

NOVEMBER 1992

COMMISSION DECISIONS

11-23-92 Southern Ohio Coal Company LAKE 91-650-R Pg. 1781

ADMINISTRATIVE LAW JUDGE DECISIONS

11-05-92 Sec. Labor for Coy Crabtree v. LEECO, Inc. KENT 92-718-D Pg. 1789
11-05-92 International Anthracite Corp. PENN 92-230 Pg. 1790
11-05-92 Harriman Coal Corporation PENN 92-305 Pg. 1796
11-05-92 Eagle Nest Incorporated WEVA 91-293-R Pg. 1800
11-06-92 Energy Fuels Coal Incorporated WEST 91-432 Pg. 1804
11-09-92 Peabody Coal Company KENT 91-1013 Pg. 1824
11-17-92 Paul Shirel employed by PYRO Mining Co. KENT 92-73 Pg. 1826
11-17-92 Well Tech Incorporated VA 92-54 Pg. 1830
11-18-92 Peabody Coal Company KENT 92-42 Pg. 1836
11-19-92 Sec. Labor for Clayton Nantz v. Nally and
Hamilton Enterprises, Inc.(not final) KENT 92-259-D Pg. 1858
11-23-92 Pyramid Mining, Inc. KENT 92-126 Pg. 1905
11-23-92 Faith Coal Company SE 92-145 Pg. 1907
11-25-92 Acme Gravel Company CENT 92-113-M Pg. 1931
11-27-92 Pittsburg and Midway Coal Mining Co. CENT 91-196 Pg. 1941
11-27-92 Powderhorn Coal Company WEST 92-93 Pg. 1951

ADMINISTRATIVE LAW JUDGE ORDERS

10-29-92 Contest of Respirable Dust Samples Master No. 91-1 Pg. 1957
11-13-92 Wharf Resources USA Inc. CENT 92-240-M Pg. 1964
11-13-92 Fisher Sand and Gravel Co. CENT 92-246-M Pg. 1968
11-13-92 Livingston Marble & Granite WEST 92-430-M Pg. 1971
11-18-92 Chestnut Ridge Sand PENN 92-696-M Pg. 1973
11-20-92 Contest of Respirable Dust Samples Master No. 91-1 Pg. 1975

NOVEMBER 1992

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

Secretary of Labor, MSHA v. Virginia Crews Coal Company, Docket Nos. WEVA 92-246 and WEVA 92-247. (Judge Koutras, October 13, 1992)

There were no cases filed in which review was denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 23, 1992

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket Nos. LAKE 91-650-R
 : LAKE 91-664-R
SOUTHERN OHIO COAL COMPANY :

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act" or "Act"). The Secretary of Labor alleges that Southern Ohio Coal Company ("SOCCO") violated 30 C.F.R. § 75.1704-2(a), a mandatory underground coal mine safety standard requiring that escapeways follow "the safest direct practical" route out of the mine¹ and failed to abate the violation, which resulted in a section 104(b) order.² SOCCO contested the citation and order, and sought

¹ Section 75.1704-2(a) provides:

In mines and working sections opened on and after January 1, 1974, all travelable passageways designated as escapeways in accordance with § 75.1704 shall be located to follow, as determined by an authorized representative of the Secretary, the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners. Escapeways from working sections may be located through existing entries, rooms, or crosscuts.

² Section 104(b) of the Mine Act provides, in pertinent part:

Follow-up inspections; findings; orders. If, upon any follow-up inspection of a ... mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to [section 104(a)] has not been totally abated within the period of time as originally fixed therein or

(continued...)

temporary relief from the order.

Commission Administrative Law Judge Avram Weisberger concluded that SOCCO violated section 75.1704-2(a), sustained the Secretary's section 104(b) failure to abate order, and denied SOCCO's application for temporary relief. 13 FMSHRC 1149 (July 1991)(ALJ). The Commission granted SOCCO's petition for discretionary review, which challenges (1) whether the Secretary had proved a violation of 30 C.F.R. § 75.1704-2(a), (2) whether, in order to reduce the length of an escapeway, SOCCO can be required to construct an overcast, and (3) whether the judge erred in dismissing SOCCO's application for temporary relief. The Commission subsequently heard oral argument.

For the reasons set forth below, we reverse the judge's conclusion that SOCCO violated section 75.1704-2(a) and vacate the Secretary's section 104(b) order. We find the denial of SOCCO's application for temporary relief to be moot.

I.

Factual and Procedural Background

SOCCO owns and operates the Meigs No. 2 Mine. On June 11, 1991, Mine Safety and Health Administration ("MSHA") Inspector Charles Jones walked the designated primary escapeway from the mouth of the 3-South longwall section (the "mouth") to Air Shaft No. 2 (the "air shaft").³ From the mouth, the escapeway ran east parallel to the track and belt line entry for approximately 2,300 feet. The escapeway then turned north and traversed four entries by

²(...continued)

as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in [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 violation has been abated.

30 U.S.C. § 814(b).

³ Air Shaft No. 2 was placed in operation on February 23, 1991 and it was constructed, on SOCCO's own initiative, in order to improve ventilation to the working faces. It became a mine opening suitable for the safe evacuation of miners when an escape capsule (hoist) was approved by MSHA on April 25, 1991, thus reducing the designated primary escapeway from the 3-South longwall section from 16,200 feet to 7,300 feet.

means of an overcast,⁴ then turned west to the air shaft, a distance of approximately 2,500 feet. The length of the escapeway from the mouth to the air shaft was about 4,800 feet.⁵ Jones found the escapeway in good condition but was concerned about its length. Tr. 41, 113. Jones determined that the mouth was approximately 200 to 300 feet directly south of the air shaft and that a more direct route existed.

Jones issued a section 104(a) citation alleging a violation of section 75.1704-2(a) as follows:

The most direct practical route to the nearest mine opening was not provided from the 3rd South Longwall section in that miners were required to travel an additional 4,800 feet by traveling outby from the mouth of the section for 2,300 feet and traveling inby for about 2,500 feet. The emergency escape shaft is located at the mouth of the 3 South longwall section (across the track and belt entry).

The violation was designated as being of a significant and substantial nature.

Jones suggested that, in order to abate the violation, SOCCO could construct an overcast over the track and belt entry between the mouth and the air shaft, which would permit SOCCO to designate a more direct escapeway.⁶ Use of an overcast would reduce the length of the escapeway to approximately 200 to 300 feet from the mouth. Tr. 65-66, 304-05.

On July 3, 1991, SOCCO contested the citation and requested an expedited hearing, which was held on July 11.⁷ Prior to the hearing, SOCCO attempted

⁴ An overcast is "[a]n enclosed airway to permit one air current to pass over another one without interruption." Bureau of Mines, U.S. Dept. of Interior, Dictionary of Mining, Mineral and Related Terms at 780 (1968).

⁵ The designated escapeway contained four ninety degree turns but was roughly configured as three sides of a rectangle.

⁶ Under 30 C.F.R. § 75.1707, the escapeway required to be ventilated with intake air must be separated from the belt and track haulage entries for their entire length to the beginning of each working section, except as permitted by the Secretary or her authorized representative. The purpose of the overcast was to separate the track and belt entry air from the intake air, allowing the track and belt entry air to pass under, and the intake air to pass through the overcast. Thus, a person walking the escapeway from the mouth to the air shaft could travel in intake air at all times.

⁷ At the July 11, 1991, hearing, SOCCO also filed an application for temporary relief, in which it requested that it be relieved from abatement until issuance of a decision as to the validity of the section 104(a) citation. The Secretary had modified the citation to extend the abatement date until July 16, 1991. The judge denied the motion.

to abate the citation. SOCCO rerouted the escapeway and reduced its length by approximately 30 percent.

On July 16, 1991, MSHA Inspector Ronald Taylor issued to SOCCO a section 104(b) withdrawal order alleging that "little effort" had been made to abate the section 104(a) citation. On that same day, SOCCO filed a notice of contest and application for temporary relief seeking vacation of the section 104(b) order unless and until it was determined by the Commission that the citation was validly issued and that the time permitted for abatement was proper.

MSHA modified the withdrawal order on July 17 to permit mining on the 3-South longwall section based upon SOCCO's commitment to construct an overcast during the July 20 weekend. On July 19, the judge sua sponte consolidated the contest of the withdrawal order with the contest of the citation and issued his decision.

The judge determined that section 75.1704-2(a) is violated when the escapeway designated by the operator follows a route "that has not been determined by the Secretary's representative to be the safest direct practical route." 13 FMSHRC at 1151. Relying on his earlier decision in Rushton Mining Co., 10 FMSHRC 713, 716 (June 1988)(ALJ) aff'd on other grounds, 11 FMSHRC 1432 (August 1989), the judge held that, because the cited escapeway was not a "direct" route, SOCCO violated section 75.1704-2(a). 13 FMSHRC at 1151-52.

The judge noted Inspector Jones' suggestion that SOCCO construct an overcast so the escapeway could proceed more directly from the mouth to the air shaft. 13 FMSHRC at 1152. The judge also noted SOCCO's argument that section 75.1704-2(a) does not require an operator to engage in construction in order to designate a conforming escapeway and that it was not "practical" for the overcast to be constructed. Id. The judge concluded, however, that SOCCO's arguments concerned abatement, not the fact of violation. The judge reasoned that, since the Secretary had not mandated a specific escapeway route for abatement purposes, questions concerning the overcast, including its practicality, were beyond the scope of the proceeding. 13 FMSHRC at 1152 n.1. Consequently, the judge denied SOCCO's contest of the violation. 13 FMSHRC at 1152, 1154. He found, however, that the violation was not significant and substantial. 13 FMSHRC at 1153. The Secretary did not request review of that finding.

The judge also denied SOCCO's contest of the section 104(b) order and its July 16, 1991, application for temporary relief, reasoning that SOCCO's position was predicated on its argument that the cited escapeway was not violative of section 75.1704-2(a). 13 FMSHRC at 1153 n.2.

II.

Disposition of Issues

A. Section 104(a) Citation

The Secretary asserts that she is not required to designate a specific

escapeway route in order to establish a violation of section 75.1704-2(a). See O.A. Tr. 25, 29-30. See also S. Br. 8-9. The Secretary argues further that it was SOCCO's burden not only to prove what it considers to be the safest direct practical route but also to prove, in the negative, that all other routes fail to meet those criteria. O.A. Tr. 25, 29-30; S. Br. 8-9. The Mine Act imposes on the Secretary the burden of proving a violation of a safety standard. See Garden Creek Pocahontas Company, 11 FMSHRC 2148, 2152 (November 1989); Consolidation Coal Company, 11 FMSHRC 966, 973 (June 1989). The Secretary's position evades her fundamental obligation in a contest proceeding to prove a violation by the operator.

Section 75.1704-2(a) requires that designated escapeways "be located to follow, as determined by an authorized representative of the Secretary, the safest direct practical route to the nearest mine opening suitable for the safe evacuation of miners." Accordingly, it is the Secretary's burden to prove that, as compared to the designated route, there is at least one other escapeway route that she has determined more closely complies with the standard's requirement of "the safest direct practical route." Thus, in order for the Secretary to establish a prima facie case of violation, she must show that the operator's designated escapeway is deficient because it is not "the safest direct practical route." It is insufficient for the Secretary to merely cite the designated route as being out of compliance with the regulation. She must present a specific escapeway alternative that she believes is more appropriate. The language of the regulation, "safest direct practical route," implies that there is one best route. Accordingly, the Secretary, in order to prove a violation, must show that there is a specific escapeway alternative that more fully complies with those criteria than does the cited route. The judge therefore erred when he found a violation absent proof of a specific safer direct practical route. See 13 FMSHRC at 1152 n. 1.

The Secretary also asserts that a violation was established by the very configuration of the cited escapeway. O.A. Tr. 42-43, S. Br. 8. Essentially, the Secretary is suggesting that for the purposes of this proceeding, the configuration of SOCCO's escapeway is a per se violation of section 75.1704-2(a). The Secretary's interpretation is clearly at odds with the wording of the standard and loses sight of the fact that directness is not the only factor to be considered in the designation of an escapeway. See Rushton Mining Co., supra, 11 FMSHRC at 1437.

Focusing on the language of the regulation, there are three considerations in designating escapeway routes: (1) "safest," (2) "direct", and (3) "practical." Accordingly, in the Secretary's determination of what is "the safest direct practical route" there must be a consideration of all three factors. No one factor may be used exclusively to determine the designated escapeway without taking into account the other two factors. The judge therefore erred when he based his finding of violation solely on his determination that "the escapeway was not 'direct'" (13 FMSHRC at 1152) without giving due regard to its practicality and its safety relative to other possible routes.

While the Secretary "suggested" the construction of an overcast over the belt and track entry, she failed to prove that there was a specific better

route.⁸ The judge found that neither Jones nor any other representative of the Secretary mandated a particular route that was designated as an escapeway for the purpose of abating the violation. 13 FMSHRC at 1152 n.1. Jones conceded that he never gave SOCCO a specific escapeway route. Tr. 49. When asked to mark on a map an alternative for the safest direct practical route, he did not do so. Jones merely responded that "[a]nything can be used as an alternate route either inby or outby the mouth." Tr. 49, 50. Nor does the citation itself indicate a particular escapeway that Jones believed was the safest direct practical route.

Furthermore, the Secretary has taken the position throughout this proceeding that she has only suggested, but not required, construction of an overcast.⁹ See S. Br. 10-11; Tr. 14-15, 21, 23, 49, 51, 104, 132, 305, 307; O.A. Tr. 25, 29. If, indeed, construction of an overcast was not required, a route containing the overcast could not have been determined to be the safest direct practical route.¹⁰ We conclude that the judge erred in finding that the Secretary established a violation of section 75.1704-2(a).

B. Section 104(b) Failure to Abate Order and Application for Temporary Relief

Prior to the expedited hearing in this matter, SOCCO attempted to abate the violation alleged in the citation by designating a shorter route as its primary escapeway. In addition, SOCCO requested that the judge extend the time for abatement until after he issued his decision on the merits. SOCCO complied with the section 104(b) order, shut down the longwall, and constructed the "suggested" overcast. Under these circumstances, we vacate the section 104(b) order.

⁸ The record does not address whether the shorter escapeway designated by SOCCO after the citation was issued met the requirements of section 75.1704-2(a).

⁹ Even if the Secretary's "suggestion" is construed to have required the construction of an overcast, the Secretary at oral argument was equivocal as to her authority to require such construction. See O.A. Tr. 31-32, 35-36, 37-38. See also S. Br. 11-12 n.4. Counsel for the Secretary suggested that if "there was no other direct, safe and practical way out of the mine ... the Secretary under those circumstances could require construction to some extent." O.A. Tr. 32. When asked what the Secretary's position was on construction, counsel responded that she was "not going to totally preclude that possibility." O.A. Tr. 35-36. Pressed further, she responded that "we are not taking the position that the Secretary could never require construction." O.A. Tr. 37-38.

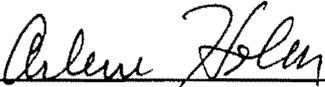
¹⁰ Finally, we note that SOCCO, on its own initiative, constructed the air shaft and the hoist. As a result, SOCCO was able to reduce its primary designated escapeway from the 3-South longwall section from 16,200 feet to 7,300 feet. It is noteworthy that, prior to voluntary action by SOCCO, which reduced the escapeway distance by 8,900 feet, the much longer escapeway was approved by the Secretary.

SOCCO also asserted that the judge erred in denying its request for temporary relief from the section 104(b) failure to abate order. Since we have vacated the order, SOCCO's assertions with respect to the application for temporary relief are rendered moot.

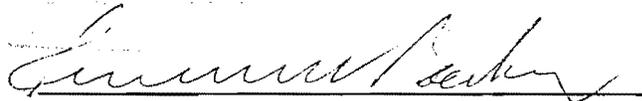
III.

Conclusion

For the foregoing reasons, we reverse the judge's finding that SOCCO violated section 75.1704-2(a) and vacate the citation. We also reverse the judge's decision sustaining the section 104(b) failure to abate order and vacate that order.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, 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
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

NOV 5 1992

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION on behalf : Docket No. KENT 92-718-D
of COY CRABTREE : BARB-CD-91-32
Complainant :
v. : Mine: No. 60
LEECO INC., :
Respondent :

ORDER OF DISMISSAL

Before: Judge Feldman

The Secretary has filed a dismissal motion requesting approval to withdraw her complaint in the captioned case for the reasons stated therein. In addition, the Secretary states that the complaining miner, Coy Crabtree, also intends to withdraw his complaint with the Mine Safety and Health Administration. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore **DISMISSED**.



Jerold Feldman
Administrative Law Judge
(703) 756-5233

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Mr. Coy Crabtree, P.O. Box 243, Viper, Kentucky 41774

/vmy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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NOV 5 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. PENN 92-230
Petitioner : A.C. No. 36-01781-03549
v. :
: B & M Tunnel
INTERNATIONAL ANTHRACITE CORP.:
Respondent :

DECISION

Appearances: Gayle M. Green, Esq. and Linda Henry, Esq.,
U.S. Department of Labor,
Office of the Solicitor, Philadelphia,
Pennsylvania;
Mr. Ronald Lickman, International Anthracite
Corporation, Pottsville, Pennsylvania,
pro se.

Before: Judge Weisberger

This case is before me based on a petition for assessment of civil penalty predicated upon the issuance of 3 Section 104(g)(1) orders alleging violations of various training requirements set forth in Part 48, Sub-Part B, of volume 30, Code of Federal Regulations. Pursuant to Notice, the case was scheduled and heard in Reading, Pennsylvania on July 14, 1992. Harold Glandon testified for the Secretary of Labor (Petitioner), and Ronald Lickman testified for the Operator (Respondent). It was agreed by the parties that Lickman's testimony and arguments set forth in Harriman Coal Corporation, Docket No. PENN 92-305, heard on the same date, are to be incorporated by reference herein.

Findings of Fact and Discussion

I. Order No. 3080095

On May 13, 1991, Harold Glandon, an MSHA Inspector, inspected Respondent's B & M Tunnel operation. Respondent had purchased that operation on April 26, 1991, and had never mined coal there. At the date of the inspection, there was no mining taking place at the operation and it was temporarily abandoned. However, Respondent's representative indicated Respondent "never abandoned the mine". (Tr.93) On the day of Glandon's inspection,

one of Respondent's employees, David Labenski, was operating a caterpillar bulldozer loading coal on trucks. Two other employees, Robert Searles and Ron Lickman, Jr., were observed operating a bulldozer and backhoe, respectively, grading and filling in various voids.

a. Applicability of Part 48, subpart B, supra to Respondent's Operation

Respondent argues in its brief, in essence, that it is not subject to the requirements of Part 48, inasmuch as no coal was being mined, or produced on the dates the citations herein were issued. I reject Respondent's argument for the following reasons.

Essentially, Part 48 Subpart B, supra, requires certified training for miners working at surface mines and surface areas of underground mines. Section 3(h)(1) of the Federal Mine Safety and Health Act of 1977 defines a mine, inter alia as "...lands, excavations, ... used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits" Respondent's employees were engaged in filling voids which had resulted from the extraction of coal (Tr.10, 14, 88). As such, the site at issue falls within the statutory definition of a mine.

b. Violation of 30 C.F.R. § 48.25

According to Ronald Lickman, Respondent's President, Ron Lickman, Jr., had been operating construction equipment for 15 years. Ron Lickman, Jr., told Glandon that he was experienced with the 245 backhoe as he had performed construction work. Further, Glandon indicated that he appeared to know how to operate the backhoe, and that the equipment and the work practices looked good. Also, Ron Lickman, Jr., had received 8 hours training at another site. However, he informed Glandon that he was not certified as an experienced miner, and that he had not received 16 hours training, nor had he received 8 hours training on the site.

Glandon issued an Order pursuant to Section 104(g)(i) of the Federal Mine Safety and Health Act of 1977, which, provides as follows:

If, upon any inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and

to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

30 C.F.R. § 48.25 provides as follows:

(a) Each new miner shall receive no less than 24 hours of training as prescribed in this section. Except as otherwise provided in this paragraph, new miners shall receive this training before they are assigned to work duties. At the discretion of the District Manager, new miners may receive a portion of this training after assignment to work duties: Provided, that no less than 8 hours of training shall in all cases be given to new miners before they are assigned to work duties. (Emphasis added)

30 C.F.R. § 48.22(c) defines a "new miner" as a miner who is not an experienced miner. Section 48.22(b) supra defines an "experienced miner" as either a miner who was employed as a miner on the effective date of the regulations i.e. October 13, 1978, or one who has received training from an appropriate state agency within the preceding 11 months, or one who has had a least 12 months experience working in a surface mine or surface of an underground mine during the preceding 3 years, or one who has received the training for a new miner within the proceeding 12 months.

Section 48.22(a)(1) defines a "miner", inter alia as a person working in a surface mine or surface areas of an underground mine and "regularly exposed to mine hazards."

Inasmuch as Ron Lickman, Jr., was engaged in operating heavy equipment, he clearly was exposed to the hazard of operating this equipment at the mine site in question. Accordingly he is to be considered a "miner" within the purview of Section 48.22 supra. Although he indicated to Glandon that had received 8 hours training at another site, there is no evidence that he had either received training acceptable to MSHA from an appropriate state agency within the preceding of 12 months, or had received training for a new miner within the preceding 12 months. Also, there is no evidence that he was employed as a miner as of the date the regulation was made effective i.e. October 13, 1978. Further, although he had experience operating heavy equipment, there is no evidence that he had at least 12 months experience working in a surface mine or surface area of an underground mine during the preceding three years. Hence, I conclude that he was not an experienced miner within the purview of Section 48.22(b), and accordingly must be considered a new miner.

Section 48.25 supra, unequivocally provides that a new miner shall be given "no less than eight hours of training... before they are assigned to work duties." Ron Lickman, Jr., did not receive 8 hours of training before he was assigned to work duties at the subject mine. Hence, he was not given the training provided for in Section 48.25 supra. Accordingly, I conclude that Order No. 3080095 was properly issued.

c. Significant and Substantial

According to Glandon, an accident was highly likely to have occurred as a consequence of Lickman not having been provided with new miner training pursuant to Section 48.25 supra, and that in the event of an accident there could be a serious injury. He thus concluded that the violation was "significant and substantial". In this connection he noted that slope of the area in question was approximately 20 degrees, there was loose earth from the grading operation, and the earth was unstable. He opined that if the earth would shift, the equipment being operated could roll down the void.

However, Lickman was experienced operating the 245 backhoe in question, and according to Glandon, appeared to know how to operate that equipment. Also, Lickman had had experience at operating heavy equipment at construction sites. Based on these factors, I conclude that it has not been established that there was a reasonable likelihood that the hazard contributed to by the lack of Section 48 training would have resulted in an event in which there is an injury. (See U.S. Steel Mining Company, 6 FMSHRC 1834, 1836 (August 1984).

Accordingly I conclude that it has not been established that the violation herein is significant and substantial (Mathies Coal Company, 6 FMSHRC 1 (January 1984)).

d. Penalty

Respondent's management should have been aware that it had the responsibility of providing Lickman with 8 hours training prior to his being assigned work duties. However, the gravity of the violation herein is mitigated by Lickman's experience in operating the equipment in question at construction sites. I find that a penalty of \$100 is appropriate for this violation.

II. Order No. 3080096

On May 13, 1991, Glandon observed David Labenski operating a caterpillar front end loader loading trucks with coal. According to Glandon, he "talked to Mr. Labenski and his certification his annual refresher training, had expired five months previously" (Tr.24) (sic). Glandon issued an Order pursuant to Section

104(g) (1) supra, citing a violation of 30 C.F.R. § 48.28.

Section 48.28(a) supra, provides, as pertinent, that "each miner shall receive a minimum of 8 hours of annual refresher training". Inasmuch as Labenski had not received this annual training, Glandon's order was properly issued.

Labenski was observed operating the loader in question on level terrain. According to Glandon, if the loader turned over with the bucket in a raised position, Labenski could have become injured, even though the loader had roll-over protection. However, according to Lickman, Labenski had worked on this site several years and was quite proficient with the loader. Based on Labenski's experience, I conclude that it has not been established that there was a reasonable likelihood of an injury producing event contributed to by Labenski's lack of annual refresher training. I thus conclude that it has not been established that the violation was "significant and substantial" (See U.S. Steel, supra).

Considering the terrain on which the vehicle in question was being operated by Labenski, and experience on the site, I find that the gravity of the violation herein to be considerably mitigated. I find that a penalty of \$50 is appropriate for this violation.

III. Order No. 3080097

On May 14, 1991, Glandon observed Roberts Searles operating a Caterpillar bulldozer. Glandon asked him if he had received newly employed experience miner training, and he indicated that he had not. Searles, who appeared to Glandon to know what he was doing and was operating the dozer safely, informed Glandon that he had worked at another of Lickman's job sites where he had received training and a certificate.

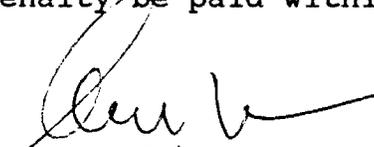
Glandon issued Order No. 3080097 alleging a violation 30 C.F.R. § 48.26. Section 48.26 supra requires a newly employed experienced miner to receive training, "...before such miner is assigned to work duties." This training includes, inter alia, an introduction to the work environment which includes "...a visit and tour of "the mine", as well as instruction concerning the ground control plans "at the mine", and procedures for working safety in areas of pits and spoil banks. (Emphasis added). It is clear that Section 48.26 supra, requires instruction regarding conditions at the mine where the experienced miner is "newly" employed, and currently working. Inasmuch, as Searles was not provided with such training before he was assigned to his work duties at the subject site, Respondent herein did violate Section

48.26 supra.¹

Since Searles appeared to know what he was doing, was operating safely, and had received training at another Lickman's jobs sites, I conclude that the violation herein was not "significant and substantial". I find that a penalty of \$75 is appropriate for this violation.

ORDER

It is ORDERED that Order Nos. 3080095, 3080096 and 3080097, be amended to reflect the fact that the violations cited therein are not "significant and substantial". It is further ORDERED that Respondent pay a civil penalty of \$225 for the violations found herein, and that such penalty be paid within 30 days of this decision.


Avram Weisberger
Administrative Law Judge

Distribution:

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Mr. Ronald Lickman, President, International Anthracite Corporation, 101 N. Center Street, Suite 309, Pottsville, PA 17901 (Certified Mail)

nb

¹In light of this decision, I deny Respondent's Motion, made at the hearing, to dismiss the order issued for Searle's lack of training. Since he had not been provided with the proper training before he was assigned to his work duties, as required of Section 48.26 supra, Glandon properly withdrew Searles.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 5 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 92-305
Petitioner : A.C. No. 36-06440-03509
v. :
HARRIMAN COAL CORPORATION, : Goodspring No. 1 Mine
Respondent : East and West
:

DECISION

Appearances: Gayle M. Green, Esq. and Linda Henry, Esq.,
U.S. Department of Labor,
Office of the Solicitor, Philadelphia,
Pennsylvania;
Mr. Ronald Lickman, International Anthracite
Corporation, Pottsville, Pennsylvania,
pro se.

Before: Judge Weisberger

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary (Petitioner) alleging a violation by the operator (Respondent) of 30 C.F.R. § 77.410. Pursuant to notice the case was heard in Reading, Pennsylvania, on July 14, 1992. Howard Joseph Smith, testified for Petitioner, and Ronald Lickman, testified for Respondent.

Finding of Fact and Discussion

On September 19, 1991, Howard Joseph Smith, an MSHA Inspector, inspected Respondent's Penag Goodspring Mine. He observed a Caterpillar Model 988 front-end loader in operation. He testified that the "backup alarm was not working", and that "there was no audible alarm" (Tr.20). He issued a citation alleging a violation of 30 C.F.R. § 77.410, which in essence, provides that front-end loaders shall be provided with a warning device that, "(1) gives an audible alarm when the equipment is put in reverse;" Respondent did not offer any evidence to contradict the testimony of Smith that on the date he issued the citation the alarm on the loader in question was not functioning. Accordingly I find that the Respondent herein violated Section 77.410.

According to Smith, the violation herein is to be characterized as "significant and substantial". He explained that this type of does loader not have a mirror¹, and that there is a blind spot immediately behind the loader. According to Smith, the tires are almost 6 feet in height, and hence, it is not possible for an operator to see the immediate 12 to 15 feet behind the loader. He further testified that on the date he issued the citation, in addition to employees operating various pieces of heavy equipment, he observed a mechanic, Michael Dent, approximately 15 to 18 feet away from the loader. In essence, he concluded that because the reverse alarm did not function, an injury was reasonably likely to have occurred due to the blind spot behind the loader. He also concluded that, given the weight of the machine, i.e. approximately 20 tons, should the loader run over an individual, serious injuries would result.

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), The Commission set forth the elements of a "significant and substantial" violation as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

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

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury". U.S. Steel Mining Co., 6 FMSHRC 1834, 1336 (August 1984).

Ronald Lickman, Respondent's President testified that he

¹Although Respondent in its brief alleges that mirrors are standard equipment on this loader, Respondent did not adduce any evidence at the hearing with regard to the existence of a mirror on the loader.

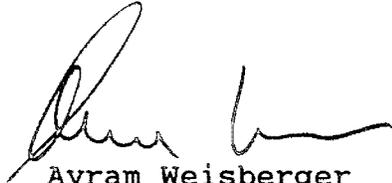
normally visits the site in question approximately once a week. He indicated that Dent is a mechanic/welder who spends approximately 80 percent of his time in a shop welding buckets. He indicated that the only time Dent works at the face where the loader in question operates, is when he has to repair or observe a piece equipment. In general he indicated that there were no new employees on the site.

Considering all the above I conclude that the record establishes a violation of Section 77.40 supra, which contributed to the hazard and of a person being hit by the loader operating in reverse. Also given the blind spot which makes it impossible for the operator of the vehicle to see the immediate 15 to 18 feet behind the loader, and the fact that at least one miner works, at times, in the area, I conclude that there was a reasonable likelihood that the hazard contributed to by the violation herein would result in a injury producing event. Accordingly, I conclude that it has been established that the violation herein was significant and substantial.

I find that the violation herein was serious as it could have resulted in severe injuries. There is no evidence as to how long a period of time prior to the date of the citation the alarm was not in operation. Lickman indicated that operators of loaders usually pull the alarm, but that he would fire an employee for disconnecting the alarm. I conclude that Respondent's negligence herein was not more than ordinary.² Taking into account the seriousness of the violation as well as the remaining statutory factors stipulated to by the parties I conclude that a penalty of \$100 is appropriate for the violation found herein.

ORDER

It is ORDERED Respondent shall, within 30 days of this decision, pay a civil penalty of \$100.



Avram Weisberger
Administrative Law Judge

²There is no merit to Respondent's argument that, in essence, management shall not be liable for the negligence of its employees. The law is well settled that, to the contrary, an operator is liable for the violations of the Act committed by its employees, (Western-Fuels Utah, 10 FMSHRC 256 (1988); Sewell Coal Co v. FMSHRC, 686 F.2d 1066 (4th Cir. 1982); Allied Products Co. v. FMSHRC 666 F.2d 890 (5th Cir. 1982)).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 5 1992

EAGLE NEST, INCORPORATED, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 91-293-R
: Citation No. 3751114; 3/20/91
:
SECRETARY OF LABOR, : Eagle Nest Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Mine ID 46-04789
Respondent :

DECISION ON REMAND

Before: Judge Weisberger

Statement of the Case

On May 20, 1991, I issued a decision dismissing the Notice of Contest at issue, and finding that the violation alleged in the Notice of Contest was not significant and substantial. (13 FMSHRC 843 (1991)). Subsequently, the Secretary's petition for discretionary review was granted by the Commission. On July 28, 1992, the Commission issued its decision vacating my finding that the violation was not significant and substantial, and remanding "...for further analysis and determination of the S&S issue without consideration of whether the hazard could be mitigated by the use of caution." (14 FMSHRC 1119, 1123). In a telephone conference call on August 6, 1992, I initiated with counsel for both parties, both counsel requested the right to submit briefs regarding the issues raised by the Commission's remand. This request was granted, and on September 28, 1992, the parties each filed a brief on remand.

Finding of Fact and Discussion

The citation at issue alleged the following condition as being violative of 30 C.F.R. § 75.305 as follows:

At least one entry of the longwall tailgate return entry could not be made safely in its entirety. Water has accumulated in depth exceeding 16 inches at Survey Spad [N]o. 3777 and various locations outby (sic). This condition creates a hazard to those persons required to make weekly examinations.

In my decision, (13 FMSHRC supra), I found that the accumulation of water presented a hazard to miners who would have to traverse it to make an examination, that this hazardous condition was not immediately corrected and that accordingly, Section 75.305 supra was violated. There was no challenge to these findings.

In analyzing whether the violative condition was properly designated by the inspector as being significant and substantial, I am guided by the following authority as set forth in the Commission's decision (14 FMSHRC supra at 1122):

A violation is properly designated as S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)). The Secretary is not required to present evidence that the hazard actually will occur. Thus, in Youghioghney & Ohio Coal Co., 9 FMSHRC 673 (April 1987), the Commission held that:

In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard

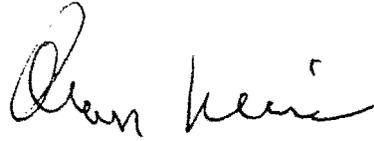
contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required. See, e.g., U.S. Steel Mining Co., 7 FMSHRC at 1125; U.S. Steel Mining Co., 7 FMSHRC 327, 329 (March 1985).

9 FMSHRC at 678. The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation. Texas Gulf, Inc., 10 FMSHRC 498, 501, (April 1988).

Further, in its decision, 14 FMSHRC supra, the Commission found that the first, second and fourth elements of the Mathies, test were not in issue, with the only issue being the third element of the Mathies, test i.e., whether there was a reasonable likelihood that the hazard of slipping or falling would result in an injury.

I find that on March 19, 1991, there was an accumulation of water approximately 48 inches deep at the No. 23 pump. I further find, based on the uncontradicted testimony of MSHA inspector Ronnie Joe Dooley, that on March 20, 1991, water extending the width of the entry reached a depth of 16 inches. I also find, based on the testimony of Dooley, that the accumulations of water were murky and the bottom could not be seen. Further, the uncontradicted testimony of Dooley establishes that the bottom of the mine floor contained mud, as well as submerged rocks, abandoned pieces of wood from cribs and pallets, lumps of coal, rocks, remnants from concrete stoppings, and a submerged 10 inch water line. Due to the depth of the water, its murky nature which prevented one from observing the bottom, the presence of numerous stumbling and tripping hazards on the bottom, and due to the fact that the area would have to be traversed by an examiner conducting the weekly examination required by Section 75.305, I conclude that there was a reasonable likelihood that the hazard of slipping or falling, contributed to by the fact that the hazard of accumulation of water was not immediately corrected, would result in an injury of a reasonably serious nature. I based this conclusion additionally upon the ground that the Commission, 14 FMSHRC supra, reversed my finding in the initial decision in this case, (13 FMSHRC supra), that the hazard of slipping or falling could be mitigated by walking cautiously to feel for submerged objects so they could be avoided.

Based on the all the above I conclude that it has been established that the violation herein was significant and substantial.¹



Avram Weisberger
Administrative Law Judge

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nb

¹In reaching my conclusion I have considered all the arguments advanced by the Operator in its brief, but find them to be without merit. The critical issue for resolution is the likelihood of an injury contributed to by the violation herein i.e. the failure to correct the hazardous conditions of water accumulations. As such, the argument by the Operator that pumps were installed to eliminate past and future water accumulation, is not relevant to a determination of this issue. Also, it has not been established that the fact that the hip boots were provided, lessens the likelihood of an injury as a result of the depth of the murky water hiding from vision submerged hazardous objects. Nor is it relevant that Ronnie Roberts, the longwall coordinator, testified that he "wouldn't" ask anyone to travel in water deeper than hip boots (Tr.266) Further, in analyzing whether the specific violative condition herein was significant and substantial I do not place much weight on the testimony of Roberts who indicated that he did not have knowledge of anyone being injured as a result of slipping in hip level water. This testimony is not probative of the likelihood of the specific hazards presented herein resulting in an injury producing event.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

4/18/92

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 91-432
Petitioner	:	A.C. No. 05-03455-03592
	:	
v.	:	Southfield
	:	
ENERGY FUELS COAL INCORPORATED	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Phillip D. Barber, Esq., Denver, Colorado, for Respondent.

Before: Judge Cetti

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 C.F.R. § 801 et seq., the "Act," charging Energy Fuels Coal Incorporated (Energy Fuels) with five "significant and substantial" (S&S) violations of mandatory safety standards in 30 C.F.R. Part 75 entitled "Mandatory Safety Standards - Underground Coal Mines."

Energy Fuel filed a timely answer contesting the alleged violations, the significant and substantial designation of the alleged violations and the appropriateness of the proposed penalties.

The only witnesses called to testify for the Petitioner were federal mine inspectors Donald Jordan and Melvin H. Shiveley. The only witnesses called by Energy Fuels were Messrs. Gary Carroll, the mine's Safety Supervisor, James W. Pushchak, the mine's Maintenance Superintendent and Randy Acre, Manager of the Southfield Mine.

I

I have considered the evidence presented and the record as a whole, and find that a preponderance of the substantial, reliable, and probative evidence along with the applicable law establishes the following Findings of Fact and Conclusions.

Findings and Conclusions

1. Respondent is the operator of the Southfield Mine located at Fremont County, Colorado. The mine is an underground coal mine.

2. The operations and products of the Southfield Mine affect commerce or the products of such mine enter commerce. Accordingly, the mine and its operators are subject to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act).

3. As a result of an inspection by an authorized representative of the Secretary, Respondent was issued five citations, pursuant to § 104 of the Act (30 U.S.C. § 814) and penalties were proposed pursuant to §§ 105 and 110 of the Act (30 U.S.C. §§ 815 and 820). Each alleged violation was alleged to be a significant and substantial (S&S) violation.

4. Each citation number, date issued, provision or standard allegedly violated, MSHA's proposed penalty and the penalty assessed herein is as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Penalty Assessed</u>
3242478	1/8/91	75.512	119	Vacated
3243302	1/9/91	75.1105	192	\$100
3243303	1/9/91	75.512	119	80
3243304	1/15/91	75.400	168	20
3242437	1/2/91	75.202(a)	119	<u>20</u>
			TOTAL	\$220

5. With respect to Citation No. 3242478, the evidence is insufficient to establish a violation of 30 C.F.R. § 75.512. There was no persuasive evidence that the 480 volt belt control and starter box in question was not frequently examined, tested and properly maintained to assure safe operating conditions. The citation should be vacated and the proposed penalty set aside.

6. With respect to Citation No. 3243302, the air compressor was housed in an expanded metal housing with no fireproofing material. It was not housed in a fireproof structure. There was a 104(a) non S&S violation of 30 C.F.R. § 75.1105. The violation

was not significant and substantial as there was no reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonable serious nature. The operator was negligent. A civil penalty of \$100 is appropriate.

7. With respect to Citation No. 3243303, the Pinco 150 KVA Power Center, that provided power to the belt drive that hauls coal out of the mine, was not maintained in safe condition. This was a 104(a) non S&S violation of 30 C.F.R. § 75.512. The violation was not significant and substantial as there was no reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. An appropriate penalty for this violation is \$80.

8. With respect to Citation No. 3243304, the preponderance of the evidence established the existence of an accumulation of combustible material within the meaning of the cited safety standard (30 C.F.R. § 75.400) as interpreted by the Commission in Old Ben Coal Co., 1 FMSHRC 1954 (December 1979) and Old Ben Coal Co., 2 FMSHRC 2806. The violation was not significant and substantial as there was no reasonable likelihood that the hazard contributed to would result in an injury of a reasonable serious nature. A civil penalty of \$20 is appropriate.

9. With respect to Citation No. 3242237, there was a non S&S 104(a) violation of 30 C.F.R. § 75.202(a). There was a hazard related to a potential fall of a rib. There was no negligence on the part of the operator. The likelihood that the hazard contributed to would result in injury was remote. An appropriate penalty under the facts and circumstances established at the hearing is \$20.

II

DISCUSSION AND FURTHER FINDINGS

Citation No. 3242478

Citation No. 3242437 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.512 and charges as follows:

The 480 volt belt control and starter box located at crosscut #56 of the west submains was not maintained in safe condition, in that the doors provided were not locked and could be opened by unauthorized personnel and expose themself [sic] to 480 volts.

The cited safety standard 30 C.F.R. § 75.512 provides as follows:

§ 75.512 Electric equipment; examination, testing and maintenance.

All 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 and made available to an authorized representative of the Secretary and to the miners in such mine.

This belt control and starter box supplies power to the belt motor. It sits on the mine floor on a set of metal skid bars and consists of a box shaped cabinet, 36" by 60" and approximately 36 to 48 inches high. It has two metal doors on the front. On the outside of the metal box is an "on-off" switch to stop and start the belt. Inside the metal box is a breaker panel and wiring for the power center. To access the breaker or the wiring, the doors of the box have to be opened. There are no electrical parts outside of the box and the only hazard which Inspector Shiveley described was the possibility that an unauthorized person might open the cabinet doors and inadvertently contact an energized part.

The only thing Inspector Shiveley observed that he felt was unsafe was that the doors to the metal cabinet were ajar and not locked so as to prevent an unauthorized person from touching anything inside the cabinet. The only thing the inspector required for abatement of the citation was to put a lock on the cabinet so as to keep "unauthorized people" from getting inside the cabinet. The inspector on cross examination admitted that the cited safety standard does not restrict access to "authorized personnel" and does not have any "locking out" requirement.

Jim Pushchak, the Southfield Mine Maintenance Superintendent and a certified electrician, testified on behalf of Energy Fuels. Mr. Pushchak testified the control box was in safe operating condition. It had no electrical problems and was maintained, serviced and tested by qualified electricians pursuant to 30 C.F.R. § 75.512.

