# DECEMBER 1993

## COMMISSION DECISIONS AND ORDERS



## ADMINISTRATIVE LAW JUDGE DECISIONS



## ADMINISTRATIVE LAW JUDGE ORDERS

# DECEMBER 1993

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

Secretary of Labor on behalf of Danny Shepherd v. Sovereign Mining Company, Docket No. KENT 94-69-D. (Judge Feldman, November 18, 1993.)

Secretary of Labor, MSHA v. Harold Mitchell, employed by H B & B Equipment Company, Docket No. VA 92-180. (Chief Judge Merlin, Default Decision of May 20, 1993 - unpublished.)

Secretary of Labor, MSHA v. Fort Scott Fertilizer-Cullor, Inc., et al., Docket No. CENT 92-334-M and CENT 93-117-M. (Judge Feldman, November 18, 1993.)

There were no cases filed in which review was denied.

# COMMISSION DECISIONS AND ORDERS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 6, 1993

TEMPORARY REINSTATEMENT
PROCEEDING

| | | |
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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA)<br>on behalf of LOY PETERS,<br>DONALD GREGORY, and<br>DARRYL ANDERSON,<br>Complainants | : | Docket No. WEST 93-652-D |
| v. | : | |
| THUNDER BASIN COAL COMPANY,<br>Respondent | : | |

DECISION

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("the Mine Act"), Thunder Basin Coal Company ("respondent") has filed a petition for discretionary review of Administrative Law Judge Arthur J. Amchan's November 2, 1993, order of temporary reinstatement, issued pursuant to Commission Procedural Rule 45, 58 Fed. Reg. 12158 (March 3, 1993), to be codified at 29 C.F.R. § 2700.45 (1993). We grant respondent's petition for discretionary review and, for the reasons that follow, affirm the judge's order requiring the temporary reinstatement of Loy Peters, Donald Gregory, and Darryl Anderson ("complainants").

Complainants were employed at respondent's Black Thunder mine as technicians-welders when they were laid off on July 8, 1993. On August 31, 1993, complainants jointly filed a discrimination complaint with the Secretary of Labor ("Secretary") pursuant to Section 105(c)(2) of the Mine Act, alleging illegal discharge. Following an investigation, the Secretary determined that the discrimination complaint filed by the miners was not frivolous and on September 24, 1993, filed an application for temporary reinstatement. The Secretary alleged that each of the complainants was illegally discharged in retaliation for exercising specified statutory rights protected under the Mine Act. Respondent contended that the termination of the three complainants occurred as a result of a legitimate business decision to reduce its work force at the Black Thunder Mine by 34 miners. On October 20 and 21, 1993, an evidentiary hearing on the application was held. On November 2, 1993, the judge issued his decision, concluding that the complaint of illegal discharge filed by the three miners was not frivolous.

After conducting an extensive evidentiary hearing consisting of testimony from seven witnesses and the admission into evidence of 50 exhibits, the judge evaluated the evidence as to each individual complainant and concluded, "[T]he Secretary has met his burden in establishing that the discrimination complaints of Loy Peters, Darryl Anderson, and Donald Gregory alleging retaliatory discharge on July 8, 1993 are 'not frivolous.'" Slip op. at 12

As the Commission has previously stated, "The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." Secretary of Labor o.b.o. Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1305, 1306 (August 1987), aff'd, Jim Walter Resources, Inc. v. FMSHRC, 920 F.2d 738 (11th Cir. 1990). That is the only issue before us. We have carefully reviewed the record, the petition for discretionary review, and the Secretary's response thereto, and conclude that the judge's determination that the complaint of the three miners is not frivolous is supported by substantial evidence and is consistent with applicable law.

Respondent has additionally applied for a stay of the order of temporary reinstatement. Upon review of the application, and the Secretary's response in opposition thereto, we deny the application for a stay. We note, however, that respondent's alternative request that the complainants be economically reinstated has been accepted by the individual complainants. Secretary's Response in Opposition to Petition for Discretionary Review and Application to Stay Order at 25 n.15.

Accordingly, the judge's order requiring the temporary reinstatement of Loy Peters, Donald Gregory, and Darryl Anderson is affirmed.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Distribution

Colleen Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Laura Beverage, Esq.
Jackson & Kelly
1660 Lincoln Street
Denver, CO 80264

Administrative Law Judge Arthur J. Amchan
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 9, 1993

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| AIR PRODUCTS AND CHEMICALS, INC. | : | |
| | : | |
| v. | : | Docket No. PENN 91-1488-R |
| | : | |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |

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

## DECISION

BY: Backley and Nelson, Commissioners[1]

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). It involves a citation alleging a violation of section 103(a) of the Mine Act issued to Air Products and Chemicals, Inc. ("Air Products") after it denied an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") entry to its Cambria Co-Generation Facility ("Cambria").[2] Administrative Law Judge Gary Melick vacated the citation. 13 FMSHRC 1657 (October 1991)(ALJ). He concluded that, although MSHA had statutory jurisdiction over coal handling portions of the Cambria operation, MSHA had failed to displace the enforcement authority of the Department of Labor's Occupational Safety and Health Administration ("OSHA"). 13 FMSHRC at 1661-63. The Commission granted cross-petitions for discretionary review of the judge's decision filed by the Secretary of Labor and Air Products. For the reasons discussed below, we affirm the judge's decision in part and reverse in part.

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[1] Commissioners Backley and Nelson join in this opinion to reverse the judge's determination that Air Products and Chemicals, Inc. did not violate section 103(a) of the Mine Act, 30 U.S.C. § 813(a). Commissioner Doyle, writing separately, concurs in result with Commissioners Backley and Nelson. Chairman Holen, dissenting, would vacate the citation alleging a violation of section 103(a) and affirm in result the judge's decision.

[2] Section 103(a) of the Act provides in pertinent part that "any authorized representative of the Secretary ... shall have a right of entry to, upon, or through any coal or other mine." 30 U.S.C. § 813(a).

I.

Factual and Procedural Background

Cambria uses bituminous coal refuse and "run-of-mine" coal to produce electricity and steam.[3] 13 FMSHRC at 1658. The coal refuse, provided by RNS Services, Inc. ("RNS"), is delivered by truck to Cambria.[4] The refuse is deposited into a hopper, where it passes through a grizzly, which separates and removes over-sized material. Id. The refuse is transferred, stored, and then conveyed to a Bradford breaker, which breaks and screens the material in a rotating drum. Id. The material is further screened, sized, crushed, and stored until it is fed into combustion boilers. Id. The run-of-mine coal is delivered by truck to a hopper, then transferred, and stored. Id. That material also is screened, sized, crushed, and stored until it is burned. 13 FMSHRC at 1658-59.

On August 2, 1989, during the initial stages of Cambria's construction, MSHA Subdistrict Manager Tim Thompson met with Air Products officials to determine whether the facility was subject to Mine Act jurisdiction. 13 FMSHRC at 1659. Air Products indicated that the refuse supplier would perform coal processing at its mine before the refuse was transported to Cambria, and that Air Products would only customize the refuse by sizing and crushing it to the particular specifications required by its boiler. Id. Thompson advised Air Products that Cambria would not fall within MSHA's jurisdiction. Id.

Air Products completed construction of the facility and trained its employees in accordance with OSHA specifications and regulations. 13 FMSHRC at 1659-60. In August 1990, OSHA conducted a routine inspection of the entire plant and issued citations. 13 FMSHRC at 1660.

In September 1990, MSHA discovered that RNS would not be performing onsite processing but that processing would take place only at Cambria. 13 FMSHRC at 1659. Subdistrict Manager Thompson telephoned Terry Lane, a regional administrator for OSHA, explaining his belief that MSHA had jurisdiction over the Cambria coal handling facilities and inviting Lane to attend a meeting on October 31 to discuss Mine Act jurisdiction. 13 FMSHRC at 1659; Tr. 125. Thompson testified that Lane stated that he would not attend, but that someone from OSHA's Pittsburgh office might attend. 13 FMSHRC at 1659; Tr. 125. No OSHA representatives were present at the meeting, and MSHA did not further contact OSHA. 13 FMSHRC at 1659.

During the October meeting, Thompson and Air Products officials discussed the fact that RNS was not screening or sizing the coal before delivering it to Cambria and that Air Products had acquired and was using a Bradford breaker. Tr. 84-85, 104-05, 148-49. Thompson advised Air Products

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[3] Refuse is material rejected in initial coal processing. Tr. 62, 102. "Run-of-mine" coal is coal that has not been processed. Tr. 74.

[4] MSHA asserts jurisdiction over RNS and its independent contractors. Tr. 64-65, 73-74.

that Cambria's coal handling facilities were subject to Mine Act jurisdiction. 13 FMSHRC at 1659. MSHA officials subsequently examined the coal handling facilities at Cambria, and again met with Air Products, confirming MSHA's asserted jurisdiction. Tr. 85-86.

In April 1991, the Associate Solicitor of Labor concluded in a written opinion that certain of Cambria's coal handling facilities fell within Mine Act coverage. S. Exh. 4; Tr. 90. On May 24, 1991, during a compliance assistance visit at the Cambria plant, MSHA Inspector Gerry Boring discussed the Solicitor's opinion with an Air Products official. Tr. 92. On September 5, 1991, upon returning to the facility to conduct a routine inspection, Inspector Boring was denied entry and, accordingly, issued a citation alleging a violation of section 103(a) of the Mine Act. Tr. 46-47. The citation was terminated after the plant manager allowed him entry.[5] S. Exh. 1; Tr. 47. Air Products subsequently contested the citation, and an expedited hearing was held before Judge Melick.

The judge found that some areas in the Cambria plant were subject to Mine Act jurisdiction since they contained "structures," "equipment," and "machinery" used in the "work of preparing the coal", as that phrase is defined in section 3(i) of the Mine Act, 30 U.S.C. § 802(i). 13 FMSHRC at 1661. The judge vacated the citation, however, because he determined that MSHA's inspection of the Cambria facility did not reflect "a reasoned resolution of the jurisdictional question by the Secretary and her agencies" but, rather, "resulted from an ad hoc unilateral assertion of jurisdiction by MSHA." 13 FMSHRC at 1663 (citations omitted).

II.

Disposition of Issues

A. Mine Act Jurisdiction

Air Products argues that the judge erred in finding the Cambria facility a "mine" subject to the Mine Act, because although it engages in some of the activities listed in section 3(i) of the Act as the "work of preparing the coal," its preparation activities are not those usually performed by a coal mine operator. A.P. Br. at 5, 12. Air Products states that it does not prepare coal for resale but, rather, as the ultimate consumer, handles coal merely to consume it generating electricity. A.P. Br. at 9.

Section 4 of the Mine Act, 30 U.S.C. § 803, provides that each "coal or other mine" affecting commerce is subject to the Mine Act. Section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), broadly defines "coal or other mine" as including "facilities, equipment [and] machines ... used in ... the work of preparing coal...." The term "work of preparing the coal," as defined in section 3(i) of the Act includes "breaking, crushing, sizing [and] storage" of coal, and "such other work of preparing ... coal as is usually done by the

[5] Boring issued additional citations, contests of which have been stayed pending disposition of this case. Tr. 48; A.P. Post-Arg. Br. at 5 n.1.

operator of [a] coal mine."

In Westwood Energy Properties, 11 FMSHRC 2408 (December 1989), the Commission concluded that a culm bank operation, in which culm (anthracite coal mining waste) was screened and crushed to the specifications required by Westwood's electric generation facility, was subject to Mine Act jurisdiction. 11 FMSHRC at 2412-15. The Commission explained that Westwood, which performed some of the processes enumerated in section 3(i) of the Mine Act, engaged in the work of preparing coal that is usually done by a coal mine operator. 11 FMSHRC at 2414-15. The Commission rejected Westwood's "ultimate consumer" argument that its facility was not subject to Mine Act jurisdiction because Westwood did not prepare coal for resale but, rather, for its own consumption. Id.

The Commission applied similar reasoning in Pennsylvania Electric Co., 11 FMSHRC 1875, 1879-82 (October 1989) ("Penelec"), concluding that conveyor head drives used to transport coal at an electric generation facility were subject to Mine Act jurisdiction. The United States Court of Appeals for the Third Circuit affirmed this determination, stating that "the delivery of coal from a mine to a processing station via a conveyor constitutes coal preparation 'usually done by the operator of a coal mine.'" Pennsylvania Electric Co. v. FMSHRC, 969 F.2d 1501, 1503 (3d Cir. 1992).

