NOVEMBER 1994

COMMISSION DECISIONS AND ORDERS

11-01-94	Peabody Coal Company	LAKE 93-23	Pg. 2199
11-07-94	Brown Brothers Sand Company	SE 94-21-M	Pg. 2205
11-21-94	Sec. Labor for Clayton Nantz v. Nally & Hamilton Enterprises	KENT 92-259-D	Pg. 2208

ADMINISTRATIVE LAW JUDGE DECISIONS

11-01-94	Walter Kuhl and Son	PENN 93-449-M	Pg. 2231
11-02-94	Sec. Labor for James Hyles, etc. v. All American Asphalt	WEST 93-336-DM	Pg. 2232
11-03-94	Friend & Rikalo, Incorporated	WEST 94-90-M	Pg. 2251
11-04-94	North American Slate Inc.	YORK 93-156-M	Pg. 2257
11-07-94	Derald Wilson v. Freeman United Coal	LAKE 94-229-D	Pg. 2259
11-08-94	Pittsburg & Midway Coal Mining Co.	CENT 94-14	Pg. 2260
11-08-94	Raymond Stiefel, III v. Lang Sand and Gravel, Inc.	SE 94-128-DM	Pg. 2275
11-08-94	Buffalo Crushed Stone	YORK 92-117-M	Pg. 2290
11-09-94	Monarch Cement Company	CENT 94-96-M	Pg. 2292
11-15-94	Ambrosia Coal & Construction Co.	PENN 93-233	Pg. 2293
11-17-94	Manalapan Mining Company	KENT 93-614	Pg. 2308
11-18-94	Redstone Mining Incorporated	PENN 94-327	Pg. 2309
11-18-94	Bridger Coal Company	WEST 91-233	Pg. 2310
11-21-94	Navajo Concrete Incorporated	WEST 92-771-M	Pg. 2318
11-25-94	Rox Coal, Incorporated	PENN 94-192-R	Pg. 2320
11-25-94	Phillip R. Elswick v. Copperas Coal	WEVA 94-119-D	Pg. 2326
11-28-94	Chrisman Ready-Mix, Inc.	CENT 94-35-M	Pg. 2329
11-28-94	Power Operating Company	PENN 92-849	Pg. 2331
11-29-94	ABM Coal Company, Inc.	KENT 94-320	Pg. 2345
11-29-94	Cyprus Emerald Resources Corp.	PENN 94-587	Pg. 2359

ADMINISTRATIVE LAW JUDGE ORDERS

11-04-94	Art Beavers Construction Co.	WEST 93-615	Pg. 2361
11-28-94	Buck Mountain Coal Company	PENN 94-104	Pg. 2367
11-30-94	Sec. Labor for Cletis Wamsley etc. v. Mutual Mining, Inc.	WEVA 93-394-D	Pg. 2371

NOVEMBER 1994

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

Secretary of Labor, MSHA v. Brown Brothers Sand Company, Docket No. SE 94-21-M. (Judge Hodgdon, September 28, 1994)

Secretary of Labor, MSHA v. Fluor Daniel Incorporated, Docket No. SE 94-92-M. (Judge Feldman, October 5, 1994)

Review was denied in the following case during November:

Secretary of Labor, MSHA v. A-Rock Incorporated and Elmer James Nicholson, employed by A-Rock, Docket No. WEST 94-162-M, etc. (Judge Weisberger, September 27, 1994)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 1, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 93-23
PEABODY COAL COMPANY	:	

BEFORE: Jordan, Chairman; Doyle and Holen, Commissioners[1]

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). The issue is whether Peabody Coal Company ("Peabody") violated 30 C.F.R. § 75.316 (1991) by collecting a dust sample at a location other than that specified in its approved ventilation and dust control plan ("ventilation plan").[2] Administrative

---

[1]Commissioner Marks assumed office after this case had been considered at a decisional meeting and a decision drafted. In light of these circumstances, Commissioner Marks elects not to participate in this case.

[2] 30 C.F.R. § 75.316, substantially identical to 30 U.S.C. § 863(o), provided as follows:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

On November 16, 1992, 30 C.F.R. § 75.316 was superseded by 30 C.F.R. § 75.370, which imposes similar requirements.

Law Judge Gary Melick concluded that Peabody violated its ventilation plan by placing the pump at an incorrect location. 15 FMSHRC 1652 (August 1993) (ALJ). The Commission granted Peabody's petition for discretionary review, which challenged the judge's determination. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

On September 21, 1992, Ronald Zara, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected Peabody's Marissa Mine, an underground coal mine in Randolph County, Illinois. In the Main Belt East entry, he noticed a dust collection pump located on the east side of the 1st North Submain conveyor belt, upwind from the transfer point where that belt discharges coal onto the Main East belt.[3]

Under Peabody's ventilation plan, the sampling location for that area was downwind from the dumping point for the North Submain head roller, on the south side of the Main East belt, some 15 feet west of the transfer point. 15 FMSHRC at 1653, 1658; Jt. Stips. 3, 4, Ex. B, p. 5. The approved sampling location was clearly marked. 15 FMSHRC at 1654; Jt. Stip. 4. The pump Zara observed was in a less dusty location than that required by the ventilation plan. Id. Zara issued a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging that Peabody was out of compliance with its plan because the pump was not in the approved location.

The parties filed cross motions for summary decision. In granting the Secretary's motion, the judge noted that 30 C.F.R. § 70.208(a) requires operators to take one valid dust sample from each designated area in each bimonthly period.[4] 15 FMSHRC at 1653. He concluded that Peabody violated its ventilation plan by sampling at a location other than the one designated by the plan, with the intention of submitting that sample to meet the requirements of section 70.208(a). Id. at 1653-54. The judge also determined that the sampling did not qualify for the exception set forth in 30 C.F.R. § 70.209(d) because Peabody had not previously identified it as

---

[3] The parties stipulated to the facts, which are set forth at 15 FMSHRC at 1655-57.

[4] Section 70.208(a) provides:

> Each operator shall take one valid respirable dust sample from each designated area on a production shift during each bimonthly period .... The bimonthly periods are:
>
> ...
>
> August 1-September 30 ....

intended for purposes other than those set forth in 30 C.F.R. Part 70, 71, or 90.[5] Id. The judge rejected Peabody's argument that its plan would have been violated only if it had actually submitted a sample collected at the improper location. He concluded that the essence of the violation was the placement of the dust sampling device at an improper location with the intent to submit the resulting sample. Id. at 1654. The judge found that the incorrect placement was unintentional and assessed a civil penalty of $100. Id.

II.

Disposition

Peabody contends that the Secretary has not alleged that it violated a specific provision of the ventilation plan and asserts that the plan "does not prohibit sampling at incorrect locations." PDR at 2-3. Noting that section 70.208(a) requires that a valid sample be taken in each bimonthly period, and that the relevant period did not end until October 1, 1992, subsequent to the citation, Peabody argues that collecting an invalid sample before the deadline for submission cannot constitute a violation.

The Secretary responds that the judge's decision is supported by substantial evidence and is legally correct. The Secretary points out that 30 C.F.R. § 70.208(e) obligates operators to collect dust samples for designated areas at the locations set forth in their approved ventilation plans. Peabody's plan specified the proper place for sampling and the sample was not being collected there. The Secretary construes sections 70.208 and 70.209 to impose "two separate and distinct" requirements, "'collecting' valid samples and 'transmitting' valid samples," and contends that "the operator must comply with both requirements, not just with the latter." S. Br. at 8.

A fundamental purpose of a mine ventilation plan is to ensure that the operator collects valid dust samples. Considering the plan provisions and regulations together, we conclude that their plain terms impose location requirements for collecting designated area samples and that

---

[5] Section 70.209(d) provides:

> All respirable dust samples collected by the operator shall be considered taken to fulfill the sampling requirements of part 70, 71 or 90 of this title, unless the sample has been identified in writing by the operator to the District Manager, prior to the intended sampling shift, as a sample to be used for purposes other than required by part 70, 71, or 90 of this title.

The judge inadvertently cited 30 C.F.R. § 75.209(d), which refers to roof control, but correctly quoted the language of section 70.209(d).

compliance with the ventilation plan is contingent upon sampling at the proper locations.[6]

Section 70.208(e) provides:

> Designated area samples shall be collected at locations to measure respirable dust generation sources in the active workings. The approved mine ventilation plan contents required by § 75.371(t) ... shall show the specific locations where designated area samples will be collected....

30 C.F.R. § 70.208(e). Section 75.371(t) requires plans to specify "[t]he locations where samples for 'designated areas' will be collected, including the specific location of each sampling device...." 30 C.F.R. § 75.371(t). Under section 70.209(d), all respirable dust samples collected by the operator are presumed to be taken to fulfill the sampling requirements of Part 70, 71 or 90 of the Secretary's regulations, unless, prior to the sampling shift and in writing, the operator has identified the sample as one to be used for other purposes.

The sampling requirements in Peabody's plan mirror and implement the Secretary's regulations. The plan includes a "Selection Sheet for Designated Areas," listing the designated areas for dust sampling: the selection sheet sets forth for each area a precisely described "Position of Sampling Instrument Within Designated Area." Jt. Stip. Ex. B, p. 5. The Main Belt East area was one of the designated sampling areas and a specific position for the sampling device was set forth.

It is undisputed that the pump observed by the inspector was collecting a sample in a location other than that designated in the plan. Likewise, it is undisputed that Peabody did not inform MSHA prior to the shift that the sample was intended for purposes other than those required by Part 70, 71 or 90. 15 FMSHRC at 1653-54; Jt. Stips. 8, 12. Peabody has conceded that the cited pump was being used to collect a sample in the designated area for submission pursuant to its bimonthly sampling obligations under section 70.208(a). 15 FMSHRC at 1653; Jt. Stip. 12. We agree with the judge that, under the circumstances, Peabody's dust sampling was in violation of its ventilation plan.

We reject Peabody's assertion that, based on the bimonthly time periods set forth in section 70.208(a), its improper sampling was not a violation because it had nine days remaining to take and submit a valid sample. PDR at 4. The essence of the violation was the improper

---

[6] Once a ventilation plan is approved and adopted, its provisions are enforceable as mandatory standards. UMWA v. Dole, 870 F.2d 662, 671 (D.C. Cir. 1989); Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Freeman United Coal Mining Co., 11 FMSHRC 161, 164 (February 1989).

location of the sampling device. As noted by the Secretary, the collection requirement, although related to the transmittal requirement, is a distinct obligation.

Further, we agree with the Secretary that to accept Peabody's position would undercut MSHA's effective enforcement of the ventilation program. Under Peabody's approach, an MSHA inspector would be barred from issuing a citation when he discovers a dust collection pump in operation at an incorrect location. Instead, MSHA would be required to determine, after such sample had been submitted, that it had been collected at the wrong location.

Accordingly, we conclude that the judge's determination of violation is supported by substantial evidence and is legally correct.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Distribution

David R. Joest, Esq.
Peabody Coal Company
1951 Barrett Court
P.O. Box 1990
Henderson, KY 42420

Tana M. Adde, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 7, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	CIVIL PENALTY PROCEEDING Docket No. SE 94-21-M
v.	:	
BROWN BROTHERS SAND COMPANY	:	

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

DIRECTION FOR REVIEW AND ORDER

BY: Jordan, Chairman; Doyle and Holen, Commissioners

The petition for discretionary review filed by Brown Brothers Sand Company ("Brown Brothers") is granted on the issue of the method of payment of civil penalties. Briefing pursuant to Commission Procedural Rule 75, 29 C.F.R. § 2700.75 (1993), is deemed unnecessary.

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"), involves nine citations issued against Brown Brothers by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Administrative Law Judge T. Todd Hodgdon upheld eight of the citations and imposed civil penalties on Brown Brothers, pursuant to section 110(i) of the Mine Act, 30 U.S.C. § 820(i). 16 FMSHRC 1996 (September 1994)(ALJ).

In his decision, the judge stated:

> Brown Brothers Sand Company is **ORDERED** to pay, by single check or money order for the entire amount, civil penalties in the amount of $1,036.00 for these violations within 30 days of the date of this decision.

16 FMSHRC at 2007. In a footnote to this order, the judge stated:

> It appears that in a previous case heard by me [Brown Brothers Sand Company, 16 FMSHRC 452 (February 1994)], the Respondent paid the assessed penalty in loose coins. (Tr. 13-15.) If, by such actions, Brown Brothers intended to demonstrate its contempt for the Commission, as suggested by the Secretary, it is advised that continued gestures of this nature may well reflect adversely on any consideration of its good faith in future appearances before the Commission.

Id. at 2007 n. 5.

Brown Brothers objects to the judge's requirement that it pay the penalty by single check or money order. We find merit in that objection. The U.S. Code provides that currency and coins "are legal tender for all debts . . . taxes, and dues." 31 U.S.C. § 5103 (1988). Neither the Mine Act nor the Secretary's regulations make reference to the manner of payment of civil penalties. See generally 30 U.S.C. § 820(j); 30 C.F.R. Part 100. The judge states no basis for his order to require payment of the penalties "by single check or money order." Moreover, we find no basis in the record, the Mine Act or the Secretary's regulations to conclude, as did the judge, that payment of assessed penalties in "loose coins" should reflect adversely on consideration of Brown Brothers' good faith in future appearances before the Commission.

Therefore, we vacate that portion of the judge's decision that requires payment of the penalty "by single check or money order for the entire amount" and footnote 5, in its entirety. We have considered the operator's other assignments of error and, in all other respects, the judge's decision is affirmed..

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I agree with my colleagues that there is no basis in the record to support the Administrative Law Judge's remarks in footnote 5 that "if, [by paying assessed penalties in loose coins], Brown Brothers intended to demonstrate its contempt for the Commission, as suggested by the Secretary, it is advised that continued gestures of this nature may well reflect adversely on any consideration of its good faith in future appearances before the Commission." 16 FMSHRC 1996, 2007 (September 1994). While it may be accurate to characterize Brown Brothers' past payment of assessed penalties in loose coin as a sign of "contempt for the Commission" and the adverse decisions of its corps of administrative law judges, there is no warrant for the proposition that such "contempt" would "reflect adversely on any consideration of its good faith in future appearances before the Commission." Id. Consequently, I join with my colleagues in vacating footnote 5.

However, I disagree with my colleagues' holding that the judge acted ultra vires in specifying the method by which the operator was to pay the assessed penalty. In my view, it is within the sound discretion of a judge to specify the method of paying an assessed penalty. Therefore, I would affirm the judge's decision in this connection.

Marc Lincoln Marks, Commissioner

Distribution

Steve Brown
Brown Brothers Sand Company
P.O. Box 82
Howard, GA 31039

Michael K. Hagan, Esq.
Office of the Solicitor
U.S. Department of Labor
1371 Peachtree St., N.E., Room 339
Atlanta, GA 30367

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

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

November 21, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CLAYTON NANTZ	:	
v.	:	Docket No. KENT 92-259-D
NALLY & HAMILTON ENTERPRISES, INC.	:	

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

DECISION

BY: Doyle and Holen, Commissioners[1]

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), Administrative Law Judge George A. Koutras concluded that Nally & Hamilton Enterprises, Inc. ("NHE") constructively discharged Clayton Nantz in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), and awarded Nantz backpay plus interest. 14 FMSHRC 1858 (November 1992)(ALJ) (liability); 15 FMSHRC 237 (February 1993)(ALJ)(damages). The Commission granted NHE's petition for discretionary review, which challenged the judge's determination of discriminatory discharge and his backpay award. The Commission also directed review, sua sponte, of the judge's deduction

[1] All Commissioners agree on the disposition of issues except for the deduction of unemployment compensation from the backpay award. Commissioners Doyle and Holen have voted to affirm the judge's decision to deduct unemployment compensation; Chairman Jordan and Commissioner Marks would reverse the judge on this issue. The effect of the tie vote is to let stand the judge's ruling that unemployment compensation is deducted from the backpay award. Pennsylvania Elec. Co., 12 FMSHRC 1562, 1563-65 (August 1990), aff'd on other grounds, 969 F.2d 1501 (3d Cir. 1992).

of unemployment compensation from Nantz's backpay award. For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

Nantz operated an enclosed-cab bulldozer at NHE's Gray's Ridge Job Mine, a surface coal mine in Harlan, Kentucky, on the night shift. On or about April 3, 1991, a truck struck the bulldozer Nantz customarily used, knocking out its back window. 14 FMSHRC at 1860, 1889. As a result of the broken window, Nantz began experiencing problems with dust exposure. Id. at 1860. On a number of occasions, he complained to Foreman Henderson Farley and then to his replacement, Foreman Wayne Fisher, that dust was choking him and causing health problems. Id. at 1885. Both foremen assured Nantz that the window would be replaced. Id. at 1860-61.

Upon reporting to work on April 16, Nantz asked Fisher whether the window had been replaced. 14 FMSHRC at 1861. When Fisher replied that it had not, Nantz asked if he could perform other work to avoid the dust problem. Id. The foreman advised Nantz that he could operate a loader for an hour or so but that he would then have to return to work on the bulldozer. Id. Nantz told Fisher that he did not want to operate the equipment without the window, gave him his phone number, and asked him to call when the window was replaced. Id. Nantz returned a day or two later to pick up his paycheck. Id. He again asked Fisher if the window had been installed. When Fisher replied that it had not, Nantz said he was leaving and told Fisher to call him when the window was replaced. Id.

Nantz filed a discrimination complaint with the Secretary of Labor on May 29, 1991. On January 31, 1992, the Secretary filed a complaint on Nantz's behalf, pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), alleging that Nantz had been discriminatorily discharged. Before the judge, NHE moved to dismiss the complaint and the Secretary's proposed penalty on the grounds that the Secretary had unduly delayed in filing. The judge denied the motion, ruling that NHE had failed to establish that it had been prejudiced by the Secretary's delay. 14 FMSHRC at 1882.

The judge concluded that NHE had constructively discharged Nantz in violation of section 105(c)(1). 14 FMSHRC at 1899. He found that Nantz's refusal to operate the bulldozer on April 16 and April 17, and his refusal to operate a loader for a short period of time on April 16 (termed by the judge an "alternate work refusal"), were activities protected under the Mine Act. Id. at 1893, 1897. He concluded that Nantz was exposed to intolerable, hazardous dust conditions that made it difficult for him to see the trucks in the fill area and caused choking and breathing problems. Id. at 1898. The judge determined that NHE's failure to repair the broken window and its insistence that Nantz operate the bulldozer amounted to constructive discharge. Id. at 1899. The judge assessed a civil penalty of $1,000 against the operator. Id. at 1901.

In awarding backpay, the judge deducted two weeks' pay because, after leaving NHE, Nantz delayed two weeks before seeking other work. 15 FMSHRC at 248-49. He also deducted from Nantz's backpay an amount equal to the unemployment compensation he had received. Id. at 249. The judge rejected NHE's contention that the backpay award should be reduced because of the Secretary's delay in filing the complaint. Id. at 250. He also rejected NHE's assertion that an offset should be made against backpay because of an alleged job offer extended to Nantz, finding that the offer was not bona fide. Id. The judge ordered Nantz's reinstatement and awarded him $17,385 in backpay for the period from April 16, 1991, through December 31, 1992, plus interest. Id. at 250-51.

II.

Disposition of Issues

A. Discriminatory Discharge

A miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. Id.; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

1. Constructive Discharge

A constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. See, e.g., Simpson v. FMSHRC, 842 F.2d 453, 461-63 (D.C. Cir. 1988). In essence, "[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly." Id. at 461.

NHE argues that the judge erred in concluding that Nantz was constructively discharged, contending that Nantz's work refusal was not protected and that Nantz was not faced with intolerable work conditions. The Secretary responds that the judge properly found Nantz's refusal to work to be activity protected under the Mine Act and that he properly concluded that

Nantz had been discriminatorily discharged.[2]

In analyzing whether Nantz was constructively discharged, we address whether Nantz's refusal to operate the bulldozer constituted protected activity under the Act and whether the dust exposure was an intolerable condition, which, left unaddressed, compelled his resignation. These issues are analyzed under the framework the Commission has applied when a miner alleges a discriminatory discharge under section 105(c) of the Mine Act. See, e.g., Pasula, 2 FMSHRC at 2797-800; Robinette, 3 FMSHRC at 817-18.

a. Protected Activity

The Mine Act grants miners the right to complain of a safety or health danger or violation, but does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have inferred a right to refuse to work in the face of a perceived danger. See Secretary on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC 516, 519-21 (March 1984), aff'd, 780 F.2d 1022 (6th Cir. 1985); Price v. Monterey Coal Co., 12 FMSHRC 1505, 1514 (August 1990)(citations omitted). A miner refusing work is not required to prove that a hazard actually existed. See Robinette, 3 FMSHRC at 812. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." Id.; see also Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. Robinette, 3 FMSHRC at 807-12; Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." Robinette, 3 FMSHRC at 810. This requirement's purpose is to "remove from the Act's protection work refusals involving frauds or other forms of deception." Id.

NHE asserts that Nantz's refusal to operate the bulldozer was not protected because he lacked a good faith, reasonable belief that a hazardous condition existed. Contrary to NHE's contentions, substantial evidence supports the judge's determination that Nantz's work refusal was made in good faith and was reasonable because the dust conditions caused by the broken window were, in fact, hazardous. 14 FMSHRC at 1892-93. Nantz, whom the judge deemed a credible witness, testified that, as a result of the dust in the cab, he choked, suffered from headaches, and had difficulty seeing. Id. at 1888, 1898; Tr. 17. A "judge's credibility findings ... should not be overturned lightly." Quinland Coals, Inc., 9 FMSHRC 1614, 1618 (September 1987). Nantz's co-workers corroborated his testimony that he was exposed to extreme dust levels. Tr. 116, 135; see also Tr. 155-56. They also testified that they heard Nantz complain

---

[2] The Secretary argues that NHE actually discharged Nantz for his work refusals. S. Br. at 6. The evidence may also support a finding that Nantz was discharged. See, e.g., Tr. 124. (Co-worker Harold Farley testified that Foreman Fisher had said he hated to let Nantz go because he was a good worker.)

several times to management that the dust was getting to him "bad" (Tr. 97, 101, 117-18, 131) and one co-worker reported to Foreman Fisher that Nantz was suffering from dust exposure. Tr. 133.

NHE contends that an "objective" test should be applied to determine whether a good faith, reasonable belief in a hazard exists. It asserts that Liggett Indus., Inc. v. FMSHRC, 923 F.2d 150 (10th Cir. 1991), supports its contention that a miner's belief must be objectively reasonable. In Liggett, the court held that, although a miner need not prove the actual existence of a hazard, the lack of a hazard would bear on the reasonableness of a miner's belief that his health was in danger. Id. at 152 (citation omitted). Liggett is consistent with Commission law requiring a miner to show that his perception of a hazard was based on a good faith belief and was reasonable under the circumstances. See Haro v. Magma Copper Co., 4 FMSHRC 1935, 1944 (November 1982); Secretary on behalf of Hogan v. Emerald Mines Corp., 8 FMSHRC 1066, 1072 (July 1986).

In support of its position that Nally's belief was not reasonable, NHE points to evidence that others did not regard the dust exposure as hazardous. PDR at 3, 13, citing Tr. 198-99, 201-02, 244-45, 294. NHE also argues that Nantz's failure to request a dust mask and his refusal to use a clear plastic cover over the window show the unreasonableness and lack of good faith of his work refusal. It asserts that a reasonable miner in Nantz's place would have taken advantage of these and other self-help remedies if the dust level had been truly severe.

The judge found that NHE did not require its personnel to use masks. 14 FMSHRC at 1891. Nantz testified that he was not aware that dust masks were available and that, in any event, the dust exposure was too intense for a mask to be of assistance. Tr. 73-74. The judge's factual determinations are amply supported in the record.[3]

We also agree with the judge that NHE's evidence on the makeshift plastic covering deserves little weight. 14 FMSHRC at 1890. The judge found that the plastic cover, which Nantz testified would impair his vision (Tr. 70-71), was not routinely used as a preventive measure against dust exposure. 14 FMSHRC at 1891. Foreman Fisher stated that a plastic cover "would help," but conceded that it would not have prevented dust in the bulldozer. Tr. 265. Superintendent Louis Hamilton stated only that, in the past, plastic had been placed on back windows of lifts for protection and that he did not believe it decreased night visibility. 14 FMSHRC at 1891; Tr. 207. NHE's witnesses acknowledged that plastic covering was intended

---

[3] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

to help maintain warmth in the cab in winter. 14 FMSHRC at 1891. We perceive no reason to overturn the judge's factual determinations on this issue.

An operator has an obligation to address a danger perceived by a miner who makes a safety complaint. Secretary on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983); Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985). Once it is determined that a miner has expressed a good faith, reasonable concern, the analysis shifts to an evaluation of whether the operator has addressed the miner's concern "in a way that his fears reasonably should have been quelled." Gilbert, 866 F.2d at 1441; see also Bush, 5 FMSHRC at 997-99. The record does not support NHE's assertions that, even if Nantz had a good faith, reasonable belief that the dust condition was hazardous, it acted reasonably to quell his fears, thus rendering his continuing work refusal unreasonable. NHE asserts that the fill area was watered to control dust and that the window was repaired within a reasonable period of time. The record, however, supports the judge's finding that the operator's water trucks did not adequately control the dust. 14 FMSHRC at 1891-92; Tr. 22-23, 70, 135-36. Moreover, the judge found that approximately 13 or 14 days elapsed from the time the window was broken until Nantz's work refusal, during which time NHE "failed to take timely actions to repair the dozer or to take it out of service so that it could be repaired promptly." 14 FMSHRC at 1889, 1898. The record shows that the window was eventually repaired in only three hours during a normal shift. Id. at 1889; Tr. 147-48. We agree with the judge that NHE did not adequately address Nantz's safety concerns.

We conclude, therefore, that Nantz reasonably and in good faith refused to operate the bulldozer and that, in accordance with Commission precedent, his refusal qualified as protected activity under the Act.

b. Intolerable Conditions

NHE argues that the dust conditions did not reach an intolerable level. The judge found that the dust conditions were severe, causing vision difficulties, "and more significantly, ... choking and breathing problems." 14 FMSHRC at 1898. This determination is supported by Nantz's testimony and corroborated by his co-workers. We conclude that substantial evidence supports the judge's finding that the dust, which caused breathing and visibility problems, reached an intolerable level.

Accordingly, we affirm the judge's conclusion that NHE constructively discharged Nantz by refusing to remedy the intolerable dust conditions to which he was subjected.

2. Affirmative Defense

In affirmatively defending against Nantz's claim, NHE asserts that Nantz's refusal to operate the loader was not protected activity and independently justified his termination. NHE Br. at 9.

On April 16, when he was told that the window had not been repaired, Nantz offered to do any work other than operate the bulldozer. Tr. 24-25, 101, 133-34, 138. Fisher offered Nantz work on a loader for a short time but informed him that he would later have to return to the bulldozer. Tr. 25, 138, 267. (The usual loader operator testified that he expected to relieve Nantz after two hours. Tr. 138-40.) The judge found that this offer of work on the loader was not an "adequate and reasonable response" to Nantz's complaint and that Nantz reasonably believed that he would shortly be exposed once again to the severe dust conditions. 14 FMSHRC at 1896. The record supports the judge's finding. Tr. 25, 138-40. We agree with the judge that Nantz's refusal to operate the loader for a brief period of time was inextricably connected to his refusal to operate the bulldozer and also qualified as protected activity.

Accordingly, we affirm the judge's determination that NHE failed to affirmatively defend against Nantz's claim.

3. Conclusion

For the foregoing reasons, we hold that Nantz was discriminatorily discharged in violation of section 105(c)(1) of the Mine Act.

B. Backpay Award

1. Filing Delay by Secretary

NHE asserts that the Secretary's four-month delay in filing Nantz's complaint should result in a corresponding reduction in the backpay award. The judge rejected this contention on the ground that the operator had failed to show legally recognizable prejudice resulting from the delay. 15 FMSHRC at 250.

The Mine Act permits a miner who believes that he has been discriminated against to file a complaint with the Secretary within 60 days of the alleged violation. 30 U.S.C. § 815(c)(2). After receipt of the complaint, the Secretary has 90 days to notify the miner, in writing, of his determination as to whether a violation occurred. 30 U.S.C. § 815(c)(3). Section 105(c)(2) provides that, once the Secretary determines that a violation has occurred, "he shall immediately file a complaint with the Commission." Commission Procedural Rule 41(a) implements the latter provision by requiring the Secretary to file a discrimination complaint with the Commission within 30 days after such written determination. 29 C.F.R. § 2700.41(a) (1993).

Nantz filed his discrimination complaint on May 29, 1991, within the 60-day period. The Secretary was required to notify Nantz of his determination of violation by August 27, and file a complaint with the Commission by September 26. The complaint was filed on January 31, 1992, more than four months late. The record discloses no reason for the delay.

The Commission has determined that the time limits in sections 105(c)(2) and (3) "are not jurisdictional" and that the failure to meet them should not result in dismissal, absent a showing of "material legal prejudice." See, e.g., Secretary on behalf of Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986). As the judge found, the delay was not extreme and did not prejudice NHE's presentation of its case. 15 FMSHRC at 250; 14 FMSHRC at 1882-83. Therefore, we decline to reduce Nantz's backpay on account of it. However, as the Commission stated in Hale, "[t]he fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary." 8 FMSHRC at 908. We remind the Secretary to adhere to the time limits set forth in section 105(c) of the Act and to explain to the Commission reasons for delay.

2. Purported Job Offer

NHE argues that, in July 1991, it offered Nantz a job at its Leatherwood facility and, because Nantz rejected this offer, his backpay award should be reduced. The judge determined that NHE's "suggestion that it made an 'offer' of reemployment to Mr. Nantz is unsupported," and he found "no evidence that this was the case." 14 FMSHRC at 1903; see also 15 FMSHRC at 250. After filing his discrimination complaint with the Secretary, Nantz visited the Leatherwood site and asked his former foreman, Henderson Farley, if there were anything for him to do. Tr. 242. Farley replied: "[N]o, not right at the time, but if I got something, you know, I would put him back to work." Id. Farley testified that he never contacted Nantz and that Nantz never contacted him again. Tr. 243. Nantz confirmed that Farley stated only that he would see what he could do and had not conveyed a firm job offer. Tr. 76-77. Accordingly, we affirm the judge's refusal to reduce the backpay award based on NHE's claim of a job offer.

3. Nantz's Delay in Seeking Work

NHE argues that, in calculating the backpay award, the judge failed to make a deduction for the two-to-three-week period following his termination during which Nantz did not seek other work. In fact, the judge deducted two weeks pay from the award on account of Nantz's delay in seeking other employment. 15 FMSHRC at 249.

4. Deduction for Unemployment Compensation

In Meek v. Essroc Corp., 15 FMSHRC 606 (April 1993), the Commission addressed for the first time the question of whether unemployment compensation benefits are appropriately deducted from backpay awards.[4] Concluding that the issue is a matter of agency discretion, the Commission determined that a policy of deducting unemployment benefits comports with the Mine Act's goal of making miners whole. Id. at 617-18. It adopted this policy to be followed by its judges. Id. at 618.

Because the Mine Act is silent on the issue of unemployment compensation, the Commission looked for guidance to case law interpreting similar remedial provisions of the National Labor Relations Act, 29 U.S.C. § 160 ("NLRA"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) ("Title VII") and the Age Discrimination in Employment Act, 29 U.S.C. § 626(b) ("ADEA"). 15 FMSHRC at 616. The Mine Act's remedial provisions, as well as those of Title VII and the ADEA, are modeled on section 10(c) of the NLRA, as amended, 29 U.S.C. § 160(c). See, e.g., Secretary on behalf of Dunmire v. Northern Coal Co., 4 FMSHRC 126, 142 (February 1982).

The Commission relied, in part, on NLRB v. Gullett Gin Co., 340 U.S. 361 (1951), in which the Supreme Court was presented with the issue of whether the National Labor Relations Board ("NLRB") abused its discretion in refusing to deduct unemployment compensation from a backpay award while allowing deduction of other earnings. In concluding that the NLRB had not abused its discretion, the Court stated: "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion...." Id. at 363.

Consistent with the Supreme Court's decision in Gullet Gin, certain reviewing courts have held that similar discretion exists under other labor statutes with remedial provisions patterned on the NLRA. Thus, the United States Courts of Appeals for the Second, Seventh, Ninth and Tenth Circuits determined that, under Title VII and the ADEA, the deduction of unemployment compensation from backpay awards is a matter within the discretion of the trial judge. See, e.g., EEOC v. Enterprises Ass'n Steamfitters, 542 F.2d 579, 591-92 (2d Cir. 1976)(Title VII); Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1428 (7th Cir. 1986)(Title VII); Naton v. Bank of Cal., 649 F.2d 691, 699-700 (9th Cir. 1981)(ADEA); EEOC v. Sandia Corp., 639 F.2d 600, 624-26 (10th Cir. 1980)(ADEA); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988)(ADEA). The Commission noted in Meek that other circuits (the Third and Eleventh), also relying on Gullett Gin, have established a policy of

---

[4] The Secretary was not a party to Meek. While that case was pending, the Commission, sua sponte, directed review in this case of the issue of deductibility of unemployment compensation benefits because the administrative law judge here had made a determination on the issue in direct contrast to that made by the judge in Meek.

non-deductibility to be followed by trial courts within the circuit. 15 FMSHRC at 618, citing Craig v. Y&Y Snacks, Inc., 721 F.2d 77, 81-85 (3d Cir. 1983); Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549, 1550-51 (11th Cir. 1983).[5] In accordance with this case law, the Commission, in Meek, concluded that this Commission has discretion to adopt an appropriate policy concerning the deduction of unemployment compensation from backpay awarded under the Mine Act. 15 FMSHRC at 616-17, citing Gullet Gin, 340 U.S. at 363. See also S. Rep. No. 181, 95th Cong., 1st Sess. 37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978).

Thus, interpreting Gullett Gin to the effect that the Commission's policy is a matter within its discretion, a three-member majority adopted as agency policy the deduction of unemployment compensation from backpay awards. 15 FMSHRC at 618. Commissioner Backley, interpreting Gullett Gin to the effect that unemployment compensation may not be deducted, dissented in Meek. Id. at 621-22. The Commission reaffirmed its holding in Ross v. Shamrock Coal Co., 15 FMSHRC 972, 976-77 (June 1993).

In this case, which was decided by the judge prior to the Commission's decision in Meek, both the Secretary and NHE argued to the judge that the deduction of unemployment compensation from backpay awards was within the discretion of the judge. 14 FMSHRC at 1902; 15 FMSHRC at 249. In exercising his discretion, the judge deducted an amount equal to the unemployment compensation received by Nantz from his backpay award. 15 FMSHRC at 249.

In contrast to his argument to the judge, the Secretary now urges the Commission to reverse the judge's deduction of unemployment compensation benefits and to determine as a matter of agency policy that such benefits should not be deducted from backpay awards. S. Br. at 19. In support of his position, the Secretary argues that the benefits are "collateral" and that state law in 47 states requires that the benefits be repaid to the state unemployment agency.[6] Id. at 20-22. The Secretary suggests that, at the time of each backpay award, the Commission may want to notify the appropriate state agency to facilitate agency proceedings to recoup from the

---

[5] Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1114 (8th Cir. 1994), decided by the Eight Circuit after Meek was issued, similarly established a circuit-wide policy of non-deductibility under the ADEA. The dissent apparently misreads the Commission's recitation of this case law. Slip op. at 21. Under our analysis, Gullett Gin does not preclude a policy of deductibility, non-deductibility, or trial judge discretion.

[6] Under the Social Security Act, 42 U.S.C. § 503(g), and the Internal Revenue Code, 26 U.S.C. § 3304(a)(4), states may require restitution of unemployment compensation when, as a result of an award of backpay, the worker is rendered not unemployed for the period of the award and the benefits received become overpayments.

miner the unemployment compensation he had received earlier. Id. at 20. As to the other three states, the Secretary argues that the discriminatee is "the logical choice" to retain the benefits. Id. at 22 (citation omitted).

