DECEMBER 1995

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

DECEMBER 1995

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

Secretary of Labor, MSHA v. Amax Coal Company, Docket No. LAKE 95-267. (Judge Amchan, October 24, 1995)

Billy R. McClanahan v. Wellmore Coal Incorporated, Docket No. VA 95-9-D. (Judge Barbour, October 30, 1995)

Rock of Ages Corporation v. Secretary of Labor, MSHA, Docket Nos. YORK 94-76-RM through YORK 94-83-RM. (Judge Feldman, November 3, 1995)

Secretary of Labor, MSHA v. General Road Trucking Corporation, Docket No. YORK 95-102-M. (Chief Judge Merlin, unpublished Default Order issued November 20, 1995)

Secretary of Labor, MSHA v. Consolidation Coal Co., Robert Wyatt & Danny Crutchfield, Docket Nos. WEVA 94-377, etc. (Judge Koutras, November 20, 1995)

Secretary of Labor on behalf of William Kaczmarczyk v. Reading Anthracite Company, Docket No. PENN 95-1-D. (Judge Amchan, November 22, 1995)

There were no cases filed in which Review was not granted.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 26, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 95-102-M
GENERAL ROAD TRUCKING CORP.	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On November 20, 1995, Chief Administrative Law Judge Paul Merlin issued an Order of Default to General Road Trucking Corp. ("General Road") for failing to answer the proposal for assessment of penalty filed by the Secretary of Labor on June 26, 1995, or the judge's Order to Respondent to Show Cause issued on September 14, 1995. The judge assessed the civil penalty of $1,200 proposed by the Secretary.

On December 4, 1995, the Commission received a letter from General Road's secretary asserting that "Mr. Anthony . . . does not run this plant," "does not understand why he is considered in violation," and that "[t]his was his initial statement and the reason he requested a hearing."

The judge's jurisdiction in this matter terminated when his decision was issued on November 20, 1995. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem General Road's letter to be a timely filed petition for discretionary

review, which we grant. *See, e.g.*, *Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

On the basis of the present record, we are unable to evaluate the merits of General Road's position. In the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Amber Coal Co.*, 11 FMSHRC 131, 132-33 (February 1989).

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

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

December 5, 1995

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
On behalf of Frank Scott,	:	Docket No. KENT 96 52-D
Complainant	:	BARB CD 95-21
v.	:	
	:	Mine No. 68
LEECO, INCORPORATED,	:	
Respondent	:	

ORDER GRANTING TEMPORARY REINSTATEMENT

On November 13, 1995, the Secretary of Labor (Secretary) filed an application for an order requiring Leeco, Inc. (Leeco), to reinstate temporarily Frank Scott to the position he held immediately prior to June 12, 1995, or to a similar position at the same rate of pay and with the same or equivalent duties. The application was supported by the affidavit of Ronnie Brock, Supervisory Special Investigator of the Mine Safety and Health Administration (MSHA), and by a copy of the complaint of discrimination filed by the Secretary on behalf of Scott.

On November 17, 1995, counsel for Leeco requested a hearing on the application. On November 20, 1995, Tony Oppegard entered his appearance as counsel for Scott.

Pursuant to the agreement of the parties, the matter was heard on November 28, 1995, in Hazard, Kentucky.

Prior to the presentation of testimony, I summarized the pleadings and reminded counsels that the issue to be decided was narrow -- namely, whether Scott's complaint of discrimination was "not frivolously brought," as that term is used in section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (Mine Act) (30 U.S.C. § 815(c)(2)).

THE TESTIMONY

THE SECRETARY'S WITNESS

FRANK SCOTT

Scott is a miner with 13 years of mining experience, the last five of which has been as a mine electrician. Leeco's No. 68 Mine is an underground coal mine consisting of two sections. Scott began work at the mine on March 27, 1995. He quit working for Leeco on June 12, 1995, and his last day of actual work was June 10.

On that date, Scott was scheduled to work his usual shift -- the afternoon shift (3:00 p.m. - 11:30 p.m.). He arrived at the mine around 2:30 p.m. The mine was not in production because the belt was being moved. Scott stated that he was advised by David Smith, the maintenance foreman and one of Scott's supervisors, that one of his tasks would be to install a "Y box." (A "Y box" is similar to an electrical junction box. Its purpose is to direct the current that enters the mine to the separate sections.)

Scott proceeded underground and began working on the box. The power was off. When the power was restored, Scott was asked to check the equipment on one of the sections to make certain it was operating correctly. Scott looked at his watch. It was approximately 4:00 p.m. The main mine fan was on.

The equipment was functioning properly and Scott went to the belt head to advise Smith by telephone that the equipment was "ok." It was now about 4:30 p.m. He could not reach Smith, so he walked to where the section foreman, Rob Collett, was working in order to tell Collett he could not contact Smith. According to Scott, three or four minutes later Smith yelled at him over the speaker telephone and stated that all of the power had gone off at the mine but that it should be on again in 15 minutes.

Smith then directed Scott to work on repairing a hydraulic drill. Scott testified he worked on the drill but could not get it to operate properly. Scott spoke with Smith on the telephone and Smith told him to work on repairing the continuous mining machine. It had broken down the previous day. Scott claimed

that Smith was anxious to have the machine repaired because production was supposed to be resumed at 12:01 a.m., on June 11.

The continuous mining machine was at the face, so scoop operator Tinsley Hubbard transported Scott there. Hubbard remained with Scott. The repair work required Scott to weld a part on the machine. While working on the machine, Scott was asked by Hubbard if Scott thought they would have to work all night with the mine fan off. Scott stated that he could tell the main mine fan was not working because the smoke from the welding stayed in the air. In addition, he could not feel an air current. Scott believed it took him approximately one hour to complete the welding.

Scott and Hubbard then traveled to the belthead where Collett and Tim Kilburn, a repairman, were working. Scott testified that he asked both men how much longer he and Hubbard would have to stay underground when the fan was off. (Scott claimed he did not then know the Secretary's regulations prohibit miners from remaining underground for more than 15 minutes when the fan has stopped (30 C.F.R. § 75.313(c)(1)).) According to Scott, Collett and Kilburn just looked at him, hung their heads, and said nothing.

Scott was then told by Kilburn to move the belthead cable. Scott and Hubbard moved the cable and Scott stated that Hubbard again asked him how long they would have to work with the fan off. (Scott knew the fan was still off because he felt hot moving the cable, something that never had happened before.)

It was around 7:00 p.m., now. Scott and Hubbard went to the overcast to eat dinner. Scott could not hear the air whizzing through the overcast, an indication that power was not yet restored to the fan. Miners James Scalf and Randal Young also were eating at the overcast. They asked if they would have to work all night with the fan off, and Scott said he did not know. Scott testified that he did not leave the mine because he feared he would be fired.

Scott continued to move cable after dinner. He finished the task around 8:30 p.m. At this point, Kilburn left the mine in order to get more J hooks to hang cable. Five or ten minutes

later Scott heard the "Y box" begin to hum and air began to whiz through the overcast. Kilburn returned and Scott asked him how the fan had been restarted. According to Scott, Kilburn stated that he had done it.

Around 9:25 p.m., Scott heard Smith and Kilburn speaking to one another over the telephone. Scott could not decipher what they were saying. A short time later, Kilburn told Scott that Smith wanted him to stay into the next shift to build a spillboard and to install a guard on the belthead.

Scott testified that he could not get the spillboard built because a scoop that was necessary to bring in supplies was inoperable. Its battery was low. Scott got a battery charger and hooked it up to the scoop. He did not believe he could do any more work that night, so he left the mine around 1:00 a.m.

The next day, June 11, was a Sunday. Scott discussed with his wife the fact that on June 10, he had been underground with the fan off. He also stated he discussed with her two other work practices he believed were hazardous and that he had been required to do three or four times previously -- one was the practice of hanging high voltage power lines (i.e., lines carrying 12,470 volts) while the power was on and the other was the practice of working on belt equipment guards while the belts were operating. (Scott did not know the specific dates when he was asked previously to hang energized high voltage cables, but he believed it was during the months of April, May and June. In addition, he did not know the specific dates when he was asked to work on guards while the belts were running.) After talking with his wife, Scott stated that he resolved not to perform any more unsafe work.

On June 12, Scott returned to the mine around 3:00 p.m. In the changing room he encountered Smith, who asked Scott to come and speak with him in a back room. Scott changed his clothes and met with Smith. Scott testified that Smith wanted to know why the spillboards had not been installed on June 10. Scott explained that the scoop was "down." Smith handed Scott a written work order for June 12 (Gov. Exh. 1). It listed four jobs, included cutting part of a guard off of a belt tail piece. Scott maintained that Smith also orally instructed him to hang a high voltage line. Scott replied that he did not want to hang

high voltage cable while the power was on and that he did not want to work on guards while the belts were running. In addition, he asked Smith about working underground on June 10, while the power was off.

According to Scott, Smith responded that if he would not do the work, he should leave and not come back. Scott told Smith if that were the case, he would quit. Scott maintained that as he was leaving the meeting with Smith, he encountered Kilburn. He gave Kilburn the written work order and he told Kilburn he had quit because on June 10, he had to work underground for four hours while the fan was off and because he was asked to work on the tailpiece guard while the belt was running. He stated that at no point did he ask Smith to lay him off.

Scott maintained that prior to June 12, he never had a discussion with Smith regarding his general job performance and he never was disciplined by Leeco.

LEECO'S WITNESSES

DAVID SMITH

Smith has been a maintenance foreman for Leeco for the last three years. Smith hired Scott. Smith stated that Scott's primary duty was to keep equipment running at the mine.

Smith testified that on June 10, the main work that needed to be done was to set up the belthead drive and tailpiece in a neutral entry. Smith also stated that on June 10, no specific work assignments were given to Scott. (Usually, Smith orally advised Scott about what he was to do before he went underground.) As best Smith could recall, Scott was supposed to fix the hydraulic drill. Smith stated he spoke with Scott about this over the mine telephone. Also, Scott was supposed to make sure the equipment was running properly.

Smith testified that on June 10, he left the mine around 4:30 p.m. He went home and took his wife out for dinner. On his way back from dinner, he and his wife stopped at the mine. It was around 9:30 p.m. or 10:00 p.m. Smith wanted to ask if the drill had been fixed. There was no indication that the power had failed, and no one told Smith it had. After inquiring about the drill, Smith left the mine.

Smith did not again speak with Scott until June 12, when he asked Scott to meet with him. At the meeting, Smith stated that he asked Scott why he had not fixed the drill and why he had to be told to do things. Smith told Scott he should take more initiative and show a greater interest in his work. He then gave Scott the written work assignments for the day (Gov. Exh. 1).

According to Smith, Scott did not question him about any of the assignments, including the work on the belt guard. Rather, Scott's response was to ask to be laid off. Smith told Scott he could not lay him off and Scott then raised the subject of the fan. Smith testified that Scott stated something to the effect that he could get unemployment compensation because the fan had been off. (Smith maintained that this was the first time he heard about the June 10 power failure and the resulting fan stoppage.) Aside from the fan, Scott mentioned no other complaints to Smith. Nor to Smith's knowledge, did Scott complain to anyone else.

Smith knew of no instances when Scott was instructed to hang high voltage cable while it was energized, nor did he know of any instances when Scott was instructed to work on guards while belts were running.

According to Smith, on about ten occasions prior to June 12, he had spoken with Scott about his job performance and about the need to do better work. He kept records of some of these conversations in his notebooks. He agreed that Scott never had been given a written warning concerning his job performance and never had been disciplined.

TIM KILBURN

Kilburn is a second shift repairman at the mine. On June 10, the second shift miners were Kilburn, Collett, Scalf, Young, Hubbard and Scott. Their primary job was to extend the belt line and set up the head drive, using a battery powered scoop and the hydraulic drill. They also were to work on the "Y box."

Kilburn went underground around 4:00 p.m. Kilburn understood Scott's duties to be to work on the belt line and to repair a continuous mining machine.

Kilburn agreed with Scott that he, Kilburn, left the mine

during the evening of June 10. However, he denied he had restarted the fan, and that he told Scott he had done so. In fact, Kilburn denied that on June 10, he ever spoke with Scott about the fan being off. Kilburn maintained that when he left the mine, it was to get materials for the spillboard Scott was supposed to install, not to restart the fan. According to Kilburn, the fan could restart itself once power was restored.

Kilburn stated that Scott never complained to him about any of the working conditions at the mine. Kilburn knew of no instance in which Scott was asked to hang energized high voltage cable. In any event, cable usually was hung on the third shift, not on the second shift. In addition, he knew of only one instance prior to June 12, when Scott had worked installing a belt guard at a head drive. Kilburn had worked with him and the power was not on while the work was being done.

In Kilburn's view, Scott did not like to work overtime. According to Kilburn, on June 10, Scott told him he would quit if he had to work overtime that night.

On June 12, the only thing Kilburn heard Scott ask Smith was whether Smith could get Scott unemployment compensation, or words to that effect. Following the conversation, Scott handed his written work order to Kilburn. Item No. 4 of the order required part of the guard on the belt tailpiece to be cut away. The work was completed by another miner after Scott quit, but only after the belt had been moved up and power to it had been cut off. These were the same circumstances in which Scott would have been expected to complete the task.

Before Scott left the mine on June 12, he again saw Kilburn. He told Kilburn that he had quit his job. He did not mention anything about why he quit. Rather, he told Kilburn that Smith had "[obscenity] with the wrong person. "

THE DISCRIMINATION COMPLAINT AND THE "NOT FRIVOLOUSLY BROUGHT" STANDARD

The essence of Scott's complaint, as put forward by the Secretary on Scott's behalf, is that prior to June 10, 1995, he was asked to, and he did perform work at the mine that was hazardous -- specifically, hanging energized high voltage power

cables and working on mechanical equipment guards while belts were running. Also, on June 10, he worked underground with the fan off for an extended period. On June 12, he was ordered by Smith to perform tasks he believed to be hazardous, and he voiced his fears to Smith. When his fears were not addressed, he was forced to quit.