Here, it is undisputed that Air Products engages at Cambria in some of the coal preparation activities enumerated in section 3(i) of the Mine Act, namely, breaking, crushing, sizing, and storing coal. A.P. Br. at 12; S. Br. at 10. In addition, both parties acknowledge that such activities are essentially similar in nature to those conducted at the Westwood facility. A.P. Br. at 21 & n.9, 32 n.16; S. Reply Br. at 8-9.[6] Consistent with Westwood, we conclude that Air Products, which performs some of the coal preparation activities listed in section 3(i) of the Mine Act, engages in the work of preparing coal that is usually done by a coal mine operator.[7] This holding is also consistent with the Third Circuit's Pennsylvania Electric decision, in that the Cambria coal handling structures, equipment, and machinery, like Penelec's conveyor head drives, perform functions necessary in the "work of preparing the coal" before the coal is transferred to the boiler building to produce energy. We therefore affirm the judge's finding that Cambria's coal handling facilities are subject to Mine Act jurisdiction.

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[6] Air Products does not dispute the judge's statement that:

> Air Products acknowledges that the nature of the facility herein is essentially indistinguishable from the nature of the facility found by the Commission in Westwood ... to be within Mine Act jurisdiction.

13 FMSHRC at 1661.

[7] For the same reasons set forth in Westwood and Penelec, we reject Air Products's ultimate consumer defense. See Westwood, 11 FMSHRC at 2415; Penelec, 11 FMSHRC at 1881.

B. Preemption

With respect to whether MSHA properly exercised its statutory enforcement authority sufficient to preempt OSHA's enforcement authority at Cambria, we note that the Secretary, through MSHA, has promulgated regulations in 30 C.F.R. Part 77 (surface coal mines). Inspector Boring issued citations alleging violations of Part 77 as covering the working conditions at Cambria's coal handling facilities.[8] A.P. Post-Arg. Br. at 6-7; see Pennsylvania Electric, 969 F.2d at 1504, applying Columbia Gas v. Marshall, 636 F.2d 913, 915-16 (3d Cir. 1980). Although these citations are not presently before us (n.5, supra), there is nothing in the record to persuade us that the cited surface coal regulations in Part 77 may not colorably be applied to Cambria's coal handling facilities. In addition, it is noteworthy that before Inspector Boring issued the citations alleging violations of Part 77 and the access citation, Air Products had been provided adequate notice, through meetings with MSHA and a compliance assistance visit, that MSHA would be asserting Mine Act jurisdiction over those areas of Cambria listed in the Solicitor's opinion as subject to Mine Act jurisdiction. See Westwood, 11 FMSHRC at 2416; Penelec, 11 FMSHRC at 1883. In these circumstances, we reverse the judge's conclusion that MSHA had not properly asserted its jurisdiction.

C. Violation

As to the issue of violation before us, the relevant factual record and applicable legal principles are sufficiently clear for resolution on review without the necessity of a remand. The evidence is undisputed that Air Products denied Inspector Boring entry based upon its belief that the Cambria facility was not subject to the Mine Act. Tr. 46. Section 103(a) of the Act (n.2 supra) grants authorized representatives of the Secretary a right of entry into all mines for the purpose of performing inspections. See, e.g., Calvin Black Enterprises, 7 FMSHRC 1151, 1156 (August 1985); United States Steel Corp., 6 FMSHRC 1423, 1430-31 (June 1984); see generally Donovan v. Dewey, 452 U.S. 594, 598-606 (1981). Given our conclusions above, Air Products violated section 103(a) by denying Inspector Boring entry. Accordingly, we reverse the judge's determination that Air Products did not violate section 103(a), and we affirm the citation.

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[8] Under section 4(b)(1) of the Occupational Safety and Health Act (the "OSHAct"), 29 U.S.C. § 653(b)(1), OSHA standards apply to working conditions unless another federal agency exercises its statutory authority in a manner preempting OSHA coverage. See Penelec, 11 FMSHRC at 1878-79. In Pennsylvania Electric, the Third Circuit stated that OSHA preemption analysis requires the application of a two-part test:

> (1) [whether] a regulation was promulgated by a ... federal agency other than OSHA; and (2) whether the regulation promulgated covers the specific "working conditions" at issue.

969 F.2d at 1504, citing Columbia Gas v. Marshall, 636 F.2d 913, 915-16 (3d Cir. 1980).

Finally, we find it appropriate to reiterate our concern, expressed in detail in Penelec, 11 FMSHRC at 1885, and Westwood, 11 FMSHRC at 2418-19, that the Secretary continues to avoid resolving disputes with operators regarding dual regulation by OSHA and MSHA at electric generation facilities without implementation of the procedures set forth in the Department of Labor's MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (April 17, 1989), amended 48 Fed. Reg. 7521 (February 22, 1983)("Interagency Agreement"). Conflicting indications of enforcement authority by the Secretary, through MSHA and OSHA, may create confusion, compromise safety, and result in higher costs of production as operators readapt their facilities to comply with competing regulations. Such confusion may increase upon promulgation of final safety standards by OSHA applicable to the operation and maintenance of electric power generation facilities.[9] Implementation of the Interagency Agreement procedures would resolve such jurisdictional confusion in an expeditious and effective manner, and we strongly urge the Secretary to follow such a course of action.

[9] OSHA has published proposed safety standards relating to electric power generation facilities. 54 Fed. Reg. 4974-5024 (January 31, 1989). The proposed standards have not yet been published as final rules.

## III.

## Conclusion

For the reasons discussed above, we affirm the judge's determination as to jurisdiction, but reverse his determination that Air Products did not violate section 103(a) of the Mine Act. Accordingly, the citation is affirmed.

Richard V. Backley, Commissioner

L. Clair Nelson, Commissioner

Commissioner Doyle, concurring:

I am constrained to concur in the determination that the operations of Air Products and Chemicals, Inc. ("Air Products") fall within the jurisdiction of the Mine Safety and Health Administration ("MSHA") and to reverse the judge's decision, which vacated the citation because there was no evidence of a reasoned resolution of the jurisdictional question between MSHA and the Occupational Safety and Health Administration ("OSHA").

In Pennsylvania Electric Co. v. FMSHRC, 969 F.2d 1501 (3d Cir. 1992), the Court concluded that each of the activities listed in section 3(i) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 802(i) (1988), as part of the "work of preparing the coal," wherever and by whomever performed and irrespective of the nature of the operation, subjects anyone performing that activity to the jurisdiction of the Mine Act, if MSHA has promulgated a regulation governing the working conditions at issue. 969 F.2d at 1503.[1]

It would appear that, under the Third Circuit's decision, the activities initially contemplated by Air Products (sizing and crushing coal) would also have subjected it to Mine Act jurisdiction, although, as found by the administrative law judge, MSHA advised Air Products that those activities would not bring it under the Mine Act. 13 FMSHRC 1657, 1659 (October 1991).[2]

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[1] But cf. Stroh v. Director, OWCP, 810 F.2d 61 (3d Cir. 1987), which noted that delivery both to the ultimate consumer of a finished product and to one purchasing and processing raw coal for its own consumption would fall outside Mine Act coverage. 810 F.2d at 64. In Pennsylvania Electric, the Court chose not to treat Pennsylvania Electric Company ("Penelec") as one purchasing and processing coal for its own consumption. Rather, it treated the processing facility, located "within [Penelec's] electric generating plant" (969 F.2d at 1502), as a separate entity from Penelec's "energy producing facility." Id. at 1504 (emphasis added).

[2] If MSHA has jurisdiction, it does not have the discretion to waive it as to some entities, as it did in settling the factually similar Westwood Energy Properties, 11 FMSHRC 2408 (December 1989). MSHA agreed not to exercise jurisdiction over Westwood while simultaneously claiming that the settlement agreement "[did] not constitute a change in policy by the Secretary regarding jurisdiction over other similar operations." Secretary's Motion to Approve Settlement and to Dismiss in Westwood at 2. The Secretary, in attempting to reconcile his inconsistent actions, relies on cases such as Heckler v. Chaney, 470 U.S. 821 (1985), which deal with an agency's decision not to exercise enforcement authority committed to its discretion. Sec. Br. at 10-15. Those cases involve not only a different legal issue (prosecutorial discretion vs. waiver of jurisdiction) but a different factual situation as well. Under the Mine Act, enforcement is not left to MSHA's discretion. Section 103(a) requires the agency to inspect all surface mines in their entirety at least twice each year. 30 U.S.C. § 813(a)(1988).

In any event, given the breadth of the Third Circuit's holding, the judge must be reversed and the citation affirmed.

Joyce A. Doyle, Commissioner

Chairman Holen, dissenting:

I respectfully dissent. Applying Judge Mansmann's analysis in her dissent in Pennsylvania Electric Co. v. FMSHRC, 969 F.2d 1501, 1506-17 (3d Cir. 1992), I would vacate the citation against Air Products and affirm the judge's decision in result.

As Judge Mansmann observed, the operator of an electrical generating facility is not an operator of a coal mine, as that term is commonly understood. 969 F.2d at 1509. Further, if a coal consumer becomes a coal preparation facility within the meaning of section 3(h)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802(h)(1)(1988)("Mine Act"), by engaging in any of the activities listed in section 3(i), 30 U.S.C. § 802(i), the Mine Act potentially reaches every end user of coal. 969 F.2d at 1509-10. Such a broad interpretation is ultimately at odds with the legislative history of the Mine Act, which is directed to safety and health problems associated with mining activity. Id. at 1510. Judge Mansmann also reasoned that the Third Circuit's decisions applying section 3(h)(1) of the Mine Act to the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. (1988), do not support coverage of ultimate consumers of coal, including those who prepare coal for their own use. Id. at 1510-12 & n.8. Finally, she could find no basis for the preemption of jurisdiction of the Occupational Safety and Health Administration ("OSHA") by the Mine Safety and Health Administration ("MSHA"), in light of inconsistent and equivocal exercise of regulatory authority by MSHA. Id. at 1513-17. Accordingly, Judge Mansmann concluded that the coal conveying activity at issue was part of the process of electrical power generation, rather than coal preparation. Id. at 1517.

I also note that, although the Commission's opinion states that its holdings are consistent with Pennsylvania Electric (slip op. at 4), the opinion in fact contradicts the Third Circuit's reasoning in Pennsylvania Electric. The Third Circuit found plain the language of sections 3(h)(1) and 3(i) of the Mine Act, which define "coal or other mine" and "work of preparing the coal." 969 F.2d at 1503-04. The Commission apparently does not find that statutory language to be plain. It relies on Commission case precedents in Westwood Energy Properties, 11 FMSHRC 2408 (December 1989), and in Pennsylvania Electric Co., 11 FMSHRC 1875 (October 1989)("Penelec"). Slip op. at 4. Neither Commission case cited based its reasoning on the plain language of the relevant statutory language; both cases set forth interpretations of that language, citing in turn earlier Commission precedent in Oliver M. Elam, Jr., Co., 4 FMSHRC 5 (January 1982). Westwood Energy Properties, 11 FMSHRC at 2414; Penelec, 11 FMSHRC at 1880-81. The Third Circuit's holding admitted no "nature of the operation test" as set forth in Elam nor any limitation on jurisdiction by MSHA over persons or facilities engaged in coal preparation, other than a regulation in place that covers the specific working conditions at issue. 969 F.2d at 1503-04.

The Commission's opinion is further at variance with Pennsylvania Electric in that it examines, and finds adequate, the advance notice that MSHA provided to the operator before it asserted jurisdiction over the Cambria Co-generation Facility ("Cambria"). Slip op. at 5. The Third Circuit's holding admitted no such examination of MSHA's enforcement actions:

> [T]he plain language of § 4(b)(1) [of the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(1)(1988)] indicates that the enforcement history surrounding a regulation is not relevant to the issue of whether another agency preempts OSHA.

969 F.2d at 1505.

I share my colleagues' concern that indications of conflicting safety enforcement authority by the Secretary of Labor through MSHA and OSHA create confusion, compromise safety and reduce productivity, as shifting policies force operators to modify facilities and work processes.[1] Slip op. at 6.

Results of the Third Circuit's expansion of MSHA's jurisdictional reach in Pennsylvania Electric remain to be seen. The Third Circuit's decision in effect requires MSHA to inspect all facilities performing any of the coal preparation activities listed under section 3(i) of the Mine Act. MSHA may comply with that decision by increasing the variety and the number of facilities it inspects, pursuant to the inspection requirement of section 103(a) of the Mine Act, 30 U.S.C. § 813(a). Alternatively, MSHA may attempt to continue its policy of exercising its jurisdiction selectively, as exemplified by its assertion of jurisdiction over Cambria and its agreement not to assert jurisdiction over the admittedly similar Westwood facility (see slip op. at 4 n.6; Westwood Energy Properties, 12 FMSHRC 1625, 1626 (August 1990)(ALJ)). Unfortunately, the record in this case contains no suggestion that a reasoned resolution of overlapping safety enforcement schemes within the Department of Labor may be forthcoming.