The issue of recoupment was not argued in Meek. The Commission followed its precedent, which recognized that, in determining backpay awards, it "endeavors to make miners whole and to return them to their status before illegal discrimination occurred." 15 FMSHRC at 617; see Munsey v. Smitty Baker Coal Co., 2 FMSHRC 3463, 3464 (December 1980); Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2056 (December 1983). "Our concern and duty is to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." 15 FMSHRC at 617, quoting Dunmire, 4 FMSHRC at 143. Monetary relief is awarded "to put an employee into the financial position he would have been in but for the discrimination." Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982). Further, the Commission sought "to fashion relief that is just and does not overcompensate the discriminatee." Meek, 15 FMSHRC at 617, citing Dunmire, 4 FMSHRC at 142-43.

In deciding that unemployment compensation should be deducted from a backpay award under the Mine Act, the Commission noted that such a policy does not result in less than full compensation to the miner for his lost wages. 15 FMSHRC at 617. It noted the similarity in effect between deducting unemployment compensation and deducting other earnings, in that both leave the discriminatee in the same position he was in before the illegal discrimination. Id. Under settled Commission law, a miner's earnings are deducted from his backpay award. See, e.g., Dunmire, 4 FMSHRC at 144.

The Commission also recognized that deducting unemployment compensation from backpay awards is not inconsistent with the Mine Act's goal of deterring illegal conduct because an employer must still place the victim of unlawful discrimination in the position he would have been in but for the unlawful discrimination, by providing backpay with interest, reinstatement with full seniority rights and attorneys' fees. 15 FMSHRC at 617. Further, the Mine Act, unlike the NLRA, Title VII, and the ADEA, mandates a separate civil penalty against an operator who unlawfully discriminates against a miner. 30 U.S.C. §§ 815(c), 820(a).[7] The Commission's recently issued Procedural Rules require the Secretary to propose a separate civil penalty for a violation of section 105(c). 29 C.F.R. § 2700.44 (1993).

In disavowing Commission precedent, the dissent mischaracterizes the rationale of Meek as the theory that "the failure to deduct unemployment compensation results in a windfall to the miner...." Slip op. at 15. The term "windfall" appears in Meek only in the dissent and that concept was not the basis for the Commission's decision.[8] Rather, Meek rests on the

---

[7] We reject the dissent's assertion that "adoption of a deduction policy conflicts with the Mine Act's goal of deterring illegal conduct." Slip. op. at 21.

Commission's determination that the goal of the Mine Act's discrimination provisions is to make miners whole. The Commission determined that this goal was best met by deduction of unemployment compensation. The Commission's alleged failure "to explain why the recoupment of benefits ... does not adequately address any concerns over a windfall to miners" (slip op. at 16) stems from the fact that, contrary to the dissents' assertions, both here and in Meek, such concerns were not the basis for the Commission's decision in either case.[9]

The dissent's reliance on Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988), is misplaced. The Commission has not, as asserted, employed a standard for analyzing this issue different from that set forth in Gullett Gin. Slip op. at 17-18. Rather, the Commission has followed the Supreme Court's analysis (that the issue of deductibility is within the agency's discretion) "to render a decision that differs from the Supreme Court's." Levine, 864 F.2d at 460 (emphasis in original). Under our colleagues' analysis, a split between the United States Courts of Appeals could not have occurred. In their opinion, those circuits permitting the deduction of unemployment compensation from Title VII and ADEA cases would have erred in "bottom[ing their] discretionary policy choice on standards or reasons which have been rejected by the Supreme Court." Slip op. at 18 ; See, e.g., Naton, 649 F.2d at 700 ("[The district court] retained the discretion under the ADEA to deduct the [unemployment] compensation from the backpay award."); Enterprise Ass'n Steamfitters, 542 F. 2d at 592 (In a Title VII action, it is "not an abuse of discretion to deduct sums received from collateral sources such as unemployment compensation.") We do not believe that those United States Courts of Appeals so erred.[10]

The Secretary's arguments have been carefully considered, including his acknowledgment on review that the deduction of unemployment compensation is a matter of Commission

---

[8] Our colleagues, disagreeing with the policy established in the exercise of the Commission's discretion, have attempted to discredit that policy by misrepresenting its rationale. They have also attributed improper motives to the majorities here and in Meek. See, e.g., slip op. at 20 ("their zeal to ensure that no possibility exists for illegally discharged miners to receive overlapping compensation"). They have also speculated as to how we would vote on the issue of consequential damages, which is not before us, and concluded that we have "bolstered" the case against that vote. Slip op. at 18.

[9] Although our colleagues support recoupment as a method for addressing the Commission's alleged "concerns" about a "windfall" (slip op. at 16), they do not propose recoupment as agency policy nor do they adopt the Secretary's suggestion that the Commission facilitate recoupment. They propose only that a backpay award "should not be reduced by the amount of unemployment compensation received...." Slip op. at 14.

[10] The dissent takes issue with the Commission's current policy and also with its earlier practice, supported by the Secretary at hearing, which left discretion to the trial judge to determine this issue.

discretion. S. Br. at 19. We reaffirm the reasoning and conclusion set forth in Meek and reaffirmed in Ross v. Shamrock, 15 FMSHRC 972, and affirm the judge's deduction of unemployment compensation from Nantz's backpay award.

III.

Conclusion

For the foregoing reasons, the Commission affirms the judge's conclusion that NHE constructively discharged Nantz in violation of section 105(c)(1) of the Mine Act and affirms the judge's backpay award.

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Jordan, Chairman and Marks, Commissioner, concurring in part and dissenting in part:

We concur with Commissioners Doyle and Holen on the disposition of all issues except the requirement that unemployment compensation be deducted from backpay. On that point, we would reverse the administrative law judge and hold that a backpay award to a miner injured by a mine operator's violation of the Mine Act should not be reduced by the amount of unemployment compensation received by the injured employee.

The question concerning the propriety of a setoff for unemployment compensation was first decided by the Commission in Meek v. Essroc Corp., 15 FMSHRC 606 (April 1993). Meek involved a claim of discrimination filed and prosecuted by the affected employee, without the participation of the Secretary, pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). In Meek, the Commission majority reversed the administrative law judge in part and ruled that a backpay award on behalf of a discriminatee under the Mine Act must be reduced by the amount of unemployment compensation received by the miner victimized by the operator's violation of the Act. Commissioner Backley dissented on the unemployment compensation issue. 15 FMSHRC at 621-26. Meek did not appeal the Commission's decision to the Court of Appeals.

In his brief before the Commission, the Secretary, citing to Meek, urged the Commission "to adopt Commissioner Backley's position." S. Br. at 19 n.4. We have considered the Meek decision in light of the arguments of the parties, and we have concluded that Commissioner Backley's Meek dissent continues to set forth the proper disposition of the unemployment compensation issue. Because of the importance of this question to the effective enforcement of the Act's protection of miners from employer discrimination on the basis of protected health and safety activity, we reiterate here, with some amplification, the analysis first set forth in Commissioner Backley's dissent in Meek.[1]

I.

It is beyond dispute that the Commission has the discretion to fashion backpay remedies which effectuate the purposes of the Mine Act. But the Commission's discretion in this area is not unlimited; as with any court or agency, the Commission must base its exercise of discretion upon reasoned, rational principles that are not in conflict with the facts of the case or binding precedent.[2] Failure to do so amounts to an abuse of that discretion. In this case, examination of

---

[1] Commissioner Backley participated in considering this case and voted to reverse the judge's unemployment compensation holding, but his term of office expired before the decision was ready for issuance. See, e.g., Penn Allegh Coal Co., 3 FMSHRC 2767 n.1 (December 1981).

[2] See, e.g., NLRB v. Blake Constr. Co., Inc., 663 F.2d 272, 285 (D.C. Cir. 1981).

the bases upon which our affirming colleagues conclude that unemployment compensation received should be deducted from backpay awards constrains us to conclude that they have abused their discretion.

In deciding this case, our colleagues reaffirm the rationale and decision of the Commission in Meek. Slip op. at 10. Distilled to its core, the Meek majority's two-pronged rationale was that the failure to deduct unemployment compensation results in a windfall to the miner that is in conflict with the policy to require deductions of earnings from backpay, and that such failure to deduct constitutes an additional expense to the employer. Both of these propositions have already been rejected by the Supreme Court.

A.

The "employee windfall" theory has long since been considered and rejected by the Supreme Court. The leading case in this area is NLRB v. Gullett Gin Co., 340 U.S. 361 (1951). While the Meek majority pays lip service to Gullett Gin, its decision flies in the face of the Supreme Court's holding. In rejecting the employee windfall rationale, the Gullet Gin Court held that state unemployment compensation benefits represent entirely collateral benefits having nothing whatever to do with the remedial purpose of the statute. Id. at 364. In determining that the NLRB acted properly within its discretion by refusing to deduct unemployment compensation from backpay under the National Labor Relations Act, the Supreme Court clearly differentiated unemployment compensation from earnings. The Court flatly rejected the argument that unemployment compensation was to be treated as earnings, stating:

> In Marshall Field & Co. v. National Labor Relations Board, 318 U.S. 253, ... this Court held that the benefits received by employees under a state unemployment compensation act were plainly not earnings which, under the Board's order in that case, could be deducted from the backpay awarded.

340 U.S. at 363.

The Gullett Gin Court also rejected the argument that the unemployment compensation payments were to be considered as direct payments from the employer and therefore properly set off against the backpay award. The Court stated:

> Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state.

Id. at 364 (citations omitted).

In addition to the collateral benefits rationale, the Supreme Court in Gullett Gin identified a second basis for its holding that declining to deduct unemployment compensation does not result in a windfall to the injured employee. The Court observed that "some states permit recoupment of benefits paid." 340 U.S. at 364 n.1. This effective and sensible approach has been widely followed. In adopting a rule of non-deductibility of unemployment benefits and rejecting the windfall argument, the Third Circuit reasoned:

> [A]lthough it appears to provide double recovery, in fact that is not the inevitable result. Often insurers have subrogation rights, and in some circumstances state benefits are recoupable. For example, a recently enacted Pennsylvania statute provides for recoupment of unemployment benefits when backpay has been awarded.

Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 83-84 (3d Cir. 1983) (citation omitted); see also Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988), where the court rejected the setoff because Colorado law requires an employee who receives a backpay award to "repay . . . all unemployment benefit payments received...."

In affirming a lower court ruling on this question, the Ninth Circuit referred approvingly to the rationale that:

> if Congress did not intend for an employee to receive unemployment benefits in addition to backpay the logical solution is a recoupment of the unemployment benefits by the state employment agency.

Kauffman v. Sidereal Corp., 695 F.2d 343, 347 (9th Cir. 1982).

Indeed, even in the Seventh Circuit, where the court registered a preference that an employee not receive unemployment compensation and overlapping backpay, the court reasoned that the solution was not to allow the employer to "get a deduction for unemployment insurance benefits but that [the employee] should have to repay them...." Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1429 (7th Cir. 1986). The court went on to observe that if that were not possible "the choice seems to be between conferring a windfall on Allis-Chalmers and a windfall on Hunter. As the victim of Allis-Chalmers' wrongdoing, Hunter is the logical choice." Id.

In its brief to the Commission, Nally and Hamilton makes no reference to the Commission's Meek decision, but rather urges us to affirm the judge's proper use of discretion to require a backpay setoff. Our affirming colleagues decline to explain why the recoupment of benefits, endorsed by the Supreme Court and courts of appeals, does not adequately address any concerns over a windfall to miners. As demonstrated in this case, the employer/operator, the

party-in-interest in the litigation, will almost always be more than eager to notify the appropriate state authority to recoup unemployment compensation. Indeed, Nally and Hamilton has even argued for the intervention of the state agency into this proceeding.

B.

By reaffirming Meek, our colleagues apparently continue to maintain that the failure to deduct unemployment compensation would effectively require the operator "to additionally compensate the miner with backpay for funds already received, if the miner . . . received unemployment compensation." Meek, 15 FMSHRC at 617-618 (emphasis supplied). The majority opinion went on to note that "[w]hen an individual receives unemployment compensation, his previous employer is, as a result, taxed at an increased rate, depending upon the degree of experience rating." Id. at 618 n.11. Although our colleagues' point is not fully explicated, we take these comments together as a suggestion that when a discriminatee receives both unemployment compensation and backpay, the offending employer is made to pay twice for the same wrong.

The short answer to this concern is that the employer's experience rating may well remain unaffected in view of the high probability that unemployment compensation will be recouped by the state fund, as detailed above. But in any event, the Supreme Court has already found wanting the "extra payment" proposition advanced by the Meek majority. In Gullett Gin, the Court explained:

> We doubt that the validity of a back-pay order ought to hinge on the myriad provisions of state unemployment compensation laws [citations omitted]. However, even if the Louisiana law has the consequence stated by respondent, which we assume arguendo, this consequence does not take the order without the discretion of the Board to enter. We deem the described injury to be merely an incidental effect of an order which in other respects effectuates the policies of the federal Act. It should be emphasized that any failure of respondent to qualify for a lower tax rate would not be primarily the result of federal but of state law, designed to effectuate a public policy with which it is not the Board's function to concern itself [citation omitted].

340 U.S. at 365. As the Court made clear, the employer's responsibility to contribute to an unemployment compensation fund is for the purpose of "carry[ing] out a policy of social betterment for the benefit of the entire state" (Id. at 364) and has nothing to do with remedying or deterring violations of federal anti-discrimination laws. Accord EEOC v. Ford Motor Co., 645 F.2d 183, 196 (4th Cir. 1981), rev'd on other grounds, 458 U.S. 219 (1982).

Although the Commission has the discretion under the Mine Act to establish a policy on this issue, even one that differs from the result reached by the Supreme Court, the Commission

does not have the authority to bottom its discretionary policy choice on standards or reasons which have been rejected by the Supreme Court. As one Court of Appeals has stated:

> A lower court, when faced with a factually distinguishable but legally relevant Supreme Court decision, may employ the Supreme Court's method of analysis to render a decision that differs from the Supreme Court's. A lower court, however, may not employ a different standard in analyzing the different facts.

Levine v. Heffernan, 864 F.2d 457, 460 (7th Cir. 1988) (emphasis in original and supplied).

The Commission is required to follow not only Supreme Court decisions but also the clear implications of those decisions. Hendricks County Rural Elec. Membership Corp. v. NLRB, 627 F.2d 766, 769 (7th Cir. 1980), rev'd on other grounds, 454 U.S. 170 (1981), on remand, 688 F.2d 841 (7th Cir. 1982). Unless and until the Supreme Court chooses to depart from its ruling and rationale we must be so guided. Kovacs v. United States, 355 F.2d 349, 351 (9th Cir. 1966).

Our colleagues protest that, because they have not used the word "windfall," their opinion has been unfairly criticized for relying on the discredited windfall theory. Slip op. at 11-12. But the affirming Commissioners' concern in Meek that failure to deduct unemployment benefits would overcompensate the discriminatee and result in "double recovery" (15 FMSHRC at 617, quoting EEOC v. Enterprise Ass'n Steamfitters, 542 F.2d 579, 592 (2d Cir. 1976)) is nothing more or less than the windfall theory under different names. The affirming Commissioners have repeated their erroneous reliance on the windfall theory here. Slip op. at 11, 13 (citing "overcompensat[ion]" and "reaffirm[ing] the reasoning and conclusion set forth in Meek ..."). Our colleagues' attempt to camouflage the basis of their decision, while understandable in light of judicial rejection of the windfall theory, is unpersuasive.[3]

By flouting the collateral benefits doctrine, the affirming Commissioners have bolstered the legal basis for injured miners to seek relief, based on the employer's violation of the anti-discrimination provisions of the Act, for collateral losses, e.g., a repossessed car, a cancelled insurance policy, or medical treatment for depression.[4]

---

[3] Contrary to our colleagues' assertion, our criticism is based on their faulty rationale, not on any "improper motives" (slip op. at 12 n.8).

[4] Such relief would be consistent with section 105(c)(2) of the Mine Act, which grants the Commission authority to provide relief from unlawful discrimination "including, but not limited to, . . . reinstatement . . . with backpay and interest." 30 U.S.C. § 815(c)(2) (emphasis supplied). In this connection, the Senate Committee on Human Resources stated its:

II.

Beyond the foregoing legal basis for our disagreement with the affirming Commissioners, we are eager to dissociate ourselves from a policy choice which fails to fairly balance the interests of the parties. After reading our colleagues' opinion on this issue, it would seem necessary to remind the reader that in this case the miner prevailed, i.e., he was the victim of an illegal discharge. This caution is necessary because the affirming Commissioners' rationale focuses unduly on avoiding the risk of visiting a windfall recovery upon the miner. Never mind that our colleagues' approach betrays no concern that a reciprocal windfall may inure to employers whose backpay liability will be partially discharged from a public fund not intended for such use. As the Tenth Circuit has observed:

> The deduction or offsetting of unemployment benefits may well result in a windfall to the employer. He finds himself in a position where he is not responsible for the payment of the illegally withheld backpay and then offsetting it with unemployment benefits by the government, which is unjust enrichment except to the extent that employers make contributions to the fund.

EEOC v. Sandia Corp., 639 F.2d 600, 626 (10th Cir. 1980).

The Seventh Circuit's reasoning in Hunter, 797 F.2d at 1429, serves to pinpoint the basic unfairness of our colleagues' policy choice. The Meek majority conceded that state recoupment of unemployment compensation occurs "in many instances." 15 FMSHRC at 617 n.10. This suggests that the risk of a windfall recovery to the miner is limited. Indeed, the Secretary advises that only Georgia, Rhode Island and Louisiana do not have recoupment provisions. S. Br. at 21-22. On the other hand, the Meek majority also conceded that the risk of any increased employer expense, due to higher unemployment insurance taxes, is variable and unknown. 15 FMSHRC at 618, n.11.

> [i]ntention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

S. Rep. No. 181, 95th Cong., 1st Sess. 37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978) ("Legis. Hist.") (emphasis supplied).

Thus, our affirming colleagues' twin concerns -- miner windfall recovery, and increased employer payment -- are bottomed on nothing more than vague speculation regarding the effects of wide state-by-state legal variations. Nevertheless, in their zeal to ensure that no possibility exists for illegally discharged miners to receive overlapping compensation, our colleagues have adopted a national policy which will at times provide an employer with a windfall setoff from his backpay obligation. We, as did the court in Hunter, find this choice to be illogical and unfair. Moreover, our colleagues' policy is directly in conflict with the Gullett Gin Court's express rationale detailing the basis for its rejection of the employer's argument that under the experience-rating record formula it will be prejudiced.

One of the most glaring infirmities of our colleagues' decision is that it undermines one of the fundamental purposes of backpay awards under the Mine Act and other anti-discrimination provisions -- the deterrence of unlawful conduct in the future. Subsequent to the issuance of the Meek decision, the Eighth Circuit had occasion to address this issue in an Age Discrimination in Employment Act case. In reversing the district court's deduction of unemployment compensation from the backpay award the Court stated:

> Backpay awards in discrimination cases serve two functions: they make victimized employees whole for the injuries suffered as a result of the past discrimination, and they deter future discrimination. . . . Reducing a backpay award by unemployment benefits paid to the employee, not by the employer, but by a state agency , . . . makes it less costly for the employer to wrongfully terminate a protected employee and thus dilutes the prophylactic purposes of a backpay award. . . . Indeed, it leads to a windfall to the employer who committed the illegal discrimination. . . .
>
> Based on these considerations, no circuit that has considered the matter has determined that unemployment benefits should, as a general rule, be deducted from backpay awards in discrimination cases. Circuits have split, however, over whether deducting unemployment benefits should be prohibited or should be left to the discretion of the trial court. The majority [of courts] have held that, as a matter of law, unemployment benefits should not be deducted from backpay awards. See Craig, 721 F.2d at 85 [3rd Cir.]; Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 627-28 (6th Cir. 1983), cert. denied, 466 U.S. 950 . . . (1984); Kauffman v. Sidereal Corp., 695 F.2d 343, 346-47 (9th Cir. 1982) (per curiam); E.E.O.C. v. Ford Motor Co., 645 F.2d 183, 196 (4th Cir. 1981), rev'd & remanded on other grounds, 458 U.S. 219 . . . (1982), . . . on remand, 688 F.2d 951, 952 (4th Cir. 1982) (per curiam); Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549, 1550-51 (11th Cir. 1983) (en banc) (per curiam). Three circuits have adopted a minority position that deducting unemployment benefits lies within the discretion of the trial court. See Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988); Hunter, 797 F.2d at 1429 (Posner, J., acknowledging discretion as Seventh Circuit rule but stating that it "may be unduly favorable to

> defendants"); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977). The Second Circuit has in the past affirmed a deduction of unemployment benefits as discretionary, see E.E.O.C. v. Enterprise Assoc. Steamfitters Local 638 of U.A., 542 F.2d 579, 592 (2d Cir. 1976), cert. denied, 430 U.S. 911 . . . (1977), but more recently indicated that the circuit's rule remains unsettled, see Promisel v. First Am. Artificial Flowers, 943 F.2d 251, 258 (2d Cir. 1991), cert. denied, . . . 112 S.Ct. 939 . . . (1992).

Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1113-14 (8th Cir. 1994) (emphasis supplied).[5] The Eighth Circuit found the view of the majority of the Courts of Appeals, that deduction of unemployment benefits is inconsistent with the deterrent purpose of backpay awards in discrimination cases and awards a windfall to employers that discriminate, to be the "more sound position" and adopted it. Id. at 1114. We do not agree with our colleagues that the Courts of Appeals for the Third, Fourth, Eighth, Ninth and Eleventh Circuits erred in reaching this conclusion.[6]

Gaworski and like cases fatally undermine our colleagues' conclusion that "deducting unemployment compensation from backpay awards is not inconsistent with the Mine Act's goal of deterring illegal conduct." 15 FMSHRC at 617; slip op. at 11. This repeated leap of logic is too vast to be ignored. In fact, it is correct to state the opposite -- that adoption of a deduction policy conflicts with the Mine Act's goal of deterring illegal conduct. There certainly is no deterrent value in establishing a policy whereby a violating operator may be relieved of his obligation to furnish illegally withheld pay from a discharged worker by offsetting his obligation through the use of state funds. In adopting a circuit-wide rule of non-deductibility of unemployment benefits, the Third Circuit concluded that "the legislative history and Gullett Gin are persuasive, that the primary prophylactic of Title VII would thereby be better served." Craig, 721 F.2d at 85. Recognizing that backpay awards have a prophylactic or deterring effect on future discrimination, the court also concluded: "To the extent that a backpay award is reduced by unemployment benefits, this purpose is diluted." Id. at 84.[7]

---

[5] We share our colleagues' view that case law relating to Title VII of the Civil Rights Act of 1964, the National Labor Relations Act, and the Age Discrimination in Employment Act is applicable to this issue.

[6] The affirming Commissioners state that in Gaworski, the Eighth Circuit "established a circuit-wide policy of non-deductibility under the ADEA." Slip op. at 10 n.5. Our colleagues fail to mention the holding of Gaworski that a uniform deduction requirement is inconsistent with the very purpose of backpay awards in discrimination cases. 17 F.3d at 1113.

[7] Our colleagues, misapprehending the basis of the dissent, mistakenly assert that in our view,"those circuits permitting the deduction of unemployment compensation . . . erred . . . ." Slip op. at 12. Gullet Gin makes clear that an agency has discretion in this area. But that

Curiously, our colleagues continue to attempt to support their policy choice by noting that the Mine Act imposes a civil penalty upon offending operators. 15 FMSHRC at 618; slip op. at 11. We see no relevance of this fact to the issue of what constitutes an appropriate, fair backpay award to a miner who has been illegally discharged. In commenting on the wide breadth of relief that the Commission should require under the Mine Act, the Senate Committee on Human Resources expressly stated "the relief provided under Section 10[5](c) is in addition to that provided under sections 10[4](a) and (b) and 10[5] for violations of standards." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Legis. Hist. at 623 (emphasis supplied).

For the foregoing reasons we would follow the reasoning of the Supreme Court, and the rule followed by the majority of courts, that unemployment compensation not be deducted from backpay awards. We would therefore reverse the decision of the administrative law judge on the issue of deducting unemployment compensation benefits from backpay, and order that no such deduction occur.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

---

discretion must be exercised in a manner consistent with Supreme Court holdings. Levine v. Heffernan, supra. Unlike our colleagues' opinion here, the Courts of Appeals permitting trial court discretion to deduct unemployment benefits do not base their holdings on the rejected employee windfall theory. Indeed, in Cooper, Hunter and Sandia Corp., the Courts of Appeals approved the trial courts' refusal to deduct unemployment benefits. In Naton, the Ninth Circuit case cited by our colleagues, the court expressly declined to reach the question presented here; the later Kaufmann decision places that circuit among the majority that disallows deductions. Finally, as noted by the Gaworski court, in Promisel, the Second Circuit recently backed away from its earlier embrace of the employee windfall theory in EEOC v. Enterprises Ass'n Steamfitters.

Distribution

Susan E. Long, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Marcia A. Smith, Esq.
100 W. Center Street
P.O. Box 699
Corbin, KY 40702

Administrative Law Judge George Koutras
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

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 1 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 93-449-M
	:	A. C. No. 36-07715-05501
v.	:	
	:	Kuhl Sand & Gravel Pit
WALTER KUHL AND SON, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a Motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $364 to $175 is proposed. I have considered the representations and documentation submitted in these cases, 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 $175 within 30 days of this Order.

Avram Weisberger
Administrative Law Judge

Distribution:

Gayle M. Green, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Room 14480, Gateway Building, Philadelphia, PA 19104

Mr. Walter Kuhl, Kuhl Sand and Gravel, 9335 Peck Road, Erie, PA 16510

/efw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-3993/FAX (303) 844-5268

November 2, 1994

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of	:	
JAMES HYLES,	:	Docket Nos. WEST 93-336-DM
	:	WEST 93-436-DM
DOUGLAS MEARS,	:	WEST 93-337-DM
	:	WEST 93-437-DM
DERRICK SOTO,	:	WEST 93-338-DM
	:	WEST 93-438-DM
GREGORY DENNIS,	:	WEST 93-339-DM
Complainants	:	WEST 93-439-DM
	:	
v.	:	
	:	All American Aggregates
ALL AMERICAN ASPHALT,	:	
Respondent	:	

DECISION

Appearances: J. Mark Ogden, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Complainants;
Lawrence Gartner, Esq., Naomi Young, Esq., Gartner & Young, P.C., Los Angeles, California, for Respondents.

Before: Judge Cetti

I

These discrimination proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act").

The proceedings were initiated by the Secretary under Section 105(c)(2) of the Mine Act on behalf of the Complainants James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis. The Secretary alleges that Respondent All American Asphalt (All American) in violation of Section 105(c) of the Mine Act discharged the four Complainants in retaliation for engaging in

protected safety activity on two separate occasions. All eight cases were consolidated and at the request of the parties, hearings on the merits of the consolidated complaints of discrimination were held in Riverside, California.

At the close of that hearing, the undersigned Judge issued an Order of Temporary Reinstatement from the bench, followed by a written decision a few days later ordering temporary reinstatement of the Claimants. See Docket Nos. WEST 93-124, WEST 93-125, WEST 93-126 and WEST 93-127. 16 FMSHRC 31 (1994). Thereafter both parties filed post-hearing and reply briefs setting forth the facts, law and arguments in support of their respective positions in the above-captioned matters. I have considered their arguments as well as the facts and the law in my adjudication of these matters.

II

Threshold Issues

Respondent raises two threshold issues by its assertion that (1) "this entire matter is barred by the Statute of Limitations." and (2) that the Complainants' complaints are preempted by the NLRA. Both contentions for reasons discussed below are rejected.

A. The Discrimination Complaints Are Not Time-Barred

Respondent asserts that all eight complaints filed by the Secretary on behalf of the four Complainants are time-barred pursuant to 105 (c)(2), 30 U.S.C. § 815 (c)(2) and the Commission Procedural Rule 29 C.F.R. § 2700.41.

Section 105(2)(a) of the Mine Act, 30 U.S.C. § 815(c)(2), provides that if:

> "[T]he Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination...."

29 C.F.R. § 2700.41 provides:

> "A discrimination complaint shall be filed by the Secretary within 30 days after his written determination that a violation has occurred."

It is well settled that these filing guidelines are not jurisdictional. The purpose of the time limits is to avoid stale

claims. Late filing may be excused. Christian v. South Hopkins Coal Company, 1 FMSHRC 126, 134-136 (April 1979); Bennett v. Kaiser Aluminum & Chemical Corporation, 3 FMSHRC 1539 (June 1981); Secretary v. 4-A Coal Company, Inc., 8 FMSHRC 240 (February 1989).

The Commission has indicated that dismissal of a complaint for late filing is justified only if the Respondent shows material, legal prejudice attributable to the delay. See Secretary/ Hale v. 4-A Coal Company, Inc., supra. No such showing has been made here. Under the facts and circumstances presented at the hearing in this case the late filing is excused. Respondent's request for dismissal of the complaints on the grounds that they are time-barred is denied.

B. Respondents' Discrimination Complaints Are Not Preempted by the NLRA

Respondent contends that the claimants' discrimination complaints are preempted by the National Labor Relations Act (NLRA). Respondent asserts that because "Complainants' allegations include their layoff of their employment and because it is undisputed that Complainants have grieved their July 1992 layoff through the Union, thereby evincing a recognition on Complainants' part that their claim cannot be resolved without resort to the Union agreement, the wrongful layoff claims are necessarily based upon rights and duties derived from the Labor Agreement and thus preempted by of the Labor Management Relations Act." 29 U.S.C. § 185.

As stated by the Secretary in his reply brief, the remedial purposes of the Mine Act are separate and distinct from the public policy goals of the Labor Act. The Commission has stated, the Mine Act is not a "labor" statute, but rather is intended to promote the safety and health of the nation's miners. Peabody Coal Co., 7 FMSHRC 1357 (September 1985), affirmed, 822 F.2d 1134 (D.C. Cir. 1987). The Commission has recognized that when the purposes of the Mine Act coincide with other statutes, the Commission must attempt to strike a "careful accommodation of one statutory scheme to another." Accordingly, given the mandate of the federal courts that the Mine Act must be interpreted to enforce its remedial purposes while ensuring that other important public policies are not ignored, it is self-evident that the Commission has jurisdiction to determine whether Respondent discharged the Complainants for engaging in MSHA-related safety activity. See also Southern Steamship Co. v. NLRB, 316 U.S. 31 (1962); McLean Trucking Co. v. United States, 321 U.S. 67 (1944).

It is recognized that protected activities of miners under Section 105(c) may be identical to or closely related to activities for which protection is also provided under the National Labor Relations Act (NLRA). It is also noted that MSHA and the

General Counsel of the National Labor Relations Board (NLRB) have entered into a memorandum of understanding aimed at coordinating the processing of identical or related claims filed both under the Mine Act and the NLRA. Under this agreement, where miners file claims under both the Mine Act and the NLRA and the claims are both based on the same activity which is covered by Section 105(c), the NLRB will defer action or dismiss the claim pending before it so that the claim can be handled exclusively before the Secretary of Labor and the Mine Safety and Health Review Commission. 45 Fed. Reg. 6189.

Respondents' contention that the discrimination complaints are preempted by the NLRA is rejected.

III

In April 1991 Respondent was completing a new addition to its rock finishing plant. On Thursday morning, April 18th, Mr. Hyles, the leadman on Respondent's graveyard shift had a conversation with Mr. Ryan, the vice-president and the plant supervisor. Mr. Ryan told Mr. Hyles he was going to start running the new finishing plant the next day. Hyles told Ryan it wasn't ready to run. At that time the plant had a lot of guards, access ladders, decks, catwalks, trip cords and other basic safety features that were not in place. Since Ryan had been supervising the construction work on the new finish plant he knew many of the basic safety features had not as yet been installed.

Mr. Ryan told Hyles that they needed the material and it was going to run "shit or bleed," Ryan stated that they weren't going to spend $15,000 or $20,000 to buy material for a week and wait for the plant to be completed. Ryan told Hyles that if he did not want to run the plant in its uncompleted state "any one of these other guys here would take your job."

Later that same day, Thursday, April 18, Hyles called Mr. McGuire the business representative for Operating Engineers Local 12 and reported to him his supervisor's (Ryan) intention. In response to the Hyles call, Mr. McGuire that same day came to the plant and observed the unsafe conditions. McGuire told Hyles that if the plant actually started operating in that condition he would call and report it to MSHA. Hyles' testimony regarding this aspect of the case was affirmed by the testimony of Mr. McGuire.

When Hyles went to work on his next shift at 7 p.m., Friday, April 19th, the uncompleted new finish plant was running and had obviously been running for several hours. Mike Ryan told Hyles he wanted as many workmen as possible scattered out over the plant to watch for belts tracking properly and to make sure everything was running properly. The plant was still in the same condition as it was in the previous day. The guards, some access

ladders, decks, catwalks, stop cords and handrails were still not installed.

Ryan assigned Hyles to work as leadman that weekend, Friday, Saturday and Sunday with the combined second and third shift crews working together. Complainants Doug Mears, Greg Dennis and Derrick Soto were on Hyles' crew and worked in the finish plant that weekend under Hyles' supervision and were exposed to the hazards of the uncompleted new plant. Hyles was concerned for their safety. Hyles spoke to them about the unsafe conditions and warned them to be careful. All three Complainants made comments to Hyles that they "couldn't believe" the plant was being operated in its uncompleted state, without the basic safety features in place.

During the Saturday and Sunday shifts the three Complainants Greg Dennis, Doug Mears and Derrick Soto observed Hyles video-taping the plant in operation and questioned him about it. All voiced their concerns to Hyles about the hazards involved in working at the new plant in its uncompleted condition.

Hyles talked to the three Complainants about taking the video-tape to MSHA. All the Complainants agreed that it was a serious matter involving a certain level of danger in working under the existing conditions and that the video tape should be turned in to MSHA.

Early Monday morning; about 7 a.m., Hyles took the video tape to the MSHA field office in San Bernardino where the video tape was shown on a television screen to MSHA Inspector Carisoza.

Inspector Carisoza after observing the video-tape stated it warranted an MSHA inspection. That same Monday afternoon MSHA inspectors made a hazard inspection of the plant in operation. As a result of the inspection, the inspectors issued numerous citations including 29 unwarrantable failure citations. MSHA also shut down the plant until all violations were abated.

Later that same Monday, after the inspection, Ryan called Hyles at home and told him not to come to work that evening because "someone had turned them in" and MSHA had come to the plant and shut the operation down.

About a week later, the first day Hyles returned to work after the MSHA shutdown of the plant, he had lunch with Ryan and Gary White, the maintenance shift leadman. Ryan asked if they "had any idea who had turned him in." Ryan said he wanted to find out who it was and he would "make it so miserable for them, they would be happy to go work someplace else." Hyles testified he did not admit his part in initiating the MSHA inspection as it was his understanding his name would be kept anonymous. He

testified he was "foolish enough to believe that maybe he (Ryan) would never find out."

Hyles heard Mr. Daniel Sisemore, the president of All American state that he would like to find out who was causing him all the problems and that he would "make it worth their while to seek employment elsewhere."

William Smillie, a former employee, testified that he also heard Mr. Sisemore while in the mine office state that they "would like to know who had filed the complaint, so they could make it worth their while to leave."

Ryan on cross-examination admitted that company president Sisemore asked him who "turned in" the company.

In May of 1991 based on information given to him by Ryan, Hyles told Complainant Derrick Soto that Ryan planned to lay Soto off and keep some less senior employees. Soto then told Ryan that if Ryan did that he, Soto, would file a grievance with the Union. Soto was not laid off at that time.