Only belt men and electricians have any reason to access this power center. All of these miners are either certified electricians or have been task trained, and know how to operate the equipment and are aware of any hazards related to it. There were no exposed electrical equipment on the exterior of the box, and the only reason that a belt man opens the doors to this box is to reset the breaker for the belt control. Mr. Pushchak testified that if a person went inside the box to reset the

breaker, the power inside the box would have been deenergized except for the leads coming in on the line side into the top of the main breaker. Therefore, exposure to electrical hazard was negligible.

Mr. Pushchak described the metal cabinet box as having metal doors on the front that latch shut. He testified that since 1979 every belt drive in the mine has had this type of box. These boxes are inspected frequently by personnel from the Southfield Mine, and by the MSHA inspectors. Mr. Pushchak stated that in the 12 years that these boxes were in use at the mine they have never before had any complaint from any inspector that these boxes constituted an unsafe condition. Energy Fuels had never received any indication before this citation was written that it was going to be required to lock this box.

Inspector Shiveley's application of the cited safety standard to the facts of this case constitutes an impermissible expansion of the plain meaning of the standard and thus constitutes an impermissible avoidance of the rulemaking requirements of Section 101 of the Mine Act.

In relation to the deference to be accorded an agency's interpretation of a mandatory safety standard, the court is required to give effect to the actual words and the plain objective meaning of the regulations and is not bound by the agency's "hidden intentions and idiosyncratic interpretations." Western Fuels - Utah, Inc., March 1989, 11 FMSHRC 278, 284.

It is a basic tenant of administrative law that "a regulation cannot be applied in a manner that fails to inform a reasonably prudent person of the conduct required." Secretary v. Garden Creek Pocahontas Company, 11 FMSHRC 2148, 2152, (1989) (citing Mathies Coal Company, 5 FMSHRC 300, 303 (1983)). An agency's failure to provide adequate and fair notice constitutes a denial of due process and renders any attempted enforcement action invalid. Gates and Fox Company, Inc. v. Occupational Safety and Health Review Commission, 790 F.2d 154, 156 (D.C. Cir. 1986). The rulemaking provisions of the Mine Act were intended to ensure sound standards and regulations and fair and adequate notice to regulated parties. Regulatory interpretations that extend beyond the clear language of the regulation and change the rights or duties of the parties constitute unenforceable amendments that are in avoidance of required rulemaking procedures. Garden Creek Pocahontas Company, supra.

If the Secretary truly desires to require a cabinet housing a power center such as the one in question to be equipped with a lock and use it to lock out access by "unauthorized persons", then the Secretary must pursue this goal through notice-and-comment rulemaking. The Secretary should promulgate a standard to clearly and directly address not only the perceived hazard but

also clearly inform the mine operator what he must do for compliance.

I credit the testimony of Mr. Pushchak. Based upon the plain meaning of the cited section quoted above, the testimony of Mr. Pushchak and the admissions made by Inspector Shiveley on cross examination (all summarized above) I find that a preponderance of the evidence presented at the hearing failed to establish a violation of 30 C.F.R. 75.512. Citation No. 3242478 and its related proposed penalty are vacated.

Significant and Substantial Violations

MSHA designated the four remaining citations significant and substantial (S&S) violations. The term significant and substantial is taken from Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard ...". It is well established that a violation is properly designated as S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

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

6 FMSHRC at 3-4. See also Austin Power Co. v. Secretary, 861 F2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984).

It is this third element of the Mathies formula that the preponderance of the evidence presented fails to establish in each of the four remaining citations discussed below.

Citation No. 3243302

Citation No. 3243302 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1105 and charges as follows:

The 480 volt Sullair air compressor Serial No. 003-55609 located in crosscut #24 of the west submains, was not installed or maintained in a fireproof structure, in that the area surrounding the air compressor was designed of expanded metal, no fireproofing material was provided for roof or ribs in area. The air currents, when tested, were being coursed to the return.

The safety standard 30 C.F.R. § 75.1105 provides as follows:

§ 75.1105 Housing of underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps.

Underground transformer stations, battery-charging stations, substations, compressor stations, shops and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction.

It is undisputed that the 480 volt air compressor was not housed in a fireproof structure or area, and for this reason the violation of 30 C.F.R. § 75.1105 was conceded. The primary issues remaining were whether the violation was S&S and the appropriate penalty.

The air compressor was a screw type compressor enclosed in an expanded metal housing. There were electrical leads and oils "involved in the unit." The potential hazard was that a fire under some circumstances could occur within the compressor and possibly ignite combustible material.

The air compressor was located in a crosscut between a return airway and an intake airway. Respondent asserts the open ends of the crosscut were sealed off from the air courses. There was undisputed evidence that air coming into the crosscut from the intake side was restricted and minimized by a flame resistant curtain. The return side of the crosscut was blocked off by a

fireproof Kennedy stopping. A tube ran from a hole in the Kennedy stopping to a place directly above the air compressor. All air from the crosscut, and any fumes or smoke, would be coursed through the tube into the return airway and away from any miners. There was no active mining at the time the violation was observed and the citation written, and no one was outby the place where the crosscut air was vented into the return. A smoke-test performed by the inspector demonstrated that the air was being properly vented into the return.

The air compressor was located four to five feet from one wall of the crosscut, eight to ten feet from another wall of the crosscut and approximately one foot from the top of the crosscut. The crosscut had been rock dusted as required by law. The air compressor was resting on a rock floor, a naturally incombustible surface.

The inspector testified that the compressor was operating and there was a "probability or possibility" that the conditions observed could cause a fire. He put his hand on the coal 12 inches above the top of the compressor and found the coal was warm. The inspector testified that he probably "could have left it (his hand) there" without burning his hand. He did not take a temperature reading of any thermostats installed on the compressor.

Mr. Jim Pushchak, the Maintenance Superintendent at the Southfield Mine, accompanied Inspector Shiveley when this citation was written. He observed the compressor and determined that it was working properly and running as normal. The equipment was in safe operating condition, was not emitting any smoke, was not unduly hot and did not have any accumulation of combustible material on it.

This particular compressor had been operating at this location for over seven months with no problems. The mine has never had any problems with the air compressor and it was still working properly and safely on the date of the hearing, some 16 months after the citation was written.

One factor of considerable importance on the S&S issue was that the compressor was equipped with an automatic fire extinguisher that was activated by heat. Once activated, it would have completely extinguished any fire hazard in the crosscut by covering the entire area with a fire dampening chemical. Mr. Pushchak concluded his testimony with his opinion that under all the facts surrounding the violation there was no reasonable likelihood of a fire resulting from the violation.

Upon careful evaluation of all the probative evidence I find that the preponderance of the evidence presented did not

establish a reasonable likelihood that the hazard contributed to by the violation would result in an injury. There was no persuasive evidence of a confluence of factors that such an event was reasonably likely. There existed a mere possibility that was less than the reasonable likelihood required in Mathies for an S&S finding.

I find the operator was negligent to a moderate degree in using over a long period of time an air compressor subject to weekly examination, that did not comply with the fire proof housing requirement of the cited standard. The violation was serious. On consideration of all the statutory criteria in § 110(i) of the Act I find that a civil penalty of \$100 is appropriate.

Citation No. 3243303

Citation No. 3243303 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.512 and charges as follows:

The Pinco 150 KVA Power Center 4160/480 volt, located in crosscut #2 of the 2 left 2 west, was not maintained in safe condition, in that the 480 volt line side power lugs were exposed on the upper part of the 400 amp rating circuit breaker supplying power to the 2 west beltdrive. Persons that are required to test and operate the circuit breaker would be exposed to the energized 480 volt lugs.

§ 75.512 Electric equipment; examination, testing and maintenance.

All 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 and made available to an authorized representative of the Secretary and to the miners in such mine.

The power center in question provides power to a belt drive that hauls coal out of the mine. It was located two or three crosscuts from where the coal was being mined. It was housed in a large box-shaped metal cabinet that sat on the mine floor. It was 5 feet wide, 8 feet long and 3 feet high. In front, the cabinet had a closed metal door. On the side it had a sign warning that the power center had "dangerous, high voltage."

Inside the metal cabinet is a circuit-breaker unit. This unit is a small plastic box with a handle on the front. Inspector Shiveley testified the breaker box poses no hazard if you operate it properly but could be dangerous if the miner "shoved" the handle of the breaker up with the palm of his hand in such a way that his fingers went up and over the top of the insulating barrier (insulated backboard) rather than lifting up the handle to deenergize it.

The hazard according to the inspector were two uninsulated exposed lugs located behind the insulated barrier inside the circuit breaker unit. These lugs were attached to the bussing on the primary 480 volt feed and were not insulated. A person operating the handle located in front of the breaker by pushing the breaker handle with the palm of his hand could get his fingers over the top of the insulated barrier back board in such a manner that his fingers could come in contact with the uninsulated lugs. If this were to happen, the person would probably be electrocuted.

The Respondent presented evidence that there is no electrical equipment exposed either on the outside of the power center box, or on the outside of the inner breaker box. In order to contact the metal lugs, a person would have to get down on his knees, open the outer metal doors, and reach the inner breaker box and push his fingers over the top of the insulating barrier. The citation was abated by placing a few pieces of insulating tape over the top on the insulated backboard so that the lugs were no longer exposed to an inadvertent potential contact.

I credit the testimony presented by Respondent which established that it was not reasonably likely that the hazard contributed to would result in an injury. The power center box sat on the mine floor and was only 3 feet high so that a person opening the cabinet door to reset the breakers would most likely pull up on the breaker handle and rather than getting down close to the floor level to push the handle with the palm of his hand in such a manner as to push his fingers over the top of the insulated barrier and contact the uninsulated lugs. Although the hazard contributed to was not reasonably likely to result in injury, there was a remote possibility that the hazard contributed to could result in a serious injury. Since the injury could be fatal, the violation was serious.

Based upon the evidence presented, I find that there was a violation of 30 C.F.R. § 75. 512. I further find, based upon the particular facts surrounding the violation, that the preponderance of the evidence does not establish a reasonable likelihood that the hazard contributed to, would result in an injury. Thus the evidence did not establish the third element required by the Mathies criteria for an S&S finding.

On careful consideration of all of the statutory criteria in Section 110(i) of the Act, I find a civil penalty of \$80 is an appropriate civil penalty for this non S&S violation.

Citation No. 3243304

Citation No. 3243304 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

Accumulation of combustible material, float coal dust was deposited along the rockdusted ribs and mine floor, in the last open crosscut #16+65 for a distance of 180' feet, the area in MMU0060, 2 west was dark gray to black.

The cited safety standard 30 C.F.R. § 75.400 provides as follows:

§ 75.400 Accumulation of combustible materials.

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Float coal dust is defined in 30 C.F.R. § 75.400-1(b) as follows:

(b) The term "float coal dust" means the coal dust consisting of particles of coal that can pass a No. 200 sieve.

Inspector Melvin Shiveley was the Secretary's only witness. On January 15, 1991 when he inspected the Second West section of the Southfield Mine he found that miners were actively mining coal in the area. They were cutting coal with a continuous miner. Inspector Shiveley observed that there was "float coal dust" laying on the curtain and mine floor for a distance of approximately 180 feet outby from the face. It was such a fine layer of "float coal dust" that its depth was not measurable. He observed white rock dust under the coal dust. The "float coal dust" was black in color near the face to dark gray further away from the face.

On cross examination, Inspector Shiveley testified he did not observe any coal dust in suspension and took no test to determine whether the particles of dust could pass through a No.

200 sieve. See 30 C.F.R. § 75.400-1. The inspector agreed that you need to stir up coal dust by another explosion to make coal dust self explosive.

On redirect examination, the inspector agreed with his counsel that walking or moving equipment in the area where float coal dust had settled would have stirred it up and put it in suspension.

The inspector testified that he took air readings and found the volume of air was permissible and in compliance with the Southfield Mine Ventilation Plan; that methane was not excessive and that he found no electric equipment in the area that was not in permissible condition.

Coal is mined at the Southfield Mine in the conventional way with a continuous miner and shuttle cars. There is no longwall mining. The mining cycle begins with a continuous miner making a cut of coal. The coal is then loaded and the continuous miner is moved out of the section and a roof bolting machine is moved in. The roof bolter installs roof bolts for permanent roof support. The roof bolter is equipped with a rock dusting machine. After bolting the roof, the roof bolter blows rock dust into the air so that it will be carried by the mine's ventilation and deposited outby the working face on top of any coal dust. This citation was abated by having the roof bolting machine rock dust the area. Respondent contends it would have done this as part of the normal mining cycle had it been allowed to continue. Inspector Shiveley visited the adjacent entry that was part of this same mining cycle, where the roof bolting machine had just completed its work. He found that this entry had been properly rock dusted as part of the normal mining cycle.

Inspector Shiveley acknowledged that it was not practical to clean up or scrape up fine float coal dust; that the alternative is to apply rock dust; and stated "once that rock dust is applied, then you no longer consider that can be accumulation" because the float coal dust is covered up with an uncombustible material. (Tr. 96 line 8-25, Tr. 97 line 1-2).

Inspector Shiveley conceded that the liberation of coal dust is a "natural feature" and "an unavoidable consequence of mining." He acknowledged that it is not possible to mine coal without generating coal dust as part of the mining cycle. Coal dust is liberated, suspended in the air, carried away as part of the ventilation of the section and deposited outby the working face during a normal mining cycle. Because the coal dust is moist, most of the coal dust falls from the air near the working face. Inspector Shiveley conceded that float coal dust is combustible only if (1) the float coal dust is in suspension, (2) there is an ignition source, and (3) there is an actual ignition or an explosion.

As pointed out in Respondent's brief, Inspector Shiveley testified that the length of time that coal particles had been present in the area was irrelevant and that, in his opinion, time was not a factor in determining whether there was an accumulation under § 75.400.

Q: So in your opinion, it makes no difference how long the accumulation is there; isn't that correct?

A: Yes.

Q: Time is not a factor?

A: No, it isn't.

Q: Mr. Shiveley, you don't know how long this coal dust had been present on top of the rock dust, do you?

A: No, I don't.

(Tr. 105, line 24-25, Tr. 106 line 1-6).

Energy Fuels presented the testimony of two witnesses, Jim Pushchak and Randy Acre. It also introduced Respondent's Exhibit R-2, a diagram that was helpful in describing the mining cycle, the cited area and the surrounding entries, returns and crosscuts.

Mr. Pushchak testified substantially as follows: He has worked at the Southfield Mine for twelve years and is familiar with the mining cycle at the mine. He accompanied Inspector Shiveley on this inspection and walked through the area that was cited by Inspector Shiveley. Mr. Pushchak explained that the dust in the area in the return that was closest to the working face was black because that was where most of the coal dust tended to settle after being blown away from the face. The continuous mining machines were equipped with water sprays which dampened the liberated coal dust. As a result, this dust is heavier and is deposited near the working face. As one proceeded further away from the face, there was less coal dust on the rock dust because most of the coal dust had dropped closer to the face.

Mr. Pushchak described what was occurring in the mining cycle when the citation was written. Using the diagram, Ex. R-2, he explained the continuous miner had just finished cutting Cut No. 3 in the main entry and had moved to the adjacent left entry to begin Cut No. 4. As the continuous miner moved out of Cut No. 3, the roof bolting machine moved into Cut No. 3 to install permanent roof support and then apply rock dust. The coal dust

which lay on top of the rock dust outby the working face had been generated as a result of Cut No. 3. The average amount of time from the end of the cutting of coal to the application of rock dust (with roof bolting having occurred in the interim) is 30 minutes. Cut No. 3, however, was a longer cut than the average cut made on that shift. (Tr. 147 lines 12-16).

It is generally conceded that it would not be possible to mine coal without generating float coal dust. Energy Fuel contends it would be hazardous to the health and safety of miners to apply rock dust while mining was occurring. This could only be done manually by miners standing just outby the working face. Float coal dust would be generated by the mining, and some of it would be deposited on the miners or it would be inhaled by them. Therefore, Energy Fuel contends it is necessary to wait until after the mining and the roof bolting have been completed before rock dusting. Furthermore, it contends that until the mining is actually completed and the coal dust settles, rock dusting would not cover all of the coal dust in suspension.

Randy Acre, the Mine Manager at the Southfield Mine, testified substantially as follows: He has been in the coal mining business for 20 years. He is well acquainted with mining cycle at the Southfield Mine. Coal dust is rendered harmless by allowing it to settle on top of rock dust, and then applying an alternate layer of rock dust on top of the coal dust which renders the coal dust incombustible.

Mr. Acre testified that the continuous miner in this area was equipped with special water sprays that force the wet coal dust to settle in the return entries. The continuous miner is equipped with a methane detection system that first provides a warning, and then automatically shuts down the machine if the amount of methane exceeds 2% per cubic meter.

Mr. Acre confirmed that the mining cycle in this area provided for immediate application of rock dust after the roof bolter completes bolting the roof of the cut.

The regulations assume that coal dust will be liberated as part of the mining process, and requires the mine to "clean it up" and not allow it to "accumulate." Inspector Shiveley testified that time was "irrelevant" in determining whether an accumulation existed. Based on his observation, he was of the opinion that an accumulation existed and that he was justified in issuing the citation.

In Utah Power & Light v. Secretary of Labor, 951 F.2d 292, 295 (10th Cir. 1991)(n. 11), the Tenth Circuit stated that 75.400 "prohibits permitting [coal dust] to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient

speed." (Emphasis added). Thus, the length of time that combustible material is present is relevant.

As Energy Fuels points out in its post-hearing brief, the logic of the Tenth Circuit ruling is apparent. If an operator is not given a reasonable amount of time to clean up a by-product of the mining cycle, then an operator could be cited as soon as any coal dust is generated. This, however, is not what has happened in this case. The cut in question was longer than the usual cut being made on this shift and the mine manager conceded that one hour may have elapsed after the roof bolter moved in and began bolting the roof and the rock dusting of the cut began. (Tr. 157 line 20-25, Tr. 158 line 1-2).

It is undisputed that Federal Coal Mine Inspector Shiveley observed a fine layer of combustible coal dust deposited along the ribs and mine floor in the last open crosscut for a distance of 180 feet. Based upon his observations, Inspector Shiveley was of the opinion that the coal dust he observed for a distance of 180 feet was an impermissible accumulation and cited it as such. Based upon Inspector Shiveley's observation, opinion and testimony, I find that this rather extensive fine layer of coal dust was an accumulation in violation of 30 C.F.R. § 75.400. I also credit the testimony of Messrs. Pushchak and Randy Acre that established there was no reasonable likelihood that the hazard contributed to would result in an event that would cause injury. Since the preponderance of the evidence did not establish this essential factor needed to support an S&S finding, I find that the violation was a non S&S 104(a) violation.

Considering all the statutory criteria in Section 110(i) of the Act and the fact that the accumulation consisted of only a fine layer of coal dust of rather recent origin, I find a penalty of \$20 is an appropriate penalty for this 104(a) non S&S violation.

Citation No. 3242437

Citation No. 3242437 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.202(a) and charges as follows:

A loose coal rib measuring about 6' x 10' x about one ft. in thickness, with at least a four inch space behind it, just inby crosscut #24 in the first right entry of the south mains (intake haulage) was leaning out in a hazardous position. This is the main travel-way in and out of the working section.

The cited safety standard 30 C.F.R. § 75.202(a) provides as follows:

§ 75.202 Protection from falls of roof, face and ribs.

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

The primary issues presented are as follows:

1. Did the Secretary sustain her burden of proving that Energy Fuels violated 30 C.F.R. § 75.202(a) as alleged in the citation?
2. If there was a violation, was the violation significant and substantial?
3. If there was a violation, what is the appropriate penalty?

Donald Jordan, Federal Mine Inspector, testified that on the date of inspection, October 9, 1991, he was conducting a 103(i) inspection which is required every five years. [30 U.S.C. § 813(i)]. Inspector Jordan cited Energy Fuels for a violation of 30 C.F.R. § 75.202(a) because he observed a rib just inby crosscut 24 that "appeared to be a hazard." He stated that the rib was "loose." Inspector Jordan looks for loose ribs whenever he inspects a mine.

Inspector Jordan was looking for loose ribs when he entered the Southfield Mine on the morning that the citation was written, but he did not observe that the rib he cited was "loose" or that any rib was "leaning" when he entered the mine, even though he traveled past the area that he later cited on his way back from the working face.

Inspector Jordan on his way out of the mine traveled the same route he used to travel into the mine. As he traveled out through the main travelway of the mine, he observed a rib that had a crack on one side that "would possibly extend to the point that it could hit someone." (Emphasis added). Inspector Jordan had no idea how long the rib was in the condition that was noted in his citation. He did not know whether any miner had passed by this rib when it was loose, or whether any miner had observed the rib and failed to scale it down. The pre-shift report did not indicate that this rib had any crack in it. Inspector Jordan testified on cross examination that he could not definitely say whether the rib would have fallen naturally or whether it would have remained indefinitely in the position that it was in when the citation was written. However, when asked by his counsel on

redirect examination if it is "likely" the rib would have fallen on its own, he replied "Yes ma'am, I think it would have."

Inspector Jordan stated that cracks in ribs are common in coal mines and that rib hazards are controlled by scaling--or prying--the rib down. Inspector Jordan inspected four to six thousand feet of the mine on the day the citation was written and did not observe any other cracked or loose ribs. The miners were working approximately 1,500 to 2,000 feet away from the cited area and Inspector Jordan did not observe any person standing, or walking by this rib. Evidence was presented that a person who was traveling in the area cited by Inspector Jordan would have probably driven by this rib in one or two seconds.

Gary Carroll, the Safety Supervisor at the Southfield Mine, has worked in underground mines since 1974 and worked at the Southfield Mine for over 10 years. He testified substantially as follows:

The roof at the Southfield Mine is controlled by permanent and supplemental roof support. The ribs at the Southfield Mine are controlled by maintaining a permissible width (18 to 20 feet) in the entries and by scaling and barring down ribs that are loose.

On the day that the citation was written, Mr. Carroll rode into the mine with Inspector Jordan on the mancar tractor, driving down the center of the entry, as was normally the case. Both he and Inspector Jordan were "looking around" as they went into the mine to check for cracks and loose ribs. No cracks or loose ribs were noticed as they entered the mine and none were noticed during the inspection of the working face.

When miners enter and leave the mine, they ride either in a tractor, or in a trailer pulled by the tractor, that has metal supports on the sides. On the date of the citation, the miners were working approximately 1,500 to 2,000 feet from the cracked rib.

Cracks in ribs are common at the Southfield Mine. However, a crack does not mean that a rib is loose. It is not possible to tell simply by visual observation whether a rib is loose. The Southfield Mine Roof Support Plan requires that loose ribs be scaled down. Mr. Carroll routinely scales down ribs whenever he observes a loose rib. The hazard of a loose rib is that a person standing close to the rib could be injured if the rib fell naturally.

Mr. Carroll did not observe any crack in the rib as he entered the mine. Like Inspector Jordan, he observed the crack in the rib when he was leaving the mine. The crack was on one side of the rib only, Mr. Carroll did not observe that the rib

was leaning precariously. Mr. Carroll testified that the crack was no more than four feet in height. He stated the entire coal seam at this point in the mine has a maximum height of 5 to 5 1/2 feet.

Mr. Carroll had difficulty prying loose the cracked portion of the rib. It took three separate attempts to pry the piece of coal away from the rib. On a scale of one to ten, with ten being the most difficult rib to pry down, this rib was "between a six and a seven" in difficulty. To Mr. Carroll, this meant that it was "difficult to pry down." Mr. Carroll testified that the rib was approximately four feet in height, six feet across at the bottom and two feet across at the top after it was pried down. After it was forcibly pried down, most of the coal fell within two to three feet of the rib.

Mr. Carroll testified that this crack in the rib posed no hazard to any miner. The crack was approximately one-half mile from the working face. It had been several years since there had been any work in this area. In the twelve years that Mr. Carroll had been at the mine, he has had to walk by this area only once. On every other occasion, he drove or rode in a tractor by this portion of the main travelway and would pass by the area within a second or so. Energy Fuels has never had a rib fall in the travelway that caused any injury in the twelve years that the mine has been in existence.

Respondent contends the Secretary failed to prove that Energy Fuels had violated 30 C.F.R. § 75.202(a) because she produced no evidence to show that Energy Fuels was not supporting or otherwise controlling the ribs to protect persons from hazards related to rib falls. The undisputed testimony was that Energy Fuels regularly inspects for loose ribs and when they are noticed, bars them down.

The standard states that ribs shall be supported or controlled to protect people from hazards. Even though Inspector Jordan viewed almost 5,000 feet of entryway during this inspection, he saw only one place where there was even a crack in a rib. Inspector Jordan did not observe this rib which he said was "obviously leaning" when he passed by it on his way into the mine. Respondent contends that the only conclusion that can be drawn is that the rib cracked after Inspector Jordan and Mr. Carroll drove by it on their way into the mine. The Secretary presented no evidence that the condition was known to Energy Fuels and that Energy Fuels failed to take steps to control it. I find that the evidence fails to establish that Energy Fuels was negligent.

With respect to the special significant and substantial finding, the evidence fails to establish that, if the rib in question were to fall, a chain of events would occur that would

be reasonably likely to result in injury. Exposure to the hazard of a falling rib would occur only when a miner is very close to or in the immediate area of the falling rib.

Furthermore, it took a considerable effort to pry down this rib and the testimony of Inspector Jordan regarding this rib posing a hazard was only that when it fell, it "might possibly extend to the point where it could hit someone." It appears from the evidence that such a possibility was remote.

The evidence failed to establish a reasonable likelihood that the hazard contributed to would result in injury.

Based upon the evidence presented, I find that there was a 104(a) non S&S violation of 30 C.F.R. § 75.202(a). However, based upon the particular facts surrounding that violation, I find that the preponderance of the evidence does not establish a reasonable likelihood that the hazard contributed to, would result in an injury.

On careful consideration of all of the statutory criteria in Section 110(i) of the Act, including the operators lack of negligence, I assess a civil penalty of \$20 for this non S&S violation.

ORDER

Based upon the above finding of fact and conclusions of law, **IT IS ORDERED** that

1. Citation No. 3242478 is **VACATED**.
2. Citation Nos. 3243302, 3243303, 3243304 and 3242436 **ARE MODIFIED** to delete the significant and substantial finding and, as modified, **ARE AFFIRMED**.
3. Respondent Energy Fuels Coal Incorporated shall **PAY** to the Secretary of Labor a penalty in the sum of \$220 within 30 days of the date of this decision.



August F. Cetti
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 9 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 91-1013
Petitioner : A. C. No. 15-02709-03766
v. :
PEABODY COAL COMPANY, : Camp No. 1 Mine
Respondent :

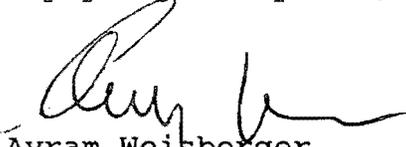
DECISION

Appearances: W. F. Taylor, Esq., U.S. Department of Labor,
Office of the Solicitor, Nashville, Tennessee,
for Petitioner;
David R. Joest, Esq., Peabody Coal Company,
Henderson, Kentucky, for Respondent.

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Pursuant to notice, the case was scheduled for hearing on September 2, 1992. On that date, prior to going on the record, counsel indicated that they had just settled this matter. On October 9, 1992, Petitioner filed a motion to approve a settlement agreement and to dismiss this case. Respondent has agreed to pay the proposed penalty of \$1,700 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of \$1,700 within 30 days of this order.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 1 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-73
Petitioner : A.C. No. 15-13881-03792-A

v. :

PAUL SHIREL, employed by : Pyro No. 9 Slope
PYRO MINING COMPANY, : William Station
Respondent :

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 91-1340
Petitioner : A.C. No. 15-13881-03781-A

v. :

DONALD D. GUESS, employed : Pyro No. 9 Slope
PYRO MINING COMPANY, : William Station
Respondent :

DECISION

Appearances: Stephen D. Turow, Esquire, Office of
the Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Petitioner;
Flem Gordon, Esquire, Madisonville, Kentucky,
for Respondents

Before: Judge Melick

A bench decision was issued in the captioned cases at
hearings on October 8, 1992, granting the Respondents' Motions
for Summary Decision. That decision, with only non-substantive
changes, is as follows:

I will, as I said before, grant the Motions
for Summary Decision as to both cases and dismiss
both civil penalty proceedings, Docket Nos.
KENT 92-73 and KENT 91-1340. These cases are before
me upon the petitions for civil penalty which were
filed by the Secretary of Labor against Paul Shirel
and Donald Guess under Section 110(c) of the Federal
Mine Safety and Health Act of 1977, [30 U.S.C.
Section 801, et seq., the "Act"] charging Shirel and

Guess as agents of a corporate mine operator, namely Pyro Mining Company, with knowingly authorizing, ordering or carrying out violations by the named corporate mine operator.

Section 110(c) of the Act provides, in part, that whenever a corporate mine operator violates a mandatory health or safety standard any director, officer or agent of such a corporation who knowingly authorized, ordered or carried out such violation shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under subsections (a) and (b).

Under Commission Rule 64(b), motions for summary decision shall be granted only if the entire record, including the pleadings, depositions and affidavits, show that there is no genuine issue as to any material facts and that the moving party is entitled to summary decision as a matter of law.

As I have already stated, while the instant motions were filed untimely under Commission Rule 64(a), it makes little sense to proceed further on the merits when the motions would be dispositive of the cases. On September 23rd of this year, Respondents filed Motions for Summary Decision in each of these cases, asserting that, on the dates of the alleged violations, Pyro Mining Company was not in fact a corporate entity, but was a partnership, and that an essential ingredient of the charges could not therefore be sustained. In these proceedings, it is indeed undisputed that, on the dates of the violations at issue, Pyro Mining Company was a partnership recognized under the laws of Illinois and Kentucky and was not a corporation under any jurisdiction. It is also undisputed that Pyro Mining Company was the legally designated operator of the No. 9 Slope, William Station Mine at relevant times.

The Secretary alleges in her petitions in these cases that Shirel and Guess were employees of Pyro Mining Company, and as such were acting as agents of Pyro Mining Company as a corporate operator. Since it is indeed now undisputed that Pyro was not then a corporate operator and was not a corporation, but rather was a partnership, the allegations in these petitions cannot be sustained and the petitions must accordingly be dismissed.

I express no opinion here, and have no information, as to whether either or both of the Respondents could be charged under Section 110(c) as agents of one or both of the corporations making up the partnership Pyro Mining Company, for they in fact were not charged in these cases as agents of those corporations and there is no allegation that these corporations were in fact the operators of the Pyro No. 9, William Station Mine.

I should add that in reaching this decision, I have not disregarded the Secretary's argument that Pyro as a partnership was more closely akin to a traditional corporation than a true partnership, and that Congress intended that partnerships like Pyro should be considered to be corporate operators for purposes of Section 110(c) of the Act. However, I cannot make a finding contrary to the clear and unambiguous language of Section 110(c), and the language is indeed clear and unambiguous, that only agents of corporations and corporate operators are chargeable under Section 110(c).

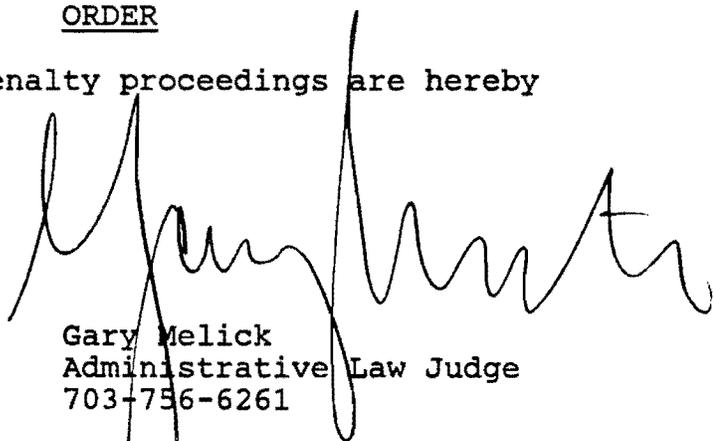
The Secretary, in essence, would have me amend Section 110(c) to hold liable agents not only of corporate operators but also agents of partnerships composed of two corporations. An administrative law judge is certainly not in a position to make such an amendment and I am certainly bound by the plain, clear and unambiguous language of the statute.

I might add that the Secretary's arguments do tend to point out that Congress may wish to revisit the language of Section 110(c) in light of this particular case and, indeed, in light of the Richardson case and other decisions which suggest that agents of large operators other than corporate operators should be included within the scope of Section 110(c).

For the above reasons, however, I am granting the Motions for Summary Decision. These proceedings are concluded. Thank you.

ORDER

The captioned civil penalty proceedings are hereby
DISMISSED.



Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 17 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 92-54
Petitioner,	:	A.C. No. 44-01520-03501 JIC
	:	
v.	:	Virginia Pocahontas #3
	:	
WELL TECH INCORPORATED,	:	
Respondent.	:	

DECISION

Appearances: Javier I. Romanach, Esq., Arlington, VA, for Petitioner;
George R. Carlton, Jr., Esq., Dallas, Tx, for Respondent.

Before: Judge Fauver

The Secretary seeks civil penalties for three alleged violations of safety standards under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

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

FINDINGS OF FACT

1. On August 7, 1991, Federal Mine Inspector Leslie Slowey inspected gas well site #267 of Island Creek Coal Company's Virginia Pocahontas #3 underground coal mine. He inspected the Cooper Drill rig operated by Well Tech Incorporated. Well Tech Incorporated, an independent contractor, had a contract with the mine operator on a call-up basis to service wells used to extract methane from the mine. This process involved withdrawing suction rods, lifting the pump out of the well and servicing or repairing the pump to correct the basis for the call-up by the operator. Well Tech's services were essential to the mine's system of removing methane from the mine. Methane removal was essential to the extraction of coal.

2. Inspector Slowey inspected the drill rig for safety and cited three violations. First, he found that the fan inlets and drive belts for the motor of the drill rig were not properly guarded to keep a person from coming in contact with exposed moving parts, in violation of 30 C.F.R. § 77.400(a), for which he issued Citation No. 3778953. He determined that this violation was "significant and substantial."

Second, he found that the drive shaft coupling was not guarded to prevent a person from coming in contact with moving machinery parts, in violation of 30 C.F.R. § 77.400(a), for which he issued Citation No. 3778954. He determined this violation was "significant and substantial."

Third, he found that the Cooper Drill rig did not have an operable back-up alarm, in violation of 30 C.F.R. § 77.410, for which he issued Citation No. 3778955. He determined this violation was "significant and substantial."

DISCUSSION WITH FURTHER FINDINGS

A threshold issue is whether Respondent is an "operator" within the meaning of the Act. Section 3(d) of the Act provides that:

"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.

Section 3(d) was added by the 1977 Amendments to the Mine Act to expand the definition of "operator" to include "any independent contractor performing services or construction" at a mine. In Otis Elevator Company v. Secretary of Labor and FMSHRC, 921 F.2d 1285 (D.C. Cir. 1990), the Court held that in § 3(d) the "phrase 'any independent contractor performing services ... at [a] mine' means just that" and that the Court "need not confront ... whether there is any point 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 since [Otis] conceded that it was performing limited but necessary services at the mine" (921 F.2d at 1290 n. 3, emphasis added). Otis had a contract to service the shaft elevators at the mine.

In Lang Brothers, Inc., 14 FMSHRC 413 (1991), Lang Brothers had an annual contract to clean and plug gas well sites for Consolidation Coal Company, "to ensure that natural gas does not seep through the well into a mining area and create a safety hazard." 14 FMSHRC at 414. In holding that Lang Brothers was an "operator," the Commission stated:

Lang's work at the well sites ... was integrally related to Consol's extraction of Coal. Cf. Carolina Starlite, 734 F.2d at 1551. The sole purpose of Lang's cleaning and plugging contract with Consol was to facilitate Consol's extraction of underground coal. 14 FMSHRC at 418.

The Commission did not adopt the restrictive interpretation of Old Dominion Power Company v. Secretary of Labor and FMSHRC, 772 F.2d 92(4th Cir. 1985) (implying that an independent contractor must have a "continuing presence at the mine" to be held to be an "operator" under the Act). Rather, it held that the de minimis standard may be measured by the significance of the contractor's presence at the mine as well as the duration or frequency of its presence. The Commission noted that even though Lang's actual presence at the mine to clean and plug wells was for a short period, its activity was an integral part of Consol's extraction process.

In Bulk Transportation Services, Inc., 13 FMSHRC 1354 (1991), the contractor had a contract with a coal mine operator to transport coal from the mine to a generating station 40 miles away. The Commission noted that Bulk had a substantial presence at the mine -- "[T]here is a constant flow of truck drivers in and out ... four to five days a week" 13 FMSHRC at 1359 -- but it focused on the significance of Bulk's activities to the extraction process in determining that Bulk was an operator subject to the Mine Act. "Given the undisputed fact that Bulk was Beth Energy's exclusive coal hauler between Mine No. 33 and the generating station, and given the quantities of coal hauled by Bulk, we agree with the judge that Bulk's services in hauling coal were essential and closely related to the extraction process." 13 FMSHRC at 1359.

Similarly in this case, Well Tech's work on gas well pumps used to remove methane from Island Creek's mine was essential to the extraction of coal. As Inspector Slowey testified, "This mine's ventilation plan requires that the methane be taken out of the mine by vertical drilling. In order to keep the mine going they have to reduce the methane down to a certain percent or the miner will not operate down there." Tr. 42.

Well Tech performed such work at the Virginia Pocahontas #3 Mine for 578 hours in 1991, the year of the citations. This is substantially more time than Otis mechanics spent at the mine in Otis Elevator Co., supra. There the Court stated that it need not address "whether there is any point 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" since Otis was "performing limited but necessary services" at the mine. 921 F.2d at 1290 n.3. Well Tech was similarly performing "limited but necessary services" at Virginia Pocahontas #3 mine, and was therefore an "operator" within the

meaning of the Act. ¹

In considering the evidence as to the three citations, I find that the inspector's testimony was reasonable and persuasive. Respondent did not present any evidence in rebuttal of his testimony as to the facts concerning the alleged violations.

Citation No. 3778953

Inspector Slowey cited a violation of 30 C.F.R. § 77.400(a), alleging that the fan inlets and drive belts for the motor of the Cooper Drill rig were not guarded properly to prevent a person from coming in contact with these moving machinery parts.

Section 77.400(a) states, among other things, that "fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

The Commission has held that this standard "imports the concepts of reasonable contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094, 2096 (1984).

Although the fan inlets were toward the front of the cab, opposite the end where the employees usually worked, the inspector testified that there was still a hazard because the employees might come in contact with the moving parts during maintenance or repair work. Tr. 15.

The Commission has held that a violation may be classified as "significant and substantial" if there is a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature. Texasgulf, 10 FMSHRC 498, 500 (1988). Considering that the machinery guard standard is intended to protect employees from coming in contact with moving machinery parts because of "inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness" (see Thompson Brothers

¹ The Secretary of Labor enforces both the Mine Act and the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., and has reasonable discretion in determining which of her two enforcement agencies, OSHA or MSHA, should exercise jurisdiction over a given facility or activity. The Secretary is entitled to deference in exercising such discretion. See, e.g., Brock v. Cathedral Bluff Shale Oil Co., 796 F.2d 533, 537 (D.C. Cir. 1986); and Donovan v. Carolina Starlite Co., 734 F.2d 1547 1522 & n.9 (D.C. Cir 1984). See also Southern Railway Company v. Occupational Health Review Commission, 539 F.2d 335 (1976). I find that the Secretary's exercise of discretion to assert Mine Act jurisdiction over Well Tech's operations is reasonable and enforceable.

Coal Company, above), I find that the evidence sustains the inspector's finding that the violation presented a reasonable likelihood of resulting in substantial injury. It is not required that the Secretary prove that injury was more probable than not, but only that there was a "reasonable likelihood" of injury. In practical terms, this requires only a sustantial possibility of injury. See, e.g., judges' decisions in Mountain Coal Co., 14 FMSHRC 1572, 1582-1583 (1992), and Consolidation Coal Co., 14 FMSHRC 748-752 (1991).

Citation No. 3778954

Inspector Slowey cited a violation of 30 C.F.R. § 77.400 (a) because the drive shaft coupling for the motor to the rig was unguarded.

He testified that there was a reasonable likelihood that an employee would come in contact with pinch points of the drive shaft and lose a hand or an arm. Tr. 17.

I find that the evidence sustains this charge and the inspector's finding that the violation was "significant and substantial."

Citation No. 3778955

Inspector Slowey cited a violation of 30 C.F.R. § 77.410(a)(1) because the drill rig did not have an operable back-up alarm. The standard provides that mobile equipment including trucks (except pickup trucks with an unobstructed rear view) "shall be equipped with a warning device that gives an audible alarm when the equipment is put in reverse."

Inspector Slowey testified that the Cooper Drill rig is in effect a truck mounted derrick. Tr. 29. The drill rig was stationary at the time he was there, and he asked the drill rig operator to put the drill rig in reverse to check the back up horn. He observed that the rig did not have a back up horn. Tr. 32,42.

I find that the evidence sustains this charge and the inspector's finding that the violation was "significant and substantial."

Considering the criteria for assessing civil penalties under § 110(i) of the Act, I find that the following penalties are appropriate for the violations found herein:

<u>Citation</u>	<u>Civil Penalty</u>
No. 3778953	\$39
No. 3778954	\$39
No. 3778955	\$39

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. Respondent was an "operator" of the subject mine within the meaning of the Act.
3. Respondent violated the safety standards as cited in Citation Nos. 3778953, 3778954, and 3778955.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation Nos. 3778953, 3778954, and 3778955 are AFFIRMED.
2. Respondent shall pay the above civil penalties of \$117 within 30 days of the date of this Decision.


William Fauver
Administrative Law Judge

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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-42
Petitioner : A.C. No. 15-08357-03687
 :
v. : Docket No. KENT 92-56
 : A.C. No. 15-14074-03597
PEABODY COAL COMPANY, :
Respondent : Docket No. KENT 92-65
 : A.C. No. 15-14074-03598
 :
 : Martwick UG Mine

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for
the Petitioner;
David R. Joest, Esq., Peabody Coal Company,
Henderson, Kentucky, for the Respondent.