The standard for the review of an application for temporary reinstatement requires that the Secretary's legal theory, as well as the Secretary's factual assertions, be not frivolous (see Jim Walter Resources, Inc. v. FMSHRC , 920 F.2d 738, 747 (11th Cir. 1990). It is abundantly clear that a miner has a right to complain about unsafe work conditions and practices as well as a right to refuse to work if the operator does not respond to a reasonable complaint (Gilbert v. FMSHRC, 866 F2d. 1433, 1444 (D.C. Cir. 1989; 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 constructive discharge is proven when a miner who engaged in a protected activity can show that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign (See, e.g., Simpson v. FMSRHC, 842 F.2d 453, 461-63 (D.C.Cir. 1988).)

Although the merits of the Secretary's legal theory ultimately may or may not be sustained at trial, the theory is certainly not frivolous. The parties really do not dispute that the fan at the mine was off for a period of time on June 10. A miner who felt he or she had been made to work too long under those conditions reasonably could have felt compelled to complain about it, and to have been entitled to a meaningful response. Moreover, if, in fact, the Secretary can establish that Scott complained about hanging energized high voltage cables and working on the mechanical equipment guards while belts were operating -- and Scott's testimony in this regard was not patently unbelievable or pretextual -- such complaints could also have been reasonable and have required a reasonable response on Leeco's part.

Further, while there is stark disagreement about whether Scott ever was required to engage in hazardous work practices involving high voltage cables and guarding and, if so, whether he

ever lodged complaints about the practices, the resolution of the disagreements requires credibility determinations and factual findings appropriately made after a full trial of the issues, with testimony from all of those involved. Moreover, and as I have just noted, it is agreed that there is at least some factual basis for Scott's assertions regarding the fan, in that it did cease to function on June 10, while Scott was underground. Smith and Scott also agreed that at some point during their conversation of June 12, Scott raised the matter of the fan with Smith. Whether, as Leeco argues, Scott's motivation was whole pretextual also involves credibility determinations and consideration of other factual evidence and is best determined after a complete trial of the issue.

For these reasons, I conclude that while there is conflicting testimony on almost all of the fundamental issues, it cannot be found that the theory behind Scott's discrimination complaint and the factual assertions associated with it are clearly fraudulent, clearly without merit, or clearly pretextual. Accordingly, I find that Scott's complaint is "not frivolously brought" and that Scott is entitled to temporary reinstatement.

ORDER

Leeco is **ORDERED** to reinstate Frank Scott to the position he held on June 12, or to a similar position at the same rate of pay and with the same or equivalent duties assigned to him.

David F. Barbour

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 7 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-472
Petitioner	:	A.C. No. 15-17377-03506 AI5Z
v.	:	
	:	West Volunteer Mine
HOBERT VERNON GENTRY,	:	
Employed by Gentry Brothers	:	
Trucking Co., Inc.,	:	
Respondent	:	

DECISION

Appearances: Edward F. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Payton F. Reynolds, Esq., Whitesburg, Kentucky for Respondent.

Before: Judge Fauver

This is a civil penalty action under § 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 **et seq.**, charging Respondent, Hobart Vernon Gentry, aka Hobart Gentry, with individual liability as an agent of a corporation, Gentry Brothers Trucking, Co., Inc.

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

FINDINGS OF FACT

1. At all relevant times Respondent was President of Gentry Brothers Trucking Co., Inc., a small independent contractor that hauled coal from the West Volunteer Mine of Andalex Resources, Inc., an open pit mine. The coal was sold or used in interstate commerce or with a substantial effect upon interstate commerce.

2. Respondent personally directed and supervised the Gentry Brothers Trucking Company and was personally aware of the defective brakes on a truck that was involved in a fatal accident on October 13, 1993.

3. Prior to the accident, Respondent knew that the brakes on the truck were defective, but he failed to remove the truck from service pending receipt of brake parts that were on order. He also knew that no record was made of the defective brakes.

4. On October 13, 1993, Ricky Thomas Corbitt, a 27 year-old miner with only two months experience hauling coal for the Gentry Brothers Trucking Company, was assigned to drive the truck.

5. The truck was heavily loaded in the pit. As Corbitt was driving up a steep ramp (about 18 degree incline) to leave the mine, the drive shaft broke. When the shaft broke, the engine no longer provided any power to the wheels. Because the brakes were defective, they could not hold the truck on the ramp and the truck rolled backward. The truck gained momentum and went out of control, moving backward at a fast rate. The driver attempted to jump from the truck but did not clear the vehicle. He was fatally struck by a part of the truck. The truck continued its runaway descent, ending in a crash landing on its side near the bottom of the ramp.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Section 110(c) of the Act provides:

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

The Commission has interpreted the term "knowingly" as follows:

> "'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 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, 3 FMSHRC 8, 16 (1981) (emphasis added; footnotes and citations omitted), *affirmed sub nom. Richardson v. Secretary of Labor and FMSHRC*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord Roy Glenn*, 6 FMSHRC 1583, 1585-1587 (1984); *BethEnergy Mines*, 14 FMSHRC 1232, 1245 (1992); *Warren Steen Construction*, 14 FMSHRC 1125, 1131 (1992). In *Kenny Richardson*, the Commission held that a finding of a "knowing" violation does not require a showing that the individual "willfully" violated the Act or regulations. Rather, the Commission held, it need only be shown that "a person in a position to protect employee safety and health fail[ed] to act on the basis of information that [gave] him knowledge or reason to know of the existence of a violative condition." 3 FMSHRC at 16.

Respondent is charged with violations of two safety standards, in 30 C.F.R. §§ 77.1606(a) and 77.1605(b).

Section 1606(a) provides:

Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.

Section 1605(b) provides:

Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes.

Respondent had direct personal supervision of the operations of the corporation. At times he worked on the brakes of Corbitt's truck himself. At the relevant time he knew that the brakes were defective and that parts were on order. Yet he failed to see that the brake defects were recorded for the driver to be aware of the actual condition of the truck and for any safety inspector to see the safety history of the vehicle.

He decided that it was unnecessary to record safety defects in the truck because he expected the driver to tell him about any violations or unsafe conditions. In reaching that decision he violated § 77.1606(a). In light of Respondent's direct personal supervision of the business, and his personal knowledge of the brake defects and the failure to keep a record of the brake defects, I find that as an agent of the corporation he knowingly authorized, ordered, or carried out the violation of § 77.1606(a) within the meaning of §110(c) of the Act.

Respondent also violated § 77.1605(b), by failing to remove the truck from service pending repair of the brakes. The brakes were highly defective and could not hold the truck on a steep incline. Respondent put the driver at severe risk in failing to remove the truck from service. I find that Respondent knowingly authorized, ordered, or carried out the violation of § 77.1605(b) within the meaning of § 110(c) of the Act.

The gravity associated with both violations is very high. The steepness of the incline made it obvious that operating a heavily loaded truck with defective brakes put the driver at very high risk. Failure to record the defective brakes withheld crucial information from the driver, who may have been alerted by such a record to seek protection afforded by the Act, e.g., to request his employer to assign him to another vehicle or to other duties pending repair of the defective brakes. It also withheld crucial information from any safety inspector (company, state or federal) that would have alerted him or her to inspect the vehicle immediately to see whether it was safe to operate. Finally, Respondent's failure to remove the truck from service involved very high gravity because it subjected the driver to the risk of a fatal injury.

Section 110(i) of the Act 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 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.

Section § 110(i) refers to an operator. There is no dispositive case law on the application of § 110(i) criteria to an individual in a § 110(c) case.

The corporation that employs Respondent is a small independent contractor engaged in hauling coal by truck.

The gravity and negligence involved in the two violations were very high. The government has not alleged an unreasonable time in abating the violations after notice. It is presumed that the operator made a good faith effort to abate the violations promptly after notice.

With respect to impact of the proposed penalties on Respondent's ability to continue in business, the record shows that Respondent has filed for both corporate bankruptcy and personal bankruptcy. I find that Respondent and the corporation have already placed themselves in financial jeopardy unrelated to any civil penalty associated with these violations. The record reflects the existence of the two bankruptcy proceedings, but there is no indication of whether either the company or Mr. Gentry will be able to recover from their current economic condition and continue in business. No relationship has been shown between the proposed penalties sought by the Secretary and the financial conditions alleged by Mr. Gentry and the corporation.

I find that it would be contrary to the purposes of § 110(i) to reduce a penalty solely because of a pending bankruptcy petition. It appears that Congress was concerned that penalties should not be so large as to affect an operator's ability to continue a viable business. However, this does not indicate a congressional concern to give special protection to a company or individual that is defaulting on its bills to creditors and is running the business into a state of bankruptcy without any demonstrated relationship between its insolvency and civil penalties assessed under the Act.

Considering all the criteria of § 110(i), I find that a civil penalty of $2,500 is appropriate for the violation of 30 C.F.R. § 1606(a) and a civil penalty of $5,000 is appropriate for the violation of 30 C.F.R. § 1605(b).

CONCLUSIONS OF LAW

1.The judge has jurisdiction.

2. Respondent knowingly violated 30 C.F.R. §§ 77.1606(a) and 77.1605(b) within the meaning of § 110(c) of the Act, as alleged in the petition.

ORDER

WHEREFORE IT IS ORDERED that:

1. The citation and order included in the petition are AFFIRMED.

2. Respondent shall pay civil penalties of **$7,500** within 30 days of the date of this DECISION.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 1 2 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-370
Petitioner	:	A.C. No. 48-00977-03525
v.	:	
	:	Black Thunder Mine
THUNDER BASIN COAL COMPANY,	:	
Respondent	:	

DECISION

Before: Judge Amchan

Factual Background[1]

In September 1990, eight miners employed at Thunder Basin's surface coal mine near Wright, Wyoming, signed a form designating Dallas Wolf and Robert Butero as their representatives under section 103(f) and Part 40 of Volume 30 of the Code of Federal Regulations. The principal function of a miners' representative under these provisions is to accompany MSHA personnel during their inspections of an operator's worksite. Such representatives may also obtain an immediate inspection of a mine pursuant to section 103(g) of the Act.

Respondent refused to recognize Wolf and Butero as miners' representatives and refused to post the form so designating them as required by 40 C.F.R. §40.4. Wolf and Butero have never been employees of Thunder Basin. Wolf is the principal organizer of the United Mine Workers of America (UMWA) in the Powder River Basin. Butero is a health and safety official of the UMWA.

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[1]I regard the material facts in this case to be undisputed. The specific findings herein are based on portions of the record identified in my summary decision of May 11, 1994, 16 FMSHRC 1070, 1072-74. These findings were incorporated by reference in my August 24, 1994 decision on remand, 16 FMSHRC 1849.

Respondent's Black Thunder mine is non-union and the company has successfully resisted UMWA attempts to organize its workforce. In 1987 the UMWA lost an election conducted pursuant to the National Labor Relations Act by a vote of 307 to 56. The company regarded the designation of Wolf and Butero as miners' representatives to be motivated primarily, if not solely, by the desire of a few of its miners to assist the UMWA in its organizational efforts.

In March 1992, Thunder Basin sought and obtained an injunction from the United States District Court for the District of Wyoming prohibiting MSHA from enforcing the Part 40 designation of Wolf and Butero. However, both the United States Court of Appeals for the Tenth Circuit and the United States Supreme Court held that the District Court did not have jurisdiction to issue the injunction, Thunder Basin Coal Company v. Martin, 969 F.2d 970, 973 (10th Cir. 1992); Thunder Basin Coal Co. v. Reich, 510 U.S. __, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994).

In March 1993, the Commission, in Kerr-McGee Coal Corporation, 15 FMSHRC 352, decided that designation of the same union officials as miners' representatives at another non-union mine in the same county as the Black Thunder mine was not invalid, per se. A citation issued to Kerr-McGee for failure to post the form so designating Wolf and Butero was affirmed.

On January 21, 1994, two days after the Supreme Court decision, and an MSHA internal communication regarding that decision, Thunder Basin's President, James A. Herickhoff, wrote the MSHA District Manager in Denver, Colorado. He requested that the agency issue a citation to resolve the miners' representative issue at the Black Thunder mine. Herickoff stated further that Respondent expected MSHA to specify an abatement time "sufficient for the parties to pursue resolution of this important issue before the Commission and the courts."

MSHA inspector James A. Beam issued such a citation (No. 3589040) at 8:10 a.m. on February 22, 1994. The citation required abatement within 15 minutes. When this period elapsed without compliance by Respondent, Beam issued Order No. 3589101 pursuant to section 104(b) of the Act. The order did not require Respondent to withdraw miners from any area of the mine or cease

any of its operations. Within hours Thunder Basin filed an application for temporary relief with the Commission and an application for an expedited hearing on the application.

On March 11, 1994, MSHA's Office of Assessments informed Respondent of its intention to assess a $2,000 daily penalty for each day that the company failed to post the miners' representative form. After my March 25, 1994, decision denying temporary relief, 16 FMSHRC 1033, MSHA informed Respondent on March 27, 1994, that assessment of the daily penalty would commence that day.

On March 28, 1994, Thunder Basin filed a petition for discretionary review of my March 25, 1994 decision. The Commission affirmed the decision on April 8, 1994, 16 FMSHRC 671. On being apprised of the Commission's decision on April 8, Thunder Basin posted the miners' representative notice.

The denouement of the litigation regarding the miners' representative can be summarized as follows:

> August 24, 1994, ALJ decision affirming the citation/order in this case, 16 FMSHRC 1849;
>
> December 2, 1994, Court of Appeals for the District of Columbia affirms Review Commission decision in Kerr-McGee v. FMSHRC, 40 F.3d 1257 (D.C. Cir. 1994);
>
> June 7, 1995, U.S. Court of Appeals for the Tenth Circuit affirms Commission decision in the instant case, Thunder Basin Coal Co v. FMSHRC, 56 F.3d 1275 (10th Cir. 1995)[2].
>
> June 26, 1995, U.S. Supreme Court declines to grant certiorari in Kerr-McGee, __ U.S. ___, 115 S.Ct. 2611, 132 L. Ed. 2d. 854 (1995).