In June 1991, MSHA conducted a Section 110(c) investigation of Respondent's vice-president Michael Ryan to determine if he authorized or ordered the numerous violations that were cited in April 1991. During that investigation the four Complainants as well as most of the other employees were interviewed by MSHA special investigator Ronald Mesa. Government Exhibit Nos. 2, 3, 4 and 5 are the MSHA interview statements of Hyles, Mears, Soto and Dennis given to the MSHA special investigator. Respondent was aware that the four Complainants as well as many other employees were interviewed during the Section 110(c) investigation because Ryan in cooperation with MSHA made arrangements for the interviews. Ryan was present at the mine site when the on-site interviews were conducted in the investigators vehicle which was parked in front of the mine office. Ryan acknowledged that he knew that the four Complainants were interviewed by the investigator during the Section 110(c) investigation. Under the Mine Act it is clear that the four Complainants as well as every employee who cooperated with the 110(c) investigation, were interviewed and gave statements were engaged in protected activity under Section 105(c) of the Mine Act.

In October 1991, Hyles was demoted from his leadman position. Hyles testified that Ryan did this without any explanation. Hyles testified that when he asked Ryan why he was demoted, the only reason given to Hyles was that they "no longer saw eye to eye." (Tr. 394). Hyles testified he first learned of Respondent's alleged concern about his conduct such as sleeping on the job was from MSHA investigator Matchett after Hyles filed his initial discrimination complaint.

On July 7, 1992, the Complainants along with 16 of its 27 operating engineers were told that they were temporarily laid off while the company was moving their big primary crusher. Complainants were told they would be off work a week or two. When Complainants called the plant every week or two in July and August, they were told work was slow and just a few of the more senior people were working a few days a week. In fact, however, Respondent had been calling the work force back to work so that by the end of August 1992 the entire work force had been called back and were working except the four Complainants and one other employee (Martin Hodgeman). Some of the employees were working overtime. Later Martin Hodgeman was permitted to bump a less senior employee so that the four Complainants were the only employees not recalled after the temporary July 7, 1992 layoff.

In late August 1992, about the 28th of that month, Complainant Hyles and Soto went to the plant and observed less senior employees than the Complainants were working. All four Complainants then filed grievances with their union contesting their layoff and the refusal to recall them.

The union contract in July and August of 1992 required Respondent All American to notify the union if the company planned a layoff and that there be a "bumping meeting." In a bumping meeting a more senior employee could, if qualified, bump a less senior employee. At the arbitration it was found the company violated the union agreement by not having a bumping meeting.

IV

The provision of All American's contract with the International Union of Operating Engineers, Local 12 in pertinent part as to seniority, layoffs and bumping privileges are as follows:

> Article XIII, Seniority
>
> Section 1(a): ... For the purpose of bidding or bumping, an employee must be qualified in the opinion of the Employer to perform the work required by the classification into which he is bidding or bumping.
>
> Section 1(b): Regular Layoff and Recall. At a reasonable time before a layoff or recall takes place, the Employer shall notify the Union and the parties shall meet and effect the layoff or recall in accordance with the provisions of this Section. In cases of reduction in force, seniority by job classification shall prevail. He shall have bumping privileges as follows:

1. He shall have the right to bump into any classification provided he has total seniority over the employee he is bumping and is qualified. Bumping shall be on the shift and at any location his seniority entitles him to.

Section 3: Seniority Termination. Seniority shall be terminated by . . .(3) if the employee performs no work for the Employer within the bargaining unit for a period of six months . . . .

Article XIV, Grievance Procedures

Section 1. ... A "grievance as that term is used in this contract means a claim by an employee or employer, that a term of this Contract has been violated. . . .No dispute, complaint or grievance shall be recognized unless called to the attention of Employer and the Union within 30 days (except on discharge, which shall be seven working days) after the alleged violation occurred.

(b) Step Two: If the grievance is not settled in Step One within two working days, within ten days thereafter, it shall be presented in writing through the Union to the Employer. A committee of an equal number of representatives of the Employer and the Union will meet within 30 working days thereafter to settle the grievance. If a decision is reached by this committee, it shall be final and binding upon all parties involved.

V

The Secretary in his post-hearing brief points out that the union contract required All American to afford a senior employee the right to bid on jobs held by less senior employees in the event of a layoff or recall, and to reassign the more senior employee to any job classification which he is capable of performing. (Tr. 201-202). The Labor Agreement did not require that the more senior employee who is bidding on the job to be the best equipment operator, or better or faster than the less senior employee, in order to be entitled to "bump" into that job. [Tr. 1660 (Ryan); Government Exhibit No. 51 Arbitrator's Decision at 15, fn. 7].

The Complainants filed complaints of discrimination with MSHA in September 1992. The Secretary initiated temporary

reinstatement proceedings in January 1993, and the four Complainants were temporarily reinstated on February 11, 1993, by agreement of the parties.

When the four Complainants were temporarily reinstated, All American had changed the hours of the two shifts. The maintenance shift was changed from the day shift to the second shift, and the production shift was changed to the first (day) shift. (Tr. 443).

The four Complainants were assigned to work on the day shift performing production job classifications. Evidence was presented that each of the Complainants experienced a deterioration in working conditions, including increased scrutiny and verbal harassment. (Tr. 444-445, 468-470).

In early March 1993, All American implemented a temporary third (midnight) shift to run production, temporarily assigning several of the most senior plant repairmen to perform production jobs during the third (midnight) shift. Ryan testified that the third shift was implemented on a temporary basis, in order to run wet material through the plant. Hyles testified that the senior plant repairmen assigned to the third shift, Alex Alegria, Dennis Simmons, Clemente Nunez, and Mack Crutchfield, had performed maintenance work on the day shift for many years prior to March 1993. (Tr. 447). Hyles testified that it was unusual for senior employees to be assigned to work the midnight shift. (Tr. 450). The most senior employees are entitled to the best shift, and most senior employees bid onto the day shift, which is considered the best shift in terms of the working hours. (Tr. 447).

On March 24, 1993, after having assigned the senior plant repairmen to perform the production jobs on the midnight shift for three weeks, All American announced a layoff. Prior to the layoff, Ryan stated to McGuire, the union agent, that he had "four too many operators at the plant," and "had four problem children on days." McGuire testified that he believed Ryan was referring to the four Complainants, and that he expected that Ryan would layoff the four Complainants. (Tr. 206).

When All American discontinued the temporary third shift, on March 23, Ryan did not reassign the senior plant repairmen to their regular positions on the maintenance shift. All American required all of the temporary third (midnight) shift employees to participate in the formal layoff meeting and to bid on jobs held by less senior employees in order to get back onto the day shift. Ryan testified during cross-examination that he expected the senior plant repairmen on the temporary third (midnight) shift to bid back onto the day shift. (Tr. 1687).

Each of the four Complainants was "bumped" (replaced) by a senior plant repairman. Plant repair positions were available on

the seniority list. Union official McGuire testified that it was unusual for a plant repairman to bump into a conveyerman position, when plant repair positions were available. (Tr. 798-850). The four Complainants were the only employees who were displaced as a result of the layoff on March 24, 1993. (Tr. 457).

Alex Alegria, the most senior plant repairman at the mine, replaced Complainant Gregory Dennis in the conveyerman position, the least skilled position at the mine and one which involves primarily manual shoveling. The other three senior plant repairmen, Clemente Nunez, Dennis Simmons, and Mack Crutchfield, who had been classified as plant repairmen for many years prior to the March 1993 layoff, replaced ("bumped") Complainants Hyles (loader operator), Soto (loader operator), and Mears (crusher operator). (Tr. 456). Hyles testified that it was unusual for senior plant repairmen to bump into production jobs. (Tr. 457).

On March 24, 1993, each of the four Complainants was called into the layoff meeting and instructed that he was to bid on a job held by a less senior employee because he had been "bumped" out of his current job. (Tr. 452). The four Complainants testified that they were apprehensive and intimidated during the course of the layoff meeting, and believed that Ryan would refuse to allow any of them to bump into job classifications (disqualifying them) for which they were qualified in order to terminate their employment. (Tr. 452). Complainants Hyles and Soto requested they be permitted to consult with their attorney, due to the pending MSHA discrimination complaints, prior to selecting a job bid. (Tr. 452). Neither Ryan or anyone else advised the Complainants that their job bids would be considered untimely after the meeting. Evidence was presented that Complainants Mears and Dennis did not request to bump during the meeting, because they believed Ryan would automatically disqualify them from any job. The Complainants wanted to consult with the Solicitor handling these discrimination cases before exercising any bidding or bumping rights they may have had under the employer's agreement with the union.

Shortly after the layoff meeting, Local 12 business agent, McGuire, called Ryan to inform him that Hyles requested to bump into the plant operator position. McGuire testified that Ryan responded, "You can tell Marty Collins (Business Agent) no fucking way." (Tr. 220-221). Each of the Complainants later submitted a written request to bid into jobs held by less senior employees. All American refused to accept any of the Complainants' requests to exercise their "bumping" rights, alleging that their requests were untimely.

Union officials McGuire and Collins testified that there is no requirement in the Labor Agreement that the employee select a job bid at the time of the layoff meeting. (Tr. 218, 1096). Collins testified that the industry practice is to allow

employees to consider their options and consult with their families for several days. (Tr. 1102-1103). Collins testified that he believed that it was improper for All American to refuse to honor the job bids of the Complainants after the meeting, and that it was reasonable for Hyles and Soto to request time to seek advice of counsel due to the pending MSHA case. (Tr. 1092, 1095).

VI

Each of the four Complainants filed a second complaint of discrimination with MSHA alleging that the March 1993 layoff was in retaliation for their MSHA-related safety activity. The Secretary initiated temporary reinstatement proceedings, but did not at that time proceed with the hearing set for reinstatement when the Complainants were again temporarily reinstated by agreement of the parties on April 26, 1993.

Petitioner presented evidence that when Complainants returned to work in late April 1993, the four Complainants were again verbally harassed by mine management, subjected to increased scrutiny on the job, and given reduced working hours and constantly changing reporting times. (Tr. 462-464, 471-472, 729-732). The Secretary points out that during the same period in April 1993, All American began hiring approximately 10 new employees, including several plant repairmen. (Tr. 472-474; Government Exhibit No. 16 Seniority list dated August 25, 1993 and Government Exhibit No. 28 Dispatch records of new employees).

In August 1993, All American posted a seniority list which indicated that the seniority dates of Complainants Mears, Soto, and Dennis were January 1993. (Tr 732). When Mears asked why his original seniority date was not on the list, Ryan stated that he had no seniority. (Tr. 733).

Petitioner points out that the monthly production records provided by All American which reflect gross production of aggregate show that All American increased its output of finished material in July-August 1992, and in March-April 1993. (Government Exhibit 50). Petitioner also points out that the charts introduced by Respondent do not reflect that the company reduced the number of employees when the national economy was performing poorly. (Respondent's Exhibit 40A).

VII

Cathy Ann Matchett, the special investigator with MSHA, who investigated the discrimination complaints testified that in her interview with Mr. Smillie, a former employee, he stated that he had overheard a conversation between Mr. Sisemore and Mr. Ryan saying that they wish they knew who had reported them to MSHA so they could make it worth that person's while to leave.

Matchett when asked what information Smillie provided concerning sleeping on the third shift. She replied "He stated that Mr. Hyles had--that that had happened quite a bit, and that everyone did it now and then, including himself".

The special investigator also testified she obtained information that the four employees that bumped the four Complainants were heavy-duty repairmen, with the highest seniority at the mine, and at that time there were two plant repair jobs available.

Asked as to what the union officials told her regarding whether the Complainants' layoff was proper, the investigator replied as follows:

> A. The three individuals I spoke to strongly indicated to me that the Company was trying to manipulate the bumping procedure and the lay-off procedure in order to get rid of the four Complainants; that, although it was technically done correctly, it was not the common way to handle a bumping procedure.
>
> Q. And, how strongly did the Union officials make that statement to you?
>
> A. Very strongly. (Tr. 68).

The special investigator testified as a result of her investigation that she concluded that discrimination had occurred and recommended that enforcement of the provisions of 105(c) of the Act be pursued.

Matchett, the MSHA special investigator in this matter prepared a Memorandum of Interview immediately after her March 26, 1993, interview of Patrick McGuire, business representative for the Operating Engineers. The Memorandum of Interview (Government Exhibit 19) states in part the following;

> Mr. McGuire stated that as long as he has been associated with All American Asphalt (3-4 years) the repairmen who bumped into the production jobs held by the four Complainants, had always worked as repairmen. I asked if, by working on the third shift for 3 weeks, these men then were qualified to work in production. He said that the company is the sole qualifier and if the company says they are qualified, they are qualified. He did point out that there were repair jobs

available to bump, but none of the men (repairmen) did so. McGuire foresees that Ryan will work the four repairmen on production and then hold them over to do repair.

McGuire said that the bumping procedure was strange because as the men came in, one at a time, they didn't say, "I want a loader position." They said, "I want Hyles' loader position." McGuire stated that this was at the bounds of legality, and that the men doing the bumping would not talk to the union representatives. Ryan had taken the reinstatement order (not a copy of the reinstatement agreement) and posted it on the company bulletin board three days before the announcement of the lay-off--presumably to show that he had the right to RIF the reinstated employees.

McGuire stated that Ryan never directly said he was going to "get" these men, but "that was the inference that was made." McGuire says that Ryan and All American Asphalt is his worst nightmare. He foresees that Ryan will work the guys he has 14-16 hours/day rather than put on another shift and place these guys. ... .

McGuire thinks the company is trying to use the union against MSHA to protect the company. ... .

McGuire is very disgusted about the latest developments and believes that the company and its attorney have planned this for some time.

Investigator Matchett also prepared a Memorandum of Interview immediately after her March 26, 1993, interview of Marty Collins, the business representative for the Operating Engineers IUOE Local No. 12. The Memorandum (Government Exhibit 18) states in part the following:

I asked Mr. Collins about the latest lay-off at All American. He said management had accomplished it according to the collective bargaining agreement but that they were sure the repairmen who did the bumping had been told where to bump. According to Mr. Collins, it doesn't make sense for a repairman to bump a conveyorman, who just shovels all

day. The union has no proof that the men were coached by the company. At the bumping meeting, Collins and McGuire objected to the company bumping the two shop stewards (Soto and Dennis). Management said they didn't recognize the language in the contract about stewards.

I asked Mr. Collins if he heard a comment made by Mr. Ryan to Pat McGuire to the effect that "one way or another, we'll get rid of those four." Collins said he did not hear such a comment.

I asked Mr. Collins if, in setting up the third shift which was subsequently subject to lay off, the company had acted in accordance with the agreement. He said that they had. He stated that the company told the union the reason they put on the third shift was because of the wetness of the material. It was so wet that the plant would not run to capacity and therefore, they needed another production crew to keep the plant running more hours. Since the material had dried out, the company contends that these positions are now extra. The lay off of this third shift resulted in the bumping of the four complainants. ... .

He contends that the company is trying to do through the lay off procedure what they couldn't do through the grievance procedure. (Ex. 18).

VIII

Applicable Law

Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(1) in relevant part provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, in-

> cluding a complaint notifying the operator or the operator's agent...of an alleged danger or safety or health violation in a coal or other mine...or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c) of the Act was enacted to ensure that miners will play an active role in the enforcement of the Act by protecting them against discrimination for exercising any of their rights under the Act.

The basic principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under Section 105(c) of the complaining miner must prove, by a preponderance of the evidence, that (1) be engaged in protected activity, and (2) that the adverse action taken against him was motivated in any part by that protected activity. In order to rebut a prima facie case of discrimination, the operator must show either that no protected activity occurred, or that the adverse action was in no part motivated by the miner's protected activity. Secretary of Labor on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

If the operator cannot rebut the miner's prima facie case in this manner, it nevertheless can defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to such an affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982)

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, (November 1981), rev'd on other grounds sub nom at 2510. 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), NLRB v. Transportation Management Corporation, 462 U.S. 393, (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

IX

Adverse Action

Based upon the record and Respondent's representation I find that as of October 1991 Respondent still had not found out who "turned in" Ryan and All American to MSHA for the safety violation of April 1991. I further find that the demotion of Hyles from his leadman position on the graveyard shift to a journeyman loader position on the day shift in October 1991 was not motivated by Hyles' protected activity. I find that at that time Hyles' supervisor, Ryan, had received credible substantiation of the rumors of Hyles' on the job misconduct in the performance of his duties as a leadman on the graveyard shift. This misconduct involved sleeping on the job and possible time card fraud. I further find that even assuming arguendo that Respondent suspected or knew of Hyles' protected activity and had mixed motives in demoting Hyles, that Hyles' unprotected on the job misconduct by itself would have caused All American to demote him from his leadman job and assign him to a lower paying journeyman job on the day shift. There was no violation of 105(c) in demoting Hyles from his leadman position.

The major adverse action taken by All American was it's failure to recall the four Complainants after the temporary July 1992 layoff. Respondent's refusal to recall the Complainants resulted in termination of their seniority pursuant to section 3 item (3) of Article XIII of the Union Agreement. That section provides "Seniority shall be terminated by ...(3) if the employee performs no work for the Employer within the bargaining unit for a period of six months ... ."

Based upon the interview statements received in evidence and the testimony of the four Complainants, the special MSHA investigator, Mr. Smillie, and the Union officials Collins and McGuire, I find that sometime prior to the July 1992 layoff All American became acutely aware of the Complainants' April 1991 protected activity and were motivated because of that protected activity to get rid of the four Complainants. In order to obscure its discriminatory animosity towards the Complainants, Respondent pursued an indirect course of action that resulted in termination of the employment of the Complainants. This course of action started with the July 1992 temporary layoff that resulted in the recall of the entire work force except the four Complainants.

The Claimants were again voluntarily reinstated by agreement of the parties on February 11, 1993. Thereafter, All American temporarily put on a third (graveyard) shift for a short period of time, March 6, 1993 to March 27, 1993. Ryan assigned his most senior employees to this graveyard shift such as the repairmen who had for a long period of time been doing maintenance work on the day shift. Respondent changed the first production shift from a night shift to the day shift. Thus the four Complainants were reassigned to do their production work on the day shift. I agree with the Secretary that the main purpose of Respondent's convoluted work assignment, shift changes, temporary graveyard shift and layoff was to terminate the Complainants' employment while appearing to be simply complying with the union agreement.

The Secretary accurately summarizes the contrived basis for the layoff of the four Complainants as follows:

> Accordingly, Respondent manipulated the job assignments of the senior plant repairmen, contrary to the normal practice at the mine, assigning them to the least desirable working hours on a temporary basis, in order to have them "bump" the Complainants off of the day shift.
>
> Instead of simply reassigning the plant repairmen to their normal jobs on the maintenance shift (which presumably required their assistance to continually repair and maintain the finish plant), Respondent implemented a formal layoff which it planned to result in the four Complainants being "bumped" by the senior plant repairmen. In sum, this convoluted series of work assignments was contrived by Respondent to terminate the Complainants, while appearing to comply with the contractual requirement of holding a meeting with the union.

Conclusion

Without question the remarks of Mr. Ryan, Respondent's supervisor and vice-president and those of Mr. Sisemore, Respondent's president, displayed hostility towards the protected activity of April 1991 and it was only a matter of time before Respondent gained knowledge of who engaged in the protected activity and contrived a way to get rid of Complainants in a manner that they hoped would obscure their retaliatory animus towards Complainants for their protected activity.

Based upon reasonable inferences from the evidence presented I find and conclude that Respondent discriminated against Complainants in violation of 105(c) of the Mine Act.

ORDER

1. The Respondent is **ORDERED** to reinstate each of the Claimants to his former position with full back pay, benefits and interest to the date of his reinstatement, at the same rate of pay, and with the same status and classification that he would now hold had he not been unlawfully discharged in July 1992. 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 expunge from each of the Claimant's personnel file and company records all references to the circumstances surrounding his employment termination.

Counsel for the parties are **ORDERED** to confer with each other during the next twenty (20) days with respect to the remedies due each of the Claimants, 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 twenty (20) 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 and 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, 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, assessment of the civil penalty assessment for the discrimination violations in this matter is held in abeyance pending a final dispositive order.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

J. Mark Ogden, Esq., Office of the Solicitor, U.S. Department of Labor, 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Naomi Young, Esq., GARTNER & YOUNG, P.C., 1925 Century Park East #2050, Los Angeles, CA 90067-2709 (Certified Mail)

Eve Chesbro, Esq., Ontario Airport Center, 337 North Vineyard Avenue #400, Ontario, CA 91764-4453 (Certified Mail)

Mr. James Hyles, 15986 Nancotta Road, Apple Valley, CA 92307 (Certified Mail)

Mr. Douglas Mears, 18212 Brightman Avenue, Lake Elsinore, CA 92503 (Certified Mail)

Mr. Derrick Soto, 15394 Dakota Road, Apple Valley, CA 92307 (Certified Mail)

Mr. Gregory Dennis, 11128 Amarillo Street, Alta Noma, CA 91701 (Certified Mail)

sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 3 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-90-M
Petitioner	:	A. C. No. 45-00632-05507
v.	:	
	:	Wynoochee Gravel Pit 1
FRIEND & RIKALO, INCORPORATED,	:	
Respondent	:	Docket No. WEST 94-381-M
	:	A. C. No. 45-02614-05515
	:	
	:	Portable Crusher #1

Decision

Appearances: Rochelle Kleinberg, Esq., Office of the Solicitor U.S. Department of Labor, Seattle, WA for Petitioner;
John O. Friend, and Chuck Hulet, Aberdeen, WA for Respondent

Before: Judge Weisberger

Statement of the Case

These cases, consolidated for hearing, are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner) alleging violations by Friend & Rikalo, Incorporated (Respondent) of various mandatory safety regulations. Pursuant to notice the cases were heard in Seattle, Washington on October 4, 1994.

Findings of Fact and Discussion

Citation Nos. 4128560, 4128361 and 4128362 (Docket No. WEST 94-90-M)

Dennis Harsh, an MSHA inspector inspected Respondent's Wynoochee Gravel Pit on October 6, 1993. He testified that there were no fittings securing a 440 volt electric cable to 3 electric breaker compartments. He issued three citations alleging violations of 30 C.F.R. § 56.12008 which provides, as pertinent, that cables shall enter electrical compartments ". . . only through proper fittings." Harsh's testimony was not impeached by Respondent, as Respondent did not cross examine him. Respondent did not offer any testimony or exhibits to contradict the testimony of Harsh. Therefore, I accept Harsh's testimony. Based upon his testimony, I find that Respondent did violate

Section 56.12008, supra. Further, I accept Harsh's uncontradicted and unimpeached testimony that should an injury occur as consequence of the violation, the injury would be fatal. I find that a penalty of $50 is appropriate for each of these citations.

Citation No. 4128363 (Docket No. WEST 94-90-M)

On October 6, 1993, Harsh continued his inspection of the subject site. He indicated that the on-off controls for the various conveyors were at the motor control center. The motor control center was located in a van where the plant operator worked. According to Harsh, when he was at the on-off controls, he was unable to observe the full length of the two conveyor systems, and the feeder that was in the pit area. Harsh indicated that there were no visible or audible warnings installed on the conveyor system. He issued a citation alleging a violation of 30 C.F.R. § 56.14201(b) which, as pertinent, provides as follows: "When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started." Respondent did not impeach the testimony of Harsh. Respondent did not offer any testimony or evidence to contradict the observation of Harsh.[1] Therefore, based upon the testimony of Harsh which I accept, I find that Respondent did violate Section 56.14201(b), supra.

According to Harsh, he observed trucks in the stock pile area. He indicated that there was "very heavy truck traffic." (Tr. 32). He also observed truck drivers standing outside their trucks approximately 30 to 40 feet from the transfer conveyor. He opined that the cited conditions would "eventually" cause an

---

[1] John D. Friend, one of Respondent's owners, manages the subject pit. He testified that when the conveyor system at issue was installed approximately two years ago, he contacted MSHA for a voluntary inspection to ensure compliance. He indicated that subsequent to the inspection he was told that the system was "in full compliance." (Tr. 48). He also indicated that the system has been inspected every six months, and was not cited until the instant citation was issued by Harsh. Friend further indicated that the conveyor system has remained in the same configuration since it was installed. He also indicated, in essence, that the motor control center has been kept at the same location. The fact that previous MSHA inspectors found Respondent not to be in violation of Section 56.14201, supra regarding the subject conveyor system, has a bearing on Respondent's negligence. However, it is not entitled to any probative weight in a de novo proceeding relating to whether Respondent was in violation of Section 56.14201(b), supra.

accident or injury. (Tr. 33). He based his opinion upon his experience working in mines, ". . . and also reading of equipment starting up without full warning to persons unaware that it's going to start, and also accident investigations that I've read about and been involved with." (Tr. 33). He indicated that he rated an injury that could reasonably be expected as permanently disabling. He concluded that the violation was significant and substantial. He said that this conclusion was based upon MSHA policy that a violation was deemed significant and substantial if as a result of a violation an injury is reasonably likely to occur resulting in loss of work days, or restricted duties.

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).

I find that as a result of the violation herein an injury producing event could have occurred. However, the record does not present any specific facts to base a conclusion that an injury producing event was reasonably likely to have occurred. Hence, following well established Commission precedent I find that the violation was not significant and substantial.

I accept the testimony of John D. Friend, one Respondent's owners, that the conveyor system at issue was found by MSHA to be in full compliance when it was set up two years ago, and was not cited in subsequent inspections. I thus find that Respondent's negligence herein to be mitigated to some degree. I find that a penalty of $75 is appropriate for this violation.

Violations of 30 C.F.R. § 56.14107(a).

Citation No. 4128364 (Docket No. WEST 94-90-M)

According to Harsh, when he made his examination on October 6, there was no guard across the bottom of the tail pulley on the sand conveyor belt. He indicated that although there was a guard on the right side of the tail pulley, it extended only to a point approximately 4 inches below the tail pulley. He also indicated that the belt was not guarded across the bottom. According to Harsh, the lack of a bottom guard, and the lack of a full guard covering the tail pulley allowed easy access to a rotating pulley. He indicated that the plant operator works in the area. He also opined that a person shoveling under the belt could get entangled in the moving parts of the belt in the absence of a bottom guard.

On cross examination, it was elicited from Harsh that a person could be injured by the exposed pulley only if he would crawl on under the belt. In this connection, Chuck Hulet, the manager of Respondent's rock pits, testified that there is no reason for a person to go under the conveyor. He indicated that if the area under the belt has to be cleaned, the cleaning is performed with a small front loader ("Bobcat"). Louigi Hanchett, a ground-man employed by Respondent, is responsible for cleaning in and around conveyors. Hanchett testified that once or twice a day he cleans under the conveyor at issue with a bobcat and shovel. He testified that he has never crawled under a conveyor while it was running. In his opinion the belt was guarded adequately.

30 C.F.R. §56.14107(a) provides as follows: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

Respondent did not impeach or contradict the testimony of Harsh that (1) there was no guard across the bottom of the conveyor belt at issue, and (2) the right hand side guard extended only 4 inches below the tail pulley. I therefore accept his testimony. I find that because of these two conditions, there was a possibility of contact with a moving tail pulley. I thus find that Respondent did violate Section 56.14107, supra.

Harsh indicated on cross-examination that a person could be injured by the exposed rotating pulley only if he were to crawl under the conveyor. Such an injury could occur only while the conveyor is in operation. There is no evidence that persons regularly work under the conveyor, or in very close proximity to the conveyor in the area cited, while it is in operation. In this connection, I accept the testimony of Hanchett that he never

crawls under the conveyor while it is running. Within this context I find that it has not been established that there was a reasonable likelihood of an injury producing event, i.e., contact with a rotating tail pulley as a consequences of the violation herein. I thus find that the violation was not significant and substantial.[2]

Citation No. 4128365

According to Harsh, the guard across the bottom of the 7/8 tail pulley left two inches exposed. Also, there was a 4 inch gap between the frame and the rear section of the guard. The tail pulley was 37 inches above the ground. In essence, this testimony was not impeached or contradicted, and I accept it. Based upon testimony of Harsh, I find that Respondent did violate Section 56.14107, supra.

Citation No. 4128366

According to Harsh, on October 6, 1993, when he inspected the Canica feed conveyor, he observed that two inches of the pulley was exposed below the guard. He also observed a hole in the left side of the guard that measured 6 inches by 6 inches. This hole was directly adjacent to the rotating pulley. He said that the bottom of the pulley was 28 inches above the ground level.

The testimony of Harsh was not impeached or contradicted, and therefore I accept it. I find that Respondent did violate Section 56.14107, supra.

Citation No. 4128801 (Docket No. WEST 94-381-M)

On November 3, 1993, Harsh observed that there was no back guard or inside guard next to the motor and gear box on the shaker screen. The lower portion of the exposed pulley was 49 inches above the ground, and the upper pulley and belt areas were 70 inches above the ground. I accept the testimony of Harsh, and

---

[2] At the hearing, Petitioner indicated that the testimony Harsh would give pertaining to the issue of significant and substantial in citation nos. 4128365, 4128366, 4128801 (Docket No. WEST 94-381) citation no. 4128802 (Docket WEST 94-381), and citation no. 4128803 (Docket No. WEST 94-381) would be the same as the testimony given regarding the issue of significant and substantial in citation no. 4128364. No new evidence was presented in citation nos. 4128365, 4128366, and 4128801 on the issue of significant and substantial. Thus I find that my decision regarding the issue of significant and substantial in citation no. 4128364 is applicable also to citations nos. 4128365, 4128366, and 4128801.

find that as consequence of the lack of adequate guarding there could have been contact with exposed moving parts. I conclude that Respondent did violate Section 56.14107(a), supra.

Citation No. 4128802 (Docket No. WEST 94-381-M)

In essence, according to Harsh, when he examined the No. 1-3 conveyor belt he observed that the belt/pulley pinch-points on the drive motor and on the gear box were exposed. He indicated that the distance between the drive motor and the guard was approximately 4 inches from the motor. Hence, contact with exposed parts was possible. Based on the testimony of Harsh, I conclude that Respondent did violate Section 56.14107(a), supra.

Citation No. 4128803

Harsh observed the 1-1 conveyor, and noted that there was no horizontal guard for the pulley. He also noted that there was a gap of approximately 3-4 inches between the guard, and the exposed motor. Based on the testimony of Harsh, I conclude that Respondent did violate Section 56.14107(a), supra.

Penalties

I find that a penalty of $50 is appropriate for each of the violations of Section 56.14107(a), supra.

ORDER

It is hereby **Ordered** that the following citations are amended indicate that are not significant and substantial: (1) Citation Nos. 4128363, 4128364, 4128365, 4128366, 4128801, 4128802, and 4128803.

(2) It is further ordered that Respondent shall pay a civil penalty of $525 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

Rochelle Kleinberger, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212 (Certified Mail)

John Friend, Owner/Operator, and Chuck Hulet, Plant Operator, Friend & Rikalo, Incorporated, P.O. Box 3, Aberdeen, WA 98520 (Certified Mail)

/efw

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

NOV 4 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 93-156-M
Petitioner	:	A. C. No. 43-00484-05501
	:	
v.	:	
	:	Bush Quarry
NORTH AMERICAN SLATE	:	
INCORPORATED,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlement for the one violation in this case. A reduction in the penalty from $50 to $20 is proposed. The citation in this case was issued because a record of health and safety inspections were not being kept. The Solicitor advise that the failure to have the inspection records available was due in part to the intermittent operation of the mine. Therefore negligence was less than originally thought. Also the operator is small in size and the facility was newly opened.

I have reviewed the documentation and representations made in this case, and 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 the operator **PAY** a penalty of $20 within 30 days of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

David L. Baskin, Esq., Office of the Solicitor, U. S. Department of Labor, One Congress Street, 11th Floor, P. O. Box 8396, Boston, MA 02114

Rosemary A. Macero, Esq., Morrison, Mahoney & Miller, 250 Summer Street, Boston, MA 02210-1181

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 7 1994

DERALD WILSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 94-229-D
v.	:	VINC CD 94-04
FREEMAN UNITED COAL MINING CO., Respondent	:	Crown II Mine

ORDER OF DISMISSAL

Appearances: Derald Wilson, Girard, Illinois, pro se;
Kathryn S. Matkov, Esq., Gould and Ratner,
Chicago, Illinois, for Respondent.

Before: Judge Melick

At hearing, Complainant, Derald Wilson, requested approval to withdraw his complaint in the captioned case. At a trial conference, Mr. Wilson was shown documentary evidence indicating that the alleged retaliatory event actually preceded his claimed protected activity. Permission to withdraw was accordingly granted at hearing and is hereby confirmed. 29 C.F.R. § 2700.11. This case is therefore **DISMISSED**.

Gary Melick
Administrative Law Judge

Distribution:

Derald Wilson, 302 North Harrison, Girard, IL 62640 (Certified Mail and Regular Mail)

Tony Kujawa, 1220 S. Park Avenue, Suite D, Herrin, IL 62948 (Certified Mail)

Kathryn S. Matkov, Esq., Gould and Ratner, 222 North LaSalle St., 8th Floor, Chicago, IL 60601 (Certified Mail)

\lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 8 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. CENT 94-14
PITTSBURG & MIDWAY COAL MINING CO., YORK CNYN COMPLEX, Respondent	:	A. C. No. 29-00845-03553
	:	Docket No. CENT 94-48
	:	A. C. No. 29-00845-03554
	:	Docket No. CENT 94-65
	:	A. C. No. 29-00845-03555
	:	Docket No. CENT 94-66
	:	A. C. No. 29-00845-03556
	:	Docket No. CENT 94-67
	:	A. C. No. 29-00845-03557
	:	Docket No. CENT 94-68
	:	A. C. No. 29-00845-03558
	:	Docket No. CENT 94-70
	:	A. C. No. 29-00845-03560
	:	Docket No. CENT 94-71
	:	A. C. No. 29-00845-03561
	:	Docket No. CENT 94-77
	:	A. C. No. 29-00845-03562
	:	York Surface Mine
	:	Docket No. CENT 94-78
	:	A. C. No. 29-00095-03575
	:	York Canyon Underground
	:	Docket No. CENT 94-46
	:	A. C. No. 29-00224-03617
	:	Docket No. CENT 94-47
	:	A. C. No. 29-00224-03618
	:	

: Docket No. CENT 94-64
: A. C. No. 29-00224-03620
:
: Cimarron Mine

ORDER DENYING RESPONDENT'S MOTION TO STAY DOCKET NO. CENT 94-47 AND DECISION

Appearances: Janice L. Holmes, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
John W. Paul, Esq., Pittsburg & Midway Coal Mining Company, Englewood, Colorado, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act). The respondent, Pittsburg & Midway Coal Mining Company is a subsidiary of the Chevron Company. These matters were heard on July 27 through July 29, 1994, in Santa Fe, New Mexico. The respondent has stipulated that it is a mine operator subject to the jurisdiction of the Act.

The parties presented a settlement motion at trial for the purpose of resolving all of the above docketed cases with the exception of Docket No. CENT 94-47. The terms of the parties' agreement were approved on the record and will be incorporated at the end of this decision.

DOCKET NO. CENT 94-47

Docket No. CENT 94-47 concerns 104(d)(1) Citation No. 3589770 and 104(d)(1) Order No. 3589771 issued on July 15, 1994, by Mine Safety and Health Administration (MSHA) Inspector Melvin Shiveley for violations of section 75.323(c)(2)(i) and (ii), 30 C.F.R. §§ 75.323(c)(2)(i) and (ii), as a result of methane concentrations of 1.8 percent and 8.8 percent in the working section outby the face in the No. 2 return tailgate entry at the respondent's 4 left longwall in its Cimarron Mine.

Section 75.323(c) provides, in pertinent part, that when a split of air returning from any working section contains 1 percent but not more than 1.4 percent methane, adjustments in the ventilation system must be made to reduce the methane concentration in the return air to less than 1 percent. When the split of air from the working section in the return entry contains 1.5 percent methane or more, the operator must withdraw

personnel pursuant to section 75.323(c)(2)(i) and deenergize equipment at its source pursuant to section 75.323(c)(2)(ii).