Arlene Holen, Chairman

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[1] Counsel for the Secretary attempted to allay the Commission's concern, expressed at oral argument, and stated, "this case serves as a public notice of the Secretary's policy regarding enforcement over coal preparation facilities." Oral Arg. Tr. at 54. Counsel acknowledged, however, in Response to the Commission's Request for Information, that confusion will likely continue:

> If an operator is uncertain as to which agency's standards will apply to its operations, of course, it can eliminate any risk of noncompliance by complying with the stricter of the two standards where compliance with one standard automatically accomplishes compliance with both standards -- or, where it does not, by complying with both standards directly. In the alternative -- and obviously more practical -- an operator who is uncertain as to which agency's standards will apply to its operations can simply approach MSHA and OSHA and ask. Indeed, an operator planning to construct a new facility can approach MSHA and OSHA and ask for clarification before it even constructs the facility.

S. Response at 3. At Cambria, early discussions did not forestall confusion.

Distribution

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

R. Henry Moore, Esq.
Buchanan Ingersoll
600 Grant Street
USX Tower, 57th Floor
Pittsburgh, PA 15219

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 13, 1993

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. KENT 91-1340 |
| DONALD GUESS, employed by<br>PYRO MINING COMPANY | : | |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. KENT 92-73 |
| PAUL SHIREL, employed by<br>PYRO MINING COMPANY | : | |

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

DECISION

BY THE COMMISSION:

In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"), the issue is whether employees of a partnership comprised of corporate partners may be subject to individual liability under section 110(c) of the Mine Act, 30 U.S.C. § 820(c).[1] The Secretary of Labor proposed the

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[1] Section 110(c) provides, in part:

> Whenever a corporate operator violates a mandatory health or safety standard ..., any director, officer,or agent of such corporation who knowingly authorized, ordered, or carried out such violation, ... shall be subject to the same civil penalties, fines, and

(continued...)

assessment of civil penalties against Donald Guess and Paul Shirel for their alleged conduct in knowingly authorizing, ordering, or carrying out violations of mandatory safety standards by their employer, Pyro Mining Company ("Pyro"). Administrative Law Judge Gary Melick dismissed the proceedings against Guess and Shirel on the grounds that section 110(c) applies only to agents of corporations and that Pyro was a partnership at the time of the violations. 14 FMSHRC 1826 (November 1992)(ALJ). For the following reasons, we affirm the judge's decision.

## I.
## Factual and Procedural Background

Pyro was a general partnership comprised of two corporations, which operated the William Station Mine, where Guess and Shirel were employed as the mine's maintenance foreman and production manager, respectively. Stips. 1, 8-9 at Tr. 11-13; S. Br. at 13. In September and December 1991, the Secretary filed petitions proposing assessment of civil penalties against Guess and Shirel alleging they had knowingly authorized, ordered, or carried out Pyro's violations of mandatory safety standards at the mine. The cases were consolidated for proceedings before Judge Melick. Guess and Shirel filed motions for summary decision, asserting that Pyro was not a corporation at the time of the violations and that, accordingly, they were not subject to liability under section 110(c).

Judge Melick granted respondents' motions for summary decision. He noted that, although the Secretary had stated in the civil penalty proposals that Guess and Shirel were acting as agents of a corporate operator at the time of their allegedly violative conduct, the undisputed evidence showed that Pyro was a partnership, not a corporation. 14 FMSHRC at 1827. The judge concluded that section 110(c) of the Act unambiguously provides for individual liability only against agents of corporations. 14 FMSHRC at 1828. Accordingly, he dismissed the proceedings. 14 FMSHRC at 1827, 1828. The Commission granted the Secretary's petition for discretionary review of the judge's dismissal.

## II.
## Disposition of Issues

The Secretary argues that the judge's literal interpretation of section 110(c) of the Act thwarts the purpose of that provision and the Mine Act's overall purpose of protecting miners. He contends that Congress enacted the provision to reach individuals in large corporate operations, who would otherwise be immune, in order to hold those individuals personally liable for

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[1](...continued)
imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. § 820(c). Section 110(c) was carried over without significant change from section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("Coal Act").

decisions resulting in violations of mandatory safety or health standards. The Secretary argues that Pyro is a large operator and, because Pyro's partners are corporations, no individual associated with Pyro is ultimately responsible for the partnership's liabilities. In addition, the Secretary contends that the judge's literal interpretation of the provision leads to the anomalous result that an operator structured as a single corporation would constitute a corporate operator within the meaning of section 110(c), while an operator comprised of two corporations would not. In response, Guess and Shirel maintain that the language of section 110(c) of the Act unambiguously restricts individual liability to certain individuals associated with corporate operators, and that the judge correctly dismissed the civil penalty proceedings brought against them.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). If a statute is clear and unambiguous, effect must be given to its language. Chevron, 467 U.S. at 842-43. Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)(citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be given effect. Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (D.C. Cir. 1989)(citations omitted). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "Chevron I" analysis. Id.[2]

Section 110(c) of the Act provides that whenever "a corporate operator violates a mandatory health or safety standard ... any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, ... shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d)." (Emphasis added.) The phrase "corporate operator" is followed by the phrase "of such corporation" (emphasis added), and thus plainly refers to operators that are corporations. Therefore, on its face, section 110(c) of the Mine Act provides for individual liability only against agents of operators that are corporations.

The legislative history of section 110(c) reveals no intention that the section itself should apply to persons other than those associated with corporate operators. Rather, by its terms, section 110(c) subjects specified corporate employees to the "same civil penalties, fines, and imprisonment" to which others are subjected under sections 110(a) and (d). (Emphasis added.) The legislative history of section 110(c) of the Mine Act, and its predecessor, section 109(c) of the Coal Act, manifests a Congressional intent

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[2] If a statute is ambiguous or silent on a point in question, a second inquiry, a "Chevron II" analysis, is required to determine whether an agency interpretation of the statute is a reasonable one. Coal Employment Project, 889 F.2d at 1131.

to proceed individually against persons employed by corporate operators "to assure that the decision-makers responsible for illegal acts of corporate operators would also be held personally liable for violations." Richardson v. Secretary of Labor, 689 F.2d 632, 633 (6th Cir. 1982), aff'g, Kenny Richardson, 3 FMSHRC 8 (January 1981), cert. denied, 461 U.S. 928 (1983)(emphasis added). See also H.R. Rep. No. 563, 91st Cong., 1st Sess. 11-12 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Congress, 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1041-42 (1975). Section 110(c) must be applied in accordance with its unambiguous language.

We reject the Secretary's contention that the judge's literal interpretation of the provision thwarts its purpose and leads to an anomalous result. Section 110(c) is one part of a broader provision of the Mine Act that addresses the assessment of penalties against individuals and operators. We note that in Kenny Richardson the Secretary argued that Congress's decision to limit liability under section 110(c) to directors, officers and agents of corporate operators had a rational basis. 3 FMSHRC at 26-27.

Accordingly, we hold that section 110(c) of the Mine Act provides for individual liability of agents of corporate operators only. Because the evidence is undisputed that Pyro was a partnership, and not a corporation, we affirm the judge's decision dismissing the civil penalty proceedings against Guess and Shirel.

## III.
## Conclusion

For the reasons discussed above, we affirm the judge's decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Distribution

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

Flem Gordon, Esq.
Gordon & Gordon, P.S.C.
P.O. Box 1305
Madisonville, KY 42431

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 16, 1993

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. WEVA 92-783 |
| UNITED STATES STEEL MINING<br>COMPANY, INC. | : | |

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

## DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), presents two issues: whether United States Steel Mining Company, Inc. ("U.S. Steel") violated a transportation safeguard issued under 30 C.F.R. § 75.1403[1] and whether that violation was of a significant and substantial ("S&S") nature.[2] Commission Administrative Law Judge William Fauver concluded that U.S. Steel violated the safeguard and that the violation was S&S. 15 FMSHRC 452 (March 1993)(ALJ). U.S. Steel filed a petition for discretionary review with the Commission, challenging whether the safeguard was valid and whether the judge erred in determining that the alleged violation was S&S. For the reasons that follow, we affirm the judge's conclusion that U.S. Steel violated the safeguard and remand the S&S issue for further consideration.

## I.

## Factual Background and Procedural History

On May 23, 1989, James Bowman, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted a regular

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[1] Section 75.1403, entitled "Other safeguards," provides:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard."

inspection of U.S. Steel's Gary No. 50 Mine in West Virginia. Inspector Bowman observed that the trolley poles of two vehicles frequently disengaged from the trolley wire as they traveled along the track entry. 15 FMSHRC at 452; Tr. 12-13. The disconnection caused the vehicles to de-energize. The inspector determined that the problem was caused by "kinks, bends and twists in the wire and by an excessive distance between the track and the trolley wire." 15 FMSHRC at 452.

As a result, Bowman issued safeguard notice No. 3238838, which provided:

> The trolley wire was inadequately installed in 6-B and 6-C sections in that the wire gauge[3] was much wider than the track. Kinks, bends, and twists were present in the trolley wire, causing the trolley pole to de-energize on numerous occasions. The wire gauge is so wide that anti-pole swing devices can not be used at several locations along the 6-B and 6-C track entries by Jeep No. 97 and personnel carrier No. 33.
>
> This is Notice to Provide Safeguard. All trolley wire shall be installed within a gauge where anti-swing[4] devices can be used on all equipment and installed without excessive kinks, bends, and twists that de-energize track equipment while traveling along the track within reason.

15 FMSHRC at 454 (footnotes added); Ex. P-3.

On February 4, 1992, MSHA Inspector Earl Cook inspected the mine. The trolley pole of the track-mounted jeep in which he traveled disengaged and caused the jeep to lose power 15 times. Inspector Cook determined that the causes of the trolley pole disconnections were kinks in the wire and a wide gauge between the track and wire. He issued a citation to U.S. Steel for violation of the safeguard. U.S. Steel contested the violation and proposed penalty. A hearing was held on October 14, 1992.

The judge determined that the safeguard was valid because it was "based on an evaluation of the specific conditions at the mine and the determination that such conditions created a transportation hazard in need of correction." 15 FMSHRC at 455 citing Southern Ohio Coal Co., 14 FMSHRC 1, 13 (January 1992). The judge concluded that the safeguard provided U.S. Steel "with

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[3] Inspector Bowman testified that the gauge meant the horizontal distance between the trolley wire and the rail. Tr. 27.

[4] Anti-swing devices restrict the movement of trolley poles to prevent injury to passengers. Tr. 26. Inspector Bowman testified that, when such a device is in place, "it allows the pole a certain range to work side-by-side to stay on the trolley wire. If the trolley wire is outside a certain gauge, then the anti-swinging device causes the trolley pole to come off the wire...." Tr. 13.

sufficient notice of the nature of the hazard": disconnection of trolley poles due to severe kinks in the wire and excessive distance between the wire and the track. 15 FMSHRC at 455-56. The judge also concluded that the safeguard specified "the conduct required of the operator to remedy such hazard": installation of the trolley wire a proper distance from the track and without kinks or twists. Id. The judge found that the cited conditions violated the safeguard because the trolley pole disconnected at five locations where the distance from the track to the trolley wire was too wide, and at ten other locations where there were kinks. Id.

The judge applied a "substantial possibility" test of injury in reaching his conclusion that the violation was S&S. He determined that an "[a]nalysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether the violation presents a substantial possibility of resulting in injury or disease...." Id. (emphasis in original). The judge assessed a $690 penalty for the violation. Id. at 457.

II.

Disposition

A. Violation of the Safeguard

U.S. Steel argues that the safeguard was invalid because it failed to provide fair notice of what was required or prohibited. U.S. Steel asserts that the terms "excessive" and "within reason" were interpreted incorrectly by the judge, and that a finding of violation under the safeguard would require numerous occurrences of pole disconnection because of kinks and distance between the trolley wire and the track. The Secretary contends that the safeguard provided adequate notice to U.S. Steel to install trolley wire within a certain distance of the trolley track and to correct kinks, bends or twists that cause the pole to separate from the wire.

The Commission has held that "a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985). The Commission has further stated that its approach toward interpretation of the safeguard provisions of the Act "strikes an appropriate balance between the Secretary's authority to require ... safeguards and the operator's right to notice of the conduct required of him" and that "the safety of miners is best advanced by an interpretative approach that ensures that the hazard of concern to the inspector is fully understood by the operator, thereby enabling the operator to secure prompt and complete abatement." Id.

The language of the safeguard provides that the hazard to be eliminated is too great a distance between the track and the wire and the presence of kinks, bends or twists that would cause the trolley pole to disengage. Thus, the safeguard notice addressed the very hazard that was the subject of the citation. It specifically identified trolley pole disengagement due to kinks in the wire or to horizontal distance between the track and the wire. Those

conditions served as the basis for the citation.