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[2]The Commission did not grant Respondent's petition for review of the ALJ decision, which became a final order of the Commission.

The Secretary has proposed a penalty of $360 for the initial citation and a daily penalty of $2,000 for Respondent's failure to timely abate that citation. The Secretary's Complaint asks for a total penalty of $26,360. The $2,000 daily penalty is proposed from March 27, 1994, to April 8, 1994. This is the period from which MSHA informed Respondent that it would assess a daily penalty to the date the miners' representative form was posted.

Assessment of A Civil Penalty

Section 110(b) of the Act provides that an operator who fails to correct a violation for which a citation has been issued within the period permitted for its correction may be assessed a civil penalty of not more than $5,000 for each day during which such failure or violation continues. The Commission is given authority to assess all civil penalties provided for in the Act in section 110(i).

The latter section directs that the Commission shall consider six criteria in assessing penalties: the operator's history of previous violations, the size of the operator, the negligence of the operator, the gravity of the violation, the effect of the penalty on the operator's ability to stay in business and the good faith of the operator in achieving rapid compliance after being notified of the violation. The parties have stipulated as to four of the criteria.

Thunder Basin had 23 violations of the Act in the two years preceding the posting violation. It had no prior violations of the cited provisions, nor any prior penalties assessed pursuant to section 110(b). It is a large operator and a $26,360 penalty would not affect its ability to stay in business. The parties also stipulated that the gravity of the violation was "low," that it was not "significant and substantial," that no lost workdays could be expected and that there was no likelihood of injury due to the violation.

Thus, the only criteria at issue are the good faith of Respondent in achieving abatement and its negligence. As to the latter, Respondent did not negligently fail to post the miners' representative notice, it intentionally did not do so. The real question is Respondent's "good faith."

A better way of phrasing the issue, however, is whether Respondent should be assessed a substantial civil penalty for its insistence on exhausting all avenues of judicial review prior to complying with the citation. The Secretary contends that Thunder Basin's course violates the fundamental enforcement scheme of the statute. As the Secretary points out, that scheme requires an operator to abate a citation within the time set by MSHA, even if it contests the citation. Further, the Secretary argues that an operator who stands upon his rights, waiting for an adjudication of the citation's validity, assumes the risk that if the citation is upheld that it will be assessed the daily penalties provided for in section 110(b).

Respondent argues that the citation in this case is quite different than the typical MSHA citation. First, it asserts that the health and safety of its employees was not affected by its failure to post the miners' representative notice. Secondly, it argues that given the harm done to its rights under the National Labor Relations Act to fairly challenge the UMWA's organizational drive, it was entitled to wait until the Commission ruled on its application for temporary relief before posting the notice.

The difficulty with Respondent's position is that the Commission had already spoken on the issue in this case prior to the issuance of instant citation and order. Respondent, at numerous junctures, has argued that the facts in its case were distinguishable from those in Kerr-McGee. I rejected that argument in my March 25, 1994, decision on Respondent's application for temporary relief, 16 FMSHRC 1033 at 1037-38.

I reiterate my belief that any fair reading of the Kerr-McGee decision establishes that the Commission was fully aware that the designation of Wolf and Butero as miners' representatives was made in part, if not primarily, to assist the UMWA organizational drive at Kerr-McGee. Kerr-McGee is indistinguishable from the instant matter. This being the case, I conclude that MSHA was acting reasonably in refusing to extend the abatement date to allow Thunder Basin to adjudicate the validity of the citation issued to it on February 22, 1994, Martinka Coal Co, 15 FMSHRC 2452 (December 1993).

Assessing the penalty in this case requires a balancing of two considerations. First is what I conclude was Thunder Basin's insistence of getting a "second bite of the apple" in the adjudication process despite the Commission's decision in Kerr-McGee. As I stated in my March 25, 1994 Order Denying Temporary Relief, this is analogous to requesting a stay of the Kerr-McGee decision, which is expressly prohibited by section 106(c) of the Act.

On the other hand, I agree with Respondent that this is not a case in which its failure to abate necessarily exposed miners to hazards. Indeed, I conclude that whether it did so is purely speculative. Only if Wolf or Butero could have apprised MSHA of hazards at Respondent's mine of which miners at the site would not have been aware would Respondent's noncompliance have posed a threat to its employees. Although such a possibility existed, I conclude that any danger arising from Respondent's failure to abate was very remote.

Finally, I have given consideration to Respondent's argument, at pages 14-15 of its brief, that in part it was relying on assurances from the Commission and Tenth Circuit that it would not be subject to daily penalties if it chose to litigate rather than abate. The decisions on which it relies, Mid-Continent Resources, Inc., 12 FMSHRC 949 (May 1990) and the Tenth Circuit decision overturning the injunction, predate the Commission's decision in Kerr-McGee. Once the Commission decided Kerr-McGee, Respondent's reliance on these assurances was unreasonable.

Balancing the aforementioned factors, I conclude that an appropriate penalty is $100 per day from March 27, 1994 to April 8, 1994; a total penalty of $1,300. Respondent could have been assessed a daily penalty commencing February 22, 1994. However, MSHA proposed a daily penalty from March 27, and I conclude that the $2,000 per day proposal is much too high given the low gravity of the violation.

ORDER

Respondent is hereby ordered to pay to the Secretary of Labor the sum of $1,300 within 30 days of this decision. Upon such payment this case is dismissed.

Arthur J. Amchan
Administrative Law Judge

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 13 1995

SOUTHERN MINERALS, INC.,	:	CONTEST PROCEEDINGS
TRUE ENERGY COAL SALES, INC.,	:	Docket Nos. WEVA 92-15-R
and FIRE CREEK, INC.	:	through WEVA 92-116-R
Contestants	:	
v.	:	Fire Creek No. 1 Mine
	:	Mine ID No. 46-07512
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 92-786
Petitioner	:	through WEVA 92-791
v.	:	
	:	Fire Creek No. 1 Mine
SOUTHERN MINERALS, INC.,	:	
TRUE ENERGY COAL SALES, INC.,	:	
FIRE CREEK, INC.,	:	
Respondents	:	

PARTIAL DECISION
and
NOTICE OF HEARING

Before: Judge Barbour

Appearances: Pamela S. Silverman, Esq., Ronald Gurka, Esq., Mark Malecki, Esq., Office of the Solicitor, U.S. Dept. of Labor, Arlington, Virginia
On behalf of the Government;
Robert I. Cusick, Esq., Marco M. Rajkovich, Esq., Mindy G. Barfield, Esq., Jean Bird, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky
On behalf of the Contestants.

These consolidated civil penalty and contest proceedings are brought under section 105 of the Federal Mine Safety and Health

Act of 1977 (Mine Act or Act, 30 U.S.C. § 815). They involve 101 alleged violations of mandatory safety standards for underground coal mines for which aggregate civil penalties of $576.681 have been proposed. They also involved 102 contested citations and orders.

The cases arise out of a fatal explosion that occurred at Fire Creek, Inc.'s (Fire Creek) No. 1 Mine. Following an investigation of the accident, the Secretary of Labor, through his Mine Safety and Health Administration (MSHA), issued the contested citations and orders to Fire Creek, Southern Minerals, Inc. (Southern Minerals) and True Energy Coal Sales, Inc. (True Energy) (collectively, the Contestants).

The Secretary contends that the Contestants are liable jointly and severally as operators of the mine. Southern Minerals and True Energy respond that they are not operators within the meaning of the Mine Act and therefore should not be held liable. Fire Creek does not dispute the Secretary's jurisdiction.

The proceedings were bifurcated so that the jurisdictional status of Southern Minerals and True Energy could be resolved prior to addressing the individual merits of the cases. Following extensive discovery, the Secretary, Southern Minerals and True Energy, filed cross motions for summary decision. The motions were denied (Southern Minerals, Inc., 17 FMSHRC 465 (March 1995) and the matter was heard in Princeton, West Virginia. Comprehensive briefs were filed by the parties.

In denying the cross motions, I first described the general factual background of the proceedings and the relationships of the parties (17 FMSHRC 466-469).

I stated in part:

> The Contestants are closely held corporations that share some common officers and directors. Fire Creek was organized in 1988 by D[orsey] L[ee] ("Jack") Bowling, Brenda Bowling (Jack Bowling's wife) and David Harold. The Bowlings and Harold were the corporation's only shareholders. David Harold was president and

director of Fire Creek and Ronda Harold (David Harold's wife) was secretary/treasurer. In July 1989, Ronald Lilly obtained 10 percent of the stock from Jack Bowling and Lilly became secretary/treasurer. [David] Harold left Fire Creek in October 1990, and the corporation bought back his shares. Also, in October 1990, W. ("Fred") St. John became the president of Fire Creek. He and Jack Bowling served as directors.

Southern Miners was organized in 1987 with Jack Bowling as the sole stockholder. In October 1989, the stock was divided between Jack Bowling, his son, his daughter and St. John. Jack Bowling served as president and [a] director, St. John served as the vice president and [a] director, and Brenda Bowling acted as secretary/treasurer.

True Energy was organized in 1986. At that time, Jack Bowling, his daughter and son were the corporation's shareholders. In October 1989, St. John acquired 20 percent of Jack Bowling's stock, leaving Jack Bowling with 60 percent. The other 20 percent continued to be owned by Bowling's daughter and son. Bowling served as president and director, St. John served as vice president and director, and Brenda Bowling served as secretary/treasurer.

Southern Miners had no employees. In general, it held coal leases and subleases, contracted with others, including Fire Creek, to mine leased coal, and monitored coal production for royalty purposes. Southern Minerals bought the coal and sold it to True Energy. Fire Creek operated the No. 1 Mine pursuant to a contract with Southern Minerals.

Coal from the mine was processed by an unrelated company pursuant to a contract with True Energy, and True Energy sold the processed coal. True Energy also provided various administrative and technical services to Southern Minerals'

contractors, including Fire Creek.

> When Harold left Fire Creek in October 1990, Ward Bailey, an employee of Fire Creek, . . . [became] mine manager. Bailey contacted MSHA officials after the explosion at the mine. Neither Bailey, nor any other Fire Creek officials notified Southern Minerals or True Energy. Southern Miners and True Energy were not represented at the meetings conducted by MSHA during the investigation of the explosion. Neither Southern Minerals nor True Energy received a citation or an order from MSHA regarding any aspect of the operation at the mine until seven months after the explosion, when the contested citations [and orders] were issued. Fire Creek is out of business and may not be capable of paying any penalties for any violations found to have existed (17 FMRSHRC 467-468).

Regarding the specific facts involving the relationship of the parties, I stated in part:

> Southern Minerals leased the mineral rights to the land on which the mine is located from Pocahontas Land Company (Pocahontas). Southern Minerals then contracted with Fire Creek. Southern Minerals paid Fire Creek a royalty payment based on the amount of coal produced at the mine. Southern Minerals also lent funds to Fire Creek to purchase mining equipment. At times, Fire Creek obtained advances from Southern Minerals to cover operating expenses . . . In general, [the] advances were secured by future coal production.
>
> The [a]dministrative services proved by True Energy to Fire Creek involved handling Fire Creek's business and financial records, i.e., maintaining payroll and personnel files, monitoring workers' compensation, medical insurance and other employee benefits, depositing semimonthly cash receipts, maintaining accounts receivable files, maintaining accounts payable files, [and] monitoring cash flow . . .

The technical services provided by True Energy to Fire Creek involved surveying, spad setting, map preparation and map certification. True Energy began surveying for Fire Creek in January 1990. At that time, True Energy hired two spad setters to work at the mine. Until July 1990, Fire Creek paid True Energy for the technical services (17 FMSHRC 468-469 (citations omitted)).

DENIAL OF SUMMARY DECISION

In denying the cross motions for summary decision, I explained my understanding of what the Act requires for operator status to vest in an entity. I noted that section 3(d) of the Act defines an "operator" as, "[a]ny owner, lessee, or other person who operates controls, or supervises a . . . mine or any independent contractor performing services or construction work at such mine" (30 U.S.C. § 802(d)).

I stated:

> The definition clearly requires "owners, lessees or other persons" to participate in and/or have authority over the operation, control or supervision of a mine. Accordingly, it is not correct to read the definition [so] as to make owners or lessees operators in and of themselves(17 FMSHRC 471).

I also noted that section 2(e) of the Act provides that "operators" of the nation's mines have primary responsibility for preventing the existence of unsafe and unhealthful conditions (30 U.S.C. § 801(e)) and stated that, in my view, it makes no sense to place liability on those who have not participated in creating the conditions in a mine or who have no actual authority over and responsibility for those conditions (17 FMSHRC 471-472). On the other hand, placing liability on an entity or on entities who have participated in creating the conditions in a mine or who have the authority to so participate provides a spur to compliance and to safer, more healthful working conditions (17 FMSHRC 472).

I concluded:

> [A] purely "passive entity" would not meet the statutory definition of "operator" . . . provided the entity did not reserve to itself authority to control mining operations or to control the mine itself. In other words . . . an entity that leased mineral rights and contracted with another entity to mine coal would subject itself to Mine Act liability if it made decisions with respect to how coal would be mined and how the mine would be staffed and run, or if it had the actual authority to make such decisions (17 FMSHRC 472).

Finally, and citing to the Commission's decision in W-P Coal Company (16 FMSHRC 1407 (July 1994)), I stated that the aspects of participation and supervision that make an entity an "operator" under the statute can be gauged by analyzing the entity's actual participation in the mine's engineering, financial, production, personnel and safety affairs and determining whether there is sufficient involvement in terms of actual participation and in terms of the authority to participate for the Secretary to proceed against the entity (17 FMSHRC at 473).

Turning to those indices of operator status, I concluded that I could not determine from the then existing record whether Southern Minerals and True Energy were "operators" as defined by the Act and that additional evidence was needed (17 FMSRHC 474-480).