The respondent has stipulated to the violative methane reading of 1.8 percent outby the face in the No. 2 return entry.[1] (Tr. 79, 420). Although the respondent asserts that longwall foreman James Hancock was unaware of the 8.8 percent methane reading outby the face in the No. 2 entry, the respondent has admitted that it cannot refute the location and validity of this reading. (Tr. 145-146, 153-154, 195, 232, 315-317, 343, 420). In addition, the respondent repeatedly admitted that, given these high methane readings, immediate deenergizing and withdrawal of personnel should have been the respondent's response. Therefore, having recognized the exigency of the circumstances, the respondent has essentially conceded that the violations in issue were properly characterized as significant and substantial. (Tr. 117-118, 335, 339-341, 343, 351). What is contested is whether the violations are attributable to the respondent's unwarrantable failure.

At trial the respondent declined to call longwall foreman James Hancock as a witness because Hancock is the subject of an MSHA special investigation. While I indicated that I would have entertained a pretrial motion to stay this case for possible consolidation with a 110(c) proceeding pending completion of MSHA's investigation, I declined to stay this matter based on a motion made at trial without opening the record. I stated that the testimony and evidence presented by the parties would be received. If the record evidence was insufficient to dispose of the issues before me, I noted that I would entertain a motion for stay or a motion for continuance for further depositions and possible further testimony at the end of the hearing. (Tr. 56-57).

At the conclusion of the hearing, for the reasons noted below, I concluded that the evidence, including signed statements by three of the respondent's employees who took pertinent methane

---

[1] The 1.8 percent reading was obtained by the respondent's employee David Ortiz, who is also the safety committeeman, in return air located two cribs outby the face along the rib line in the No. 2 entry. Section 75.323(a) requires that methane air samples be taken at least 12 inches from the roof, face, ribs and floor. Mine personnel, particularly safety committeemen, are aware of this 12 inch requirement. (Tr. 97, 227). Although the respondent has stipulated to this 1.8 percent reading and has conceded that Ortiz probably took the reading "correctly", respondent's counsel indicated that he would have liked to ask Ortiz about the precise location of this methane reading. (Tr. 231, 420). The respondent, however, did not call Ortiz as a witness.

readings, as well as the testimony of respondent witnesses safety coordinator Donald Giacomo and safety manager Michael Kotrick, provided an adequate and essentially uncontroverted record that supports the actions of Inspector Shiveley. (Tr. 407-411).[2] Consequently, I issued a tentative bench decision affirming Shiveley's citation and order. (Tr. 418-436). However, I noted that I would defer making a final written decision until I considered the respondent's proposed findings and conclusions addressing the matters raised in my tentative bench decision.[3] (Tr. 417-418).

The respondent filed proposed findings of fact and conclusions on October 5, 1994. The proposed findings were accompanied by a motion for stay pending MSHA's investigation results and a motion to consolidate this case with two related 104(d) orders issued 6-weeks prior to trial. A similar motion to stay made by the respondent was denied at trial. (Tr. 410-411).

The MSHA investigation and the orders sought to be consolidated were known to the respondent well in advance of the hearing. I decline to delay my decision in this matter on the basis of these belated posthearing motions. Accordingly, the respondent's motions for stay and consolidation **ARE DENIED**.

Preliminary Findings of Fact

The subject citation and order were issued as a result of the respondent's failure to deenergize equipment at the power source and failure to withdraw personnel immediately after methane readings of 1.8 and 8.8 percent were obtained at approximately 6:00 a.m. on July 14, 1993, outby the working face

---

[2] At transcript page 409 I noted that Ortiz states he obtained the 8.8 percent reading in the working section. However, I erroneously stated the reading was taken one crib inby the No. 2 return entry. Ortiz states the reading was taken two cribs outby in the No. 2 entry.

[3] At the conclusion of my tentative bench decision, I discouraged extensive posthearing briefs and requested the respondent to limit its proposed findings and conclusions to three issues. (Tr. 444-445). Upon further reflection, I realize parties are entitled to file proposed findings and conclusions under section 557(c) of the Administrative Procedure Act. 5 U.S.C. § 557(c). Consequently,, on September 24, 1994, I had a conference call with the parties wherein, with the approval of the parties, I set October 7, 1994, as the date for the respondent's filing of unlimited proposed findings and conclusions and October 20, 1994, as the Secretary's reply date. The respondent's findings were filed on October 5, 1994, and the Secretary replied on October 17, 1994.

in the No. 2 return entry. The 1.8 and 8.8 percent methane readings were taken by David Ortiz, a repairman and United Mine Worker's Union safety committeeman employed by the respondent. After taking these high readings, Ortiz encountered longwall foreman James Hancock at the longwall face. The thrust of the respondent's defense to the unwarrantable failure charge is that Ortiz, the union safety committeeman, did not inform James Hancock, who had authority to deenergize power and withdraw personnel, that he (Ortiz) had obtained high methane readings.

Shortly before the high methane readings were obtained by Ortiz, dangerously high methane readings were also obtained by longwall foreman James Hancock and safety coordinator Daniel McClain. The high methane condition was known to Angelo Pais, Hancock's supervisor and longwall coordinator, and the respondent's Cimarron Mine Complex mine manager John Klinger.

As indicated above, the reasons for the respondent's decision not to call Hancock are clear. However, for reasons best known by the respondent, the respondent also declined to call Ortiz, McClain, Pais or Klinger. Inexplicably, citing "efficiency", the respondent relied on the testimony of safety coordinator Giacomo rather than safety coordinator Daniel McClain or safety committeeman David Ortiz although it was McClain and Ortiz rather than Giacomo who had direct knowledge of the pertinent events in this proceeding. (Tr. 72-73, 75-77). The respondent also called safety manager Kotrick who admittedly arrived at the mine site at approximately 6:00 a.m. on July 14, 1993, after the events in question had occurred. (Tr. 332). Thus, neither of the witnesses called by the respondent had direct knowledge of the facts in issue.

I have relied on signed statements by Hancock, Ortiz and McClain in my disposition of this case.[4] These statements are essentially consistent with the testimony of Giacomo and Kotrick.

Further Findings and Conclusions

The incident in question occurred on the "graveyard" shift from 11:00 p.m. on July 13 through 7:00 a.m. on July 14, 1993, at the 4 left longwall section of the respondent's Cimarron Mine. The Cimarron Mine is ventilated by a blowing system rather than an exhausting system. Air is circulated by a fan that blows air down a 400 foot shaft for distribution throughout the mine.

---

[4] Although Respondent's Ex. 1 is not signed, it is a typed summary prepared by the respondent of information provided by Hancock on July 16, 1993. It was admitted in evidence without objection.

The 4 left longwall section is developed as a two entry system. The No. 2 return entry is on the tailgate side of the longwall. The No. 2 entry is approximately 17 feet wide by 7 feet high. It is supported by two rows of cribs built on 5 foot spacings with a walkway down the center between the cribs. (Tr. 302-304). Although the No. 2 entry also serves as a bleeder entry, the entry's primary purpose is as a return. Therefore, at trial I ruled that the mandatory safety standards regarding permissible methane concentrations of one percent for return entries rather than 2 percent for bleeder entries should apply. Counsel for the respondent indicated that he had no objection to my ruling. (Tr. 311-313, 322).

Shiveley's contemporaneous July 14, 1993, inspection notes reflect that James Hancock was aware of a high methane concentration problem on the tailgate side of the 4 left longwall section since returning from vacation on June 30, 1993. (P. Ex. 7). Safety Manager Kotrick testified that he had "nothing to refute" that there was a history of a methane concentration problem of at least several weeks duration prior to the July 14, 1993 incident. (Tr. 403-404). Kotrick was aware that Mike Calango, a miner's representative, had filed a 103(g) complaint with MSHA concerning high methane levels at the longwall section.

Shiveley arrived at the respondent's mine site at approximately 10:00 a.m. on July 14, 1993, after receiving Calango's complaint at 9:00 a.m. concerning continued mining operations despite high methane readings. Shiveley proceeded to the tailgate of the 4 left longwall accompanied by Kotrick and miner representative Martha Horner. Shiveley took several methane readings at various locations which were all within permissible limits. Wing brattice curtain which redirected the intake air and alleviated the methane concentration problem had been installed prior to Shiveley's arrival at the mine. (Tr. 166). Shiveley ascertained that there was a problem of high methane readings on the "graveyard" shift earlier that morning. However, personnel from that shift had departed the mine at 7:00 a.m. prior to his arrival. Shiveley gathered information about the early morning incident and left the mine at approximately 2:20 p.m.

Shiveley returned to the mine at approximately 10:15 p.m. on July 14, 1993, and stayed until 2:15 a.m. on July 15, 1993, acquiring information about the incident under investigation. Based on his investigation, Shiveley issued 104(d)(1) Citation No. 3589770 and 104(d)(1) Withdrawal Order No. 3589771 to Hancock at 12:15 a.m. on July 15, 1993. The citation and order were terminated when issued as the remedial installation of the brattice curtain had already occurred. However, Shiveley's actions were appropriate as the Commission has concluded that the Act's 104(d) withdrawal sanctions are not limited to instances

where an inspector observes an existing violation. NACCO Mining Company, 9 FMSHRC 1541, 1548 (September 1987). (Tr. 242-246). In this regard, inspectors may cite operators if they believe violations occurred based upon their investigation of past events and circumstances. Id. at 1549; see also Cyprus Plateau Mining Corporation, 16 FMSHRC 1610, 1614 (August 1994).

Shiveley's findings and subsequent MSHA investigation revealed that at 11:00 p.m., prior to the start of his July 14 "graveyard" shift, safety coordinator McClain met with swing shift longwall foreman Bob Falagrady who expressed concern about a high level of methane inby the gob at the tailgate. (Resp. Ex. 4). McClain had been hired by the respondent only 2 weeks before.

McClain went to the headgate of the 4 longwall section where he met Hancock at approximately 1:00 a.m. Hancock had been taking methane readings that were within normal limits. Sometime after 3:15 a.m. McClain went to the break line or hinge point of the tailgate shield in the No. 2 entry where he obtained a 7 percent methane reading at the break line and a 9 percent reading approximately 15 feet inby the break line. (Resp. Ex. 4; P. Ex. 8). The location of these readings are illustrated in a diagram prepared by McClain in Resp. Ex. 4 and a map drawn by Hancock in Joint Ex. 1. The parties stipulated that these readings were taken by McClain between 3:15 and 4:30 a.m. (Tr. 369-370).

Understanding the concept of the break line is crucial for a proper evaluation of the degree of the respondent's negligence in this case. The "break line", also known as the break point or hinge point, is defined as "[t]he line in which the roof of a coal mine is expected to break." Dictionary of Mining, Mineral, and Related Terms, U.S. Dept. of the Interior, Bureau of Mines, 1968. The break line is the point at which, when coal is extracted and the longwall shield is advanced, the roof crumbles and falls creating the gob. It is the point at which the roof support ends at the hinge point of the shield. (Tr. 93-94, 169-171). The parties stipulated that the break point is 12 feet inby the face. (Tr. 94). The respondent characterized the 12 foot area between the face inby to the break point as a "working area of the working section" as it is under supported roof. (Tr. 109, 174).

Although the respondent attempted to portray McClain's 7 percent reading as "behind" the break line in the gob, the preponderance of the evidence, including Kotrick's testimony, reflects the reading was taken at the break line. (Resp Ex 4, Joint Ex. 1; Tr. 351, 373-374, 425). Inspector Shiveley's uncontroverted testimony establishes that methane testing at the break line is essential to ensure that methane concentrations are vented out the bleeder system rather than migrating outby the

break line through the return air into the working section. (Tr. 132-135).

McClain's 7 percent methane concentration reading at the break line evidenced a dangerous methane buildup in the working section. This reading troubled McClain. McClain told Hancock that he was uncomfortable with the 7 percent methane concentration at the break line and the 9 percent reading inby the break line in the gob. However, Hancock told McClain that he felt the readings from the break line inby into the gob did not present a problem.

As McClain was a new employee, he asked Hancock who he should talk to regarding this apparent ventilation problem. Hancock stated no one was available on the midnight shift but recommended people he could talk to on the day and swing shifts. Sometime between 4:30 a.m. and 5:00 a.m. McClain called Hancock to determine if Hancock had taken any further methane readings in the tailgate. Hancock informed McClain that he had not taken further readings but he was about to do so. McClain told Hancock that he had spoken to Complex Manager John Klinger who told McClain that Hancock should shutdown the section if the methane concentrations had not changed in the tailgate. Hancock asked McClain to explain the situation to his (Hancock's) supervisor Angelo Pais. (Resp. Ex. 1). Hancock was waiting for further instructions from Pais.

Counsel for the respondent has conceded that Hancock's interpretation that McClain's 7 percent methane reading was not a problem was not an appropriate response. (Tr. 379). In this regard, Kotrick testified that McClain's 7 percent reading in the vicinity of the break line was cause for great concern and that he did not agree with Hancock's analysis of the situation and Hancock's decision to continue operations. (Tr. 351, 394). Although McClain's 7 percent reading was not a basis for the citation and order in issue, the testimony of Giacomo and Kotrick, as well as statements made to McClain by complex manager Klinger, reflect that consideration should have been given to withdrawing personnel as a result of this reading alone. (Tr. 339-340, 393-394).

At 5:45 a.m. Hancock obtained a 6 percent methane reading at the tailgate entry approximately 12 feet inby the break line at the back of the shield. (P. Ex. 6). Shortly thereafter, Hancock spoke to his crew consisting of headgate man Isidro Tapia, shearer operators Delbert Archuleta and Dan Renner, propmen Jim Feldman and Gerry Renner, and mechanic David Ortiz. (P. Ex. 8). Hancock told them that McClain had found 9 percent methane at the tailgate and that they had the right to refuse to work in unsafe conditions. (Resp. Ex. 1; P. Ex. 8). However, shifting the statutory burden placed on operators to withdraw personnel when methane levels are above 1.5 percent to employees to voluntarily

remove themselves from the mine is inappropriate and ineffective. (Tr. 342).

At approximately 6:00 a.m. the power to the longwall shear automatically shutdown because of a defect in the sensor of the methanometer. The shutdown that caused this malfunction was not related to high methane readings at the tailgate. The automatic shutdown of the shear was not the equivalent of shutting off power at the source as the belt conveyor continued to run. In addition, all lights and other electric equipment continued to operate in the section. Thus, the shearer shutdown did not remove other potential ignition sources. (Tr. 397-399).

Contemporaneous with the shear shutdown, David Ortiz, safety committeeman, became very concerned and decided to take methane readings of his own. Ortiz obtained an 8.8 percent methane reading in the walkway of the No. 2 return entry two cribs outby the face and a 1.8 percent methane reading two cribs outby the face along the rib line. (P. Ex. 8; Tr. 105, 145-153). These readings are depicted by an "O" and circled in red on Joint Ex. 1.[5]

At approximately 6:10 a.m., Ortiz met Hancock carrying a roll of brattice near the headgate. Hancock told Ortiz that Pais had instructed Hancock to install brattice curtain to see if they "could get the problem solved." (P. Ex. 8). Precisely what Ortiz told Hancock is unclear. Hancock, in an exculpatory written statement provided to MSHA on May 11, 1994, states that Ortiz told him about an 8 percent methane reading in the gob at the tail of the shield rather than an 8.8 percent reading two cribs outby in the No. 2 entry in the working section. (Resp. Ex. 5). However, Hancock admits that Ortiz did inform him of the 1.8 percent reading along the rib. Id.

Hancock further stated:

> Ortiz was excited about the gas. I was too. (About [one] week later I told him it didn't dawn on me the significance of the 1.8 % reading. He said likewise it didn't on him either). (Emphasis added). (Resp. Ex. 5).

---

[5] Early in the trial, the respondent alleged that Ortiz' 8.8 percent reading was taken in the No. 2 entry inby the face in the gob. This allegation is illustrated on the map in Joint Ex. 1 prepared by Hancock. However, after telephoning Ortiz for clarification after the first day of trial, Ortiz informed the respondent that his 8.8 percent reading was not taken in the gob. Rather, it was obtained two cribs outby the face in the center walkaway of the No. 2 entry in the working section. (See, e.g., Joint Ex. 1; Tr. 145-150).

This statement is glaringly inconsistent. It is difficult to reconcile the admitted excitement of Ortiz and Hancock over the methane readings if they failed to recognize the significance of those readings.

Ultimate Conclusions

As discussed above, the respondent has stipulated to the 1.8 percent methane concentration detected by Ortiz along the rib line in the working section in the No. 2 return entry. Similarly, the respondent cannot refute the 8.8 percent reading taken by Ortiz near the 1.8 percent reading in the center walkway of the No. 2 entry two cribs outby the face. It is also undisputed that the respondent failed to deenergize power at the source or withdraw personnel after these readings were obtained. In this regard, the evidence reflects that the automatic shutdown of the longwall shear at 6:00 a.m. on July 14, 1993, because of a faulty sensor in the methanometer, did not constitute deenergizing at the source as the belt conveyors and lights continued to operate. Consequently, the evidence establishes the fact of the violations of sections 75.323(c)(2)(i) and (ii) cited by Shiveley in Citation No. 3589770 and Order No. 3589771, respectively.

A violation is properly characterized as significant and substantial if it is reasonably likely that the hazard contributed to by the violation will result in injuries of a reasonably serious nature if mining operations were permitted to continue without abatement of the violation. Ordinarily, the appropriate analysis for determining whether a violation is significant and substantial is set forth in the Commission's decision in Mathies Coal Company, 6 FMSHRC 1 (January 1984).

In the instant case, the respondent has stipulated to the fact that the cited violations were properly characterized as significant and substantial in view of Ortiz' statement that his 8.8 percent reading was obtained in the return entry outby the face in a working section. (Tr. 117-118). Although the respondent has stipulated to the significant and substantial question, I wish to note that applying the traditional Mathies test in this case is unnecessary. High methane concentrations in working sections, as much as nine times the permissible limit in this instance, are presumptively significant and substantial under section 303(i) of the Mine Act. 30 U.S.C. § 863(i).

In section 303(i), Congress requires the immediate shutdown and withdrawal of personnel when methane concentrations are 1.5 percent or higher. High methane concentrations are so serious that Congress has removed any discretion from MSHA inspectors. In fact the statutory burden to cease operations and withdraw until methane concentrations are below 1 percent is placed directly on the operator without the necessity for

intervention by any MSHA official. Given this congressional mandate, the gravity of these violations easily satisfies the criteria for a significant and substantial designation.

Finally, we arrive at the question of unwarrantable failure. In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected, or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use . . . characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention'"). Id. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." Id. at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (February 1991).

Resolution of the question of whether the respondent's inaction in this case constitutes unjustifiable or inexcusable conduct requires an analysis of what management personnel knew on July 14, 1993, and when they knew it. At the outset I note that management knew there was a methane concentration problem at the longwall tailgate since late June 1993. At 11:00 p.m. on July 13, 1994, at the beginning of the graveyard shift in question, swing shift longwall foreman Falagrady told safety coordinator McClain about high levels of methane inby the gob at the tailgate.

Conscious of Falagrady's concern, between 3:15 a.m. and 4:30 a.m. McClain obtained a 9 percent methane reading in the gob approximately 12 to 15 feet inby the break line and a 7 percent methane concentration in an outby direction from the gob at the break line in the direction of the return air. The 7 percent reading was cause for grave concern because, as Kotrick admitted, it was taken approximately at the break line rather than in the gob. (Tr. 351, 374, 378). As discussed earlier, the significance of this 7 percent reading is that it indicated that the methane in the gob was migrating into the working section rather than being effectively ventilated through the bleeder system.

Despite the fact that McClain told Hancock that he was concerned about these readings, mining operations continued even after McClain reported these readings to complex manager John Klinger. In this regard, at trial even the respondent did not contend that its failure to react to McClain's the 7 percent reading was appropriate. (Tr. 379). Thus, the respondent should have seriously considered withdrawing personnel as early as 3:15 a.m. to 4:30 a.m. Instead, Hancock continued mining

operations while waiting for further instructions from supervisor Angelo Pais.

At approximately 5:45 a.m. Hancock obtained a 6 percent methane concentration at the back of the tailgate shield approximately 15 feet inby the break line. Once again consideration should have been given to withdrawing personnel. Instead, Hancock informed the longwall crew that they could voluntarily leave the mine if they felt it was unsafe. Although I am certain Hancock was well intentioned, attempting to transfer the decision to withdraw from the mine operator as mandated under section 303(i) of the Mine Act to the individual miner is inexcusable. Peer pressure and the fear of retribution, whether or not such fear is warranted, could dissuade employees from evacuating. Thus, the respondent missed a second opportunity to cease operations and withdraw.

While the McClain and Hancock readings are not the basis for the citation and order in issue, the respondent clearly had ample notice of a serious methane problem in the No. 2 tailgate entry. At approximately 6:00 a.m., safety committeeman David Ortiz obtained methane concentrations of 1.8 percent along the rib line and 8.8 percent in the center walkway two cribs outby the face in the return air. It is undisputed that Ortiz met Hancock at the longwall near the headgate shortly after obtaining these readings. Hancock has admitted that Ortiz informed him of the 1.8 percent concentration.

Hancock's statement that he failed to appreciate the significance of this 1.8 percent reading given the obvious concern, if not fear, of McClain and Ortiz, as well as the concern of manager Klinger, defies belief. The respondent's failure to deenergize sources of ignition such as the belt conveyor and other electric lights and equipment and withdraw personnel on the basis of Ortiz' 1.8 reading alone constitutes inexcusable and unjustifiable conduct.

I reach this decision without addressing the respondent's vigorous assertion that Ortiz never informed Hancock of the 8.8 percent reading. While I find it difficult to imagine that safety committeeman Ortiz would have neglected to communicate this information to Hancock, there is no direct evidence or written admissions on this issue. In this regard, I find the respondent's suggestion at trial that Hancock's purported lack of knowledge of Ortiz' 8.8 percent reading is attributable to noise at the longwall which interfered with Hancock's ability to hear Ortiz as notably unconvincing. (Tr. 192-194).

It was, however, incumbent on Hancock to obtain all pertinent information from Ortiz to assist Hancock in his decision whether to withdraw personnel. Taking the respondent at its word, Hancock's failure to obtain all relevant information,

given management's notice of a significant methane condition, in and of itself manifests an unwarrantable failure by the respondent.

Accordingly, 104(d)(1) Citation No. 3589770 and 104(d)(1) Order No. 3589771 shall be affirmed. As noted in my tentative bench decision, given the respondent's size as well as the serious gravity and high degree of negligence collectively manifested by the respondent's management staff, the $17,500 total civil penalty proposed by the Secretary for the citation and order in issue shall also be affirmed.[6]

SETTLEMENT TERMS

As indicated above, the parties reached settlement of all other matters in this consolidated docket proceeding. The settlement terms include the respondent's payment of $4,291. The settlement terms were presented by the parties and approved on the record as being consistent with the civil penalty criteria in section 110(i) of the Act. The settlement with respect to the proposed and agreed upon penalties is as follows:

Docket No. CENT 94-14

Citation No.	Proposed Penalty	Settlement
3589188	$ 2,300	$1,700

Docket No. CENT 94-48

Citation No.	Proposed Penalty	Settlement
3589587	$ 3,500	$ 617

Docket No. CENT 94-65

Citation No.	Proposed Penalty	Settlement
3589543	$ 50	$ 50
3589548	$ 50	$ 50
3589550	$ 50	Vacated
3589551	$ 431	Vacated

[6] The Secretary proposes a civil penalty of $8,000.00 for Citation No. 3589770 and $9,500.00 for Order No. 3589771.

Docket No. CENT 94-66

Citation No.	Proposed Penalty	Settlement
3589560	$ 50	$ 50
3589582	$ 50	Vacated
3589462	$ 288	$ 288

Docket No. CENT 94-67

Citation No.	Proposed Penalty	Settlement
3589594	$ 50	$ 50
3589617	$ 50	$ 50
3589618	$ 50	$ 50

Docket No. CENT 94-68

Citation No.	Proposed Penalty	Settlement
3590391	$ 50	Vacated

Docket No. CENT 94-70

Citation No.	Proposed Penalty	Settlement
3590589	$ 431	$ 200

Docket No. CENT 94-71

Citation No.	Proposed Penalty	Settlement
3590712	$ 288	$ 288
3590713	$ 288	$ 130

Docket No. CENT 94-77

Citation No.	Proposed Penalty	Settlement
3590479	$ 595	$ 50 (S&S Deleted)

Docket No. CENT 94-78

Citation No.	Proposed Penalty	Settlement
3408853	$ 178	$ 100 (S&S Deleted)

Docket No. CENT 94-46

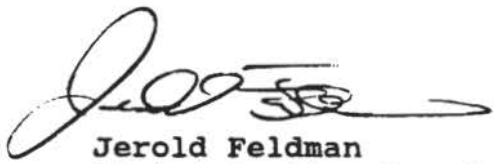
Citation No.	Proposed Penalty	Settlement
2930235	$ 900	Vacated

Docket No. CENT 94-64

Citation No.	Proposed Penalty	Settlement
3589568	$ 50	Vacated
3589569	$ 50	Vacated
3589570	$ 50	Vacated
3589572	$ 309	$ 309
3590487	$ 309	$ 309
TOTAL	**$10,417**	**$4,291**

ORDER

Accordingly, **IT IS ORDERED** that 104(d)(1) Citation No. 3589770 and 104(d)(1) Order No. 3589771 in Docket No. CENT 94-47 **ARE AFFIRMED. IT IS FURTHER ORDERED** that the respondent shall pay a total civil of $17,500 in satisfaction of this citation and order. In addition, consistent with the approved settlement terms noted herein, the respondent **IS ORDERED** to pay total civil penalties of $4,291 in satisfaction of the captioned docket proceedings referenced above. The respondent has already paid the $1,700 agreed upon civil penalty in Docket No. CENT 94-14. Consequently, the respondent **SHALL PAY** a total civil penalty of $20,091 in these matters within 30 days of the date of this decision. Upon timely receipt of payment, these cases **ARE DISMISSED.**



Jerold Feldman
Administrative Law Judge

Distribution:

Janice L. Holmes, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

John W. Paul, Esq., The Pittsburg & Midway Coal Mining Co., P.O. Box 6518, Englewood, CO 80155-6518 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 8 1994

RAYMOND OTIS STIEFEL, III, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 94-128-DM
v.	:	SE MD 93-06
	:	
LANG SAND & GRAVEL COMPANY, INCORPORATED, Respondent	:	Lang Pit
	:	I.D. No. 01-02959
	:	

DECISION

Appearances: Raymond Otis Stiefel, III, Albertville, Alabama, pro se;
David Lee Jones, Esq., Jones and Milwee, Guntersville, Alabama, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

This case involves a discrimination complaint filed by Raymond Otis Stiefel, III, against Lang Sand & Gravel Company, Inc. (Lang Sand and Gravel or the company) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. § 815(c)(3). Stiefel alleges that on July 1, 1993, he was demoted because he called the Secretary of Labor's Mine Safety and Health Administration (MSHA) to report safety violations. Stiefel further alleges that after he was demoted, he was, in effect, forced to quit. Stiefel requests back pay and expenses.

Lang Sand & Gravel responds that Stiefel had to return to his previous job with the company and rather than return, he gave his two week notice. The company adds that Stiefel had to return to his previous job because the company eliminated the shift on which he worked for economic reasons.

Stiefel filed an initial discrimination complaint with MSHA. Following an investigation of the complaint, MSHA determined that a violation of section 105(c) had not occurred and Stiefel then filed a complaint with the Commission. Pursuant to notice, a hearing was conducted in Huntsville, Alabama. Prior to the hearing Stiefel amplified the remedies he was seeking to include certain medical bills and restitution for a truck that he allegedly lost while unemployed.

The fundamental issues are whether Stiefel engaged in any activities protected under the Mine Act and, if so, whether his demotion and subsequent loss of employment were motivated in any part by those activities.

THE TESTIMONY

The Complainant's Witnesses

Raymond Otis Stiefel, III.

Stiefel testified on his own behalf. He stated that on July 1, 1993, Greg Johnson, supervisor of Lang Sand & Gravel's Lang Pit, came to his home. According to Stiefel, Johnson was there pursuant to the instructions of Leon "Pete" Lang, owner and president of Lang Sand & Gravel (Tr. 18-19). In the presence of Mark Bouska, a co-worker of Stiefel's, who was also Stiefel's neighbor and friend, Johnson informed Stiefel that he was demoted from a night shift supervisor to a day-shift front-end loader operator. According to Stiefel, Johnson stated that the action was taken because Stiefel had informed MSHA about an accident at the company's pit. Stiefel stated, "Lang ... directed ... Johnson to remove me from the night shift to day shift as a loader operator where he could keep an eye on me because I could no longer be trusted since I had called MSHA" (Tr. 19).

Stiefel further stated that on July 2, he met with Lang and Johnson and Lang reiterated what Johnson had said on July 1 (Tr. 19-20). Stiefel characterized his response as follows: "Because of the unsafe conditions existing at Lang Sand & Gravel during the period of time and being wholly concerned with my safety and the safety of others, I was forced to tender my resignation" (Tr. 20).

Stiefel stated that he began working for the company as a laborer in approximately July 1992. Prior to that he had worked as a heavy equipment operator, but he never before had worked in the sand and gravel industry (Tr. 28). He worked approximately three months as a laborer and in the Fall of 1992 transferred to the job of front-end loader operator.

As Stiefel recalled, the pit was operating on two 12-hour shifts at that time. However, some time during April 1993, the company began working three eight hour shifts (Tr. 30).

Stiefel believed that he was making $5.00 an hour when he began working as a front-end loader operator. Three or four months later Stiefel transferred to a position loading sand products into dump trucks for transportation (Tr. 25-26). In this position Stiefel earned $5.50 an hour. Subsequently, his pay was raised to $6.00 an hour, and when he left the company he was making $6.50 an hour (Tr. 26-27).

Stiefel testified that around June 22, 1993, the job of plant operator on the night shift became available. He and Lang discussed it and decided that he was the right person for the job (Tr. 33, 35). The job consisted of supervising two workers and operating the plant -- i.e, operating the machinery that processed sand and gravel (Tr. 34-35). According to Stiefel, the supervisory responsibilities consisted solely of authority to shut down the plant if something happened or if the equipment broke down. Once he had shut down the plant he was supposed to call Lang or Johnson and to do nothing until he checked with them (Tr. 92).

Stiefel began the job on June 23, at a rate of $6.50 an hour (Tr. 36). He claimed he usually worked six days a week and averaged between 45 and 50 hours a week when he worked on the third shift (Tr. 70). Thus, he worked five to ten hours of overtime a week spread out over a six day period (Tr. 71).

Stiefel also claimed he was supposed to receive a pay raise, but Lang never told him how much it would be and he never got one. Id. Stiefel stated that whenever he asked about a raise Lang told him that he, Lang, was "hard up for money" (Tr. 89).

In Stiefel's view, things went "rather smoothly," during the first three or four days after he became night supervisor, although there were problems with some of the equipment that caused the company to be short of sand (Tr. 37).

There were four front-end loaders at the pit. On June 28, two were running and two were out of service. On June 30, Stiefel came to work around 10:00 p.m (Tr. 66). A miner named Outher Stampler was running one of the front-end loaders. At some point Bouska took over. Bouska was going to use the front-end loader to load the processing plant (Tr. 117). According to Stiefel, Johnson and a miner named Albert Pridmore told Bouska to get off the front-end loader so that Pridmore could use it to load trucks (Tr. 40).

Stiefel claimed that he had operated the same front-end loader on June 30, and had noted that the brakes did not work properly. He stated that he had complained about the brakes (Tr. 48).

Pridmore loaded trucks the night of June 30 - July 1. Stiefel testified that around 1:10 a.m. on July 1, he heard the engine of the front-end loader stall. Stiefel was working in the electric room. He looked out and saw the front-end loader going backward down the hopper loading ramp. The equipment went off of the ramp and overturned. Stiefel ran to help Pridmore. Pridmore, who had hurt his back, slowly removed himself from the equipment (Tr. 41-42).

Johnson told Stiefel to take Pridmore to the hospital, which Stiefel did. Around 6:00 a.m., Pridmore was released from the emergency room (his back injury was not severe) and Stiefel returned to the pit (Tr. 42).

Back at the pit Stiefel spoke with Johnson for approximately an hour about what had happened. Around 7:00 a.m. or 7:30 a.m., Lang appeared (Tr. 74). The front-end loader had been righted and the company's mechanic, Billy Chambers, was inspecting it. Lang, Johnson, Bouska and Stiefel were there while Chambers checked the equipment's condition (Tr. 43). Stiefel believed that Chambers did not check the brakes (Tr. 42, 74). Around 7:30 a.m., Stampler got back on the front-end loader and started loading trucks.

Stiefel went home around 8:45 a.m. However, prior to going home, Stiefel had words with Lang concerning "why [Lang] couldn't fix his equipment properly" (Tr. 43). Lang told Stiefel it was none of his business and, as Stiefel explained, "I peeled out of there. I was extremely hot" (Tr. 43). Stiefel maintained that everyone who worked at the pit knew that the brakes on the front-end loader did not work, but that Lang's attitude was that if a miner did not want to operate the equipment Lang would find someone who did (Tr. 50).

Stiefel claimed that when he asked Lang why equipment could not be fixed at the pit and when Lang told him it was none of his business, Stiefel responded, "if we can't get stuff [fixed] around here I guess I'll give my two-week notice" (Tr. 55). Stiefel maintained that in so doing he was not really giving Lang his two-week notice, rather he was making clear he was not going to be responsible for hurting anyone or for telling someone to operate the front-end loader out of fear that he would lose his job. Id.

Once home Stiefel called MSHA to advise the agency what had happened and to ask for an inspector to be sent to "check the plant" (Tr. 43). He placed the call around 9:00 a.m. (Tr. 83). Stiefel was not certain but believed he might have spoken with Terry Phelps in MSHA's Birmingham, Alabama office (Tr. 52, 83). Stiefel testified he also reported that the front-end loader did not have brakes and that it was a practice at the pit for the equipment to be used in an unsafe condition (Tr. 127-128).

Stiefel believed that in response to his call MSHA came to the pit, but the company, by a ruse, prevented a meaningful inspection of the equipment. Stiefel speculated that the company might have "hosed down" the front-end loader so it would not be hot and the MSHA inspector would not recognize that the equipment had been used. Or, the company might have placed a "red tag" on the front-end loader to indicate it had not been operated the day of the accident (Tr. 54, 110).

Stiefel acknowledged he was not present when the inspector came to the pit, but stated he was told by someone that this is what had happened. He asserted that previously he had been ordered to park a front-end loader he had been using in order to make it appear to a visiting inspector that the equipment had been removed from service (Tr. 112-113, 124-125). Stiefel did not report this to MSHA "because of fear of losing [his] job" (Tr. 126).

Later that day, as Stiefel was preparing to go to work, Johnson came to Stiefel's home and told Stiefel, at Lang's direction, that because he had been the one who called MSHA he was going to be returning to the second shift and was going to drive a front-end loader. In addition, he was not going to get a pay raise and would no longer be a supervisor (Tr. 84).

Stiefel maintained he responded that he would not operate another piece of equipment at the pit. Stiefel did not go to work that night because Johnson told him to report the following morning (Tr. 86). Johnson did not tell Stiefel that the third shift had been terminated (Tr. 86).

Stiefel stated that the next day, July 2, he called MSHA again and asked if Lang or Johnson could demote him because he had contacted MSHA. The MSHA representative stated he could not be demoted for that reason (Tr. 86).

Around noon, he returned to the pit. Johnson and Lang were there. In Johnson's presence Stiefel asked Lang why he was "demoted" and Lang replied, "You're demoted because you called MSHA, and I can't trust you no more" (Tr. 44). Stiefel considered it a "demotion" because he was not going to be a supervisor, he was not going get the raise he had been promised and he was going to have to operate unsafe equipment (Tr. 45-46). Stiefel responded by telling Lang he could not be demoted for calling MSHA and that to do so was a violation of federal law (Tr. 44-45). Lang replied, "I can do whatever I want" (Tr. 45).