Before: Judge Barbour:

STATEMENT OF THE CASE

These civil penalty cases were initiated by the Secretary of Labor ("Secretary") against Peabody Coal Company ("Peabody") pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 and § 820. In Docket No. KENT 92-42 the Secretary charges Peabody with two violations of mandatory safety standards for underground coal mines found at Part 75, Volume 30 of the Code of Federal Regulations. In Docket No. KENT 92-56 the Secretary charges Peabody with one such violation. In Docket No. KENT 92-65 the Secretary charges Peabody with two Part 75 violations and with one violation of the mandatory notification and reporting standards found at Part 50, Volume 30 of the Code of Federal Regulations.

The violations in Docket No. KENT 92-42 are alleged to have occurred at Peabody's Camp No. 11 Mine. The other violations are alleged to have occurred at Peabody's Martwick Mine. Peabody timely answered the Secretary's penalty proposals and the cases were consolidated for hearing. At the hearing the parties presented their positions through the testimony of witnesses and through documentary evidence. Following the trial both counsels submitted helpful briefs, which I have fully considered in reaching this decision.

SETTLEMENT AGREEMENTS
DOCKET NO. KENT 92-42

The parties agreed to settle one of the violations at issue in Docket No. KENT 92-42. Citation No. 3548678 was issued pursuant to Section 104(a) of the Act, 30 U.S. C. § 814(a), and alleges a violation of 30 C.F.R. § 75.316, a mandatory safety standard requiring an operator to adopt and comply with a ventilation system and methane and dust control plan approved by the Secretary. The citation states that Peabody was not complying with its approved plan in that curtains controlling ventilation were not installed and maintained in a reasonably airtight condition. The parties agreed the evidence would show that the curtains were properly installed. They also agreed, however, that the inspector was right in finding the curtains were not properly maintained following installation. The parties further agreed that the violation was not a significant and substantial contribution to a mine safety hazard (a "S&S" violation), that an injury was unlikely to occur as a result of the violation and that Peabody exhibited moderate negligence in regard to the violation. A \$20 civil penalty was proposed for the violation, which the parties stated would be appropriate.

DOCKET NO KENT 92-56

The parties agreed to settle the sole violation at issue in Docket No. KENT 92-56. Section 104(a) Citation No. 3551054 alleges a violation of 30 C.F.R. § 75.507, a mandatory safety standard requiring, except where permissible power connection units are used, that all power connection points outby the last open crosscut be located in intake air. The citation states that a battery charging station containing four energized chargers was located in return air, five crosscuts outby the face. Given the fact that Peabody's evidence would show that it had built a tent-like structure around the charging station to separate the station for return air, the parties agreed that an injury was unlikely to occur as a result of the violation and that the violation was non-S&S. They further agreed that at the time the violation was cited, Peabody was in the process of changing the ventilation routing in the vicinity of the violation and that the violation was due to Peabody's moderate negligence. They also agreed that a civil penalty of \$227 would be appropriate.

DOCKET NO. KENT 92-65

The parties agreed to settle two of the three violations alleged in Docket No. KENT 92-65. Section 104(a) Citation No. 3416929 alleges a violation of 30 C.F.R. § 75.1710-1, a mandatory safety standard requiring installation and use of canopies and cabs on all self-propelled electric face equipment. The citation states that the inspector observed a roof bolting machine

operator who was tramming a roof bolting machine but who was not under a canopy. The parties agreed that the violation was due to the operator's negligence. However, because the roof bolting machine operator was tramming the machine under fully supported roof which showed no signs of fault, they believed there was but a remote possibility of an accident. Therefore, they agreed that the violation was non-S&S. The parties also agreed that a civil penalty of \$192 would be appropriate.

Section 104(a) Citation No. 3548448 alleges a violation of 30 C.F.R. § 75.1107-16(b), a mandatory safety standard pertaining to the proper testing and maintenance of fire suppression devices. The citation states that the fire suppression system on a scoop was inoperative because of a torn hose. The parties agreed that the violation was the result of the operator's negligence but that it was non-S&S. They asserted that in the event of a fire an alternative fire suppression hose attached to the scoop could easily have been detached and used as fire fighting equipment. The parties further agreed that a civil penalty of \$126 would be appropriate.

SETTLEMENT APPROVAL

In light of the facts as stated by the parties, as well as the other relevant statutory penalty criteria set forth in the parties joint motions to approve the settlements, I conclude the proposed settlements are in the public interest and should be approved. I will incorporate the terms of the settlements into my ORDER at the end of this Decision.

CONTESTED VIOLATIONS

There remained for trial one alleged violation in Docket No. KENT 92-42 and one alleged violation in KENT 92-65.

KENT 92-42

Mine Act

<u>Section</u>	<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>
Section 104(a)	3551088	07/18/91	§ 75.202

STIPULATIONS

Prior to the hearing the parties submitted for inclusion in record the following stipulations:

1. The Mine Safety and Health Review Commission and its administrative law judges have jurisdiction to entertain the instant case and to enter a decision in the same.

2. Peabody Coal Company and its Camp No. 11 Mine are subject to the Federal Mine Safety and Health Act of 1977.
3. The controlling entity, Peabody Coal Company, produced eighty four million six hundred eighty nine thousand nine hundred and two (84,689,902) tons of coal during the calendar year 1991.
4. Camp No. 11 Mine of Peabody Coal Company produced fifty thousand seven hundred and thirty nine (50,739) tons of coal.
5. The violation history for the subject mine is 15 assessed violations during the course of 96 inspection days.

Parties' Joint Stipulation of Fact 1-2.

DISCUSSION

The citation at issue arose out of an inspection of the No. 2 Unit at Peabody's Camp No. 11 Mine by personnel of the Mine Safety and Health Administration ("MSHA"). The unit, which had only recently turned off of the main entry, was being mined with a continuous mining machine. MSHA Inspector Harold Gamlin, who had begun a regular quarterly inspection of the mine in early July 1991, became concerned about the condition of the roof on the unit. Gamlin's concern lead him to consult with MSHA roof control specialist Larry Cunningham, among others. Cunningham was sent to the mine with Gamlin and others and issued the subject Section 104(a) citation alleging that Peabody violated 30 C.F.R. § 75.202 by failing to control the roof to protect persons from hazards relating to falls of the roof.¹ Subsequently, the Secretary proposed a civil penalty of \$174 for the violation. Peabody answered that the violation as charged had not in fact occurred.

The citation states:

The operator has failed to control the roof to protect persons from the hazards related

¹30 C.F.R. § 75.202 states:

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock burst.

(b) No person shall work or travel under unsupported roof unless in accordance with this subpart.

to falls of the roof. This mine has had 11 roof falls since May 6, 1991. The falls are centrally located on the mine map and are in a valley which is posing poor roof conditions. The operator is trying different steps to control the roof such as decreasing the width of the entries on No. 2 unit from 20' to 18' and decreasing the wide opening to 24' and not 28'[,] five roof bolts are being installed in a row instead of four. Time is allowed for abatement to further evaluate these steps taken by the operator.

G. Exh. 5.

In addition to alleging a violation of Section 75.202 Cunningham also found that the violation was S&S, that injuries resulting in lost workdays and restricted duty were reasonably likely to occur and that the violation was due to Peabody's moderate negligence. The sole issue at trial was whether the violation occurred.

THE SECRETARY'S WITNESSES

MSHA Inspector Gamlin testified that he began a regular quarterly inspection of the mine on July 3, 1991. On that date the mine had one operating unit developing the main entry and work was beginning on starting a second unit, the No. 2 Unit. This unit was turning off the main entry.

Inspector Gamlin stated that prior to inspecting the mine he examined MSHA records pertaining thereto and noticed reports of roof falls in the main entry. He described the roof in the main entry as looking "very fragile" on the first day of his inspection. Tr. 78. He further stated that when he inspected the No. 2 Unit, the roof there also looked "very fragile." Tr. 78.

Gamlin stated that on July 17, 1992, during an inspection of the No. 2 Unit, he found that some of the entries on the unit exceeded the 20 feet width allowed under the roof control plan, and he issued a citation for a violation of Section 75.220, the mandatory safety standard requiring mine operators to adopt and follow a roof control plan approved by the Secretary. Tr. 79-80 ²

²The citation states:

The roof control plan was not being followed in the No. 2 Unit . . . The South East Nos. 4 and 6, No. 2 Unit was driven in excess of 21 feet approximately 70 feet outby the working face inby the second open crosscut. The roof control plan states the entries shall be driven 20 feet in width. A roof fall had occurred in No. 7 entry at engineer spad 1 + 40 third open crosscut outby working
(continued...)

Gamlin testified that his concern about the roof conditions led him to speak about controlling the roof with mine officials, including Douglas Rowlands, the mine superintendent, and Paul Sparks, the mine safety manager. Gamlin believed better control could be obtained by using 4-foot, fully-grouted roof bolts, rather than the 6-foot, point anchor bolts then in use. According to Gamlin, Rowlands explained that his supervisors would not allow him to use fully-grouted roof bolts. Tr. 81-82³ Gamlin further testified that on July 17 he called William Dupree, an MSHA supervisor and roof control specialist, and they discussed the roof conditions that Gamlin had observed. Tr. 85. The conversation led to a subsequent mine visit by Gamlin, Cunningham and Dupree. At the mine, Gamlin spoke with Rowlands and Sparks, as well as with David Fuson, a mine foreman, and told them that because of his concern about the roof he had felt the need to ask the MSHA roof control specialists to assist him. Tr. 90-91.

The MSHA personnel then went underground, accompanied by Peabody representatives. During their time underground, Gamlin, who was observing the pattern of the roof bolts, measured two places on the unit where roof bolts were spaced 10 feet apart rather than five feet as required by the roof control plan. Gamlin therefore cited Peabody for another violation of Section 75.220.⁴

Gamlin testified that on July 18, he did not observe any practices over and above those required by the roof control plan that were being used by Peabody to try to better control the roof (Tr. 92) and that he, Cunningham and Dupree discussed with Rowland, Sparks and Fuson, the additional steps that the MSHA personnel believed Peabody should be implementing. These steps

²(...continued)
face.

G. Exh. 3.

³Sparks, testified the decision to forego the use of the fully-grouted bolts was made by one of Rowland's bosses who believed the 6-foot, point anchor bolts were the best bolts on the market and who wanted to continue them in use. Tr. 214-216.

⁴The citation states:

The roof control plan was not being followed on the No. 2 Unit . . . in that a pin in the crosscut between entry No. 4 and 5 when measured was 10 feet apart and one pin in the last open crosscut of No. 4 entry when measured was 10 feet apart.

G. Exh. 4

included the need to narrow the width of the entries to 18 feet, to add additional roof bolts to the bolting pattern, and the possible use of truss roof bolts in some instances. Tr. 91-92, 95-96, 100-101. (As Gamlin recalled, the Peabody personnel agreed to narrow the entries. Gamlin could not recall whether there was any agreement about roof bolt spacing. Tr. 107.) Gamlin believed that all of these things should have been done by Peabody before July 18 -- indeed, in his opinion they should have been done when the No. 2 Unit was first turned -- because Peabody knew that it had encountered adverse roof conditions prior to starting the No. 2 Unit and that procedures required by the roof control plan were ineffective in controlling these conditions. Tr. 120.

Cunningham, a MSHA roof control specialist, stated that Gamlin had called him on Friday, July 12 and said that he needed Cunningham's assistance with roof control problems at the mine. On the following Monday, July 15, Cunningham discussed Gamlin's request with his supervisor, Dupree, and told Gamlin that he and Dupree would come to the mine later in the week. On July 18, Cunningham and Dupree met Gamlin at the mine. Cunningham stated the MSHA personnel went underground and formed an inspection party with the Peabody representatives, including among others, Rowlands, Sparks and Larry Stanley, a Peabody foreman.

Cunningham described the conditions that he found on the unit. Cunningham stated that he noticed an area where a roof fall had occurred. Although the fall had been cleaned up, the brows were not properly supported in that loose rock remained around the brows. He also recalled seeing an overcast area, approximately 100 feet in length, where the entry width of 22 to 23 feet exceeded the 20 feet width allowed by the approved roof control plan. He stated that in addition to these areas, he believed that there were two locations where Inspector Gamlin found the spacing of the roof bolts to be too wide and where improper grouting was used when installing the bolts. Tr. 129-130. Cunningham went on to describe the "adverse roof conditions" that, in his opinion, were causing the roof control difficulties.

The . . . shale roof was causing a lot of problems with . . . bolting that they were using . . . It was not consistent using header bolts on the roof to try to alleviate some of the shale rock falling out between the bolts. And also . . . there was some timbers that was scattered in the areas that would have served a whole lot better purpose if they had been set properly, but they was just lying on the ground.

Tr. 130-131.

Cunningham stated his belief that Section 75.220 requires an operator to develop and follow a roof control plan suitable to the mine but that the roof control plan is a minimum plan and that roof conditions may require an operator to take protective roof control measures additional to those mandated by the plan. Cunningham noted that Section 75.202 requires an operator at all times to control the roof, face and ribs of areas where miners are required to work or travel. Tr. 132-133. Because there had been eleven reported roof falls in two months and three reported roof fall injuries on the unit, as well as because he had observed "loose shale falling out between bolts . . . wide places being mined, and . . . bolt spaces being too wide", he believed Peabody was not protecting persons working on the unit from the hazards of roof falls. Tr. 132. (Cunningham stated that he had with him copies of the accident reports when he went to the mine on July 18 and in addition that he was told at the mine by a union safety committeeman about the roof fall injuries that had occurred on the No. 2 Unit. Tr. 172-173.) Cunningham therefore cited Peabody for a violation of Section 75.202.

Although he wrote on the citation form, "The operator is trying different steps to control the roof such as decreasing the width of the entries on the No. 2 Unit from 20' to 18' and decreasing the wide opening to 24' and not 28'. Five roof bolts are being installed in a row instead of four" (G. Exh. 5), Cunningham was adamant that these steps were not being implemented at the time he issued the citation but rather were what Peabody agreed to do after the section had been inspected by the inspection party. He stated that he included the statement on the citation form in order to justify giving Peabody a week to abate the alleged violation. Tr. 135-136, See also Tr. 156. Cunningham maintained that the additional roof control procedures he described were agreed to as the result of discussions between himself, Dupree, Gamlin, Paul Sparks, the safety director, Jimmy Howard, the section foreman, Doug Rowlands, the mine superintendent, and Larry Stanley, the mine foreman. Tr. 135-136. Cunningham asserted that on July 18 he observed nothing to indicate Peabody had undertaken anything beyond the requirements of the roof control plan to control the roof. Tr. 145, 162. On July 18 he measured the width of the entries six or seven times and he found no entries that measured 18 feet or narrower. Further, he measured the spacing of some of the roof bolts. He found no instances in which the roof bolt pattern consisted of five bolts across rather than four. Had he found that the entries had been narrowed to 18 feet and the bolting pattern had been tightened, he would have had no reason to issue the citation. Tr. 291-293.

Cunningham testified that Rowlands told him that the unit was being mined in a "bowl" (by this Cunningham understood Rowlands to mean "an area where the surface is indented and therefore you would have less overburden in the area underground where they were mining" Tr. 144) and that once out of the "bowl" Rowlands expected the roof conditions to improve. Id.

With regard to Peabody's negligence in allowing the violation of Section 75.202 to exist, Cunningham believed Peabody to be guilty of moderate negligence rather than high negligence. Cunningham believed that with the number of roof falls that had occurred, Peabody should have been aware it needed to do more to protect its miners from the dangers of the roof (Tr. 166) and that "the company had the means there to correct the conditions." Tr. 143.

William Dupree, a MSHA roof control supervisor, testified that Rowlands told him the company had hired two geologists to evaluate the subject roof conditions and that they had told Rowlands that the area in which the poor roof occurred was an old washout.⁴ After reviewing a mine map (G. Exh. 10), Dupree testified that the No. 2 Unit was encompassed by this washout or "bowl." Tr. 198, See also G. Exh. 10 (areas marked by Dupree in blue and green). With regard to whether any precautions over and above those required by the roof control plan had been taken by Peabody prior to July 18, Dupree testified that although one of the roof fall reports telephoned to MSHA on June 12, 1991, indicated that the company had "Called in 2 Roof Specialists, Narrowed Entry Width - Tightened Bolt Pattern" (G. Exh. 7 at 4), on July 18 he did not see any evidence the width of the entries had been narrowed to less than the 20 feet required by the roof control plan. Tr. 204-205. When asked how wide the entries were, Dupree stated, "I helped Cunningham measure some [of the entries]. Some of them were 22 to 23 feet wide and that would be 3 or 2 feet more than what the plan called for under normal circumstances." Tr. 205. He also stated his understanding that Gamlin had measured two areas where the roof bolts were as much as 10 feet apart. Tr. 205-206.

PEABODY'S WITNESSES

Safety Manager Paul Sparks confirmed that prior to July 1991, the mine had experienced an unusually large number of roof falls in the southwest main entries, although, at that time, the roof falls were concentrated in an area outby the No. 2 Unit.

⁴The terms "washout" and "bowl" were used to describe the same general area. See Tr. 198, 202. The Dictionary of Mining Mineral and Related Terms defines "washout", inter alia, as "[b]arren, thin, or jumbled areas in coal seams." U.S. Department of the Interior, DMMRT (1968) 1217.

this increase in the number of roof falls was first noticed in May. Tr. 243. Sparks stated that he had at least one conversation with Inspector Gamlin -- a conversation at which Mine Superintendent Rowlan was present -- about the possibility of using a different kind of roof bolt (a 5-foot, fully-grouted bolt) to better control the roof. Sparks had agreed with Gamlin that a 5-foot, fully-grouted bolt would probably improve control because it would keep air and moisture for getting into the roof. However, according to Sparks, Rowlan was not able to approve a trial use of fully-grouted roof bolts because Rowlan's boss insisted on use of 6-foot, point anchor bolts. Sparks stated that under most circumstances, the point anchor bolt was regarded as the best roof bolt on the market. Tr. 214-215.

Sparks also stated that mine management knew that there was a problem controlling the roof because of the "bowl" effect, and he maintained that management was trying different things to solve the problem. Tr. 216. Referring to a reported roof fall that had occurred on June 12 (G. Exh. 8 at 4), Sparks explained that as a result of the fall, it was recommended that, in addition to adding extra roof support (roof bolts or timbers) to the area in which the fall had occurred, Peabody arranged to have geologists examine the area and advise mine management as to what was causing the roof to fall. Tr. 217, 245-246. The geologists came in mid-June and Sparks explained:

The geologist ran compaction tests on the area as far as the immediate roof above the main roof. And we found it took to water exceptionally more than what you really want it to . . . This roof was really susceptible to water and it would expand once the moisture got to it, and once it expands, it has no other choice but to fall.

Tr. 218. To help alleviate the problem, Sparks further explained, the geologists suggested the roof bolt holes be sealed to prevent moisture-laden air from seeping into the roof and that the best way to accomplish this was to use fully-grouted roof bolts. Peabody decided to install fully-grouted bolts approximately one month after July 18. Tr. 221, 227-228. Once installed the fully-grouted bolts resulted in, "a whole lot less falls mainly because [they] did keep the air and water out." Tr. 237.

According to Sparks, Peabody also installed truss bolts and timbers along the main and submain belt entries. Sparks stated that this was being done during July in some areas. Tr. 221-222. The trussing and timbering was in addition to the requirements of the roof control plan. Tr. 223.

Sparks also stated that around the third week of June, Rowlands told the foremen of the No. 1 Unit that until mining advanced out from under the bad top they were to narrow entries to 18 feet and they were to cut the entries 24 feet wide when the continuous mining machine turned a crosscut. Tr. 256. Sparks added that Rowlands had told the No. 2 Unit face foreman and section foreman essentially the same thing the last week in June or the first week in July. Tr. 224-225. In addition, the foremen were told to put extra bolts in the roof and truss it, if the roof required such measures. Tr. 224. Nonetheless, Sparks admitted that three separate roof fall injuries had occurred after the instructions were given (one on July 9 and two on July 11), all of which injuries he had reported to MSHA. Tr. 263, G. Exh. 9.

Sparks testified that on July 18, while at the mine with the inspection party, Rowlands told MSHA roof control specialist Cunningham and MSHA roof control supervisor Dupree the things Peabody had done to try to better control the roof. "We talked to them about the geologists and what they had found as far as the moisture and the roof . . . different things of that type." Tr. 230. As for the implementation of roof control procedures, Sparks stated that some of the entries had been narrowed, but that some had places that were "a little wide." Tr. 231, See also Tr. 257. Also, Sparks was uncertain whether there had been any truss bolting on the No. 2 Unit. Tr. 234. As Sparks explained, on July 18, the unit had only been in production approximately one week and the miners who worked on the unit had been laid off from the mine for three, four or five years. Sparks explained, "We were getting back to more or less a learning process which . . . it just takes you a little while to get the feel of it again, especially as far as the miner or roof bolter or anything." Tr. 231.

With regard to Cunningham's statement on the citation form "that Peabody is trying different steps to control the roof," (G. Exh. 5), Sparks maintained that it accurately reflected what MSHA understood Peabody was doing. "[I]t's written exactly the way it was. That's the reason they gave us further time to evaluate them." Tr. 236, See also Tr. 273. Sparks stated that Inspector Cunningham was told about the steps Peabody had undertaken before he went to the mine on July 18. Tr. 258. In addition, Sparks stated that when Cunningham issued the citation he had told Cunningham that the specified remedial steps already were taking place. Tr. 265.

Eugene Howard, face foreman on the No. 2 Unit, recalled that at some point around the time of the miners' vacation he was told to narrow the entries and corners and to tighten the roof bolting

pattern. Tr. 278.⁵ He stated that the No. 2 Unit had begun production on July 8. Tr. 279. Howard also testified that he had instructed his crew with regard to these roof control procedures, but admitted that there were times when entries were cut too wide and roof bolts were not properly spaced. Tr. 284-285. "Nobody's perfect," he stated. Tr. 285. He was of the opinion that roof control procedures improved on the No. 2 Unit as his crew gained more experience. Id. Howard agreed with Sparks that the citation, as written by Inspector Cunningham, contained procedures that Peabody had already put into effect. Tr. 287.

THE VIOLATION

Section 75.202 states in pertinent part:

(a) The roof face and ribs of area where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of roof, face or ribs and coal or rock bursts.⁶

Issues of liability for violations of this standard, and more particularly, for violations of the standard's requirement that the roof and ribs be supported or otherwise controlled adequately, are resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the subject roof or ribs were not adequately supported or otherwise controlled. Canon Coal Co., 9 FMSHRC 667, 668 (April 1987); Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987); See Southern Ohio Coal Co., 10 FMSHRC 138, 141 (February 1988). Put another way, were the roof and ribs adequately supported and, if not, were there any objective signs extant prior to July 18 that would or should have alerted a reasonable prudent person to the danger of the inadequately supported roof in the cited area of the mine? Because I find that the answer to the first question is "No" and that the answer to the second is "Yes", I conclude the Secretary has established the existence of the violation.

⁵Howard testified the miners' vacation was the last week of June or first week of July. Tr. 225.

⁶There are two subsections of Section 75.202. Subsection (b) prohibits persons from working or traveling under unsupported roof. The subject citation does not specify which subsection was allegedly violated. However, as Counsel for Peabody notes, no evidence was offered concerning work or travel under unsupported roof. Peabody Br. 10. Clearly, the alleged violation pertains to Section 75.202(a).

Inspector Cunningham cited Peabody for "failing to control the roof to protect persons from hazards related to falls of the roof." G. Exh. 5. On July 18, the date he issued the subject citation, mining was taking place in the No. 2 Unit, and, as his testimony indicated and as Paul Sparks essentially agreed (Tr. 212-214, 216), the area being mined was well within the "bowl," the area of faulty roof that was subject to more than ordinary instability and chance of fall.

Peabody argues that it was not given fair notice of the requirements of the standard. See Peabody Br. 10-12. However, given the unambiguous mandate of the standard that the roof, face and ribs of areas where persons work or travel be supported to protect those persons from hazards related to roof falls and the backdrop against which the citation was issued -- a backdrop of prior reported roof falls, reported minor injuries due to those falls and a geographic area marked by unusually unstable roof -- I cannot find that a reasonably prudent person familiar with mining industry and the goal of the standard to protect miners from roof fall injuries would have failed to recognize the hazardous nature of the roof and the resulting requirement to consistently implement steps to provide adequate roof support. Indeed, and as Peabody's witnesses attest, Peabody itself fully recognized by mid-June the hazard to miners presented by the increasing number of roof falls in the "bowl" area and decided to seek the opinion of experts about the problem. Tr. 221. This led to a recommendation that fully-grouts roof bolts be used, a recommendation that Peabody did not adopt until approximately mid-August. Id.

Further, I credit Paul Sparks testimony that Rowlands was aware of the hazardous nature of the roof and told the foremen to narrow the entries to 18 feet and, where crosscuts were turned, to take 24 feet rather than 28 feet of coal. Tr. 225. I also credit his testimony that Rowlands told the foreman to tighten the bolting pattern. Tr. 256.⁷ Further, I credit his testimony that the supervisors on the No. 2 Unit were told to install truss bolts as needed. Tr. 234. Howard, a foreman on the No. 2 Unit confirmed that Rowlands instructed him regarding the steps to take to better control the roof and "always" asked him if he were following these instructions. Tr. 288. I therefore conclude that Peabody recognized the hazardous nature of the roof on the No. 2 Unit and the resulting requirement to consistently implement steps to provide adequate roof support.

⁷These instructions were given to the foremen of the No. 1 Unit and No.2 Unit. While the subject citation pertains to the No. 2 Unit, the roof conditions were essentially the same on both units. Sparks agreed that both units referred to the same general area of the mine, Tr. 254, and as already noted, the roof conditions caused by the "bowl" prevailed for both units.

Peabody's problem with compliance lay not in recognizing the hazard but in remedying it. The day before the subject violation was issued Gamlin testified that he cited Peabody for instances where the width of the entries and the bolting pattern did not conform to the requirements of the roof control plan. Peabody did not contest these citations. Thus, Peabody was not consistently complying with its plan, let alone with the additional measures that were necessary for adequate roof control when mining in the "bowl" area.

When the subject citation was issued mining was continuing in the "bowl" area, and Cunningham testified that he found loose shale falling out between bolts, wide places being mined and bolt spacing that was too wide and in excess of the approved roof control plan. Tr. 131-132. I credit this testimony. Further, Cunningham's testimony was essentially unrefuted that he tried to find recently cut entries that were 18 feet across and intersections that were cut less than the plan required and that he could not remember finding any. Cunningham's testimony is given added credence by the statements of Howard, Peabody's foreman on the No. 2 Unit, who candidly described his problems getting the No. 2 Unit crew to comply with Rowlands instructions regarding the roof control measures that they were to carry out. Tr. 284-285. In addition to Cunningham's testimony, I note Dupree's statement that on June 18, he helped Cunningham measure the entries and that some exceeded the width allowed by the plan. Thus, there is ample evidence to establish that Peabody consistently failed to implement those extra-plan measures, such as further narrowing the entries and tightening the roof bolting pattern, that all agreed were necessary given the prevailing roof conditions.

I conclude, therefore, the Secretary has established that on July 18, 1991 and as alleged in Citation No. 3551088 Peabody violated Section 75.202.

GRAVITY AND NEGLIGENCE

The sole issue contested by Peabody is the existence of the violation. Inspector Cunningham testified that he believed Peabody's failure to control the roof on the No. 2 Unit so as to protect persons from the dangers of roof falls subjected miners on the unit to injuries from falling loose roof, injuries that could range from minor to fatal. Tr. 171. Having found that the violation existed, I fully credit the inspector's opinion and conclude that it was a very serious violation.⁸

⁸As previously noted, the inspector also designated the violation as S&S. Peabody does not dispute this finding.

Peabody's own witnesses testified that for a considerable time before it was cited Peabody was well aware of the potentially hazardous roof conditions in the subject area. Moreover, Foreman Howard knew he had a "rusty" crew under his command on the No. 2 Unit, knowledge that warranted increased diligence to insure compliance, diligence the violation belies. I find therefore that Peabody negligently failed to control the roof to protect persons on the No. 2 Unit from the hazard of roof falls.

CIVIL PENALTY

The Secretary proposed a civil penalty of \$74, which I consider inadequate in view of the very serious nature of the violation, Peabody's negligence and Peabody's stipulated large size. Rather, I conclude that a civil penalty of \$500 is appropriate, and in so doing I take into account Peabody's stipulated history of prior violations and rapid, good faith abatement of the subject violation. While both are commendable, they do not compensate for the gravity of the violation and Peabody's negligence. Roof control is, after all, of singular importance in protecting the safety of underground coal miners.

KENT 92-65

Mine Act

<u>Section</u>	<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>
Section 104(a)	3416937	08/07/91	50.10

STIPULATIONS

At the hearing the parties stipulated as follows:

1. The Martwick Mine, annually produces one million five hundred ninety thousand (1,590,000) tons of coal;
2. The Martwick Mine has an effect on interstate commerce, as that term is used in the Mine Act;
3. The Commission has jurisdiction to hear and decide the case;
4. During the 24 months immediately prior to the subject violation there were 195 assessed violations during the course of 388 inspection days.

See Tr. 5.

DISCUSSION

The citation at issue arose out of an inspection of the Martwick Mine conducted by MSHA Inspector Lendell Noffsinger on August 7, 1991. During the course of the inspection, Noffsinger determined that Peabody had failed to report a roof fall as required by 30 C.F.R. § 50.10.⁹ He further determined that an injury was unlikely to result from the violation and that if an injury did occur it would not result in lost workdays. He also concluded that the violation was not S&S and that Peabody was moderately negligent in failing to report the roof fall. Subsequently, the Secretary proposed a \$20 civil penalty for the alleged violation.

The citation states in relevant part:

A roof fall has occurred in the No. 1 intake on the No. 1 Unit . . . two crosscuts inby spad No. 4918. The fall occurred either on June 4 or June 5, 1991, timbers were set on the 2nd shift June 5, 1991. The fall was not immediately reported to MSHA.

G. Exh. 1¹⁰ Peabody's position is that the violation did not in fact occur. The sole issue is whether the roof fall took place in an area where miners are normally required to work or travel and thus whether the roof fall was reportable.

⁹30 C.F.R. § 50.10 states in part:

If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine.

30 C.F.R. § 50.2(h)(8) defines an "accident" as:

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

30 C.F.R. § 75.2 defines "Active workings" as:

[A]ny place in a coal mine where miners are normally required to work or travel.

¹⁰Noffsinger testified that he erred in writing June 4 and June 5, 1991, that he had meant to write August 4 and August 5, 1991. Tr. 11-12, 25.

THE TESTIMONY
THE SECRETARY'S WITNESS

Noffsinger stated that during the course of the August 7 inspection of the Martwick Mine he was asked by a miner whether Peabody had reported a recent roof fall. When Noffsinger responded "No," Noffsinger was asked to look at the area where the fall had occurred. Noffsinger viewed the area and, because the roof fall had not been reported, issued the subject citation. Tr. 12.

Noffsinger stated that he observed the area of the roof fall with Bob Gray, an MSHA trainee who accompanied Noffsinger on the inspection. On the floor of the area he saw roof bolts and fallen roof. He also saw a few 9-foot roof bolts that remained in the roof but the roof had fallen out from around these bolts. Tr. 13, 27. Noffsinger stated that the area around the fall had been timbered in accordance with usual practice to keep the fall area from spreading. Tr. 21-22, 23-29.

Noffsinger gave varying reasons why he believed the roof fall should have been reported. He stated an unplanned roof fall at or above the anchor zone of the roof bolts and in active workings had to be reported, and he recited the regulatory definition of active workings -- any place in a coal mine where miners are normally required to work or travel. Tr. 13, 20. Noffsinger agreed that the timbers were installed after the roof fall and that such timbering around falls is a one-time activity, but Noffsinger testified that he based his determination that the fall had occurred in "active workings" on the fact that the timbers had been set. Tr. 31.

Noffsinger also stated if the timbering had not taken place, he still would have considered the roof fall to have occurred in active workings and thus to be reportable. He explained that the entry in which the fall had occurred was ventilated by intake air and that he had spoken with his supervisor, Joe Parks, and with MSHA roof control supervisor, Bill Dupree, before visiting the area of the fall and they had indicated that where there are two entries ventilated by intake air, miners would normally travel in one of the entries. Tr. 36. Thus, he believed the cited area to have constituted "active workings," he stated, "because they [meaning his two supervisors] said it was active workings." Tr. 37.

Noffsinger also stated that he understood the definition of "active workings" to mean that an area constitutes "active workings if any work is ever done in an area or anyone ever travels through the area". Tr. 32.

Finally Noffsinger stated that for him not to have considered the area where the fall occurred to be active workings, the area would have had to be an abandoned area and to have been sealed off so that people could not physically get to it. Tr. 41.

PEABODY'S WITNESS

Steven Little, Safety Supervisor at the Martwick Mine, testified on Peabody's behalf. Little identified Peabody's Exhibit R-1 as a map that essentially depicts the panel where the roof fall had occurred. As described by Little, at the time of the fall there were five entries on the panel. Men and materials reached the face area via the supply entry. Coal was mined at the faces, taken to the dumping point, transferred to a belt and removed from the mine via the belt entry. The supply and belt entries were immediately adjacent to one another and contained neutral air. When facing inby there was a timbered return entry to the immediate left of the supply entry. The return air in this entry was kept separate from the neutral air of the supply entry by permanent concrete block stoppings. When facing inby and to the immediate right of the belt entry there was a timbered entry that served as an escapeway. The intake air in this entry was kept separate from the neutral air of the belt entry by permanent concrete block stoppings. When facing inby and to the immediate right of the intake escapeway was another timbered intake entry. There were no stoppings separating these two intake entries. Tr. 48-52, 61-62, See Exh. R-1. Little maintained the intake escapeway was required to be examined on a weekly basis but that the adjacent intake entry -- the entry in which the roof fall occurred -- was not required to be examined on a periodic basis and, in fact, was never required to be examined. Tr. 54-55.

Little acknowledged that once a roof fall occurs an operator is required to support the area, if necessary, by setting timbers and that once timbers have been set miners do not normally return to work on them. Tr. 56. He indicated that miners working on a unit would normally work and travel in the area where coal was mined, an area away from the fall area, and that no other employees at the Martwick Mine would ordinarily and on a routine basis travel through the entry where the rock fall had occurred. Tr. 58, See Exh. R-1.

During cross-examination, Little stated that in all likelihood on August 5, the section foreman found the roof fall and that to do so he would have had to be at least adjacent to the fall, but Little would not say that the foreman had gone into the area where the fall occurred. Little acknowledge that the regulations in Part 75 require the weekly examination of an intake air course, but because the regulations require that at least one entry of each intake air course be examined and

maintained Peabody had always examined the intake entry adjacent to the one in which the fall occurred. Tr. 62-63. When asked whether the intake entry where the fall occurred is ever traveled, Little responded "No." When pressed with "Never?", Little stated, "I can't say absolutely never, but it's not regularly or normally traveled." Tr. 63. Little acknowledged that following the fall no barricades were erected or signs posted to prevent travel in the area where the fall had occurred, but he maintained that any travel there would have been inadvertent. Tr. 69. Taylor explained, "There's no way we can continuously and constantly be with all the employees in the mine to be sure that no one ever steps over there, but as a general practice of mining, [the fall area is] not normally or ordinarily traveled or worked in." Id.

Finally, Little stated his opinion that the area where the fall had occurred was not a "working face", "working place", "working section" nor an "abandoned area", as those terms are defined in 30 C.F.R. § 75.2. Tr. 63-65.

THE VIOLATION

The Secretary bears the burden of proving that the alleged violation existed. In order to determine whether the Secretary has met that burden, it is appropriate to first analyze the wording of the pertinent regulations at issue, for it is this language that imposes the mandatory requirements with which an operator must comply. Here, the applicable language is unambiguous. Section 50.10 requires an operator to immediately contact the MSHA District or Subdistrict office "[i]f an accident occurs." As has been previously noted, the meaning of "accident" is defined in pertinent part as "[a]n unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use." There is no dispute that the roof fall occurring on August 4 or August 5, 1991, was "at or above the anchorage zone where roof bolts [were] in use" and that Peabody did not "immediately contact the MSHA District or Subdistrict Office" when the fall occurred. The question is whether the fall occurred in "active workings"?

Section 75.2(g)(4) of the regulations, consistent with Section 318(g)(4) of the Act, 30 U.S.C. § 878 (a)(4), defines "active workings" as "any place in a coal mine where miners are normally required to work or travel." Boiled down to its simplest terms, the question is whether the Secretary proved that miners are "normally required to work or travel" where the roof fall occurred? I conclude that she did not.

The Secretary chose to prove the violation solely through the testimony of Inspector Noffsinger. It is clear to me that he was confused as to why he found a violation of Section 50.20. Initially, he stated that he had issued the citation because

Peabody personnel had set timbers around the fall area. Tr. 31. He explained this line of reasoning by indicating that if any work is ever done in an area or if anyone ever travels through an area, the area constitutes active workings. The problem with this interpretation of "active workings" is that Section 75.2(g)(4) does not state that "active workings" are any place where miners are ever required to work or travel, but rather that "active workings" are where miners are normally required to work or travel. By modifying the requirement for work or travel with the adverb "normally," the Secretary in promulgating the regulation signaled that "active workings" are those places where miners are required constantly or periodically or with a certain degree of frequency to work or travel. The record in this case simply will not support a finding that miners constantly, periodically or with any degree of frequency worked or traveled in the area where the fall occurred. Indeed, the evidence is quite to the contrary.

Inspector Noffsinger testified that timbering around falls is usually a one-time activity. Tr. 31. Safety Director Little agreed, stating that once such timbers are set miners do not return to work on them. Tr. 56. Moreover, Little's testimony that miners working on the No. 1 Unit would usually work and travel where coal was mined -- an area some distance for the entry in which the roof fell -- and that no other Peabody employees would ordinarily or on a routine basis pass through the roof fall area was essentially undisputed, as was Little's opinion that weekly examinations were not required for the entry where the fall occurred and that the entry was never examined or traveled on a regular basis. Tr. 62-63. Further, although Little acknowledged that it was likely the section foreman had found the fall, Little's statement that he could not say the foreman went into the subject entry when he found it does not prove normal work or travel or provide a basis from which normal work or travel can be inferred.¹¹

¹¹The Secretary argues that in order to ascertain that a roof fall occurred the section foreman would have to have traveled in the area of the fall, but Little's supposition that the foreman could have been in the entry adjacent to the fall rather than in the entry in which it occurred seems more reasonable. It is hard to imagine the foreman putting himself purposefully under an area of roof that had fallen and whose edges had not yet been supported. Of course, as the Secretary notes, the foreman did not testify, and although the Secretary requests that I be aware that the foreman "was conveniently absent from the hearing" (Sec. Br. 8), I can hardly draw an inference adverse to Peabody from his absence since the Secretary herself did not initiate pre-trial discovery regarding the foreman nor seek to compel his testimony. Perhaps it bears repeating that it is the Secretary's burden to prove the alleged violation, not the operator's.

The Secretary argues that Little's opinion that the area was not a "working face," "working place," "working section" or "abandoned area" leaves active workings as the only way to define the area. Sec. Br. 6. As Peabody's counsel notes, the problem with this argument is that it assumes that such definitions are intended to encompass the entire mine. Peabody Br. 7. They are not. Rather, I agree with Peabody's counsel that definitions are provided for those terms that are used in the mandatory safety standards and which require definition. The definitions are not intended to provide an exhaustive classification of all areas of the mine, which leads back to the issue at hand -- whether, on the basis of this record, the Secretary proved that the roof fall occurred where miners normally are required to work or travel? For the reasons stated above, I find that she did not.¹²

ORDER

In light of my approval of the proposed settlements and my conclusions regarding the contested violations, I enter the following order:

KENT 92-42

Peabody is ordered to pay a civil penalty of \$20 for the violation of Section 75.316 cited in Citation No. 3548678. Peabody also is ordered to pay a civil penalty of \$500 for the violation of Section 75.202 cited in Citation No. 3551088.

KENT 92-56

Peabody is ordered to pay a civil penalty of \$227 for the violation of Section 75.507 cited in Citation No. 3551054. The Secretary is ordered to modify Citation No. 3551054 by deleting the inspector's S&S finding.

KENT 92-65

Peabody is ordered to pay a civil penalty of \$192 for the violation of Section 75.1710-1 cited in Citation No. 3416929, and the Secretary is ordered to modify the citation by deleting the inspector's S&S finding. Peabody is also ordered to pay a civil penalty of \$126 for the violation of Section 75.1107-16(b) cited

¹²The Secretary also asserts that pursuant to 30 C.F.R. § 75.402 and 30 C.F.R. § 75.403 Peabody employees would have had to travel into the entry where the fall occurred to ascertain the incombustible content of rock dust that regulations require to be applied and maintained. Sec. Br. 7. Regardless of its hypothetical merits, this argument has no support in the record. Not one word of testimony or documentary evidence was offered regarding it.

Citation No. 3548484, and the Secretary is ordered to modify the citation by deleting the inspector's S&S finding. Finally, the Secretary is ordered to vacate Citation No. 3416937.

Peabody shall pay the civil penalties and the Secretary shall modify and vacate the referenced citations within thirty (30) days of the date of this Decision and, upon receipt of payment, these matters are dismissed.

David F. Barbour
David F. Barbour
Administrative Law Judge
(703) 756-5232

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-259-D
ON BEHALF OF CLAYTON NANTZ, :
Complainant : BARB CD 91-24
v. :
NALLY & HAMILTON ENTERPRISES, : Gray's Ridge Job
INCORPORATED, :
Respondent :

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Complainant;
David O. Smith, Esq., Marcia A. Smith, Esq.,
Corbin, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the Secretary of Labor against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). The complaint was filed on behalf of Clayton Nantz, a former employee of the respondent who claims that he was discharged on or about April 16, 1991, because he refused to continue to operate a bulldozer that had the back window broken out, a condition which he believed constituted a hazard to his health and safety.