With regard to Southern Minerals, I looked first to its involvement in the engineering aspects of the mine and stated I could not find whether it was such as to constitute the control envisioned by the Act (17 FMRHRC 474-475). I further concluded I could not determine from the then existing record whether Southern Minerals used the advancing of funds to Fire Creek to control how mining was done at the mine or to control the mine itself (17 FMSHRC 475-476). I also concluded that the record regarding conversations between Bowling and Harold concerning mining operations and production raised "unresolved questions of content and context" (17 FMSHRC 477). Finally, I found that I could not determine from the record whether Bowling's involvement in Fire Creek's personnel matters was indicative of operator status (Id.).

In analyzing True Energy's status, I looked first at the administrative services it provided to Fire Creek. I noted that it was not unusual for small to medium size operators to contract for administrative services, and I stated that I could not conclude from the existing record that True Energy was using the administrative services it provided to control how mining was carried out or how the mine was operated (17 FMSHRC 478).

I also reviewed True Energy's involvement in engineering at Fire Creek. I stated that the surveying of sight lines and the setting of spads was not sufficient in and of itself to make True Energy an operator, that there must be evidence that True Energy controlled or intended to control mining operations (17 FMSHRC 479). I made essentially the same finding with regard to the certification and preparation of mine maps (Tr. 479-480).

Finally, I stated:

> [A] hearing on the issue of liability will be necessary. The burden of proof will be on the Secretary. He must establish by substantial evidence of record that Southern Minerals and/or True Energy exercised actual control over the mining operations at the mine, or over the mine itself, or had the power to exercise such control (17 FMSHRC 480).

STIPULATIONS

At the hearing, the parties stipulated as follows:

1. The Fire Creek No. 1 Mine is located in McDowell County, West, Virginia.

2. Operations of the . . . mine are subject to the . . . Act.

3. Pocahontas owns the mineral rights to the . . . mine.

4. Fire Creek . . . is a West Virginia corporation [,]incorporated on March 14, 1988.

5. The . . . Fire Creek No. 1 Mine was the only mine ever operated by Fire Creek.

6. Fire Creek shares Post Office [B]ox 5066 in Princeton, West Virginia with Southern Minerals, Inc.

7. Beginning with the dates listed, the shareholders, officers, and directors of Fire Creek . . . were as follows:

Shareholders	Officers/Directors
June 27, 1988	
David Harold (50%)	David Harold (Pres./Dir.)
D.L. "Jack" Bowling (25%)	Rhonda Harold (wife) (Sec./Treas.)
Mrs. D.L. (Brenda) Bowling (Wife) (25%)	
July 1, 1989	
David Harold (40%)	David Harold (Pres./Dir.)
Ronald Lilly (10%)	Ronald Lilly (Sec./Treas.)
Mrs. D.L. (Brenda) Bowling (Wife) (25%)	
October 20, 1990	
Treasury stock (40%)	W. Fred St. John (Pres./Dir.)
Ronald Lilly (10%) (Sec./Treas./Dir.)	Ronald Lilly
D.L. "Jack Bowling (25%)	D.L. "Jack" Bowling (Dir.)
Mrs. D.L. (Brenda) Bowling (wife) (25%)	

8. Prior to January 1, 1990, True Line, Inc. (True Line) and its contractors generally provided all engineering/surveying services and map certifications for Fire Creek.

9. After January 1, 1990, John E. Caffrey, P.E., certified maps for the . . . mine which required engineering certification.

10. On January 31, 1991, True Line billed "True Energy Coal Sales, Inc. - Southern Minerals" for the preparation of twelve one-hundred foot maps of the . . . mine, closure maps of the . . . mine, and a meeting with John E. Caffrey, P.E., regarding the . . . mine.

11. Beginning with the dates listed, the shareholders, officers and directors of Southern Minerals were as follows:

Shareholders	Officers/Directors
October 1, 1989 to January 1991	
D.L. "Jack" Bowling (60%)	D.L. "Jack" Bowling (Pres./Dir.)
W. Fred St. John (20%)	W. Fred St. John (V. Pres./Dir.)
Jacqueline Bowling Karnes (10%)	Brenda Bowling (10%) (Sec./Treas.)
Jason Bowling (10%)	

12. Beginning with dates listed, the shareholders, officers and directors of True Energy were as follows:

Shareholders	Officers/Directors
October 1, 1989 to January 1991	
D.L. "Jack"Bowling (60%)	D.L. "Jack" Bowling (Pres./Dir.)
W. Fred St. John (20%)	W. Fred St. John (V. Pres./ Dir.)
Jacqueline Bowling Karnes (10%)	Brenda Bowling (Sec./Treas.)
Jason Bowling (10%)	

(Joint Exh. 1)

FIRE CREEK AND THE MINE

Harold testified that he and Lilly opened the subject mine and operated it under the name of H&H Coal Co. (H&H). Soon, they determined the mine could not be run successfully with the

equipment they were using. Therefore, they went to Bowling and Bowling prosed that a new corporation be chartered to operate the mine and that new continuous mining equipment be purchased (Tr. I, 12-13). (Bowling testified that it was Harold, not himself, who suggested the mine could be operated successfully if up-to-date continuous mining equipment was used (Tr. II, 278).)

Bowling had no previous experience mining with continuous mining equipment. Harold, however, was thoroughly familiar with it. Bowling was of the opinion that Harold "was able . . . to go a little bit further than anybody else as far as making . . . [mining] efficient" (Tr. II, 306). In fact, Bowling described Harold as "one of the best miners in the State of West Virginia" (Tr. II, 279, see also Tr. II, 303-304). In Bowling's view, once the company was formed, Harold ran Fire Creek "in total" (Id.). Bowling never went underground (Tr. II, 345).

Fire Creek purchased the new equipment with a bank loan that was secured by the equipment as well as by Bowling's and his wife's personal guarantee (Tr. I, 15; Tr. II, 278-279, 311, 316). The original loan was for $600,000. The amount was added to over time as other equipment was acquired (Tr. I, 16). Eventually, the loan was paid in full by Fire Creek (Tr. II, 317). In addition, Fire Creek assumed some of H&H's prior obligations and equipment (Tr. I, 20-21).

Fire Creek contracted with Southern Minerals to mine coal that Southern Minerals leased (Tr. I, 22; Gov. Exh. 2). Fire Creek had no property interest in the coal (Tr. II, 105). Southern Minerals had sole authority to dispose of the coal (Tr. II, 105).

From its inception in 1988 through January 1991, Fire Creek received over $6,000,000 in revenue and made a profit of over $500,000 (Tr. II, 192).

However, in the months before the accident the company consistently lost money. Subsequent to the accident, Fire Creek closed the mine. St. John testified he made the decision to close the mine in his capacity as president of Fire Creek and that before he made the decision, he discussed it with Lilly and

Bowling, in their capacities as directors of the company (Tr. II, 239-240). Fire Creek has not mined coal since the accident (Tr. II, 221). St. John contended that the company has not gone back into mining because it is concentrating first on resolving the legal issues resulting from the accident (Tr. II, 239).

According to St. John, Fire Creek has no funds to pay the penalties proposed for the violations that are alleged in these cases. Nor does it have assets it can liquefy to obtain the funds (Tr. II, 171). Bowling agreed that Fire Creek is "broke." He added that the company's equipment had been sold "to pay fines and so forth" (Tr. II, 335).

Prior to the accident, the only entity ever cited by MSHA for violations at the mine was Fire Creek (Tr. I, 186-187). MSHA did not take the position that Southern Minerals and True Energy were operators until seven months after the accident.

THE SECRETARY'S POSITION REGARDING CONTESTANTS' STATUS AS OPERATORS

The basis for the Secretary's theory regarding Southern Minerals' and True Energy's status as operators, is that through their associations with Fire Creek they were, in reality, part of a single entity that controlled the mine. Counsel for the Secretary stated:

> [O]ur position is that Fire Creek is part of an entity with several other corporations that operate the . . . [m]ine, composing, for lack of a better word, an association and that, therefore, the officers, employees and . . . directors of any of those corporations are agents of all of them. (Tr. I, 164).

Put another way, in the Secretary's view, the three companies were a single association, and thus, a person whose purpose it was to mine coal. This was expressed by counsel for the Secretary, when he stated that Fire Creek, Southern Minerals and True Energy:

> together comprise a person operating a coal mine under the Act, a person being defined . . . under the Act as an association. And an

> association has been defined in the law as . . . a group of people joining together to do something.
>
> [The Secretary] believe[s] that these three companies have operated in such a way that they have joined together. And their joinder is for the purpose of operating a coal mine. Therefore, they are an association. An association is within the definition of a person. And a person . . . is an operator under the Act (Tr. I, 192).

James Bowman, who investigated the accident at the Fire Creek Mine for MSHA, testified that the accident investigation team suggested the Secretary cite True Energy and Southern Miners along with Fire Creek because:

> Southern Minerals and True Energy . . . and Fire Creek were corporations under common ownership. They were under the common control of one principal for the common good of all three. One could not exist without the other (Tr. I, 214).

He also stated that by citing all three entities, the Secretary "increase[d] the likelihood that the penalties would be collected" (Tr. I, 215). He maintained, "the key thing is responsibility." For a long time, MSHA has been trying to place responsibility on the principals who actually have control over . . . mining activities" (Tr. I, 217-218). Counsel for the Secretary agreed that the Secretary was trying to avoid a situation wherein the owner or lessee of a mine had the authority to control health and safety at a mine, yet escaped liability because of failing to exercise that authority (Tr. II, 364).

THE LAW

The issue of whether the Contestants are "operators" must be resolved within the context of the statutory definition of that word (30 U.S.C. § 802(d). To put the matter in its simplest terms, either Southern Minerals and True Energy meet the definition or they do not. If one or both do, one or both were properly cited. If one or both do not, these proceedings must be dismissed with respect to the party or parties outside the scope of the Act. While the Secretary has emphasized his wide

enforcement discretion, and while it is true such discretion exists (Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986), it comes into play only in regard to statutory operators. Obviously, the Secretary holds no writ to proceed against those who are not so defined.

As I have noted previously, analysis of the Contestants' status begins with the words of the statutory definition and the assumption that the Act's drafters carefully chose the words to mean what they say (Order, 17 FMSHRC at 471; see also Berwind Natural Resources Corp., 17 FMSHRC 684, 703 (April 1995)(order in part granting and denying motion for summary decision)). The Act defines an "operator" as "[a]ny owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction work at such mine" (30 U.S.C. § 802(d)). The clause, "who operates, controls, or supervises a coal or other mine," describes and qualifies each noun in the preceding phrase "any owner, lessee, or other person." Thus, the definition requires "owners, lessees or other person[s]" to participate in and/or have authority over the operation, control or supervision of a mine (see Elliot Coal Mining Company, Inc., v. Director, Office of Workers Compensation, 17 F.3d 616, 629-630 (3d Cir. 1994)). The purpose of the statutory definition is to place responsibility for health and safety upon those entities who create the conditions at the mine or who have actual authority over those conditions on the theory that such responsibility will further compliance. Control may be either direct or indirect, but it must be actual. In other words, an operator must "call the shots" at a mine regarding its day-to-day operation or have the authority to do so (see Berwind, 17 FMSHRC at 704 (citing National Industrial Sand Ass'n v. Marshall, 601 F.23d 698, 701 (3d Cir. 1979) ("Designation . . . as operators . . . requires substantial participation in the running of the mine" (emphasis in original))).

For these reasons I concluded previously -- and state again here -- that in order to establish an entity as an "operator" subject to the Act, the Secretary must prove that the entity, either directly or indirectly, substantially participated in the operation, control or supervision of the day-to-day operations of the mine, or had the authority to do so (Berwind, 17 FMSRHC at 705).

Further, and as I have noted, because the forms of participation and authority vary from entity to entity, the question of whether an entity meets the statutory definition of "operator" must be resolved on a case-by-case basis (17 FMSHRC 473).

W-P provides guidance. There, the Commission looked to specific indicia of operator status -- characteristics such as an entity's involvement in a mine's engineering, financial, production, personnel and safety affairs. Because in W-P the Commission concluded a lessee's substantial and "considerable" involvement in the operation of the mine warranted the Secretary proceeding against it (16 FMSRHC at 1411, n.5), I read the decision as echoing the court's requirement that a cited entity must exhibit "substantial participation in the running of the mine" (National Industrial Sand, 601 F.2d at 701). Thus, in my opinion, the Commission's decision implicitly recognizes that an entity's involvement in the day-to-day operation of a mine can be so infrequent or minimal, i.e., so insubstantial, inconsiderable or removed from actual mining, that operator status does not vest (17 FMSHRC 473; Berwind, 17 FMSHRC 705).

This approach to determining jurisdictional status is in harmony with the way the coal industry frequently operates. In the East especially, where contract mining is common, leased coal reserves often are mined not by lessees but by entities with whom lessees contract and the relationships between lessees and contractors often differ. By looking to the various aspects of the relationships to determine whether there is substantial control over the day-to-day operation of the subject mines, or whether there is the authority to exercise such control, the differences are accounted for and compliance is fostered.

Clearly those who control day-to-day mining and/or who have the authority to do so are those who can and do control the conditions and practices that ensure compliance with the Act and the mandatory safety and health regulations promulgated pursuant to it. It is they who are and who should be held responsible when the conditions and practices fall short.

I do not subscribe to the Secretary's assertion that because an entity that mines the coal is "owned, operated, controlled,

and supervised to one degree or another" by other entities, each of those entities can be held jointly and severally liable for violations at the mine (Sec. Br. 32). The issue is not whether the entity doing the mining is owned, operated, controlled, and supervised "to one degree or another" by others, but the degree to which it is controlled and supervised. As I have stated, in my view the Commission has recognized that an entity's involvement in the day-to-day operation of a mine may be so infrequent, minimal or removed, i.e., so insubstantial, inconsiderable or remote from actual mining, that operator status does not vest.