After Stiefel left the mine on July 2, he did not return to seek re-employment (Tr. 57). Had he returned he would have been making the same amount of money as when he left -- $6.50 an hour (Tr. 90). Subsequently, Stiefel filed for state unemployment compensation, which was denied. Stiefel maintained he failed to get the compensation because he could not attend the hearing (Tr. 119).

Mark Bouska

Bouska testified that he initially worked for the company as a truck driver and later worked as a laborer. In the latter position, he operated front-end loaders from time to time (Tr. 130-131).

On June 29, Bouska was loading sand with the front-end loader that was involved in the July 1 accident (Tr. 132). He was working on the day shift and operated the equipment for about 45 minutes (Tr. 137). On June 30, he operated it again. The front end loader was not "red tagged" on either day (Tr. 138).

On July 1, he arrived at the pit around 6:00 a.m. He checked in and found Johnson who asked him to shovel underneath some of the conveyor belts. Bouska shoveled until around 7:30 a.m, when Johnson asked him to do other tasks (Tr. 152).

When Bouska checked in, some of the other employees were talking about the accident that had occurred earlier that morning. Bouska spoke with Stiefel who described the accident to Bouska (Tr. 153).

Around 11:00 a.m., Bouska maintained that Stampler, who had been operating the front-end loader that morning, parked it by the break room shed. Johnson came over and told Bouska to hose it down in order to cool the engine.

Bouska stated that he left the company that morning. He walked off the job because of "[f]ear for my safety" and because of an apparent dispute with Lang about who was Bouska's boss, Johnson or Lang (Tr. 146). Bouska did not complain to MSHA about his safety concerns.

After he quit, Bouska went to Stiefel's home to ask what Stiefel was going to be doing over the July 4 weekend (Tr. 155).

Leon "Pete" Lang

Stiefel also called Lang as a witness. Lang denied he ever told Stiefel that he was demoted for calling MSHA (Tr. 161).

Brenda Crist

Finally, Stiefel called his fiancee, Brenda Crist, to testify concerning a June 13, 1994, conversation involving her, Stiefel and Johnson. Crist stated that Johnson told Stiefel, "You called MSHA on Mr. Lang, therefore, you were demoted because you could no longer be trusted, and he needed to keep you within his sights" (Tr. 168).

In addition, Johnson stated that Lang told him Stiefel was supposed to get a raise after he started his job on the third shift. Johnson wondered why Stiefel never got the raise (Tr. 169). Crist believed Johnson was not employed by the company when the conversation took place (Tr. 172).

The Company's Witnesses

Leon "Pete" Lang

Lang is the president of the company and owns a controlling interest in it. Lang stated he also owns and operators Lang Construction, a company involved in site preparation (Tr. 174-175).

Lang Sand & Gravel was formed in 1990. The property on which the pit and plant are located is leased. The first day of operations was January 16, 1991 (Tr. 176). In July 1993, Lang was dividing his time by spending half of it with the construction company and half of it at the sand and gravel operation. Lang described Johnson as the person responsible for the day-to-day operations of the sand and gravel company (Tr. 178). Lang said of Johnson, "[H]e operated the plant, did quality control, and supervised people, and he could even hire them and fire them. I guess you'd call him just a general superintendent" (Tr. 179).

Turning to the accident of July 1, Lang stated that fines had been imposed on the company because the front-end loader had overturned -- "$5,000 for the company and $5,000 personal" (Tr. 180). Although he was not sure, Lang believed the fines had to do with the brakes on the equipment (Tr. 181). He added that within a week of the accident the company obtained a new front-end loader.

Lang stated that when he arrived at the pit between 7:00 and 7:30 a.m. on the morning of July 1, he was informed of the accident. Shortly thereafter he and Stiefel went to the accident site and Lang asked Stiefel why Stiefel had allowed the use of the front-end loader that night. (Lang observed that while Stiefel, whom he described as a good worker, did not have hiring and firing authority, he had the responsibility not to use a piece of equipment if it was in unsafe condition (Tr. 183, 210).

Lang maintained that Stiefel tried to change the subject by asking Lang why Pridmore was allowed to operate a front-end loader when Pridmore "couldn't see" (Tr. 184). (Lang explained that Pridmore had hurt his eyes before he started working for the company, but that when he was hired his vision was not a problem (Tr. 185). "I have a doctor's excuse his eyes [were] okay," he stated. Id.) According to Lang, he told Stiefel it was none of his business, that when he hired someone he was sure they were fit to work. Lang testified that as he and Stiefel turned and started to walk back to the electric shed, Stiefel said that he was turning in his two-week notice. Lang did not make any response to Stiefel's announcement. As Lang stated, "[H]e just turned his notice in and I just let him leave" (Tr. 212).

Lang stated that to the best of his knowledge, the front-end loader was righted and transported to an area near the plant office and was not put back into service again (Tr. 186).

Lang also explained that at first the plant operated on one shift. However, when new equipment was installed, Lang decided to add a second shift and, ultimately, a third shift to try to keep up with the demand for sand and gravel (Tr. 187). Lang was not certain how long the plant had been operating on three shifts when the accident occurred. However, on July 1 he decided to terminate the third shift and it has not been reinstituted.

Lang maintained the reason for terminating the third shift was "mainly economic," but he also decided to end it because he did not have control over what went on at the operation in the middle of the night (Tr. 188). Once the third shift was eliminated the company went to two nine-hour shifts. Had Stiefel stayed Lang believed he would have been able to work as many hours as he wanted, given the fact that there would have been plenty of overtime work available (Tr. 189). Lang did not recall making any representations to Stiefel about when he would receive a raise (Tr. 189, 214).

Lang stated that at the time of his discussion with Stiefel, he was unaware Stiefel had called MSHA. It was not until MSHA personnel arrived on the morning of July 1 that he learned someone had contacted the agency. Although he subsequently found out it was Stiefel, he could not remember when (Tr. 190, 210). Lang observed that because he would have been required to report the accident to MSHA in any event, there was no particular detriment to the company based on Stiefel's report since MSHA would have known about the accident whether or not Stiefel called (Tr. 200).

Lang also testified that he never authorized Johnson to tell Stiefel he was being demoted and that the reason he was moved back to the job he had before he went to the third shift was because of the termination of the third shift. In that position he was not going to suffer any reduction in salary or reduction in benefits or in the number of hours he had the opportunity to work (Tr. 191).

Kay Derek

Kay Derek is the office manager and bookkeeper. She works at the office trailer located near the plant entrance. She testified that on July 1, after Stiefel spoke with Lang, Stiefel came by the office and told her he had quit. At this time no one from MSHA had come to the property (Tr. 221). She described his mood as "so-so" and she added, "I've seen him more upset" (Tr. 216). However, he was upset enough that she did not inquire why he had quit. Id.

Derek acknowledged that she had previously advised personnel at the plant that MSHA inspectors or investigators were on the property just to let the company personnel know the federal personnel were present. However, she never gave any instructions to company personnel to hide or to shut down anything and she had no knowledge of such a thing ever happening (Tr. 218).

THE LAW

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

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

STIEFEL'S PRIMA FACIE CASE

Under this case law, Stiefel must first establish that he engaged in protected activity and as a result suffered discrimination.

PROTECTED ACTIVITY

I conclude that Stiefel has established he twice engaged in protected activity. First, I accept his testimony that on July 1, following his return to the mine from the hospital, he had a discussion with Lang in which he complained about the safety of equipment at the mine and specifically about the brakes on the front-end loaders (Tr. 43, 55, 75). Stiefel and Lang agreed that a conversation took place. In Stiefel's version, Stiefel asked Lang why equipment, including the brakes on the front-end loaders, could not be fixed at the mine (Tr. 43, 55). In Lang's version, Lang challenged Stiefel as to why Stiefel let miners use the brakeless front-end loader and Stiefel challenged Lang as to why Lang let Pridmore operate the front-end loader when he knew Pridmore had vision problems (Tr. 185).

I do not discount entirely Lang's description of the discussion, in that I believe the exchange involved Pridmore and his use of the front-end loader. Because the conversation came close upon the heels of the accident, it is logical that at least part of it would have related to what Pridmore was doing and why he was operating the equipment. Indeed, Stiefel's initial discrimination complaint suggests that some of the discussion involved who was responsible for Pridmore using the front-end loader. (In the complaint Stiefel wrote: "I told them it was not my fault that the loader don't have brakes on it and that the loader man was on that loader when I started by shift" (Complaint, Exhibit 1, p. 3).)

It strikes me as likely that in such a discussion Stiefel would have tried to dilute his own responsibility, whatever it may have been, by complaining about safety and the brakes. His testimony that he complained about the brakes is also essentially consistent with what he is reported to have told MSHA Investigator Steve Kirkland, who interviewed Stiefel 13 days after the accident and who memorialized the interview on July 27, 1993 (Complaint, Exh. 5 at 2). I therefore credit Stiefel's account of the discussion to the extent of finding it included a complaint by Stiefel about the safety of the brakes.

It has long been settled that a miner has a right under the Act to make safety complaints about equipment to his or her employers and that such complaints are protected activity. See Secretary on behalf of Nantz v. Nally & Hamilton Enterprises, Inc., 14 FMSHRC 1858, 1884 (November 1992) (ALJ Koutras) and cases cited therein.

Second, I accept Stiefel's contention that on July 1 he called MSHA to report the accident and the brake problem. Indeed, the company does not disagree. Lang stated that sometime after MSHA inspectors arrived at the mine on the morning

of July 1, he found out that Stiefel had called the agency (Tr. 190, 210).

As with safety complaints to employers, the right of a miner to make safety complaints to MSHA has long been recognized. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (November 13, 1981).

Thus, I conclude that Stiefel has established the first part of his prima facie case.

ADVERSE ACTION AND MOTIVATION

Having established that he engaged in protected activities, the question is whether Stiefel also has established he suffered adverse action because of them. Here, I conclude the answer is no.

With regard to his safety complaint to Lang, and as the following exchanges make clear, Stiefel was adamant that he was not forced to quit work and in fact did not quit work because of Lang's response:

> JUDGE: Did you advise the company on [July] 1st that you were going to be leaving in two weeks?
>
> MR. STIEFEL: I did not tell him that I was leaving in two weeks. . . . I didn't give my two-week notice. I did not state to the man that I was quitting in two weeks. I told him I wasn't gong to be responsible for hurting another person or ... telling another [p]erson to get on this piece of equipment for fear of my job.

Tr. 55.

> MR. JONES: [W]hat was it you told ... Lang about two weeks?
>
> MR. STIEFEL: I said if he could not get his equipment running right and safe that I would have to give my two-week notice. I did not state in fact that I was giving my two-week notice. I said if.
>
> * * *
>
> I said that I'm not giving my two-week notice, but we have to get something done. I said exactly we have to get something done to this equipment because I can't stand here and watch people get hurt.

Tr. 74-75.

I take Stiefel at his word and conclude that he did not choose to leave work or was not forced to leave work because of his safety complaints to Lang on the morning of the accident. Rather, he adopted what was essentially a "wait and see" attitude.

That leaves the question of whether Stiefel suffered any adverse action because he reported the accident and the condition of the brakes to MSHA. Stiefel's initial contention was that he was demoted because he called MSHA (Complaint, Exh. 1, p. 3). This bare-bones assertion was fleshed-out in Stiefel's interview with Kirkland. Kirkland describes Stiefel as stating that he reported safety violations to MSHA around 10:00 a.m. on July 1, that Johnson arrived at his home around 5:00 p.m., that Johnson told him Lang said because he had called MSHA, Stiefel could not be trusted as a supervisor and that Lang and Johnson had decided to return him to his previous job as a front-end loader operator during a day shift. Kirkland also reports Stiefel as stating that Johnson told him to come to work the next day in that capacity, that Bouska was present during the conversation and that Stiefel did not go back to work anymore except to go to the mine on July 6 to pick up his pay check (Complaint, Exhibit 5 at 2-3).

At the hearing, Stiefel testified that the conversation with Johnson occurred essentially as described to Kirkland (Tr. 19, 84-86). In addition, he added an incident that Kirkland did not report. Stiefel asserted he returned to the mine on July 2 and there, in the presence of Johnson, asked Lang why Lang had demoted him. According to Stiefel, Lang replied it was because Stiefel had called MSHA and could not be trusted (Tr. 44-46).

I find that Stiefel was in fact advised he would have to return to his old position. Lang testified the change was based upon economic reasons and a desire for better control at the mine (Tr. 188-189). According to Lang, he was able to meet customer demand by working two shifts and overtime rather than three shifts. This assertion was not challenged, and I find it is true. Given the fact that he could meet customer demand if he eliminated the night shift, it is logical to me that he would have wanted to do so in order to have better control at the mine. Afterall, a presumably preventable, and potentially fatal, accident had just happened on Stiefel's "watch." Although Stiefel maintained he was essentially a supervisor in name only, I do not believe it (Tr. 92). It strikes me as highly unlikely Stiefel would have considered the loss of supervisory status part of a "demotion" if all he lost was a meaningless title. Rather, I accept Lang's description of Stiefel's responsibilities (Tr. 183, 210). Therefore, I do not infer any prohibited adverse action or retaliatory intent from the elimination of the night shift.

It is true that had Stiefel returned to work during the day he would have lost his supervisory responsibilities. However, Stiefel had switched to the night shift one week prior to the accident. Lang testified that Stiefel's job status was probationary, and this testimony was not challenged (Tr. 189). It is a common practice to place an employee on probationary status when the employee is switched to a new job. In such a situation I believe the company could terminate Stiefel's supervisory status and not run afoul of the Act, provided its motivation was not proscribed. Here, where Stiefel was on duty when a serious accident occurred, it was not unreasonable that Lang wanted to relieve him of his responsibilities.

Further, Stiefel did not establish that he suffered a loss of pay. Although one of Stiefel's contentions was that he was denied a promised pay raise, there was nothing in writing regarding the raise, nor was any testimony offered that such raises were customary. Lang could not recall promising Stiefel a raise and even if he had remembered such a promise, in the absence of a written agreement or evidence of a practice to award such raises, I would not find that reneging on the promise was discriminatory, especially when the employee held the position on a provisional basis (Tr. 189, 214). Moreover, had Stiefel returned to his old position he would have been paid at the same hourly rate, and Stiefel did not offer any testimony or evidence to counter Lang's contention that overtime work, which would have allowed Stiefel to earn as much or more than he had earned at night, was readily available (Tr. 189).

Nor did Stiefel establish that had he returned to day work to operate a front-end loader he would have been forced to work under unsafe conditions. Stiefel would have been returning to the mine after MSHA had conducted an inspection. Presumably, unsafe conditions would have been detected during the inspection and would have been corrected or have been in the process of being corrected. Stiefel did not appear to believe that the conditions were generally so unsafe that he was forced to refuse to work. On July 1, and before MSHA inspectors had even been called to the mine, he decided not to give his two week notice. (It also is important to note that if he had returned to the mine he would have retained the right to refuse to work if he believed in good faith that conditions were unsafe.)

Finally, and most important, I do not believe that Stiefel established that any of the allegedly adverse actions were motivated by his telephone call to MSHA. The record is inadequate to support a finding that on July 1 Johnson told Stiefel he was demoted because he had called MSHA. Although Stiefel testified Bouska was present during the July 1 conversation with Johnson, when Bouska was called to testify on Stiefel's behalf, Stiefel asked him not one question about the conversation or even about

his whereabouts at the time, except to establish that he came to Stiefel's home on the afternoon of July 1 to inquire about Stiefel's plans for the July 4 weekend (Tr. 155).

Fundamental to Stiefel's failure of proof is the fact that Stiefel did not call Johnson to testify. Stiefel stated that Johnson would not appear unless subpoenaed, but he neither subpoenaed Johnson nor offered any explanation why Johnson could not appear. Rather, Stiefel attempted to offer an "affidavit" from Johnson in lieu of testimony. Counsel for Lang Sand & Gravel objected, and I sustained the objection (Tr. 63-64). I agreed with counsel that it would prejudice the company to permit a statement to be entered when it could not be subjected to cross examination and when the best evidence -- the witness -- was apparently available but simply not called.

Stiefel also offered the testimony of his fiance concerning a conversation with Johnson in which she as involved approximately two weeks before the hearing (Tr. 168-172). She remembered Johnson as saying that Stiefel was demoted because he called MSHA and because Lang could no longer trust him. She was allowed to testify over the objection of counsel because she was recounting a conversation she had heard. Her testimony was admissible, but I accord it no weight. Once again the best evidence -- Johnson's -- was not presented. Moreover, I note that Stiefel made no reference to the substance of this supposed conversation during his testimony, even though he was said to have been present during it.

Thus, the essential portion of Stiefel's case for unlawful motivation rests solely upon his and Crist's uncorroborated testimony. They hardly were disinterested witnesses and the lack of corroboration, when it seemingly could have been obtained with ease, in my view fatally undermines their credibility.

Further, I do not credit Stiefel's testimony that on July 2 when Stiefel returned to the mine to pick up his pay check, Lang told him "You're demoted because you called MSHA, and I can't trust you no more" (Tr. 44). I find it highly significant that this purported conversation appears no where in Stiefel's initial complaint. Indeed, Kirkland reports Stiefel as stating that after July 1 he did not go back to the mine, except on July 6 to pick up his check (Complaint, Exhibit 5 at 2-3). Lang denied he ever made such a statement and Johnson, the only other person said to have been present during the conversation, did not testify.

CONCLUSION

Accordingly, I conclude that while Stiefel has established he engaged in protected activity, he has failed to prove he suffered any adverse action because of it. Therefore, Stiefel has not established a prima facie case and his complaint must be and is DISMISSED.

David F. Barbour
Administrative Law Judge

Distribution:

Raymond Otis Stiefel, III, 560 Doyle Drive, Albertville, AL 35950

David Lee Jones, Esq., Jones and Milwee, P.O. Box 909, Guntersville, AL 35976

\lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 8 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 92-117-M
Petitioner	:	A. C. No. 30-00012-05516
v.	:	
	:	Docket No. YORK 92-128-M
BUFFALO CRUSHED STONE,	:	A. C. No. 30-00012-05517
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

On October 31, 1994, the Commission issued a decision in these cases, 16 FMSHRC _____, which reversed my determination[1] that five similar violations of 30 C.F.R. § 56.9301 were not significant and substantial. The decision contains the following directive "we remand for reassessment of civil penalties in light of our determination."

Considering the Commission's conclusion that the cited violations were significant and substantial, I find that these violations were of a high degree of gravity. I find that a penalty of $136 is appropriate for each of these violations.

[1] Buffalo Crushed Stone, 15 FMSHRC 1641 (August 1993).

ORDER

It is **ORDERED** that Respondent, within 30 days of this decision, shall pay a civil penalty of $430.[2]

Avram Weisberger
Administrative Law Judge

Distribution:

James A. Magenheimer, Esq., Office of the Solicitor, U.S. Department of Labor, 201 Varick Street, New York, NY 10014 (Certified Mail)

Susan E. Long, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Mr. Salvatore Castro, Safety Director, Buffalo Crushed Stone, 2544 Clinton Street, P.O. Box 710, Buffalo, NY 14224 (Certified Mail)

/efw

[2] The initial decision I issued on August 11, 1993, 15 FMSHRC, 1641, supra ordered Respondent to pay a penalty of $820, which included a $50 penalty for each of the five citations which are the subject of this remanded decision. Hence, Respondent is presently ordered to pay a civil penalty of $86 for each of these citation, i.e., the difference between the original penalty of $50, and the present finding of a penalty of $136.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 9 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 94-96-M A.C. No. 14-00124-05544
v.	:	Monarch Cement Mine
MONARCH CEMENT COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Feldman

This case is before me upon petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary has filed a motion to approve a settlement agreement and to dismiss this case. A reduction in penalties from $506.00 to $350.00 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement **IS GRANTED**, and it **IS ORDERED** that the respondent pay a total penalty of $350.00 within 30 days of this order, and, upon receipt of payment, this matter **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Mr. Daniel E. Cretiz, Monarch Cement Company, P.O. Box 1000, Humboldt, TX 66749 (Certified Mail)

\rb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 15 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 93-233 A.C. No. 36-04109-03520
v.	:	
AMBROSIA COAL & CONSTRUCTION COMPANY, Respondent	:	Ambrosia Tipple
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 94-15 A.C. No. 36-04109-03522-A
v.	:	
WAYNE R. STEEN, Employed by AMBROSIA COAL & CONSTRUCTION COMPANY, Respondent	:	Ambrosia Tipple

DECISION

Appearances: Nancy F. Koppelman, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
William P. Getty, Esq., Meyer, Unkovic & Scott, Pittsburgh, Pennsylvania, for Respondent Ambrosia Coal & Construction Company;
Frank G. Verterano, Esq., Verterano & Manolis, New Castle, Pennsylvania, for Respondent Wayne R. Steen.

Before: Judge Fauver

These consolidated cases were brought under §§ 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq, for civil penalties for alleged violations of a safety standard.

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

FINDINGS OF FACT

1. The Ambrosia Tipple, owned and operated by Respondent Ambrosia Coal & Construction Company, produces about 58,000 tons of coal a year for sale or use in interstate commerce.

2. William Carr, a miner, operated a Caterpillar 966-C Highlift, Serial Number 76J 1007, on June 3, 1992, at the Ambrosia Tipple. About 11:10 a.m. MSHA Inspector David Weakland and MSHA Inspector Trainee Charles J. Thomas arrived at the tipple to conduct a health and safety inspection.

3. As they drove up to the property, Inspector Trainee Thomas saw the highlift loading a coal truck in the area behind the stacker belt, and observed that the operator was having difficulty bringing it to a stop.

4. The inspectors first went to the scale house to identify themselves, explain the purpose of the inspection, and determine who was in charge and who would be the company representative to accompany them. There they met Respondent Steen, who identified himself as the foreman and accompanied them on their inspection.

5. After leaving the scale house, Inspector Trainee Thomas asked Inspector Weakland if he could go over and inspect the 966C highlift. Inspector Weakland agreed and directed Thomas to notify him if he observed any problems.

6. Thomas approached William Carr while he was loading coal, and asked him about the condition of the brakes. Carr told him that the brakes were "bad" and had been that way for several weeks. Thomas then asked Carr to position the highlift on an incline ramp in front of the crusher. The ramp has a 30 to 40 degree incline.

7. When Thomas asked Carr to engage the parking brake, he observed that the highlift rolled down the incline ramp. He then asked Carr to reposition the highlift on the incline ramp and apply the foot brake. Thomas observed that the foot brake would not hold the vehicle, and the highlift rolled down the incline.

8. Thomas then called to Inspector Weakland, who came over to the machine. Weakland asked Carr if he had any brakes on the highlift and Carr responded that there were no brakes and there had not been any for several weeks.

9. Inspector Weakland asked Carr to try the brakes on fairly level ground. When he asked Carr to raise the bucket of the highlift and to apply the foot brake, he observed that the highlift drifted backwards. When he asked Carr to raise the bucket and to apply the parking brake, he observed that the highlift still drifted backwards.

10. After this demonstration, Inspector Weakland interviewed Carr in the presence of Respondent Steen. Carr stated that the highlift had no brakes, it had been that way for several weeks, he had notified his foreman, Steen, about it, and had noted bad brakes in his maintenance log. When Carr stated that he had notified Steen about the bad brakes, Weakland asked Steen why he did not have the brakes fixed. Steen stated that he had called the maintenance shop to try to get a mechanic to fix them, but "it's like pulling teeth to get things fixed around here." Tr. 37, 38. I do not credit Steen's statement that he had called the maintenance shop when Carr informed him the brakes were bad.

11. Inspector Weakland continued his inspection of the highlift and observed that, in addition to unsafe brakes, the vehicle had no seatbelt, there was an accumulation of combustible fuel at the pivot point of the machine and motor compartment, and the machine was not equipped with a fire extinguisher. Inspector Weakland then informed Steen that the highlift was unsafe to operate.

12. Inspector Weakland and Inspector Trainee Thomas went to the scale house around 12:30 p.m. to look for the maintenance log, discuss the violations they had observed, refer to the regulations, and write citations. When Weakland was preparing Citation No. 3700771, at issue in this case, Thomas showed him the maintenance log for the highlift. The log, entitled "Daily Work and Cost Record," contained daily entries noting "bad brakes" on May 1, 4, 5, 6, 7, 8, 22, 26, 27, and 28, 1992. Some entries were initiated "B.C." (for Carr) and some were initialed "W.S." (for Steen), indicating they operated the highlift on those dates.

13. After preparing the citations to be served on "Wayne Steen, Foreman," Weakland and Thomas met Steen in the scale house for a closing conference.

14. Steen did not raise any objection to being identified as the "Foreman" on the citations or being treated as foreman by the inspector and trainee.

15. During the inspection, Steen gave work instructions to Carr to abate some of the safety violations discovered in the inspection.

16. In two prior health and safety inspections of Ambrosia Tipple, Steen identified himself as the tipple foreman to MSHA Surface Mine Inspector Thomas Sellers, accompanied Sellers on the inspections, attended the closing conference, oversaw the abatement of conditions cited and accepted the citations issued to "Wayne Steen, Tipple Foreman" without objecting to the title.

17. Steen was the certified mine examiner for the Ambrosia Tipple. He conducted daily safety examinations and entered findings in the official MSHA record of examinations. All of his entries were signed in the place printed for "Foreman."

18. After the closing conference on June 3, 1992, Carmen Ambrosia, owner of the company, told Weakland he wanted to see a demonstration of the highlift brakes. Weakland asked Carr to back the highlift up the ramp (leading to the crusher). He then asked him to remove his foot from the foot brake and to apply the emergency brake. The highlift rolled down the ramp without any hesitation. When it was driven back up the ramp, Weakland asked Carr to apply the foot brake. The highlift slid down the incline without any hesitation.

19. Upon observing the defective brakes, Ambrosia told Steen, "We can't stay in business like this," and he further stated, "We can't operate equipment like this." Tr. 176.

20. After the demonstration of the highlift for Carmen Ambrosia, Weakland informed Ambrosia that the highlift would have to be removed from service. Ambrosia asked whether they could drive the highlift to the maintenance building and park it there. Weakland agreed, and followed behind the highlift in Weakland's vehicle while Carr drove the highlift to the maintenance building.

21. Inspector Weakland then "red-tagged" the highlift and both inspectors departed the premises. This was around 2:07 p.m.

22. The operator of the highlift, William Carr, had notified the tipple foreman, Wayne Steen, prior to June 3, 1992, that there were no brakes on the highlift.

23. During the inspection on June 3, 1992, Carr falsified the maintenance log for the highlift by adding notations of "bad brakes" for all the dates listed in Fdg. 12, above. Carr falsified the log to avoid blame for failing to record the bad brakes in May. He wrote his initials for some of the entries and Steen's initials for some of the other entries. All the falsified entries were written by Carr.

24. During May 1992 and up to June 3, 1992, Steen did not record any unsafe condition of the brakes on the highlift in the official MSHA examination record. However, William Carr notified him of bad brakes during this period. Also, Steen operated the highlift in May when the brakes were bad but did not record bad brakes in the examination book or take any steps to have them repaired or have the machine removed from service.

25. On the day of the inspection, June 3, 1992, after the inspectors left, Carr told Steen he had falsified the log to add

notations of "bad brakes" in May 1992, and had made some entries with Carr's initials (B.C) and some entries with Steen's initials (W.S.). Tr. 352-353. Steen concurred in the deception -- stating, "I guess that's okay" (Tr. 352) -- and around June 6 Steen falsified the official MSHA examination record (which he was charged to keep as certified mine examiner) by adding false entries to note "bad brakes" on the highlift for the dates May 30, 1992, and June 2 and 3, 1992. Tr. 20a ("a" denotes June 29, 1994, transcript). He falsified the book in an effort to cover-up his failure to report the defective brakes on those dates and to conform to the false records created by Carr.

26. As stated, Carr told Steen on June 3, 1992, that he had falsified the maintenance log to show "bad brakes" entries. Carr told Carmen Shick, the Company's Chief Executive Operating Officer, "shortly after that" (Tr. 342). When he told Shick, Shick said, "that wasn't a very good idea"; however, nothing was done to change the log. Tr. 352-353. I find that Shick knew about the false maintenance log before December 29, 1992, when he sat through Special Investigator John Savine's interview of Respondent Steen. Savine's investigation on December 29 was to see whether a § 110(c) action should be brought against any corporate agent for knowingly authorizing, ordering or carrying out the violation cited as to the highlift on June 3, 1992.

27. When Carmen Shick attended Investigator Savine's interview of Respondent Steen, on December 29, 1992, Shick knew that Carr had falsified the maintenance log on the highlift by making numerous entries of "bad brakes" on past dates as if they had been written in the log on those dates but in fact all were written June 3, 1992. Shick sat in on Savine's interview of Steen December 29, 1992, in which Steen gave a false account to Savine about Carr's entries in the log. Steen falsely told Savine that Carr made the entries on the dates indicated and when Carr signed Carr's initials it meant Carr operated the highlift on those dates and when Carr signed Steen's initials it meant Steen operated the highlift on those dates. Steen deliberately concealed from Savine the fact that Carr had falsified the log by writing all the "bad brake" entries on the same date (June 3, 1992).

28. Carmen Shick knew through Carr's statement to him that Carr had falsified the log and that Steen gave a false account about Carr's entries in the maintenance log to investigator Savine. Despite this, he did not require that the corporate records be corrected to state the truth and did not tell Investigator Savine that Savine was given false accounts by both Steen and Carr as to the accuracy of the maintenance log for the highlift. I reject Shick's statement that Steen did not tell him about the falsified log until a week after Savine's investigation, and I find that Steen told him on or before the day of the investigation, December 29, 1992. I also reject

Shick's statement that he had only "suspicions" and not proof of the false maintenance log when he sat through Steen's interview by Savine since Carr told him "shortly after" June 3, 1992. Tr. 342. It is clear that once Shick learned the maintenance log was false, he participated in the cover-up.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

These cases involve a § 104(d)(1) citation against the corporation for violating 30 C.F.R. § 77.404(a) and a § 110(c) charge against Wayne Steen as an agent of the corporation for knowingly authorizing, ordering or carrying out the cited violation.

Charge Against the Corporation

Citation No. 3700771 charges a violation of 30 C.F.R. § 77.404(a), which provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Section 77.404(a) imposes two duties: (1) to maintain machinery and equipment in safe operating condition; and (2) to remove unsafe equipment from service immediately. Violation of either duty violates the regulation. Peabody Coal Co., 1 FMSHRC 1494 (1979).

The evidence demonstrates that Ambrosia Coal violated both of these duties.

In the MSHA inspection on June 3, 1992, the highlift brakes were tested and neither the foot brake nor the emergency brake would stop the vehicle. The operator of the highlift, Carr, testified that in order to avoid hitting coal trucks being loaded, he had to "slip it into reverse and back up." I find that the highlift did not have operable brakes.

The lack of brakes was an unsafe condition. The machine operator could misjudge distances in trying to fast-reverse as a means of stopping, and could collide with a truck being loaded or strike a pedestrian (including a truck driver who might be on foot to check his truck). The danger of the inoperable brakes was increased by the fact that the highlift did not have a seatbelt. Also, the highlift was used on a ramp with a 30 to 40 degree incline.

I find that the corporation violated § 77.404(a) by failing to maintain the highlift in safe condition and failing to remove it from service immediately.

I also find this was a "substantial and significant violation," which the Commission has defined as a violation that is reasonably likely to result in an injury of a reasonably serious nature. Mathies Coal Company, FMSHRC 1, 3-4 (1984). The lack of operable brakes posed a number of discrete safety hazards: (1) without operable brakes the highlift could not stop immediately and could collide with a coal truck or pick-up truck being loaded, a pedestrian or a structure at the tipple; (2) the highlift was used to load the crusher on a 30 to 40 degree ramp upon which the brakes would not hold; (3) the highlift was driven throughout the tipple yard and could roll out onto the highway causing a traffic collision since there was no berm, curb or divider separating the tipple yard from the highway; (4) the fact that the highlift was not equipped with a seatbelt significantly increased the hazards to the driver caused by inoperable brakes.

I find that this was an "unwarrantable" violation, which the Commission has defined as a violation involving aggravated conduct beyond ordinary negligence. Virginia Crews, 15 FMSHRC 2103 (1993); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (1987). The record demonstrates that the foreman, Respondent Steen, knew the brakes were bad and failed to have the brakes repaired or to remove the highlift from service immediately. The driver of the highlift, William Carr, told Inspector Weakland that the highlift had bad brakes for several weeks, and he had informed his foreman, Respondent Steen, about the bad brakes. In addition, during the interview with Carr, Inspector Weakland inquired of Respondent Steen, who was also present, why he did not get the brakes fixed. Steen acknowledged that he had been aware of the condition and stated "it's like getting teeth pulled to get things fixed around here." Furthermore, Steen himself operated the highlift during the period when the brakes were bad and he was the company's certified surface mine examiner as well as foreman. I find from all the evidence that the highlift had no operable brakes and the corporation, through its foreman and mine examiner, [1] was guilty of high negligence in violating § 77.404(a).

Charge Against Respondent Steen

The Secretary has charged Respondent Steen under § 110(c) of the Act, which provides in part:

> Whenever a corporate operator violates a mandatory health or safety standard . . ., any director, officer, or agent of

---

[1] Steen's status as certified mine examiner is relevant to the issue of an "unwarrantable" violation by the corporation. However, since it was not alleged as a basis for § 110(c) agency, I do not decide the issue whether a certified mine examiner qualifies as a § 110(c) corporate agent.

such 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 (d).

Section 3(e) of the Act defines "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine."

I find that Mr. Steen was a foreman, and therefore a corporate "agent" under § 110(c) of the Act.[2]

Steen routinely identified himself as the tipple foreman when MSHA inspectors entered the property to perform health and safety inspections. During the June 1992 inspection, Steen identified himself as the tipple foreman, accompanied Inspector Weakland on the inspection, gave work instructions to William Carr to abate some of the conditions cited by Inspector Weakland, and represented the company in the closing conference in which Inspector Weakland issued and explained citations to Steen, and Steen accepted the citations issued to "Wayne Steen, Foreman" without objecting to that title.

MSHA Inspector Thomas Sellers testified that he commences his surface mine inspections by asking who is the superintendent or foreman, and in inspections of the Ambrosia Tipple in July 1991 and March 1992 Steen identified himself as the foreman, accompanied him as the company representative, attended the closing conferences, telephoned the mechanics to arrange for

---

[2] In its brief, the Secretary contends that if Mr. Steen were found not to be a foreman he would still be liable under § 110(c) as an agent because he was a certified mine examiner. Mr. Steen contends that this theory should not be allowed because it was not alleged in the Secretary's petition or prehearing statements. I agree. A § 110(c) respondent is entitled to a hearing in accordance with the Administrative Procedure Act, specifically 5 U.S.C.A. § 554. Subsection (b)(3) requires timely notice of "the matters of fact and law asserted." The facts and law provided to Mr. Steen by the Secretary charged him with § 110(c) liability as the foreman at the tipple or the person in charge of operations, not as a certified mine examiner.

The Secretary's theory of agency of a mine examiner, introduced after the hearing, comes too late. Accordingly, the § 110 (c) agency issue is limited to the question whether Mr. Steen was a foreman or the person in charge of operations at the tipple.

abatement of violations, and accepted citations issued to "Wayne Steen, Tipple Foreman" without objecting to that title.

On December 29, 1992, when MSHA Special Investigator John Savine interviewed Steen, Steen identified himself as the tipple foreman.

Steen was paid a flat weekly salary without overtime pay for hours over 40 per week. Rank and file employees were paid an hourly rate with time and a half for overtime. Steen was the certified mine examiner who conducted the daily surface mine examinations required by the Act and regulations. He signed the official MSHA examination record in the place for the "Foreman," not as a rank and file employee.

The corporation and Steen may not represent to MSHA through official documents and oral statements by Steen that he is the foreman and then be heard to deny that fact when a question of imputation for his conduct arises.