As the judge concluded, the language of the safeguard indicates that "excessive" kinks distort the wire to a degree that would cause the trolley pole to disengage during travel. The phrase "within reason" does not suggest, as U.S. Steel asserts, that the safeguard is violated only when there are an unreasonable number of disconnects of the trolley pole. We agree with the judge that the phrase "within reason" refers to "traveling" and references traveling at a reasonable speed. Moreover, the evidence establishes that the trolley pole disconnected at ten locations because of kinks in the wire and at five locations because of the distance between the track and the wire. Fifteen disconnections during one trip would constitute a violation of the safeguard, even under U.S. Steel's interpretation. Thus, we conclude that U.S. Steel was given fair notice of what was required by the safeguard and that the safeguard was violated by the cited conditions.

B. Whether the Violation Was S&S

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

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The Commission has held that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)(emphasis in original).

Contrary to Commission precedent, the judge applied a "substantial possibility" test to establish the third element of Mathies. 15 FMSHRC at 456. In Energy West Mining Co., 15 FMSHRC 1836, 1839 (September 1993), the Commission held that "the ... substantial possibility analysis does not lend itself to review under the third Mathies standard." Therefore, we conclude that the judge erred by applying a substantial possibility test, and we remand this case to the judge for proper application of the third Mathies element, i.e., whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

## III.

## Conclusion

For the foregoing reasons, we affirm the judge's ruling that U.S. Steel violated the safeguard. We also vacate the judge's S&S determination and remand for further analysis pursuant to the Mathies standard.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Distribution

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

Billy M. Tennant, Esq.
U.S. Steel Mining Company
600 Grant Street
Room 1580
Pittsburgh, PA 15219

Administrative Law Judge William Fauver
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 17, 1993

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DANNY SHEPHERD | : | |
| v. | : | Docket No. KENT 94-69-D |
| SOVEREIGN MINING COMPANY | : | |

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

ORDER

BY THE COMMISSION:

On November 18, 1993, Administrative Law Judge Jerold Feldman concluded that the discrimination complaint of Danny Shepherd was not frivolously brought and, accordingly, ordered Shepherd's immediate reinstatement.

On December 3, 1993, the Secretary filed with the Commission, a motion to compel compliance with the judge's order of temporary reinstatement or, alternatively, to remand the matter to the administrative law judge. In the motion, the Secretary stated that the complainant was laid off by Sovereign Mining Company ("Sovereign") on November 19, 1993, the day after the judge's order was issued. The Secretary asserts that Shepherd should not have been laid off and that, by its action, Sovereign was circumventing the temporary reinstatement order.

On December 13, 1993, Sovereign filed a response to the Secretary's motion, denying the assertions made by the Secretary regarding Shepherd's layoff. Both Sovereign and the Secretary state that remanding this matter to the judge would be an appropriate way to dispose of the issues raised in the motion and the response.

The judge's jurisdiction in this matter terminated with the issuance of his order of temporary reinstatement on November 18. Commission Procedural Rule 69(b), 58 Fed. Reg. 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b)(1993). Accordingly, we remand this matter to Judge Feldman to resolve the issues raised by Secretary's motion and Sovereign's response. See Black Dragon Mining Company, 15 FMSHRC 2110, 2111 (October 1993).

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Distribution:

Forest E. Cook, Esq.
Cook Law Offices
118 Hays Street
P.O. Box 909
Whitesburg, KY 41858

Carl C. Charneski, Esq.
U.S. Department of Labor
Office of the Solicitor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Tony Oppegard, Esq.
Mine Safety Project of
the Appalachian Research
& Defense Fund of Kentucky, Inc.
630 Mexwelton Count
Lexington, KY 40508

Administrative Law Judge Jerold Feldman
Federal Mine Safety and Health
Review Commission
Office of the Administrative Law Judge
2 Skyline, 10th floor
5203 Leesburg Pike
Falls Church, VA 22041

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 21, 1993

| | | |
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| MARTINKA COAL COMPANY | : | |
| | : | |
| v. | : | Docket Nos. WEVA 93-45-R |
| | : | WEVA 93-46-R |
| SECRETARY OF LABOR | : | |
| MINE SAFETY & HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (1988)("Mine Act" or "Act"), presents the issue of whether two withdrawal orders were validly issued to Martinka Coal Company ("Martinka") under section 104(b) of the Mine Act, 30 U.S.C. § 814(b).[1] Administrative Law Judge Avram Weisberger upheld the withdrawal orders. 15 FMSHRC 99 (January 1993)(ALJ). The Commission granted Martinka's petition for discretionary review, which challenged the judge's findings. For the reasons that follow, we affirm the judge's decision.

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[1] Section 104(b) of the Mine Act states, in pertinent part:

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

I.

Factual and Procedural Background

On October 21, 1992, Inspector Robert Blair of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the No. 4 Flyte Belt Line ("belt line") at Martinka's Tygart River Mine. He observed accumulations of coal and coal dust mixed with water under the belt line. He determined that, in some places, belt rollers were running in dry coal accumulations. He also observed haystack-shaped accumulations of loose coal under the belt. The inspector determined that the violative conditions existed along the entire 5,200 foot length of the belt line. He issued a citation alleging a violation of 30 C.F.R. § 75.400 for these accumulations.[2]

Inspector Blair also observed that several belt rollers were stuck or frozen, that bottom belt rollers were missing for a distance of about 100 feet, and that the belt was rubbing against the structure that supports its rollers. Inspector Blair issued a citation alleging a violation of section 75.1725(a) for these conditions.[3]

Daniel Conaway, the mine's safety manager, advised Inspector Blair that it would take Martinka several days to abate the violations. The inspector allowed Martinka five days, including a weekend, for abatement.

On Monday October 26, Inspector Blair returned to the mine and, accompanied by John Metz, the mine manager, and David Kincell, the miners' representative, inspected the belt line. The belt was operating and carrying coal. Inspector Blair determined that some of the accumulations he had observed on October 21 were still present along the belt. Specifically, he found combustible materials under the belt tail piece and in several other places under the belt line. Accordingly, he issued a section 104(b) order of withdrawal.

Inspector Blair also determined that some of the other safety problems he had cited on October 21 continued to exist. Specifically, he observed frozen rollers at the tail piece, frozen or missing rollers at several other places, and the belt rubbing against the supporting structure. As a

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[2] Section 75.400 provides:

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

[3] Section 75.1725(a) provides:

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

consequence, he issued a second section 104(b) order of withdrawal. Martinka contested both section 104(b) orders, but did not contest the underlying citations.

The judge upheld both orders. He concluded that the inspector acted reasonably in not extending the period of time for abatement of the violations. 15 FMSHRC at 101-02.

With respect to the order based on coal accumulations, the judge found that the Secretary established a prima facie case that at least some of the violative conditions described in the citation had not been totally abated by October 26. 15 FMSHRC at 104-05. He further found that Martinka's evidence had not rebutted the Secretary's evidence that the accumulations had not been completely removed. 15 FMSHRC at 105-06.

With respect to the order regarding the belt rollers, the judge determined that the Secretary established a prima facie case that some of the cited rollers were still frozen or missing on October 26. 14 FMSHRC at 106-07. He found that Martinka had not offered any specific evidence to rebut the Secretary's evidence. 15 FMSHRC at 107. He determined that, while Martinka may have replaced some of the frozen or missing rollers cited by the inspector, it had not replaced or repaired all of them. Id.

## II.
## Disposition

On review, Martinka contends that the inspector should have extended the abatement time because it had made diligent, good faith abatement efforts. Martinka maintains that it devoted 40 man-shifts to abating the violations and had applied 60 tons of rock dust. It contends that it totally abated the coal accumulation violation and that all that remained on October 26 was incombustible muck. It also contends that it totally abated the belt roller violation, but that some of the violative conditions reoccurred on October 26. Martinka argues that neither its conduct in response to the citations nor any hazards justified the issuance of withdrawal orders. The Secretary contends that substantial evidence supports the judge's finding that the violations had not been totally abated at the time the orders were issued. He contends further that the judge correctly determined that the inspector had acted reasonably in not extending the abatement time.

In Mid-Continent Resources, Inc., 11 FMSHRC 505 (April 1989), the Commission established the following analytical framework for the adjudication of section 104(b) orders:

> [W]hen the validity of a section 104(b) is challenged by an operator, it is the Secretary, as proponent of the order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. We hold, therefore, that the Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a

> preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may rebut the prima facie case by showing, for example, that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred.

Id. at 509 (emphasis in original).

A. Abatement of § 75.400 violation

It is undisputed that Martinka attempted to clean up at least some of the accumulations cited by the inspector. The judge, however, credited the testimony of Blair and Kincell that not all the accumulations had been removed.

Substantial evidence supports the judge's findings[4]. Both Blair and Kincell testified that dry accumulations were present under the tail piece on October 26. Inspector Blair testified that these accumulations had not been deposited recently because they were dull in appearance. He also testified that there were accumulations of hard packed coal dust on the belt structure under the top center rollers. Finally, he testified that Martinka had flattened out some of the accumulations and covered them with rock dust and that some haystack accumulations remained. As noted by the judge, the inspector's contemporaneous notes support his testimony.

Martinka argues that the high moisture content of the accumulations rendered them incapable of combustion by any ignition source that was present. The Commission has held that a "construction of the standard that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress' intent to remove fuel sources from mines and permits potentially dangerous conditions to exist." Black Diamond Coal Mining Co., 7 FMSHRC 1117, 1121 (August 1985). Inspector Blair testified that the wet accumulations could dry out. Moreover, the judge found that the accumulations observed by Blair and Kincell at the tail piece on October 26 were dry. 15 FMSHRC at 103-04. Thus, substantial evidence supports the judge's finding that "at least some of the violative conditions described in the 104(a) citation ... existed at the time the 104(b) order was issued." 15 FMSHRC at 105.

Martinka contends that its alleged failure to abate did not create a safety hazard because air ventilating the belt is coursed directly into the

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

return airway, and not, as Inspector Blair testified, into the working sections. It maintains that the degree of the hazard created by the failure to abate should be the most important factor in determining whether the abatement time should be extended. Martinka argues that the judge erred in relying on Inspector Blair's testimony to find that a fire in the area could send smoke into the working sections and trap miners working inby the fire. 15 FMSHRC at 102.

The record supports the judge's finding that combustible materials created a fire hazard along the belt line, even if the hazard was not as great as Inspector Blair believed. While the degree of the hazard is a relevant factor, it is not the sole factor to be considered. Thus, the record supports the judge's finding that Inspector Blair acted reasonably in determining that the time for abatement should not be extended.

B. Abatement of § 75.1725(a) violation

Martinka argues that it had abated the conditions observed by Inspector Blair on October 21 and that any violations found on October 26 were the result of a recurrence of the cited condition. Martinka points to Mine Manager Metz's testimony that, when he personally inspected the belt line on October 23, all rollers were in operating condition. Metz also testified that many of the rollers that Inspector Blair thought were frozen on October 26 were, in fact, operational. He stated that these rollers were simply not being turned by the moving belt at the time of the inspection.

Substantial evidence supports the judge's findings. The judge credited the testimony of Blair and Kincell that some of the violative conditions cited on October 21 continued to exist on October 26. 15 FMSHRC at 107-08. Inspector Blair testified that, when he returned to the mine on October 26, two rollers near the tail piece that had been frozen on October 21 were still frozen. In addition, the inspector observed that many of the missing bottom rollers were still missing on October 26. As a consequence, the belt was still rubbing against the belt structure, although at a different place.

The judge determined that Metz's testimony concerning the replacement or repair of rollers was too vague to rebut the testimony from Blair and Kincell that some of the violative conditions continued to exist on October 26. Id. He concluded that Martinka failed to demonstrate that the violative conditions described in the section 104(a) citation had been abated within the required time but had recurred. Id.

Martinka argues that it had substantially abated the violation by October 26 as a result of its diligent, good faith efforts and, thus, that the inspector's failure to grant an extension was unreasonable. Martinka says that it replaced 15 to 18 belt rollers after being cited, but was required to replace only two additional rollers to terminate the withdrawal order. The judge concluded that the presence of combustible accumulations and ignition sources, such as frozen rollers and the belt rubbing against the belt structure, created a hazard on October 26. 15 FMSHRC at 102. Substantial evidence also supports the judge's finding that Inspector Blair acted reasonably in determining that the abatement time should not be extended.

## III.
## Conclusion

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

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Distribution

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

Thomas L. Clarke, Esq.
Martinka Coal Company
800 Laidley Tower
P.O. Box 1233
Charleston, WV 25324

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 22, 1993

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. VA 92-180 |
| HAROLD MITCHELL, Employed by<br>H B & B EQUIPMENT COMPANY | : | |

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, 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). On May 20, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Harold Mitchell, employed by H B & B Equipment Company, for failing to answer the proposal for assessment of civil penalty filed by the Secretary of Labor or the judge's February 24, 1993, Order to Show Cause. The judge assessed a civil penalty of $2,000. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

In a letter to the judge dated May 26, 1993, counsel for Harold Mitchell asserted that Mitchell had responded to the judge's show cause order in a letter to the Commission dated March 18, 1993. Counsel attached a copy of Mitchell's March 18 letter and, on the basis of that response, sought relief from the default order.