Moreover, in the past MSHA appears to have adopted this position. John Tisdale, the manager of MSHA's accident investigation program, and a person with a long and distinguished career in the mining industry, testified that when he worked for two large corporate coal operators in the 1980s, the corporations frequently contracted with smaller companies to mine the corporations' coal reserves. The larger corporations provided various engineering, technical and administrative services to the smaller contract operators, services that MSHA today would apparently argue afforded the corporations the "degree" of control it asserts is indicative of operator status, yet Tisdale knew of no instance in which the corporations were cited for the violations of the on-site operators (Tr. I, 272-277; Tr. II, 46-49).

Nor do I subscribe to the Secretary's arguments that the Contestants are operators because together with Fire Creek they functioned as a unitary entity performing all of the aspects of mining; from the development of the mine to extraction and stockpiling of the coal. Parts of the industry have functioned in a multifaceted nature for years, and, as Tisdale's testimony makes clear, in the past, the Secretary has chosen to cite the production operators rather than to cite those who provided them services (see Tr. I, 272-277; Tr. II, 46-49).

While this past practice does not stop the Secretary from changing his view and proceeding against the Contestants -- provided they are operators within the meaning of the Act (17 FMSRHC 480-481) -- it certainly raises questions about both the wisdom and the validity of a "unitary entity" approach to enforcement. Moreover, as I note below, the Secretary's unitary theory may fly in the face of the right of separate corporate

entities performing separate tasks to be regarded in law as separate persons and if adopted may extend jurisdiction without a logical limit (see infra 25-26).

Therefore, I reiterate that the issue before me is whether the Secretary has established that each of the Contestants either directly or indirectly, substantially participated in the operation, control or supervision of the day-to-day operations of Fire Creek No. 1 Mine, or had the authority to do so.

THE CONTESTANTS AS OPERATORS

THE STATUS OF FIRE CREEK

The parties agree that the actual day-to-day operation of the mine was substantially controlled and supervised by Fire Creek and that at all times relevant to these proceedings, Fire Creek was an operator within the meaning of the Act.

THE STATUS OF SOUTHERN MINERALS

INDICES OF OPERATOR STATUS

INVOLVEMENT IN EMPLOYMENT

Harold, who had run the mine for Fire Creek, testified that he worked daily at the mine, both underground and on the surface (Tr. I, 27-28). According to Harold, he did the actual hiring and firing and no other person had that authority, including Bowling (Tr. 28, 31). However, he agreed that there were times when he discussed with Bowling the hiring of employees:

> We were always looking for good people. [A]ny time that I could find out about good people from . . . Bowling or anybody else . . . we would talk about it . . . And if he knew somebody, then I would talk to them (Tr. I, 28).

In addition, Harold spoke with others in the mining community -- people unrelated to Fire Creek -- when seeking employee recommendations.

Harold stated that he did not always hire miners of whom Bowling approved, and Bowling never told him he could not employ

a person he wanted to hire (Tr. I, 126). Also, Bowling never told Harold to fire a person (Tr. I, 126). However, if there was an employee that "wasn't doing [his or her] job and . . . was costing production, " Harold would discuss the situation with Bowling because Bowling was "part owner of the [mine]" (Tr. I, 144) and Bowling always had "some" input in the discussion (Tr. I, 30).

Bowling agreed that it was Harold who did the hiring. Bowling stated that from time to time Harold would call and ask him if he knew of good people whom Harold could hire. Bowling also stated that he and Harold would discuss things Harold had done at the mine that could lead to labor-management difficulties (Tr. II, 280). Bowling described their discussions as "the same that I would have with a neighboring operator" (Tr. II, 285).

After Harold left the mine, Bowling stated that he and St. John hired Ward Bailey to replace Harold (Tr. II, 280). St. John stated that the decision to hire Bailey and Curtis Stillwell, who acted as the mine superintendent after January 1991, was made by himself, Ron Lilly and Bowling (Tr. II, 226-227.) George Bowman, a special investigator for MSHA, testified that during an investigation by the United States attorney following the explosion, Bailey was interviewed and stated that Bowling alone hired him (Tr. I, 171-172). (Bailey was not called as a witness, and thus, his version of the conversation and his credibility could not be gauged.) James Bowman, another MSHA special investigator, testified that when he went to the mine following the explosion, Curtis Stillwell stated that he had been hired by Bowling (Tr. I, 206). (Stillwell too was not called as a witness.)

Finally, Harold maintained that while he did not advise Bowling on day-to-day personnel problems, he discussed "serious matters" with him -- matters such as the need to hire more miners. He did so because "Bowling owned a portion of the [mine]" (Tr. I, 34-35).

Given this testimony and the record evidence, I find that Harold was responsible for the hiring and firing of the rank and file miners. Harold stated as much, and I fully credit Harold's testimony to this effect (Tr. I, 28). I also credit his testimony that he did not always hire miners of whom Bowling approved, and that Bowling never stated that he could not hire

such miners (Tr. 126). There is no credible evidence to contradict Harold's assertions in this regard.

However, there is credible evidence establishing that although Bowling did not make the day-to-day hiring and firing decisions regarding rank and file miners, he had, as Harold put it, input into "serious" personnel policy matters, such as the need to hire more miners (Tr. I, 34)." I conclude that Bowling not only discussed such matters with Harold, but that he had a say in the ultimate decision. Bowling, as president of Southern Minerals, the company whose coal was being mined, had an obvious interest in maximizing production. It is inconceivable to me that Harold would have discussed the need for more miners with Bowling if he did not need Bowling's approval to hire them. In other words, while Bowling had no demonstrable veto over who was hired, he fundamentally contributed to the decisions to hire. To have this kind of input into the determination of the number of miners who worked at the mine was to exercise control over the day-to-day operation of the mine.

Harold stated he discussed employment matters with Bowling because Bowling "owned a portion of the [mine] (Tr. I, 34-35)," but there is no distinction apparent when Bowling acted on behalf of Fire Creek and when he acted on behalf of Southern Minerals. He wore both hats. This overlapping of responsibilities regarding rank and file miners leads me to conclude that when Bowling became involved in such personnel matters, he did so on behalf of both Fire Creek and Southern Minerals.

In addition, the testimony establishes that Bowling was actively and substantially involved in hiring superintendents Bailey and Stillwell. Harold testified that he and Bowling hired Bailey to replace Harold (Tr. II, 285), and St. John stated that Bowling was instrumental in the hiring of Stillwell (Tr. II, 248). In addition to being involved in the hiring of these crucial members of the mine's day-to-day management, it is clear that Bowling controlled their tenure at the mine. Bowling himself testified that he could terminate the superintendent's employment if the superintendent did not operate the mine like Bowling wanted (Tr. II, 357).

Just as Bowling exercised his authority without distinguishing whether he acted for Fire Creek or Southern Minerals regarding the number of rank and file miners hired, so

too did he fail to distinguish for whom he was or would act when he hired or fired the mine's superintendents. This lack of a clear distinction between the times Bowling was wearing his Fire Creek hat and his Southern Minerals hat when he acted on mine personnel matters leads me to conclude that Bowling had the authority to act and did act on behalf of both.

I find, therefore, that the decisions regarding whether to hire more miners and the decisions regarding the hiring or firing of the mine's superintendents, substantially involved Bowling, and through Bowling, Southern Minerals, in the day-to-day operation of the mine.

INVOLVEMENT IN PRODUCTION AND ENGINEERING

I conclude as well that Southern Minerals, through Bowling, was substantially involved and had the authority to be substantially involved in day-to-day production and engineering at the mine.

I credit Harold's testimony that Bowling called every day for the mine's production figures and that when production was low, he and Bowling discuss the reasons why (Tr. I, 36-37). It is clear from Harold's testimony that Bowling took a very active interest in production and that this was not a "hands off" situation.

It is equally clear to me that Harold and Bowling acted as a "team" when the mining process encountered difficulties that hindered production. Harold was specific about discussing such difficulties with Bowling and about getting advice from Bowling concerning how to overcome the difficulties (Tr. I, 38; 49; 134-136), and I discount Harold's testimony that Bowling never ordered that mining proceed in a certain manner or direction (Tr. I, 49). George Bowman testified that Harold told him during the criminal investigation that Bowling had specifically instructed him to mine certain bleeder blocks (Tr. I, 173). Harold did not deny this. Rather, he could "not recall" the discussion (Tr. I, 49).

I find that from the beginning Bowling was involved substantially with production at the mine and that Bowling's corporate interest and self interest in maintaining ongoing production kept him substantially involved, both in the manner in

which coal was produced and in the ongoing mining process.

Harold credibly stated that Bowling participated in the initial decision to mine with a continuous mining machine (Tr. 137-138). Harold also testified that Bowling's involvement in production continued once mining commenced. Harold stated that if he had a production problem, he discussed it with Bowling. For example, when the mine was shut down as a result of a state or federal inspection, he discussed it with Bowling, and he stated that he did so probably more than once (Tr. I, 42-43). When he was asked if Bowling ever pressured him in any way with regard to the level of production, he responded:

> He called me every day to find out what production was and how much coal I was going to get that day. And he'd want to know if I was going to get a certain amount of coal or if I was not. And I don't know if you could take that -- I'd say it's pressure.
>
> * * * *
>
> I consider it a pressure, yes, ma'am (Tr. I, 44).

As important, and as Bowling himself testified, Bowling had actual authority substantially to control some of the most significant things that affected production, engineering and safety at the mine. Bowling stated that if he called the superintendent and inquired about mine ventilation, preshift examinations and the in-mine smoking program, he would expect answers, and expect that problems would be corrected.

> Q. [Y]ou indicated you could have called [the superintendent] and inquired about those areas, ventilation fan, preshift, smoking program . . . and you would have required [the superintendent] to tell you about those conditions; is that correct?
>
> * * * *
>
> A. Yes, sir. If I asked him, I would expect an answer.
>
> Q. And if he had told you that things weren't

going too good [sic] or if you had information from another reliable source that led you to believe things were not as good as they could be in those areas, you could have required [the superintendent] to fix those problems?

A. Yes, sir. I'd have him investigate and see what the problem was immediately (Tr. II, 356-357).

Bowling testified that if there was a condition on a ventilation map that he did not like, he had the authority to have the condition changed (Tr. II, 358-359).

I recognize that both Harold and Bowling testified that Bowling's authority in these cases derived from his position as a stockholder of Fire Creek (see Tr. I, 101-102; Tr. II, 359). I am sensitive to the fact that law and public policy favor the limitation of business risks through incorporation and that corporations are treated at law as individual entities even if they share the same or many of the same directors, officers and stockholders. However, I also recognize that their status as separate legal entities may be considered a fiction and be disregarded when those acting for the corporations do so in such a fashion that their corporate individuality no longer exists. When that happens, treating an entity as separate may permit it to evade its legal obligations. In order words, it can be unjust to recognize an entity as separate when those who act for it do not (see Las Palmas Association v. Las Palmas Center Associates (1991, 2nd Dist.) 235 Cal. App. 1220).

Here, with respect to the aspects of production, engineering and safety, that I have discussed, it is impossible to distinguish the actions of Bowling on behalf of Southern Minerals from those of Bowling on behalf of Fire Creek. The corporate identities have merged to the extent that I find when Bowling acted concerning these aspects of mining, he acted both for Fire Creek and Southern Minerals and therefore, that Southern Minerals substantially participated in the day-to-day operations of the mine in these areas.

Evidence was also offered by the Secretary concerning the relationship of Southern Minerals and Fire Creek with regard to mining projections, mapping and permits. However, the Secretary has not established that Southern Minerals' involvement in these

aspects of mining was indicative of its substantial participation in the day-to-day operation of the mine. Rather, the record shows that Southern Minerals was involved to ensure its own individual interests in making certain only its leased coal was mined and was mined without waste.

INVOLVEMENT IN FINANCE

There are several aspects of Fire Creek's finances in which Southern Minerals played a part that substantially impacted the day-to-day operation of the mine.

Harold testified that he regularly discussed with Bowling the cost of the supplies used at the mine, as well as any "out of the ordinary" expenses that arose (Tr. I, 142, see also Tr. I, 48). Bowling did not deny the discussions and I conclude they occurred.

In addition, it is clear that Southern Minerals frequently advanced money to Fire Creek. The advances were made against production (Tr. I, 77; 114). The money was used to purchase needed supplies and equipment and to pay off past due debts (Tr. I, 113-115; Tr. II, 104-105). According to Harold, the determination whether Fire Creek had enough income to cover its expenses was made by Harold, Bowling and, at times, St. John (Tr. I, 116). St. John agreed that when he was president of Fire Creek he knew when the company would experience a fiscal short fall and he would arrange with Southern Minerals for an advance (Tr. II, 165). In deciding whether and when to arrange for an advance, St. John essentially testified that he consulted himself (Tr. II, 165). Further, Harold testified that he was not always aware when money was advanced (Tr. I, 119).

Once again, the evidence reveals the lack of any clear separation of functions between Fire Creek and Southern Minerals in these areas among the parties. It is impossible to distinguish where Bowling's and St. John's financial authority as representatives of Fire Creek ended and their authority as representatives of Southern Minerals began, and vice versa. St. John's testimony that as president of Fire Creek he consulted himself as vice president and director of Southern Minerals when arranging for advances to Fire Creek from Southern Minerals, is typical of the overlap:

Q. Who is responsible for making the determination to advance funds to Fire Creek . . . ?

A. I made those determinations.

Q. And in what capacity did you make that determination?

A. As president of Fire Creek, I would have acknowledged the shortage of money and would have made arrangements with Southern Minerals to make those advances.

* * * *

Q. [W]ith whom in Southern Minerals did you speak regarding that?

A. Me (Tr. II, 165).

Thus, I conclude that Bowling and St. John acted as though the entities were one when they arranged for the advances. Their testimony that advances against production were a normal way of doing business between a lessee and its contract operator was entirely credible (Tr. I, 136-137; Tr. II, 284), and I do not believe that the extension of money in and of itself indicates the entity advancing the funds necessarily is acting as a statutory operator. However, without a careful separation of form and function -- a separation that is not in evidence here -- the entity advancing the money can only be seen as playing a significant part in the day-to-day operation of the on-site mining enterprise.