In addition, the behavior of Carr and that of the corporate owner support the conclusion that Steen was the tipple foreman. The highlift operator, William Carr, told Inspector Weakland that he had reported the bad brakes to the foreman, Steen. Steen was present and did not correct Carr's statement. If Steen was not his foreman, it is unlikely that Carr would make a point of telling the MSHA inspector that he reported the condition to him. When Inspector Weakland asked Steen why he did not have the bad brakes repaired, Steen acknowledged he was aware of the condition and commented on how hard it was to get the company to make repairs. Steen did not reply, as one would expect if he were merely a rank and file miner, that it was not his job to remove equipment from service and arrange for repairs. Finally, when the owner, Carmen Ambrosia, observed the demonstration of the highlift on the incline ramp, when the brakes could not stop the highlift, he exclaimed to Steen, "We can't stay in business like this" and "We can't operate equipment like this." Thus it appears that the owner of Ambrosia Coal believed that Steen held a position of authority which made him responsible for overseeing the conditions in the tipple yard.

Respondent contends that since Steen lacked authority to hire or fire employees he was not a foreman. I do not agree. Upper management held a tight reign on the hiring and firing of employees, but they still employed a supervisor at the tipple. On balance, I find that the reliable evidence establishes that Steen was the day shift foreman at the tipple, and therefore qualified as a corporate agent under § 110(c).

I now consider the issue whether Steen "knowingly" authorized, ordered or carried out the cited violation.

The Commission has reviewed the legislative history for the term "knowingly" as used in § 110(c) and determined that "knowingly" means "knew or should have known":

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

The Commission has also ruled that a "knowing violation under § 110(c) involves aggravated conduct, not ordinary negligence." Bethenergy Mines, Inc., 14 FMSHRC 1232, 1245 (1992).

The record demonstrates that Steen had actual knowledge of the bad brakes on the highlift for at least five and possibly 6 working days prior to June 3, 1992, when the violation was cited. The highlift operator, William Carr, notified Steen of the bad brakes on May 27 or 28, 1992, and Steen himself drove the highlift in the period when it had bad brakes. I find that Steen, as foreman, knowingly authorized and permitted the violation by failing to have the brakes repaired and to remove the vehicle from service immediately.

The Falsified Safety Records

During the June 3, 1992, inspection, Carr falsified the maintenance log for the highlift by adding entries of "bad brakes" for 10 dates in May 1992. He did this to avoid blame or possible liability for himself and Steen for failing to record bad brakes on the days they operated the vehicle. For some entries he signed his initials (B.C.) and for other entries he signed Steen's initials (W.S.) as the operator of the highlift. Carr then placed the doctored log where the inspectors were likely to find it. The inspectors found the falsified log, and transcribed Carr's entries of "bad brakes" as evidence that the company and the foreman showed "reckless disregard" for the safety of personnel by not repairing the brakes or removing the

vehicle from service immediately. On the day of the inspection, after the inspectors left Carr told Steen that he had doctored the maintenance log. Steen concurred in the cover-up and, a couple of days later, Steen falsified the official MSHA examination record to add entries of bad brakes on various dates in order to avoid blame for failing to report the bad brakes and to conform to the false records created by Carr.[3]

The Chief Executive Operating Officer, Carmen Shick, participated in the cover-up. When Carr told him about the false log "shortly after" on June 3 (Tr. 342), Shick took no action to correct the corporate records to show the truth, permitted Carr and Steen to continue their cover-up, and failed to tell MSHA that it was being deceived by the false maintenance log and by the statements of Carr and Steen. On December 29, 1992, the day MSHA Special Investigator Savine was investigating the events of June 3, 1992, Shick sat through Savine's interview of Steen in which Steen gave a false account of the maintenance log.

Civil Penalties

The Secretary has proposed a civil penalty of $7,000 for the violation by the corporation and a civil penalty of $3,500 for Respondent Steen's violation as a corporate agent.

Assessment of civil penalties, based upon the criteria in § 110(i) of the Act, are de novo before Commission judges. Consolidation Coal Company, 11 FMSHRC 1935 (1989). Section 110(i) provides:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such

---

[3] Steen and Carr defend their falsification of mine safety records on the ground that MSHA Inspector Trainee Thomas "frightened" them by discussing possible civil fines and "jail time" for their failure to record the unsafe brakes and have them repaired. They contend that Carr "panicked" and falsified the maintenance log to report "bad brakes" (for 10 dates in May), signing his initials for some entries and signing Steen's initials for others. Steen went along with this and falsified the MSHA examination records because he also "panicked." I reject this explanation for falsifying mine safety records. I do not decide the question of what language was used by Thomas and whether he unduly alarmed Carr and Steen. This is something MSHA may wish to consider in its further training of Thomas. However, whether Carr and Steen felt intimidated or not, there is no justification for their falsifying the mine safety records and perpetrating a deliberate deception of MSHA.

> penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

I find that Ambrosia is a small sized operator. The tipple produces about 58,000 tons of coal a year.

In the two years preceding the issuance of Citation No. 3700771, Ambrosia Coal had 19 violations, 13 of which were assessed as significant and substantial.

With regard to the negligence factor, the Secretary has charged "reckless disregard" for safety in Citation No. 3700771 and in the §110(c) charge. This allegation is based, in part, upon Carr's entries of "bad brakes" in the maintenance log for the highlift, and the fact that Steen failed to have the brakes repaired or to remove the highlift from service immediately. I find that the maintenance log was falsified by Carr post-event, and is not evidence of contemporaneous written notice of bad brakes. Also, I find that Steen's mine examination record was falsified by Steen post-event, and is not evidence of contemporaneous written notice of bad brakes. However, Steen had actual knowledge of the bad brakes and knowingly failed to have the vehicle repaired or removed from service immediately. I find that the violation by the corporation and Steen was due to high negligence and an unwarrantable failure to comply with the safety standard.

The falsifying of safety records by Steen, as foreman and certified mine examiner, has some bearing on the degree of his negligence concerning the violation of § 77.404(a). He testified that when he falsified the official MSHA examination records on June 6, three days after the MSHA inspection, he did not consider whether the inspectors had photographed or transcribed the pages he was falsifying. Had he thought of this, he stated, he would not have falsified the records. This indicates that Steen was not only prepared to commit a dishonest act in an attempt to avoid liability, but took a reckless risk of exposure by not recognizing that the inspectors may have already photographed or transcribed the pages he falsified. This sheds some light upon the risk-taking nature of Steen's judgment, and his high negligence, in permitting a highlift to operate without operable brakes.

With regard to gravity, I find that the violation was reasonably likely to result in a serious injury and therefore was a "significant and substantial" violation within the meaning of § 104(d) of the Act.

One of the criteria of § 110(i) is the good faith effort of the operator to achieve rapid compliance after being notified of the violation. Since the inspector red-tagged the vehicle, the question of the operator's abatement does not arise. That is, the red tag provided instant compliance with § 77.404(a).

Once the criteria of § 110(i) have been evaluated, a civil penalty should be assessed in a reasonable amount sufficient to deter the company or person charged, and others similarly situated, from committing a similar violation in the future. I find that the deliberate cover-up by Steen and Shick (both of whom were corporate agents) increases the deterrence needed concerning the amount of civil penalties for the violation of § 77.404(a).

Steen, as foreman, condoned and concealed Carr's act of falsifying the maintenance log. Steen also falsified the official MSHA examination record to conform to the cover-up. Later, on December 29, 1992, Steen and Carr lied to MSHA Special Investigator Savine about the "bad brakes" entries in the maintenance log. That is, they told Savine that Carr wrote all the entries on the dates indicated and when he signed his initials it meant Carr operated the highlift and when he signed Steen's initials it meant that Steen operated the highlift.

Carmen Shick participated in the cover-up by condoning Carr's falsification of the maintenance log, failing to have the log corrected once he learned it was false, concealing the falsity of the log from the MSHA special investigator, and permitting Carr and Steen to lie to MSHA about the maintenance log. I find that Carr told Shick about the false log "shortly after" June 3, 1992.[4]

---

[4] Even if Shick's statement were credited, that he did not know of Carr's falsified log until one week after Investigator Savine's investigation on December 29, 1992 (a contention I reject), the facts clearly show that Shick participated in the cover-up by Carr and Steen. Once Shick knew the log was false and Carr and Steen lied to Investigator Savine, Shick did not cause the corporate records to be corrected to show the truth and took no steps to tell MSHA that it was being deceived by the false log and false statements of Carr and Steen. Shick condoned the falsification of corporate records and the deliberate scheme of Carr and Steen to deceive the MSHA inspectors.

Considering all of the above factors, I find that a civil penalty of $11,000 is appropriate for the corporation's violation of 30 C.F.R. § 77.404(a) and a civil penalty of $4,000 is appropriate for Steen's § 110(c) violation as a corporate agent.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent Ambrosia Coal & Construction Company violated 30 C.F.R. § 77.404(a) as alleged in Citation No. 3300771.

3. Respondent Wayne R. Steen, a corporate agent within the meaning of § 110(c) of the Act, knowingly authorized and permitted the corporation's violation of 30 C.F.R. § 77.404(a).

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent Ambrosia Coal & Construction Company shall pay a civil penalty of $11,000 within 30 days of this decision.

2. Respondent Wayne R. Steen shall pay a civil penalty of $4,000; provided: in light of his financial obligations he shall be permitted to pay the penalty according to the following schedule:

a. To pay $500 on the 10th day of each month, beginning December 10, 1994, for eight consecutive months.

b. If Respondent Steen fails to make any monthly payment when due, the balance of his civil penalty shall immediately become due with interest due from such date until paid at the same interest rate imposed by IRS for late payments of federal income taxes.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Nancy F. Koppelman, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

William P. Getty, Esq., Meyer, Unkovic & Scott, 1300 Oliver Building, Pittsburgh, PA 15222 (Certified Mail)

Frank G. Verterano, Esq., Verterano & Manolis, 2622 Wilmington Road, New Castle, PA 16105 (Certified Mail)

/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 17 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 93-614
	:	A. C. No. 15-16318-03576
v.	:	
	:	Docket No. KENT 93-615
MANALAPAN MINING COMPANY, Respondent	:	A. C. No. 15-16318-03577
	:	
	:	Mine #6

DECISION ON REMAND

Before: Judge Weisberger

On September 14, 1994, the Commission granted Respondent's petition for discretionary review of my decision in these cases. On October 25, 1994, the Commission remanded these cases to me to rule on the joint motion to approve settlement which had been filed before the Commission on October 14, 1994.

I have reviewed the motion, and the record in these cases. I conclude that the terms of the motion meet the criteria set forth in Section 110(i) of the Act. Accordingly, the motion is **GRANTED.**

It is **Ordered** that, within 30 days of this decision, Respondent pay a civil penalty of $5,922 for the violations found in these cases.

Avram Weisberger
Administrative Law Judge

Distribution:

Colleen A. Geraghty, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Susan C. Lawson, Esq., Buttermore, Turner, Lawson & Boggs, 111 South First Street, Harlan, KY 40831 (Certified Mail)

/efw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 18 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 94-327
	:	A. C. No. 36-08102-03509
v.	:	
	:	Merrill Strip
REDSTONE MINING INCORPORATED, Respondent	:	

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA 14480 for Petitioner;
Charles F. Erickson, President, Windber, PA 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). Petitioner has filed a Motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $2,500 to $1,700 is proposed. I have considered the representations and documentation submitted in these cases, 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

Distribution:

Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Charles Erickson, President, 318 Spruce Street, Windber, PA 15963 (Certified Mail)

/efw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-3993/FAX (303) 844-5268

NOV 18 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-233 A.C. No. 48-00677-03523
v.	:	Jim Bridger
BRIDGER COAL COMPANY, Respondent	:	

DECISION

Appearances: Carl C. Charneski, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Henry Chajet, Esq., Jackson & Kelly, Washington, D.C., for Respondent.

Before: Judge Cetti

I

The stay in this case is lifted. 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, 30 U.S.C. § 801 et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), seeks a civil penalty of $192 from the Respondent for the alleged violation of 30 C.F.R. § 71.101. This safety standard in relevant part provides:

> When the respirable dust in the mine atmosphere of the active workings contains more than 5% quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner is exposed at or below a concentration of respirable dust computed by dividing the percent of quartz into the number 10.

The Respondent, Bridger Coal Company, filed a timely answer contesting the alleged violation. After due notice to the parties, a hearing was held in Denver, Colorado. At the hearing, the Petitioner presented the testimony of Thomas F. Tomb, chief

of the Dust Division at the Department of Labor's Pittsburgh Health and Safety Technology Center and Joseph William Pavlovich, Subdistrict Manager of MSHA, Coal Mine Safety and Health, District 9. Respondent presented the testimony of Dr. Morton Corn. Dr. Corn since 1980 has been the John Hopkins University professor of Environmental Engineering and director of the division of the same name in the School of Hygiene and Public Health, which is a graduate school. Respondents also presented the testimony of Mr. Robert E. McCartney, the miner's representative of the miners employed at the Bridger Mine.

II

ISSUES

The issues presented at the hearing were whether Respondent violated the cited standard and if it did, was the violation S&S and the amount of the appropriate penalty. The underlying basic issue is the validity of using a single shift dust sample to set a reduced quartz standard under Section 71.101 and then using that reduced standard four years later to issue the citation in question.

III

STIPULATIONS

All the essential basic facts involved in this case are set forth in the stipulations which the parties entered into the record as follows:

1. Bridger Coal Company (Bridger) operates a surface coal mine in Sweetwater County, Wyoming.

2. Bridger is subject to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

3. The Mine Safety and Health Administration (MSHA) issued Citation No. 2931949 to Bridger on October 11, 1990, through an authorized representative of the Secretary. Citation No. 2931949 alleges a violation of 30 C.F.R. 71.101. The citation narrative states:

> Based on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated work position #384, Pit 001-0, was 0.7 mg/m^3 which exceeds the applicable limit of 0.6 mg/m^3, when quartz is present. Management shall take corrective steps/action to lower

the respirable dust, then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory.

4. Designated work position (DWP) 384 is located within the enclosed cab of a Drilltech D-60 drill.

5. Citation No. 2931949 was issued pursuant to Section 104(a) of the Mine Act. It charges that the violation of Section 71.101 was of a "significant and substantial" nature and that it was the result of Bridger's moderate negligence.

6. Bridger admits that the citation was issued by an authorized representative of the Secretary, denies that it violated Section 71.101, denies that it was negligent and denies that the alleged violation was significant and substantial.

7. The citation was abated on October 31, 1990.

8. The civil penalty proposed by MSHA will not affect Bridger's ability to continue its business operations.

9. The sampling results and silica analysis of DWP 384, Pit 001-0, are as follows:

(a) On September 16, 1986, MSHA established a .6 mg/m^3 respirable dust standard for DWP 384 <u>based on a single sample</u> quartz analysis of 19%. (Underlining added).

(b) From September 16, 1986, through July 18, 1990, DWP 384 was the subject of 52 respirable dust samples collected by the operator and analyzed by MSHA.

(c) On July 18, 1990, an MSHA respirable dust sample of DWP 384 was analyzed at 10% quartz. Bridger was provided notice of the opportunity for it to take an optional sample for quartz analysis or to accept the MSHA result of 10%, which would have resulted in a 1.0 mg/m^3 standard.

(d) Bridger elected to take an additional sample and did so on September 4, 1990. This sample was analyzed by MSHA at 14% quartz. Because Bridger's September 4, 1990, sample had a greater than 2% quartz difference from MSHA's July 18, 1990, sample, the operator

was provided with another opportunity to resample.

(e) Bridger took another respirable dust sample of DWP 384 on September 27, 1990. The results of this sampling showed the level of quartz at 15%.

(f) Based on the average of the quartz analysis for the July 18, 1990, MSHA sample (10%), and Bridger's samples of September 4 and 27, 1990 (14% and 15%, respectively), MSHA established a new respirable dust standard for DWP 384 of .8 mg. Bridger was notified of this new standard on October 2, 1990.

(g) On September 5, 1990, Bridger had submitted a bimonthly sample for DWP 384 pursuant to 30 C.F.R. 71.208(a). This sample was weighed by MSHA and reported to Bridger as resulting in a concentration of 1.2 mg/m^3, thus triggering the requirements of 30 C.F.R. 71.208(c) for five respirable dust samples to determine compliance with 30 C.F.R. 71.101.

(h) Pursuant to 30 C.F.R. 71.308(c), Bridger submitted five samples for DWP 84. These samples were taken on September 27 and 30, 1990, and on October 1, 3, and 4, 1990.

(i) The average concentration for these five compliance samples submitted by Bridger was reported by MSHA as .7 mg/m^3 and served as the basis for Citation No. 2931949 issued on October 11, 1990.

10. The Time Line attached as Exhibit A reflects the respirable dust sampling activities relative to DWP 384 described above. (Referenced in the briefs as stipulation no. 12).

11. On February 10, 1992, MSHA Subdistrict Manager Joseph W. Pavlovich sent a letter (attached as Exhibit B) to Bridger removing DWP 384 from bimonthly sampling status because the samples taken by the operator and MSHA were below the applicable .8 mg/m^3 standard for a one-year period. (Referenced in the briefs as stipulation no. 13).

12. Bridger had not been cited for a violation of 30 C.F.R. 71.101 for five years prior to the citation at issue. (Referenced in the briefs as stipulation no. 14).

IV

Dr. Morton Corn of John Hopkin's University, professor of Environmental Engineering was Respondent's expert witness. Dr. Corn testified at the hearing in this matter that a single shift sample, such as that taken in this case in September 1986 to establish the reduced dust standard, "is practically meaningless." Thomas Tomb, chief of the Dust Division at the Pittsburgh Health and Technology Center, Respondent's expert, agreed that "one sample doesn't do the job for either an enforcement purpose or health risk in terms of understanding exposure of miners ... ." The Commission in its recent decision, Keystone Coal Mining Corporation, 16 FMSHRC 6 (January 4, 1994) held that MSHA's program for issuing citations for excessive levels of respirable dust based on a single shift sample is invalid in view of the 1971 "legislative type" rule that compliance determinations may not be based on a single sample. Notice of that rule published in the Federal Register and states in part:

> Notice is hereby given that, in accordance with section 101 of the Act, and based on the data summarized ..., the Secretary of the Interior and the Secretary of Health, Education, and Welfare find that single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed.
>
> In April 1971, a statistical analysis was conducted by the Bureau of Mines, using as a basis the current basic samples for the 2.179 working sections in compliance with the dust standard on the data of the analysis.... [R]esults of the comparisons ... [show] that a single shift measurement would not, after applying valid statistical techniques, accurately represent the atmospheric conditions to which the miner is continuously exposed.

36 Fed. Reg. 13286 (July 17, 1971).

The Commission decision in Keystone affirming the vacating of a citation based on a single shift sample, demonstrates that single shift sampling such as used in this case to establish the reduced dust standard in September 1986 does not approximate exposure with reasonable accuracy, and logically mandates dismissal of the citation in this case.

V

The basic fundamental respirable dust standard required by the Mine Act [Section 202(b)(2)] and codified as part of MSHA's regulations at 30 C.F.R. § 70.100(a) is that the average concentration of dust be continuously maintained at or below 2 milligrams per cubic meter of air (2.0 mg/m^3).

It is only "where" (Section 205 of the Act) and "when" (30 C.F.R. § 70.101) the respirable dust in the mine atmosphere of the active workings contain more than 5 percent quartz that the 2 milligram standard must be lowered and the operator required to maintain the respirable dust below the 2.0 milligram average concentration. "When" the mine atmosphere of the active workings contains more than 5 percent quartz, the operator is required to maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below the respirable dust standard computed under the formula set forth in 30 C.F.R. § 70.101.

In, Southern Ohio Coal Co., 16 FMSHRC 1096 (May 13, 1994), Judge Koutras vacated the citation alleging a violation of Section 70.101 stating that MSHA's policy of having a reduced dust standard follow the mechanized mining units when it moves to a different part of the mine, regardless of reduced quartz levels at the new location, was not logical or rational. An operator should not be held liable for failing to comply with a reduced dust standard at a location "based upon a quartz exposure that may not exist."

In the present case I agree with Respondent's contention that if the Secretary cannot determine compliance with the dust standards through single shift sampling, it surely cannot set a reduced standard based on a single shift sample. Furthermore, the Secretary should not be permitted to ignore concurrent 1990 quartz analysis and use the outdated 1986 reduced dust standard based on a single shift sample to issue the citation in question. I am satisfied from the record that the best indicator of the quartz content during the time frame of this citation is the average of the three samples taken in July and September 1990 which established a new respirable dust standard for DWP 384 of .8 mg.

CONCLUSION

Based upon the stipulations which I accept as established facts and the testimony of the expert witnesses, particularly the testimony of Dr. Morton Corn, I find and conclude that the citation in question should be vacated.

ORDER

In view of the foregoing findings and conclusions Citation No. 02931949 citing an alleged violation of 30 C.F.R. § 70.101 is **VACATED** and the related proposed civil penalty is set aside.

August F. Cetti
Administrative Law Judge

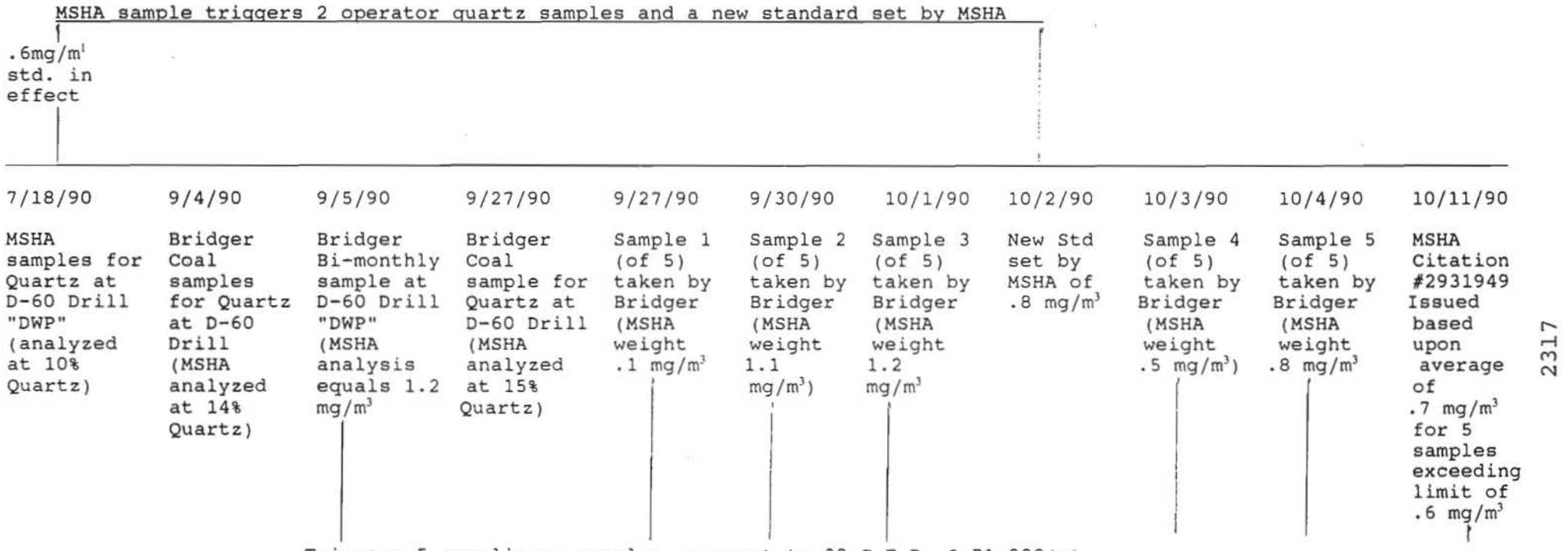
Distribution:

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

Henry Chajet, Esq., James Zissler, Esq., JACKSON & KELLY, 2401 Pennsylvania Avenue, NW, Suite 400, Washington, DC 20037
(Certified Mail)

sh

EXHIBIT A



2317

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3812/FAX 303-844-5268

NOV 21 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-771-M A.C. 04-04240-05518-R
v.	:	
NAVAJO CONCRETE INCORPORATED, Respondent	:	Navajo Concrete Inc.

DECISION APPROVING SETTLEMENT

Before: Judge Morris

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 parties filed a motion seeking to settle the ten citations, originally assessed for $1,571.00 for the sum of $1,256.00.

In support of the motion, the parties further submitted information relating to the statutory criteria for assessing civil penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the settlement and the proposed payments and I find they are reasonable and in the public interest. The settlement should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement is **APPROVED.**

2. The citations and the amended penalties are **AFFIRMED.**

3. Respondent is **ORDERED TO PAY** to the Secretary of Labor the total sum of $1,256.00. Said amount shall be payable in eight

equal installments of $157.00 each. The first installment shall be payable on or before January 1, 1995, and subsequent installments shall be paid on or before the first day of each month thereafter.

John J. Morris
Administrative Law Judge

Distribution:

J. Mark Ogden, Esq., Office of the Solicitor, U.S. Department of Labor, Federal Building, Suite 3247, 300 North Los Angeles Street, Los Angeles, CA 90012 FAX 213-894-2064

Mr. Albert A. Lewis, President, NAVAJO CONCRETE, INC., P.O. Box 117, Templeton, CA 93465 FAX 805-238-0140

/ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 25 1994

ROX COAL, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 94-192-R
	:	Citation No. 3712004; 1/24/94
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 94-193-R
	:	Order No. 3959742; 1/24/94
	:	Docket No. PENN 94-194-R
	:	Order No. 3959743; 1/24/94
	:	Diamond T C Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 94-360
	:	A.C. No. 36-08214-03537
v.	:	Diamond T C Mine
ROX COAL INCORPORATED, Respondent	:	

DECISIONS

Appearances: John M. Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Respondent; Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for the Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contests filed by Rox Coal Incorporated (hereafter Rox Coal), pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the legality of one section 104(d)(1) "S&S" citation and two section 104(d)(1) "S&S" orders issued on January 24, 1994, citing Rox with three alleged "unwarrantable failure" violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The civil penalty case concerns proposed penalty assessments filed by the

petitioner pursuant to section 110(a) of the Act, seeking penalty assessments against Rox for the alleged violations. A consolidated hearing was held in Somerset, Pennsylvania, and the parties appeared and participated fully therein. The parties subsequently informed me that they agreed to settle their disputes and they filed their settlement proposals pursuant to Commission Rule 31, 29 C.F.R. § 2700.31.

Issues

The issues presented in these proceedings are whether the cited conditions or practices constituted violations of the cited safety standards; whether the alleged violations were "significant and substantial"; whether the alleged violations resulted from Rox's "unwarrantable failure" to comply with the cited standards; and the appropriate civil penalties to be imposed for the violations, taking into account the 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 104(d), 105(d), and 110(a) and (i) of the Act.

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

Stipulations

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

1. Rox Coal is subject to the Act and the presiding judge has jurisdiction in these proceedings.

2. The subject citation and orders were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Rox Coal at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

3. Rox Coal demonstrated good faith in the abatement of the citation and orders.

4. The assessment of civil penalties in these proceedings will not affect Rox Coal's ability to continue in business.

5. The appropriateness of the penalties, if any, to the size of Rox Coal's business should be based on the company's

annual production tonnage of 2,478,856, and the Diamond TC mine annual production tonnage of 225,074.

6. The Diamond TC Mine was assessed 102 violations over 111 inspection days during the 24 months preceding the issuance of the subject citation and orders.

7. The parties stipulate to the authenticity of their exhibits, but not to their relevance, nor to the truth of the matters asserted therein.

Discussion

Docket No. PENN 94-192-R

Section 104(d)(1) "S&S" Citation No. 3712004, issued at 9:00 a.m., on January 24, 1994, cites an alleged violation of 30 C.F.R. § 75.203(d), and the condition or practice cited is described as follows:

> Proper mining methods are not being followed in the 4 Right Two Main active section.
>
> The working face of the crosscut between the No. 1 and No. 2 entries has been mined through from the No. 2 entry to an unsupported area of the the No. 1 entry. The condition occurred inby survey station No. 1031 of the No. 1 entry. Also, the crosscut from the No. 3 entry to the No. 2 entry, inby survey station 1022 of the No. 3 entry has been mined into an unsupported area of the No. 2 entry.
>
> In order for this citation to be terminated all employees shall be reinstructed in proper mining methods and aspects of the approved roof control plan.

Docket No. PENN 94-193-R

Relying on the previously issued section 104(d)(1) Citation No. 3712004, the inspector issued a section 104(d)(1) "S&S" Order No. 3959742, at 9:45 a.m., on January 24, 1994, citing an alleged violation of 30 C.F.R. § 75.220(a)(1), and the cited condition or practice states as follows:

> The approved roof control plan (March 9, 1992), in effect at the subject mine was not being followed in the 4 right submains working section (Safety precaution No. 20, page 8). Inby the next crosscut of Survey Station No. 1022 in the No. 3 entry a visible clay vein, 1 to 4 feet wide, extended rib to rib across the entry. Two crosscuts, T-5 channels or equivalent were not installed on each side of clay vein. Also, at the

working face of No. 3 entry a clearly visible clay vein 1 to 5 (sic) wide approximately 40 feet long ran up the middle of the entry. Bacon skins were installed in this area but they are not equivalent to which is required in safety precaution No. 20. Also, there was an area approximately 15 feet where nothing was installed according (sic) precaution No. 20.

Docket No. PENN 94-194-R

Following the issuance of the aforementioned section 104(d)(1) citation and order, the inspector issued section 104(d)(1) "S&S" Order No. 3959743, at 9:50 a.m., January 24, 1994, citing an alleged violation of 30 C.F.R. § 75.360(b)(3), and the cited condition or practice states as follows:

> Improper (sic) pre-shift examinations were not being made in the 4 right submains working section in that when conducting an inspection in the section obvious hazards of the approved roof control plan was observed and citations/orders were issued on these conditions. The areas the preshift examiner placed his dates, time, and initials. The record book had no hazards observed.

The order was subsequently modified on February 15, 1994, and the following was added to the description of the cited conditions or practices:

> An adequate preshift examination was not being made in the 4 Right Submains working Section.

In support of the alleged violations, the Secretary presented the testimony of Acting Subdistrict Manager Theodore W. Glusko (Tr. 11-142); and MSHA electrical inspector William Kerfoot (Tr. 144-178).

Rox Coal presented the testimony of mine assistant safety engineer David Flick (Tr. 178-202); roof bolter operator Robert Smith (Tr. 203-215); section foreman Ralph Young (Tr. 215-224); and section foreman Michael J. Phillips (Tr. 222-237).

The parties subsequently informed me that they proposed to settle the disputed citation and orders and the petitioner filed a motion seeking approval of the proposed settlements. Upon approval of the proposed settlements associated with the civil penalty proceeding (Docket No. PENN 94-360), Rox Coal has agreed to withdraw its contests challenging the disputed citation and orders.

In support of the proposed settlement dispositions of the section 104(d)(1) citation and orders, the petitioner states that based on the testimony presented at the trial of these matters,

the parties are in agreement that there is insufficient evidence to establish gross negligence or aggravated conduct by Rox Coal with respect to the three cited violations. Under the circumstances, the petitioner states that MSHA has agreed to reclassify the section 104(d)(1) citation and orders as section 104(a) citations, with corresponding proposed penalty assessment reductions.

Conclusions

After careful review and consideration of the pleadings, the testimony and evidence presented at the hearing, as reflected in the trial transcript, and the arguments presented in support of the proposed settlements, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.31, the motion filed by the petitioner IS GRANTED, and the settlements ARE APPROVED.

ORDER

In view of the foregoing, IT IS ORDERED AS FOLLOWS:

1. Section 104(d)(1) "S&S" Citation No. 3712004, January 24, 1994, citing a violation of 30 C.F.R. § 75.203(d) IS MODIFIED to a section 104(a) "S&S" citation, and as modified IT IS AFFIRMED. Rox Coal IS ORDERED to pay a civil penalty assessment of $300, in settlement of the violation.

2. Section 104(d)(1) "S&S" Order No. 3959742, January 24, 1994, citing a violation of 30 C.F.R. § 75.220(a)(1), IS MODIFIED to a section 104(a) "S&S" citation, and as modified IT IS AFFIRMED. Rox Coal IS ORDERED to pay a civil penalty assessment of $300, in settlement of the violation.

3. Section 104(d)(1) "S&S" Order No. 3959743, January 24, 1994, citing a violation of 30 C.F.R. § 75.360(b)(3), IS MODIFIED to a section 104(a) "S&S" citation, and as modified IT IS AFFIRMED. Rox Coal IS ORDERED to pay a civil penalty assessment of $300, in settlement of the violation.

IT IS FURTHER ORDERED that payment of the aforesaid civil penalty assessments shall be made by Rox Coal 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

Distribution:

Joseph A. Yuhas, Esq., 1809 Chestnut Avenue, P.O. Box 25, Barnesboro, PA 15714 (Certified Mail)

John M. Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Room 14480, Gateway Building, Philadelphia, PA 19104 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 25 1994

PHILLIP R. ELSWICK, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 94-119-D
	:	HOPE CD 93-20
COPPERAS COAL CORPORATION, Respondent	:	No. 1 Mine

DECISION

Appearances: Robert Lee White, Esq., Madison, West Virginia, for the Complainant;
Anthony J. Cicconi, Esq., Shaffer & Shaffer, Charleston, West Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainant filed an initial complaint with the U.S. Department of Labor, Mine Safety and Health (MSHA), and after investigating the complaint, MSHA informed the complainant of its decision not to pursue the matter. The complainant then filed his complaint pro se with the Commission, and subsequently retained counsel to represent him.

The complainant alleged that he was employed by the respondent as a certified electrician for six days at the respondent's mine, and was reassigned as a greaser after he had reported an unsafe breaker and panic switch on a mining machine to mine management. The respondent took the position that the complainant quit his job for reasons other than his safety complaint and denied any discrimination. A hearing was convened in Charleston, West Virginia, and the parties appeared and participated fully therein. However, as discussed hereafter, the

parties agreed to settle their dispute, and the complainant's oral motion to withdraw his complainant based on the settlement was granted from the bench. After considering the terms of the settlement on the record, it was approved from the bench, and the matter was dismissed.

Issue

The issue presented in this case is whether or not the respondent discriminated against the complainant by reassigning him from his certified electrician's job to a greaser's job after he complained to mine management about an unsafe condition on a continuous mining machine.

Applicable Statutory and Regulatory Provisions

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

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

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

Discussion

The complainant presented the testimony of Billy Cook, a former employee of the respondent who commuted to the mine and worked with the complainant at the time he left his employment. The complainant, Phillip Elswick, also testified, and both witnesses were cross-examined by the respondent's counsel, and responded to several questions from the presiding judge. At the conclusion of all of this testimony and during a break in the hearing, counsel for the parties informed me that the parties reached an agreement to settle their dispute and that Mr. Elswick decided to withdraw his complaint on the basis of the settlement reached by the parties.

The proposed settlement was made on the record, and it was approved by the presiding judge. Mr. Elswick's request to withdraw his complaint was granted, and the case was dismissed from the bench.

Order

The parties ARE ORDERED to comply with the terms of the settlement. In view of the settlement and the withdrawal of the complaint, this matter IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Robert Lee White, Esq., 55 Avenue B, P.O. Box 157, Madison, WV 25130-0157 (Certified Mail)

Anthony J. Cicconi, Esq., Shaffer & Shaffer, Bank One Center, 707 Virginia Street E, Suite 1710, P.O. Box 3973, Charleston, WV 25339 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 28 1994

SECRETARY OF LABOR, MINE AND SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 94-35-M
	:	A.C. No. 0301597-05504
v.	:	Docket No. CENT 94-42-M
	:	A.C. No. 0301597-05505
CHRISMAN READY-MIX, INC., Respondent	:	Clarkville Quarry

DECISION

Appearances: Nancy B. Carpentier, Esq., Robert A. Goldberg, Esq., Office of the Solicitor, U.S. Department Of Labor, Dallas, Texas, for the Petitioner; Lonnie C. Turner, Esq., Turner & Mainard, Ozark, Arkansas, for the Respondent.