The judge's jurisdiction over this case terminated when his decision was issued on May 20, 1993. Commission Procedural Rule 69(b), 58 Fed. Reg. 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b)(1993). Due to clerical oversight, the Commission did not act on the May 26 letter within the required statutory period for considering requests for discretionary review. The judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

Relief from a final Commission judgment or order on the basis of inadvertence, mistake, surprise or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1). 29 C.F.R. § 2700.1(b)(Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable

Commission rules). Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). In the interest of justice, we reopen this proceeding and deem the May 26 letter to be a Petition for Discretionary Review, which we grant.

On the basis of the present record, we are unable to evaluate the merits of Mitchell's position. We remand the matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we reopen this matter, vacate the judge's default order and remand this matter for further proceedings.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Distribution:

Edward H. Fitch, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Boulevard
Arlington, VA 22203

Harold Mitchell
Route 2, Box 450B
Honaker, VA 24260

Dennis E. Jones, Esq.
One Flannagan Avenue
P.O. Box 1237
Lebanon, VA 24266

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety and Health
Review Commission
1730 K Street, N.W., Suite 642
Washington, D.C. 20006

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 22, 1993

| | | |
|---|---|---|
| VINCENT BRAITHWAITE | : | |
| | : | |
| v. | : | Docket No. WEVA 91-2050-D |
| | : | |
| TRI-STAR MINING | : | |

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

DECISION

BY THE COMMISSION:

This is a discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), brought by Vincent Braithwaite against Tri-Star Mining ("Tri-Star"), pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).[1] Administrative Law Judge William Fauver awarded damages to Braithwaite after concluding that Tri-Star had unlawfully discharged him because he refused to operate a piece of equipment that Braithwaite believed he was unqualified to operate. 14 FMSHRC 1460 (August 1992)(ALJ); 14 FMSHRC 2001 (December 1992)

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[1]Section 105(c) provides, in pertinent part:

> (1) No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation in a coal or other mine ....
>
> ....
>
> (3) Within 90 days of the receipt of a complaint ... the Secretary shall notify, in writing, the miner ... of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

(ALJ). The Commission granted Tri-Star's petition for discretionary review, which challenged the legal and factual basis for the judge's determination of liability and damages. For the reasons stated below, we reverse the judge's decision and dismiss the complaint.

## I.
## Factual and Procedural Background

### A. Factual Background

Tri-Star operates a surface mine employing 27 miners, approximately six of whom are designated as heavy equipment operators. On July 24, 1989, Tri-Star hired Braithwaite as a heavy equipment operator. At that time, Braithwaite initialed Form 5000-23 of the Department of Labor's Mine Safety and Health Administration ("MSHA"), indicating that he was either qualified to operate, or had been trained to operate, eight specified pieces of equipment. Braithwaite's foreman, Ray Tighe, placed his initials beside Braithwaite's, and Mine Superintendent George Beneer signed the form. At the time he initialed the form, Braithwaite had limited experience in operating only two pieces of equipment. One was a Cline coal haulage truck, which he subsequently drove on a regular basis for Tri-Star, and the other was an FB 35 loader. 14 FMSHRC at 1460-61.

On September 25, 1990, Foreman Tighe asked Braithwaite to operate the Euclid R-120 (the "R-120" or the "Uke"), a large 50-ton dump truck used for hauling overburden. 14 FMSHRC at 1461. The R-120, larger than the Cline truck Braithwaite regularly drove, was frequently operated on uneven ground and rocked from side to side. Tri-Star had provided training on the R-120 to Braithwaite, which consisted of his riding beside an experienced driver and then driving the R-120 with the experienced driver beside him. 14 FMSHRC at 1462. Following that training, Braithwaite had driven the R-120 in active mining operations for three or four days. Id.; Tr. 27.

Braithwaite refused Tighe's September 25 order to drive the R-120, stating that he was "uncomfortable" driving it. Tighe sent Braithwaite to the mine office to talk to Mine Superintendent Beener. Braithwaite told Beener that he was "uncomfortable" operating the R-120. While Braithwaite was in Beener's office, Foreman Tighe requested a driver for the Cline truck and one for the R-120. Beener sent Braithwaite back to the mine site to run the Cline or, if it was not running, to assist the mechanic in working on it. 14 FMSHRC at 1461, 1464.[2]

When Braithwaite returned to the mine site, Tighe inquired as to what had happened at the meeting with Beener. Braithwaite reported to Tighe that Beener had told him, "[Y]ou do not have to run a Euclid, ... we will keep you

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[2]The judge referred to Braithwaite's meeting with Mine Superintendent Beener and Braithwaite's subsequent conversation with Tighe as occurring on September 24, 1990. 14 FMSHRC at 1464. However, both events occurred after Braithwaite's work refusal on September 25, apparently on the same day. See Tr. 17-18, 122.

on a Cline." Tr. 126. Tighe checked with Beener, who said he had told Braithwaite, "[W]e would try and keep him on the Cline if he felt uncomfortable with the Uke but there would be times that he would have to run the Euclid." Tr. 124-25. Tighe did not tell Braithwaite about his conversation with Beener. 14 FMSHRC at 1464. On two occasions after September 25, Braithwaite was asked to operate the R-120 and he did so for a total of two hours. Id. at 1462.

On September 27, 1990, two days after his conversation with Beener, Braithwaite again initialed MSHA Form 5000-23, indicating that he was qualified to operate or had been trained to operate eleven pieces of equipment, including the Euclid R-120. Jt. Ex. 2. On April 2, 1991, Foreman Tighe told Braithwaite to park the Cline and "to run the Uke because there was no more coal to haul with the Cline." Tr. 69. Braithwaite responded that he felt "uncomfortable" operating the R-120 and that he "had already talked to Mr. Beener about it." Tr. 30. Braithwaite did not mention safety or request additional training on the R-120. Tighe told Braithwaite to turn over the maintenance records for the Cline and "hit the road." Tr. 29. Braithwaite understood Tighe to mean that he was fired and left the mine without speaking further to Tighe or Beener. 14 FMSHRC at 1463.

B. Procedural Background

Following his discharge, Braithwaite obtained copies of his MSHA 5000-23 forms and complained to MSHA that the forms had been falsified. MSHA conducted an investigation into these allegations, pursuant to section 103(g) of the Mine Act, 30 U.S.C. § 814(g), but found no basis for them. Subsequently, Braithwaite filed a discrimination complaint with MSHA, under section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). Following its investigation, MSHA notified Braithwaite that it found no violation. Braithwaite filed a complaint against Tri-Star on his own behalf, pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3), and a hearing was held on April 29, 1992.

In his August 24, 1992, decision on liability, the judge concluded that Tri-Star discharged Braithwaite for refusing to operate the R-120, which he believed he was not qualified to operate. The judge found that Braithwaite's experience on the R-120 was limited. In his view, Braithwaite properly communicated a safety concern when he told the foreman, on September 25, 1990, that he did not feel comfortable operating the R-120 and when he told the mine superintendent how he felt about operating the R-120. 14 FMSHRC at 1462, 1464.

The judge further found that, after speaking with Beener, Foreman Tighe had an obligation to tell Braithwaite that Beener had said that Braithwaite would be required to operate the R-120 or lose his job. 14 FMSHRC at 1464. The judge concluded that, if the foreman had received such instructions, he had a duty to address Braithwaite's safety concern and offer further training on the R-120. According to the judge, Tighe, by remaining silent, left Braithwaite in the position of believing he had been relieved by Beener of the duty to operate the R-120. Id. at 1464-1465.

The judge found that, when Braithwaite again refused to operate the R-120 on April 2, 1991, Tighe did not properly address Braithwaite's safety concern by correcting Braithwaite's belief that he had been relieved of responsibility to drive the R-120. The judge found that, if Tighe had done so, Braithwaite could have requested more training on the R-120 in order to keep his job, and that such a request would itself have been a protected work refusal in light of the limited training he had received. 14 FMSHRC at 1463, 1466.

On December 1, 1992, the judge issued his second decision, awarding damages and also denying Tri-Star's motion for reconsideration, which was based on the decision and evidence in Braithwaite's state unemployment compensation proceeding. 14 FMSHRC 2001.

II.

Disposition of Issues

Tri-Star argues that certain of the judge's findings are contrary to findings in the MSHA investigations of Braithwaite's section 103(g) and discrimination complaints, including MSHA's conclusion that training had been conducted properly. Tri-Star further argues that Braithwaite walked off the job on April 2, did not communicate a valid safety complaint to Tighe, and could not have communicated one, given his training and experience on the R-120. Tri-Star also raises a number of issues concerning the judge's award of damages. In response to Tri-Star's petition for review, Braithwaite submitted a statement with attachments addressing several of Tri-Star's factual contentions.

The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

A miner's refusal to perform work is protected under the Mine Act if it is based upon a reasonable, good faith belief that the work involves a hazard. Robinette, 3 FMSHRC at 808-12; Conatser v. Red Flame Coal Co., 11 FMSHRC 12, 17 (Jan. 1989); see also Simpson v. FMSHRC, 842 F.2d 453, 458 (D.C. Cir. 1988). The Commission has held: "Proper communication of a perceived hazard is an integral component of a protected work refusal, and responsibility for

the communication of a belief in a hazard underlying a work refusal lies with the miner." Conatser, 11 FMSHRC at 17, citing Dillard Smith v. Reco, Inc., 9 FMSHRC 992, 995-96 (June 1987). "[T]he communication requirement is intended to avoid situations in which the operator at the time of a refusal is forced to divine the miner's motivations for refusing work." Smith, 9 FMSHRC at 995. The miner's failure to communicate his safety concern denies the operator an opportunity to address the perceived danger and, if permitted, would have the effect of requiring the Commission to presume that the operator would have done nothing to address the miner's concern. Id. Thus, a failure to meet the communication requirement may strip a work refusal of its protection under the Act. Finally, the Commission has held that the "communication of a safety concern 'must be evaluated not only in terms of the specific words used, but also in terms of the circumstances within which the words are used ....'" Conatser, 11 FMSHRC at 17, quoting Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (July 1986), aff'd mem., 829 F.2d 31 (3d Cir. 1987).

The key issue here is whether Braithwaite made an adequate safety communication. The judge found that, on September 25, 1990, Braithwaite communicated to Tri-Star a safety concern that was adequate, "indicating that he did not feel properly trained or qualified to operate the R-120 truck safely." 14 FMSHRC at 1464. However, the record reflects only that Braithwaite was "uncomfortable" driving the R-120 and that he told Beener how he "felt." Tr. 18, 121-23. Braithwaite's testimony as to what he actually told Tighe and Beener on September 25 does not go beyond these statements. Although Braithwaite explained at the hearing that he felt "uncomfortable" running the R-120 because of its large size, that he "wasn't trained much on it," and that he was concerned about the safety of other workers (Tr. 18, 122-23), we discern nothing in the record to indicate that Tighe had reason to know that Braithwaite's discomfort was more than a personal preference not to operate the R-120 (see Tr. 18, 25, 33). Further, Braithwaite testified that he never requested additional training on the R-120. Tr. 121. Thus, Braithwaite's communication was inadequate to establish a protected work refusal.

Further, after Braithwaite's refusal to drive the R-120 on September 25, 1990, Braithwaite drove it on two occasions. On September 27, he initialed MSHA Form 5000-23, indicating that he was qualified to operate the R-120.[3] 14 FMSHRC at 1462. Six months later, on April 2, 1991, when Foreman Tighe asked Braithwaite to run the R-120 because there was no work for the Cline truck, Braithwaite again responded that he was "uncomfortable" operating it and refused to do so. Again, there is no evidence to indicate that Tighe had

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[3]The judge relied on an MSHA interview statement from the MSHA investigator who assisted in investigating Braithwaite's discrimination complaint to establish that Braithwaite could not have been properly trained on the equipment listed on the form. 14 FMSHRC at 1462. The investigator's statement, however, does not address Braithwaite's training on specific equipment. MSHA's investigation concluded, moreover, that "training was done properly" at Tri-Star and that Braithwaite was "properly trained in the operation of the Euclid dump truck." Resp. Ex. 1, pp. 9, 10.

reason to know that Braithwaite had a safety concern or that his discomfort was anything more than a personal preference.

In Conatser, the Commission reviewed communication of a work refusal factually similar to Braithwaite's. There, the Commission determined that a miner's statement was, in context, ambiguous. 11 FMSHRC at 17. The fact that the miner had driven the truck on seven prior occasions vitiated the adequacy and clarity of the communication. Id. Here, the record is similarly lacking in an unambiguous safety communication from Braithwaite on April 2. Accordingly, we conclude that, as a matter of law, Braithwaite's statements were insufficient communication of a safety concern to protect his refusal to work.