The respondent filed a timely answer denying any discrimination, and contending that Mr. Nantz voluntarily quit his job. In its defense, the respondent asserted that the refusal by Mr. Nantz to continue to operate the bulldozer in question was not based upon a good faith reasonable belief that his health or safety were threatened. The respondent also contended that the initial complaint, and the amended complaint seeking a civil penalty assessment for the alleged violation of section 105(c) of the Act, were not timely filed as required by the Act and the Commission's Rules.

A hearing was held in Cumberland Gap, Tennessee, and the parties filed posthearing briefs. I have considered their respective arguments in the course of my adjudication of this matter.

Issues

The issues in this case include the following: (1) whether the complainant was engaged in protected activity when he complained about the bulldozer in question and refused to operate it because he believed it was unsafe; (2) whether his work refusal was reasonable; (3) whether he timely communicated his safety complaints to mine management; and (4) whether he quit or was fired from his job. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.
2. Sections 105(c)(1), (2) and (3) and 110(a) and (d) 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.

Stipulations

The parties stipulated to the following (Exhibit J-1):

1. The Commission has jurisdiction in this matter.
2. The respondent, a Kentucky Corporation, engaged in the production of coal, and is therefore an "operator" as defined by the Act.
3. The respondent's Gray's Ridge Job Mine, is a surface mine, the products of which enter commerce within the meaning of the Act.
4. During the year 1990, the Gray's Ridge Job Mine produced 203,536 tons of coal, and the respondent corporation, as controller, produced 856,573 tons of coal in 1990.
5. Clayton Nantz was employed by the respondent as a bulldozer operator at its Gray's Ridge Job Mine, and is a "miner" within the meaning of the Act.
6. At the time he ceased to be employed by the respondent, Clayton Nantz was being paid at the rate of \$10.50 per hour

for regular hours worked and \$15.75 per hour for overtime hours worked.

The Complainant's Testimony and Evidence

Clayton Nantz testified that he was employed by the respondent on two or three occasions and that his most recent employment period was from June, 1990, to April 16, 1991. He stated that he has worked in the mining industry for 18 years as a heavy equipment operator, including dozers, loaders, and drills. He was laid off on the previous occasions because he had less seniority and that during his last period of employment with the respondent he operated a D8-L bulldozer, with an enclosed cab, and he described his duties (Tr. 11-14). Mr. Nantz stated that he was paid a regular rate of \$10.50 an hour, and \$15.75 an hour for overtime, and that he worked, five and six days a week, 10 hours a day. The regular work week was 40-hours, and anything over that was overtime. He worked the second shift from 3:30 p.m. to 3:30 a.m., moving dirt and rocks with the bulldozer (Tr. 13-15).

Mr. Nantz stated that the back window of his bulldozer was knocked out when a truck backed into the machine during the day shift and he was not at work when this occurred. Mr. Nantz stated that his shift foreman Henderson "Hen" Farley informed him that the window had been broken out and that he would have it replaced. The missing window resulted in problems which Mr. Nantz described as "choking, dust coming in, smothering headaches, just couldn't see" and he explained that the dust generated by the trucks when materials were dumped made it difficult for him to see the trucks backing in to him and that before the window was knocked out "the dust wasn't near as bad" (Tr. 17).

Mr. Nantz stated that foreman Farley was on the job for approximately one week before he left for another job. However, during the week that Mr. Farley served as foreman Mr. Nantz stated that he complained to him two or three times about the broken window and that Mr. Farley told him that "We'll try to get it, he said he'd get a glass ordered to put it in" (Tr. 18). Mr. Nantz confirmed that the window was not fixed when Mr. Farley left the job (Tr. 19).

Mr. Nantz stated that Wayne Fisher took over as foreman after Mr. Farley left, and that he complained to Mr. Fisher on "a regular basis every other day or so" about the broken window and informed him that "I couldn't stand the dust and the choking, smothering, gagging and going on from the dust" (Tr. 20). Mr. Nantz stated that he wanted the window fixed "Because the dust was so bad, it got in there and it just, you know, I couldn't breath. It was choking me to death, I was smothering, and it was causing me, you know, health problems, damage, I

couldn't take it" (Tr. 21). He also stated that he continued having problems seeing the trucks and that Mr. Fisher assured him that the window would be fixed (Tr. 20-21).

Mr. Nantz stated that four weeks passed from the time the window was broken out and the last night of his employment when he was discharged (Tr. 21-22). He described his appearance after his work shift both before and after the window was knocked out, and he stated that the water truck had a mechanical problem and was not operated after the dozer window was broken out (Tr. 23). Mr. Nantz stated that when he reported for work on April 16, 1991, he asked Mr. Fisher if the window had been repaired and Mr. Fisher informed him that it had not. Mr. Nantz then informed Mr. Fisher that he did not want to operate the machine in the dust with the window broken out and asked for other work. Mr. Fisher informed him that he had no other bulldozers and suggested that Mr. Nantz might be able to operate a loader for an hour or so, but that he would then have to operate the dozer with the broken window. Mr. Nantz then informed Mr. Fisher that he did not want to operate the dozer in the dust and gave Mr. Fisher his phone number and asked him to call him when the window was replaced because he did not want to operate the dozer without a window because "it was just so dusty, I couldn't breathe, I couldn't take it" (Tr. 26).

Mr. Nantz stated that he next returned to the mine one or two nights later and again asked Mr. Fisher if the window had been repaired. Mr. Fisher informed him that the window was not repaired and stated "The dozer's out there, do you want to run it like it is?" and "Either run it like it is or go to the house. You're fired if you don't run it" (Tr. 27-28). Mr. Nantz stated that he then picked up his check and went home and Mr. Fisher never called to tell him that the dozer had been repaired (Tr. 27).

Mr. Nantz stated that after his last evening's employment with the respondent he looked for other work and he explained his efforts in this regard and confirmed that he found other work (Tr. 27-30). He also confirmed that his hospitalization benefits ended when he was discharged by the respondent and that he has incurred medical expenses since that time (Tr. 30-31).

On cross-examination, Mr. Nantz testified about his prior employment and earnings with the respondent (Tr. 31-33). Mr. Nantz confirmed that he has operated an open cab dozer for at least nine years and that he would be exposed to dust while operating such a dozer. He stated that an enclosed cab is more comfortable because of the air conditioning and heating. He confirmed that he wore dust masks while operating equipment without a cab enclosure (Tr. 34-37).

Mr. Nantz explained the work that he was doing with the dozer in April 1991, and he confirmed that he had operated the machine with the doors open when the batteries overcharged and the doors would not stay shut, or when the air conditioning was putting out hot air. He explained that he would strap the doors together and denied that he ever operated the machine in dust with the doors open. Mr. Nantz could not recall that he ever told Mr. Farley that he strapped the doors open because he could not stand to be enclosed in the cab, but he stated that "I could have said that I don't like to be housed up, you know, when the heater's hot or something, maybe I said something like that, but I don't know" (Tr. 40-42).

Mr. Nantz stated that except for a possible absence for illness he never "laid off" or missed work during the time the window was broken because of any dusty conditions, and he stated that "You didn't lay off up there, if you did, you didn't have a job" (Tr. 42-43). Mr. Nantz confirmed that he never made any notes of the specific days that he asked Mr. Farley about the broken window, and that he did not document the specific number of days that the window was broken out of the machine (Tr. 44). Mr. Nantz further confirmed that when his deposition was taken he stated that the window was out three to four nights before Mr. Farley left, but that he was not positive about this and that it may have been out for four to seven days before Mr. Farley left. Mr. Nantz also stated that Mr. Fisher was on the job for two weeks while he operated the dozer with the broken window (Tr. 45-48).

Mr. Nantz confirmed that he filed a worker's compensation claim for silicosis on May 24, 1991, against the respondent claiming that he was totally and permanently disabled and unable to work, but that his claim was denied (Tr. 49-55; Exhibits R-2 through R-4). Mr. Nantz further testified about his subsequent employments, and he also confirmed that he drew some unemployment benefits (Tr. 56-63). Mr. Nantz stated that during his employment with the respondent he worked a fifty-hour regular week, and eight or eight and one-half hours on Saturday (Tr. 64-66).

Mr. Nantz described the damage sustained by the dozer window when it was knocked out. He stated that there was "very little" frame damage, and he confirmed that within a day or two after the window was damaged the mechanics "done what they could do" to straighten out the frame so that the glass would fit back in. He believed that the mechanics on the job replaced the window, but he did not know when this was done. Mr. Nantz confirmed that the frame was straightened out while Mr. Farley was still on the job, and while it was not perfect, he believed that it would have held a new window in place (Tr. 68).

Mr. Nantz believed that he initially refused to operate the bulldozer during his second shift on Monday, April 15, 1991, and that he spoke to Mr. Fisher that evening. Mr. Nantz confirmed that Mr. Fisher offered to let him run a highlift for an hour and one-half, and he also offered to water his work area with one load of water. Mr. Nantz characterized one load of water as "like pouring a cup of coffee out in that much dust" (Tr. 70). Mr. Fisher also mentioned the use of clear plastic over the back window area of the dozer, but Mr. Nantz indicated that he had tried this at another mining operation and could not see through the plastic material, particularly at night with rain and muddy conditions. He also indicated that he did like plexiglass because it gets scratched up, and with the accumulated dust, he cannot see through it (Tr. 70-72) Mr. Nantz stated that he did not request a dust mask or ear plugs because he thought the broken window would be replaced (Tr. 73). Mr. Nantz further explained his refusal to operate the dozer as follows at (Tr. 74-75):

A. (Interposing) I wasn't going to operate in that kind of dust, I couldn't take it, you know, it was just like turning a blower in your face when them trucks come back through there and fan that dust, and there was no way I could live and stand that.

Q. But you used these dust masks on other jobs?

A. There was never dust on other jobs like that.

Q. This is the dustiest job in your twenty (20) years?

A. We always used trucks on this job, on the other jobs, nobody hardly ever used over one (1) truck years ago. And this job had a lot of rubber tired equipment, and they moved more dirt more than any other job I ever seed, because it had more trucks.

Q. Well, there's two (2) trucks up there wasn't there?

A. Yeah, but everybody else I ever have worked for, would haul maybe a mile down the road and dump into a fill.

* * * * *

Q. Now, you could have operated the 980 loader that they offered to you; couldn't you?

A. For an hour and a half.

Q. But you didn't want to do that?

A. Not get back out in that dozer, not the rest of the night, eight (8) hours in that dust.

Q. And you didn't want to -- you weren't interested in them watering the area with a water truck?

A. One load wouldn't have even reached to me.

Mr. Nantz confirmed that sometime in June or July, 1991, he spoke with Mr. Farley at the respondent's Leatherwood strip mining operation, and that Mr. Farley had called and asked him to come and look the job over. Mr. Nantz stated that Mr. Farley asked him if he would like to go back to work running a D10 dozer, and indicated that he would speak with the respondent's owner, Tommy Hamilton, about it. Mr. Nantz stated that he informed Mr. Farley that he would go back to work if the respondent paid his back wages, but that Mr. Farley never contacted him again. Mr. Nantz confirmed that he was willing to return to work if he received his back pay (Tr. 77-80; 82-83).

Mr. Nantz stated that during April 1991, he could not recall that the water truck was operating in the "fill area on top of the hill", and that during the entire time the dozer window was missing Mr. Farley and Mr. Fisher did not have the water truck operating around the dozer (Tr. 81). Mr. Nantz stated that he worked in the dust "going into the fourth week" and that he did not use a dust mask because "every day they was telling me we was going to get a window put in - - we're going to get a window put in. I kept waiting every day to get my window put in, why would I need a dust mask? If my window was in, I wouldn't have no problem" (Tr. 81-82).

Mr. Nantz stated that when he left the respondent's employment on April 16, 1991, the dozer window was still missing and he had no idea as to whether it was ever repaired, and he believed that the dozer was sold (Tr. 84). He confirmed that he did not want to operate the endloader for an hour and one-half as offered by Mr. Fisher because he would have had to go back and operate the dozer with the missing window and he did not want to operate it in the dust (Tr. 84). He further explained as follows at (Tr. 92-93):

Q. Okay, and you told them that you were available to work and that you would operate any other piece of equipment?

A. I told the foreman that.

Q. Okay. But you would not operate the 980 loader?

A. That was only for one (1) hour, or something, until the guy got ready to use it. I mean, I wasn't going to get to

use it a shift, just one (1) hour, and then I'd have to go back and start eating dust again.

Mr. Nantz confirmed that the mine is a non-union operation, and that he was not aware of any MSHA inspection of the dozer after the truck backed into it (Tr. 86). Mr. Nantz confirmed that he never spoke to Mr. Tommy Henderson about the missing dozer window, and that he was unable to speak to mine superintendent Chuch Brock about the matter because he would leave work in the evening when he (Nantz) began his work shift. Mr. Nantz further confirmed that he only spoke to foremen Farley and Fisher and they indicated that they would speak to higher management about the matter. He also confirmed that he had never filed any previous safety complaints against the respondent (Tr. 90-91).

Ronnie L. Napier, testified that he has been employed by the respondent for approximately 12 years. He stated that in April, 1991, he worked the second shift from 5:00 p.m. to 3:30 a.m. with Mr. Nantz, and that he operated an endloader. Mr. Napier confirmed that he has known Mr. Nantz since grade school and that they drove to work together. He worked with Mr. Nantz on the second shift for six or seven months before Mr. Nantz left on April 16, 1991.

Mr. Napier stated that he observed that the back window on the bulldozer that Mr. Nantz operated was broken out, and that it was in this condition for "a couple of weeks or more" before Mr. Nantz left. Mr. Napier stated that he heard Mr. Nantz ask shift foreman Wayne Fisher "a couple of times" about when the window would be replaced, and he also heard him complain to Mr. Fisher about the dust. Mr. Napier stated that he noticed a difference in Mr. Nantz's appearance before and after the bulldozer window was broken out. He confirmed that Mr. Nantz appeared clean before the window was out, but he was dusty and dirty after operating the machine with the missing window.

Mr. Napier stated that he worked with Mr. Nantz on the last evening of his employment on April 16, 1991, and Mr. Nantz asked Mr. Fisher if the window had been replaced, and Mr. Fisher informed him that it had not. Mr. Nantz then asked Mr. Fisher if there was other equipment that he could operate and Mr. Fisher replied "no". Mr. Nantz then gave Mr. Fisher his telephone number and asked him to call him when the window was fixed. Mr. Nantz then left after stating that he "couldn't eat anymore dust". The window was repaired 3 or 4 evenings after Mr. Nantz left, and Mr. Napier never observed Mr. Nantz operate the dozer after the window was replaced (Tr. 94-102).

On cross-examination, Mr. Napier stated that he did not see Mr. Nantz when he returned to the job site to pick up his check on April 17, 1991, and he never heard Mr. Fisher offer to let Mr. Nantz operate a 980 loader instead of the dozer with the missing window. Mr. Napier could not state that he ever heard Mr. Fisher offer to cover the broken window area with plastic.

Harold Farler testified that he has been employed by the respondent for four years as a mechanic, truck driver, and service man fueling, oiling, and greasing equipment. He worked the same shift with Mr. Nantz during his last employment at the mine, and he rode to work with Mr. Nantz and Mr. Napier.

Mr. Farler stated that Mr. Nantz complained to him about the missing bulldozer back window and also complained that the dust was so bad that he couldn't stand it. Mr. Farler stated that Mr. Nantz also complained to Mr. Napier, and he did not know whether he complained to anyone else. Mr. Farler stated that Mr. Nantz did not appear dirtier after work when the dozer window was not broken out, but after it was broken out, Mr. Nantz had dust all over him and he appeared "muddy" (Tr. 110-115).

Mr. Farler believed that the dozer window was missing "going on the fourth week" before Mr. Nantz left the job. Mr. Farler did not ride to work with Mr. Nantz on the last evening of his employment, but he was present during that shift. Mr. Farler did not hear the conversation between Mr. Nantz and Mr. Fisher on the evening that Mr. Nantz left the job, but he did hear Mr. Nantz complain to Mr. Fisher about the missing window, and he heard Mr. Nantz tell Mr. Fisher that the dust was so bad that he could not stand it. The dozer with the missing window was operated for three more shifts before it was repaired. Mr. Farler never observed Mr. Nantz operate the dozer after the window was replaced (Tr. 116-118).

On cross-examination, Mr. Farler stated that on the evening before Mr. Nantz left the site on Tuesday, April 16, 1991, Mr. Nantz told him that he was going to work and if the window was not replaced he would seek some other work to do. Mr. Farler stated that Mr. Nantz operated the bulldozer on Monday, April 15, 1991, and that Tuesday, April 16, 1991, was the first time he did not operate it. The dozer "sat for three nights" before a new man came in to operate it.

Mr. Farler could not recall if any repairs were started on the dozer before Mr. Nantz left and he did not know if any mechanics were working on the window frame. Mr. Farler stated that Mr. Fisher told him that the two water trucks at the site "were down", but he could not recall when this occurred. Mr. Farler stated that the water trucks did not operate during April (Tr. 119-123).

Mr. Farler stated that he rode home with Mr. Fisher after work on the evening that Mr. Nantz left the mine and that Mr. Fisher told him that "he hated to let Clayton go because he was a good worker" and that after informing Lewis Hamilton, the day shift supervisor and foreman, on the radio that Mr. Nantz did not want to operate the bulldozer with the window out of it, Mr. Hamilton told him (Fisher) "to cut him loose, let him go, he couldn't let him by with that. If he did, all the other men would gripe" (Tr. 124-126).

Daniel Belcher testified that he has worked for the respondent for four years and that he works on the evening shift from 6:00 p.m. to 4:30 a.m. operating an endloader. He worked with Mr. Nantz on the same shift for approximately a year. Mr. Belcher believed that the dozer back window operated by Mr. Nantz was missing for about three weeks before Mr. Nantz left, and that Mr. Nantz complained about the missing window and the dust.

Mr. Belcher stated that he heard Mr. Nantz complain to his shift foreman Wayne Fisher about the missing dozer window and the dust, and Mr. Nantz asked Mr. Fisher when the window would be replaced. Mr. Belcher stated that on the evenings that he drove a truck when Mr. Nantz was pushing fill material with the dozer with the missing window, the conditions were dusty. Mr. Belcher stated that he asked Mr. Fisher to speak with Mr. Nantz about the dust "getting so bad" and informed him that Mr. Nantz might quit because of these conditions. Mr. Belcher confirmed that he heard Mr. Nantz speak with Mr. Fisher about the missing window on the last night that he worked and that after Mr. Fisher told Mr. Nantz that the window had not been replaced Mr. Nantz wanted to know if another machine, or work in the shop, was available and Mr. Fisher stated that "he didn't have anything". Mr. Nantz then gave Mr. Fisher his telephone number and told him to call him when the window was repaired. Mr. Belcher recalled that the window was broken out for "around three weeks or something" before Mr. Nantz's last night of employment. Mr. Belcher stated that during the time the window was broken he operated the water truck two or three times spreading one load of water in the fill area each time (Tr. 128-136).

On cross examination, Mr. Belcher confirmed that the water truck was "a pretty good sized truck", but he was not sure of the tank capacity. He also believed that Mr. Fisher operated the water truck during the time the dozer window was broken out, and he remembered only one water truck, but indicated that there may have been two. He confirmed that Mr. Fisher offered to let Mr. Nantz operate the 980 loader while he (Belcher) operated the water truck to water the fill area. Mr. Belcher "guessed" that Mr. Nantz did not want to operate the loader, but he did not know what Mr. Nantz may have told Mr. Fisher in response to his offer. Mr. Belcher stated that he had no need for the loader for two

hours, but as soon he completed the watering task, and cleaning coal, he would have resumed operating the loader for the remainder of his shift (Tr. 136-140).

Mr. Belcher could not recall any conversation between Mr. Nantz and Mr. Fisher concerning the use of plastic over the dozer back window or the use of a dust mask. He confirmed that dust masks were available on the job and that some of the drill men use them and some do not. Mr. Belcher confirmed that he does not use a dust mask because his highlift has an enclosed cab (Tr. 141).

Johnnie Moore, testified that he previously worked for the respondent from 1980 to 1991, and that he was employed as a first shift mechanic in April, 1991. He knew Mr. Nantz as an evening shift bulldozer operator. Mr. Moore stated that he performed repair work on the D8 dozer operated by Mr. Nantz and he observed that the rear window was missing but he did not know how long it was missing.

Mr. Moore stated that he was working at the mine the last evening that Mr. Nantz worked and that he overheard a conversation over the company radio in his tool truck between the night shift foreman, who he knew by his nickname "Fish", and Mr. Lewis Hamilton, and he recalled the conversation as follows (Tr. 146-147):

A. This has been over a year ago. He just told Lewis that Clayton had refused to run the dozer on the count of the window being out of it, and that if he had anything else for him to do he would do it, but he didn't have anything else for him to do. And Clayton went onto the house, I reckon, and he told Lewis that he had another man, that he could bring in another man tomorrow night to run the dozer if he wanted him to.

Q. Did Mr. Hamilton say a reply to that?

A. He told him whatever he wanted to do.

Q. Now, that night that you heard the conversation on the radio, was the back window still out of the bulldozer, at that time?

A. Yes.

Mr. Moore stated that a week or so later, his shift foreman Charles Brock instructed him to help "the window people" install a new window on the dozer that Mr. Nantz refused to operate.

Mr. Moore stated that the window frame had not been straightened out prior to this time, and that it took him an hour or two to do this work, and that the window was then installed in an hour (Tr. 147-148).

On cross-examination, Mr. Moore stated that Mr. Brock instructed him to straighten out the dozer window frame "a couple of weeks" after Mr. Nantz left the job. Mr. Moore stated that the dozer may have had a cracked door window and that a small side window was also missing. He did not know if anyone else worked on the window frame before he did, and he reiterated that he and a welder worked on it after Mr. Nantz left the job. He stated that the window was replaced by the Bell Glass Company at the mine site, and that this is the way that broken windows were always repaired. Mr. Moore stated that during the radio conversation that he heard between Mr. Fisher and Mr. Hamilton, he did not recall Mr. Hamilton say anything about firing Mr. Nantz (Tr. 149-153).

Karen Nantz, the complainant's wife, testified that her husband has worked for the respondent on several occasions, and that he last worked for the respondent from July, 1990, to April 16, 1991. Mrs. Nantz stated that her husband was always dirty when he came home from work, which was not unusual, but she noticed a change in his appearance sometime in mid-March of 1991. She stated that he would be "caked with dust", and his clothes and lunch bucket were filled with thick dust, which was "blue-Grayish" in color (Tr. 153-156).

On cross-examination, Mrs. Nantz stated that when her husband worked for other coal companies, and when he operated a drill, his appearance was not as dusty and she did not notice as much dust on his clothing. She did not know whether her husband wore a dust mask. Prior to operating the dozer with the broken window her husband was never "caked" with dust, and the dust did not cover his nose, mouth, and hair. She acknowledged that "getting dirty" was normal on strip mining jobs.

In response to questions concerning certain medical expenses incurred by her husband after he left the respondent's employment, Mr. Nantz confirmed that the medical bills shown in exhibits C-13, C-14, and C-15, were for treatment her son and daughter received as the result of an accident in a four-wheel vehicle which was not covered by insurance. She also confirmed that a bill for \$18.79 (exhibit C-6) was for medication for her husband for pleurisy (Tr. 156-162).

MSHA Special Investigator Ronnie Brock testified that he conducted the investigation of Mr. Nantz's complaint, and he confirmed that he prepared a back-pay computation based on the information supplied to him by Mr. Nantz and his wife

(Exhibit C-1) (Tr. 162-169). Mr. Brock also confirmed that he did not document all of Mr. Nantz's employments subsequent to his termination, did not verify through company records the claimed hours of regular and overtime pay by Mr. Nantz when he worked for the respondent, and that he did not ask Mr. Nantz about any unemployment payments or workers compensation benefits. Mr. Brock further confirmed that his investigation did not disclose any citations issued to the respondent as a result of the broken bulldozer window, and that there was no MSHA regulation requiring an enclosed cab for a bulldozer (Tr. 170, 182-188).

Respondent's Testimony and Evidence

Louis Hamilton testified that he is employed by the respondent as the mine superintendent and that he served in that position in April, 1991, and was familiar with the mining operation where Mr. Nantz was employed at that time. He confirmed that Henderson Farley was the second shift foreman, and after he was moved to the Leatherwood operation, Wayne Fisher became the foreman. Mr. Hamilton identified Exhibit R-5 as summaries of Mr. Nantz's earnings and hours worked during 1991, and he confirmed that the information was provided to him by the company payroll clerk. Mr. Hamilton confirmed that the normal work week is 50 hours, excluding any Saturday work, and that any work over 40 hours is considered overtime (Tr. 189-197).

Mr. Hamilton stated that the window on the bulldozer in question was broken out when a truck backed into it bending the frame. The frame needed to be straightened, and some welding work was required before the window glass could be replaced. The mechanic on the first shift would normally repair any frame damage but the glass would be replaced by a local glass company at the mine site (Tr. 198).

Mr. Hamilton stated that he was not aware of any complaints by the first shift dozer operator about the broken window, and he first became aware of Mr. Nantz's concern when he refused to operate the dozer and Mr. Fisher called him about the matter over the two-way radio. Mr. Hamilton assumed that Mr. Fisher called him on the second evening when Mr. Nantz came to the site to check about the glass and he believed that Mr. Fisher told him Mr. Nantz was quitting and going home because "he would not run the machine like that" (Tr. 199). Mr. Hamilton told Mr. Fisher "that if he wouldn't run it that we would have to get someone else, if he left" (Tr. 200).

Mr. Hamilton stated that Mr. Fisher told him that he had offered to let Mr. Nantz operate the 980 loader but that Mr. Nantz wanted his bulldozer fixed and wanted to run that machine and nothing else. Mr. Hamilton denied that he told

Mr. Fisher to fire Mr. Nantz or that he made any statement that he could not allow Mr. Nantz "to get away with something like that, because all the employees would start doing it" (Tr. 200). Mr. Hamilton stated that Mr. Nantz would not have been replaced or let go if he had operated the 980 loader, and that he would not have been fired (Tr. 201).

Mr. Hamilton stated that he has 15 years of surface mining experience, including the operation of loaders and bulldozers with open and closed cabs. In his opinion, Mr. Nantz could have avoided the dust coming in the back window by positioning himself and the machine to avoid the dust. He also did not believe that a short term, or four to six weeks exposure to dust, would be a health hazard or harmful (Tr. 203-204). He also believed that Mr. Nantz could have protected himself from the dust and he explained the loading and dumping process and the methods for operating the bulldozer (Tr. 205-207).

Mr. Hamilton stated that Mr. Nantz could have used an MSHA approved dust mask which was available at the work site, and he indicated that plastic is put on the machine back windows for protection and he did not believe that it decreases visibility at night. He stated that "we always try" to provide a light plant for illumination in the shot and fill areas (Tr. 207-208).

On cross examination, Mr. Hamilton stated that he worked at the mine on the same shift as Mr. Nantz and that he was there the entire time the window was broken out of the bulldozer in question. When asked if he ever mentioned to Mr. Nantz the ways to move the machine to avoid any dust, Mr. Hamilton responded "all operators know how to use it" (Tr. 210). In response to further questions, Mr. Hamilton reiterated that he was unaware of Mr. Nantz's complaints to Mr. Fisher until Mr. Fisher called him, and he did not know how long the window was broken (Tr. 216, 219).

James Cornett testified that in April, 1991, he was employed by the respondent as a second shift spare equipment operator and that he knew Mr. Nantz. He stated that he operated a D9 bulldozer at the "shot" area, and that he recalled that the back window of the D8 dozer was broken out during the first shift. Mr. Cornett stated that he overheard a conversation on the parking lot between Mr. Nantz and Mr. Fisher prior to a work shift. He heard Mr. Nantz complain "about wanting a window" and that Mr. Fisher offered him a loader to operate but Mr. Nantz told Mr. Fisher that he could not operate the loader. He also heard Mr. Fisher offer to install a piece of plastic in the back window, but he could not recall exactly what Mr. Nantz said about the plastic (Tr. 226).

On cross-examination, Mr. Cornett stated that he was standing close to Mr. Fisher and Mr. Nantz during their

conversation, but he could not specifically recall whether Mr. Nantz said he could not, or would not, operate the loader offered by Mr. Fisher (Tr. 227-228). Mr. Cornett could not recall the exact date of the conversation, and he indicated that it may have been 3 or 4 days before Mr. Nantz left the job. Mr. Cornett stated that Mr. Nantz also told him that he left because "the dust was bad" and Mr. Cornett confirmed that "we were working in a real dusty shot at that time" (Tr. 229).

William H. Farley testified that he is employed by the respondent as a foreman and that he was in that position when Mr. Nantz worked in April, 1991. He confirmed that he transferred from that particular job site on Friday, April 5, 1991, and reported to the "Leatherwood-Blue Diamond-Big Laurel" site on Monday, April 8, 1991, when Mr. Fisher replaced him as foreman. Mr. Farley stated that an accident involving the bulldozer in question occurred "a day before I left, which was probably on a Thursday". He stated that he operated the dozer the day he left because Mr. Nantz was off, and he also operated it the day before. When asked if the glass was completely out when he operated the dozer, Mr. Farley responded "No, it was still in there, there was one little glass on the side that was there, but the big glass in the back was still out" (Tr. 234). He described the damage to the dozer as "bent the side of the cab, just a little bit in, and knocked that one glass out" (Tr. 234-236).

Mr. Farley stated that Mr. Nantz never operated the bulldozer with the back window completely out, and that Mr. Nantz never complained to him about any dust or the missing side window (Tr. 236). He stated that Mr. Nantz would have operated the bulldozer with the damaged window frame for only one shift while he was foreman, and that the side window was the only one missing. The back window was still intact but "it might have been a little gap in one corner of it, where the cab was bent", and he did not know when the window came out (Tr. 237).

Mr. Farley stated that he observed Mr. Nantz operating the dozer with the doors open prior to the window damage on more than one occasion, "just about every day", including the winter season. Mr. Nantz told him that he had the doors open because "a lot of times he can't stand to be cooped up in that, you know, closed up and stuff" (Tr. 239-240). Mr. Farley also indicated that he has ridden with Mr. Nantz in a pickup with three people in the front seat, and that Mr. Nantz would get out and let the third person sit in the middle, or he would ride in the bed of the truck (Tr. 240).

Mr. Farley stated that Mr. Nantz never complained to him about the dozer doors or the air conditioning not working properly, and he did not know when the broken dozer window was repaired (Tr. 241). He confirmed that Mr. Nantz came to the

Leatherwood job site to speak with him about going to work for him. Mr. Farley denied that he asked Mr. Nantz to come to the site, and he stated that Mr. Nantz "just showed up one evening". He stated that Mr. Nantz informed him that he did not want to work with Mr. Fisher and "asked me if I had anything for him to do" (Tr. 242). Mr. Nantz told him that he was interested in going back to work and if there were an opening he would come back. Mr. Nantz placed no conditions on his returning to work, and he never called on him again about any openings, and Mr. Farley never contacted Mr. Nantz again. Mr. Farley stated that when Mr. Nantz was preparing to leave after the conversation, Mr. Nantz "told me that he had decided he didn't want to work anyway, that he had the company sued and stuff, or something of that nature" (Tr. 243-244).

Mr. Farley stated that he has worked in the surface mining industry for 20 years, and has served as a foreman for the respondent for eight years. He has operated open-cab equipment and did not believe that it was reasonable to believe that anyone operating in dust for a month would result in serious health consequences. Although he would not like doing it, he would not object, and he has operated a dozer with an open cab in dust but has never operated one with an enclosed cab with a missing window. He stated that dozer fans and dust masks can minimize any dust with the back window of the dozer out, and he confirmed that he has used plastic around an open cab dozer to keep warm in the winter and that it does not impair his visibility and is a common thing with open cab equipment operators. He also believed that Mr. Nantz could avoid the dust by operating his machine in different directions and he confirmed that Mr. Nantz was an experienced good operator (Tr. 244-248).

On cross-examination, Mr. Farley confirmed that he did not document or note the date that the dozer back window was broken out in the foreman's book and that his testimony is from memory (Tr. 250). He also confirmed that he never personally offered a dust mask to Mr. Nantz, and never suggested ways of avoiding the dust by positioning his dozer in a certain way (Tr. 252).

In response to further questions, Mr. Farley stated that he operated the water truck every day during the last two weeks he was on the job with Mr. Nantz. He confirmed that he considered Mr. Nantz to be "sort of a friend" and that on a couple of occasions in the past when Mr. Nantz became upset and quit his job he talked him into coming back to work. Mr. Farley stated that when the MSHA inspector took his prior statement he told the inspector that the dozer window was broken two days before he left to go to the Leatherwood site (Tr. 253).

Wayne Fisher testified that he was the night shift foremen in April, 1991, and prior to that time worked as a loader operator at the Leatherwood site for approximately six years. He

stated that he was promoted to foreman on April 8, 1991, and had not met Mr. Nantz prior to this time. He inspected Mr. Nantz's D8 dozer that evening and noticed that the back window was broken out of it. He could not recall if Mr. Nantz complained to him that evening, and he stated that "It seems like I told him that I would get it put in" (Tr. 261). The next day on April 9, Mr. Fisher spoke with the day shift boss and told him that the window needed to be replaced, and that "he told me that they was planning on putting it back in, but they was wanting to wait on a weekend, or something, when the dozer was parked, to get it in" (Tr. 262). Mr. Fisher stated that Mr. Nantz "may have said something that night. I don't remember what was said, but they may have been something said about the glass" (Tr. 262).

Mr. Fisher confirmed that Mr. Nantz worked for him from April 8, through 12, 1991, and that everyone was off on Saturday and Sunday, April 13 and 14. Mr. Nantz came back to work on Monday, April 15, and during this entire time Mr. Fisher recalled that Mr. Nantz complained one or two times that "the dust was coming in the dozer pretty bad" and that he offered to cover it with plastic and told Mr. Nantz that "I would get the glass put in today" (Tr. 263). Mr. Nantz refused his offer for the plastic which was available in the shop. Mr. Fisher stated that it was clear plastic that he could see through and that he used it to cover open dozer cabs that he has operated in the past. Mr. Fisher confirmed that the plastic would not keep the dust out of an open cab, but dusk masks were available, and the plastic did not affect visibility or the safe operation of the dozers that he has operated (Tr. 264-265).

Mr. Fisher stated that Mr. Nantz would operate the dozer in second gear at three to four miles an hour, and he was of the opinion that placing plastic over the back window would not create a safety hazard. He confirmed that dust masks are available on the job but that Mr. Nantz never asked for one. Mr. Fisher stated that Mr. Nantz operated his machine all of the time with the doors open, but he never asked to him why he did this (Tr. 266).

Mr. Fisher stated that Mr. Nantz reported for work on Tuesday, April 16, 1991, but did not work that day. Mr. Fisher explained what transpired after Mr. Nantz came to work as follows at (Tr. 267-268):

A. He come in and he told me he wasn't going to run the dozer. That if the glass wasn't put in he was going to go back home, and when I got the glass out in the dozer, he'd come back to work. And I offered to let him run a 980, and I told him, I said, "Run the 980, and I'll run the water truck and settle the dust, and then later on tonight, if I have to have the 980 to clean coal with, you can run your dozer." And he said, "No, I'm not running the 980, I'm

going home." He said, "You get the glass back in the dozer, call me, and I'll come back to work."

Q. Did you believe at that time, that you would have coal that night, in the 980 to clean?

A. No, at that time, the 92 trucks was still in the pits moving the rock off of it, and me and the day shift boss done talked about if I could clean it, clean it, and if I couldn't, we wouldn't haul the next day. It would be all right.

Q. So, there was a possibility he could have run the 980 most of that shift?

A. Yeah.

Mr. Fisher further explained that he intended to assign the normal 980 loader operator (Danny Belcher) to the water truck and that Mr. Nantz would have operated the loader at the fill area where he normally operated the dozer. The loader could be used to push fill material and Mr. Fisher believed that Mr. Nantz understood that he would be working in the fill area and not the shot area because he worked the fill all of the time and that was his job (Tr. 269).

Mr. Fisher stated that after his conversation with Mr. Nantz on April 16, he called Superintendent Hamilton and told him that Mr. Nantz refused to operate the dozer and was going home. Mr. Fisher stated that Mr. Hamilton did not say that he should fire Mr. Nantz. Mr. Fisher recalled that Mr. Hamilton stated "All right, just do what you have to do. If they're going to work, they're going to work, you know, if they ain't we're just going to have to get someone that will work" (Tr. 269-270).

Mr. Fisher stated that Mr. Nantz next returned to the mine on Wednesday, April 17, 1991, which was payday, and he recounted the following conversation with Mr. Nantz (Tr. 270-271):

A. Well, I give his check to him and he asked me if I got the glass back in his dozer. I told him, "No, it wasn't in." He said, "Well, I'm going back home, when you get it put in, call me, I'll come back to work." I said, "Clayton, you know, I've got to run that dozer, and if you want to run it, we'll work it, if your don't, I'll get somebody up her that will". And I think that was about all that was said that night, and he left, and then I hired another man on the dozer.

Q. Was the decision to replace him, basically, left up to you?

A. Yeah.

And, at (Tr. 286):

MR. FISHER: He told me he was going home, and I said, "Well, if you're going to go home, I have to take it that you're quitting your job, and I'll have to get somebody, you know, in here on the dozer."

Mr. Fisher stated that everyone was off for the holidays from Thursday, April 18, 1991, until April 22, 1991, and that the dozer window was replaced on Thursday and Friday, April 18 and 19 (Tr. 272). He confirmed that the new dozer operator Terry Doolin operated the dozer for one shift before the window was replaced and he did not complain about any dust (Tr. 273).

Mr. Fisher stated that from April 8, to April 16, 1991, he operated one of the smaller water trucks and watered the fill area when it was dusty, and he confirmed that a larger capacity truck was not used because of a brake problem (Tr. 273-275). Mr. Fisher also confirmed that dust masks were available for the asking, and that during the time Mr. Nantz worked for him he never complained to him about the dozer doors not closing or staying locked, inoperative fans, or that the air conditioning was not working (Tr. 276).

Mr. Fisher stated that he spoke to the first shift foreman after April 9, about fixing the dozer window and mentioned it to him two or three times and that the foreman told him that "We're going to fix it, it's going to be fixed" (Tr. 277). Mr. Fisher could not recall if anyone was working on the window frame during this time, and he confirmed that there was no mechanic on his shift (Tr. 278). He stated that Mr. Nantz did not request to operate other equipment when he returned to the mine on April 17, and that he would not have replaced Mr. Nantz if he had agreed to operate the 980 loader (Tr. 281).

On cross-examination, Mr. Fisher stated that after Mr. Nantz left the mine of April 16, he had to take a D9 dozer out of the shot area and use it in the fill area, and he confirmed that the D9 had all of the windows in place, but that it was a different machine. Mr. Fisher also confirmed that he told Mr. Nantz that he would let him operate the loader and then operate the dozer later on in the shift "If I needed to, I would let him run the loader all night, if I didn't have coal to clean" (Tr. 283, 287).

Terry Doolin testified that he started working for the respondent in April, 1991, a couple of days before Easter, as a D8-L Dozer operator, and he confirmed that the dozer did not have a back window (Tr. 293). He stated that he operated the dozer in the fill when he first got the job, and while it was dusty he did not have any problem turning the dozer around in the fill area.

He stated that he operated the dozer with the doors closed, that the locks were operable, the lights worked, and that he did not turn on the fan or air conditioner (Tr. 293-294). He confirmed that there was a "light plant" at the fill area, and that he minimized the dust coming through the back window by turning the dozer around to keep the dust from coming in the back window (Tr. 295). Mr. Doolin did not believe that the fill area was dustier than any normal strip mining operation, and that he sometimes waited after the trucks dumped so that the dust could clear before he started pushing the fill (Tr. 296). He confirmed that the dozer window was installed within two or three shifts after he initially operated the machine (Tr. 297).

Findings and Conclusions

The Timeliness of the Complaint and Amended Complaint, and the Denial of the Respondent's Motion for a Continuance of the Hearing.

The Secretary's initial complaint of January 31, 1992, included a proposal for an order assessing an appropriate civil penalty against the respondent for a violation of section 105(c)(1) of the Act. The Secretary stated that the complaint would be amended to reflect the amount of the penalty and the criteria used in determining the penalty. The respondent's initial answer to the complaint, filed through counsel Lloyd Edens, included an affirmative defense that the complaint was not timely filed within the time limitations found in sections 105(c)(2) and (3) of the Act, and Commission Rules 40(a) and 41(a), 29 C.F.R. § 2700.40(a) and 41(a).

On March 24, 1992, I issued a Notice of Hearing scheduling the case for hearing on July 14, 1992. On June 16, 1992, the Secretary filed a motion to amend the complaint to include a proposed civil penalty assessment of \$8,000, for the alleged discriminatory violation. In filing the motion, the Secretary's counsel stated that she "has contacted Lloyd Edens, counsel for the respondent, regarding this motion, and Mr. Edens stated he has no objection thereto". Under the circumstances, and absent any objection from respondent's counsel, I granted the Secretary's motion to amend the complaint.

Respondent's counsel Edens withdrew from the case on July 1, 1992, and his motion for a continuance of the hearing in order to obtain substitute counsel was granted, and the case was rescheduled for hearing on August 12, 1992. On July 17, 1992, counsel J. P. Cline III, an associate of Mr. Edens, entered his appearance as counsel for the respondent. Mr. Cline filed an answer to the amended complaint asserting inter alia that the amended complaint was untimely.

On August 7, 1992, five days before the scheduled hearing, counsel David and Marcia Smith, entered their appearance and notified me that they were retained to represent the respondent. At the same time, counsel filed a motion for a continuance of the hearing until sometime in September, 1992, so that they could prepare for the hearing. In view of the pending hearing, the fact that it had been previously continued at the request of the respondent, the substitution of three different attorneys, and in order to preclude any additional delay, the motion for a continuance was denied and the matter proceeded to trial on August 12, 1992.