Before: Judge Feldman

These proceedings concern proposals for assessment of civil penalties filed by the Secretary of Labor against the respondent corporation pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). These matters were called for hearing on August 2, 1994, in Fort Smith, Arkansas.

Docket No. CENT 94-35-M concerns a total proposed civil penalty of $250.00 for five citations alleging nonsignificant and substantial violations of mandatory safety standards contained in Part 56 of the mine safety regulations, 30 C.F.R. Part 56. Docket No. CENT 94-42-M involves three citations for alleged significant and substantial violations of Part 56 mandatory standards. The civil penalty proposed by the Secretary for each of these alleged violations is $63.00 for a total proposed penalty of $189.00.

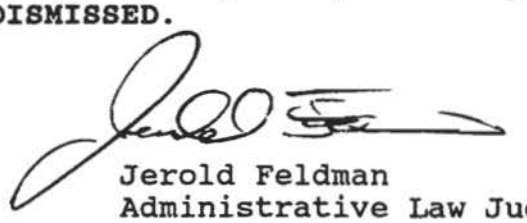
At trial, the Secretary relied upon the testimony of Mine Safety and Health Administration (MSHA) Inspector James Clifton Enochs and Robert Newton Chrisman, the respondent's Chairman of the Board. The respondent's direct case consisted of the testimony of its Chairman Robert Chrisman. At the culmination of the hearing I scheduled September 27, 1994, as the filing date for proposed findings and conclusions. The filing date was extended to October 27, 1994, at the request of the Secretary.

In lieu of filing posthearing proposed findings, on November 21, 1994, The Secretary, pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, filed a joint motion to approve settlement of all matters in issue in these proceedings. With respect to Docket No. CENT 94-35-M, the Secretary moves to vacate Citation No. 4116731. The respondent has agreed to pay the total proposed civil penalty of $200.00 for the remaining four citations. Similarly, the respondent has agreed to pay the total proposed penalty of $126.00 for two of the three citations that are the subject of Docket No. CENT 94-42-M. The Secretary seeks to vacate remaining Citation No. 4116732.

In support of their agreement, the parties state the settlement terms are consistent with the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i). While I am concerned that the agreed upon civil penalty of $63.00 for each of the two significant and substantial violations in Docket No. CENT 94-42-M may undermine the public's confidence in the enforcement of the Act by trivializing the serious nature of such violations, even where the respondent is a small operator, I will defer to the parties' agreement.

ORDER

After considering the evidence adduced at trial as well as the submission in support of the proposed settlement, the parties joint motion for the approval of settlement **IS GRANTED.** Accordingly, consistent with the parties' agreement, the respondent **IS ORDERED** to pay, within 30 days of the date of this decision, a total civil penalty of $326.00 in satisfaction of the citations in issue in these proceedings. Upon timely receipt of payment, these cases **ARE DISMISSED.**



Jerold Feldman
Administrative Law Judge

Distribution:

Nancy B. Carpentier, Esq., and Robert A. Goldberg, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin St., Suite 501, Dallas, TX 75202 (Certified Mail)

Lonnie C. Turner, Esq., Turner & Mainard, 110 West Commercial, Ozark, AR 72949 (Certified Mail)

/rb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 28 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. PENN 92-849
	:	A. C. No. 36-02173-03572
POWER OPERATING COMPANY, Respondent	:	Docket No. PENN 93-13
	:	A. C. No. 36-02713-03574
	:	Docket No. PENN 93-166
	:	A. C. No. 36-02713-03579
	:	Docket No. PENN 93-171
	:	A. C. No. 36-02713-03581
	:	Docket No. PENN 93-286
	:	A. C. No. 36-02713-03583
	:	Docket No. PENN 93-499
	:	A. C. No. 36-02713-03589
	:	Docket No. PENN 93-500
	:	A. C. No. 36-02713-03590
	:	Docket No. PENN 94-7
	:	A. C. No. 36-02713-03591
	:	Docket No. PENN 94-8
	:	A. C. No. 36-04999-03541
	:	Leslie Tipple

DECISION

Appearances: Richard W. Rosenblitt, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA for Petitioner
Michael T. Farrell, Esq., Stradley, Ronon, Stevens & Young, Philadelphia, PA for Respondent

Before: Judge Weisberger

Statement of the Case

These cases, consolidated for hearing, involve Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner) alleging violations of various mandatory regulatory safety

standards set forth in Part 30 of the Code of Federal Regulations. Subsequent to the filing of Answers by the Operator (Respondent) and subsequent to discovery, these cases were heard in Johnstown, PA on August 30 and 31, 1994. On November 14, Petitioner and Respondent filed post-hearing briefs.

Findings of Fact and Discussion

I. Docket No. PENN 93-166

A. Violation of 30 C.F.R. § 77.1104(b)

On December 3, 1992, Charles S. Lauver, an MSHA inspector, inspected the 009 Pit at the Frenchtown Mine. Lauver initially observed the highwall from his vehicle when he was approximately 80 to 100 feet from the highwall. The highwall was approximately 100 feet long, and approximately 50 feet high. Lauver approached the highwall by foot. When he was approximately 20 feet from the base of the highwall, he observed loose rocks scattered along the full length of the highwall at all levels of the highwall. He estimated that approximately 25% of the vertical area of the highwall was covered with loose material. He said that the size of the loose material that was round in shape, ranged from the size of golf balls up to twelve inches in diameter. The size of the loose material that was square in shape ranged from 2 inches by 2 inches to 10 to 12 inches by 4 to 6 inches. In addition, he observed approximately 10 to 12 deep cracks in the highwall. He estimated that the longest cracks were 5 to 8 feet in length, and the shortest ones were 2 feet in length. He estimated that, at the most, they extended 10 to 12 inches deep into the highwall. According to Lauver, the cracks were scattered along the length of the highwall. He opined that the presence of cracks indicates some degree of deterioration of the highwall. Also, he noted that cracks allow water to enter the highwall. He indicated that upon freezing, the water would expand, causing material to become loose from the highwall.

He also observed a thin layer of mud in at least one area. He estimated that the mud was probably 12 inches square, and a quarter inch thick. He opined that the mud layer was evidence of a "mud slip." (Tr. 69). He described a mud slip as a very thin layer of mud that exists inside the highwall between two layers of rock or shale. He said that, in general, because a mud slip is slippery, it can cause rocks to slide off the highwall at any time.

Lauver also described a void or undercut at the base of the highwall which was 5 feet deep, 10 feet high, and extended approximately 30 feet in length. He explained that because of the void, there would be less support for the overhang (area immediately above the void) causing instability to the highwall.

Lauver issued a citation alleging a violation of 30 C.F.R. § 77.1104(b) which provides as follows: "Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted."

On cross-examination, it was elicited from Lauver that during his inspection he did not see any material falling from the highwall and that, in essence, cracks on highwalls are common. He also agreed that standing at a point on the ground 20 feet from the highwall, which was the closet he got to the highwall, and ". . . looking up at a 50 foot highwall at objects that were as small as golf balls at some point, you would have a hard time telling for certainty whether they were loose." (Tr. 102) (sic).

Larry Kanour, Respondent's safety director, was the only witness on behalf of Respondent. He had not inspected the highwall on December 3, prior to the time it was cited by Lauver at approximately 8:00 a.m. However, he indicated that in his examination of the highwall on December 2, 1992, he had not noticed any loose material. He indicated that after he had inspected the highwall, he did not believe that it had any unsafe loose rocks, mud slips, cracks, or undercuts. On cross-examination, it was elicited that the examination that he had made of the highwall on December 2, was from his vehicle, approximately 70 feet from the highwall.

I find that the general testimony of Kanour regarding his opinion that there were no unsafe conditions on December 3, as observed from his vehicle 70 feet from the highwall, is insufficient to rebut or contradict Lauver's detailed testimony regarding the quantity, size, and extent of the various conditions he observed from approximately 20 feet from the base of the highwall. Based on the nature and extent of the conditions observed by Lauver, I find that on December 3, there were unsafe conditions on the highwall that had not been corrected. Also a portion of the highwall was overhanging a void. I also find that the unsafe areas of the highwall were not posted. I thus find that Respondent violated Section 77.1004(b), supra.

B. Unwarrantable Failure

In order to establish that a violation resulted from an operator's unwarrantable failure, it must be established that the operator engaged in aggravated conduct which is more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997, 2203-2204 (1987)).

According to Kanour, he had not noticed any loose material in his inspection of the highwall on December 2. He indicated that on December 3, he had not yet inspected the highwall prior to the time it was cited. Lauver opined that on December 3, the loose material on the highwall was "very obvious" to him, and it was "very visible." (Tr. 87).[1] He also said that the undercut was "very visible." (Tr. 87). He opined that the loose material and other conditions that he observed, had been in existence over two to three 12 hour shifts. He based his opinion upon the extensive loose materials seen on October 3. There is no evidence as to when the void or overhang had been created.

I accept the detailed testimony of Lauver regarding the extent and types of various conditions he observed on the highwall. Also, in light of his experience, I accept his conclusion that the conditions were very visible, and very obvious. Due to the extent and nature of these conditions, I find that the violation herein resulted from Respondent's aggravated conduct in not having observed these conditions from a position where they could have been observed, and not having taken steps to have these conditions corrected, or having had the area posted. I thus find that the violation herein resulted from Respondent's unwarrantable failure.

C. Significant and Substantial

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

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

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a

---

[1] On cross examination he indicated that two-thirds of the "condition" was totally obscured "as I approached it." (Tr. 125) (emphasis added). I find this admission to be insufficient to dilute his testimony on direct examination that the undercut was "very visible." (Tr. 87).

mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

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

I have found that the cited conditions herein constituted a violation of Section 77.1104(b), supra. Also the evidence indicates that these conditions created the hazard of an injury from falling rock. Lauver indicated on cross-examination that when he examined the highwall, he stood in the area that he had previously described on direct-examination as being exposed to the danger of falling rocks or other material. Kanour indicated that the drill operator who worked on December 2 had not complained about any dangerous condition. Kanaour also indicated that he had not received any complaints from the drill operator who worked on December 3, a Mr. Eckburg, about dangerous conditions "in-that Pit." (Tr. 134). Kanour also indicated that the cab of the drill rig was steel enclosed.

I accept Lauver's uncontradicted and unimpeached testimony that the drill operator spends approximately 15% to 20% of his time outside the cab performing various duties such as moving the drill, or removing chips from the drill holes. This individual would then be exposed to the danger of being hit by falling material from the highwall. Taking into account the size and extent of unsafe material on the highwall, I conclude that it has been established that the violation contributed to the hazard of an injury from falling material, and that this injury was reasonably likely to have occurred. Due to the extent and size

of the loose material on the highwall, I find that there was a reasonable likelihood that the resulting injury would be of a reasonably serious nature. I find that the violation was significant and substantial.

D. **Penalty**

I find that the violation herein was of a high level of gravity, and resulted from more than ordinary negligence. I find that a penalty of $9,000 is appropriate.

II. Docket No. PENN 93-286 (Citation No. 3709747)

According to Lauver, on December 3, 1992, while continuing to inspect the highwall, he traveled to the upper bench above the highwall. Using a slope meter, he sighted along the slope of the highwall, and the meter indicated a slope of 0 degrees. He issued a citation pursuant to 30 C.F.R. § 77.1000, alleging a failure to follow the Ground Control Plan ("Plan") because the highwall was vertical for a 300 foot distance ". . . . and there is loose material on the highwall and the highwall was undercut for over 30 ft." (sic).

The Plan provides for the slope of the highwall to be as follows "± 12°" (Government Exhibit 9, p. 5). The Plan also provides as follows: "Note: All loose material removed from highwalls by drag line or other equipment during the progress of the operation." (Government Exhibit 9, p. 5). (Emphasis added). Further, as pertinent, the Plan provides that "Where the height of the highwall is such where it cannot be reached with the equipment to remove loose material, a barricade will be provided along the highwall to prevent falling material from injuring workmen."

Kanour indicated that he was instrumental in creating the Plan. He opined that the slope of the highwall did conform to the Plan. Lauver indicated on cross-examination all highwalls "curve," and are "not uniform all the way across." (Tr. 185). He also explained that it is nearly impossible to maintain an exact degree of slope on a highwall, and hence, a 3 to 4 degree variance is allowed.

I find, as set forth above, I(A) infra, that the evidence establishes that there were loose materials throughout the highwall. Since the highwall was 50 feet high, some of the loose material could not have been reached with equipment. Since a barricade was not provided as required by the Plan, I conclude that the plan has been violated. Also, since the

operation continued in spite of loose material being on the highwall I find that there was a violation of the section of the Plan which requires the removal of such material "during the progress of the operation." Hence I find that it has been established that Respondent did violate its Plan, and hence did violate Section 77.1000, supra. I find that the violation was significant and substantial, essentially for the same reasons setforth above, I(C) infra. I find that a penalty of $1,779 is appropriate.

III. Docket No. PENN 92-849

A. Violation of 30 C.F.R. § 1607(a)(a)

According to Lauver, on July 1, 1992, he observed three to five Caterpillar 777 and 785 rock trucks. He said that the trucks were loaded with overburden consisting of rocks, shale, soil, and clay. He said the largest items were approximately 2 feet by 4 feet. According to Lauver, the material in the trucks ". . . was far above the sides of the bed." (Tr. 215). Lauver further indicated that materials were falling off both the sides and the rear of the trucks as they traveled down the road. He said that some areas of spillage on the roadway extended 10 feet in strips, and that in addition, in some areas ". . . there would be a pile approximately a foot to 18 inches in depth." (Tr. 220).

Lauver issued a citation alleging a violation of 30 C.F.R. § 77.1607(a)(a), which provides as follows: "Railroad cars and all trucks shall be trimmed properly when they have been loaded higher than the confines of their cargo space."

Greenawalt opined that there were not enough rocks spilling out of the trucks to constitute any danger. According to Greenawalt, once a coal truck is loaded with coal by a loader, the operator of the loader trims the coal truck as follows: "(he) will pack the top down and pack the side down with the bucket on the loader. . . ." (Tr. 333). Greenawalt explained that in contrast, rock trucks are loaded by hydraulic shovels. He said that in loading the Caterpillar 785 rock trucks, the hydraulic loader loads until a red light appears on a computer, signaling that the truck is loaded. Kanour testified that pedestrians are not allowed in the area where rocks fall off trucks. He also said that vehicles are not allowed to drive so as to be in danger of being hit by falling rocks. Greenawalt explained that trucks straddle, or go around spillage. He said that in normal operations, spillage is cleaned by a grader or dozer. Also, loaded trucks are given the right-of-way on the 100 foot wide roadway.

Richard Dufour, who operated the hydraulic shovel that loaded the trucks at issue, opined that the trucks were not improperly loaded, and they did not constitute any danger to him.

Lauver indicated on cross-examination that it is not possible to trim a rock truck after it has been loaded.

The term "trimmed properly" as contained in Section 77.1607(aa) supra, is not defined in the Act, or Title 30 of the Code of Federal Regulations. "Trim" is defined in Webster's Third New International Dictionary (1986 Edition), as pertinent, as follows: "to reduce by removing excess or extraneous matter." Hence, applying the common meaning of the term "trim" I find that, the term "trimmed properly" means that if a truck contains excess material that juts out beyond the confines of the cargo area, the material must be trimmed. (See, Peabody Coal Company), 2 FMSHRC 1072, (May 7, 1990) (Judge Laurenson); Power Operating Company, 16 FMSHRC 591 (March 23, 1994) (Judge Weisberger); Power Operating Company, 16 FMSHRC 1380, 1394 (June 30, 1994). (Judge Weisberger)).

I accept the testimony of Lauver, inasmuch as it was not contradicted or impeached, that the trucks at issue were loaded with materials above both sides and the rear of the trucks at issue. Hence, I conclude that the cited trucks were loaded higher than their cargo space. I thus conclude that Respondent violated Section 77.1607(a)(a), supra.

B. Significant and Substantial

Lauver described having observed material falling off both sides, and the rear of the trucks at issue as they traveled down the roadway. He also described piles of material on the road 1 to 1 1/2 feet deep. He said that other areas of spillage extended in 10 foot strips. He said that there were approximately 200 to 300 pounds of spillage on the roadway. Lauver described the rocks that had been spilled as being extremely sharp. He also indicated that because the material was falling off the trucks as they travelled, other trucks that travel on the road could be hit by the falling material. Also, on occasion, miners work in the area where the trucks travel, to fuel the rock trucks from a fuel truck.

Greenawalt indicated that it is standard procedure for a grader to clean spilled material as soon as such material is noted by the operator of the grader, or as soon as the operator is notified of the spillage by him (Greenawalt), or one of the other truck drivers. Greenwalt indicated that the major portion of the graders' workday is spent cleaning spillage. He further

indicated that Respondent has guidelines which require other vehicles in the area to yield the right-of-way to loaded rock trucks. He also stated that it is Respondent's policy to unload a rock truck with a shovel prior to any repair work being performed on it. Kanour indicated that vehicles are not allowed to be driven in such a fashion as to be in danger of being hit by falling rocks. He also stated that pedestrians are not allowed in the area of falling rock.

I take cognizance of Respondent's guidelines and work practices which are intended to minimize any risk of an accident due to the spillage of material from the trucks at issue. However, I place more weight upon the existence of the following physical factors: the number of trucks in violation of Section 77.1607(a)(a), supra; the fact that materials were above both sides and the rear of the trucks and were falling off of these areas; the extent of the spilled material on the roadway; and the presence of other vehicular traffic in the area. Within this framework I conclude that it has been established that, over time, there was a reasonable likelihood of an injury producing event resulting in injuries of a reasonably serious nature. I thus find that the violation was significant and substantial. (See U.S. Steel, supra).

C. Unwarrantable Failure

In essence, Respondent's witnesses opined that there was no hazard resulting from the conditions observed by Lauver. Respondent did not contradict the testimony of Lauver that on June 19, 1992, Lauver had previously cited Respondent for a violation of Section 77.1607(a)(a), supra, based upon conditions similar to those noted in the citation at issue. Respondent did contradict or impeach Lauver's testimony, that after he issued this citation he discussed with Respondent's agents the hazards connected with material falling from trucks. He indicated that after this discussion, Kanour told him that, referring to material being loaded above the cargo space, it would not happen again. Since this testimony of Lauver was not impeached or contradicted, I accept it. I thus find, based upon Lauver's testimony, that the violation herein was as a result of more than ordinary negligence, and constituted aggravated conduct. I thus find that the violation resulted from Respondent's unwarrantable failure (See Emery, supra). I find that a penalty of $8,000 is appropriate.

IV. Docket No. PENN 93-13 (Citation No. 3490430)

Lauver testified that he could not recall what he observed during an inspection on July 14, 1992. Specifically, he could

not recall citing a truck on that date. He stated that he did not remember any facts that led to the issuance of a citation on that date. Nor could he tell why he issued a Section 104(d)(2) order at that time. Accordingly, due to the lack of proof on the part of Petitioner, Order No. 3490430 is dismissed.[2]

V. Docket No. PENN 93-171 (Citation No. 3709755)

Lauver testified that on December 8, 1992, he observed material falling from the bed of a rock truck. He indicated that the manner in which the material fell from the truck was the same as testified to him previously concerning Order No. 3490421. He indicated that the material that had fallen contained sharp edges, and was high enough to do damage to the tires or tie-rod of a pickup truck driven in the area. He opined that should damage occur, the steering of the vehicle would be affected, "causing a sudden stop which would in return jolt the operator, the driver of the truck." (Tr. 395).

Lauver issued a citation alleging a violation of 30 C.F.R. § 77.1607(a)(a), supra. Essentially for the reasons discussed above, III(A) infra, I find that Respondent did violate Section 77.1607(a)(a).

Greenawalt, who was driving a pickup truck behind the truck in question, testified that he did not see material falling off the back of the truck. He did however see material on the road which he indicated was no danger to him, as the truck that he was driving could have driven around, or straddled the material. Greenawalt said there were no other vehicles in the area that were in any danger. He said had he seen material rolling off the back of the truck, he would have called to have the road cleaned. He also indicated that when he saw the material on the road he told the bulldozer operator to clean it up immediately, and the operator informed him that he was already on his way to clean it up.

For the reasons discussed above, III(B) infra, I conclude that the violation herein was significant and substantial, as well as the result of Respondent's unwarrantable failure.

I find that a penalty of $7,500 is appropriate.

---

[2] Since Lauver had no recollection of the facts that formed the basis of the order he issued, I place no probative weight on Government Exhibits 15 (the citation issued by Lauver) and 16 (Lauver's notes).

VI. Docket No. PENN 93-499 (Citation No. 3709734)

On June 21, 1993, Keith Russell Thompson was employed by Operators Unlimited, and was working at Respondent's Ginner Mine operating a Caterpillar 777 rock truck dumping material from a dumping site. Thompson estimated that the berm at the edge of the dumping site was 12 inches high, and was composed of dirt and rock. According to Thompson, after he had dumped at least 10 times, he picked up a load of materials, transported it to the dumping site, put the rock truck in reverse, and backed up to the berm traveling approximately 1 to 2 miles an hour. Thompson stated that once the back tire touched the berm, he "pushed the brake on" (Tr. 443), and the back of the truck slid beyond the berm for a distance of approximately 50 feet.

Perry Ray McKendrick, an MSHA inspector, was at the Ginner Mine on June 21, but did not observe the accident involving Thompson. Once McKendrick was informed of the accident, he went to the site of the accident. He estimated that the berm was three feet high in the area of the tire marks left by Thompson's vehicle. However, McKendrick indicated that at least part of the berm was at shoulder level.[3] McKendrick said that the berm was loose, and was not packed down or consolidated. He estimated that the base of berm was 3 feet wide. He indicated that the slope of the dumping site averaged 45 degrees.

McKendrick issued a citation alleging a violation of 30 C.F.R. § 77.1605(l) on the ground that the berm that was in place did not keep the truck at issue from traveling beyond the berm.

McKendrick indicated, on cross-examination, that he could not say that a berm at the mid-axle height of a 777 rock truck would definitely stop the truck from going beyond the berm.[4] He also indicated on cross-examination that most berms are made of loose material. He further indicated that a driver of a 777 rock truck would have to "give some fuel to get the CAT 777 over the berm" i.e., a berm 3 feet high. (Tr. 525) (sic).

David Jackson, project administrator for Operators Unlimited, opined that it is not appropriate to bump into the berm in order to stop the vehicle. Jackson said that prior to

---

[3] McKendrick is 5'7" tall.

[4] McKendrick stated that the diameter or the rear tires of the 777 truck in issue is 105 inches.

the accident Thompson was told not to hit the berm when backing up. Jackson fired Thompson, after the accident for negligently running through the berm.

30 C.F.R. § 77.1605(l) provides as follows: "berms . . . . shall be provided to prevent overtravel and overturning at dumping locations." 30 C.F.R. § 77.2(d) provides that the term berm "means a pile or mound of material capable of restraining a vehicle."

The plain language of § 1605(l) requires berms to prevent overtravel. Adequacy of a berm may be an issue involving a violation of 30 C.F.R. § 77.1605(k),[5] relating to elevated roadways. However, Section 77.1605(l) supra has different and stronger wording. Thus, the only issue here is whether the berm prevented overtravel. It is undisputed that the rock truck overtraveled the berm in a dumping area. I thus find that Respondent did violate Section 1605(l), supra.[6]

I find that the violation of Section 1605(l), supra, contributed to the accident that occurred in June 1993. The operator of the vehicle that overtraveled the berm was not injured. The berm was three feet high, in the area of the accident, and about a foot high elsewhere in the area. The midpoint of this diameter of the rear tires on the 777 rock truck in issue is approximately 4 1/2 feet. According to McKendrick, the driver of a 777 truck would have to "give some fuel to get the 777 over the berm" i.e., a berm three feet high. Within this context, I find the violation was not significant and substantial.

---

[5] Section 1605(k) supra requires only that berms "shall be provided" on the outer bank of elevated roadways. As such, the critical inquiry regarding an alleged violation of Section 1605(k), supra is whether the berms were adequate (U.S. Steel Corp, 5 FMSHRC 3 (1983). In contrast, Section 1605(l) specifies and qualifies that the berms are to be provided "to prevent overtravel."

[6] In essence, Respondent argues that driver negligence caused the berm's failure, and therefore no violation occurred. I reject this argument. A miner's negligence is irrelevant to whether an operator violated a standard (it is relevant in rating its negligence). A mine operator is liable without regard to fault for all violations of mandatory safety standards occurring in its mine committed by its employees, even if caused by unforeseeable misconduct of a non-supervisory employee. ASARCO, Inc., 8 FMSHRC 1632 (1986), aff'd., ASARCO,Inc. v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989); Southern Ohio Coal Co., 4 FMSHRC 1459, 1462 (1982).

A. Penalty

According to Thompson, during the one month that he worked at the site prior to the accident, he was never disciplined or told that he was not doing his work properly. On the other hand, Greenawalt testified that he reprimanded Thompson because on the Friday before the accident, Thompson had "bumped hard into the berm causing the berm to actually move backwards." (Tr. 541-542). Based on my observation of the witnesses' demeanor, I accept the testimony of Greenawalt. According to McKendrick, in essence, in order for a Caterpillar 777 to go over the berm, the operator must accelerate. Within this context, I find that the low level of Respondent's negligence should mitigate to some degree, the penalty to be imposed. I find that a penalty of $200 is appropriate.

VI. Settlements

Subsequent to the hearing, on September 16, 1994, Petitioner filed Motions for Decision and Order Approving Settlement, pertaining to Docket Nos. PENN 93-500, PENN 94-7.[7] Penn 94-8, and Order No. 3709750 (Docket No. PENN 93-171). A reduction in total penalties from $14,790 to $10,745 is proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the Motions are **GRANTED**.

ORDER

It is Ordered that: (1) the following citations/orders be amended to non-significant and substantial: 3715434, 3708654, 3710040, and 3709734; (2) the following orders be amended to citations that are not the result of Respondent's unwarrantable

[7] The Motion filed September 16, 1994, concerns citation no. 3709736. A Motion to approve settlement concerning the remaining citation, No. 3710040, had been served on Respondent on May 5, 1994, and filed, via fax, on November 14, 1994.

failure: 3715434 and 3708654; (3) citation No. 3715432 be vacated; (4) citation No. 3490430 be dismissed; and (5) Respondent shall pay a total civil penalty of $37,224 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

Richard W. Rosenblitt, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Room 14480, Philadelphia, PA 19104 (Certified Mail)

Michael T. Farrell, Esq., Stradley, Ronon, Stevens & Young, 2600 One Commerce Square, Philadelphia, PA 19103-7098 (Certified Mail)

/efw

FEDERAL MIN_ SAFETY AND HEALTH REVIEW COMMISSION

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

November 29, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 94-320
	:	A. C. No. 15-16973-03538
v.	:	
	:	Docket No. KENT 94-329
ABM COAL COMPANY, INC., Respondent	:	A. C. No. 15-16208-03576
	:	
	:	Docket No. KENT 94-330
	:	A. C. No. 15-16208-03577
	:	
	:	Docket No. KENT 94-533
	:	A. C. No. 15-16208-03578
	:	
	:	No. 1 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner;
Roger Blair, Office Manager, ABM Coal Company, Inc., *Pro Se*, Mary Alice, Kentucky for Respondent.

Before: Judge Hodgdon

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against ABM Coal Company, Inc., pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820. The petitions allege 32 violations of the Secretary's mandatory health and safety standards. For the reasons set forth below, I vacate one citation, affirm the rest, while modifying three of them, and assess penalties in the amount of $5,743.00.

A hearing was held in these cases on August 17, 1994, in Pineville, Kentucky. MSHA Inspector Robert D. Clay, testifying for the Secretary, was the only witness at the hearing. In addition to the evidence presented at the hearing, I have also considered the parties post-hearing briefs in my disposition of these cases.

SETTLED VIOLATIONS

At the beginning of the hearing, the parties advised that they had reached a settlement agreement in Docket Nos. KENT 94-320 and KENT 94-533. In addition, ABM's representative stated that there were several citations in the two remaining dockets that ABM did not wish to contest.

With regard to Docket No. KENT 94-320 the parties agreed to reduce the total amount of proposed penalties from $1,664.00 to $1,152.00. This was accomplished by reducing the proposed penalty for Citation No. 4039883 from $431.00 to $50.00 and the penalty for Citation No. 4039880 from $431.00 to $300.00. All of the other proposed penalties would remain as assessed.

The reduction in the first citation occurred because the citation had been subsequently modified by the inspector from "significant and substantial" to "non-significant and substantial" but the modification had not caught up with the file. (Tr. 9.) The other penalty was reduced because of a reduction in the number of miners affected by the violation. (Tr. 9-10.)

The parties agreed to reduce the proposed penalty in Docket No. KENT 94-533 from $1,008.00 to $800.00 by modifying Citation No. 4241932 to delete the "significant and substantial" designation and reducing the penalty from $168.00 to $50.00 and by modifying the level of negligence for Citation Nos. 3164811 and 3164812 from "moderate" to "low" and reducing the penalties for $168.00, each, to $123.00, each. (Tr. 11-12.) The penalties for the remaining three citations would be as originally assessed.

The Respondent did not contest Citation Nos. 3164862, 3164863, 3164864, 4258059, 4241744 and 4241745 in Docket No. KENT 94-329 and Citation Nos. 4241750, 4241755, and 4258021 in Docket No. KENT 94-330. Mr. Blair stated that he understood that the proposed penalty would be assessed for these citations. (Tr. 20.)

Having considered the representations and documentation presented, I conclude that the proffered settlements are appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i). Accordingly, approval of the settlement agreements is granted and their provisions will be carried out in the order at the end of this decision.

CONTESTED VIOLATIONS

Docket No. KENT 94-329

Citation No. 3164865 was issued by Inspector Clay on October 26, 1993. It alleged a violation of Section 75.400 of the Regulations, 30 C.F.R. § 75.400, and stated that "[c]ombustible material in the form of float coal dust has accumulated in the 004 face belt starting box and its energized electrical components." (Gov. Ex. 8.) Citation No. 3164868 sets out the same violation, on the same date, for "the energized belt starting box at the No. 4 belt drive." (Gov. Ex. 9.)

The inspector testified that float coal dust had accumulated on the electrical components and the floor of both starting boxes. He stated that it was black in color, appeared to be "an eighth of an inch, or so, deep," was "extremely flammable" and "extremely explosive when suspended . . . within any type of enclosed area." (Tr. 26, 47.)

Section 75.400 requires that "[c]oal dust, including float coal dust deposited on rock-dusted services, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein." In its brief, ABM implicitly admits that the violations occurred by arguing only that the violations were not "significant and substantial." (Resp. Br. at 1.) Consequently, I conclude that ABM violated Section 75.400 in both of these instances. *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (October 1980).

Turning next to the question of whether the violations were "significant and substantial," a "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 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 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, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria).

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

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

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

As is usually the case, whether these violations were S&S turns on the third element of the *Mathies* criteria. In connection with this element, Inspector Clay testified that:

> Inside [these] starting box[es] there are exposed conductors, there are electrical components; there is constant arcing. Every time the conveyor belt is

> stopped or started there's a line starter contained herein; there's other electrical components, circuit breakers that have a tendency to arc anytime the power was removed from the conveyor belt due to any type of malfunction or any type of repair work.

(Tr. 26-7, 47.)

The inspector stated that if arcing occurred with an accumulation of fine coal dust a "fire" and "an explosion which would initially blow the lids off of the box or blow doors open and spread it to the mine outby area" would result. (Tr. 27, 47.) He further testified that if the fire spread out to the mine, the ribs could catch fire, miners could be overcome by the smoke and that float coal dust in the mine air, which was present around the conveyor belts, "would intensify the explosion of the fire." (Tr. 27-8, 47-8.)

ABM argues that the violations were not S&S because as part of its weekly cleanup program the starting boxes are routinely vacuumed by the company's electrician and, therefore, only a minute amount of coal dust could accumulate between cleaning periods. It states that "[o]ur cleanup program was approved by MSHA and there has never been an incident caused by dust in these starting boxes." (Resp. Br. at 1.)

The Commission has held that "[a] cleanup plan cannot establish procedures that allow coal and other combustible materials to accumulate in violation of section 75.400," nor preclude the violation from being S&S. *Utah Power & Light Co.*, 12 FMSHRC 965, 969-71 (May 1990). I conclude that the uncontroverted testimony of Inspector Clay establishes "that the hazard contributed to by the violation, an ignition or explosion in the active workings in question, posed a reasonable likelihood of injury to any miners working there." *Id.* at 971. *See also Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1231-32 (June 1994). Accordingly, the violations were "significant and substantial."

The next contested citation was issued on November 28, 1993. Citation No. 3164879 is for a violation of Section 75.512, 30 C.F.R. § 75.512, and states that "[t]he energized 4,160 volt silpak power center, serial No. B-799-578[,] located 1 cross cut from the No. 6 belt head was not maintained in a safe operating condition. The lid over the energized 4,160 volt power wires was not secured." (Gov. Ex. 11.)

Section 75.512 requires that "[a]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions." In connection with this violation, Inspector Clay testified that there are three lids on the power center, secured by eight bolts, and that three bolts were missing from one of the lids. He estimated that in this unsecured condition the lid could be raised five or six inches and access gained to the inside by an unqualified person, i.e. someone other than a certified electrician. Based on this evidence, I conclude that the regulation was violated.

The inspector believed that this violation was "significant and substantial" because "there were energized power conductors there. There was nothing to hinder anyone from coming over there had there been a malfunction." (Tr. 62.) On the other hand, he also testified that even if the power center had all its bolts in place, anyone with "[e]ither a half-inch socket and a ratchet or a pair of adjustable pliers or possibly a crescent wrench" could get into it. (Tr. 62-3.)

In view of the fact that such tools would not appear to be that hard for an unauthorized person to acquire in a mine, and the fact that the lid could only be raised five or six inches, I do not believe that three missing bolts raises the likelihood of a serious injury in this instance from possible, which would exist even if the bolts were present, to reasonably likely. Accordingly, I conclude that the third element of the *Mathies* criteria has not been met, and that the violation was not "significant and substantial." I will adjust the penalty appropriately.

Citation No. 3164880 was also issued on November 28. It sets out a violation of Section 75.202(a), 30 C.F.R. § 75.202(a), and relates that "[l]oose inadequately supported draw rock was observed at various locations along the No. 5 belt line. This draw rock ranged in thickness of 2 to 5 inches." (Gov. Ex. 13.) Inspector Clay testified that this was in the No. 3 entry and that the belt line also served as a secondary escapeway. He opined that if the unsupported draw rock should happen to fall on someone it could result in a fatal injury.

Section 75.202(a) provides that "[t]he 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 inspector stated that he observed miners working in the entry and on the belt line. Consequently, I conclude that ABM violated this regulation.

Inspector Clay testified that one of the loose hanging rocks was three feet by four feet and was four inches thick. He said that some of the small rocks could be scaled down with a pry bar and that the rest had to be supported by straps and bridge bars. Applying the *Mathies* criteria, I conclude that this violation was "significant and substantial."

Citation No. 4241742 also alleges a violation of Section 75.202(a). It says that "[d]islodged roof supports in the form of timbers were missing & broken at various locations along the No. 5 belt conveyor." (Gov. Ex. 14.) In connection with this violation, the inspector testified that he observed 20 to 25 timbers at various locations on the right and left rib of the No. 5 belt entry that were broken, missing or dislodged, which indicated to him that "the area obviously had been taking excessive weight from the overburden and the immediate roof located above that entry." (Tr. 70.)

Inspector Clay further testified that the timbers were necessary to provide adequate roof support in that area and that their absence could have resulted in a fatal roof fall. Based on this evidence, I conclude that the regulation was violated and that the violation was "significant and substantial."

Docket No. KENT 94-330

The first two contested citations in this docket were issued on November 3, 1993, for splices at different locations on a trailing cable for a continuous miner. Citation No. 4242751 states that "[a] permanent splice in the 4/0 3 conductor 480 volt energized cable extending to & serving the 101 Jeffery Continuous Miner on the 004 MMU was not effectively insulated and sealed so as to exclude moisture at a location approximately 60 feet from the starting box" in violation of Section 75.604(b), 30 C.F.R. § 75.604(b). (Gov. Ex. 22.) Citation No. 4241752 sets out an identical violation for a splice "approximately 90 feet from the starting box." (Gov. Ex. 23.)