In his decision, the judge shifted the communication burden from Braithwaite to Tri-Star. The judge concluded that Foreman Tighe was obliged to tell Braithwaite, who alleged Beener had relieved him of any duty to operate the R-120,[4] that he would be required to operate the R-120 or lose his job. 14 FMSHRC at 1464. As noted in Conatser, "responsibility for the communication ... lies with the miner." 11 FMSHRC at 17. Nothing in the record suggests that communicating safety concerns to Tighe would have been futile. Compare Simpson v. FMSHRC, 842 F.2d 453, 459-61 (D.C. Cir. 1988).

We conclude that Braithwaite's work refusal did not include the required safety communication and therefore, as a matter of law on this record, was unprotected.[5] See Smith, 9 FMSHRC at 995-96.

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[4]Braithwaite's stated belief that he had been relieved of his responsibility to operate the R-120 was not based on anything Beener said. See Tr. 18, 121-24, 129, 139. Braithwaite testified that, after he told Beener how he felt, Beener "walked around, scratched his head ... shut the door, a couple of minutes later he come [sic] out and said go to job six, run [the] Cline." Tr. 123. Furthermore, as Braithwaite testified, no other heavy equipment operator was excused from operating a particular piece of equipment. Tr. 138-39.

[5]Given our disposition of this case based on the inadequacy of Braithwaite's safety communication, we need not reach the reasonableness or good faith of his belief that he was not adequately trained or qualified to operate the R-120. See Dillard Smith v. Reco, Inc., 9 FMSHRC at 996 n.*. We also need not reach Tri-Star's additional arguments, including issues relating to the judge's award of damages.

III.

Conclusion

For the foregoing reasons, the judge's decision is reversed, and his orders are vacated.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Distribution:

Thomas G. Eddy, Esq.
Eddy & Osterman
820 Grant Building
Pittsburgh, PA 15219

Vincent E. Braithwaite
53 West Harrison St.
Piedmont, WV 26750

Administrative Law Judge William Fauver
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike
Suite 1000
Falls Church, VA 22041

# ADMINISTRATIVE LAW JUDGE DECISIONS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 7 1993

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. VA 93-69-M |
| | : | A.C. No. 44-06731-05501 |
| v. | : | |
| | : | Darden Pit |
| MATERIALS DELIVERY, Respondent | : | |

## DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Petitioner;
V. Cassel Adamson, Jr., Esq., Adamson & Adamson, Richmond, Virginia, for Respondent.

Before: Judge Amchan

This case is before me upon a petition for civil penalties filed by the Secretary of Labor pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., for seven alleged violations of mine safety standards. This matter was heard in Emporia, Virginia on October 5, 1993. After considering the record before me, I have assessed civil penalties of $1,044, the same amount proposed by the Secretary.

## NOTIFICATION OF COMMENCEMENT OF OPERATIONS

On January 20, 1993, MSHA Inspector Charles E. Rines conducted a workplace inspection of a pit in Southampton County, South of Franklin, Virginia, at which Respondent was extracting sand and gravel for use in its concrete plants (Tr. 18-21). Rines was on his way to a different site when he noticed the activity at Respondent's Darden pit (Tr. 97-98). From conversations with State of Virginia inspectors he was aware that mining activity was about to start at the site but did not know that such activity had commenced until he drove by the site on January 20 (Tr. 19).

Rines determined that Respondent had not notified MSHA as to commencement of their mining operations at the Darden pit (Tr. 23-25). He, therefore, issued to Respondent Citation No. 4083517 alleging a violation of 30 C.F.R. § 56.1000 (Tr. 21-25). This regulation requires that:

> The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Safety and Health Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, mailing address, person in charge, and whether operations will be continuous or intermittent. . .

In writing the citation (Exh. P-2), Rines characterized Respondent's negligence as "high" due to the fact that he had issued a citation for violation of the same requirement to Respondent on June 22, 1992, at a pit in King William County, Virginia (Exh. P-2b, Tr. 29-37). In June 1992, Rines had discussed the notification requirement with Pat Kenny, who was Respondent's foreman at both the King William site and at the Darden pit, his supervisor, Gene Sneed, and company president, Richard Rose (Tr. 31-37).

**THE FRONT-END LOADERS**

While Rines was at the Darden pit, Respondent was removing material with a dragline and was using two front-end loaders to move the material to an area where it was separated into sand and gravel and loaded onto trucks for delivery to its cement plants (Tr. 20-21). On one of the loaders, serial number 75A2808, neither the horn nor the reverse signal alarm was working (Tr. 39, 79). Rines spoke to operator of the loader, who told him that both had been inoperative for 2 to 3 days (Tr. 42, 80).

The wheels of this loader were approximately 6 feet high and the operator's vision was obstructed for a distance of 17 feet to his rear (Tr. 44-45). Two employees of Respondent and two truck drivers employed by a contractor were walking back and forth from the pit on the same roadway used by the loaders (Tr. 43). Respondent did not use an observer to signal the driver when it was safe to back up.[1]

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[1]There is no direct evidence as to whether there was a signalman or not. Nevertheless, I infer from the record that there was no signalman. Mr. Rines' testimony as to the danger of employees being run over when the loaders were operated in reverse would make no sense if Respondent was using such an

Inspector Rines issued Citation No. 4083518 alleging a "significant and substantial" violation of 30 C.F.R. § 56.14132(a) for the use of the loader with an inoperative reverse signal alarm (Tr. 36-39, Exh. P-3). That standard requires that:

> Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

The inspector opined that an injury or fatality was "reasonably likely" due to the presence of the blind spot to the operator's rear, the presence of employees in the area of the vehicle, and the ambient noise level at the pit, which he believed would make it unlikely that employees would notice the loader backing up (Tr. 48-50). He characterized Respondent's negligence as "high" due to the fact that it had been cited for the identical violation on the same machine during his inspection of Respondent's worksite in King William County in June 1992 (Exh. P-3a, Tr. 50-53).

Respondent also received Citation No. 4033522, alleging another violation of 30 C.F.R. § 14132(a) on account of the inoperative horn on the same vehicle, and Citation No. 4033521 because of an inoperative horn on the other front-end loader, serial number 75A2786 (Tr. 68-82). With regard to the latter vehicle, Rines was told that the horn had not been working for approximately 2 weeks (Tr. 70-71).

Rines characterized these violations as "significant and substantial," because he believed that an accident was reasonably likely--given the proximity of employees to the vehicle and the limited visibility of the operator to the front of the vehicle (Tr. 71-72). He characterized Respondent's negligence as "high" given the fact that the horns on both the loaders did not work, and hadn't been working for a while when he arrived on the site (Tr. 76-83). In assessing the degree of negligence, Mr. Rines also considered the fact that Respondent's foreman, Pat Kenny, was also the supervisor on Respondent's worksite that he inspected in June (Tr. 76).

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Footnote 1 continued

observer. Moreover, Respondent has not contended that it used an observer and clearly was relying on the reverse signal alarm to warn employees who might venture behind the loader (Respondent's Answers to Interrogatories, Answers 2, 4, and 8).

## UNSECURED COMPRESSED GAS CYLINDERS

During his inspection, Mr. Rines observed five compressed gas cylinders lying on the ground (Tr. 55). Three were Oxygen cylinders; two were acetylene cylinders (Tr. 55). A barrel with a fire inside was 5 to 7 feet from two of the cylinders and the others were within 2 feet of a roadway traveled by the front end loaders (Tr. 55). Two of the cylinders were later used to cut metal (Tr. 113).

Four employees were observed in the area where the cylinders were laying and Mr. Rines was concerned that the proximity of the cylinders to the fire could cause an explosion and that they were subject to damage by the front-end loaders and could become projectiles (Tr. 56-59). The inspector issued Respondent Citation No. 4083519, which alleged a "significant and substantial" violation of 30 C.F.R. § 56.16005. That regulation requires that, "Compressed and liquid gas cylinders shall be secured in a safe manner." Mr. Rines deemed Respondent's negligence to be "high" as it had been issued a citation for the same hazardous condition in June, 1992 (Exhibit P-4a, Tr. 60-61).

## TOILETS

Inspector Rines also determined that no toilet facilities were provided for the four employees at the mine site (Tr. 65). He, therefore, issued Citation No. 4083520, which alleged a violation of 30 C.F.R. § 56.20008. That regulation provides that, "Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel." A citation for the same violation was issued to Respondent at the King William County site in June 1992 (Exhibit P-5a , Tr. 65-66).

## THE RAISED BUCKET

On January 21, 1993, Inspector Rines observed the operator of one of Respondent's front-end loaders, leave his vehicle with the bucket loaded and in a raised position (Tr. 83-86). The operator walked behind the vehicle, which was on a 6 percent grade, with its front-end higher than its rear, to talk to his foreman, Pat Kenny, and superintendent Gene Sneed (Tr. 83-86, 116).

The inspector was concerned that the stress placed upon the parking brake by the raised and loaded bucket could cause the parking brake to fail, or that it could cause the rupture of hydraulic hoses (Tr. 87-89). Rines issued Respondent Citation No. 4083523 alleging a "significant and substantial" violation of 30 C.F.R. § 56.14206(b). That standard requires that:

When mobile equipment is unattended or not in use,

dippers, buckets and scraper blades shall be lowered to the ground. . .

**ISSUES**

At hearing, Respondent appeared to dispute the proposition that it was engaged in interstate commerce, although it admitted that it was subject to the Act in responding to the Secretary's request for admissions. In any event, it is clear that Respondent's operations "affect commerce" and, thus, it is covered by the Federal Mine Safety and Health Act.

Respondent uses vehicles manufactured in interstate commerce and, therefore, its operations affect commerce on this basis alone (Tr. 141). Island Construction Co., Inc., 11 FMSHRC 2448 (ALJ December 1989). Moreover, Respondent's pit, which is located within 10 miles of the North Carolina/Virginia state line (Tr. 21), does compete with out-of-state sources of sand and gravel, which Respondent might have to use if it did not operate the Darden pit. Its activities at the Darden pit thus "affect commerce" on this basis as well. Marshall v. Bosack, 463 F. Supp. 800 (DC Pa 1978); Godwin v. OSHRC, 540 F.2d 1013 (9th Cir., 1976).

The only witness presented by Respondent was John Boston, its Financial Manager, who was not on the Darden site the day of Mr. Rines' inspection and has no experience in mining other than in its financial aspects (Tr. 131-136). Mr. Boston testified that Respondent was unable to get a copy of Volume 30 of the Code of Federal Regulations (CFR) for 10 months after its June 1992 MSHA inspection (Tr. 132).

I do not consider the unavailability of the CFR to be an ameliorating factor in assessing the penalties in this case. Respondent was cited for four of the seven violations found in this case during the prior inspection in King William County. Respondent, thus, had been specifically told of the requirement for the reverse signal alarm, toilets, notification of MSHA, and the securing of its gas cylinders. Respondent should have been aware of the need to keep the horns on the front-end loaders in operable condition from its conversations with Rines about the back-up alarm in June, 1992. Additionally, it is only a matter of common sense that, if a vehicle has a horn, it compromises safety to some extent if it doesn't work.

As to the raised and loaded bucket, it appears that Rines considered Respondent's previous lack of knowledge of the regulation in rating its negligence as "moderate" as opposed to "high" as he did for the violations for which Respondent had been cited before (Tr. 90-91). Moreover, MSHA's Office of Assessments also treated this violation differently in proposing a lower penalty.

Respondent also suggests that consideration be given to the fact that Pat Kenny, its foreman at the Darden Pit and at the King William county site, was fired subsequent to this inspection (Tr. 134). However, it is unclear what role, if any, the MSHA citations played in Mr. Kenny's discharge and, in any event, his conduct is imputable to Respondent for penalty assessment purposes Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981).

With regard to its front end loader 75A2808, Respondent contends that Citations Nos. 4083518 (inoperative back-up alarm) and 4083522 (inoperable horn) are duplicative (Tr. 135). The standard states that manually-operated horns **or** other audible warning devices provided as a safety feature shall be maintained in functional condition. Respondent contends that the standard should be read to require only that the horn or the back-up alarm be functional not both. I conclude that the literal meaning of the standard is not necessarily that given to it by Respondent, and I reject such a reading as being completely at odds with the purposes of the Act.