During opening remarks at the hearing, counsel Marcia Smith suggested that the respondent may have been prejudiced by my denial of the motion to continue the hearing, and she indicated a desire to preserve my ruling for the record (Tr. 5). Counsel asserted that at least two former employees, "the foreman that was involved and the mechanic that did the repair work", identified as "chuck and somebody else", were out of the area and could not be found to testify (Tr. 6, 7). Counsel further asserted that the mine superintendent would testify as to any prejudice to the respondent as the result of the absence of two key witnesses and the fact that they could not be located (Tr. 9).

In his posthearing brief, and citing transcript pages 208-209, counsel David Smith asserts that mine superintendent Lewis Hamilton testified that Chuck Brock was the first shift foreman in charge of bulldozer repairs and that his whereabouts were unknown at the time of the hearing, since he had moved to California (Brief, pgs. 12-13). At page 27 of his brief, Mr. Smith states that "Since the mechanic in charge, Chuck Brock, had left the state and was not available to testify at the hearing on behalf of Nally & Hamilton, it is impossible for Nally Hamilton to know at this point in time why the window was not fixed on the weekend of April 12, 1991, rather than on the following weekend". Finally, at page 41 of the brief, counsel asserts in part that in view of the Secretary's delay in bringing the complaint, Mr. Nantz's backpay claim should be denied.

I have reviewed the testimony of Mr. Hamilton, and while it is true that he testified that Mr. Brock was no longer employed by the respondent and had moved to California, Mr. Hamilton further stated that "I think he came back in this area in the last week", (emphasis supplied), and that it was rumored that "he's gone to work for Clover Fork" (Tr. 209). The record reflects that Mr. Nantz worked for the Cloverfork Mining and Excavation Company after he left the respondent's employ, and it would appear to me that this company would have been conveniently located to the respondent had it endeavored to pursue the rumor that Mr. Brock had returned from California and was working there, particularly since Mr. Hamilton believed that Mr. Brock

had returned to the area at least a week prior to the hearing. Thus, it would further appear to me that Mr. Brock may have been available for testimony had the respondent made some attempts to locate him, or at least made an effort to obtain his deposition. The respondent apparently did neither.

The respondent's suggestion that Mr. Brock was the only witness who could testify as to why the broken window in question was not repaired sooner is not well taken. I initially take note of the fact that Mr. Brock worked the first day shift, and that Mr. Nantz operated the bulldozer with the missing window on the second, or night shift. Insofar as any repairs to the bulldozer are concerned, superintendent Hamilton and second shift foremen William Farley and Wayne Fisher all testified for the respondent, and they all presented testimony regarding the condition of the broken window and framework, and the efforts made by the respondent to make the necessary repairs. First shift mechanic Johnny Moore, who was subpoenaed to testify for the Secretary, and who was cross-examined by counsel Smith, testified about the repairs which he and a welder named "Wayne" made to the window frame, as well as when the window glass was replaced. Under the circumstances, I conclude and find that the absence of Mr. Brock was not critical or prejudicial to the respondent's case. The respondent could have called the welder who assisted mechanic Moore, as well as the glass contractor who installed the dozer window, but it did not do so.

In view of the foregoing, and after further consideration of the respondent's assertions concerning the claimed prejudicial denial of its motion to continue the hearing, I conclude and find that the respondent was not prejudiced and that its counsel had a full and fair opportunity to defend the respondent's position through the testimony of all of the knowledgeable witnesses who appeared at the hearing. Indeed, the record attests to the fact that counsel Smith was well-prepared, conducted a thorough and competent examination of all witnesses, and submitted a brief which I believed reflects his grasp of the issues as well as his knowledge of the applicable case law.

With regard to the alleged failure by the Secretary to timely file the complaint, I take note of the fact that section 105(c)(3) of the Act requires the Secretary to proceed with expedition in investigating and prosecuting a miner's discrimination complaint. Sections 105(c)(2) and (c)(3), require the Secretary to act within the following time frames:

1. Commence the investigation of the complaint within 15 days of its receipt from the miner.
2. Within 90 days of the receipt of the complaint, notify the complaining miner of any determination as to whether a violation has occurred.

3. If a determination is made that a violation has occurred, immediately file a complaint with the Commission.

The Commission's Rules, at Part 2700, Title 29, Code of Federal Regulations, implement the statutory time provisions. Rule 40(a), 29 C.F.R. § 2700.40(a) requires the Secretary to file a complaint after an investigation if she finds that a violation has occurred. Rule 41(a), 29 C.F.R. § 2700.41(a), requires the Secretary to file the complaint within 30 days after her written determination that a violation has occurred.

The record in this case establishes that Mr. Nantz's employment with the respondent ceased on or about April 16, 1991, and that he subsequently went to MSHA's Harlan, Kentucky field office where he gave his initial statement of alleged discrimination on May 29, 1991 (Nantz Deposition of June 15, 1992, and Deposition Exhibit No. 2). MSHA Special Investigator Brock's investigation of the complaint followed shortly thereafter, and the Secretary's counsel confirmed that the investigation was completed on October 1, 1991, and that the Secretary made her determination that a complaint should be filed on January 15, 1992 (Tr. 7-8). The complaint was received by the Commission on January 31, 1992.

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

In Joseph W. Herman v. Imco Services, 4 FMSHRC 2135, 2139 (December 1982), the Commission upheld a dismissal of a miner's complaint filed 11 months after the alleged act of discrimination. Although the Commission found no mitigating circumstances excusing the delay, and found that the record was "replete with examples of faded memories as well as the unavailability of potentially relevant evidence", it also suggested that any mine operator prejudice resulting from lost evidence, faded memories, and witnesses who have disappeared must be balanced against the vindication of a complainant's rights in a particular case.

In Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (January 1984), the Commission found that the miner's filing of his complaint 30-days out of time was excusable because he was unaware of the filing time limitations and the mine operator failed to demonstrate the kind of legal prejudice recognized in Joseph W. Herman v. Imco Services, supra, namely, tangible evidence that has since disappeared, faded memories, or missing witnesses. See also: Bruno v. Cyprus Plateau Mining Corp.,

10 FMSHRC 1649 (November 1988) aff'd., No. 89-9509 (10th Cir., June 5, 1989) (unpublished). I take note of the fact that all of these "time limitation" cases concerned untimely delays by pro se complaining miners, while the instant proceeding involves alleged untimely delay by the Secretary and not by Mr. Nantz.

In Secretary of Labor, MSHA ex rel Donald R. Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (June 1986), the Commission reversed a judge's decision dismissing a Secretarial complaint filed with the Commission more than two years after the miner's complaint was filed with MSHA. Recognizing the fact that the Secretary seriously delayed the filing of the complaint, the Commission nonetheless held that in the absence of any showing that the respondent mine operator was prejudiced by the delay, the complaint should not have been dismissed. In speaking to the requisite time frames found in section 105(c) of the Act, the Commission stated as follows at 6 FMSHRC 908:

While the language of section 105(c) leaves no doubt that Congress intended these directives to be followed by the Secretary, the pertinent legislative history nevertheless indicates that these time frames are not jurisdictional:

The Secretary must initiate his investigation within 15 days of receipt of the complaint, and immediately file a complaint with the Commission, if he determines that a violation has occurred. The Secretary is also required under section 105(c)(3) to notify the complainant within 90 days whether a violation has occurred. It should be emphasized, however that these time-frames are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations. (Emphasis added).

S. Rep. No. 181, 95th Cong., 1 Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2 Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 624 (1978) ("Legis. Hist. "). Plainly, Congress clearly intended to protect innocent miners from losing their causes of action because of delay by the Secretary. (Emphasis added).

Related passages of legislative history make equally clear, however, that Congress was well aware of the due process problems that may be caused by the prosecution of stale claims. See Legis. His. at 64 (discussion of

60-day time limit for the filing of miner's discrimination complaint with the Secretary). The fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend against the claim. (Emphasis added).

Accordingly, we hold that the Secretary is to make his determination of whether a violation occurred within 90 days of the filing of the miner's complaint and is to file his complaint on the miner's behalf with the Commission "immediately" thereafter -- i.e., within 30 days of his determination that a violation of section 105(d)(1) occurred. If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay. Cf. David Hollis v. Consolidation Coal Co., 6 FMSHRC 21, 23-25 (January 1984), aff'd. mem., 750 F.2d 1093 (D.C. Cir. 1984) (table); Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8, 12-14 (January 1984).

As noted earlier, the record reflects that Mr. Nantz filed his initial complaint with the Secretary well within the 60-day time frame found in section 105(c)(1) of the Act, and I find no evidence that the Secretary unduly delayed the initiation of an investigation of Mr. Nantz's complaint after it was filed, or that the four months that it took to complete the investigation constituted an unreasonable delay. Further, once the Secretary made a determination on January 15, 1992, that a complaint should be filed, it was filed January 31, 1992, well within the 30 days provided by Commission Rule 41(a).

After careful consideration of the entire record in this case, I find no persuasive evidence to establish that the respondent has been adversely affected or prejudiced by any secretarial delays in this case. Any delays in the case after the case was docketed with the Commission came about as a result of three changes of attorneys representing the respondent, and one hearing continuance granted at the respondent's request due to a change in counsel. Insofar as any prejudice to the respondent as a result of delay by the Secretary in filing the complaint is concerned, I take particular note of the fact that prior to, and up to the day of the commencement of the hearing, none of the attorneys representing the respondent advanced any arguments or claims that the delay prejudiced the respondent's ability to defend itself because of the unavailability of critical witnesses, loss of evidence, or faded memories.

In my view, the respondent's present counsel did a commendable job in defending the discrimination complaint, notwithstanding my denial of his motion for a continuance of the hearing. The hearing transcript record of the testimony of all of the witnesses who had knowledge of all relevant and material facts incident to the complaint, attest to the fact that the respondent's counsel had a full and fair opportunity to present his case, and to test the case made by the Secretary on behalf of Mr. Nantz. Under these circumstances, the respondent's suggestions that it has been prejudiced by the Secretary's delay in filing the complaint ARE REJECTED, and its requests to dismiss the complaint and the proposed civil penalty assessment on this ground ARE LIKEWISE REJECTED AND DENIED.

With regard to the respondent's assertions concerning the delay by the Secretary in filing the amended complaint, I take note of the fact that the complaint was simply amended to include a proposal for a specific amount of the proposed penalty, and to inform the respondent of the particular statutory penalty criteria followed by the Secretary in support of the proposed penalty. The respondent was previously informed by the Secretary in her initial complaint that an amendment would be forthcoming, and it would appear from the record that the amended complaint was unopposed by counsel of record at the time of filing.

It is well-settled that administrative pleadings may be liberally construed and easily amended. National Realty and Construction Company v. Occupational Safety and Health Review Commission, 489 F.2d 1257 (D.C. Cir. 1973); Secretary of Labor v. United States Steel Corporation, 6 FMSHRC 1908, 1916 (August 1984). Further, given the fact that civil penalty assessment proposals by the Secretary are considered de novo by the presiding judge, and the judge is not bound by the Secretary's proposed penalty, I am not persuaded that the respondent has been prejudiced by the amendment in question, and any claims to the contrary ARE REJECTED AND DENIED.

Fact of Violation

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 (2d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511

(November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

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

Protected Activity

It seems clear that Mr. Nantz had a right to make safety or health complaints about the bulldozer that he was assigned to operate, and that these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him. 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 foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. 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).

Complainant's Safety Complaint Communication to the Respondent

In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate any safety complaints to mine management in order to afford the operator with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedgmer et al. v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Simpson v. Kenta Energy,

Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097.

Mr. Nantz testified that during the time Mr. Farley served as his foreman, he complained to Mr. Farley at least two or three times about the broken window and the dust and that Mr. Farley assured him that it would be repaired (Tr. 18). Mr. Farley was aware that the dozer had been damaged a day or two before he left the job to take another assignment, but he denied that Mr. Nantz ever complained to him about the broken window or the dusty conditions. Mr. Farley also denied that Mr. Nantz operated the dozer with the rear window completely out during the two days immediately following the damage to the dozer. Mr. Farley stated that he (Farley) operated the dozer for these two days before he left the job, and although he responded "no" to the question "was the glass completely out" (Tr. 234), he went on to explain that "there was one little glass on the side that was there, but the big glass in the back was still out" (Tr. 234). In response to a question concerning the damage sustained by the dozer, Mr. Farley stated "Bent the side of the cab, just a little bit in, and knocked that one glass out" (Tr. 234). He later testified that the side window was knocked out, but "the whole back window was still there. Just might have been a little gap in one corner of it, where the cab was bent" (Tr. 237).

I find Mr. Farley's testimony concerning the condition of the dozer back window after the collision with the truck to be contradictory. Mr. Nantz's testimony that the back window was completely knocked out by the collision is consistent with the testimony that he gave when his prehearing deposition was taken on June 15, 1992. He then testified that "I noticed my window gone" and that the window area "was all open; just gougey glass all around the back where the truck had splattered it when it run into the dozer", and he drew a diagram of the missing back window area and explained it further (Deposition Tr. 22-25; Exhibit #1). All of the other hearing witnesses who knew about the window damage, with the exception of Mr. Farley, did not contradict Mr. Nantz's assertion that the rear window of the dozer was knocked out as a result of a truck backing into it. In fact, they confirmed it.

Mr. Nantz further testified that after Mr. Fisher replaced Mr. Farley as his foreman, he complained to Mr. Fisher about the broken window and his dust problems "on a regular basis every other day or so" (Tr. 20). Mr. Nantz's complaints to Mr. Fisher were corroborated by Mr. Napier and Mr. Belcher, as well as respondent's witness James Cornett, and Mr. Fisher himself. Superintendent Hamilton confirmed that he was informed of

Mr. Nantz's complaint by Mr. Fisher at the time Mr. Nantz initially refused to operate the dozer.

I conclude and find that Mr. Nantz timely communicated his safety complaints to mine management and specifically informed management of his health and safety concerns with respect to the hazardous and dusty working conditions caused by the missing rear window of the dozer which he was assigned to operate, and that management had a reasonable opportunity to address these concerns and take the necessary corrective action. I further conclude and find that Mr. Nantz's safety and health complaint communications to management met the requirements enunciated by the Commission in Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982); Secretary ex rel John Cooley v. Ottowas Silica Company, 6 FMSHRC 516 (March 1984); Gilbert v. Sandy Fork Mining Company, supra; Sammons v. Mine Services Co. 6 FMSHRC 1391 (June 1984).

The Complainant's Work Refusal

When a miner has expressed a reasonable, good faith fear of a safety or health hazard, and had communicated this to mine management, such as a foreman, management has a duty and obligation to address the perceived hazard or safety concern in a manner sufficient to reasonably quell his fears, or to correct or eliminate the hazard. Secretary v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983); Gilbert v. Sandy Fork Mining Company, 12 FMSHRC 177 (February 1990), on remand from Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), rev'g Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987).

The focus in work refusal cases is the complaining miner's belief that a hazard exists, and the critical issue is whether or not that belief is held in good faith and is a reasonable one. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983); Miller v. FMSHRC, 687 f.2D 1984 (7th Cir. 1982). In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. bush v. Union Carbide Corp. 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co. 5 FMSHRC 1529, 1533-34 (September 1983); Haro v. Magma Cooper Co., 4 FMSHRC 1935, 1944 (November 1982); Robinette, supra, 3 FMSHRC at 810. Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066 (July 1986). The Commission has also explained that "good faith belief simply means honest belief that a hazard exists". Robinette, supra at 810.

The respondent maintains that the Secretary has failed to prove that it caused a work condition which presented an intolerable hazard to Mr. Nantz's health. The respondent asserts

that it repaired the dozer window in a much shorter period of time than claimed by Mr. Nantz at the hearing where he testified that he had to operate the dozer without the back window "going into the fourth week". The respondent asserts that this testimony was virtually parroted, "going into the fourth week", by Mr. Nantz's witnesses, but that when pinned down to the actual sequence of events, Mr. Nantz agreed that in an earlier deposition he had testified that the window was only out two or three days before foreman Farley left the job, and at the hearing he gave vague testimony that the window had been broken over a period ranging from two to seven days.

The respondent further maintains that it has established through the testimony of foreman Farley and company business records that it was two days, Thursday and Friday, April 4 and 5, 1991, that the window was out before Mr. Farley left the job, and that foreman Fisher's first day on the job was Monday, April 8, 1991. Respondent points out that it is undisputed that Mr. Nantz did not work on Friday, April 5, 1991, and that there was no work on the weekend of April 6 and 13, 1991. Under these circumstances, the respondent concludes that Mr. Nantz had to operate the dozer without the back window seven (7) working days, Thursday, April 4, 1991, Monday through Friday, April 8 through 12, 1991, and Monday, April 15, 1991, prior to his leaving work on April 16, 1991. Respondent further argues that it is undisputed that the dozer back window was replaced during the period Thursday, April 18, 1991, through Sunday, April 21, 1991, during which time the job was shut down. Under these circumstances, respondent concludes that Mr. Nantz would have only had to work two more days, Tuesday and Wednesday, April 16 and 17, 1991, with the back window out had he chosen not to leave the job.

The respondent asserts that the broken dozer window was repaired within ten working days of the accident which caused the damage, and that its witnesses explained that its mechanics had to do certain frame work so that a new window would fit, that people from a glass company put the window in, and that this work needed to be done on a weekend when the dozer was not operating.

The respondent argues that it attempted to alleviate the dust problem by offering to put a clear plastic material over the exposed back window to reduce the amount of dust, took measures to keep the fill area where Mr. Nantz worked watered to keep the dust down, and had dust masks available for Mr. Nantz's use while operating the dozer. Respondent also suggested that Mr. Nantz could have avoided the dust by availing himself of alternate methods of operating the dozer to reduce the dust exposure. However, since Mr. Nantz refused the offer of plastic covering, chose not to wear a face mask, and made no attempts to avoid the dust by maneuvering the dozer in different directions away from the dust, or turning on his air conditioning blowers, the

respondent concludes that his refusal to operate the machine was unreasonable and lacking in good faith, and that any health hazard that may have been caused to him as a result of operating the dozer without the back window intact was the result of his own stubborn refusal to attempt to do anything to alleviate the problem.

The respondent is correct in its assertion that Mr. Nantz's testimony concerning the duration of the missing back window was equivocal. However, having viewed Mr. Nantz during the course of the hearing, I find him to be a credible witness and I have no reason to believe that he lied or deliberately attempted to misstate the facts. His deposition testimony reflects that Mr. Nantz has a ninth grade education, and he candidly stated during the hearing that he did not document the specific number of days the dozer window was out and that he was not positive about the number of days which passed from the day the damage occurred and the last day he worked.

The respondent's assertion that Mr. Nantz's witnesses "parroted" his "going into the fourth week" testimony" is not well taken. The only witness who made that statement was Mr. Farler (Tr. 115). Mr. Napier testified that "a couple of weeks or more" passed from the time the window was broken out until the last day Mr. Nantz was on the job (Tr. 98). Mr. Belcher testified that he did not know when the window was knocked out, and was not sure of the elapsed time, but estimated it at "around three weeks or something" (Tr. 130). Mr. Moore did not know when the window was knocked out, had no idea how long it was out before it was repaired, and stated that "it had been out for awhile" (Tr. 145).

Superintendent Henderson did not believe the window was broken for four weeks, but he confirmed that he did not know how long it had been broken (Tr. 219). Mr. Henderson confirmed that he was not involved in the repair of the window, but he explained that the first shift foreman or mechanic would have made the repairs, and the repairs would have entailed the straightening and welding of the frame to keep the window from falling out (Tr. 198). Foreman Farler did not know when the window was repaired, and as stated previously, he testified that it was damaged a couple of days before he left the job (Tr. 241). Foreman Fisher, who reported to the job after the window was damaged, testified that he had no mechanic assigned to his second shift for repairs, but that he spoke to the first shift foreman about fixing the window two or three times, and the foreman told him each time that "We're going to fix it, it's going to be fixed". Mr. Fisher could not remember whether any repair work was being done on the window frame during this time. He confirmed that the mine was on holiday from Thursday, April 18, through Sunday, April 21, 1991, and that the window was replaced

on Thursday and Friday, April 18 and 19, and that it was in when work resumed on Monday, April 22, 1991 (Tr. 272, 282, 284).

First shift mechanic Johnnie Moore testified that "a week or so" after Mr. Nantz left the job, his shift foreman (Brock) instructed him to assist "the window people" in installing a new dozer window, and that he and a welder repaired the window frame which had not previously been straightened. Mr. Moore stated that it took "an hour or two" to do the repair work, and an hour to install the window.

After careful consideration of all of the testimony and evidence, I conclude and find that approximately 13 or 14 days passed from the time the dozer window in question was damaged when a truck backed into it on or about April 3 or 4, 1991, until Mr. Nantz left the job site on Tuesday, April 16, and again on Wednesday, April 17, 1991, and that approximately 15 days passed from the time the window was initially damaged until it was ultimately repaired on or about April 18 or 19, 1991. I further conclude and find that during all of this time, little or no work was done to repair the dozer window frame or to replace the missing window.

Although the respondent's assertion that its mechanics had to do certain frame work so that a new window would fit and that people from a glass company put the window in is true, I am not convinced that this work needed to be done on a weekend when the dozer was not operating. As a matter of fact, the mine was down for the weekends of April 6 and 13, 1991, and no work was done to repair the broken window. Under the circumstances, and given the fact that there is no evidence of any repair work to the dozer during at least two successive weekend periods when the mine was down and the dozer was not operating, I find the respondent's assertion that it could only repair the dozer on a weekend when the dozer was not operating to be less than credible. Further, the respondent's suggestion that the repair work necessary to replace the missing window was some monumental task is also lacking in credibility, and the un rebutted and credible testimony of the mechanic who did the work establishes that the repairs were made and the window was replaced in three hours during a normal working shift.

Respondent asserts that all of the other witnesses who were questioned concerning whether, in their opinion, operating this bulldozer without the back window for a limited period of time, even up to a month, would constitute a hazard to a miner's health, unanimously said "no." Respondent suggests that this is relevant to the issue and good faith of Mr. Nantz's belief to the contrary. Respondent further submits that it is also relevant that the dozer operator on the first shift did not complain or see fit to quit, and that Mr. Doolin, who operated the dozer on April 16 and 17, 1991, before it was repaired, testified that he

did not have any problems from the dust because he manuevered the dozer to avoid the dust.

I have carefully reviewed the testimony of all of the witnesses in this case, including the five witnesses called by the respondent (superintendent Hamilton, foremen Farley and Fisher, and dozer operators Cornett and Doolin). Except for Mr. Hamilton and Mr. Farley, none of the other witnesses called by the respondent, or the four witnesses called for Mr. Nantz, were asked or testified about their opinion concerning the operation of a dozer in a dusty environment with the back window missing.

Superintendent Hamilton was of the opinion that a "short term, four to six weeks" exposure to dust while operating a dozer with a missing back window would not cause him a health problem (Tr. 203-204). Foreman Farley did not believe that he would suffer serious consequences from operating a dozer in heavy dust for a period of one month, and although he stated that he would not object to doing so, he indicated that he would not like it (Tr. 244-245). Further, although Mr. Farley stated that he has operated a dozer with an open cab in dust in the past, the confirmed that he had never operated a dozer with a closed cab with the back window broken out (Tr. 246).

The respondent's reliance upon the opinions of Mr. Hamilton and Mr. Fisher in support of its assertion that it is relevant to the question of Mr. Nantz's reasonable good faith refusal to operate the dozer is rejected. The critical question here is whether or not Mr. Nantz reasonably and honestly in good faith believed that the operation of a dozer with a missing back window would be injurious and hazardous to his health and safety because of the dust to which he was subjected and exposed to because of the missing window, and whether or not Mr. Nantz reasonably and in good faith believed that he would be required to operate the dozer with the missing back window at the time of his initial work refusal on Tuesday, April 16, 1991, and his subsequent work refusal of Wednesday, April 17, 1991.

The respondent's suggestions that the use of plastic material is routinely used to keep out cold and dust in dozers with open cabs, that its use does not impair visibility, and that Mr. Nantz's testimony that it does impair his visibility was contradicted by virtually every witness who was questioned about it, must be viewed in context, and I have given it little weight. Except for Mr. Nantz, none of the four witnesses called by the Secretary, which included two endloader operators, a mechanic, and an equipment serviceman, testified about the use of plastic coverings. Dozer operator Cornett, called by the respondent as a witness, said nothing about the use of plastic coverings or whether or not it might impair his visibility.

The only witnesses who testified about the use of the plastic material were superintendent Hamilton, and foremen Farley and Fisher. Mr. Hamilton simply stated that plastic material has been placed on the back window of lifts for protection, and he did not believe that it decreased visibility at night because extra illumination is provided in the shot and fill areas (Tr. 207-208).

Foreman Farley testified that he has used plastic coverings on open cab equipment that he has operated "to keep the air knocked off" in the winter time in order to stay warm, and that this was a common practice for open cab equipment operators (Tr. 247). Mr. Farley conceded that Mr. Nantz would have a dust problem if the front window of his dozer were missing (Tr. 256-257).

Foreman Fisher testified that he used plastic covering while operating open cab dozers during the winter time, and that the plastic was wrapped around the opened cab to keep the heat generated by the radiator inside the cab. When asked if the plastic would keep the dust out, he responded "No, it wouldn't keep it out, but it would help, I mean, I never didn't even think about that dust really. . .if the dust got too bad I always got a rag or something and tie over my mouth, or nose, or get me a dust mask or something". Mr. Fisher did not believe that the plastic impeded his visibility (Tr. 265).

There is no evidence that Mr. Nantz's foreman, or the mine superintendent, offered to show Mr. Nantz how to maneuver his dozer to avoid the dust, nor is there any evidence that the respondent required its personnel to use dust masks while working in dusty areas. Highlift operator Belcher testified that some drill operators use dust masks, and others do not, and that he does not use one because his machine has an enclosed cab. With respect to the use of plastic coverings for equipment with open cabs, I take note of the fact that the dozer that Mr. Nantz was assigned to operate had an enclosed cab, and I believe that it is was not unreasonable for Mr. Nantz to expect such a piece of equipment to be maintained in a serviceable condition, including the timely repair or replacement of a broken window that is obviously intended to maintain the cab area as an enclosed working environment.

I am not persuaded that the use of the plastic covering was routinely used by the respondent as a specific preventive measure against dust exposure. The respondent's testimony reflects that plastic coverings are sometimes used by operators in the winter time to keep their open cab areas warm. Mr. Nantz was operating the dozer during the month of April and it had an enclosed cab area. Nor am I persuaded that the respondent's available water

trucks adequately kept the fill area wet enough to control the dust generated by the trucks working in the fill area where Mr. Nantz was required to operate the dozer with the missing rear window. In the final analysis, had the respondent addressed Mr. Nantz's safety and health complaints concerning the missing window and the resulting dust exposure in a more timely fashion by replacing the window, or taking the dozer out of service until it was repaired, there would be no need for makeshift coverings, dust masks, water trucks, or the maneuvering of the dozer to avoid the dust.

I conclude and find that the respondent failed to reasonably and timely respond to Mr. Nantz's communicated safety and health complaints with respect to the hazardous dust conditions to which he was exposed as a result of the missing rear window of the dozer that he was assigned to operate. Although the evidence clearly establishes that Mr. Nantz communicated his complaints to foreman Fisher, and that Mr. Fisher assured him that the window would be repaired each time Mr. Nantz complained about it, Mr. Fisher reacted by simply speaking to the day shift foreman two or three times about fixing the window. Rather than insuring that repairs were made timely, Mr. Fisher simply accepted the day foreman's assurance that it would be done.

In my view, since Mr. Fisher was Mr. Nantz's first-line supervisor, he had a duty and obligation, as part of his supervisory and managerial responsibilities, to respond in a more positive manner by insuring that the window was promptly repaired, or by tagging or removing the dozer from service until it was repaired. Instead of doing this, Mr. Fisher played a passive role, even though the means of addressing Mr. Nantz's health and safety concerns were directly within his supervisory and managerial control. Under the circumstances, I conclude and find that shifting the burden to Mr. Nantz by expecting him to protect himself from the dust hazards to which I believe he was exposed to, asking him to accept a makeshift plastic covering, expecting him to shake the dust from the covering with his hands while at the controls of his dozer, using his air conditioning blower, wearing a dust mask, or expecting him to maneuver his dozer in different directions to avoid the dust, were unacceptable and unreasonable responses to Mr. Nantz's safety and health concerns.

Although the respondent may not reasonably be expected to provide an absolutely clean working environment free of any dust, on the facts of this case where it seems clear to me that the source of the dusty conditions which Mr. Nantz had to endure while operating the dozer with a missing back window, was within the direct control of the operator, and were easily correctable, I cannot conclude that Mr. Nantz acted unreasonably when he refused to operate the dozer until the window was replaced. In view of all of the foregoing, and after careful consideration of

all of the credible testimony and evidence in this case, I conclude and find that Mr. Nantz's refusal to operate the dozer with the missing back window on the two final days of his employment with the respondent was reasonable, and that his decision in this regard was prompted by his safety and health concerns related to the hazardous exposure to dust resulting from the missing window, and a reasonable good faith belief that to continue to operate the dozer in the condition that it was in would place him at risk. I further conclude and find that Mr. Nantz's work refusals constituted protected work refusals pursuant to the Act.

The Alternate Work Refusal

The respondent argues that inasmuch as Mr. Nantz refused Mr. Fisher's offer to operate a loader in lieu of the dozer with the missing back window on the evening of April 16, 1991, and since Mr. Nantz did not contend that he was unable to operate the loader, or show that the loader was not safe to operate, his refusal to operate the loader was unreasonable. The respondent concludes that Mr. Nantz left work after refusing to operate the loader because he believed that he would have to go back to operating the dozer.

In support of its position, the respondent emphasizes the fact that both Mr. Fisher and Mr. Hamilton testified that had Mr. Nantz agreed to operate the loader he would not have been let go. The respondent points out that Mr. Nantz refused to operate the loader on April 16, 1991, and that when he returned to the mine on April 17, 1991, he simply came back to get his paycheck and find out if the dozer window had been repaired and to leave his phone number so that Mr. Fisher could call him when it was repaired. The respondent asserts that Mr. Nantz made no offer whatsoever to do other work that day and simply left the job site.

Based on Mr. Nantz's refusal to operate the loader on April 16, 1991, and his failure to report for work on April 17, 1991, showing up only to find out if the dozer had been repaired and to leave his phone number, the respondent concludes that it had sufficient reason not to call Mr. Nantz back to work after the window was repaired and to consider that he had voluntarily quit his job. The respondent suggests that since there were two incidents involved in this case, namely, Mr. Nantz's refusal to operate his own dozer, and his refusal to operate the loader offered to him, there may have been a mixed motive situation presented in this case.

The respondent submits that it has met its burden of proving that its failure to call Mr. Nantz back to work was motivated by his total lack of willingness to perform any job that was requested of him, not just the running of his own dozer. The

respondent concludes that it had a legitimate interest in having its operations continue, and that it was not reasonable for Mr. Nantz to refuse to operate the loader so long as it was available to him so that at least the operations could continue rather than refusing to do so and walking off the job. In these circumstances, the respondent further concludes that its refusal to call Mr. Nantz back to work was reasonable and did not constitute a discharge on the basis of protected activity.

I take note of the fact that the Secretary's complaint in this case does not allege that the respondent's failure to call Mr. Nantz back to work after the dozer window was repaired constituted another act of discrimination, and the Secretary's posthearing brief does not address this issue.

Mr. Nantz testified that when he reported for work on April 16, 1991, Mr. Fisher confirmed that the dozer window had not been repaired, and he then informed Mr. Fisher that he did not want to operate the dozer, but would be willing to "run the nine(9) or go out here somewhere and reclaim, out of the dust, and let someone else run the fill til I get my window in. Or, you know, run the sweeper broom or whatever else you got nobody else on so I could run to where I won't have to eat that dust another night, til he got the window in" (Tr. 25).

Mr. Nantz stated that Mr. Fisher informed him that he had no other dozers for him to operate, but there was "a chance" that he could run the loader for an hour or an hour and a half, but that he would then be sent back to the fill to operate the dozer since the loader may be needed in the shot area. Mr. Nantz stated that he did not want to run the loader because he believed that the regular loader operator would get his loader back in an hour and half to start loading coal, and he (Nantz) believed that he would have to go back on the dozer and continue operating it with the missing window in the dust for the rest of the shift (Tr. 84).

Mr. Nantz testified further that when he next returned to the mine on April 17, 1991, Mr. Fisher again confirmed that the dozer window had not been repaired, and told him that he could "either run it like it is or go to the house. You're fired if you don't run it" (Tr. 26-27). Mr. Nantz then picked up his paycheck and went home.

Mr. Napier and Mr. Belcher, both of whom were present on the same work shift with Mr. Nantz on the first evening that Mr. Nantz refused to operate the dozer with the missing window, both testified that they heard Mr. Nantz offer to run any other available equipment so that he would not have to work in the dust with his dozer, and that Mr. Fisher told Mr. Nantz that there was nothing available for him to do that evening (Tr. 101, 133-134, 138).

Mr. Napier had no particular knowledge of the events of the second evening when Mr. Nantz again refused to operate the loader, and he confirmed that he never heard Mr. Fisher offer to let Mr. Nantz run the 980 loader (Tr. 105). Mr. Belcher, the regular loader operator, testified about a conversation he heard between Mr. Fisher and Mr. Nantz which he believed took place on the first evening in question, but was not sure. Mr. Belcher stated that Mr. Fisher offered to let Mr. Nantz run the loader "for awhile", but he did not know if Mr. Nantz informed

Mr. Fisher that he did not want to run the loader, or could not run it. Mr. Belcher explained that he ran the loader for a full 10-hour shift most of the time, but that on the evening in question he was going to fill the water truck with water so that Mr. Fisher could water the fill area, and that he would have resumed cleaning coal in the pit later that evening with the loader for the remainder of the shift. Mr. Belcher estimated that he would not need to use the loader for "a couple of hours", but that after he finished with the water truck he would have to use the loader again (Tr. 136-140).

Mr. Hamilton testified that when Mr. Fisher called him the first evening to inform him that Mr. Nantz did not want to run his dozer, Mr. Fisher told him that he had offered the use of the loader to Mr. Nantz, but that Mr. Nantz wanted to run his dozer and have it repaired and that he did not want to run any other equipment (Tr. 200).

Mr. Cornett, who was also present during the Nantz-Fisher conversation on the first evening, confirmed that Mr. Fisher offered the use of the loader to Mr. Nantz, but Mr. Cornett was nor sure whether Mr. Nantz told Mr. Fisher that he would not, or could not, operate the loader (Tr. 225-228).

Mr. Fisher testified that on the first evening of April 16, 1991, he offered to let Mr. Nantz operate the 980 loader, and he informed Mr. Nantz that he intended to use the water truck to settle the dust in the fill area, and that if the loader was needed later that evening for cleaning coal, Mr. Nantz could then return to operating his dozer. Mr. Fisher explained that he told Mr. Nantz that he would let him run the loader all night if there was no coal to be cleaned with the loader, but that if he needed to, he would put Mr. Nantz back on his dozer (Tr. 283). Mr. Fisher stated that Mr. Nantz's response was "No, I'm not running the 980, I'm going home" and told him to have the glass put back in the dozer and to call him when this was done, and that he would then return to work (Tr. 267-268).

Mr. Fisher believed that Mr. Nantz was qualified to operate the loader and Mr. Nantz never told him otherwise. Mr. Fisher also believed that no coal would have been cleaned on the evening of April 16, 1991, and that there was a possibility that Mr. Nantz would have operated the loader for most of the shift

had he accepted his offer. Although Mr. Nantz would have been working in the same fill area with the loader, Mr. Fisher pointed out that the loader had all of its windows intact. Mr. Fisher confirmed that he did not consider assigning Mr. Nantz to drive the water truck, and leaving Mr. Belcher on the loader, because he did not know whether Mr. Nantz could drive the truck, but he admitted that he did not ask Mr. Nantz whether he could operate the truck (Tr. 267-269).

With regard to the events of the second evening of April 17, 1991, Mr. Fisher testified that after he informed Mr. Nantz that his dozer window had not been replaced, Mr. Nantz informed him that he was going home and he asked him to call when the window was replaced and that he would return to work at that time. Mr. Fisher confirmed that he informed Mr. Nantz that he needed to run the dozer and that if he (Nantz) did not run it, he (Fisher) would "get somebody up here that will" (Tr. 271). There is no evidence that Mr. Fisher made any further offers of alternate work on this evening, nor is there any evidence that Mr. Nantz asked for alternate work.

After careful review and consideration of all of the testimony and evidence concerning the alternate work issue, I conclude and find that the respondent's position is not well taken and it is rejected. While it is true that Mr. Fisher offered to allow Mr. Nantz the use of a loader which had all of its windows intact while continuing to work in the dusty fill area where Mr. Nantz had previously been operating his dozer with the missing back window, I am not persuaded that this offer of alternate work, which in the circumstances then presented was equivocal and conditional, constituted an adequate and reasonable response to Mr. Nantz's complaints about the dust to which he was exposed, nor am I convinced that the offer sufficiently quelled Mr. Nantz's concerns about his hazardous exposure to dust.

I conclude and find that Mr. Nantz's refusal to operate the loader was based on a reasonably founded belief that after a brief stint on the loader, he would soon find himself back on the dozer with the missing window operating in the dust again. Mr. Nantz testified that Mr. Fisher informed him that "there was a chance" that he could operate for an hour or so, but that he would have to go back to the dozer because the loader would be needed elsewhere. Mr. Belcher, the regular loader operator, testified that he heard Mr. Fisher offer Mr. Nantz the use of the loader "for awhile", and Mr. Belcher estimated that after two hours, he would again need the loader to resume loading coal in the pit area.

Mr. Fisher initially testified that he did not believe that coal would have been cleaned on the evening of April 16, 1991, and that there was a possibility that Mr. Nantz could have operated the loader for most of the shift. He also testified

that he informed Mr. Nantz that if the loader were needed to clean coal, he (Nantz) would have to resume operating the dozer again (Tr. 267-268). Mr. Fisher reiterated this testimony when he later testified that he would have let Mr. Nantz run the loader all night if he did not have coal to clean, and if he needed to, he would have returned Mr. Nantz back to his dozer later in the shift (Tr. 283).

I find Mr. Fisher's testimony to be rather equivocal and lacking in credibility, and it is contradicted by the credible testimony of loader operator Belcher who seemed confident that he would only give up his loader for approximately two hours before resuming his work in the pit cleaning coal with the loader. It seems to me that if Mr. Fisher truly believed that no coal would be cleaned during the shift in question, thereby freeing up the loader for use by Mr. Nantz for the entire shift, he would have made this clear to Mr. Nantz, particularly since Mr. Nantz had complained to him about the dust and was about to leave the job site and interrupt production. Instead, Mr. Fisher qualified his offer of the use of the loader by making it conditional and placing Mr. Nantz in the position of not knowing how long he might be on the loader before again being required to operate the dozer in a dusty work environment. Under the circumstances, I conclude and find that Mr. Nantz was not unreasonable in refusing to operate the loader, and the fact that he did does not render his refusal unprotected activity.

The Complainant's Termination

Foreman Fisher testified that after he informed superintendent Hamilton on April 16, 1991, that Mr. Nantz refused to operate the dozer Mr. Hamilton instructed him "to do what you have to do", and commented "if they're going to work, they're going to work, . . . if they ain't, we're going to have to get someone that will work" (Tr. 269-270). Mr. Fisher confirmed that when Mr. Nantz returned to the mine on April 17, 1991, and found that the dozer was not repaired, he informed him that he would not operate the dozer in that condition. Mr. Fisher stated that he then told Mr. Nantz that if he did not want to run the dozer "I would get somebody up here that will", and that "I have to take it you're quitting your job, and I'll have to get somebody in here in the dozer" (Tr. 271, 286). Mr. Fisher further confirmed that he immediately hired a replacement dozer operator that same evening and that the decision to do so was his (Tr. 271, 286).

Mine Superintendent Hamilton confirmed that after Mr. Fisher called him and informed him that Mr. Nantz had refused to operate the dozer and was going home, he told Mr. Fisher that if Mr. Nantz would not operate the dozer and went home, "we would have to get someone else" (Tr. 200). Mr. Hamilton indicated that Mr. Nantz would not have been "fired", "replaced" or "let go" if he had remained at work and operated the 980 loader (Tr. 201).

Mr. Nantz testified that when he returned to the mine to pick up his pay check the day after he initially refused to operate the dozer and went home, foreman Fisher again confirmed that the window had not been repaired and instructed him to "either run it like it is or go to the house. You're fired if you don't run it" (Tr. 27-28). I find Mr. Nantz's testimony that Mr. Fisher gave him an option of operating the dozer with the missing rear window or "going to the house" to be credible and I believe that this is what Mr. Fisher told him. As noted by the Commission in Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12, 14 (January 1989), the phrase "go to the house" is synonymous with a discharge in the mining industry. See: Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (August 1982), aff'd sub nom. Whitley Development Corp. v. FMSHRC, No. 84-3375, slip op. at 2 (6th Cir., July 31, 1985); Secretary on behalf of Keene v. S&M Coal Co., 10 FMSHRC 1145, 1147 n. 5 (September 1988).

A constructive discharge occurs whenever a miner engaged in protected activity can show that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988) at 461-463. Whether such conditions are so intolerable is a question for the trier of fact. Supra, at 463. See also: Stenson Begay b. Liggett Industries, Inc., 11 FMSHRC 887 (May 1989), aff'd, Liggett Ind. v. FMSHRC, 923 F.2d 150 (10th Cir. 1991) of Secretary ex rel. Harry Ramsey v. Industrial Constructors, Inc., 11 FMSHRC 1585 (August 1989), rev'd, 12 FMSHRC 1587 (August 1990).

I conclude and find that the credible and unrebutted testimony of Mr. Nantz, corroborated by the co-workers who worked with him on the same shift, supports his contention that during the time he was assigned to operate the dozer with the missing rear window, he was exposed to hazardous dust conditions which made it difficult for him to clearly see the trucks operating in the fill area where he was pushing fill with the dozer, and more significantly, caused him personal problems, including choking and breathing problems resulting from the dust coming into his cab area through the missing rear window. I further conclude and find that the adverse health and safety hazards caused by the dusty conditions as described by Mr. Nantz, and which stand unrebutted by the respondent, can reasonably be characterized as "intolerable". In these circumstances, I further conclude and find that Mr. Nantz acted reasonably when he left the job site on April 15, 1991, after refusing to operate the dozer, and again on April 16, 1991. In both instances, the respondent had failed to take timely action to repair the dozer, or to take it out of service so that it could be repaired promptly, and foreman Fisher left Mr. Nantz with little hope of reasonably addressing his safety and health complaints when he gave him the option of operating the dozer with the missing window or going home.