In addition, Bowling kept an eye on the cost of supplies and equipment to the equal benefit of both entities. Obviously, day-to-day operations at the mine could not have proceeded without the supplies and equipment. Bowling helped to make certain they were present. Bowling again acted as though Fire Creek and Southern Minerals were one.

THE STATUS OF TRUE ENERGY

St. John described True Energy and Southern Minerals as "sister corporations" in that as of October 1, 1989, they shared identical ownership (Tr. II, 100-101; see Joint Exh. (stips. 11-

12)). True Energy's business was to buy coal from Southern Minerals and have it processed and resold. The coal was mined by Southern Mineral's contract operators, including Fire Creek (Tr. II, 101). The coal was processed at a preparation plant owned and operated by an unrelated corporation (Tr. II, 102). True Energy also provided administrative services Southern Minerals (Tr. II, 100-101).

The fact that True Energy and Southern Minerals shared identical owners and officers, that they were, to use St. John's phrase, "sister corporations," as St. John testified, does not in and of itself mean that Southern Minerals' status as an operator is attributable to True Energy. As noted, at law, separate corporate entities are just that -- separate -- and are entitled to be considered on their own merits, regardless of their ownership and leadership, provided they function separately in fact and those acting for them do so in a manner consistent with their distinct nature.

There are two general areas in which True Energy was involved with Fire Creek -- providing administrative services and providing engineering services.

INDICES OF OPERATOR STATUS

INVOLVEMENT IN ADMINISTRATIVE SERVICES

Harold testified that True Energy took care of all of Fire Creek's business and that Fire Creek paid a fee to True Energy for this service (Tr. I, 71). However, when he was asked to specify what True Energy did, all he could think of was that True Energy paid Fire Creek's bills (Tr. I, 71-72).

St. John was more thorough in his description of the services that True Energy provided to Fire Creek. He explained that while True Energy did indeed pay Fire Creek's vendors, it also monitored Fire Creek's cash flow, deposited its cash receipts and wrote checks, which Harold signed, to pay the vendors (Tr. II, 122-123).

He further stated that True Energy paid for Fire Creek's liability insurance policies and that True Energy was fully reimbursed by Fire Creek (Tr. II, 150-151; 184). In St. John's view, True Energy did not dictate insurance choices to Fire

Creek, and Fire Creek did not always accept True Energy's insurance recommendations. For example, St. John testified that Fire Creek provided its employees with more extensive medical insurance than he recommended (Tr. II, 199).

Until July 1990, Fire Creek paid True Energy for the administrative services it received. After that, because of financial difficulties, Fire Creek did not pay True Energy and True Energy was "out" approximately $6,000 per month (Tr. II, 184, 232-233).

St. John further stated that payroll matters were handled for Fire Creek by Arnold Lively and Associates (Lively). St. John maintained that Fire Creek hired Lively and Lively dealt directly with Harold (Tr. II, 111, 115). Fire Creek kept track of the workers' hours, but Fire Creek's pay checks were prepared by Lively and Harold verified and signed them (Tr. II, 115).

Lively also prepared Fire Creek's federal and state tax forms, its FICA and Social Security forms, its depreciation schedules and its financial statements (Tr. II, 112-113; 124).

I conclude that True Energy's involvement in administrative services was not such as to indicate it had supervision and control over day-to-day operations at the mine. While it is true Fire Creek could not long have operated had its receipts not been deposited, its bills not been paid and even, perhaps, had it not contracted for liability insurance, these business aspects of its operation are far removed from the day-to-day mining functions that lie at the heart of federal regulation. To find that they are indices of operator status would be to adopt a "but for" approach to the scope of the Act, one that would base enforcement upon that fact that no matter how removed a service is from day-to-day operation, if, ultimately, the mine can not operate without the service, the provider of the service is an operator. Such an approach does not have a rational limit and its logical extension could result in holding power companies, and or accounting firms, to be "operators" within the meaning of section 3(d).

Moreover, unlike Bowling and St. John's actions for Southern Minerals regarding Fire Creek's employment, production, and finances, those who acted for True Energy in providing administration services did so on a separate and clearly defined

basis. There was no confusion about when they were acting for True Energy and when they were acting for Fire Creek. Fire Creek and True Energy agreed on the services and on the price for the services.

INVOLVEMENT IN ENGINEERING SERVICES

Initially, True Line was responsible for mining projections, spad work, and mapping for Fire Creek (Tr. I, 78-79). The projections were developed by Harold and Bowling with the assistance of James Boardwine, who worked for True Line. Although Boardwine testified that he never discussed the projections with Bowling, True Line's invoices indicate that True Line representatives met with Harold and Bowling concerning the projections, and I believe this in fact occurred (Tr. II, 275-276; Gov. Exh. 4 at 2,4). Be that as it may, Boardwine worked for True Line, not for True Energy. Moreover, the purpose of the projections was to ensure that development of the mine did not "stray" outside the lease and that Southern Minerals' leased coal was mined without waste.

Fire Creek called True Line when it wanted spads set. When production was good, True Line set spads approximately twice a week. Around January 1990, True Line stopped doing spad work and True Energy hired replacements for Fire Creek (Tr. I, 81). The persons hired worked for other of Southern Minerals' contractors in addition to Fire Creek. St. John made clear in his testimony that Allen Riggins, the person who did most of the spad work, in effect was regarded as an employee of True Energy (see Tr. II, 225, see also Tr. II, 345, Tr. I, 81). I accept St. John's testimony, and I find that True Energy effectively replaced True Line as the entity responsible to Fire Creek for spad work at the mine.

The spad work was connected to mapping of the mine, which was done by Boardwine, at Harold's direction. Harold stated, "I would show . . . [Boardwine] what I wanted on the maps; and he would make those maps; you know, the changes we'd make in direction or ventilation or anything (Tr. I, 81)." Although True Line stopped doing the spad work, it continued to prepare the maps based upon information that Riggins and other True Energy employees provided, except that True Energy's employees at times, and at Harold's request, drew small section maps that the mine foremen carried and used (Tr. I, 85-86, 87-89; Tr. II, 133-134).

I conclude that True Energy's involvement in engineering services was not such as to indicate it had supervision and control over day-to-day mining operations. As stated, I do not find that True Energy was involved substantially with mining projections and there is no indication that True Energy, through its connection with spad setting, surveying, and its limited connection with map preparation, controlled or had the authority to control day-to-day mining.

As I have repeatedly observed, in my view it is not enough that a company be in some way involved with various aspects of mining. All operators are not endowed with the resources necessary to finance and control all aspects of the mining process. The economic realities of the coal fields are such that in some instances either there is contract mining or there is no mining. When this is the case, it is not unusual, indeed it is common, for those doing the actual mining to rely on others for things such as map preparation, spad setting, and the development of projections, and that is exactly what Fire Creek did with regard to True Energy.

The Secretary has not established that True Energy had control over or authority to exercise control over day-to-day mining of coal at the Fire Creek mine, and I fail to see how holding True Energy liable as an operator under these circumstances furthers the purposes of the Act.

CONCLUSION

I conclude that Southern Minerals substantially participated in the operation, control and supervision of the day-to-day operations of the Fire Creek No. 1 Mine, and therefore, was an operator of the mine within the meaning of section 3(d) of the Act.

I conclude that True Energy did not substantially participate in the operation, control and supervision of the day-to-day operations of the Fire Creek No. 1 Mine, and therefore, was not an operator of the mine within the meaning of section 3(d) of the Act.

ORDER AND NOTICE OF HEARING

These proceedings are **DISMISSED** with respect to True Energy.

The parties are advised that the civil penalty and contest aspects of these cases as they relate to Fire Creek and Southern Minerals, are scheduled to be heard commencing on Tuesday, March 5, 1996, in Princeton, West Virginia. The specific hearing site will be designated later. The matters of fact and law are as stated in the pleadings, except that no further argument will be entertained on the status of the Contestants as operators under the Act.

The parties are reminded that any person planning to attend the hearing who requires special accessibility features and/or the use of auxiliary aids (such as sign language interpreters) must request those in advance (See 29 C.F.R. §§ 2706.150(a)(3) and 2706.160(d)).

In preparation for the hearing, the parties are directed to complete the following on or before February 16, 1996: (a) confer on the possibility of settlement and stipulate as to all matters that are not substantial dispute; (b) stipulate the issues and fact and law remaining for the hearing, and, if unable to stipulate the issues, exchange written statements of the issues as contended by the respective parties; (c) exchange lists of exhibits, and, at the request of a party, produce exhibits for inspection and copying; (d) stipulate as to those exhibits which may be admitted into evidence without objection, and as to others indicate whether the exhibit is accepted as an authentic document; and (e) exchange witness lists with a synopsis of the testimony expected of each witness.

Finally, the parties are directed to file on or before February 20, 1996, prehearing reports stating (a) lists of exhibits and witnesses together with the parties' synopses of expected testimony; (b) stipulations entered into; (c) statements of the issues; and (d) a memorandum of law on any legal issue raised with citations to the principal authorities relied upon.

David F. Barbour

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 15, 1995

OLIVER J. BOUTET,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 95-373-DM
AMES CONSTRUCTION COMPANY,	:	WE MD 95-07
Respondent	:	
	:	Barrick Goldstrike Mine

ORDER OF DISMISSAL

Before: Judge Merlin

On May 15, 1995, the complainant, Oliver J. Boutet, filed with the Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. On May 17, 1995, the Commission sent Mr. Boutet a letter informing him that additional information was needed to be filed in order for his case to be processed.

Having received no response to the May 17 letter, an order to show cause was issued to Mr. Boutet on June 27, 1995, directing him to submit the information. Mr. Boutet was told that if he failed to respond to the June 27 order his complaint would be dismissed. The order was sent to Mr. Boutet certified mail return receipt requested but was returned to the Commission marked unclaimed.

On October 18, 1995, a second order to show cause was sent to Mr. Boutet because a review of the file showed that both the May 17 letter and June 27 order to show cause were mailed to Mr. Boutet at the address listed on the letter that had been sent by MSHA advising Mr. Boutet that no discrimination occurred. This was an error because Mr. Boutet's letter of complaint to the Commission lists a different address. Given the discrepancy in the mailing address, a new show cause order was issued and the Complainant was furnished with copies of the May 17 letter and the June 27 show cause order. The October 18 order was sent certified mail return receipt requested but was returned to the Commission marked "Attempted not known, Insufficient address". A handwritten notation on the envelope indicates that a suite number was necessary for this address. On December 13, 1995, my law clerk attempted to contact Mr. Boutet by telephone. However, no phone number was listed for him in the Reno, Nevada area.

Under Commission rule 2700.7(c), 29 C.F.R. § 2700.7(c), service is complete upon mailing when sent by certified mail. See, Matter of Park Nursing Center, Inc., 766 F.2d 261 (6th Cir. 1985); Cf. Fed. R. Civ. P.4(c)(2)(C)(ii), 5(b).

In light of the foregoing, it is ORDERED that the discrimination complaint be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Mr. Oliver Boutet, 1150 Terminal Way, Reno, NV 89502

Ames Construction Company, 2001 Griffin, Carlin, NV 89822

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
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DEC 1 8 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 94-108-M A.C. No. 29-01380-05511
v.	:	
	:	Sedillo Hill Mine
WESTERN MOBILE NEW MEXICO, INC., Respondent	:	

DECISION

Appearances: Robin S. Horning, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Katherine Shand Larkin, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Western Mobile New Mexico, Inc. ("Western Mobile"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 ("Mine Act"). The petition alleges one violation of the Secretary's safety standards. For the reasons set forth below, I find that the Secretary did not establish the violation and I vacate the citation.

A hearing was held in this case on April 11 and 12, 1994, in Albuquerque, New Mexico. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. FINDINGS OF FACT

Western Mobile operates the Sedillo Hill Mine, a surface limestone mine in Bernalillo County, New Mexico. Limestone is mined and crushed at the mine site. The pit consists of several benches, the faces of which are between 15 and 35 feet high. (Tr. 221). Limestone is loosened from a bench using explosives. A series of holes are drilled down from the top of the bench, explosives are loaded into the holes and the explosives are

detonated from some distance away. The loosened material is loaded and transported to the crushing plant. At the time the citation was issued, drilling and blasting at the Sedillo Hill Mine were performed by an independent contractor, Sandy Jones Construction Company ("Jones Construction"). Each bench was blasted once every week or two. (Tr. 166).

On September 15, 1993, an employee of Jones Construction, Marvin Anglin, blasted a bench near the northwest corner of the pit. Three individuals were in the same area of the pit as Mr. Anglin at the time of the blast: Matt Carnahan, Western Mobile's plant manager; and two employees of Jones Construction's insurance carrier. One of these insurance agents, Mike Wilson, was seriously injured when fly rock from the blast struck him. He suffered a bruised liver and back trauma. (Tr. 149-50). Apparently, his injuries were not of a permanent nature.

Mr. Sandy Jones, owner of Jones Construction, notified MSHA of the accident and MSHA Inspector Omar Sauvageau was sent to the mine to investigate. He was accompanied by Thomas J. Loyd, an MSHA supervisory mining engineer. After conducting an investigation, Inspector Sauvageau issued citations to Western Mobile and to Jones Construction. The section 104(a) citation issued to Western Mobile alleges a violation of 30 C.F.R. § 56.6330. The citation states:

> On 9/15/93 a blasting accident occurred at the Sedillo Hill Mine, where one person was injured and hospitalized by fly rock, and two other persons were peppered by small material from the round which was blasted in the pit. The men were located approximately 500 feet from the blast site when they initiated the blast. There was not a suitable blasting shelter in the area where the blast was initiated. The men were standing next to pickup trucks which were intended to be used as shelters, not behind them as intended.

(Ex. G-6). In the citation, the inspector determined that the alleged violation was significant and substantial and was caused by Western Mobile's moderate negligence. The inspector also determined that the alleged violation was reasonably likely to cause a fatal injury. (Ex. R-1). The Secretary assessed a penalty of $3,000.00 against Western Mobile.