An interpretation of the standard more in keeping with the Act is that horns and/or other audible warning devices that are on the vehicle must be maintained in functional condition. The horn and the back-up alarm are designed to address different hazards. The horn is provided primarily to warn employees who the operator sees in front or to the side of the vehicle, and to warn employees when the operator is going to move. The back-up alarm is designed to account for the operator's restricted vision to the rear, and operates automatically so as to warn employees who the operator may not be able to see. The devices are not duplicative and thus separate civil penalties are appropriately assessed when both devices on one machine are not working.[2]

Inspector Rines characterized the inoperable horns, back-up alarm, the unsecured cylinders, and the raised bucket as "significant and substantial" violations. The Commission has held that to establish a "significant and substantial" violation, the Secretary must show: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature Mathies Coal Company, 6 FMSHRC 1 (January 1984). The determination of whether a violation is "S&S" is not limited to conditions at the time the violation is

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[2]A penalty for an inoperable back-up alarm may be inappropriate in situations in which the employer is providing an observer to signal when it is safe to back up pursuant to 30 C.F.R. § 56.14132(b), but that is not the situation presented in the instant case.

observed but includes consideration of continued normal mining operations U. S. Steel Mining Co., Inc., 6 FMSHRC 1573 (July 1984).

There is no controversy regarding the first two elements of the "S&S" criteria with regard to any of the five violations at issue. Respondent's witnesses Boston takes issue with Mr. Rines' opinion that it is reasonably likely that one would be killed if struck by a front-end loader operating in soft sand. As Mr. Rines has expertise, by virtue of his experience in mining and the safety field in particular, I credit his opinion over that of Mr. Boston and find that the Secretary has satisfied criteria number 4 of the "S&S" test.

As to criteria number 3, I also credit Mr. Rines and conclude that in the normal course of mining operations, if front-end loaders operate without horns and or/back-up alarms; if gas cylinders are not properly secured; and if operators leave their loaders unattended with the bucket raised, it is reasonably likely that each of these conditions will sooner or later cause injury to a miner. Therefore, I conclude that all five citations were properly cited as "significant and substantial" violations of the Act.

## ORDER

### Conclusions and Penalty Assessment

Section 110(i) of the Act requires the Commission to consider six factors in assessing civil penalties; the operator's history of previous violations, the appropriateness of such penalty to the size of Respondent's business, the negligence of the mine operator, the effect of the penalties on the operator's ability to remain in business, the gravity of the violations and the good faith of Respondent in attempting to achieve rapid compliance with the Act.

Respondent has admitted that payment of the proposed penalty will not affect its ability to stay in business (Response to Secretary's Request for Admissions # 6). Certainly Respondent qualifies as a small operator, as it extracts material for use primarily in its cement operations. Respondent demonstrated good faith in correcting the violations promptly after the January 20, 1993 inspection.

Nevertheless, the gravity of the violations and the negligence of the Respondent, particularly with regard to those violations for which it had been previously cited, warrants a penalty in the range of that proposed by the Secretary. I, therefore, assess the following penalties:

Citation 4083517 $50

Citation 4083518 $204

Citation 4083519 $204

Citation 4083520 $50

Citation 4083521 $204

Citation 4083522 $204

Citation 4083523 $128

Respondent is hereby directed to pay civil penalties in the amount of $1,044 within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

Distribution:

Javier I. Romanach, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Rm. 516, Arlington, VA 22203 (Certified Mail)

V. Cassel Adamson, Jr., Esq., Adamson & Adamson, Crozet House, 100 East Main St., Richmond, VA 23219-2168 (Certified Mail)

/jf

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5267/FAX (303) 844-5268

DEC 8 1993

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| UNITED STEELWORKERS OF AMERICA on behalf of RONALD SHANE BIRD, Complainant | : | DISCRIMINATION PROCEEDING<br><br>Docket No. WEST 92-596-DM<br>RM MD 92-06 |
| v. | : | General Chemical Mine |
| GENERAL CHEMICAL COMPANY, Respondent | : | |

**DECISION**

**Appearances:** Harry Tuggle, Safety and Health Specialist, United Steelworkers of America, Pittsburgh, Pennsylvania, for Complainant;

Matthew R. McNulty III, Esq., Bradley R. Cahoon, Esq., VAN COTT, BAGLEY, CORNWALL & McCARTHY, Salt Lake City, Utah, for Respondent.

**Before:** Judge Lasher

This proceeding arises under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (1982) (herein "the Act"). Complainant's initial complaint with the Labor Department's Mine Safety and Health Administration (MSHA) under Section 105(c)(2) of the Act was dismissed.

Complainant Bird contends that he was the subject of adverse action in the form of reprimands and reassignments to different crews after making a safety complaint on February 17, 1992,[1] in the form of a work refusal.

Although Complainant suffered no economic loss (T. 27), Complainant seeks a remedy in the form of expungement of records reflecting reprimands, including records of a "hearing" into the

[1] Certain exhibits, specifically Exhibits C-1, C-2, and C-3, mistakenly show this date as 2-18-92.

matter, together with an order requiring the Respondent to cease and desist from reassigning Complainant to different crews and an order returning Complainant to work on a bore miner rather than on a continuous miner (T. 26-29, 31, 32, 34).

Respondent concedes that Complainant made a safety complaint and that such was communicated to management. Respondent denies, however, that the reprimands and reassignments of Complainant were related to his safety complaint, contending that its actions were justified since Complainant refused a direct order from his supervisor, Foreman Danny Williams, and because Complainant Bird is a frequent complainer, has a personality problem with Williams, was accused of racial and sexual harassment by another employee, was a poor bore miner operator, and actually requested one of the reassignments.

After review of the record, exhibits, and arguments and briefs of the parties, the position of Respondent is found meritorious. Accordingly, its proposed findings and conclusions are, as modified, adopted.

## FINDINGS

On February 17, 1992, the 31-year old Complainant was operating a bore miner [2] at Respondent's underground trona mine located near Green River, Wyoming (T. 34, 37-40; Ct. Ex. 1). A member of United Steelworkers of America, Local 15320, Complainant has been employed at the mine for 14 years (T. 34-36).

On the day in question, Complainant Bird was working with D crew consisting of himself and three other crew members: Corey Loveless, mechanic; Tom Smith, FTC operator; and Doug Williamson, roof-bolter operator (T. 41). His foreman was Daniel R. "Danny" Williams.

Before commencing work, Williams held a safety meeting with his crew concerning barring down and bolting procedures. (T. 107-108, 256). Following the safety meeting, as is required by MSHA regulation, Williams entered the room the crew planned to mine and noted that the right side of the room was cut six to eight inches high. The left side of the room was cut "on seam" (T. 257, 313-314). The bore miner operator working prior to Williams' shift made this uneven cut. He had apparently failed to keep his miner level (T. 257), and the seam was rolling to the right (T. 314). Based on his 21 years of experience in underground mining, more mining experience than any of the other crew members, Williams considered this cut to be safe and was making

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[2] He is also trained to operate a continuous miner (T. 37-38), and was so employed at the time of hearing (T. 34).

plans to insure the safety of his crew (T. 260, 265). Bird entered the room and drove the miner to the face. Walking on the right side of the room until they reached the face, Smith and Williamson followed the miner (T. 258).

While Williams was setting up the cut at the end of the room, Bird left his machine, and came back to talk to him and brought to Williams' attention that the room was unsafe (T. 41, 53). Bird asked Williams if he had seen the condition of the room. Williams responded he had and that it was "cut a little high." Williams and Bird then went together to look at the high-cut area (T. 258). Contrary to Bird's testimony (T. 52-53, 113-114), the area was 100 feet from the front of the room and 65 feet back from the face (T. 258, 374). As previously noted, the left side of the arch was cut on seam, but the right side of the arch was cut six to eight inches high (T. 259, 374, 311, 329). Williams instructed Bird to bar down a loose area on the right side of the arch (T. 259, 374). Bird barred down a chunk six to eight feet long and two feet square (T. 52, 289). Trona remained in the curl on both sides at the area Bird barred down. Contrary to Mr. Bird's testimony, the cut was not made into the oil shale (T. 329).

After Bird barred out the loose material, he walked to the face, and Williams thought he was going to return to work. As Williams walked back to the laser at the end of the room, Bird, without further discussion or permission, began to back the miner out of the room (T. 261). Williams went to the face and asked Williamson what was happening. Williamson said, "I guess we are moving out of here." Williams then walked up to Bird and asked him what he was doing. Bird said, "This is unsafe; we're backing out of here." Williams said, "No, we're not." Bird then said, "I want a safety steward." Without any hesitation or resistance, Williams allowed Bird to leave the area to get a safety steward (T. 262-263, 55). After Bird requested a safety steward, Williams did not order him to mine the face (T. 262).

After Bird left, Williams talked about the condition of the room with the other crew members (T. 263). No other crew member refused to work or asked to leave the room (T. 179). Crew members had in the past raised safety concerns with Williams. He and the crew were always able to work out these problems together and continue mining (T. 260). Williams never required his crews to mine areas that he considered to be unsafe and his crew had "generally" trusted his judgment whether a room was safe to mine (T. 261). This crew had encountered high cuts in the past (T. 259-260, 265) and had also encountered higher cuts than the one present in the room (T. 260). When presented with high cuts before, the crew would bar out the loose roof and then the roof bolter would rebolt the area (T. 260-261). They would use these procedures to make the room safe and then continue mining (T. 260). Based on his 21 years of mining experience and 15 years

experience as a foreman, Williams believed they could bolt the room that had been barred out and make it safe (T. 265).

Williams had the crew back up the miner so they could bolt the area where Bird had barred out the loose material (T. 263-264). Williamson proceeded to back the miner about 25 to 30 feet in front of the barred out area. The roof bolter that was located behind the miner was positioned below the area that had been barred down by Bird. Williams expected that because Bird had gone to get a safety steward a lot of people would be coming into the room. Williams testified that the room was safe to mine but that in an abundance of caution the crew proceeded to bolt the area that had been barred out by Bird (T. 265, 291). The crew had placed five bolts when the power went off on the miner and the roof bolter (T. 139, 266). They could not continue to bolt because, as they learned later, Bird had shut the power off to their equipment (T. 189, 199, 266).

Bird claims that after he left the room he was unable to locate a safety steward. He testified he attempted to reach a safety steward by making several calls from the lunch room (T. 57). Bird called **KEITH MULLINS**, D crew shift supervisor, and asked him to look at the room (T. 61, 310) but Bird did not ask him to get a safety steward (T. 310).

Bird testified on direct examination that he shut off the power when he "first heard" the equipment "beginning to move" and that he called Mullins after he shut off the power (T. 61). Subsequently, he testified about having followed Mullins' instruction not to move anything after he turned off the power (T. 99-101). Mullins testified he did not tell Bird to leave everything where it was (T. 310-311), as Bird claims.

Bird testified on direct examination that (apparently while he was at the lunch room) he heard the alarm warning that the miner and other equipment were moving. He testified, as above noted, that he proceeded immediately when he first heard it beginning to move to turn the power off to the equipment (T. 61). Bird admitted that the crew could have been backing up the equipment to rebolt the curl at the time he turned off the power. Bird also testified that he did not look to see whether the crew was backing up to rebolt. Without bothering to check, Bird apparently assumed that the crew was proceeding to mine and shut off the power (T. 124-125).[3]

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[3] The crew receives safety training during the annual MSHA refresher training (T. 190). Respondent's mine safety supervisor reviewed the crew's most recent refresher training forms. The safety supervisor testified that the crew received their annual refresher training approximately two weeks before the hear- hearing was held before this Court (T. 360). In addition, the crew received safety and workers' rights training during their new miner

After the power went off, Williams proceeded to the lunch room to determine why the power was off. Williams believed or suspected that Bird had turned off the power. He found Bird and asked him whether he (Bird) had turned off the power. Bird confirmed that he had. Williams then told him to turn on the power (T. 266). Bird refused and threatened to put his lock on the transformer (T. 267).

During this exchange, Bird did not claim that Mullins had instructed him to turn off the power or leave everything where it was. Williams then gave Bird a direct order, "Turn the power on; don't put your lock on the miner." Bird again refused. Williams said, "Shane, I'll tell you one more time, go turn the power on and do not put your lockout on the miner or I'll take you out of the mine." Bird again disobeyed Williams' direct order and locked out the miner (T. 267-268).[4] Williams then informed Bird he was taking him out of the mine (T. 268). In his 15 years of supervisory experience, Williams had never had a worker disobey a direct order. He had never been in a position where it was necessary to give a direct order to any other employee besides Bird (T. 282). Although he could have, Williams did not attempt to turn the power back on himself because he believed Bird had turned the power off and the situation was "escalating too bad" (T. 266).

Bird admitted upon examination by the Court that Williams "just said turn the power back on, and I told him 'No.'" When asked: "He didn't say go back and operate the machine?" Bird admitted, "No, no." Significantly, Bird later testified that, "Well, he did tell me to turn the power back on and go back to the miner" (T.67, 68). Williams testified, "I told Shane to go up and get his water jug. I was taking him out of the mine" (T. 268).

Mr. Bird alleges that Williams pushed him during their exchange in the lunch room (T. 130-131). Williams, however, testi-

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training (T. 361). The safety supervisor said there is a new miner training plan in effect at General Chemical that is approved by MSHA (T. 359). The plan has a specific section addressing workers' rights (T. 360). The training related to safety concerns lasts one to two hours (T. 360).