Mr. Hamilton and Mr. Fisher maintained that Mr. Nantz quit his job and that he was not fired. However, they also asserted that Mr. Nantz would not have been let go had he opted to stay at work and operate the loader offered by Mr. Fisher. I fail to see the distinction between a "let go" and a "firing". On the facts of this case, it seems rather obvious to me that after speaking with Mr. Hamilton on April 16, 1991, after Mr. Nantz refused to operate the dozer and went home, Mr. Fisher had the authority "to do what he had to do" if Mr. Nantz continued to refuse to operate the dozer, and that he was prepared to summarily fire Mr. Nantz if he refused to operate the dozer with the missing rear window.

I conclude and find that notwithstanding the offer of the loader by Mr. Fisher to Mr. Nantz, in the circumstances then presented, including the failure by the respondent to reasonably respond to Mr. Nantz's prior complains by seeing to it that the window was promptly replaced, a relatively simple matter which would have corrected the dust conditions, Mr. Nantz acted reasonably when he decided to leave the job site after refusing to operate the dozer or the loader. I further conclude and find that Mr. Nantz had every reason to believe that if he had stayed on the job operating the loader for an hour or two, he would soon find himself back on the dozer for the rest of the shift working in unhealthy and hazardous dust conditions with no reasonable expectation that management would eliminate these conditions. Under all of these circumstances, I conclude and find that Mr. Nantz's departure from the job site was reasonable and justified and constituted a constructive discharge as a result of protective work refusals. Accordingly, I further conclude and find that Mr. Nantz was unlawfully discriminated against in violation of section 105(c) of the Act, and the complaint of discrimination IS SUSTAINED.

Civil Penalty Assessment

It seems clear to me from the statutory language found in section 105(c)(3) of the Act that violations of the discrimination prohibitions found in section 105(c)(1) are subject to the civil penalty assessment sanctions pursuant to section 110(a), and the respondent's arguments to the contrary are rejected. Further, respondent's assertions at pages 42-43 of its posthearing brief that this action has been brought by the Commission and that the Commission failed to advanced any evidence whatsoever as to the appropriateness of any civil penalty assessment are erroneous. This matter has been brought by the Secretary, and the Commission's role is to consider any appeal taken by any party in response to the presiding judge's adjudication of the case.

The burden of presenting evidence to establish an appropriate civil penalty assessment based on the statutory criteria found in section 110(i) of the Act lies with the Secretary. As noted earlier, the presiding judge is not bound by the Secretary's proposed penalty assessment, nor is he bound by MSHA's regulatory

penalty assessment criteria found in Part 100, Title 30, Code of Federal Regulations. Any penalty assessment made by the judge is on a de novo basis, taking into account the record before him and the statutory criteria found in section 110(i) of the Act.

The respondent is correct in its assertion that the Secretary failed to present any hearing testimony or evidence in support of the proposed civil penalty assessment of \$8,000, and the Secretary's brief does not address the civil penalty proposal or any of the criteria upon which the Secretary made the determination that \$8,000, is an appropriate penalty assessment for the discrimination violation in question. The only information submitted by the Secretary is found in Exhibit "A" of the amended complaint. That information includes the mine and company coal production tonnage for 1990 (203,536 and 856,573), the number of assessed violations for the 24-month period prior to the violation in question (26), the number of inspection days during this period (20), the number of violations per inspection day (1.3), and the number of previously assessed section 105(c) violations (None), and some meaningless and unexplained "points" pursuant to 30 C.F.R. § 100.3(b) and (c). Although MSHA special investigator Brock testified in this case, his testimony was mostly limited to an explanation of his backpay computations, and he offered no testimony or evidence concerning any of the civil penalty criteria.

The respondent's suggestion that no civil penalty should be assessed because of Mr. Nantz's contributory negligence for failing to avail himself of the dust protection offers made by the respondent, and failing to taken precautions to avoid the dust, is rejected. I have previously rejected the respondent's attempts to shift the burden of correcting or mitigating the hazardous conditions which prompted the work refusal in this case to Mr. Nantz, and it seems well settled that a mine operator's negligence may not be imputed to the miner, and that the Mine Act is a strict liability statute.

Evaluation of the relevant criteria pursuant to section 110(i) of the Act is necessary to determine an appropriate penalty assessment in this case. I conclude and find that the respondent is a small mine operator with no prior history of section 105(c) violations. I further conclude and find that pursuant to the Act, a mine operator such as the respondent has a high duty of care to correct or prevent conditions or practices hazardous to the health or safety of its miner workforce. In this case, the evidence establishes that Mr. Fisher was well aware of the missing dozer back window, and Mr. Nantz's complaints concerning the dust, yet he chose not to insure that the window was replaced promptly, or to remove the dozer from service. Instead, he gave Mr. Nantz the option of running the dozer with the missing window in the dust, or going home. Under the circumstances, I conclude and find that the violation resulted from a high degree of negligence on the part of foreman Fisher which is imputed to the respondent.

In Consolidation Coal Company, 8 FMSHRC 890, 895-899 (June 1986), the Commission took note of the concern expressed by Congress in eliminating respiratory dust illnesses and other mine occupation-related diseases. Although that case concerned the Secretary's underground respirable dust standards, I find the Commission's observation that prevention of occupational illnesses was among the fundamental purposes underlying the Mine Act to be equally applicable in this case. The fact that Mr. Nantz did not prevail in his pneumoconiosis workers' compensation claim is irrelevant to any gravity finding, and the actual existence of a hazard need not be proved by the miner to establish that he had a reasonable and good faith belief that a hazard existed at the time of the work refusal. On the facts of this case, I have accepted Mr. Nantz's credible and un rebutted testimony with respect to the hazardous and unabated dust conditions to which he was exposed to while operating the dozer with the missing window, and it seems clear to me that his employment termination was the direct result of these conditions. Under the circumstances, I conclude and find that the discrimination violation was serious. Further, given the fact that the respondent failed to reasonably respond to Mr. Nantz's dust complaints, the relatively extended period of time which passed with no corrective action by the respondent, and the fact that repairs were made after Mr. Nantz was forced to leave his job, I cannot conclude that respondent acted in good faith to correct the conditions, or that it rapidly addressed Mr. Nantz's complaints.

I find no credible evidentiary support for the Secretary's proposed civil penalty assessment of \$8,000, particularly for a small mine operator with no prior history of discriminatory practices or violations, and the proposed penalty IS REJECTED. However, based on my consideration of the record before me, and my de novo consideration of the criteria found in section 110(i) of the Act, and in the absence of any showing by the respondent that any civil penalty assessment will adversely affect its ability to continue in business, I conclude and find that a penalty assessment of \$1,000, is reasonable and appropriate in this case.

Relief and Remedies

The amount of compensation due Mr. Nantz is in dispute. The Secretary has filed a claim of backpay in the amount of \$32,355.15, through August 12, 1992 (Exhibit C-1), and Inspector Brock testified with respect to the computations which are reflected in that document. The respondent disputes this amount of backpay and points out that it was computed upon Mr. Nantz's purported working an average of 58 1/2 hours per week, whereas its evidence reflects that Mr. Nantz worked an average of 39.6 hours per week and that there was a layoff to which Mr. Nantz would have been subject from August 14, 1991, until October 1, 1991 (Exhibit R-5, posthearing brief, pgs. 39-40).

I find Mr. Nantz's testimony concerning his normal work week and overtime to be somewhat confusing. He initially testified that he was paid \$10.50 per hour straight time and \$15.75 per hours overtime, and that he worked five and six days a week, ten hours a day. He confirmed that he worked 40 hours a week at the regular time hourly rate, and that any hours over 40 was overtime (Tr. 14-15). In subsequent responses to certain questions concerning what he may have told Inspector Brock, Mr. Nantz testified that he worked "five days a week, ten hours a day, and a lot on Saturdays, ...maybe eight and one-half hours", and one of the questions asked of him inferred that he may have worked a fifty-hour regular week, and overtime only on Saturdays (Tr. 63-65).

I take note of the fact that a copy of a workers' compensation application executed by Mr. Nantz on June 28, 1991, and submitted by the respondent, contains a statement that Mr. Nantz's wage while employed by the respondent was "\$10.50 an hour for 58 hours a week (Item M of application). The respondent has submitted additional information, including copies of payroll and work attendance records in support of its rebuttal to the Secretary's backpay claims based on Inspector Brock's computations. Inspector Brock confirmed that Mr. Nantz's initial complaint stated that he worked 58 hours a week in 1991 (Tr. 172-173). Mr. Hamilton testified that 50 hours a week was a normal work week, and that anything over 40 hours is overtime (Tr. 195).

The respondent further asserts that Mr. Nantz failed to give Inspector Brock any verification of the wages he had earned since his termination or any information concerning his unemployment insurance benefits he had received during this period of time. The parties are in agreement that any reduction of back pay compensation due for unemployment payments is a matter of discretion with the presiding judge, Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983). Mr. Nantz testified to a logging job and employment with Clover Fork Mining company after his termination, as well as his unemployment compensation (Tr. 27-30; 57-62). His deposition of June 15, 1982, also makes mention of work with L.C. logging (Tr. 18-19), and other losses he allegedly incurred (Tr. 60-63).

It is incumbent on the parties, not the judge, to evaluate this information and reduce it to specific time periods and dollar amounts, with credible evidentiary support, in support of their respective claims as to precisely what Mr. Nantz may be entitled to in terms of compensation. The parties were specifically advised in the course of the hearing that they were expected to support and "work out" among themselves the remedial compensation due Mr. Nantz in the event he prevailed in this matter (Tr. 166-167).

The record contains several exhibits concerning certain medical expenses incurred by Mr. Nantz pursuant to his employee insurance benefits provided by the respondent (Exhibits C-3 through C-15). During opening arguments, the Secretary's counsel asserted that

Joint Exhibit J-2, contains the stipulated benefit amounts that Mr. Nantz would otherwise be entitled to under the company provided medical insurance policy (Exhibit J-3; Tr. 3-4).

Citing the Commission's decisions in Metric Constructors, Inc., 4 FMSHRC 791 (April 1982 (Judge Lasher), aff'd by the Commission at 6 FMSHRC 226 (February 1984), aff'd, Brock v. Metric Constructors, Inc. 766 F.2d 469 (11th Cir. 1985), and relying on Mr. Nantz's testimony (Tr. 27), that he waited two or three weeks after his termination on April 16, 1991, waiting to see if the respondent would call him back to work, before attempting to find other work, the respondent argues that at least three weeks should be deducted from any back pay award to Mr. Nantz for his failure to immediately seek other employment.

The respondent asserts that since Mr. Nantz made no reasonable efforts to seek reemployment with the respondent, and that he "basically refused to consider any reemployment by the respondent unless he was paid his back pay", he should be denied any back pay in this case. The respondent's suggestion that it made an "offer" of reemployment to Mr. Nantz is unsupported, and I find no evidence that this was the case. The respondent's arguments are rejected.

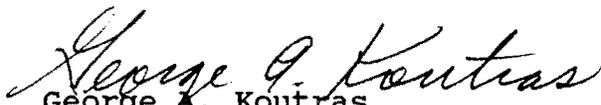
ORDER

1. The respondent IS ORDERED to reinstate Mr. Nantz to his former position with full backpay and benefits, with interest, from April 16, 1991, to the date of his reinstatement, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully discharged. Interest shall be computed in accordance with the Commission's decision in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (December 1983), and at the adjusted prime rate announced semi-annually by the Internal Revenue Service for the underpayment and overpayment to taxes.
2. The respondent IS ORDERED to compensate Mr. Nantz for all legitimate medical expenses incurred by him since the date of his termination which would have been covered by any employee medical insurance carried by the respondent for his or his family member's benefit, reimbursement or coverage of which would have been afforded him had he not been terminated.
3. The respondent IS ORDERED to expunge from Mr. Nantz's personnel file and/or company records all references to the circumstances surrounding his employment termination of April 16, 1991.
4. The respondent IS ORDERED to pay a civil penalty assessment of \$1,000, for the discriminatory violation which has been sustained.

Counsel for the parties ARE ORDERED to confer with each other during the next fifteen (15) days with respect to the aforesaid remedies due Mr. Nantz, and they are encouraged to reach a mutually agreeable resolution or settlement of these matters, and any stipulations or agreements in this regard shall be filed with me within the next thirty (30) days.

In the event counsel cannot agree, they are to notify me of this within the initial fifteen (15) day period. If there are any disagreements, counsel ARE FURTHER ORDERED to state their respective positions on those compensation issues where they cannot agree, with supporting arguments or specific references to the record in this case, and they shall submit their separate proposals, with supporting arguments and specific proposed dollar amounts for each category of relief (basic backpay, overtime, medical insurance claims, other claims), within thirty (30) days. If the parties believe that a further hearing may be required on the remedial aspects of this matter, they should so state.

I retain jurisdiction in this matter until the remedial aspects of this case are resolved and finalized. Until those determinations are made, and pending a finalized dispositive order by the undersigned presiding judge, my decision in this matter is not final. In addition, payment by the respondent of the civil penalty assessment made by me in this matter is held in abeyance pending a final dispositive order.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 23 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-136
Petitioner : A. C. No. 15-11620-03527
v. :
PYRAMID MINING, INCORPORATED, : Docket No. KENT 92-340
Respondent : A. C. No. 15-11620-03528
: Docket No. KENT 92-341
: A. C. No. 15-11620-03529
:
: Hall No. 2 Mine

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Frank Stainback, Esq. Holbrook, Wible, Sullivan,
and Mountjoy, Owensboro, Kentucky for Respondent.

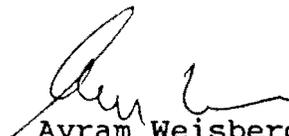
Before: Judge Weisberger

These consolidated cases are before me based on petitions for assessment of civil penalty filed by the Secretary of Labor (Petitioner) alleging violations of various mandatory safety standards. Pursuant to notice, Docket No. KENT 92-136 was scheduled for hearing for April 1, 1992. At the hearing, the parties settled Citation No. 9897840. A Partial Decision was subsequently issued regarding these citations. Also, further proceedings regarding Citation No. 3416898 were stayed pending the filing of a Petition for Assessment of civil penalty with regard to Citation No. 3416897. Subsequently, petitions were filed regarding this citation (KENT 92-340), and a companion Citation No. 3416991 (KENT 92-341). The parties engaged in pretrial discovery, and on November 12, 1992, filed a Joint Motion to Approve Settlement regarding citation No. 3416898 (KENT 92-136) as well as Citation Nos. 3416897 and 3416991 (Docket Nos. KENT 92-140 and KENT 92-141 respectively).

Initially, in the respective Petitions for Assessment of Civil Penalty, Petitioner had sought civil penalties totaling

\$1,726. In the Motion, the parties seek approval of a reduction of penalties to \$294. Based on the representatives and assertions set forth in the Joint Motion, I conclude that the proffered settlement is appropriate considering the factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977. I therefore approve the settlement, and grant the joint motion.

It is ORDERED that, within 30 days of this Decision, Respondent shall pay civil penalties totalling \$294.


Avram Weisberger
Administrative Law Judge

Distribution:

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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 23 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 92-145
Petitioner : A.C. No. 40-02755-03533
v. :
 : Docket No. SE 92-146
FAITH COAL COMPANY, : A.C. No. 40-02755-03534
Respondent :
 : Docket No. SE 92-252
 : A.C. No. 40-02755-03535
 :
 : No. 15 Mine

DECISIONS

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
Lonnie Stockwell, Owner, Faith Coal Company,
Palmer, Tennessee, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern 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 of \$876, for twelve (12) alleged violations of certain mandatory safety and health standards found in Parts 48, 70, and 75, Title 30, Code of Federal Regulations.

The respondent filed answers denying most of the violations, and advancing certain mitigating circumstances with respect to the cited conditions or practices, including a claim that the financial condition of the company, which is a sole proprietorship owned and operated by Mr. Lonnie Stockwell, as well as Mr. Stockwell's personal financial situation, precludes the payment of any civil penalty assessments for the violations in question.

A consolidated hearing was convened in Chattanooga, Tennessee, and the parties appeared and participated fully therein. The parties waived the filing of posthearing briefs,

and they were permitted to present arguments on the record in the course of the hearing in support of their respective positions. I have considered their arguments in the course of my adjudication of these matters.

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. Sections 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Issues

The issues presented in these proceedings are (1) whether the cited conditions or practices constitute violations of the cited mandatory safety or health standards, (2) whether several of the alleged violations were "significant and substantial" (S&S), and (3) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act. The one principal issue presented is whether or not the respondent has established that it is financially unable to pay any of the civil penalties assessed in these proceedings, and whether the payment of such penalties will affect its ability to continue in business.

Stipulations

The parties stipulated to the following (Tr. 4-6, 20):

1. The respondent and the No. 15 Mine are subject to the jurisdiction of the Act, and the presiding judge has jurisdiction to hear and decide these matters.
2. The respondent's annual coal production is approximately 11,691 production tons, and the No. 15 mine has an annual coal production of 8,016 tons.
3. The respondent is a small underground coal mine operator and presently operates only one mine, namely the No. 15 mine.
4. All of the citations issued in these proceedings were timely abated by the respondent in good faith either within or prior to the times fixed by the inspectors who issued them.

Discussion

Docket No. SE 92-145

This case concerns two alleged violations issued by MSHA Inspector Archie L. Coburn, Jr., on November 19, 1991, and they are as follows:

Section 104(a) non-"S&S" Citation No. 3395619, cites an alleged violation of 30 C.F.R. § 70.204(d)(1), and the cited condition or practice states as follows (Exhibit J-2):

Suitable examinations of the respirable dust pump are not being made by the certified person. A voltage meter is not available to test the battery of the respirable dust pump to assure that proper voltage is provided. This was learned through the interview with the operator during a CBE type inspection.

Section 104(a) non-"S&S" Citation No. 3395620, cites an alleged violation of 30 C.F.R. § 75.1712-4, and the cited condition or practice states as follows (Exhibits J-3 and P-1):

The bathhouse waiver for this mine was not being complied with in that no sanitary toilet facilities were provided. As stipulated on cover sheet of bathhouse waiver.

Docket No. No. SE 92-146

This docket includes six (6) alleged violations issued by MSHA Inspector Archie L. Coburn, Jr., and they are as follows:

Section 104(a) "S&S" Citation No. 3395610, November 5, 1991, as modified, cites an alleged violation of 30 C.F.R. § 75.1704-2(c)(2), and the cited condition or practice states as follows (Exhibit J-4):

The results of examinations of emergency escapeways and facilities fire doors and for smoking articles were not recorded in the approved book. Last entry 10-21-91.

Section 104(a) "S&S" Citation No. 3395611, November 5, 1991, cites an alleged violation of 30 C.F.R. § 75.306, and the cited condition or practice states as follows (Exhibit J-5):

The results of weekly examinations for methane and hazardous conditions were not recorded in the approved book. Last entry 10-24-91.

Section 104(a) "S&S" Citation No. 3395612, November 5, 1991, as modified, cites an alleged violation of 30 C.F.R. § 75.512, and the cited condition or practice states as follows (Exhibit J-6):

The required record book for examination of electrical equipment was not available at the mine for inspection by an authorized representative of the Secretary and to the miners.

Section 104(a) "S&S" Citation No. 3395613, November 5, 1991, cites an alleged violation of 30 C.F.R. § 70.210(b), and the cited condition or practice states as follows (Exhibit J-7):

The results of the last bi-monthly respirable dust survey run at the mine was not posted on the mine bulletin board.

Section 104(a) "S&S" Citation No. 3395617, November 18, 1991, cites an alleged violation of 30 C.F.R. § 75.316, and the cited condition or practice states as follows (Exhibit J-8):

The No. 2 entry on the 001-0 section was advanced 20 feet inby the last open crosscut, and a deflector curtain was not provided as required by the approved ventilation methane and dust control plan.

Section 104(a) "S&S" Citation No. 3395618, November 18, 1991, cites an alleged violation of 30 C.F.R. § 75.301, and the cited condition or practice states as follows (Exhibit J-9):

The required 3,000 CFM of air was not maintained in the No. 3 entry on the 001-0 section where coal was being loaded with a Elkhorn AR4 scoop, in that only 2,430 CFM could be measured.

MSHA Inspector Larry J. Anderson issued the following two violations.

Section 104(a) "S&S" Citation No. 3395347, December 2, 1991, cites an alleged violation of 30 C.F.R. § 75.1704-2(c)(2), and the cited condition or practice states as follows (Exhibit J-10):

Dates, time and initials had not been placed at various locations in the 001 section immediate return escapeway which would indicate the area had been examined by a certified person.

Section 104(a) "S&S" Citation No. 3395348, December 3, 1991, cites an alleged violation of 30 C.F.R. § 75.523, and the cited condition or practice states as follows (Exhibit J-11):

The panic bar installed on the Elkhorn battery powered tractor S.N. 73-87 was not maintained in an operative condition in that the panic bar had been damaged and could not be depressed enough to deenergize the tram motor on the machine.

MSHA Inspector Clyde J. Layne issued Section 104(a) "S&S" citation No. 3395579, on December 2, 1991, citing an alleged violation of 30 C.F.R. § 75.208, and the cited condition or practice states as follows (Exhibit J-12):

Safety precautions were not being maintained to prevent persons from traveling inby permanent supports in the first left place in the No. 1 entry. The cut of coal had been cleaned up and a visible warning or a physical barrier was not posted at the end of the permanent roof supports. The face of the place was approximately 9 feet inby the last permanent support.

Docket No. SE 92-252

Section 104(g)(1) Order No. 3395455, issued by MSHA Inspector Tommy D. Frizzell on September 26, 1991, cites an alleged violation of mandatory training standard 30 C.F.R. § 48.28(a), and the cited condition or practice states as follows:

James Stockwell, observed performing duties at the surface area of the underground mine, has not received the requisite safety training as stipulated in section 115 of the Act. Mr. Stockwell has not received the annual refresher training. In the absence of such training, James Stockwell is declared to be a hazard to himself and others and is to be immediately withdrawn from the mine until he has received the required training.

Testimony and Evidence. Docket No. SE 92-145

Citation No. 3395619. 30 C.F.R. § 70.204(d)(1).

MSHA Inspector Archie Coburn testified about his experience, including ten years of private industry coal experience as an electrician and equipment operator. He confirmed that he was at the mine on November 19, 1991, to perform a respirable dust technical investigation, and during an interview with mine operator Lonnie Stockwell it was revealed that he did not have a voltmeter to check the battery voltage on the respirable dust

sampling pumps as required by the regulation. The pumps are owned by the Tennessee Consolidated Coal Company, but Mr. Stockwell maintains them. The regulation requires that the pumps be maintained and calibrated by a certified person, and Mr. Stockwell is certified to take care of the pumps. The voltage meter serves to check the voltage on the pumps prior to and after a respirable dust survey is made. Mr. Coburn did not know how long the violation existed, and he stated that Mr. Stockwell admitted that he did not have the type of meter necessary to check the pumps (Tr. 13-15).

Mr. Coburn believed that Mr. Stockwell would be expected to know about a voltage meter because he is certified by MSHA to taken respirable dust samples, is a certified electrician, and has been trained to use and calibrate the pumps (Tr. 15). Mr. Coburn explained the importance of maintaining the pumps and insuring the proper voltage. He confirmed that different types of voltage meters are used at mines that could be equipped with a charging plug to check the pump voltage, but no such meter was available at the time the citation was issued (Tr. 16).

Mr. Coburn confirmed that there were no dust pumps at the mine at the time of the inspection because Mr. Stockwell had already submitted his bimonthly samples and returned the pumps to Tennessee Consolidated. He also confirmed that Mr. Stockwell had requested that company to examine the pump batteries from the last calibration date, but had not as yet received the examination records (Tr. 16-17). Mr. Coburn stated that he used a spare pump to check the pump calibration and Mr. Stockwell's ability to calibrate the pumps (Tr. 18).

Mr. Coburn confirmed that the violation was not significant and substantial, that it resulted from a moderate level of negligence, and that it was abated within an hour and fifteen minutes with a minimal amount of time and cost (Tr. 19).

On cross-examination, Mr. Coburn could not recall Mr. Stockwell advising him that he did not understand the question asked of him concerning the availability of a voltage meter. Mr. Coburn stated that Mr. Stockwell told him that he did not have a voltmeter capable or adapted to charge a dust pump, but that after he had written the citation Mr. Stockwell produced a voltmeter with a charging plug, and proceeded to test the pump to his satisfaction. Mr. Coburn then terminated the citation (Tr. 21-27).

Mine Operator Lonnie Stockwell testified that he keeps all of his electrical equipment, including test meters, at the "stove room building" at the mine site, and he contended that he misunderstood Mr. Coburn's inquiry about the availability of a voltmeter for testing the respirable dust pumps. Mr. Stockwell stated that after their initial conversation, Mr. Coburn left the

mine office, which is in a separate building, and went to his truck. Mr. Stockwell stated that he then realized what Mr. Coburn had asked him and he proceeded to the electrical storage building, picked up a meter, and went to the truck and showed it to Mr. Coburn and demonstrated to him that it would work. Mr. Coburn described the meter as an inexpensive "radio shack item" which was in the shop (Tr. 33-35).

On cross-examination, Mr. Stockwell explained the different methods used to test the dust pumps, and he confirmed that he had to unplug one set of leads from the voltmeter he produced for Mr. Coburn and replace them with another set of leads, and he explained how that meter is used, and confirmed that Mr. Coburn may have given him suggestions as to how to adapt the voltmeter so that he could use it to test the dust pump voltage (Tr. 38-42).

Citation No. 3395620, 30 C.F.R. § 75.1712-4.

Inspector Coburn stated that he issued the citation because sanitary toilet facilities were not provided at the mine as required by the bathhouse waiver granted to the respondent on October 15, 1990 (Exhibit P-1). He confirmed that the mine operates one shift per day and that six to ten people work on the shift (Tr. 44). He testified that the nearest sanitary toilet facility was located 300 to 400 yards off mine property at another adjacent mine site operate by the T&G Coal Company. He confirmed that pursuant to the waiver, the respondent was not required to have a full shower or bathhouse facility, but had to have a sanitary toilet facility consisting of a fully flush toilet or a chemical toilet known as a "Port-o-pot" (Tr. 46).

Mr. Coburn stated that there was no flush toilet facility at the mine, but he did observe a "Port-o-pot" chemical toilet that was still in the shipping box, and it was not in place or operational so that it could be used (Tr. 47). He observed that Mr. Stockwell had begun to install a partition in the trailer where the "stove room" was located in order to provide privacy when the toilet was set up, and Mr. Coburn confirmed that he terminated the citation when Mr. Stockwell began working on the partition. He confirmed that Mr. Stockwell now rents a sanitary toilet facility for the mine (Tr. 48).

Mr. Coburn confirmed that the violation was not significant and substantial, and that it resulted from a moderate negligence level. He confirmed that when he asked to see the sanitary toilet facility, Mr. Stockwell showed him the "Port-o-pot" which was still in the box. The top was off the box, but the toilet was still wrapped in plastic and there were no chemicals to activate it. He confirmed that the partial walls and a roof were under construction to provide privacy for the men once the toilet was installed and made operational (Tr. 50).

On cross-examination, Mr. Coburn stated that he did not see the toilet paper which Mr. Stockwell contended was on top of a refrigerator in the trailer (Tr. 52). In response to further questions, Mr. Coburn stated that he issued the citation because of the lack of toilet privacy and chemicals, and the fact that the portable facility was not in service and ready for use. He believed it had to be ready for use at any time, and not just when someone wished to use it. He confirmed that the portable toilet which he observed was still in the crate, and it was the only one he saw on the mine surface (Tr. 55).

Mr. Stockwell testified that a roll of toilet paper was on top of the refrigerator in the building where the portable toilet was located, and he stated that water was available for use with the toilet but that none was placed in it at the time because it was winter and the building is not heated at night and the water could freeze. He believed that privacy could be maintained by simply closing the door to the building, and that heat and soap and water are provided during the work shift. He stated that he knew of nothing else that he could do to be in compliance with the law (Tr. 56-57).

Mr. Stockwell denied that the portable toilet was still in the shipping crate as contended by the inspector. He stated that he purchased the toilet used and that it was not in a box. He had it wrapped in a "green garbage sack" as a convenient way to keep it clean and dust free, and when it needed to be used "you just pull the garbage sack away from the side of it and you got a clean facility to use" (Tr. 57). He described the toilet as a self-contained device that can be lifted by one person, and when it is used, water and a deodorizer are poured inside. He stated that no chemicals are used, and that after someone uses the toilet, the contents are taken out and disposed of, and it is washed out and made ready for use again. He confirmed that there is no running water available, but that a bucket of water is made available, and he is in the process of trying to obtain running water (Tr. 58-59).

On cross-examination, Mr. Stockwell explained his understanding of a "sanitary toilet facility", and he believed that the portable toilet in question satisfied the waiver requirements (Tr. 62-64). He reiterated that he purchased the toilet as a used device from another mine operator and that he took it home and cleaned it up and placed it in the garbage bag to keep it clean (Tr. 70-71).

Inspector Coburn was recalled by the presiding judge, and he did not dispute Mr. Stockwell's assertion that the toilet was in a green bag. Mr. Coburn confirmed that it was not in a wooden crate, and he saw no packing materials, but he reiterated that the toilet was not set up for use. He confirmed that the toilet could have been used if chemicals were provided (Tr. 73).

Citation No. 3395612

Mr. Stockwell conceded that the electrical equipment examination record book in question was not at the mine at the time of Mr. Coburn's inspection on November 5, 1991. Mr. Stockwell asserted that he had taken the book home with him in order to make certain entries after completing a prior work shift and that he inadvertently forgot to bring it back to the mine with him when he returned to work. He further asserted that he told the inspector that he could drive home to obtain the record book and immediately return to the mine with the book but that the inspector took the position that since the book was not available at the mine the violation existed and a citation would have to be issued.

MSHA's counsel asserted that if called to testify the inspector would testify that he had no recollection that Mr. Stockwell offered to drive home to retrieve the record book in question and that since the book was not at the mine site for his review a violation occurred (Tr. 76-78).

After further discussions, the parties decided to settle this alleged violation, and the solicitor agreed that the citation should be further modified to reflect a non-"S&S" citation (as originally issued) and that the proposed \$54 penalty assessment would be reduced to \$20. Both parties agreed to this proposed disposition (Tr. 78).

Citation No. 3395613

Mr. Stockwell conceded that the results of the last bimonthly respirable dust survey were not posted on the mine bulletin board at the time of the inspection by Mr. Coburn on November 5, 1991. However, Mr. Stockwell asserted that the survey results were posted on the bulletin board prior to the inspection but that he removed the document in order to prepare a response and to communicate an error in the test results to MSHA's Birmingham, Alabama office. Mr. Stockwell further asserted that the document was in his vehicle parked outside the mine and that he informed the inspector of this but the inspector took the position that since the results were not posted on the bulletin board as required when he conducted his inspection the violation existed.

After further discussion and consultation by the parties, they informed me that they proposed to settle this citation and they agreed it should be modified to a non-"S&S" citation, and that the penalty should be reduced from \$54 to \$20 (Tr. 78-80).

With regard to the remaining citations in this case, Mr. Stockwell stated that he did not wish to dispute the fact of violations, and he agreed that all of the conditions and practices described by the inspectors on the face of each of the citations accurately reflect the conditions cited by the inspectors as violations. Further, Mr. Stockwell waived the presentation of any evidence or testimony rebutting the inspector's findings concerning each citation, and he stated that he would accept them as written, and that he wished to rely on his contention that he is financially unable to pay any civil penalty assessments, and that the payment of said penalties will adversely affect his ability to continue in business (Tr. 80-82; 85-87; Exhibits J-4, J-5, J-8 through J-12, P-3).

Testimony and Evidence. Docket No. SE 92-252.

MSHA Inspector Tommy D. Frizzell testified as to his experience and training, and he confirmed that he issued the section 104(g)(1) order withdrawing James Stockwell from the mine until he received his required annual refresher training (Exhibit J-13; Tr. 189-90). He explained that on September 25, 1991, he observed Lonnie Stockwell's brother James performing mine duties that he had not been trained to do, and he confirmed that when he reviewed the training records at the mine he could not find a form verifying that James had received his annual refresher training. Mr. Frizzell stated that Lonnie Stockwell informed him of his belief that the training Forms 5023 were at his home and that he had a need for the forms in connection with some court litigation, and that he would bring them to the mine the next day. Mr. Frizzell was aware of the litigation and he gave Lonnie Stockwell an opportunity to produce the records the next day (Tr. 91-91).

Mr. Frizzell stated that on September 26, 1991, he again asked Mr. Stockwell to produce the training records, and Mr. Stockwell informed him that he did not know what he had done with them. Mr. Frizzell stated that he called the state training office which trains miners for Mr. Stockwell and most of the other area mines, and he was told that there was no record that James Stockwell had received any training the prior year. Mr. Frizzell confirmed that James Stockwell would normally receive a training card and a copy of Form 5023, but he could not produce any evidence that he had received training. Mr. Frizzell further confirmed that he did not ask James Stockwell if he had been trained, but that another inspector who was with him did, and James stated that he had received no training for approximately two years (Tr. 94).

Mr. Frizzell stated that he observed James Stockwell operating a front end loader, and that he was also dumping coal cars and had to walk between them to uncouple them. He was also performing surface maintenance work. After informing Lonnie

that James could not work until he received his training, James became upset and left the mine, and Lonnie stated that he could not work the mine without James on the surface. Lonnie offered to train James at his home, but Mr. Frizzell informed him that he would have to monitor the training because he did not know if Lonnie had the required training materials (Tr. 95-96).

Mr. Frizzell stated that Lonnie Stockwell has a training instructor's card, but does not have the training facilities or the necessary videos and materials, and he only does task training and newly employed miner training. Annual refresher training is done by the state (Tr. 97). Mr. Frizzell reiterated that Lonnie Stockwell could not produce any records verifying that James had received the required annual refresher training. He confirmed that the order was terminated on September 30, 1991, after Lonnie brought him a copy of the training forms from the state training department verifying that James had been trained (Tr. 98).

Mr. Frizzell stated that he based his "S&S" finding on his belief that without the required training, James would be a hazard to himself or someone else, and that if he continued working and an accident occurred, it would be serious because he performs hazardous surface work (Tr. 98). Mr. Frizzell confirmed that he based his "high negligence" finding on the fact that Lonnie Stockwell has known about the training requirements for several years, has trained his men, and had everyone else take annual refresher training except James. Mr. Frizzell believed that Lonnie knew or should have known that James had not been trained (Tr. 99).

In response to further questions, Mr. Frizzell stated that Mr. Lonnie Stockwell had training records at the mine for all of his other employees except for his brother James, and after initially telling him that he had the records at home, Lonnie could not produce them the next day (Tr. 102).

On cross-examination, Inspector Frizzell confirmed that Mr. Lonnie Stockwell was qualified to provide the full range of training for his employees, including retraining (Tr. 103). In the course of further cross-examination, Mr. Stockwell produced his mine training record books, and pointed out that when he moved to the No. 15 mine on May 14, 1990, from another mine, he was told that he would have to give the employees newly employed experienced miner training because they were working at a new site, and that this retraining would be good for one year. He produced a copy of an MSHA Certificate of Training Form 5000-23, showing that James Stockwell received Newly Employed, Experienced Miner training on May 14, 1990, and another training certificate form showing the James Stockwell received annual refresher training on November 17, 1990, which would have been well within

the 12-month period expiring on November 17, 1991, approximately two months after the order was issued by Mr. Frizzell. Mr. Stockwell confirmed that the copies he produced were made from the original training record books that he produced for examination by Mr. Frizzell and MSHA's counsel, as well as the presiding judge (Tr. 103-107; Exhibit R-1). Mr. Stockwell further explained his training record keeping procedures (Tr. 107-109).

Inspector Frizzell confirmed that he had not previously seen the training records produced by Mr. Stockwell in court, and he confirmed that had the records been produced by Mr. Stockwell at the time of the inspection, he would not have issued the violation in question because the respondent still had two months to go before the training certificate for James Stockwell expired (Tr. 111). Mr. Frizzell further confirmed that the violation would have been vacated during the conference stage had Mr. Stockwell produced his records at that time (Tr. 118).

Mr. Stockwell explained that he could not produce the training books in question at the time of the inspection because he was in the midst of litigation over a training grievance and the records were with his attorney at that time, rather than at his home as he had initially thought, and it took him some time to find the record books (Tr. 111). Mr. Stockwell described his brother James as "contrary" and "doesn't like people telling him what to do" (Tr. 112). From these reasons, he decided to train James himself to avoid problems, and he believed that he trained him adequately (Tr. 113).

Mr. Stockwell further explained his failure to produce his training records earlier in this litigation, including the time when he and the solicitor were in pretrial discussions, and he stated that he failed to do so because he had no confidence that he would be treated fairly, and his lack of trust in the "system" because he had previously been unsuccessful in pleading his case to the inspector's superiors on two occasions when he participated in MSHA conferences (Tr. 114-120). Mr. Stockwell reiterated that he could not find his training records at the time Inspector Frizzell issued the order, and in order to terminate the order so that he would not lose the crucial work performed by his brother James, his brother was again trained on September 30, 1991 (Tr. 121, Exhibit R-1).

After an opportunity to examine the training records produced in court by Mr. Stockwell, the Solicitor questioned Mr. Stockwell about his record keeping practices, the entries made on the training certificate forms kept in the books, the training that he administered to his employees at the mine, and the training they received from the state training office

(Tr. 125-130). Mr. Stockwell conceded that he "was wrong" in not apprising the solicitor earlier that he had found the records (Tr. 130). Mr. Stockwell further explained as follow at (Tr. 131):

A. -- I didn't have any place -- I had never met you until this morning, I talked to you on the phone several occasions and your predecessor I talked to on the phone the same way, I shared a lot of information with, that come when we had the other hearing in court and it was -- I give my defense to the end, that's the way I looked at it, and so, I was afraid to give it to you. I guess the bottom line is I had already been through Mr. Frizzell's supervisor on two or three occasions and not got any help, and I had a bad experience with the Solicitor's Office and I guess I grouped you in with it and I apologize fore that, I shouldn't have done that, because I should have trusted you on your own merit and I didn't do it.

And, at (Tr. 186):

MR. STOCKWELL: Again I apologize for the way I mishandled the last citation, not trusting the system and I guess that's really what it boils down to and I apologize to you and I will apologize to Mr. Frizzell. I am sorry I handled it so crudely and I hope you will accept my apology.

Mr. Stockwell further explained his failure to produce his training records earlier, and he denied that he withheld the records until the day of the trial in this case "to get even" with MSHA (Tr. 136-140). The solicitor asserted that she had no reason to believe that the training records and documents produced by Mr. Stockwell for the first time in court were not legitimate, and she had no reason to believe that they had been falsified (Tr. 135-136). However, counsel pointed out that Mr. Stockwell chose not to share these records with her or the inspector prior to the hearing, and that if he had done so, the order would have been vacated and she would not have expended trial preparation time in prosecuting the case. Under the circumstances, counsel requested that Mr. Stockwell be assessed costs for the time she spent in litigating the contested order (Tr. 135).

Findings and Conclusions

Docket No. SE 92-145

Fact of Violation. Citation No. 3395619.

The respondent is charged with a failure to make suitable examinations of its respirable dust pumps in that it failed to provide a voltage meter for the testing of the pump batteries to

assure that proper voltage was provided. The cited mandatory standard, section 70.204(d)(1), requires the testing of the respirable dust testing device (pump) battery while under actual load to assure that the battery is fully charged. Since Mr. Stockwell could not initially produce a voltage meter capable of testing the pump batteries at the time the inspector inquired about the availability of the meter, and apparently indicated to the inspector that he did not have one, the inspector assumed that a meter was not available for use in testing the pumps during the required testing cycle, and that the pump batteries were not being testing as required by the standard. Under these circumstances, the inspector proceeded to issue the citation.

The inspector confirmed that Mr. Stockwell showed him a voltage meter after the citation was written, but he indicated that the meter was a normal production ohm meter used for testing circuits, and that following his suggestions, Mr. Stockwell had to make certain modifications to render the meter capable of testing a dust pump battery. After satisfying himself that Mr. Stockwell was capable of testing a pump battery with the modified voltage meter, the inspector accepted this as abatement and terminated the violation before leaving the mine. The inspector confirmed that the meter was not in its modified form when he issued the citation (Tr. 27).

Mr. Stockwell admitted that he told the inspector that he did not have a voltage meter capable of testing a dust pump battery available at the mine, but he claimed that he misunderstood the inspector's inquiry. He stated that after he realized what the inspector was looking for, he obtained a voltage meter from his electrical supply building, and after equipping it with a charging plug suitable for testing a pump battery, he took it to the inspector and showed it to him. Mr. Stockwell admitted that he had to modify the meter by changing the test leads and wires and rotating the meter dial to the proper voltage and current, and he did not deny that the modifications were made at the suggestion of the inspector (Tr. 39-40).

After careful consideration of all of the evidence and testimony, I conclude and find that the petitioner has established a violation. I cannot conclude that the inspector acted unreasonably in issuing the citation after Mr. Stockwell informed him that he did not have a voltage meter capable of testing a dust pump battery. Although I do not totally disbelieve Mr. Stockwell's testimony that he was confused about the question asked of him by the inspector, as a qualified electrician and an MSHA approved qualified person to make the tests, I am not convinced that Mr. Stockwell was totally oblivious to what was required under the law. Further, since the available voltage meter which was produced by Mr. Stockwell had to be modified to render it capable of testing the voltage on the

dust pump batteries, and since it was not in its modified state ready for use for that purpose at the time the inspector proceeded to issue the citation, I conclude and find that a violation has been established. Accordingly, the contested citation IS AFFIRMED.

