance with the formula set forth in Secretary ex rel. Bailey v. Arkansas Carbona Company, 5 FMSHRC 2042 (1983).

3. Respondents are assessed a civil penalty of $550.00 for the above violation, and they are jointly and severally liable for such civil penalty.

4. Respondent Babcock Mining Co. is jointly and severally liable with the other Respondents for the above back pay, interest, and civil penalty. However, inasmuch as Babcock Mining Co. has filed for bankruptcy, an order requiring it to make such payments will not be entered in this proceeding.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondents Henry McCoy, Virgil McMillion and McMillion Enp., Inc., shall pay the above back pay of $6,340.00 and interest of $570.60 to Complainant David Willis within 30 days of this Order. If payment is not made within such period, interest on the back pay shall continue to accrue under the formula in the above Arkansas Carbona Company decision until payment in full is made to David Willis.

2. Respondents Henry McCoy, Virgil McMillion and McMillion Enp., Inc., shall pay the above civil penalty of $550.00 within 30 days of this Order.

William Fauver
William Fauver
Administrative Law Judge

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Babcock Mining Company, c/o Drew Hunter, Secretary, P.O. Box 2057, Ashland, KY 41105 (Certified Mail)

Mr. Henry McCoy, Babcock Mining Company, P.O. Box 2857, Ashland, KY 41105 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 30 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ALBERT HALSTEAD, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEVA 87-107-D
v.	:	HOPE CD 87-1 HOPE CD 87-4
BABCOCK MINING CO.; HENRY McCOY, Individually and as Operator of Babcock Mining Co.; VIRGIL McMILLION, Individually and as Operator of McMillion Enp., Inc., McMILLION ENP., INC., Respondents	:	No. 1 Mine

CORRECTION OF CLERICAL ERRORS IN DECISION

Before: Judge Fauver

The Supplemental Default Decision dated November 20, 1987, is amended to correct the following clerical errors: the Complainant's name in Conclusion of Law No. 2 and in paragraph 1 of the Order is changed to "Albert Halstead."

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

November 30, 1987
(originally dated Nov. 20, 1987)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ALBERT HALSTEAD, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 87-107-D
	:	HOPE CD 87-1
v.	:	HOPE CD 87-4
	:	
BABCOCK MINING CO.; HENRY McCOY, Individually and as Operator of Babcock Mining Co.; VIRGIL McMILLION, Individually and as Operator of McMillion Enp., Inc., McMILLION ENP., INC., Respondents	:	No. 1 Mine

SUPPLEMENTAL DEFAULT DECISION

Before: Judge Fauver

Pursuant to the Default Decision entered on October 20, 1987, and the affidavits filed with Complainant's proposed order for relief, the following further Findings of Fact, Conclusions of Law and Order are entered herein:

FINDINGS OF FACT

1. Complainant Albert Halstead worked an average of 44 hours per week at Babcock Mining Co., and earned a regular rate of $10.00 per hour, and an overtime rate of $15.00 per hour.

2. Mr. Halstead was discriminatorily fired from Babcock Mining Co. on October 4, 1986 and subsequently reinstated on October 9, 1986. Mr. Helstead was again discriminatorily fired from Babcock Mining Co. on October 20, 1986. Babcock Mining Co. ceased operations on December 10, 1986.

3. McMillion Enp., Inc., began operating the subject mine on January 5, 1987. On January 12, 1987, Mr. Halstead was offered a job at McMillion Enp. Inc. McMillion Enp., Inc., ceased operations on February 13, 1987.

4. Between October 20, 1986 and December 10, 1986, and between January 5, 1987 and January 12, 1987, Mr. Halstead earned a total of $1,081.00 at other jobs.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondents violated § 105(c) of the Federal Mine Safety and Health Act, 30 C.F.R. § 801 et seq. as alleged in this proceeding. They are jointly and severally liable for back pay due Albert Halstead totalling $3,279.00, together with interest of $295.11, which has been computed in accordance with the formula set forth in Secretary ex rel. Bailey v. Arkansas Carbona Company, 5 FMSHRC 2042 (1983).

3. Respondents are assessed a civil penalty of $700.00 for the above violation, and they are jointly and severally liable for such civil penalty.

4. Respondent Babcock Mining Co. is jointly and severally liable with the other Respondents for the above back pay, interest, and civil penalty. However, inasmuch as Babcock Mining Co. has filed for bankruptcy, an order requiring it to make such payments will not be entered in this proceeding.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondents Henry McCoy, Virgil McMillion and McMillion Enp., Inc., shall pay the above back pay of $3,279.00 and interest of $295.11 to Complainant Albert Halstead within 30 days of this Order. If payment is not made within such period, interest on the back pay shall continue to accrue under the formula in the above Arkansas Carbona Company decision until payment in full is made to David Willis.

2. Respondents Henry McCoy, Virgil McMillion and McMillion Enp., Inc., shall pay the above civil penalty of $700.00 within 30 days of this Order.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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

Virgil McMillion, President, McMillion Enp., Inc., Box 13, Renick, WV 24966 (Certified Mail)

R.S. Bailey, President, Craft Coal Company, State Route 15, Monterville, WV 26282 (Certified Mail)

Babcock Mining Company, c/o Drew Hunter, Secretary, P.O. Box 2057, Ashland, KY 41105 (Certified Mail)

Mr. Henry McCoy, Babcock Mining Company, P.O. Box 2857, Ashland, KY 41105 (Certified Mail)

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