The cited safety standard provided:

> Ample warning shall be given before blasts are fired. All persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to pro-

tect persons endangered by concussion or fly-rock from blasting.[1]

The term "blasting area" is defined as "the area near blasting operations in which concussion or flying material can reasonably be expected to cause injury." 30 C.F.R. § 56.2. The issue in this case is whether the four individuals were in the "blasting area" at the time the explosives were detonated.

Inspector Sauvageau testified that a mine operator must look at a number of factors when establishing its blasting procedures. He stated that these factors include the geological makeup of the rock, type of round that is drilled, depth of the holes, amount of explosives used, and the history of blasting at the pit. (Tr. 28, 52). Based on his analysis of these factors, he determined that the individuals were within the blasting area.

He believed that the fact that a man was injured showed that the people were too close to the blast site. (Tr. 27, 30, 53). He concluded that the history of blasting at this particular mine should have alerted Western Mobile to the hazard. He also considered the fact that the pit wall was highly fractured, and the blasting contractor, Jones Construction, had difficulty loading at least one of the holes because of cracks in the rock. He believed that the explosive material went into cracks in the rock and that this condition created an increased risk of fly rock.

On this particular blast, 27 holes were drilled from the top of the bench. Each hole was 19 feet deep and was 3½ inches in diameter. Nine holes were in each of three rows and the first row was about seven feet back from the edge of the bench. The holes were filled with an ammonium nitrate-fuel oil blasting agent ("anfo"). In one to four of the holes, the anfo entered cracks in the rock. Mr. Anglin, the contractor's employee, followed his usual practice when cracks are encountered. He placed empty ammonium nitrate bags into the hole to block the cracks, placed cuttings[2] into the hole, and then continued to fill the hole with anfo.

The Secretary's witnesses testified that because anfo went into the highly fractured rock, the rock did not blast as it should. When blasted, rock will "pull out" in the direction of least resistance. (Tr. 35) In this case, rock came straight out the side of the bench. Inspector Sauvageau testified that rock

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[1] This safety standard was effective through January 31, 1994. It has been superseded by section 56.6306, which differs substantially from the standard at issue in this proceeding.

[2] Cuttings are ground rock that is removed from the drill bit. (Tr. 233).

went a total of about 600 to 800 feet into the pit. (Tr. 32). Matt Carnahan testified that when anfo enters cracks in the rock, the contractor follows an established procedure to minimize the risk and that fly rock does not usually travel 500 feet in such circumstances.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary

The Secretary argues that because Western Mobile did not have a suitable blasting shelter, it was required to remove all people from the blasting area. He refers to the definition of "blast area" at 30 C.F.R. § 56.6000.[3] The Secretary relies heavily on the first sentence of this definition and argues that the evidence establishes that people were in an area in which flying material caused injury to an individual. He further maintains that the limestone formation contained numerous vertical and horizontal cracks that created weak zones and that a prudent person would recognize that such weak zones may blow out and create a fly rock problem. Anfo entered these cracks around a number of holes, creating a greater potential for fly rock. He contends that blasters frequently initiate shots at this mine from a distance of 1000 feet or more and that this history demonstrates Western Mobile's knowledge of the hazard.

B. Western Mobile

Western Mobile does not dispute that it did not have a blasting shelter. It contends that it did not violate the safety standard because it removed all persons from the area where fly rock was reasonably expected to cause injury. It relies on the definition of blasting area in 30 C.F.R. § 56.2 and the Commis-

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[3] "Blast area" is defined as:

> The area in which concussion (shock wave), flying material, or gases from an explosion may cause injury to persons. In determining the blast area, the following factors shall be considered:
>
> (1) Geology or material to be blasted.
> (2) Blast pattern.
> (3) Burden, depth, diameter, and angle of the holes.
> (4) Blasting experience of the mine.
> (5) Delay system, powder factor, and pounds per delay.
> (6) Type and amount of explosive material.
> (7) Type and amount of stemming.

sion's decision in Hobet Mining & Construction Co., 9 FMSHRC 200 (February 1987). It contends that the blaster, Mr. Anglin, considered the relevant factors, including the blasting history, geology of the area, the amount and type of explosives and stemming used, and the depth and pattern of the holes. It argues that Mr. Anglin reasonably concluded that the men were not within the blasting area when he fired the shot. Western Mobile maintains that the Secretary failed to establish that the blaster did not consider or employ these factors when initiating the blast. Western Mobile believes that the citation was issued solely because there was an injury. It contends that it complied with the requirements of the standard and that the cited fly rock incident was a "fluke occurrence." (W.M. Br. 4).[4]

III. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

The issue in this case is whether Western Mobile removed all persons from the blasting area as required by section 56.6330. The applicable definition provides that the blasting area is the area near blasting operations in which "concussion or flying material can reasonably be expected to cause injury." I reject the Secretary's contention that the definition of "blast area" is applicable to the safety standard. Because the new safety standard at section 56.6306 uses the term "blast area," the definition of that term applies to that regulation and not to the old standard at issue in this case.[5] The Secretary's expert witness, Richard Fisher, could not explain why the definition for the new standard should be applied in a case involving the old standard. (Tr. 114-15).

In Hobet, the Commission interpreted the definition of "blasting area" in conjunction with an identical safety standard for surface coal mines. The Commission held that in order to establish a violation, the Secretary must "establish the factors that a reasonably prudent person familiar with mine blasting and the protective purposes of the standard would have considered in

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[4] Western Mobile also argued that it was not properly cited for the alleged violation because Jones Construction was solely responsible for drilling and blasting in the pit. Because I find that the safety standard was not violated, I have not reached this issue.

[5] Nevertheless, the seven factors that are to be considered in determining the "blast area" are similar to the factors that all witnesses agreed should be considered by a reasonably prudent blaster before he detonates explosives. It is the first sentence of the definition of "blast area" that I have not considered in resolving the issues in the present case.

making a determination under all of the circumstances posed by the blast in issue." Hobet, 9 FMSHRC at 202. The Secretary "must then prove that the factors were not properly considered or employed." Id. The Commission went on to hold:

> An operator's pre-shot determination of what constitutes a blasting area is based not only upon the results of prior shots, but also depends upon a number of variables affecting the upcoming shot. The variables may include, but are not limited to, the amount and type of explosives used, the depth of the holes that constitute the shot, the topography, and the expertise and prior experience of the blaster.

9 FMSHRC at 202-03 (citation and footnote omitted).

There is little dispute about the factors that a blaster should consider when determining the boundaries of the blasting area. The issue is whether the blaster considered and employed these factors in this case. The burden of proof lies with the Secretary to establish a violation.

The first factor, the geology of the rock, was addressed extensively at the hearing. The rock at the Sedillo Mine is highly fractured and contains many horizontal and vertical cracks, called "voids" at the hearing. These voids are plainly visible in the photographs of the pit. (Exs. G-3, G-5). The evidence establishes that a rock formation with voids is more likely to produce fly rock because the rock is highly fractured and because explosive material can enter these voids when the shot is loaded. The evidence does not establish, however, that the presence of fractured rock should have put Western Mobile or Mr. Anglin on notice that fly rock could reasonably be expected to travel 500 feet into the pit. Mr Carnahan discussed this particular shot with Mr. Anglin prior to its detonation and Mr. Anglin did not express any concerns about fly rock. (Tr. 208).

The individuals in the pit were about 500 feet from the area being blasted.[6] Mr. Carnahan testified that he has observed 10 to 12 shots while working at the pit. (Tr. 200). In each case, Mr. Anglin was the blaster who determined the blasting area. In these shots, Mr. Anglin established a blasting area that varied between 400 and 550 feet. (Tr. 200, 203). Fly rock was not observed at these distances in any of these shots. (Tr. 201-02).

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[6] Matt Carnahan measured the distance between the shot and his location as 530 feet. (Tr. 198).

Mr. Anglin has an established procedure he followed when voids were encountered. He places ammonium nitrate bags down the drill hole to block the void and stem off the hole. He then places cuttings into the hole and continues to load the hole. (Tr. 206). He adds a second detonator to reduce the risk of a misfire. Voids were encountered in a number of the holes in the shots that Mr. Carnahan observed. He did not see any fly rock. (Tr. 207).

The Secretary's witnesses did not testify that Mr. Anglin's procedures are inadequate when encountering voids in the rock. Indeed, Mr. Fisher speculated that the blaster must have "missed one" of the holes when using this procedure and that this "missed" hole created the fly rock. (Tr. 250). The Secretary's witnesses concluded that the procedures were inadequate in this instance because a person was hit and injured. This analysis begs the question. There was no showing that the fact that voids were encountered, a not infrequent occurrence, should have put Western Mobile on notice that the people in the pit were in an area where fly rock could reasonably be expected. The procedures used by Mr. Anglin were designed to compensate for the voids and had apparently been successfully applied in previous blasts. I note that Mr. Anglin has over 20 years of experience in blasting and is a certified blaster. (Tr. 63, 209).[7]

A second factor is the blasting history at the mine. Inspector Sauvageau testified that he observed Jones Construction conduct a blast at the mine in 1991 that was detonated from the plant. He stated that the distance between the shot and the detonation point was about 1,500 feet. He also stated that all employees not involved in the blast assembled at the entrance to the plant some 2,000 feet from the blast site. Mr. Carnahan testified that Western Mobile requires employees to assemble at the plant gate so that a head count can be made to make sure that no employees are in the blasting area. (Tr. 210-12). In addition, under New Mexico law certain nearby roads are required to be blocked during all blasts and employees are dispatched from the plant gate to perform this function. Id.

Moreover, the fact that one blast was detonated from a greater distance than the September 1993 blast does not establish an adverse "blasting history" at the mine. All witnesses agreed that the blasting area changes with the factors discussed above. Nothing in the record indicates that blasts are routinely detonated from 1,500 feet or that the blast at issue was detonated from an unusually close location. In addition, Inspector

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[7] Despite the fact that Mr. Anglin knew more about the factors considered in establishing the blasting area than anyone else at the mine, Inspector Sauvageau did not talk to Mr. Anglin during his investigation of this accident. (Tr. 57, 87).

Sauvageau did not have any knowledge of factors considered by Jones Construction when establishing the blasting area in the 1991 blast. For example, the blaster could have used significantly more explosives in that blast, thereby requiring that a larger blasting area be established. Thus, the record does not establish that Western Mobile or Mr. Anglin failed to consider the blasting history when establishing the blasting area in this case.[8]

There is no evidence that MSHA considered any of the other factors in determining that a violation occurred. For example, MSHA did not consider the depth, diameter, and angle of the holes, the delay system, powder factor, or the amount or type of explosives used. MSHA is not required to consider all factors, but it is difficult to determine whether the blasting experience at a mine should have alerted an operator to the danger of fly rock in a particular blast without some consideration of these other factors.[9]

In this case, the Secretary adequately set forth the factors that a reasonably prudent person should consider in establishing the blasting area. I find, however, that the Secretary did not establish that Western Mobile or its contractor failed to adequately consider or employ these factors when the blast was detonated on September 15, 1993. Instead, the Secretary's witnesses asserted that because someone was injured, all persons were not cleared and removed from the blasting area.

Although the Secretary showed that fly rock is more likely in the presence of highly fractured rock, it is clear that large areas of the pit are fractured and that the blaster takes precautions to deal with these conditions and the resulting voids. The Secretary did not establish that the blaster failed to consider the fractured nature of the rock when detonating the blast or that he was unqualified to establish a safe blasting area as a result of these conditions.

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[8] Inspector Sauvageau also referred to an incident that occurred in the late 1980's in which a piece of fly rock struck the mine's scale house. (Tr. 37). He testified that the scale house was located about 1,500 feet from the blast site. Id. Western Mobile presented evidence that the scale house was at a different location at the time of that incident and that the distance to the blast site was about 300 feet. (Tr. 177). For the reasons stated above, this incident does not establish a blasting history that should have put Western Mobile on notice that 500 feet was not a safe distance.

[9] Of course, the blast that caused the accident in this case is now an important part of Western Mobile's blasting history.

IV. ORDER

Accordingly, Citation No. 4109895 issued to Western Mobile New Mexico, Inc. is hereby **VACATED** and this proceeding is **DISMISSED.**

Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

December 18, 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on	:	Docket No. WEST 96-81-D
BEHALF OF ARTHUR R. OLMSTEAD,	:	DENV CD 95-20
Complainant	:	
v.	:	Savage Mine
	:	Mine ID 24-00106
KNIFE RIVER MINING COMPANY,	:	
Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

This case is before me pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). On November 24, 1995, the Secretary, on behalf of Arthur Olmstead, filed an application for temporary reinstatement. Subsequently, the parties reached an agreement concerning the temporary economic reinstatement of the Complainant. A Response to Application for Temporary Reinstatement and Agreed Order Regarding Temporary Economic Reinstatement, memorializing that agreement, was filed on December 11, 1995.

Accordingly, the agreement for temporary economic reinstatement is **APPROVED**. It is **ORDERED** that the Complainant shall be **TEMPORARILY REINSTATED** by the Knife River Mining Company, effective December 7, 1995, in accordance with the terms of the Agreed Order Regarding Temporary Economic Reinstatement, which is attached to this order and whose provisions are incorporated in this order by reference thereto.

T. Todd Hodgdon
Administrative Law Judge

Attachment

Distribution:

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

December 8, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. LAKE 94-72, etc.
Petitioner	:	
	:	
v.	:	Buck Creek Mine
	:	
BUCK CREEK COAL INC.,	:	
Respondent	:	

ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT'S MOTION TO COMPEL

Buck Creek has filed a motion to compel the Secretary to produce MSHA inspectors' notes taken during inspections of Buck Creek; conference worksheets; memoranda relating to civil special investigations, special assessments and civil knowing and wilful violations; and, all other investigative files on civil section 110 cases, 30 U.S.C. § 820(c). Claiming the "work-product" privilege found in Rule 26(b)(3) of the Federal Rules of Civil Procedure or that the documents relate to the criminal investigation of Buck Creek, the Secretary objects to the production of eleven pages of conference worksheets, 25 memoranda relating to knowing and wilful violations and files in three section 110 cases.[1]

By order dated October 20, 1995, I ordered the Secretary to provide, for my *in camera* inspection, a copy of each contested document. *Buck Creek Coal, Inc.*, 17 FMSHRC 1805 (October 1995).