Citation No. 3395620

The respondent here is charged with a violation of mandatory standard section 75.1712-4, for failing to provide a sanitary toilet facility in accordance with a previously obtained bathhouse waiver for the mine. Section 75.1712-4, provides for the waiver of any or all of the bath house and toilet facilities standards found in sections 75.1712-1 through 75.1712-3, and it states as follows:

The Coal Mine Safety District Manager for the district in which the mine is located may, upon written application by the operator, waive any or all of the requirements of §§ 75.1712-1 through 75.1712-3 if he determines that the operator of the mine cannot or need not meet any part or all of such requirements, and, upon issuance of such waiver, he shall set forth the facilities which will not be required and the specific reason or reasons for such waiver.

The respondent was granted a waiver pursuant to section 75.1712-4, on October 15, 1990 (Exhibit P-1). The waiver was granted because (1) the development of a private water supply and sanitary waste disposal program was not practical, (2) it was not practical to construct a central bathhouse and change room, (3) all employees signed a statement agreeing that the waiver should be granted, (4) facilities were not available through a third party, and (5) adequate drainage facilities were not available or practical to provide. However, the waiver was subject to the following stipulation which appears in a Note under Item #8, and it states as follows:

This waiver is issued because it is impracticable for the operator to construct the necessary facilities now. This waiver is issued with the stipulation that sanitary toilet facilities approved under Section 71.500(a), 30 C.F.R. § 71, will be provided at each surface worksite.

Section 71.500(a), requires a mine operator to provide and install at least one sanitary toilet, together with an adequate supply of toilet tissue, in a location convenient to each surface work site. During oral argument, petitioner's counsel took the position that the portable toilet was still in its packing box and was not available or installed and ready for use. In support

of this position, counsel asserted that the toilet was still in its packing crate with plastic packing around it and styrofoam packing material on top of it, and that it was sealed as if ready for shipping. Counsel also pointed out that the inspector found no toilet paper available, that privacy was not provided for anyone using the toilet, and the toilet was not provided with chemicals to treat the sewage (Tr. 64-70).

Inspector Coburn initially testified that when Mr. Stockwell showed him the portable toilet, it was still in the shipping box, but the box was not sealed and the top was off, and the toilet was wrapped in plastic (Tr. 47, 49). Mr. Coburn also testified that he observed no toilet paper in the trailer where the toilet was located, there were no chemicals added to the toilet, and there was no place to use the toilet in private. Under these circumstances, the inspector did not believe that the toilet was in service and ready for use at any time, and he concluded that it did not constitute an installed sanitary toilet facility pursuant to section 71.500(a), as provided in the waiver.

I find nothing in section 71.500, that defines or explains what constitutes an installed sanitary toilet facility, nor do I find any regulatory requirement that such a facility must be installed to afford privacy, or that chemicals must be provided to treat any toilet waste. Although the "Note" found in section 71.500, states that sanitary toilet facilities for surface work areas of underground mines are subject to the provisions of section 75.1712-3, those requirements are included in the waiver granted the respondent. In any event, section 75.1712-3, only requires that a sanitary toilet facility be provided with adequate light, heat, and ventilation so as to maintain a comfortable air temperature and to minimize the accumulation of moisture and odors, and that it be maintained in a clean and sanitary condition.

Inspector Coburn defined a "sanitary toilet facility" as either a "fully flush toilet or a chemical toilet facility" commonly known as a "Port-o-Pot" (Tr. 46). In response to a question as to what needed to be done to install such a toilet for use, he explained that chemicals needed to be added, and a place had to be provided for its use "because the building that Mr. Stockwell is referring to is a van trailer where men stay in the morning to try and stay warm" (Tr. 72). Petitioner's counsel stated that "If it was in a green bag for toting in and out then perhaps it was installed, but if it was still in the packing crate with the original packing materials and stabilizing material for shipping it then it is our position it wasn't installed" (Tr. 70). Mr. Coburn confirmed that he terminated the citation after Mr. Stockwell started construction of a wall to provide privacy for the use of the toilet, and provided water and chemicals to be used with the toilet (Tr. 74).

Mr. Stockwell testified that a roll of toilet paper was available in the trailer where the toilet was located, and he confirmed that the toilet was the same kind that he had available underground and on the surface for at least two years prior to the inspection by Mr. Coburn, and that it was the kind of toilet that "has been accepted for years at every mine around there" (Tr. 63). He further testified that water was available for the toilet when it was used, and that he provided soap and water for hand washing, and that the trailer had heat and light, and that privacy could be provided by simply shutting trailer the door (Tr. 56). Mr. Stockwell denied that the toilet was still in a shipping crate, and he explained that he purchased it in a "used" condition and cleaned it up and placed it in a plastic garbage bag to keep it clean and dust-free. He also explained that it was not a chemical toilet as such, and that in order to use it, water and a deodorizer would be poured into the self-contained toilet, which could be lifted by one person, and after it was used, it would be emptied and washed out and made ready to be used again (Tr. 58).

Inspector Coburn admitted that the portable toilet was not packed in a shipping box or crate (Tr. 72), and he did not rebut Mr. Stockwell's contention that he had purchased the toilet as a used unit and that he cleaned it up and placed it in a garbage bag to keep it clean and dust-free. Although Mr. Coburn testified that he did not see any toilet paper available, I find Mr. Stockwell's testimony to the contrary to be more credible and believable.

As noted earlier, the respondent is charged with a violation of section 75.1712-4. However, I find nothing in that regulation which imposes any mandatory duties or obligations on a mine operator with respect to a sanitary toilet facility. The regulation simply authorizes MSHA's district manager, upon application by the mine operator, to grant a waiver, and if he does, the manager is required to identify the facilities which are not required and the reasons for the waiver.

The cited condition or practice alleges that the respondent failed to comply with the waiver granted by the district manager by not providing a sanitary toilet facility as stipulated on the cover sheet of the waiver. The waiver signed by the district manager, MSHA Form 2000-88, contains a stipulation indicating that the waiver was issued on the condition that the respondent would provide a sanitary toilet facility approved under section 71.500(a). Although the respondent has not been charged with a violation of section 71.500(a), I assume that the theory of the petitioner's case is that the alleged failure by the respondent to provide a sanitary toilet facility which meets the requirements of section 71.500(a), constitutes a violation of the waiver which was conditioned on compliance with that regulation, as well as a violation of that regulation itself.

The mandatory language found in the first sentence of section 71.500(a), requires an operator to provide and install an approved sanitary toilet, together with an adequate supply of toilet tissue, in a location convenient to each surface work site. On the facts of this case, I find no evidence to establish that the portable toilet or "Port-o-pot" in question, was not an approved piece of equipment. I conclude and find that the credible testimony of the respondent establishes that the portable toilet was provided, and that it was located in a convenient surface work site location, and that an adequate supply of toilet tissue was provided. However, absent any credible evidence of any MSHA guidelines or regulatory requirements dealing with the installation of a sanitary toilet, I cannot conclude that the petitioner has carried its burden of proof and has established a violation of the waiver granted the respondent. In short, I am not convinced by the petitioner's evidence that the portable toilet in question was not installed as required by the waiver which incorporates section 71.500(a), by reference. Under the circumstances, the citation IS VACATED.

Docket No. SE 92-146

Fact of Violation. Citation No. 3395612.

Mr. Stockwell did not rebut the fact that the required electrical inspection book was not at the mine and available for the inspector's review as required by the cited section 75.512. I conclude and find that the petitioner has established a violation and the citation IS AFFIRMED.

The parties agreed to a proposed settlement of this violation, and they agreed that the citation should be modified to a non-"S&S" citation, and that the initial proposed civil penalty assessment of \$54 should be reduced to \$20 (Tr. 78). The proposed settlement IS APPROVED, and the citation is modified as a non-S&S citation.

Citation No. 3395613.

Mr. Stockwell conceded that the results of the last bimonthly respirable dust survey were not posted on the mine bulletin board at the time of the inspection. The cited section 70.210(b), requires the posting of the results of the survey upon receipt by the operator, and for a period of 31 days. Since they were not posted, I conclude and find that a violation has been established, and the violation IS AFFIRMED.

The parties agreed to a proposed settlement of this violation, and they agreed that the citation should be modified to a non-S&S citation, and that the proposed penalty assessment of \$54 should be reduced to \$20. The proposed settlement IS APPROVED, and the citation is modified to a non-S&S citation.

Citation Nos. 3395610, 3395611, 3395617, 3395618, 3395347, 3395348, and 3395579.

As noted earlier, the respondent waived its right to present any evidence or testimony to rebut the findings of the inspectors with respect to these citations. Mr. Stockwell stated that he accepts the citations as written and issued by the inspectors, and that he does not dispute the violations and agreed that all of the conditions and practices noted by the inspectors accurately reflect the prevailing conditions or practices at the time of the inspections. Under the circumstances, all of these citations and violations ARE AFFIRMED.

Docket No. SE 92-252

Fact of Violation. Order No. 3395455.

In this case, the respondent is charged with a violation of the training requirements found in 30 C.F.R. § 48.28(a) because of its alleged failure to retrain James Stockwell. The cited standard requires each miner to receive a minimum of 8 hours of annual refresher training, and the burden of proof lies with the petitioner. I conclude and find that the credible evidence presented by the respondent at the hearing establishes that James Stockwell did in fact receive the requisite training and that the respondent has rebutted the petitioner's allegations to the contrary. Accordingly, the contested order IS VACATED, and the petitioner's proposal for assessment of civil penalty IS DENIED and DISMISSED.

After further consideration of the petitioner's request for an assessment of costs against the respondent because it waited until the day of the hearing to disclose the training records which the petitioner's counsel agreed would have exonerated the respondent earlier, IS DENIED. I take note of the fact that Mr. Stockwell apologized to the petitioner's counsel and the presiding judge in open court and expressed his regrets for not advancing his defense in a more timely manner. Further, considering the fact that Mr. Stockwell is not represented by counsel, and taking into account his reasons for waiting until the hearing to put on his evidence, I cannot conclude that Mr. Stockwell's actions were particularly egregious. See: Francis A. Marin v. Asarco, Inc., 14 FMSHRC 1269 (August 1992).

History of Prior Violations

The respondent's history of prior violations is shown in a computer printout submitted by the petitioner (Joint Exhibit 1). The information submitted reflects that for the period November 19, 1989, through November 18, 1991, the respondent was assessed \$9,423 for seventy-one (71), violations, and that it paid \$477, for eleven (11) of these violations. The petitioner

issued delinquency letters for thirty-three (33) of the violations which the respondent has not paid. Under the circumstances, and for an operation of its size, I cannot conclude that the respondent has a particularly good compliance record. However, the respondent's financial condition may account for his failure to pay the prior civil penalty assessments, and this would be a matter within the petitioner's enforcement jurisdiction.

Negligence

I concur with the inspector's findings that all of the violations which have been affirmed in these proceedings resulted from a moderate degree of negligence on the part of the respondent, and I adopt these findings as my findings and conclusions with respect to each of the violations.

Gravity

Except for Citation Nos. 3395612, 3395613, and 3395619, which have been affirmed as non-"S&S" violations, I conclude and find that all of the other citations which have been affirmed as significant and substantial violations in these proceedings were serious violations.

Good Faith Abatement

The parties stipulated that all of the citations in these proceedings were timely abated by the respondent either within or before the time fixed by the inspectors for abatement. I adopt this stipulation as my finding and conclusion on this issue and have taken it into consideration in assessing the civil penalty assessments for the violations which have been affirmed.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The parties have stipulated that the respondent operates one active small underground mine with an annual production of 8,016 tons, and Mr. Stockwell testified that his mining operation is a family operation which includes his father, and two of his brothers (Tr. 32). Inspector Coburn testified that the respondent is a "contract operator" for the Tennessee Consolidation Coal Company, and the mine operates one shift a day and employs six to ten people (Tr. 19, 44). Under all of these circumstances, I conclude and find that the respondent is a small mine operator.

In a contested civil penalty case the presiding judge is not bound by the penalty assessment regulations and practices followed by MSHA's Office of Assessments in arriving at initial

proposed penalty assessments. Rather, the amount of the penalty to be assessed is a de novo determination by the judge based on the six statutory criteria specified in section 110(i) of the Act, 30 U.S.C. 820(i), and the information relevant thereto developed in the course of the adjudicative hearing. Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff'd, 652 F.2d 59 (6th Cir. 1981); Sellersburg Stone Company, 5 FMSHRC 287, 292 (March 1983).

As a general rule, and in the absence of evidence that the imposition of civil penalty assessments will adversely affect a mine operator's ability to continue in business, it is presumed that no such adverse affect would occur. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). Conversely, the size and documented financial condition of a mine operator is required to be considered in any determination as to whether or not the payment of civil penalties will adversely impact on a mine operator's ability to continue in business.

In several early decisions pursuant to the 1969 Coal Act, the former Interior Board of Mine Operations Appeals held that Congress intended a balancing process in arriving at an appropriate civil penalty assessment in any given case, including consideration of the size of the mine and the ability of a mine operator to stay in business. See: Robert G. Lawson Coal Company, 1 IBMA 115, 117-118 (May 1972), 1 MSHC 1024; Newsome Brothers, Inc., 1 IBMA 190 (September 1972), 1 MSHC 1041 1041; Hall Coal Company, 1 IBMA 175 (August 1972), 1 MSHC 1037.

In several cases adjudicated by me pursuant to the 1977 Mine Act, I followed and applied the Robert G. Lawson Coal Company, line of decisions, supra, and concluded that the reduction of the initial penalty assessments were justified because the mine operators were small and in serious financial difficulties, and that the initial assessments in the aggregate would effectively put the operators out of business. See: Fire Creek Coal Company of Tennessee, 1 FMSHRC 149 (April 1979), 1 MSHC 2078; Fire Creek Coal Company of Tennessee, 2 FMSHRC 3333 (November 1980); Davis Coal Company, 4 FMSHRC 1168, 1192-1196 (June 1982); G & M Coal Company, 2 FMSHRC 3327 (November 1980) and 3 FMSHRC 889 (April 1981). See also: Davis Coal Company, 2 FMSHRC 619 (March 1980), where the Commission reviewed and affirmed several settlement decisions approving proposed civil penalty reductions based on the detrimental effect that assessment of the originally proposed penalties would have had on the mine operators ability to remain in business.

Mr. Stockwell submitted the following documentation concerning his financial condition (Exhibits ALJ-1):

1. A 1991 Federal joint income tax return reflecting a net operating loss of \$270,779, including a loss of \$26,499, for

the Faith Coal Company, a \$280 loss in rental income from a home, and a \$21,017, loss from the operation of a hay/corn farm.

2. A 1990 Federal joint income tax return reflecting a net operating loss of \$109,969, including a loss of \$83,669, for the Faith Coal Company, a \$3,720, loss from a rental home, a \$24,803, loss from the operation of a farm, and a casualty loss of \$145,533, as the result of an uninsured home fire.

3. An itemized list of outstanding 1991 and 1992 accounts payable by the Faith Coal Company to twenty-eight (28) creditors, totalling \$36,667.55.

4. A copy of a June 15, 1992, letter from the First National Bank, Tracy City, Tennessee, to Mr. and Mrs. Stockwell, informing them of their failure to make a payment due on a promissory note in the amount of \$160,495.45, and advising them that they were in default, and making a formal demand for payment in full for the balance of the indebtedness, plus interest, attorney's fees, and costs incurred in collecting the debt.

5. A copy of a July 28, 1992, letter from the U.S. Department of Agriculture, Farmers Home Administration, to Mr. and Mrs. Stockwell informing them that they were three months delinquent in their loan payments and informing them of their options and possible loan foreclosure.

6. Copies of past due 1992 tax notices from local county and city tax officials, Dunlap, Tennessee, advising Mr. and Mrs. Stockwell of past due taxes owed on their farm and two residences, in amounts totalling \$541.94.

7. A copy of a note executed by the Faith Coal Company and Mr. and Mrs. Stockwell with the First National Bank, Shelbyville, Tennessee, in the amount of \$160,495.45. The listed security for this note includes all of the coal mining equipment and machinery of the Faith Coal Company, and the maturity date of the note is shown as June 6, 1996 (posthearing letter and attachment dated October 17, 1992).

Mr. Stockwell testified and explained the documentary evidence he submitted with respect to his personal financial condition as well as that of his mining company, and the Secretary's trial counsel conducted a most thorough and detailed questioning of Mr. Stockwell regarding all of his financial affairs, assets, a farming operation, checking accounts, rental income, accounts payable and receivable, company and personal debts, mining expenses and sales, etc. In addition,

Mr. Stockwell's wife Christine, who was present in the courtroom, was called to testify regarding the financial condition of the family, including their joint assets and liabilities (Tr. 143-179).

With regard to the current viability of his mining operation, and his financial condition, Mr. Stockwell stated as follows at (Tr. 179-180):

Q. Do you have miners working most days? .

A. We try to work five days a week, occasionally on Saturday, I can't afford the overtime.

Q. So is it your statement that you're making enough money with the mine to keep the doors opened and keep things running?

A. I have been up until just -- I'm gradually getting further -- a little further behind. I kept hoping for better days for better than a year and they have not come yet. I keep hoping tomorrow is going to be better, the potential is out there for it to be better, but we're just having one difficulty after another that has kept us from doing it.

MS. STOCKWELL: If we don't make some profit by December we will have to end it.

A. I am about ready to give it -- there is an old saying give it to the end because I just -- I hate to think about going -- I know that everything I got is mortgaged, the house, she put the house we're living up as security on the \$160,000 loan, if we have to default we have got to find a place to live and that's serious.

After careful consideration of all of the evidence adduced in these proceedings concerning the respondent's financial condition, which I find credible and unrebutted, I conclude and find that the imposition of the full amount of the initial civil penalty assessments proposed by the Secretary in these cases would have an adverse impact on the respondent's ability to continue the operation of the mine. Considering the fact the respondent is a small operator and appears to be in serious financial difficulties, I find that the imposition of the full amount of the proposed penalties would, in the aggregate, jeopardize the respondent's ability to remain in business.

Penalty Assessments

In view of the foregoing findings and conclusions, and taking into account the civil penalty criteria found in

section 110(i) of the Act, I conclude and find that the following civil penalty assessments for the violations which have been affirmed are reasonable and fair, and that the respondent can afford to pay them.

Docket No. SE 92-145

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3395619	11/19/91	70.204(d)(1)	\$10

Docket No. SE 92-146

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3395610	11/5/91	70.204(d)(1)	\$10
3395611	11/5/91	75.306	\$20
3395612	11/5/91	75.512	\$20
3395613	11/5/91	70.210(b)	\$20
3395617	11/18/91	75.316	\$20
3395618	11/18/91	75.301	\$20
3395347	12/2/91	75.1704-2(c)(2)	\$15
3395348	12/3/91	75.523	\$20
3395579	12/2/91	75.208	\$25

ORDER

The respondent IS ORDERED to pay the aforesaid civil penalty assessments within thirty (30) days of these decisions and Order. Payment is to be made to MSHA, and upon receipt of payment, these matters are dismissed.

Section 104(a) non"S&S" Citation No. 3395620, November 19, 1991, 30 C.F.R. § 75.1712-4, issued in Docket No. SE 92-145, IS VACATED, and the proposed civil penalty assessment is DENIED AND DISMISSED.

Section 104(g)(1) Order No. 3395455, September 26, 1991, 30 C.F.R. § 48.28(a), issued in Docket No. SE 92-252, IS VACATED, and the proposed civil penalty assessment IS DENIED AND DISMISSED.


George A. Koutras
Administrative Law Judge

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 1 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. CENT 92-113-M
	:	A.C. No. 16-01094-05514
ACME GRAVEL COMPANY, INC., Respondent	:	Tynes Island Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. CENT 92-118-M
	:	A.C. No. 16-01201-05504
BARBER BROTHERS CONTRACTING COMPANY, Respondent	:	Asphalt Plant #5 Rock Crusher
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. CENT 92-153-M
	:	A.C. No. 16-01217-05507
ACME GRAVEL COMPANY INCORPORATED, Respondent	:	Kent #2

DECISIONS

Appearances: Ernest Burford, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for the
Petitioner;
John N. Fetzer, III, Esq., Baton Rouge, Louisiana,
for the Respondents.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessments of civil penalties filed by the petitioner against the respondents 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 for three (3) alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondents filed timely contests and answers denying the violations, and the cases were heard in Baton Rouge, Louisiana. The parties were afforded an opportunity to file posthearing briefs, but they did not do so.

Issues

The issues presented in these proceedings are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory safety standards, (2) whether two of the alleged violations were "significant and substantial" (S&S) and resulted from an "unwarrantable failure" to comply with the cited standards, and (3) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.
2. Sections 110(a), 110(i), and 104(d) of the Act.
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Stipulations

The parties stipulated to the following (Tr. 6-11):

1. The respondents and the mines in question are subject to the jurisdiction of the Act.
2. The presiding Judge has jurisdiction to hear and decide these matters.
3. The assessment of civil penalties for the violations in question will not adversely affect the ability of the respondents to continue in business.
4. The respondents exercised good faith in timely abating all of conditions or practices cited as violations.
5. The history of prior violations for the mines in question are reflected in three MSHA computer print-outs identified and received as hearing exhibits P-1 through P-3.

With regard to the settlement disposition of two of the cases, the parties agreed that the following language should be

included as part of the settlement agreements reached by the parties and approved by the presiding Judge (Tr. 24, 40):

Except for these proceedings and matters arising out of these proceedings, and any other subsequent MSHA proceedings between the parties, none of the foregoing agreements, statements, findings, and actions taken by the respondent shall be deemed an admission by the respondent of the allegations contained within the citations and the petition for assessment of penalty. The agreements, statements, findings, and actions taken herein are made for the purpose of compromising and settling this matter economically and amicably and they shall not be used for any other purpose whatsoever except as herein stated.

Discussion

Docket No. CENT 92-113-M

This case concerns a section 104(d)(1) Citation No. 3896665, issued on September 19, 1991, by MSHA Inspector Stephen C. Montgomery, citing an alleged violation of mandatory safety standard 30 C.F.R. § 56.11001. The cited condition or practice is described as follows:

Safe access to the six (6) inch dredge was not provided. A four (4) feet by eight (8) feet starfoam pontoon was being used by the dredge operator to get to and from the dredge. The dredge was approximately forty (40) feet to fifty (50) feet from the pit bank and the depth of the water was approximately fifteen (15) feet. The dredge operator would "hand-pull" himself to and from the dredge with a rope that was anchored to the ground and tied to the dredge. The flat bottom aluminum boat that had been used for transportation, had been lost several months ago when the river had risen and flooded the property. The dredge operator said he always wore a life jacket when he was on the pontoon. A life jacket was lying on the pontoon when it was observed next to the pit bank.

Mr. Frank Panepinto, Foreman, stated he had "told the dredge operator to stop using the pontoon", for transportation, "sometime ago". Mr. Panepinto stated the "10 inch" dredge operator was supposed to carry the "6 inch" dredge operator back and fourth to the "6 inch" when needed. The "10 inch" dredge operator had a flat bottom aluminum boat to use for transportation on the water. The "10 inch" dredge was approximately three hundred (300) to four hundred (400) feet from the "6 inch" dredge.

This was an unwarrantable failure on the company and Mr. Frank Panepinto for not assuring the pontoon was not still being used for transportation and not providing a boat to be used for transportation for the "6 inch" dredge.

Docket No. CENT 92-153

Section 104(d)(1) "S&S" Citation No. 3896761, issued on December 31, 1991, by MSHA Inspector Benny W. Lara, cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.14130(g), and the cited condition or practice is described as follows:

The seatbelt was not being worn by the operator of the D6 Cat Dozer, serial No. 3N61185. The operator assumed the buckle was missing. It was discovered wedged behind the seat. The employee stated he had only been working for this company about 6 months and had no training when hiring on. He stated it had a buckle one month ago and during operation one day a rag was tied to the buckle position (no buckle observed). Thought it was gone and used the rag. Frank V. Panepinto stated he has never checked to see if the belts were worn. The only time belts were discussed with the employees was when MSHA held a safety meeting during the last inspection. This is an unwarrantable failure. This machine was being used to push sand which is 12' off the ground or more.

Docket No. CENT 92-118-M

Section 104(a) non-S&S Citation No. 3628839, issued on September 18 1991, by MSHA Inspector Joe C. McGregor, cites an alleged violation of mandatory reporting standard 30 C.F.R. § 41.12 and the cited condition or practice is described as follows:

A change of person in charge of Health and Safety at the mine occurred and notification of change was not sent in to MSHA. MSHA Form 2000-7 is required to be updated when such changes occur. A citation for this violation was issued by another inspector 3/26/91.

Findings and Conclusions

Docket No. CENT 92-113-M

Counsel for the parties informed me that they reached a proposed settlement in this case, and they jointly moved for my approval of the settlement. The initial proposed civil penalty

assessment was \$250, and the respondent agreed to pay a civil penalty assessment of \$200, with no changes in the citation as it was originally issued (Tr. 11, 23) Inspector Montgomery, who was present in the courtroom, explained the circumstances under which he issued the citation in question (Tr 15-18). The respondent's counsel pointed out that a boat was in fact being used to transport miners to the dredge and that the inspector admitted that he did not actually observe anyone using floatation devices that are normally used to float pipeline as a means of access to the dredge. Counsel further asserted that the respondent does not condone the use of styrofoam pontoons by its employees as a means of access to the dredges, and if an employee engaged in such conduct he did it on his own without any direction or instruction by the respondent. Counsel also indicated that the respondent provided two boats for transportation to the dredges, but that one was lost in a flood, and that a replacement boat has been purchased and two boats are presently available at the site for access to the dredges (Tr. 18-23).

After careful consideration of the information contained in the pleadings, the stipulations with respect to the six statutory civil penalty criteria found in section 110(i) of the Act, the arguments and testimony presented in support of the proposed settlement of this case, and pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the settlement was APPROVED from the bench (Tr. 24, 28). My bench decision in this regard is herein REAFFIRMED.

Docket No. CENT 92-153-M

The parties proposed to settle the seat belt violation which is in issue in this case, and the respondent agreed to pay a civil penalty assessment of \$450. The initial proposed penalty was \$600. In support of the settlement, the petitioner's counsel stated that the equipment in question was being used on level ground, and although a seat belt was provided, the equipment operator was not using it (Tr. 29-31). The respondent's safety director testified that the employee in question has been discharged for failing to follow company written policy requiring the wearing of a seat belt when the equipment is in operation (Tr. 31).

MSHA Inspector Bennie Lara, the inspector who issued the citation and who was present in the courtroom, confirmed that a seatbelt was present but that the equipment operator was not using it. The inspector stated that the belt was found tucked behind the seat and that the employee was using a rag to tie the belt together, rather than the normal buckle used for that purpose (Tr. 32-37).

After careful consideration of the pleadings and arguments in support of the proposed settlement, including the fact that

the respondent's history of prior violations does not include prior seat belt violations, and pursuant to Commission rule 30, 29 C.F.R. § 2700.30, the settlement was APPROVED from the bench (Tr. 38). My bench decision in this regard is herein REAFFIRMED.

Docket No. CENT 92-118-M

Fact of Violation. Citation No. 3628839.

Mandatory reporting standard 30 C.F.R. § 41.10, which implements the statutory report filing requirement found in Section 109(d) of the Mine Act, requires a mine operator to submit a properly completed Legal Identity Report Form No. 2000-7, to MSHA. Pursuant to the language found in section 41.10, the submission of this form constitutes adequate notification of legal identity. One of the items required to be included as part of the operator's legal identity notification pursuant to section 41.11, is the name of the person in charge of health and safety at the mine. If any changes are made with respect to the person placed in charge of health and safety, section 41.12, requires the operator to notify MSHA of the change in writing within 30 days after the occurrence of the change. Pursuant to section 41.13, any failure by an operator to notify MSHA in writing of any change is considered a violation of Section 109(d) of the Act and subject to a civil penalty as provided in section 110 of the Act.

The evidence in this case reflects that Inspector McGregor visited the plant site on September 13, 1991, and the plant was not in operation. The inspector requested to speak to Mr. Dave Jones, the individual purportedly in charge of safety and health, and after being informed that Mr. Jones was no longer assigned to the site, the inspector left. He next returned on September 18, 1991, and spoke with foreman Clint Johnson who confirmed that he had replaced Mr. Jones as the responsible health and safety person in charge, and that this had occurred "two or more months" earlier. Based on this information, and without further documentation or verification of the actual date that Mr. Johnson replaced Mr. Jones, the inspector concluded that the change had taken place more than 30 days earlier and had not been reported, and for this reason, he issued the citation (Tr. 46-48, 53). The inspector confirmed that Mr. Johnson called the respondent's risk manager, Mr. Frank Panepinto, and advised him that the citation was issued (Tr. 53).

Inspector McGregor identified a copy of a letter dated September 17, 1991, addressed to MSHA's District Office in Dallas, Texas, with a courtesy copy to the inspector's local MSHA office in Denham Springs, Louisiana, from the respondent's Risk Manager, Frank J. Panepinto, advising MSHA that Mr. Johnson replaced Mr. David Jones as plant foreman on August 19, 1991 (Exhibit P-4). The inspector confirmed that the courtesy copy of

the letter was received in his office, and he identified the envelope the letter came in and confirmed that it is postmarked September 19, 1991 (Exhibit P-5). He also confirmed that he made the notation "Aug. 19 to Sept. 19 is 31 days" which appears on the face of the envelope (Tr. 49-51). The inspector believed that the respondent should have notified MSHA of the change in question by September 18, 1991, which would have been within the 30-day notification requirement found in section 41.12. However, since the envelope containing the notification letter was postmarked September 19, 1991, one day later, the inspector believed that this constituted a violation of section 41.12 (Tr. 49-50).

MSHA's counsel confirmed that the inspector received a fax copy of the Panepinto letter of September 17, 1991, from MSHA's Dallas office after he received the copy addressed to his local field office (Exhibit P-4, Tr. 75). The inspector did not contact the Dallas office to determine when it actually received the letter which Mr. Panepinto mailed to that office. At the conclusion of the hearing, the inspector produced a copy of an updated MSHA Legal Identity Report signed by Mr. Panepinto on September 30, 1991, and the "Effective Date of Changes" shown on the face of the report states "September 17, 1991" (Exhibit ALJ-1). The respondent's counsel stipulated that this form was submitted by Mr. Panepinto after the citation was issued in response to MSHA's request, and that the September 17, 1991, date may have been the date the report was prepared. Counsel stated that MSHA took the position at that time that any changes must be reported by using the MSHA Legal Identity Form and that a letter was insufficient (Tr. 76). A copy of the inspector's "subsequent action" terminating the citation on October 25, 1991, reflects that it was terminated after "a new updated legal identity report has been received in the district manager's office".

At the request of the respondent, the record in this case was left open in order to afford the parties an opportunity to inquire further as to precisely when the MSHA Dallas District Office may have received the Panepinto letter of September 17, 1991 (Tr. 60, 70). On October 7, 1992, I issued an Order affording the parties additional time within which to submit any further information or any posthearing briefs. However, the parties failed to file anything further and my decision in this case is based on the current record.

Mr. Panepinto produced a copy of a company employment and promotion form which reflects that Clint Johnson was promoted to plant foreman on August 19, 1991 (Exhibit R-1). Mr. Panepinto identified a copy of his September 17, 1991, letter which he addressed and mailed to MSHA's Dallas district office that same day, with a copy to Inspector McGregor's local field office in Denham Springs, Louisiana, advising MSHA of the change of the person in charge of health and safety at the plant (foreman

Johnson), and he confirmed that he signed and mailed the letter within 28 or 29 days after the change (Tr. 54-58). Absent any evidence to the contrary, I believe it is reasonable to conclude that Mr. Panepinto mailed the letter after being informed of the inspector's inquiry at the mine site during his inspection and the fact that he issued a citation.

Respondent's counsel argued that although it seems clear from the language found in regulatory section 41.12, that MSHA must be notified of any changes "within thirty days after the occurrence of any change", there is nothing in that regulation that states that the notification must be received by MSHA's District Office within 30-days after the change. Since the un rebutted evidence establishes that the Panepinto letter of September 17, 1991, was written and mailed within the 30-day period, counsel concluded that the respondent has substantially complied with section 41.12 (Tr. 65-67).

MSHA's counsel agreed that the issue in this case is whether or not the filing of the September 17, 1991, letter by Mr. Panepinto advising MSHA that Mr. Johnson replaced Mr. Jones as the responsible health and safety person at the mine was complete upon mailing, or upon receipt of the letter by MSHA (Tr. 51). Counsel further agreed that if Mr. Panepinto's letter was received by MSHA'S Dallas office on September 18, 1991, the respondent would be in compliance with the 30-day notification requirement found in section 41.12 (Tr. 64). Counsel suggested that in the event the respondent could establish that the Dallas office timely received the letter by September 18, 1991, he would move to withdraw the civil penalty proposal (Tr. 72).

The contested citation issued by Inspector McGregor cites an alleged violation of section 41.12, and included as part of the description of the violative condition or practice is a statement by the inspector that "MSHA Form 2000-7 is required to be updated when such changes occur". However, the theory of MSHA's case is that the respondent did not comply with section 41.12, because the Panepinto letter of September 17, 1991, was received in the inspector's field office on September 19, 1991, one day after the 30-day notice period for informing MSHA of the change in question expired. Neither the inspector or MSHA's counsel advanced any testimony or arguments that the citation was based on the respondent's failure to timely submit an updated MSHA Form 2000-7, or that a notification by letter, rather than the form, was insufficient or unacceptable. Indeed, when this question was raised by the presiding judge at the conclusion of the hearing after Inspector McGregor volunteered a copy of the updated Form 2000-7, which apparently served as the basis for the termination of the citation, MSHA's counsel took the position that notification of any changes transmitted by letter is sufficient to comply with section 41.12, and that the submission of the form is not necessary to achieve compliance (Tr. 78).

I find nothing in section 41.12, that requires the use of an MSHA report form to notify MSHA of any changes in the required legal identity information provided by a mine operator. That section simply requires written notification to MSHA within 30 days after the occurrence of any change. However, I take note of the fact that section 41.20, requires an operator to file "notification of legal identity and every change thereof" with the appropriate MSHA district manager, "by properly completing, mailing, or otherwise delivering Form 2000-7 legal identity report".

The respondent is not charged with a violation of section 41.20, for failing to submit an updated Form 2000-7, reporting a change in the person responsible for health and safety at the mine site in question. As noted earlier, MSHA's case is based on its assertion that the respondent's letter of notification, which MSHA concedes was an acceptable method of notification pursuant to the cited section 41.12, was received one day late. Assuming that section 41.20, can be interpreted to apply to section 41.12, notification could still be accomplished by simply completing and mailing the form to MSHA's district manger.

On the facts of this case, and considering the position taken by MSHA, I conclude and find that the evidence presented establishes that the respondent provided the requisite written notification of the change in question within 30 days after it occurred, and that the preparation and mailing of the notification letter by Mr. Panepinto within this time frame constituted adequate compliance with section 41.12, notwithstanding the fact the the letter was received more than 30 days after the change took place, and that the method of transmitting the information was by letter rather than an MSHA form. Under the circumstances, I further conclude and find that MSHA has failed to establish a violation, and the citation IS VACATED.

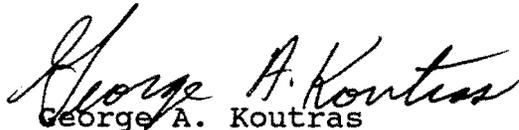
ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Docket No. CENT 92-113-M. The respondent shall pay a civil penalty assessment of \$200, in satisfaction of Section 104(d)(1) Citation No. 3896665, September 19, 1991, 30 C.F.R. § 56.11001.
2. Docket No. CENT 92-153. The respondent shall pay a civil penalty assessment of \$450, in satisfaction of Section 104(d)(1) Citation No. 3896761, December 31, 1991, 30 C.F.R. § 56.14130(g).

3. Docket No. CENT 92-118-M. The contested Section 104(a) Citation No. 3628839, IS VACATED, and the petitioner's proposed civil penalty assessment for this alleged violation IS DENIED AND DISMISSED.

Payment of the aforesaid civil penalty assessments shall be made by the respondent to MSHA within thirty (30) days of the date of these decisions and Order, and upon receipt of payment, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 91-196
Petitioner	:	A.C. No. 29-00224-03563
	:	
	:	Cimarron Mine
v.	:	
	:	Docket No. CENT 91-197
	:	A.C. No. 29-00845-03540
PITTSBURG AND MIDWAY COAL	:	
MINING COMPANY,	:	Docket No. CENT 91-202
Respondent	:	A.C. No. 29-00095-03561
	:	
	:	York Canyon-Underground Mine

DECISION

Appearances: William E. Everheart, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
John W. Paul, Esq., THE PITTSBURG & MIDWAY COAL MINING COMPANY, Englewood, Colorado, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") charges Respondent Pittsburg and Midway Coal company ("P&M") with violating safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").

A hearing on the merits was held in Alamosa, Colorado, on April 7, 1992.

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

1. The York Canyon Surface Mine, mine I.D. No. 29-00845; the Cimarron Mine, mine I.D. No. 29-00224; and York Canyon Underground Mine, mine I.D. No. 29-00095, are subject to the jurisdiction of the Federal Mine safety and Health Act of 1977, and the Federal Mine Safety and Health Review Commission.

2. The Citations in CENT 91-197 numbered 3243235, 3243236, and 324327 and Citation No. 3243346 in CENT 91-196 were all properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Pittsburgh and Midway Coal Mining Company and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of the statements asserted therein.

3. The assessment of civil penalties in CENT 91-197, CENT 91-196, and CENT 91-202 will not affect Respondent's ability to continue in business.

4. The alleged violations contained in the Citations in CENT 91-197, CENT 91-196, and CENT 91-202, were abated in a timely fashion and Respondent demonstrated good faith in obtain-
abatement.

5. The sizes of the three mines of the Pittsburg and Midway Coal Company are as follows:

a. York Canyon Surface Mine, I.D. No. 29-00845 - company size 13,587,727 production tons; mine size 482,069 in produced tons;

b. Cimmaron Mine, I.D. No. 29-00224 - mine size 73,843 produced tons;

c. York Canyon underground Mine, I.D. No. 29-0095 - mine size is listed, the company size 13,587,727 produced tons.

CENT 91-196

Citation No. 3243318 alleges P&M violated 30 C.F.R. § 75.316. At the commencement of the hearing, the Secretary withdrew the "Significant and Substantial" classification and reduced the proposed penalty from \$157 to \$20.

Respondent admitted the violation of the Citation as amended.

The Citation and proposed amended penalty should be affirmed.

Citation No. 3243346 was modified to allege P&M violated 30 C.F.R. §75.1722(a).¹

Federal coal mine inspector ANTHONY DURAN, during an AAA inspection, observed an auxiliary floor fan was inadequately guarded. The pulley was exposed and a person could contact moving parts. The fan withdraws float coal dust from the face and blows it into the return. The blower fan is chest high. The inspector would be an arm's reach from the pulley if he was dumping rock dust into the hopper. (P-17, P-18).

P&M admitted it violated § 75.17223(a). At issue is whether the violation should be classified as significant and substantial. (Tr. 8).

A violation is properly designated as being S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division National Gypsum, 6 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-104 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 500-501

¹ § 75.1722 Mechanical equipment guards.

(a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; fly-wheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

(April 1988); Youghiogheny and Ohio Coal Co. 9 FMSHRC 2007, 2011-2012 (December 1987).

In connection with Citation No. 3243346, the evidence shows a violation of the underlying guarding regulation. There was a measure of danger contributed to by the violation. Unguarded equipment is reasonably likely to result in an injury. Becoming entangled with unguarded parts such as shown in P-18 will cause a reasonably serious injury. In sum, I agree with Inspector Duran when he classified this as an S & S violation. (Tr. 51-52).

Citation No. 3243347 alleges P&M violated 30 C.F.R. § 75.503.

P&M withdrew its contest to this Citation and accepted the proposed penalty of \$20. (Tr. 8). Accordingly, the Citation and proposed penalty should be affirmed.

CENT 91-197

Citation No. 3243235 alleges P&M violated 30 C.F.R. § 77.1605(k).

MSHA Inspector Donald L. Jordan testified as to the alleged berm violation. At the conclusion of the hearing, P&M withdrew its contest to the Citation. (Tr. 88).

P&M's motion was granted. The Citation and the proposed penalty should be affirmed.

Citation No. 3243236 alleges P&M violated 30 C.F.R. § 77.410.²

MSHA Inspector **DONALD JORDAN** issued this Citation for an explosive truck that had a non-functioning backup alarm. The truck is designed with large boxes on each side. (P-9).

Inspector Jordan opined that pickup trucks are required to have a backup alarm if vision is not clear to the rear. He con-

² § 77.410 **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.

sidered the violation to be S&S. Workers were always around the truck putting priming explosives in holes.

MICHAEL KOTRICK, P&M safety manager, produced photographs that show a relatively clear view from front to rear of the explosives truck. (R-1, R-2, R-3). In Mr. Kotrick's opinion, the wire mesh on the truck permits a greater "see through" than does a standard pickup with an ordinary tailgate.

In P&M's business, miners take detonators and primer cord and drop them in holes. However, kneeling by the truck is not part of the procedure.

The parties in this case injected an issue of "see through" visibility, that is, if the driver of the truck could see workers to the rear no backup alarm is required. However, the regulation does not recognize this exception as it simply requires an audible alarm on mobile equipment when the equipment is put in reverse.

Since P&M's truck had no alarm, the Citation should be affirmed.

I agree with Inspector Jordan's evaluation that this violation was S&S. The S&S criteria, set forth above, is established by the evidence. Specifically, there was a violation of the mandatory safety standard and a measure of danger to safety was contributed to by the violation. Further, it is uncontroverted that miners work in close proximity to the truck. The final criteria is established: a truck backing into a miner would cause reasonably serious injuries or a fatality.

P&M was negligent since it should have known the backup alarm was inoperative. Gravity has been discussed in connection with the S&S criteria.

Citation No. 3243236 should be affirmed.