Section 75.604(b) states that "[w]hen permanent splices in trailing cables are made, they shall be: . . . (b) Effectively insulated and sealed so as to exclude moisture." Inspector Clay testified, with respect to the first splice, that "[t]he ends of this particular permanent splice were open, there was an opening an eighth to a quarter of an inch on each ends [*sic*] indicating that an insufficient amount of material, glue or putty, had been pressed or applied during the course of the splice." (Tr. 88.) He testified that he found the same problem with respect to the second splice.

According to the inspector, the glue or putty material "prevents water and moisture from coming inside of the boot [splice]." (Tr. 87.) The violations were abated by wrapping electrical tape at both ends of the splice.

Relying on language in the instructions which come with the splice kit, the Respondent argues the splices complied with the regulation without the tape. In particular, the Respondent points to the note to instruction No. 6 to support its position. Instruction No. 6 states "[l]ook for adhesive exposed and melted at each end of sleeve. Allow assembly to cool and adhesive to harden before shifting or bending splice area." The note says "[e]nds may be taped if insufficient cooling time is available. Tape may wear off with use. Loss will not impair function." (Resp. Ex. A.)

ABM apparently interprets the statement that loss of the tape will not impair the function of the splice to mean that the splice will still be moisture proof without the tape. I do not accept this interpretation for two reasons. First, it is more likely that the statement "loss will not impair function" refers to the function of the splice, that is that the cable be able to conduct electricity, not that the splice keep out moisture. Secondly, the note when read in its entirety plainly refers to putting tape over uncooled adhesive so that when the tape wears off with use, the adhesive will have cooled and function as it is supposed to.

In these two instances, the problem was not uncooled adhesive, but a lack of adhesive resulting in gaps at the ends of the splices which could admit water. Accordingly, I conclude that the splices violated Section 75.604(b).

In connection with his "significant and substantial" designation of these two violations, the inspector testified that the cable is frequently handled by the continuous miner operator, the miner helper, ventilation technicians and bridge operators; that if water got in the cable it could result in electrocution; and, that water was present in the mine from the coal seam, from the water spray system on the continuous miner, from the dust suppression system on continuous hauling system and from water sprayed to wet the roadways down. Based on this undisputed evidence, I conclude that the violations were "significant and substantial."

The next citation, Citation No. 4241754, alleges a violation of Section 75.214(a), 30 C.F.R. § 75.214(a), because "[a] supply of supplementary roof support materials [were] not available at a readily accessible location on the 004 working section or within 4 cross cuts of the working section." (Gov. Ex. 24.) Section 75.214(a) requires that "[a] supply of supplementary roof support materials and the tools and equipment necessary to install the materials be available at a readily accessible location on each working section or within four crosscuts of the working section."

Inspector Clay testified that during his inspection of the No. 3 Entry he asked the section foreman where the supplementary roof support materials were located and the foreman could not show him any, other than 16 timbers and some 36-inch resin bolts, either on the section or within four crosscuts of the section. The inspector further testified that after he got out of the mine, a mine official told him that the material was in the No. 4 Entry, but he was not taken back into the mine and shown where the materials were located.

Even if there were supplementary roof support materials in the No. 4 Entry at a location within four crosscuts of the working section, ABM has still violated the regulation. If the section foreman does not know where the supplementary roof materials are located and cannot immediately take the inspector to them, it can hardly be said that the materials are at a "readily accessible" location. Therefore, I conclude that ABM violated Section 75.214(a).

As Section 75.214(b) indicates, the purpose of this regulation is to have additional materials available to be used if adverse roof conditions or a roof fall are encountered.[1] In other words, this is material to be used in an emergency. As the Commission has stated, "[t]he hazards of roof falls are well known." *Cyprus Empire Corp.*, 12 FMSHRC 911, 915 (May 1990)(citation omitted). The failure to have the material necessary to react to such an emergency in a readily accessible location is clearly a "significant and substantial" violation.

---

[1] Section 75.214(b), 30 C.F.R. § 75.214(b), provides that "[t]he quantity of support materials and tools and equipment maintained available in accordance with this section shall be sufficient to support the roof if adverse roof conditions are encountered or in the event of an accident involving a fall."

Citation No. 4241756 alleges a violation of Section 75.517, 30 C.F.R. § 75.517, in that "[t]he remote line extending to the 102 Jeffrey continuous miner in use and located on the 005 MMU was not insulated adequately and fully protected at the location where it entered the rear of the machine connecting device. 2 exposed conductors were visible." (Gov. Ex. 26.) Section 75.517 requires that "[p]ower wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected."

Inspector Clay testified that the cable from the remote control to the continuous miner, "[w]here the cable entered the rear of the machine, either the cable had been pulled loose through some kind of strain or it had not been properly installed to begin with, because if a cable is loose, then two conductors can be seen." (Tr. 129.) He stated that the cable is handled frequently by the miner operator, the miner helper or a ventilation technician and that if the insulation wore off of the conductors during the normal course of mining, electrocution could result if someone touched the exposed wires.

I conclude that ABM violated the regulation as alleged. I further conclude that the violation was "significant and substantial." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573 (July 1984).

Citation No. 4241757 is the next citation. It states that Section 75.514, 30 U.S.C. § 75.514, was violated because "[t]he electrical connections made in the remote line at the No. 2 506 Jeffrey Bridge Carrier on the 005 MMU were not reinsulated at least to the same degree of protection as the remainder of the cable." (Gov. Ex. 27.) Section 75.514 requires, in pertinent part, that "[a]ll electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire."

The inspector testified that for some reason the outer jacket of the cable had been removed and that it had been replaced by wrapping electrical tape around the inner wires. He said that he concluded that the cable was not reinsulated to the same degree as the rest of the cable because the wrapped part of the cable was of a smaller diameter than the remainder of the cable. He explained that his determination that the wrapped section of the cable was not insulated to the same degree was "merely by observation." (Tr. 145.)

Inspector Clay further testified if one layer of the tape afforded the same degree of protection as the vulcanized rubber insulation on the cable, then that "would be fine and dandy," but that "[n]o one indicated to me that it did." (Tr. 154-55.) He related that the violation was abated by wrapping more tape around the repaired section, but he was not sure whether that tape was the same type as that used to repair it originally.

The evidence on this citation fails to establish a violation for two reasons. First, Section 75.514 only applies to connections or splices and there is no evidence that this was either.[2] Secondly, the fact that the repaired section of the cable was not as large as the rest of the cable does not necessarily prove that the degree of protection was not the same. Accordingly, I conclude that ABM has not been shown to have violated the regulation and will vacate the citation.[3]

The last contested citation is Citation No. 4241758. It alleges a violation of Section 75.400[4] because:

> Combustible material in the form of loose coal & float coal dust has accumulated on the mine floor to a depth of 3 to 8 inches over a distance of approximately 30 feet intermittently in the No. 3 Entry of the 005 MMU. This mine has a history of methane liberation and energized trailing cables are constantly on the mine floor. The area is dry and [*sic*]

(Gov. Ex. 28.)

The inspector testified that he observed accumulations of loose coal and float coal dust in the No. 3 Entry that he understood from the foreman had been left overnight. He stated that he based his statement in the citation that the "mine has a history of methane liberation" on an MSHA Laboratories "Analyses of Air Samples Received 02/07/94" for ABM which shows readings between 0.000 percent and 0.020 percent. (Gov. Ex. 21.)

---

[2] The inspector opined that "[i]t was probably a splice -- it may have been a damaged area. I did not have them remove the tape to inspect the inside of the conductor." (Tr. 144.)

[3] It appears that this situation would more properly have been cited under Section 75.517 of the Regulations.

[4] The text of Section 75.400 is set out on p. 3, *supra*.

Based on this unrebutted evidence, I conclude that the violation occurred as alleged. The very low methane readings for the mine would not normally lead one to conclude that the mine has a history of methane liberation. However, I find that the violation was "significant and substantial" for the same reasons discussed on page 5, *supra*, concerning the accumulations of loose coal and float coal dust in the starter boxes.

CIVIL PENALTY ASSESSMENTS

Section 110(i) of the Act, 30 U.S.C. § 820(i), sets out six criteria to be considered in determining an appropriate civil penalty. In connection with these criteria, the parties stipulated that ABM produced 305,605 tons of coal in the 12 months proceeding the proposed assessment in these cases, 238,284 tons of which were produced at the No. 1 Mine; that the proposed penalties are appropriate to ABM's size and will not affect its ability to continue in business; and that ABM demonstrated good faith in attempting and achieving rapid compliance after notification of the violations. (Tr. 13-14.) ABM's history of prior violations was also received into evidence. (Gov. Exs. 1A and 1B.)

Applying the six criteria to the contested and uncontested citations, I conclude that the penalties assessed by the Secretary are appropriate, with the exception of Citation No. 3164879, which I will reduce in accordance with my findings. I also conclude that the agreed upon penalties in the settled dockets are appropriate.

Accordingly, I have assessed a penalty for each citation as follows:

Docket No. KENT 94-320

Citation No. 4036879	$189.00
Citation No. 4039880	$300.00
Citation No. 4039881	$189.00
Citation No. 4039883	$ 50.00
Citation No. 4039884	$235.00
Citation No. 4039886	$189.00

Docket No. KENT 94-329	
Citation No. 3164862	$309.00
Citation No. 3164863	$189.00
Citation No. 3164864	$309.00
Citation No. 3164865	$189.00
Citation No. 3164868	$189.00
Citation No. 4258059	$189.00
Citation No. 3164879	$ 50.00
Citation No. 3164880	$189.00
Citation No. 4241742	$189.00
Citation No. 4241744	$189.00
Citation No. 4241745	$189.00
Docket No. KENT 94-330	
Citation No. 4241750	$189.00
Citation No. 4241751	$189.00
Citation No. 4241752	$189.00
Citation No. 4241754	$189.00
Citation No. 4241755	$189.00
Citation No. 4241756	$189.00
Citation No. 4241758	$189.00
Citation No. 4258021	$288.00
Docket No. KENT 94-533	
Citation No. 3164772	$168.00
Citation No. 3164773	$168.00

Citation No. 3164809	$168.00
Citation No. 4241932	$ 50.00
Citation No. 3164811	$123.00
Citation No. 3164812	$123.00
Total Penalty	$5,743.00

ORDER

Citation No. 4241757 in Docket No. KENT 94-330 is **VACATED** and the civil penalty petition **DISMISSED**. Citation No. 4039883 in Docket No. KENT 94-320, Citation No. 3164879 in Docket No. KENT 94-329 and Citation No. 4241932 in Docket No. KENT 94-533 are **MODIFIED** to delete the "significant and substantial" designations and the citations are **AFFIRMED** as modified. Citation Nos. 4036879, 4039880, 4039881, 4039884 and 4039886 in Docket No. KENT 94-320; Citation Nos. 3164862, 3164863, 3164864, 3164865, 3164868, 4028059, 3164880, 4241742, 4241744 and 4241745 in Docket No. KENT 94-329; Citation Nos. 4241750, 4241751, 4241752, 4241754, 4241755, 4241756, 4241758 and 4258021 in Docket No. KENT 94-330; and Citation Nos. 3164772, 3164773, 3164809, 3164811 and 3164812 in Docket No. KENT 94-533 are **AFFIRMED**.

ABM Coal Company, Inc., is **ORDERED** to pay civil penalties in the amount of $5,743.00 within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge
(703) 756-4570

Distribution:

Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Roger Blair, Office Manager, ABM Coal Company, P.O. Box 220, Mary Alice, KY 40964 (Certified Mail)

/lbk

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

NOV 29 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 94-587 A. C. No. 36-05466-04022
v.	:	
	:	Emerald Mine No. 1
CYPRUS EMERALD RESOURCES CORPORATION, Respondent	:	

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty filed on October 11, 1994, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

The penalty petition was filed on behalf of the Secretary by a "Conference and Litigation Representative", hereafter referred to as a CLR. In the cover letter to the petition the CLR advises that he is an employee of the Mine Safety and Health Administration who has been trained and designated as a CLR and is authorized to represent the Secretary in accordance with an attached Limited Notice of Appearance. In the appearance notice the CLR states that he is authorized to represent the Secretary in all prehearing matters and that he may appear at a hearing if an attorney from the Solicitor's office is also present.

Subparagraph (4) of section 2700.3(b) of the Commission's regulations, 29 C.F.R. § 2700.3(b)(4), provides that an individual who is not authorized to practice before the Commission as an attorney may practice before the Commission as a representative of a party with the permission of the presiding judge. In reviewing this matter, I take judicial notice of the fact that more than 5,000 new cases were filed with the Commission in FY 1994. Obviously, a caseload of this magnitude imposes strains upon the Secretary's resources as well as those of this Commission. It appears to me that the Secretary is attempting to allocate his resources in a responsible matter. Therefore, I exercise the discretion given me by the regulations, cited above, and determine that in this case the CLR may represent the Secretary in accordance with the notice he has filed.

On November 17, 1994, the CLR filed a motion to approve settlement for the one violation in this case. The originally assessed amount was $252 and the proposed settlement is also $252. However, the CLR requests that the citation be modified to delete the significant and substantial designation. The violation was issued because a continuous miner operator stood inside the chain conveyor on a continuous mining machine while he was cleaning and servicing the machine. The electrical power to the trailing cable for the machine had not been removed and the plug was not tagged out of service. According to the CLR, the circuit breaker on the mining machine had been placed in the "off" position. In order for the conveyor chain to move, both the circuit breaker and the conveyor switch on the machine would have to be activated. The individual responsible for operating the machine was the one standing inside the conveyor chain. The CLR represents therefore, that it was unlikely the machine would be energized while the miner operator was servicing it. I accept the representations of the CLR and based thereon approve the deletion of the S&S designation. The violation nevertheless, remains serious and warrants the agreed upon penalty assessment which is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, it is **ORDERED** that the motion for approval of settlement be **GRANTED.**

It is further **ORDERED** that Citation No. 3671905 be **MODIFIED** to delete the significant and substantial designation.

It is further **ORDERED** that the operator **PAY** a penalty of $252 within 30 days of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Gerald F. Moody, Jr., Conference and Litigation Representative, U. S. Department of Labor, MSHA, 200 James Place, Monroeville, PA 15146

Michael R. Peelish, Esq., Cyprus Emerald Resources Corp., 9100 East Mineral Circle, Englewood, CO 80112

/gl

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

November 4, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-615 A.C. No. 05-00294-03504 ZW5
v.	:	Somerset
ART BEAVERS CONSTRUCTION CO., Respondent	:	

PARTIAL SUMMARY DECISION

Before: Judge Cetti

Pursuant to 29 C.F.R. § 2700.67, the Secretary of Labor, Mine Safety and Health Administration (MSHA), through counsel, moves for a partial summary decision disposing of the issue as to whether the civil money penalty assessment was made within a reasonable time as required by 30 U.S.C. § 815(a). Respondent, Art Beavers Construction Company, sought to have the citation at issue, Citation No. 4060718, dismissed, and has asserted that the Secretary has failed to comply with the provisions of 30 U.S.C. § 815(a). (See, Respondent's Answer at paragraph 8). The Secretary asserts that the Secretary complied with the provisions of 30 U.S.C. § 815(a) as a matter of law. The parties agree that no disputed material issues of fact remain with regard to that issue and that this issue can be appropriately resolved by summary decision based on the agreed Stipulations and exhibits, the subject citation, the Petition for Assessment of Penalty and the Respondent's answer.

I

STIPULATIONS

The parties jointly stipulate and agree to the following:

1. Citation No. 4060718 was issued for an alleged non-significant and substantial violation of 30 C.F.R. § 48.29(a). A true and accurate copy of said citation is attached as Exhibit 1.

2. The cited standard requires that "[u]pon a miner's completion of each MSHA approved training program, the operator shall record and certify on MSHA Form 5000-23 that the miner has

received the specified training... The training certificates for each miner shall be available at the mine site for inspection by MSHA ..."

3. MSHA Inspector Larry Ramey issued said citation following an inspection, and he alleged that the MSHA Form 5000-23 for one miner was not available for inspection.

4. MSHA Inspector Larry Ramey terminated said inspection on September 10, 1992, and the citation was issued on the same date.

5. On that same date, MSHA Inspector Larry Ramey also issued Order No. 4060714. A notice of proposed assessment of penalty was issued by MSHA on November 25, 1992, for that order.

6. On August 4, 1993, MSHA issued the notice of proposed assessment of penalty for Citation No. 4060718. A true and accurate copy of the notice of proposed assessment is attached as Exhibit 2.

7. The notice of proposed assessment of penalty was issued 330 days after the citation was issued. (September 10, 1992 to August 4, 1993).

8. Respondent received a copy of the notice of proposed assessment of penalty on or about August 19, 1993.

9. On or about September 1, 1993, the Respondent filed a timely notice of contest with MSHA. The notice of contest was received on September 10, 1993. A true and accurate copy of that notice of contest is attached as Exhibit 3.

10. On October 13, 1993, the Secretary filed a timely Petition for Assessment of Penalty within 45 days of receipt of the operator's timely notice of contest.

11. On November 3, 1993, the Respondent filed a timely answer to the Petition for Assessment of Penalty within 30 days from the date of receipt of the petition.

12. The Respondent has not alleged that it has suffered any actual harm as a result of the 330 day delay.

13. The delay in filing of the notice of proposed assessment arose out of the unusually high caseload at the time of the issuance of the citation and a lack of clerical help to process these cases. The Commission has agreed to take official notice of the unique events that transpired in 1992. This is a matter of public record as stated in Rhone-Poulenc of Wyoming Company, __ FMSHRC ___, (October 13, 1993), (15 FMSHRC 2089). A copy of this decision is attached as Exhibit 4.

II

This proceeding arises out of the Respondent's contest of Citation No. 4060718 issued on September 10, 1992, by MSHA Inspector Larry Ramey following an inspection of that same date. (Stipulation Nos. 3 and 4). The subject citation alleged that "A copy of the MSHA Form 5000-23, for the employee 'Fred English' was not available for inspection by the writer at the mine site." (See Citation No. 40608718, attached as Exhibit 1 to Stipulation). As such, the company's actions were alleged to be in violation of 30 C.F.R. § 48.29(a). (Stipulation 1). The cited standard requires that

> [u]pon a miner's completion of each MSHA approved training program, the operator shall record and certify on MSHA form 5000-23 that the miner has received the specified training... The training certificates for each miner shall be available at the mine site for inspection by MSHA ...

(Stipulation No. 2). Inspector Ramey terminated the inspection and issued the citation on September 10, 1992. (Stipulation No. 4). According to the citation, the condition was abated on September 10, 1992, when the employee in question left the mine property. (See Citation No. 4060718, attached as Exhibit 1 to Stipulation). It is noted that on the same date, MSHA Inspector Larry Ramey also issued Order No. 4060714. A notice of proposed assessment of Penalty was issued by MSHA on November 25, 1992, for that order. (Stipulation No. 5).

On August 4, 1993, MSHA issued the notice of proposed assessment of penalty for Citation No. 4060718. (A copy of the notice of proposed assessment is attached as Exhibit 2 to the Stipulation). (Stipulation No. 6). The notice of proposed assessment of penalty was issued 330 days after the citation was issued. (September 10, 1992 to August 4, 1993). (Stipulation No. 7). Respondent received a copy of the notice of proposed assessment of penalty on or about August 19, 1993. (Stipulation No. 8). Respondent is contending that the 330 days between the issuance of the citation and the notice of proposed assessment is in contravention with 30 U.S.C. § 815 (Respondent's Answer, paragraph 3). However, Respondent has not alleged that it has suffered any actual harm as a result of the 330-day time period. (Stipulation No. 12).

On or about September 1, 1993, Respondent filed a timely notice of contest with MSHA. The notice of contest was received on September 10, 1993. (Stipulation 9, Exhibit 3). On October 13, 1993, the Secretary filed a timely Petition for Assessment of Penalty, within 45 days of receipt of the operator's timely notice of contest. On November 3, 1993, Respondent filed

a timely answer to the Petition for Assessment of Penalty within 30 days from the date of receipt of the petition. (Stipulation No. 11). Thus, the parties are not contesting whether the Secretary filed his Proposal for Penalty in a timely manner within 45 days of receipt of the Respondent's timely contest of the proposed penalty assessment pursuant to 29 C.F.R. § 2700.28. The only unresolved issue for partial summary decision is whether the Secretary complied with 30 U.S.C. § 815(a) when the Secretary issued the proposed civil penalty 330 days after the issuance of the citation.

Section 105(a) of the Act, 30 U.S.C. § 815(a) in relevant part provides that after the issuance of a citation, the Secretary shall:

> within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited ... (emphasis added).

The Act does not define the term "within a reasonable time." In addition, in the new Procedural Rules of the Federal Mine Safety and Health Review Commission, 29 C.F.R. Part 2700, effective May 1, 1993, the Commission declined to set a specific time limit in which to require the Secretary to notify the operator of a proposed penalty assessment. See 29 C.F.R. § 2700.25. [1] In the comments to the new rules the Commission stated:

> One commenter noted that neither the present nor the proposed rule sets forth a time limit within which the Secretary is to notify the operator of a proposed penalty assessment, and suggested that the Commission prescribe such a time limit. Section 105(a) of the Mine Act states that the Secretary shall provide such notice 'within a reasonable time.' Disputes over the meaning of that

---

[1] Section 2700.25 states: Proposed Penalty Assessment.

The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment.

> phrase will be resolved in the adjudicative process.

Section-by-Section Analysis 58 Fed. Reg. 12161 (1993).

The Secretary in his motion points out that the legislative history of 30 U.S.C. § 815(a) indicates that Congress did not intend for the citation to be dismissed where a penalty is not proposed promptly. As stated by the Senate Subcommittee on Labor:

> 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. (emphasis added).

S. Rep. No. 95-181, 95th Cong., 1st Sess. 24 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).

In the instant case, admittedly there was a 330-day time period between the issuance of the penalty and the issuance of the citation. The parties have stipulated that the delay in filing of the notice of proposed assessment arose out of the unusually high caseload at the time of the issuance of the citation and a lack of clerical help to process these cases. The Commission has agreed to take official notice of the unique events that transpired in 1992. This is a matter of public record as stated in Rhone-Poulenc of Wyoming Company, 15 FMSHRC 2089, (October 13, 1993), at 2093-2094. (Stipulation No. 13; copy of decision attached as Exhibit 4). Given this course of events, this constitutes one of the circumstances, although rare, when the prompt proposal of a penalty was not possible. In addition, Respondent has not suffered any actual harm as a result of the 330-day delay. (Stipulation No. 12). Dismissal of the penalty proceeding in such circumstances would be in contravention of the legislative intent of Congress and would be a harsh result where no harm has come to the operator.

CONCLUSION

It satisfactorily appears from the record, including the stipulations, that the Secretary established an adequate cause

for the delayed filing on the basis of MSHA's unusually heavy 1992 caseload and its shortage of personnel to process this caseload. The Commission has taken official notice of the unique events that occurred in 1992, in which the Commission played a part as more fully set forth in the Commission Decision Rhone-Poulenc of Wyoming Company, 15 FMSHRC 2089 (October 13, 1993).

It is also clear from the record that Respondent has not established, demonstrated nor even alleged that it was prejudiced or suffered any harm by the delay.

ORDER

The Secretary's motion is **GRANTED.** I find, under the facts and circumstances of this case, that the civil penalty assessment of $50 was made within the reasonable time required by 30 U.S.C. § 815(a).

Counsel for the parties having indicated to me that they would be able to resolve all other issues without need for formal hearing, Counsel are **ORDERED** to confer with each other during the next fifteen (15) days with respect to final resolution of this matter either by settlement or request for an order approving penalty.

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 any remaining issues where they cannot agree, with supporting arguments and specific references to the record in this case, within thirty (30) days. If the parties believe that a further hearing is required on any aspects of this matter, they should so state.

I retain jurisdiction in this matter until all aspects of this case are resolved and finalized.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

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

James E. Masson, Esq., ART BEAVERS CONSTRUCTION CO., P.O. Box 400, Crawford, CO 81415 (Certified Mail)

sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 2 8 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 94-104
	:	A.C. No. 36 02053 03548
v.	:	
	:	Docket No. PENN 94-63
BUCK MOUNTAIN COAL COMPANY, and RICHARD KOCHER, SR., OSCAR BLOUGH, JR., DAVID ZIMMERMAN, PAUL ZIMMERMAN, and HAROLD SCHNOKE, as PARTNERS,	:	A.C. No. 36-02053-03544
	:	
	:	Docket No. PENN 94-64
	:	A.C. No. 36-02053-03545
	:	
	:	Docket No. PENN 94-65
Respondents	:	A.C. NO. 36-02053-03546
	:	
	:	Docket No. PENN 94-66
	:	A.C. No. 36-02053-03547
	:	
	:	Buck Mountain Slope

PARTIAL DECISION
AND
NOTICE OF HEARING

Appearances: Gayle Green, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; David Zimmerman, Paul Zimmerman, Harold Schnoke, Richard D. Kocher, Sr., and Oscar Blough, Jr., pro se, partners Buck Mountain Coal Company, Pine Grove, Pennsylvania, for the Respondent.

Before: Judge Feldman

These proceedings concern numerous citations issued to Buck Mountain Coal Company (Buck Mountain) during the period September 1992 through July 1993. Buck Mountain Coal Company is a partnership.

Pursuant to a Notice of Hearing issued on October 17, 1994, a preliminary hearing in these matters was conducted on October 25, 1994, in Harrisburg, Pennsylvania. The Notice of Hearing limited the issues to be addressed at the preliminary hearing to whether the named partners in this proceeding are jointly or severally liable for any/or all of the citations in issue, and, if so, the financial ability of each partner to pay the proposed penalties. The Notice of Hearing also noted that the court would entertain any jurisdictional objections raised by any party.

At the preliminary hearing, Richard Kocher moved to dismiss for lack of jurisdiction based on his assertion that his partnership's mining activities did not affect interstate commerce. At the hearing, the Secretary called an owner of the Pine Creek Coal Company (Pine Creek) who purchases the coal extracted by Buck Mountain Coal Company. Pine Creek mixes the coal obtained from Buck Creek with coal from other suppliers. Pine Creek sells the coal to numerous customers including power utility companies and customers located in Maryland and New Hampshire. The coal is shipped over interstate highways. Kocher's motion to dismiss was denied on the record as it is evident that Buck Mountain's coal extraction affects interstate commerce as contemplated by section 4 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 803.[1] See Jerry Ike Harless Towing, Inc., 16 FMSHRC 683, 686-687 (April 1994).

With respect to the liability question, the evidence reflects that David Zimmerman, Paul Zimmerman and Harold Schnoke were general partners of Buck Mountain Coal Company since April 1986.[2] On April 10, 1986, partners D. Zimmerman, P. Zimmerman and Schnoke leased the right to extract anthracite coal from the Buck Mountain Slope from the G.M.P. Land Company, Inc., in return for a payment of $7.00 per net ton of coal removed. (P. Ex. 3). A Legal Identity Report completed May 5, 1986, by Paul Zimmerman lists the partners of Buck Mountain Coal Company as David Zimmerman, Harold Schnook (sic) and Paul Zimmerman.

On April 14, 1993, the Zimmermans and Schnoke assigned their mineral rights under the lease with the successor of the G.M.P. Land Company to Richard Kocher and Oscar Blough, Jr. (P. Ex. 4). Consequently, the Legal Identity Report for Buck Mountain Coal

---

[1] Kocher was advised that the period for appealing the denial of his jurisdictional objection would not begin until a final decision is issued in this matter.

[2] David Zimmerman appeared on behalf of his father Paul Zimmerman.

Company was amended on April 14, 1993, to reflect the partners as Oscar Blough, Jr., and Richard Kocher, Sr.

In view of the above, it is apparent that D. Zimmerman, P. Zimmerman and Schnoke are jointly and severally liable for all citations issued to Buck Mountain on or before April 13, 1993. Similarly, Kocher and Blough are jointly and severally liable for all citations issued to Buck Mountain after April 13, 1993. I am reserving a decision on whether the Zimmermans and Schnoke are also jointly and severally liable for citations issued to Buck Mountain after April 13, 1993. This determination will be based on whether these individuals remained substantially involved with mining operational decisions and whether they retained any control over the extraction process. See, e.g., W-P Coal Company, 16 FMSHRC 1407, 1410-1411 (July 1994).

Finally, the parties requested that I defer a decision on their financial ability to pay the proposed civil penalties in order to enable them to obtain and submit additional pertinent documentation.

The Notice of Hearing scheduling the preliminary hearing noted that a hearing on the merits of the citations in issue would be held within 60 days. Accordingly, further proceedings in these matters **are scheduled for 9:00 a.m. on Tuesday, January 24, 1995, in Harrisburg, Pennsylvania.** The hearing location will be specified in a subsequent order. The parties are advised that **any motions to approve settlement by any partner of any/or all of these matters must be filed on or before Tuesday, January 10, 1995.** Any motions filed after that date will not be considered and the parties will be required to proceed to trial. The parties are further advised that any party who fails to appear at the hearing may subject himself to the entry of a default judgment for the entire civil penalty proposed by the Secretary.

Jerold Feldman
Administrative Law Judge

Distribution:

Oscar Blough, Jr., R.D. 2, Pine Grove, PA 17963 (Certified Mail)

Oscar Blough, Jr., Buck Mountain Coal Company No. 2, R. D. #2, Box 425 B-2, Pine Grove, PA 17963 (Certified Mail)

Richard D. Kocher, Sr., R.D. 4, Box 393A, Pine Grove, PA 17963 (Certified Mail)

Richard D. Kocher, Sr., Buck Mountain Coal Company No. 2, R.D. #2, Box 425 B-2, Pine Grove, PA 17963 (Certified Mail)

David Zimmerman, Partner, R.D. 4, Box 357B, Pine Grove, PA 17963 (Certified Mail)

David Zimmerman, Partner, Buck Mountain Coal Company No. 2, R.D. #2, Box 425 B-2, Pine Grove, PA 17963 (Certified Mail)

Paul Zimmerman, Partner, R.D. 4, Box 357D, Pine Grove, PA 17963 (Certified Mail)

Paul Zimmerman, Partner, Buck Mountain Coal Company No. 2, R.D. #2, Box 425 B-2, Pine Grove, PA 17963 (Certified Mail)

Harold Schnoke, Partner, R.D. 3, Box 77C, Pine Grove, PA 17963 (Certified Mail)

Harold Schnoke, Partner, Buck Mountain Coal Company No. 2, R.D. #2, Box 425 B-2, Pine Grove, PA 17963 (Certified Mail)

Gayle Green, Esq., Office of the Solicitor, U.S. Dept. of Labor, 3535 Market Street, Room 14480, Philadelphia, PA 19104 (Certified Mail)

/rb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 30 1994

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	Docket No. WEVA 93-394-D
CLETIS R. WAMSLEY,	:	Hope CD 93-01, 93-05
	:	
ROBERT A. LEWIS,	:	Docket No. WEVA 93-395-D
	:	Hope CD 93-02
JOHN B. TAYLOR,	:	
	:	Docket No. WEVA 93-396-D
CLARK D. WILLIAMSON, AND	:	Hope CD 93-04
	:	
SAMUEL COYLE,	:	Docket No. WEVA 93-397-D
Complainants	:	Hope CD 93-07
v.	:	
	:	Docket No. WEVA 93-398-D
MUTUAL MINING, INC.,	:	Hope CD 93-11
Respondent	:	
	:	Mutual Mine I

DECISION ON DAMAGES, ASSESSMENT OF CIVIL PENALTY, AND ORDER DENYING RESPONDENT'S MOTION FOR AN EXTENSION OF TIME IN WHICH TO RESPOND TO THE SECRETARY OF LABOR'S MOTION FOR SUMMARY JUDGMENT

Before: Judge Amchan

On June 24, 1994, I found that Respondent had violated section 105(c) of the Act in discharging the Complainants on December 21, 1992. I ordered the parties to confer and advise me within 30 days as to whether they were able to stipulate to the amount of back pay due the Complainants and to facts that would allow me to calculate an appropriate civil penalty pursuant to the criteria in section 110(i) of the Act.

The parties were subsequently given an extension of time until August 24, 1994, to respond to this order. In a conference call with counsel for both parties on August 24, 1994, the complainants' counsel advised me that he had submitted a calculation of back pay to Respondent, but had not received a response.

On August 26, 1994, I ordered that: 1) No later than September 14, 1994, Respondent respond to the Complainants' counsel regarding back pay due; 2) No later than September 28, 1994, both parties file with the undersigned their final submissions regarding the amount of back pay due Complainants and the appropriate civil penalty to be assessed.

A motion for summary judgment was filed by the Secretary on October 28, 1994, representing that no formal written response to his calculations had been filed by the Respondent, nor had Respondent provided any suggested calculation of backwages. No timely response to the Secretary's motion has been filed. Instead, on November 14, 1994, the last day on which a response could be timely filed, Respondent filed a request for an extension of time until November 30, 1994. Respondent's counsel states that, "respondent has been unable to gather certain documents and compile certain information relative to the proceeding and get same to counsel . . . ."

In view of the fact that Respondent was required by my August 26, 1994, order to respond to the Secretary's calculations no later than September 14, I find that the reasons for which an extension of time is requested are completely inadequate. Therefore, I deny the motion for such an extension. The Secretary of Labor's motion for summary judgment on the issue of damages is GRANTED. Respondent is ORDERED to pay the following amounts to the respective Complainants [1]:

Cletis Wamsley	$35,880.88
Clark D. Williamson	$ 5,203.31
Samuel Coyle	$19,667.81
John B. Taylor	$23,132.15
Robert A. Lewis	$46,825.73

The aforementioned figures have been calculated pursuant to the information contained in the Secretary's October 28, 1994 motion for summary judgment and supporting attachments.

Assessment of Civil Penalty

Section 104(a) of the Federal Mine Safety and Health Act provides that a mine operator shall be assessed a civil penalty

---

[1] The Secretary's motion does not indicate receipt of unemployment insurance compensation by any of the complainants. Commission precedent, Clifford Meek v. Essroc Corporation, 15 FMSHRC 606 (April 1993), is that complainants must subtract any amounts received in unemployment compensation from the back-pay award. Therefore, if any such amounts were received they should be deducted from the amount of back-pay. The Secretary is, therefore, ordered to determine whether any of the complainants received unemployment compensation benefits and, if so, to return those amounts to Respondent within 60 days of this order.

of not more than $50,000 for each violation of an MSHA standard, or provisions of the Act. Section 110(i) of the Act provides that the Commission shall assess such penalties, taking into account the operator's history of previous violations, the size of the operator's business, the gravity of the violation, the negligence of the operator, the good faith demonstrated in attempting to achieve rapid compliance after notification of a violation and the effect of the penalty on the operator's ability to stay in business.

The Secretary in its amended complaint proposed a civil penalty of $15,000. I assess a civil penalty of $5,000 ($1,000 per complainant). Although the record indicates that Respondent intentionally discriminated against complainants in the lay-off of December 21, 1992, it also indicates that Respondent has serious financial difficulties. These problems, in conjunction with the large amounts of back-pay being awarded to complainants, lead me to conclude that $5,000 is an appropriate civil penalty pursuant to the criteria in section 110(i).

ORDER

Respondent is ordered to pay the complainants the amounts set forth herein as back-pay awards within 45 calendar days of this order. Respondent is ordered to pay to the Secretary the civil penalty within 60 days of this order. Upon payment of these amounts these cases are dismissed.

Arthur J. Amchan
Administrative Law Judge

Distribution:

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

W. Jeffrey Scott, Esq., 311 Main Street, P.O. Box 608, Grayson, KY 41143 (Certified Mail)

jf/

*U.S. GOVERNMENT PRINTING OFFICE: 1994-387-720-23380