[1] The Secretary's response states that the requested inspectors' notes were provided to the Respondent on October 10, 1995.

For the reasons indicated, the Respondent's motion is granted or denied as discussed below.[2]

Conference Worksheets

The Secretary asserts that eleven pages of conference worksheets "contain the mental impressions of the conference officers when reviewing and discussing a citation" and, therefore, come within the "work-product" privilege. For a document to come within the "work-product" privilege, it must have been prepared in anticipation of litigation or for trial. *Asarco, Inc.*, 12 FMSHRC 2548, 2558 (December 1980). In that same decision, however, the Commission held that if "litigation is contemplated but the document was prepared in the ordinary course of business rather than for the purposes of litigation, it is not protected." *Id.*

With the exception of three documents identified only by the numbers 4262876, 4262982 and 4262989 and a two-page document dated "5-31-95" and signed by "Michael D. Rennie, Conferencing Officer", it appears that the documents, to the extent they are comprehensible at all, are notes taken during a conference rather than the recording of mental impressions of conference officers when reviewing and discussing a citation. The three numbered documents (the numbers apparently refer to citation or order numbers) and the May 31 document arguably do contain some mental impressions. Nonetheless, conference worksheets are prepared in the ordinary course of business and not solely for the purposes of litigation. Therefore, they are not protected by the "work-product" privilege and are discoverable. Accordingly, the Respondent's motion to compel the production of copies of the eleven pages of conference worksheets will be granted.

Memoranda Relating to Knowing/Wilful Violations

The Secretary asserts that 12 of the 25 memoranda relate to the criminal investigation of Buck Creek. In addition, he argues that all of the memoranda come with the "work-product" privilege. The Secretary has not identified which 12 of the memoranda relate

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[2] Since the Secretary has not objected to producing any of the documents on the grounds of relevancy, I am assuming for the purposes of this order that they are all relevant.

to the criminal investigation. Nor has he indicated how they are related. Consequently, I find that that is not a basis for withholding the documents. I do find, however, that the memoranda come within the "work-product" privilege.

The memoranda are reviews by the Supervisory Special Investigator of 104(d)(1) or 104(d)(2) orders or 104(a) citations issued in conjunction with a 107(a) order, 30 U.S.C. §§ 814 and 817, which had been issued to Buck Creek, for possible knowing and/or wilful violations under Section 110(c) or (d) of the Act, 30 U.S.C. § 820(c) and (d). In each instance, the violation was considered against criteria set out by MSHA for determining whether a violation is knowing and/or wilful. In each case, the recommendation was either "no further action under Section 110(c) or (d) of the Act with regard to this particular violation," or that "the case be closed."

The recommendation, however, does not determine whether the document was prepared in anticipation of litigation. Rather, it is the purpose of the review which is dispositive. In this case, the purpose of the review is to allow the Secretary to determine whether a special investigation should be commenced under Section 110(c) or (d). The Commission has held that "[a] major function of an MSHA special investigation is to determine whether litigation should be commenced under section 110(c) or (d) of the Mine Act." *Asarco* at 2559. Furthermore, the recommendation of the Supervisory Special Investigator would not preclude the Secretary from instituting a special investigation. Accordingly, I conclude that the memoranda were made in anticipation of litigation and are protected by the "work-product" privilege.

Having determined that the memoranda come within the "work-product" privilege, they are subject to discovery "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). Buck Creek has made no such showing. Accordingly, the motion to compel the 25 memoranda relating to knowing/wilful will be denied.

Section 110 Investigative Files

The Secretary has submitted three Section 110 investigative files for inspection.[3] The Secretary objects to producing these files because they relate to the criminal investigation and because they are covered by the "work-product" privilege. With respect to one of the files, I conclude that it is related to the criminal investigation. I am unable, however, to reach a conclusion one way or the other concerning the remaining two files. On the other hand, I find that all of the files are within the "work-product" privilege.

Despite the Commission's instructions *in Buck Creek Coal Inc.*, 17 FMSHRC 501, 505 (April 1995), that "[t]he judge should also consider this commonality of evidence when determining the limits of discovery in order to permit civil proceedings to advance without prejudice to criminal matters," the Secretary has not indicated how the 110 investigations are related to the criminal matters. Notwithstanding that, I note that MSHA case file No. VINC-CSI-93-08 involves three orders that I recently continued on stay as being related to the criminal investigation of Buck Creek. *Buck Creek Coal, Inc.*, 17 FMSHRC 2149 (November 1995). Consequently, I conclude that the file is not discoverable since it involves evidence and issues in the criminal case. I conclude that discovery of the remaining two files is not precluded by a commonality of evidence and issues with the criminal investigation.

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[3] The Respondent originally indicated that eight 110 investigative files were being withheld. In the cover letter submitting the documents for my inspection, counsel for the Secretary stated that six such files were enclosed. In fact, there were only three 110 investigative files. In response to my inquiry about the discrepancy, counsel for the Secretary stated in a letter dated December 5, 1995, that:

> In response to the court's October 20, 1995 order to submit documents for **in camera** inspection, the Federal Mine Safety and Health Administration has informed me that after a search of its files there are only three section 110(c) investigative files instead of six. At the time, MSHA believed that there were six files, but apparently they were mistaken.

However, I conclude that all of the files were established in anticipation of litigation. This is so because the purpose of a 110 investigation "is to allow the Secretary to determine whether a case should be filed." *Asarco, supra.* Accordingly, I find that the three 110 investigate files are within the scope of the "work-product" privilege. Since Buck Creek has not made the requisite showing of substantial need and undue hardship discussed above, the files are not discoverable and, with regard to them, the motion to compel will be denied.

ORDER

Accordingly, Buck Creek's motion to compel is **GRANTED** with respect to the eleven pages of conference worksheets and **DENIED** with respect to the 25 memoranda and the three 110 investigative files. The Secretary is **ORDERED** to provide counsel for Buck Creek copies of the eleven pages of conference worksheets within 15 days of the date of this order.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
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December 14, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 95-426-M A.C. No. 24-00338-05502 QKD
v.	:	Continental Mine
INTERMOUNTAIN IRECO, INC., Respondent	:	

ORDER DENYING MOTION FOR SUMMARY DECISION

Respondent has filed a motion for summary decision in this case pursuant to Commission Rule 67, 29 C.F.R. § 2700.67. Rule 67(b) sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

The two citations in this proceeding state that trucks containing ammonium nitrate were parked inside Respondent's repair shop. The citations allege a violation of 30 C.F.R. § 56.6801, which provides: "Vehicles containing explosive material and oxidizers shall not be taken into a repair garage or shop." Respondent contends that ammonium nitrate is an oxidizer, not an explosive material. It argues that the plain language of the safety standard prohibits vehicles containing "explosive material and oxidizers" from entering repair garages and shops. Since the cited trucks contained oxidizers but not explosive materials, Respondent argues that the safety standard does not apply and the citations should be vacated. Respondent maintains that the unambiguous wording of the regulation supports its position that vehicles containing oxidizers alone do not violate the safety standard.

The Secretary opposes the motion for summary decision. He argues that the plain language of the standard provides that a vehicle containing only oxidizers is prohibited from entering a repair garage or shop. He contends that Respondent's interpretation of the word "and" in the standard is too narrow and that this term also means "as well as" and "or." Second, he contends that the regulatory history of this provision supports his position. Finally, he argues that the trucks contained fuel oil and ammonium nitrate in separate compartments and that these materials constituted an explosive material when combined.

The term "explosive material" is defined as "explosives, blasting agents, and detonators." 30 C.F.R. § 57.6000. The term "oxidizers" is not defined in the Secretary's regulations. Nevertheless, the parties do not dispute that the ammonium nitrate on the trucks was an oxidizer and not an explosive material, as those terms are used in the standard. Each citation was modified by the MSHA inspector to include the following language:

> Further investigation revealed that the trucks ... were loaded with ammonium nitrate which is an oxidizer but does not become explosive until it is mixed with an emulsifier containing fuel oil. There was no danger of these trucks exploding in the repair shop without a major fire being present.

As a result of this modification, MSHA determined that the alleged violations were not significant and substantial.

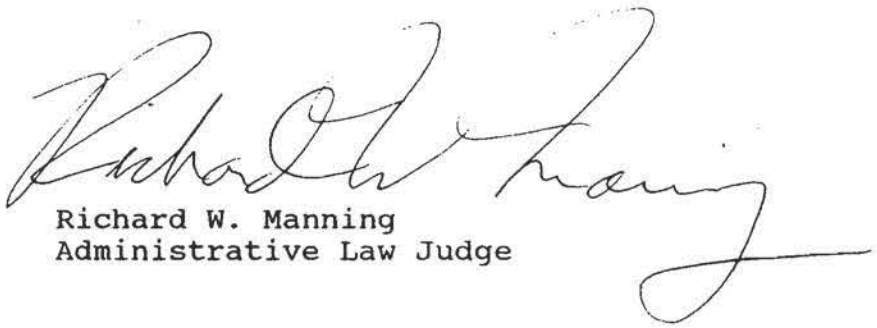
I find that Respondent is not entitled to summary decision under Commission Rule 67. First, there are genuine issues concerning the facts in this case. There is no evidence as to the meaning of the term "oxidizers" in the standard. In addition, the record contains no evidence about the relationship between oxidizers and explosive materials. The Secretary alleges that the trucks contained fuel oil and ammonium nitrate but that these materials were located in separate compartments. It is my understanding that ANFO is created when these materials are mixed. Is ANFO an explosive material? If ammonium nitrate and fuel oil are in separate compartments is a explosive material present? Do "explosives," "blasting agents" or "detonators," as those terms are used in the definition of "explosive materials," contain oxidizers? In short, the record does not contain the factual foundation I need to analyze the legal questions raised by Respondent.

The essence of Respondent's argument is that the regulation unambiguously provides that a vehicle violates the standard only if it contains both explosives and oxidizers. It bases this argument on the conjunctive usage of the word "and." As stated by the Secretary, however, the word "and" can be used in the

disjunctive sense. Under Respondent's interpretation, a truck containing only explosive materials would be permitted in a repair shop. Thus, a truck loaded with explosive materials that is parked in a repair shop would not violate the standard unless the truck also contained oxidizers. Such an interpretation does not appear to be logical, but I cannot say for certain because the record is devoid of basic information about explosive materials and oxidizers.

When a regulation is capable of being construed in two different ways by reasonably well-informed people, it is not unambiguous. Based on the limited record in this case, it would appear that section 57.6801 is capable of two logical interpretations, as presented by the parties. Respondent would have me rule on its motion based on a blind analysis of the meaning of the word "and." I believe that the word "and" must be interpreted in the context of the safety standard. The record does not contain sufficient facts for me to construe the meaning of that word within the standard at this time. The cases cited by Respondent are not inconsistent with my analysis.

Accordingly, Respondent's motion for summary decision is **DENIED** on the basis that there are genuine issues of material fact and Respondent is not entitled to summary decision as a matter of law. For the same reasons, the Secretary's cross motion for summary decision is also **DENIED.**



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 18, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 95-451-M A. C. No. 09-01059-05506
v.	:	Buffalo China Clays Company
ECC INTERNATIONAL, Respondent	:	

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

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 parties have filed a joint motion to approve settlement for the one violation in this case. A reduction in the penalty from $4,000 to $3,600 is proposed. A fatality is involved.

Citation No. 3599861 was issued for a violation of 30 C.F.R. § 56.9305(a) which requires that if truck spotters are used, they should be in the clear while trucks are backing into dumping position or dumping. The shift leadman was directing traffic and supervising road repairs at a dump location and failed to stand clear of a truck backing into dumping position and the truck backed over the leadman killing him. According to the citation, the violation was significant and substantial and negligence was rated as low. The respondent in this case is the operator of this mine.

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

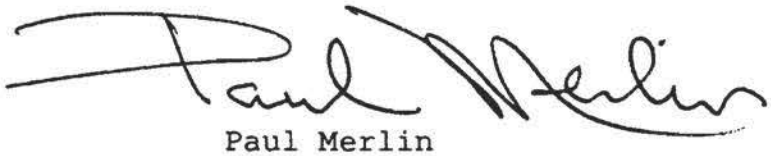
The violation in this case is the ultimate in gravity. However, the settlement motion fails to discuss any of the facts

surrounding the fatality or identify the reasons for the proposed reduction. The parties have submitted nothing more than a boilerplate motion. Even where the proposed reduction is only 10%, I cannot approve any penalty for this fatality when I do not know what happened.

A virtually identical settlement motion was filed in Docket No. SE 95-432-M which is the penalty proceeding against the independent contractor who employed the driver of the truck involved in the accident. It too, is being disapproved.

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

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



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 18, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 95-432-M A. C. No. 09-01059-05502 C6C
v.	:	Buffalo China Clays Company
C T HARRIS INCORPORATED, Respondent	:	

DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

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 parties have filed a joint motion to approve settlement for the one violation in this case. A reduction in the penalty from $5,000 to $4,500 is proposed. A fatality is involved.

Citation No. 3599862 was issued for a violation of 30 C.F.R. § 56.9305(c) which requires that when a truck driver cannot clearly recognize a spotter's signal, the truck should be stopped. A truck driver in the employ of the respondent did not know the location of the shift leadman and backed his truck over the leadman killing him. According to the citation, the violation was significant and substantial and negligence was rated as low. The respondent in this case is an independent contractor performing work at this mine.

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

The violation in this case is the ultimate in gravity. However, the settlement motion fails to discuss any of the facts surrounding the fatality or identify the reasons for the proposed reduction. The parties have submitted nothing more than a boilerplate motion. Even where the proposed reduction is only 10%, I cannot approve any penalty I do not know what happened.

A virtually identical settlement motion was filed in Docket No. SE 95-451-M which is the penalty proceeding against the operator of this mine involving the same accident. It too, is being disapproved.

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

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

Paul Merlin
Chief Administrative Law Judge

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