Citation No. 3243237 alleges P&M violated 30 C.F.R. § 77.1104.³

Federal Coal Mine Inspector Donald Jordan issued this Citation in the PEPCO Buildings, a Class 2, Division 2 building. In such a building, since there are no explosion-proof motors,

³ § 77.1104 Accumulations of combustible materials.

Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

the operator agrees to keep the area free of combustibles such as flammable liquids, oil, grease, coal dust, etc. (Tr. 23).

Mr. Jordan saw an oil and float coal dust accumulation averaging 1/16th of an inch thick. (Tr. 24). The accumulation was on a flat metal surface surrounding a 460-volt A.C. motor. (P-11 shows the accumulation; P-14 shows tracks on the floor from Mr. Jordan's shoes.)

Mr. Jordan believed the float coal dust in the presence of oil created an insulating effect that prevented the motor from adequately cooling. Under normal circumstances, Mr. Jordan agreed that the probability of ignition or fire was highly unlikely. However, tests reveal that 64/100 of an inch accumulation on a flat surface would propagate ignition if given the proper heat. (Tr. 27).

In Mr. Jordan's opinion, heat would come from the motor if overheated because of excessive coal dust in the cooling fans. In Mr. Jordan's opinion there was a strong probability that an accident or serious injury could occur. An explosion would be remote but he considered a fire to be a strong possibility.

Mr. Jordan concluded the violation was S&S.

Under § 77.1104, the Secretary must prove there were (1) combustible materials, (2) such combustibles were allowed to accumulate and (3) they created a fire hazard.

In Texasgulf, Inc., 10 FMSHRC 498 (April 1988), the Commission developed an analytical approach useful for determining the reasonable likelihood of a combustion hazard resulting in an ignition or explosion. The Commission established that there must be a "confluence of factors" to create a likelihood of ignition, cf. Compare: Eastern Associated Coal Corporation, 13 FMSHRC 178 (February 1991) involving Section 75.400.

In the instant case, I credit the testimony of P&M's safety manager Michael Katrick who testified as to a fire triangle and described the three legs as: oxygen, ignition source, and fuel in vaporized form. (Tr. 64, 65).

Further, a flash point is a point where sufficient vapors are given off a substance for it to be ignited. (Tr. 66). The lowest flash point at P&M's site was the transmission fluid. Its flashpoint was 160 degrees Centigrade. P&M's lab tested coal dust and the flash point was found to be in excess of 500 degrees Fahrenheit. (Tr. 69, 70).

Mr. Kotrick concluded the minimum flash point would be 160 degrees. (Tr. 71). The motors were tested and their highest

temperature was 55 degrees Fahrenheit. The motors are specifically designed to be used in a Class 2 Division 2 area.

Based on his research, Mr. Kotrick concluded the accumulations were a combustible mixture. (Tr. 74-75). While the materials are classified as combustible in a definitional sense, there were not present in a combustible state. (Tr. 74). There were no open flames nor electrical sparks in the area. (Tr. 75). The motor was not malfunctioning. In addition, there were fire extinguishers 10 to 20 feet away.

The Secretary's post-trial brief relies on Inspector Jordan's opinion. (Tr. 28, 29). However, I am not persuaded. Mr. Jordan agreed he did not know the flash point of the materials he observed in accumulation nor did he have any information regarding the heat given off the surface of the apparatus where the dust and oil accumulated. (Tr. 34). Further, there was no short circuit or evidence of malfunction. Mr. Jordan further agreed he had no way of knowing if the accumulation caused excessive heat. (Tr. 35).

The Secretary failed to establish an ignition source and fuel to support a fire. Accordingly, Citation No. 3243237 should be vacated.

Citation No. 3243342 alleges P&M violated 30 C.F.R. § 77.1303(ii). P&M has admitted the occurrence of the violation. The Secretary, upon the evaluation of new evidence provided by P&M agreed to withdraw the classification from "Significant and Substantial" and proposed a single assessment of \$20. (Tr. 7).

The motions were granted. The Citation and amended civil penalty should be affirmed.

CENT 91-202

Citation No. 3243321 alleges P&M violated 30 C.F.R. § 77.400(a) ⁴ P&M admits the violation. At issue are the S&S allegations and the penalty. (Tr. 8).

Inspector **DONALD JORDAN** issued this Citation. He found the west end of the feeder slide on the walkway side and the draw-off

⁴ § 77.400 Mechanical equipment guards.

(a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

tunnel at the prep land where a person could be injured was not guarded. The feeder slide is a moving machine part. (Tr. 31).

This is an area that must be examined several times a shift. The area must be checked for methane, coal spillage and accumulations.

There was a handrail parallel to the feeder slide. However, the handrail does not prevent a person from reaching into the slide.

Inspector Jordan considered the violation to be S&S because a person could become entangled and incur serious injuries. An injury could include the loss of a hand or arm. (Tr. 32, 33).

MICHAEL KOTRICK, testifying for P&M, did not contradict Mr. Jordan. He indicated the area is isolated. The 36-inch walkway is made of a heavy metal grating. (Tr. 77).

The railing, approximately 40 inches high, is between a feeder and the walkway. The hazard is 12 to 18 inches beyond the railing. (Tr. 78). The railing could be contacted by anyone who might slip. (Tr. 79).

In order to establish an S&S violation, the Secretary must establish evidence to comply with the Commission mandate set forth, supra.

Of the four elements required, I do not find there was a reasonable likelihood that the hazard contributed to will result in an injury. If a person were to slip on the walkway, he would most likely steady himself on the adjacent guardrail. Further, the unguarded feeder slide was 12 to 18 inches beyond the rail. The S&S violations should be stricken.

P&M was negligent in failing to guard the feeder slide. This was an open and obvious condition.

The gravity of this violation should be considered as low since the unguarded equipment was 12 to 18 inches beyond the railing.

CIVIL PENALTIES

P&M's negligence and the gravity of the violations have been previously discussed. The remaining statutory criteria to assess civil penalties is contained in Section 110(i) of the Act.

The stipulation (§ 5) indicates P&M is a large operator. Further, the penalties are appropriate and will not affect the company's ability to continue in business.

P&M's previous adverse history, as evidenced by Exhibits P-1, P-2, and P-3, is average.

The stipulation further indicated P&M promptly abated the violative condition. The operator is entitled to statutory good faith.

For the foregoing reasons, I enter the following:

ORDER

CENT 91-196

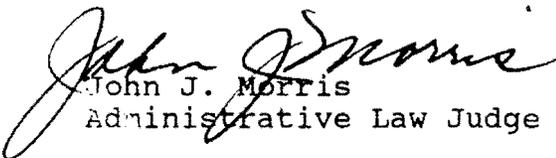
1. Citation No. 3243318 and the penalty of \$20, as amended, are **AFFIRMED**.
2. Citation No. 3243346 is **AFFIRMED** and a civil penalty of \$100 is **ASSESSED**.
3. Citation No. 3243347 is **AFFIRMED** and a civil penalty of \$20 is **ASSESSED**.

CENT 91-197

4. Citation No. 3243235 is **AFFIRMED** and the proposed penalty of \$227 is **ASSESSED**.
5. Citation No. 3243236 is **AFFIRMED** and penalty of \$200 is **ASSESSED**.
6. Citation No. 3243237 is **VACATED**.
7. Citation No. 3243342 is **AFFIRMED** and a civil penalty of \$20 is **ASSESSED**.

CENT 91-202

8. The S&S allegations are **STRICKEN** from Citation No. 3243321.
9. Citation No. 3243321, as amended, is **AFFIRMED** and a civil penalty of \$50 is **ASSESSED**.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 92-93
Petitioner	:	A.C. No. 05-00301-03671
	:	
v.	:	Roadside Mine
	:	
POWDERHORN COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Edward Mulhall, Jr., Esq., Glenwood Springs,
Colorado,
for Respondent.

Before: Judge Cetti

Statement of the Proceedings

This case is before me upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"). The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the Powderhorn Coal Company (Powderhorn), the operator of the Roadside Mine, with a 104(a), non S&S, violation of the mandatory regulatory standard found in 30 C.F.R. § 77.207 and proposed a \$20 civil penalty assessment.

The operator filed a timely answer contesting the alleged violation and the case was docketed for hearing.

Pursuant to notice, an evidentiary hearing on the merits was held before me on the primary issue of whether or not there was a violation of the mandatory safety standard 30 C.F.R. § 77.207. Both parties filed helpful post-hearing briefs raising many points and arguments that I have considered in deciding this matter.

Stipulations

The parties stipulated to the following:

1. The Mine Safety & Health Review Commission has jurisdiction.
2. Respondent is an operator within the meaning of and subject to the Federal Mine Safety and Health Act of 1977.
3. Citation No. 3582104 was issued by Mine Safety and Health Inspector David L. Head on June 24, 1991, charging a section 104(a) violation of 30 C.F.R. § 77.207.
4. Powderhorn's total coal production was 187,167 tons for the 12 month period preceding the issuance of the citation.
5. Any determination in connection with this citation will not adversely affect Powderhorn's ability to continue in business.

Findings and Discussion

Federal Coal Mine Inspector David L. Head, an experienced electrical inspector, was assigned by his supervisor to make a complete electrical inspection of both the surface and underground area of the Roadside Mine located a few miles East of Palisade, Colorado. Inspector Head during his electrical inspection was accompanied by Mr. Henry Barbe of the Roadside Mine Safety Department who later became and presently is the mine's Safety Supervisor.

On June 24, 1991, Inspector Head issued the 104(a) non S&S citation in question, Citation No. 3582104, which states:

No illumination was provided at electrical substation (C) and switch panels located on east side of the surface shops area.

No illumination was provided on the path or walkway to the substation area.

The cited mandatory safety standard 30 C.F.R. § 77.207 reads as follows:

§ 77.207 Illumination.

Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.

The testimony of Inspector Head that there was no illumination on the path or walkway to the surface substation in question or at the substation or its switch panels, other than miner's cap lamp that may or should be worn by a miner going to the substation, was undisputed.

Inspector Head testified that during his triple A inspection of the mine, he observed the surface substation in darkness as well as during daylight hours and he elaborated as follows:

Q. And could you describe the conditions that you observed both at 10:45 a.m. and also in the darkness.

A. In the darkness hours you could not see the substation from the bottom of the walkway or the pathway without knowing the substation was there. There was no illumination provided at all in that area.

Q. Now, are you telling us today that at the time you wrote the citation there was absolutely no illumination whatsoever at the substation?

A. That's correct. Tr. 20.

With respect to the location of the surface substation and purpose of the substation, Inspector Head testified that the substation sits on a ledge above the other facilities with a "25 to 30 foot vertical drop-off." There was a high voltage transmission line "directly across the substation approximately 15 to 20 feet high." Inside the fenced area there is an "enclosed type transformer and three disconnects of the 225 amps square D type. Each one is a main disconnect for the warehouse, the bath house, the office facilities and the shop area."

Inspector Head on being asked to explain in more detail what he meant by a "vertical drop-off" in his description of the location of the substation testified as follows:

Q. Now, in your description of the location of the substation you said there was a vertical drop-off; could you explain that in a little more detail.

A. Yes, sir. The vertical pathway that used to be used down there had a wire strung down from the top that they used to pull their selves up on to check the substation. That was immediately terminated at the time. The pathway was then determined as the direct route to the substation from the back of the mine over the portal area, which started out as a roadway. It's still cliff area, a vertical drop-

off, and drops down to a path. There is tripping hazards, a lot of rocks, sagebrush, different types of things, to the substation area.

Q. So how would one traverse this pathway?

A. He would start at the--across the canyonway on the opposite side of the conveyor belt and start his climbing to the elevation of the substation, which would be on the opposite side of the canyon. You make a horseshoe-type exit--or approach.

Q. Could you describe in terms of difficulty how it is to traverse this particular pathway.

A. Without proper illumination at night, it would be very hard to have visual sight to get to the substation in the first place. It would be a lot of tripping hazards involved. You would have to have some artificial lighting.

Q. Would the elevation--you said there was a vertical drop-off with the substation. Would the elevation pose any particular difficulty for a person trying to traverse this pathway in the dark.

A. Yes, it would. Tr. 18-19.

A miner would have to go to the substation not only for monthly examination but also in an emergency, such as troubleshooting the problem of a breaker tripping out in one of the facilities. Inspector Head testified that a cap lamp worn by a miner does not furnish sufficient illumination to provide safe working conditions into the electrical substation with the voltage that was present in the substation. A cap lamp does not provide "sufficient quality of light" in the substation area to meet the safety standard in question. Tr. 23, 57.

Powderhorn contends that since cap lamps are used underground for light, they should be satisfactory for surface illumination. With regard to this contention, Inspector Head was questioned and testified as follows:

Q. Okay. And also during your cross-examination you were asked a series of questions why you thought it was okay for an electrician using a head lamp to work on a power source or power panel underground, but in your opinion that would not be sufficient at this particular

substation; do you recall that line of questioning?

A. Yes, sir.

Q. Would you explain in your opinion as to why there is a difference.

A. On the underground high voltage circuit, the circuit would be locked out at the source. It would be grounded out from phase to ground. There would be no incoming power available to go into the substation to do any kind of work or troubleshooting at that time.

Q. And I know I'm perhaps stating a very obvious question, but the weather conditions underground are considerably different than on the surface; is that not correct?

A. Yes, sir. Underground would be a constant atmosphere. On the surface would be changes in the weather. Tr. 56.

Inspector Head testified that the quality of light supplied by a miners' cap lamp was not sufficient in the area in question to provide a safe work environment. Tr. 57. He noted that weather conditions underground are considerably different than on the surface. Underground there is a constant atmosphere while the surface is subject to weather changes.

At the time of the hearing, the mine was working a night shift as well as a day shift and a maintenance shift. Mr. Barbe testified that there have been night shifts since October or November of 1991 but there was only a single day shift starting at 7 a.m. at the time the citation was issued on June 24, 1991. He stated the miners' would get to the mine to get ready for the day shift about 6 a.m. Inspector Head recalled "there's been power outages at the mine at different times "including a failure during a night shift underground some time before the citation involved here was issued. Tr. 49.

Respondent concedes that the substation was subject to monthly inspections and that "typically, those inspections are conducted during daylight hours when there is plenty illumination from the sun." I accept this statement as well as Respondent's statement that "only on rare occasions would there be any possibility of going up there to substation C at night." Tr. 7 line

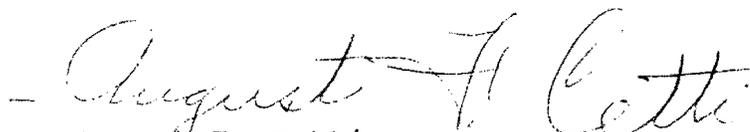
11-15. Clearly this is why the citation designated the violation as a non S&S violation, injury unlikely, negligence low, and only a \$20 penalty proposed.

Inspector Head is an experienced, well qualified mine inspector. I credit his testimony. Based upon his testimony and on his informed judgment, I find that there was a violation of the safety standard 30 C.F.R. § 77.207 as alleged in Citation No. 3582104. See Secretary of Labor v. Clinchfield Coal Company, issued March 12, 1979, MSHC 2027, review denied by the Commission in April 1979, affirmed in Clinchfield Coal Company v. Secretary of Labor, 620 F.2d 292 (4th Cir. 1980), 1 MSHC 2337 (1980). In that case the Court of Appeals upheld a finding of insufficient illumination based on the "informed judgment [of the inspector] of what constituted sufficient illumination."

On consideration of the statutory criteria in section 110(i) of the Act, I concur with MSHA's proposed \$20 penalty assessment for this non S&S violation. This is a modest but appropriate penalty under all the facts and circumstances established at the hearing.

ORDER

The Respondent is **ORDERED TO PAY** a civil penalty assessment in the amount of \$20, in satisfaction of the violation in question. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.


August F. Cetti
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 29 1992

IN RE: CONTESTS OF RESPIRABLE) Master Docket No. 91-1
 DUST SAMPLE ALTERATION)
 CITATIONS)

**ORDER DENYING MOTION TO EXCLUDE CERTAIN
TESTIMONY OF ROBERT THAXTON**

On October 7, 1992, Contestants, by the Lead Defense Counsel Committee, filed a motion for an order precluding the Secretary from offering at the common issues trial testimony of Robert Thaxton relating to his March 1992 reclassification of the cited dust filters according to his tamper codes. On October 19, 1992, the Secretary filed a response to the motion asking that the motion be denied. On October 22, 1992, Contestants filed a reply to the Secretary's response. On the same day, Contestant U.S. Steel Mining Company, Inc. (U.S.M.) filed a separate reply. On October 26, 1992, the Secretary filed a motion to strike Contestants' and U.S.M.'s replies and, in the alternative, to accept the Secretary's response which she filed the same day. I am accepting and have considered the replies and the Secretary's response thereto in deciding the pending motion.

Factual and Procedural Background

The Secretary's Document 405 in the document repository is a computer data base providing information on each of the cited filters, including the mine identification number, cassette number, sampling date, weight, and the classification of the filter under one of the twelve tamper codes devised by Thaxton. Of the more than 5000 cited filters, 652 were included under tamper code 1, 4161 under tamper code 2, 36 under tamper code 3, and the remainder under the other nine tamper codes, varying from 4 to 293. This classification apparently took place over a period of time, but was certainly completed by July 1991, when the document repository was opened. Thaxton prepared a report entitled "'AWC' Citation Determination Report" on February 7, 1992, which was made available to Contestants shortly thereafter.

The Secretary and Contestants have engaged expert witnesses who analyzed the cited filters, compared them with experimental filters, and prepared reports directed in part to the question of the cause of the abnormal white centers and other phenomena observed in the cited filters. Under the Discovery Plan, as amended from time to time, expert witness reports were to be

exchanged by February 7, 1992, and expert witness depositions were to be completed by October 16, 1992. The latter was extended at Contestants' request to October 23, 1992. In March 1992, Thaxton made a "second review" of the cited filters, which involved the separation of the filter media and backing pad, apparently not done in the first examination. This second review resulted in changes of the tamper codes for 464 filters. The most significant changes were in tamper codes 2 and 3. Tamper code 2 is entitled "cleaned"; tamper code 3 is entitled "cleaned and coned". The number of filters included under tamper code 3 was increased from 36 to 440. The number of filters under tamper code 2 was reduced from 4161 to 3742. Thaxton prepared a report entitled "'AWC' Common Issues Report" on September 25, 1992, describing the changes in the tamper code assigned to each filter. This report also revealed that he reviewed approximately 5100 samples stored in the Pittsburgh Health and Technology Center which had been received from mine operators in November and December 1991 and June 1992 and which had not been cited. It further included an analysis of the experimental filters prepared by the R.J. Lee Group, Drs. Yao and Malloy, Dr. McFarland, and Dr. Grayson, all of whom are Contestants' experts, and Dr. Marple, an expert engaged by the Secretary. The report was made available to Contestants on September 25, 1992.

Contestants' motion argues that the reclassification of the filters was deliberately withheld from Contestants for more than 6 months, that the Secretary had the clear obligation to disclose this information, and that her failure to do so undermines Contestants' ability to prepare for the common issues trial. They assert that they have been seriously prejudiced and that the only appropriate sanction for the Secretary's misconduct is to exclude the evidence that was withheld. The Secretary argues that her burden is to establish that the weight of dust in the cited filters was deliberately altered, and the precise manner of the alteration (the tamper code) is not part of her burden of proof. The Secretary further asserts that:

The tamper code assignment during the second filter review did not ... involve any modification to any tamper codes during the first review which are set forth in Document 405 all that occurred was that a column was added to MSHA's data base to reflect the results of Thaxton's observation of the cited filters as they appeared in March 1992. This recordation did not change Thaxton's observations of the cited filters as they appeared during his initial review.

(emphasis in original). These assertions are further explained by the statement that the changed classification in some instances resulted from a change in the appearance of the filter

caused by handling and by the passage of time, and in other instances because Thaxton observed "coning" or "dimpling" on the filter after the backing pad was removed. If the Secretary is arguing that the March 1992 review did not result in a change in Thaxton's conclusions as to the nature of the AWC phenomena on the 464 filters which were reclassified, the argument is incomprehensible and is rejected.

Rule 26(e)

Rule 26(e)(1)(B) of the Federal Rules of Civil Procedure requires a party to seasonably supplement a response to a discovery request to include information subsequently acquired on the subject matter on which an expert witness is expected to testify at trial. Rule 26(e)(2)(B) requires a party to seasonably amend responses to discovery when the party learns that a prior correct response is no longer true, where failure to amend would result in knowing concealment. This requirement applies to all evidence and is not limited to expert witness testimony. Rule 26(e)(3) requires a party to supplement responses to discovery upon request made by the opposite party. In this proceeding Contestants have requested that the Secretary update the document repository.

If Thaxton is an expert witness, the Secretary was obliged by Rule 26(e)(1)(B) to seasonably disclose her March 1992 reclassification. Without regard to Thaxton's status, the Secretary was required to seasonably disclose the reclassification by Rule 26(e)(2)(B) and Rule 26(e)(3). Disclosure on September 25, 1992, of the March 1992 reclassification was not seasonable, particularly in view of the imminent completion of expert witness discovery. The failure to disclose a significant change in Thaxton's consideration of the filters for a period of more than 6 months was a clear violation of Rule 26(e).

Discovery Plan

The Discovery Plan governing discovery in this proceeding was amended on June 10, 1992, and provided in part as follows:

(5) If any expert modifies or adds to the opinions previously expressed, opposing parties shall be promptly notified in writing of the opinion to which the expert is then expected to testify the opposing parties shall be given an opportunity for a reasonable time to depose that expert on such additional or modified opinions.

Thaxton has apparently not been identified as a generic expert, but as a case specific expert by the Secretary. Nevertheless,

the Discovery Plan requires the Secretary to promptly notify Contestants of the modification or addition to his previously expressed opinions. She failed to do so. I should note, however, that because of her failure I extended by 1 week the time for completion of Contestants' deposition of Thaxton which, at least in part, remedies the violation of the Plan.

Sanction

Contestants seek the exclusion of certain testimony of Thaxton. Rule 26(e) does not require the exclusion of evidence for a violation of the rule. However, if the trial judge deems it appropriate he may exclude evidence at trial for a violation of the rule's supplementation requirement which prejudices the opposing party. See Notes of Advisory Committee on 1970 Amendment to Rule 26, Federal Rules of Civil Procedure.

The exclusion of evidence is an "extreme" sanction. Dudley v. South Jersey Metal, Inc., 555 F.2d 96, 99 (3d Cir. 1977). In deciding whether to apply this extreme sanction or fashion another for the violation of the discovery rules, I must consider a number of factors:

1. The extent of the prejudice, if any, to the opposing party;
2. Whether the prejudice may be cured or lessened by a less extreme sanction than exclusion;
3. The importance of the testimony sought to be excluded to a fair and complete trial of the relevant facts and issues; and
4. Whether the violation resulted from bad faith or willfulness.

See Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 904-05 (3d Cir. 1977).

Contestants argue that because they were not informed of Thaxton's reclassification when it occurred, they were prejudiced in preparing their expert witness reports. In particular, they assert that the small number of cassettes originally classified under tamper code 3 (36) caused them to spend less time on the phenomenon of coning than they would have if they were aware of the number of cassettes so classified following the "second review" (440). There is no question that the withholding of the reclassification affected the way in which Contestants prepared for their expert witness testimony. It also affected their depositions of Mr. Thaxton. The prejudice is diminished however because of the extension of 1 week for the completion of Thaxton's deposition; by the fact that Thaxton's supplemental

report was made available September 25, 1992, prior to the completion of expert witness discovery; by the fact that the question of coning was considered and discussed in the reports and depositions of Contestants' experts; and by the fact that all the cited filters were made available for Contestants' inspection many months before Thaxton's supplemental report.

Contestants suggest that an alternative remedy would be to permit further scientific research by the Contestants' experts on the reclassification and allow the results of that research at the common issues trial. The prejudice to Contestants certainly would be lessened, if not cured, if they had the opportunity to conduct further experimentation on the phenomenon of coning.

Contestants state that the Secretary has made Thaxton a critical witness in these proceedings; that she "rested the full weight of asserting violations of the dust sampling regulations upon his subjective judgment alone." For precisely this reason, I would be reluctant to limit or exclude his testimony, lest in penalizing the Secretary, I also limit my ability to fully consider and understand the facts and the issues raised in these proceedings.

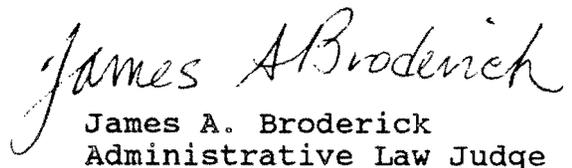
Contestants allege that the evidence of Thaxton's reclassification was deliberately withheld and imply that it resulted from bad faith. Bad faith on the part of counsel is not lightly presumed and I do not find that the evidence establishes it here. Contestants assert that Thaxton's reclassification was made known to the Secretary's expert, Dr. Marple while it was withheld from Contestants. The Secretary denies that she made it known to Dr. Marple. Contestants point to the Secretary's failure to disclose the existence of 5100 non-cited filters in the Pittsburgh lab and her failure to notify Contestants of her finding that snapping a cassette together could result in an AWC as showing bad faith. These are factors peripherally related, at best, to the subject of the motion before me. I do not conclude that they show bad faith. U.S.M. asserts that it was prejudiced in that its expert conducted little experimentation related to coning because none of U.S.M.'s cited filters were classified under tamper code 3. Following the March 1992 review, 5 filters were reclassified as tamper code 3. Thus, Dr. McFarland was deprived of the opportunity to conduct experiments related to the causes of coning. U.S.M. suggests that the trial judge might have accepted U.S.M.'s offer at the prehearing conference to be the subject of a bellwether trial had the reclassification been known. In fact, I decided against holding a bellwether trial involving any Contestant at that time, so the argument is irrelevant. U.S.M. suggests a hearing on the questions raised in the motion "not only regarding what has transpired, but to also ensure that such conduct does not reoccur." I believe that such a hearing would be counterproductive and is unnecessary to a proper decision on the motion.

Because the prejudice to the Contestants has been to some extent mitigated, because there is time prior to trial to further cure the prejudice, because the testimony is important to a fair and complete trial, and because bad faith or willfulness in failing to comply with the discovery requirements has not been shown, I will deny the motion to exclude. However, in an attempt to further cure the prejudice, I will permit Contestants to carry out further scientific studies related solely to the Thaxton reclassification and more specifically the coning phenomenon, provided that the studies shall be completed and the expert reports shall be served on the Secretary and filed with me ¹ on or before November 17, 1992.

ORDER

In accordance with the above discussion, IT IS ORDERED that

- (1) the motion to exclude certain testimony of Robert Thaxton is DENIED.
- (2) Contestants are granted time to conduct further scientific studies related solely to the Thaxton reclassification. Such studies shall be completed and reports shall be served on the Secretary and filed on or before November 17, 1992.


James A. Broderick
Administrative Law Judge

¹ I have issued a separate order directing that copies of all expert witness reports be filed with me by the same date.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 13, 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-240-M
Petitioner : A. C. No. 39-01282-05528
 :
v. : Annie Creek
WHARF RESOURCES USA :
INCORPORATED, :
 :
Respondent :

ORDER ACCEPTING LATE FILING
ORDER DENYING MOTION TO DISMISS

Before: Judge Merlin

On August 18, 1992, the Solicitor filed the penalty petition in the above-captioned case and a motion to accept late filing of the penalty proposal. On September 21, 1992, the operator filed its answer to the penalty proposal together with a motion in opposition to the Solicitor's motion to accept late filing.

Commission Rule 27 requires that the Secretary file the penalty proposal within 45 days of the date she receives an operator's notice of contest for the proposed penalty. 29 C.F.R. § 2700.27. An operator contests the proposed penalty by mailing in the so called "blue card" which has been provided to it for this purpose. The date of receipt by the Secretary is the date the operator mailed the blue card. J.P. Burroughs, 3 FMSHRC 854 (1981). Assuming that in this case the blue card was mailed the same day it was signed, June 18, 1992, the penalty proposal became due on August 3. The proposal was mailed on August 14, and received at the Commission on August 18. It was therefore, 15 days late.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of the penalty proposal upon a showing of adequate cause by the Secretary where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981).

The Solicitor's motion to accept late filing represents that the delay occurred because the case was not sent to her office until August 3, 1992. In Salt Lake County Road Department, supra, decided early in the administration of the Act, the Commission held that the extraordinarily high caseload and lack of personnel confronting the Secretary at that time constituted adequate cause for late filing. At the present juncture, I take

note of the precipitous rise in the volume of contested cases over the last few years, as indicated by the Commission's own records. I find these circumstances constitute adequate cause for the short delay in the filing of the penalty petition. Finally, the record does not indicate any prejudice to the operator from the two week delay.

More serious is the time span between the issuance of the citation on August 15, 1991, and the notification to the operator of the proposed penalty assessment on June 1, 1992. Section 105(a) of the Act, 30 U.S.C. § 815(a), provides that after the Secretary issues a citation or order under section 104, she shall within a reasonable time notify the operator of the proposed civil penalty to be assessed for the cited violation.

The Mine Act does not define "reasonable time". However, the following statements of the Senate Committee are instructive:

To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 34, reprinted in, Senate Subcommittee on Labor, Comm. on Human Resources, 95th Cong., 2 Sess., Legislative History of the Federal Mine Safety and Health Act, at 622 (1978).

It does not appear that the Commission has specifically considered whether a penalty petition must be dismissed because it was not issued until several months after the citation had been issued. However, I find relevant the principles adopted by the Commission in Salt Lake County Road Department, supra, and therefore, in the instant matter I will consider whether adequate cause existed for the delay and if the operator has demonstrated prejudice.

Note is taken of the few Commission judges' decisions where delays in the issuance of the proposed assessments have occurred. In Heldenfels Brothers, Inc., 2 FMSHRC 851 (April 1980), a judge denied a motion to dismiss where there was a 220-day delay on the ground that MSHA's assessment procedures required considerable time and that the operator had not shown that it suffered any actual harm. However, in Anaconda Company, 3 FMSHRC 1926 (August 1981), another judge dismissed a case where there had been a two year delay and the Secretary offered no reasons, but this same judge subsequently refused to dismiss a case for a 132 day delay

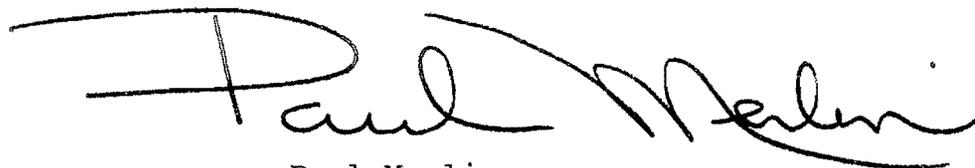
because the operator had not claimed prejudice. Industrial Construction Corp., 6 FMSHRC 2181 (Sept. 1984). Delays of a year and a half and two years have not been countenanced. Washington Corporation, 4 FMSHRC 1807 (October 1982).

In this case the delay was considerable, but within the parameters previously allowed by judges in the cases cited above. In addition, the file in this case shows that the alleged violation was the subject of an investigation of a non-fatal haulage accident. In discussing the requirement of reasonable promptness for the issuance of citations, Congress made specific reference to the time taken by accident investigations. S. Rep. No. 94-181, supra, Legislative History supra, at p. 618. Just as accident investigations are to be taken into account in determining timeliness for the issuance of citations, so they are germane in deciding the analogous question of whether adequate cause exists to justify a lag in assessing a penalty.

The operator has alleged prejudice because it will have to reconstruct events as they were on August 15, 1991, and that it must have witnesses who are available and recall the specific facts. However, there is no specific proffer that such witnesses are in fact unavailable and that the operator is unable to present its position sufficiently.

Informative with respect to the foregoing is the decision of the Commission in Old Dominion Power, 5 FMSHRC 1886 (1984), refusing to dismiss a citation because it was not issued until one year after a violation occurred where in the interim there had been a fatality investigation. The Commission found that the operator had not been prejudiced and cited the legislative history for the proposition that the "reasonable promptness" requirement was not jurisdictional. Old Dominion Power at 1894. So too, allowing the instant case to proceed is consistent with the expressed Congressional mandate that a failure to propose a penalty with promptness shall not vitiate the penalty proceeding. MSHA is, however, forewarned that as a general matter tardiness in assessments is troublesome and may in other contexts irreparably hinder its enforcement of the Act.

In light of the foregoing, it is **ORDERED** that the Solicitor's motion to accept late filing be **GRANTED** and that the operator's motion to dismiss be **DENIED**.

A handwritten signature in black ink, reading "Paul Merlin". The signature is written in a cursive, flowing style with a large initial "P" and "M".

Paul Merlin
Chief 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 13, 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-246-M
Petitioner : A. C. No. 39-01282-05501 D3H
: :
v. : Annie Creek
FISHER SAND & GRAVEL COMPANY, :
Respondent :

ORDER ACCEPTING LATE FILING
ORDER DENYING MOTION TO DISMISS

Before: Judge Merlin

On August 24, 1992, the Solicitor filed a penalty petition in the above-captioned action and a motion to accept late filing of the penalty proposal. On September 21, 1992, the operator filed its answer to the penalty proposal together with a motion in opposition to the Solicitor's motion to accept late filing.

Commission Rule 27 requires that the Secretary file the penalty proposal within 45 days of the date she receives an operator's notice of contest for the proposed penalty. 29 C.F.R. § 2700.27. An operator contests the proposed penalty by mailing in the so-called "blue card" which has been provided for this purpose. The date of receipt by the Secretary is the date the operator mails the blue card. J.P. Burroughs, 3 FMSHRC 854 (1981). Assuming that in this case the blue card was mailed the same day it was signed, June 25, 1992, the penalty proposal became due on August 10. The proposal was mailed on August 18, and received at the Commission on August 24. It was therefore, two weeks late.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of a penalty proposal upon a showing of adequate cause by the Secretary where there is no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981).

The Solicitor's motion to accept late filing represents that the delay occurred because the case was not sent to her office until August 11, 1992. In Salt Lake County Road Department, supra, decided early in the administration of the Act, the Commission held that the extraordinarily high caseload and lack of personnel confronting the Secretary at that time, constituted adequate cause for late filing. At the present juncture, I take note of the precipitous rise in the volume of contested cases over the last few years as indicated by the Commission's own

records. I find that these circumstances constitute adequate cause for the short delay in the filing of the penalty petition. Finally, the record does not indicate any prejudice to the operator from the two week delay.

More serious is the time span between the issuance of the citations on August 15 and 16, 1991, and the notification to the operator of the proposed penalty assessments on June 2, 1992. Section 105(a) of the Act, 30 U.S.C. § 815(a), provides that after the Secretary issues a citation or order under section 104, she shall within a reasonable time notify the operator of the proposed civil penalty to be assessed for the cited violation.

The Mine Act does not define "reasonable time". However, the following statements of the Senate Committee are instructive:

To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 34, reprinted in, Senate Subcommittee on Labor, Comm. on Human Resources, 95th Cong., 2 Sess., Legislative History of the Federal Mine Safety and Health Act, at 622 (1978).

It does not appear that the Commission has specifically considered whether a penalty petition must be dismissed because it was not issued until several months after the citation had been issued. However, I find relevant the principles adopted by the Commission in Salt Lake County Road Department, supra, and therefore, in the instant matter I will consider whether adequate cause existed for the delay and if the operator has demonstrated prejudice.

Note is taken of the few Commission judges' decisions where delays in the issuance of the proposed assessments have occurred. In Heldenfels Brothers, Inc., 2 FMSHRC 851 (April 1980), a judge denied a motion to dismiss where there was a 220-day delay on the ground that MSHA's assessment procedures required considerable time and that the operator had not shown that it suffered any actual harm. However, in Anaconda Company, 3 FMSHRC 1926 (August 1981), another judge dismissed a case where there had been a two year delay and the Secretary offered no reasons, but this same judge subsequently refused to dismiss a case for a 132 day delay because the operator had not claimed prejudice. Industrial Construction Corp., 6 FMSHRC 2181 (Sept. 1984). Delays of a year

and a half and two years have not been countenanced. Washington Corporation, 4 FMSHRC 1807 (October 1982).

In this case the delay was considerable, but within the parameters previously allowed by judges in the cases cited above. In addition, the file in this case shows that the alleged violations were the subject of an investigation of a non-fatal haulage accident. In discussing the requirement of reasonable promptness for the issuance of citations, Congress made specific reference to the time taken by accident investigations. S. Rep. No. 94-181, supra, Legislative History supra, at p. 618. Just as accident investigations are to be taken into account in determining timeliness for the issuance of citations, so they are germane in deciding the analogous question of whether adequate cause exists to justify a lag in assessing penalties.

The operator has alleged prejudice because the witnesses are unavailable, the record is not fresh and it is impossible for it to present its case in the best possible light. However, the operator has furnished no specifics beyond these general assertions.

Informative with respect to the foregoing is the decision of the Commission in Old Dominion Power, 5 FMSHRC 1886 (1984), refusing to dismiss a citation because it was not issued until one year after a violation occurred where in the interim there had been a fatality investigation. The Commission found that the operator had not been prejudiced and cited the legislative history for the proposition that the "reasonable promptness" requirement was not jurisdictional. Old Dominion Power at 1894. So too, allowing the instant case to proceed is consistent with the expressed Congressional mandate that a failure to propose a penalty with promptness shall not vitiate the penalty proceeding. MSHA is, however forewarned that as a general matter tardiness in assessments is troublesome and may in other contexts hinder its enforcement of the Act.

In light of the foregoing, it is **ORDERED** that the Solicitor's motion to accept late filing be **GRANTED** and that the operator's motion to dismiss be **DENIED**.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 13, 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 92-430-M
Petitioner : A. C. No. 24-00016-05504
: :
v. : Docket No. WEST 92-573-M
LIVINGSTON MARBLE & GRANITE, : A. C. No. 24-00016-05503
Respondent :
: Livingston Marble
: :
: Docket No. WEST 92-574-M
: A. C. No. 24-00660-05512
: :
: Docket No. WEST 92-575-M
: A. C. No. 24-00660-05513
: :
: Travertine Cutting & Polishing
: Plant

ORDER DENYING MOTION TO DISMISS
ORDER ACCEPTING LATE FILING

Before: Judge Merlin

On October 6, 1992, the operator filed a motion to dismiss the above-captioned cases. The operator asserts that the Commission lacks jurisdiction because the penalty petitions were not timely filed. On August 3, 1992, the Solicitor had filed motions to accept late filing in WEST 92-430-M, WEST 92-573-M and WEST 92-574-M along with the penalty proposals. The proposal for WEST 92-575-M was received on August 10, 1992.

Commission Rule 27 requires that the Secretary file the penalty proposal within 45 days of the date she receives the operator's notice of contest for the proposed penalty. 29 C.F.R. § 2700.27. The operator contests the proposed penalty by mailing in the so called "blue card" which has been provided to it for this purpose. The date of receipt by the Secretary is the date the operator mailed the blue card. J.P. Burroughs, 3 FMSHRC 854 (1981). Assuming that in these cases the blue cards were mailed the same day they were signed, the Secretary's subsequent penalty proposals for WEST 92-430-M, WEST 92-573-M and WEST 92-574-M were 46 to 60 days late. The penalty proposal for WEST 92-575-M was mailed to the Commission on the 45th day and therefore is timely.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing upon a showing of adequate

cause by the Secretary and where there is no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981).

The Solicitor's motion to accept late filing represents that the delay occurred because the cases were not sent to her office until July 24. In Salt Lake County Road Department, *supra*, decided early in the administration of the Act, the Commission held that the extraordinarily high caseload and lack of personnel confronting the Secretary at that time, constituted adequate cause for late filing. At the present juncture, I take note of the precipitous rise in the volume of contested cases over the last few years, as shown by the Commission's own records. In view of the circumstances set herein, I find that adequate cause exists for the relatively short delays of 46 to 60 days. In addition, the operator has not shown any prejudice by the delays.

In light of the foregoing, the Secretary's motion to accept late filing of the penalty proposals in WEST 92-430-M, WEST 92-573-M, and WEST 92-574-M is **GRANTED**.

It is further **ORDERED** that the operator's motion to **DISMISS** in WEST 92-430-M, WEST 92-573-M, WEST 92-574-M and WEST 92-575-M be **DENIED**.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

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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 18 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 92-696-M
	:	A.C. No. 36-08120-05504
Complainant	:	
v.	:	Chestnut Ridge Sand
	:	
CHESTNUT RIDGE SAND,	:	
Respondent	:	

ORDER

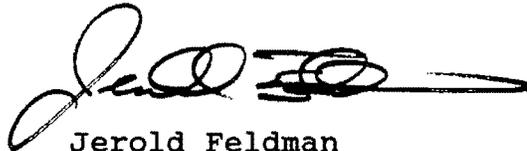
Before: Judge Feldman

The respondent, a division of Haines & Kibblehouse, Inc., (H&K) has filed a motion seeking permission to have Mr. James F. Sassaman represent it in this matter. H&K is a member of the General Building Contractor's Association. Mr. Sassaman is the association's Director of Safety and is reportedly familiar with administrative proceedings as they pertain to safety and health related issues.

The petitioner opposes the respondent's motion on the grounds that Mr. Sassaman should be precluded from serving as representative under Commission rule 3(b)(2) because "he is not experienced or familiar with the Mine Safety and Health Act of 1977, the Commission's rules of procedure, or Mine Safety issues in general." In this regard, the petitioner asserts that the seriousness and complexity of this case, which involves a 107(a) imminent danger order, requires a representative with mine safety experience.

Rule 3(b)(2) permits the appointment of a representative for the limited purpose of a specific proceeding. The plain language of this section does not preclude a representative solely because the individual has no mine safety experience. Moreover, the petitioner's reliance on the "complexity" of this case as a basis for its opposition is without merit in view of the fact that the respondent's answer admits the occurrence of the violations in issue, and seeks to be heard only on the issues of the degree of negligence and the appropriateness of the penalty assessment.

ACCORDINGLY, the respondent's motion seeking permission for Mr. James F. Sassaman to represent it in this proceeding **IS GRANTED**.



Jerold Feldman
Administrative Law Judge
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/vmy