[4] A lock is a device that all miners carry to place on a transformer to prevent power from energizing a machine. Bird placed his lock on the trans- former, which was located away from the mining equipment. Anyone can turn the power on and off at the transformer if it is not locked out. No one besides Bird could remove Bird's lock once he placed in on the transformer (T. 300).

fied convincingly that he did not touch or push Mr. Bird at any time during the incident (T. 268, 295, 300).

Following the incident at the lunch room, Williams called Keith Mullins, his shift supervisor on D crew. Mullins is Williams' immediate supervisor to whom Williams reports on a daily basis. When Mullins arrived, he and Williams went to the room to look at the roof conditions (T. 268-270, 311). Williams explained to Mullins how the crew had backed up to rebolt so they could continue to mine. Consistent with Williams' testimony, Mullins testified that the crew had placed bolts in the barred out area, trona was still in the curl in this area, and there was no sign that the cut had entered oil shale in the area (T. 311, 329). Mullins agreed that Williams "was doing the right thing" by rebolting to continue mining the room (T. 269, 327) and felt that the room did not look "bad" (T. 336).

After Mullins decided to have the crew continue mining, Bird demanded a Union safety steward (T. 312). Contrary to Bird's contention (T. 101), this was the first time he had made this request to Mullins (T. 312). Mullins then left to get Bird a safety steward. Bird admitted that on numerous occasions he had called Mullins to intercede on his behalf because Bird "thought he was fair" (T. 122). After Mullins came down and inspected the area, he decided the crew could go back to work. It was only after Mullins' review of the situation did Bird demand Mullins get a safety steward (T. 123).

**RANDY T. PITTS**, General Chemical's production superintendent over the bore panels, arrived after Mullins had left (T. 269, 371). Pitts is responsible for safety production costs, and control of the bore areas (T. 372). Pitts and Williams went to the face and discussed the roof conditions (T. 270). Pitts examined the roof conditions.

After Pitts came out of the room, Bird came up to him and claimed Williams had pushed him (T. 375). Pitts asked Williams to follow him out, so they could talk privately (T. 270, 376). Pitts asked Williams if he had pushed Bird (T. 270). Williams told Pitts he did not. Pitts again asked Williams whether he had, "in fact," shoved Bird (T. 376). Again, Williams denied pushing Bird (T. 270, 376). Pitts repeated his question about Bird's allegations and explained to Williams the severity of the allegations. Williams again denied pushing Bird and Pitts took no action against Williams. Pitts confirmed Williams had made the room safe for mining (T. 377).

Pitts then decided to separate Bird's safety concern issue from Bird's insubordination in refusing to obey Williams' direct orders (T. 377). Pitts testified, "Bird can be a very volatile person, and I felt that the situation could very easily escalate to something much more severe" (T. 377). Pitts believed that "by

removing Mr. Bird from the situation it would diffuse that" (T. 378). Pitts did not want the safety issue confused with the insubordination issue since those issues were "completely separate" (T. 379). Bird's insubordination was based solely on his refusal to obey Williams' direct orders (T. 271-272).

Pitts instructed the crew to back up the equipment and make a ventilation turn out of the room (T. 271, 377). Removing Bird from the mine and backing the miner up to make a ventilation turn separated Bird's insubordination from Bird's raising a safety concern (T. 271, 379). Pitts also decided to make the ventilation turn because he had already decided to remove Bird from the area and the crew would be short one person without Bird (T. 378). Three persons are needed to efficiently and safely mine straight ahead (T. 378, 397-398). Making the ventilation turn did not require bolting and it could be done with only two crew members (T. 378).

Pitts told Bird that he was taking him out of the mine but before this Pitts let Bird talk to the union safety steward, **ROBERT W. TAYLOR**, who had been brought to the area by Mullins (T. 210, 212-213, 312, 379-380). Taylor then proceeded to inspect the conditions of the room.

**TERRY W. ADCOCK**, Respondent's mine safety supervisor, after learning of the incident between Williams and Bird, asked **GLEN SIBER**, a Union safety steward, to go with him into the bore panel area. They arrived after Bird had been taken out of the mine (T. 355-357). Adcock and Siber discussed what had happened with Williamson and Smith and examined the room together. The crew showed them the area Bird barred out and the bolts that had been installed in that area. Adcock testified that he responded, "Well, that's a standard practice." A "safety issue" was brought up on the room, "but that was taken care of" according to Adcock (T. 367, 368). Adcock then stated that the crew told him that the safety issue was resolved when they placed bolts in the area of concern. Four or five bolts were placed in the area that had been barred out by Bird and they were painted red. Adcock testified that the roof on the left side was "[f]ine" and that it was "in good shape." The curl had not fallen out on the left side.

Exhibit C-4 contains a dispute provision that reads:

> In the event that an employee challenges his job assignment in the belief that it is eminently hazardous, the assignment will be investigated by supervision of company safety department representative and union representative. Thereafter, the case will stand on its own merits and in such case no employee will be disciplined until the foregoing procedure has been followed.

Bird claims that "in his mind" there was no investigation made pursuant to this provision (T. 96). He admitted, however, that an investigation could have been performed after he was taken out of the mine (T. 72). Bird also conceded that the language of the dispute provision did not require that he be present for the investigation (T. 98). He also conceded that nothing in the agreement required the foreman to get him a union steward (T. 101).

Prior to the time Bird was disciplined with a written warning, **BOB TAYLOR** and **GLEN SIBER**, both union representatives, investigated the conditions of the room. Also, before Bird was disciplined, Mullins, Pitts, and Adcock, General Chemical's safety department representatives (T. 136), investigated the conditions of the room. Bird testified that when Pitts arrived, he took his lock off because he believed the investigation was beginning (T. 137).

Bird was sent home by Pitts but still received a full day's pay for February 17, 1992 (T. 83, 380). Pitts clarified that the act of removing Bird from "the mine was not disciplinary; it was just to remove him from a volatile situation" (T. 380).

On February 18, 1992, the day after the incident, Respondent held a disciplinary hearing pursuant to Article XIII, Section 2, of the Labor Agreement between Respondent General Chemical and the Union ("Union Agreement") which provides:

> The administering of discipline will be done in conformity with established Company policy which shall recognize generally accepted principle of industry, due process, and just cause, and will include the employee's right to a hearing and to Union representation unless the employee is specifically advised otherwise (T. 342, 380).

At the hearing on February 18, Bird was given an opportunity to tell his side of the events that occurred on February 17 (T. 141, 343, 358, 381-382). Bird was represented by Union officials. Bird's fellow crew members also attended the hearing and talked about the incident. Exhibit C-6 makes no reference to moving Bird to another shift (T. 157).

Following the hearing, Respondent issued to Bird a Notice and Record of Disciplinary Action (Ex. C-6), which provides:

> On February 17, 1992, Shane Bird was insubordinate wherein he refused to comply with a direct order given him by his supervisor, Danny Williams. Mr. Bird was given specific instructions by Williams to turn the power back on at the transformer and not to lock out the miner. Mr. Bird disregarded the instruction and proceeded to put his lock on the miner despite Wil-

> liams' order. Insubordination is a serious violation of the company rules of conduct and would normally result in a lengthy suspension or termination. However, in consideration of mitigating circumstances presented at the hearing, the Company chose to forego these options and issue Mr. Bird a written reprimand for his actions on this day. (T. 381).

Pitts and **GERALD A. HASLAM**, Respondent's Superintendent of Human Resources, explained the meaning of the term "mitigating circumstances" used in the Notice (T. 337-338, 382). The term referred to the safety concern Bird had raised about the condition of the room. Haslam stated, "Insubordination is a very serious infraction and can result in some very severe discipline" (T. 340). However, because Bird had raised a safety issue, Haslam explained that the company decided to confine that discipline to a written warning" (T. 340). Prior to Bird's insubordination hearing, Respondent had terminated two other employees who had refused direct orders (T. 352). No grievance was filed after Bird received the written warning for insubordination (T. 420).

According to Pitts, the mitigating circumstances referred to the Company's giving Bird the benefit of the doubt about the safety issue he had raised to Williams (T. 382). Respondent, however, did not give Bird the benefit of the doubt about insubordination and Pitts testified that Bird "was clearly insubordinate" in disobeying his foreman's direct orders (T. 382-383).

Pitts telephoned Bird the evening of February 18 and told him he was being moved from D to B crew (T. 402). Pitts testified that he did not move Bird to B crew as a result of Bird's raising the safety issue (T. 402-403). Rather, Pitts testified, "The allegation of the shoving and stuff was the straw that broke the camel's back. ... I could not in good conscience put [Bird and Williams]) back together after that accusation was made (T. 403). Bird confirmed this (T. 142, 157). Bird told Pitts that "there was something that needed to be done about" his pushing allegation (T. 76). Pitts was asked on cross-examination, "To your knowledge, are people usually moved for allegations?" Pitts responded, "They're moved when a whole series of events take place. In any series of events there is a final event. That was the final event. The series of events involving Bird started in the years prior to the February 17 incident" (T. 404).

During his conversation with Pitts on the evening of February 18, Bird asked for a vacation. Respondent accommodated Bird's request for vacation. Bird was allowed to take vacation even though it was to be granted on a first-come, first-serve basis. Bird's response to this treatment was, "I thought it was pretty white of them" (T. 143-145).

Pitts testified that Mr. Bird was a "poor operator" of the borer and this, together with the insubordination and alleged shoving incident, led to Bird's being moved from D crew to B crew. Prior to February 17 Pitts, on a "great many occasions," talked to Bird about the way he operated the bore miner, both directly and through his foreman, Williams. These discussion were about (1) cutting off seam, (2) leaving the miner's top bar too low, and (3) leaving a step in the roof which created very dangerous situations. Bird also had a habit of standing outside the miner while he operated it. Pitts and Williams also talked to Bird about this problem on numerous occasions (T. 383-385). A few days before the February 17 incident, Pitts was walking past the panel and the other crew members saw him coming and flagged Bird so that he could jump back into the cab (T. 383).

During the six weeks prior to February 17, 1992, problems arose with the way Bird operated the bore miner. Bird was aware the panel belt the crew was using was old and worn (T. 272, 384). Supervision talked to Bird and all of the bore miner "operators, telling them that they had to slow down, run continually, but slower, to prevent problems" (T. 109, 384). Bird often ran at a rate that would overload the belt and the system would shut down (T. 272). When the system started back up, the belt would break (T. 110, 272). If the miner is operated too fast, it creates "hard wear and tear on the front end of the miner" (T. 384). Bird conceded that if the miner is operated too fast it adds a lot of weight to the belt causing it to break (T. 178). This increases maintenance costs and significantly slows down production (T. 384). During the six-week period prior to February 17, there were nine belt breakdowns, seven of which were the result of Bird's overloading the belts (T. 275, 384). Although the panel belt was old, it could be operated at reasonable capacity without breaking. Several times Pitts and Williams instructed Bird to slow down the miner (T. 275, 276). After these discussions, there would be "brief improvement for a few days ... . But after a few days, Bird would slip back into the same problems" (T. 276, 385). While Bird holds the record for one day's production on the bore miner (T. 276) during 1991, Bird was in last place for total production for the year (T. 276) and for the year 1992, after Bird left, D crew placed first for production. Williams explained that the discrepancy between the years 1991 and 1992 for total production was because Bird's replacement operates the miner "safely at a good speed, but not overload anything" (T. 277-278). The other operators understood better than Bird how to properly use the bore miner (T. 299). Bird is the only operator that Williams supervised during his 15 years of experience who has continually refused to change the way he operated a miner to prevent breakdowns (T. 283).

Prior to the February 17 incident, Pitts' supervisor, **RON HUGHES**, General Chemical's mine manager (T. 344), demanded that Pitts "identify and fix operational problems with the bore miner"

(T. 386). Specifically, Hughes insisted that Pitts correct problems associated with the way Bird was operating the bore miner. These problems were important factors in the decision to move Bird to another crew after his insubordination (T. 387).

Bird had confrontations "a number of times" with the foreman that preceded Williams, **DON DARROUGH** (T. 386). Pitts testified, "Darrough continuously had problems with Shane. And we came to the point of having to move Shane or move the foreman. And I told Shane that was the case; and he almost begged to stay on the machine and said that all the problems had to do with the foreman, and if he was given the opportunity to stay on the machine, that he'd do a much better job." Pitts moved Darrough to a different crew instead of Bird (T. 386).

Pitts indicated it was not possible to put Bird back as a bore miner operator because Bird is "a poor operator." Pitts denied that Bird was taken off the bore miner because he raised a safety concern. Pitts testified "Like I said, he was a poor operator and it was hurting us" (T. 387).

Mr. Haslam testified that under Article II of the 1990 Labor Agreement between General Chemical and the Union (Ex. R-3) General Chemical retains the authority to assign shifts and tasks to personnel (T. 340). Bird agreed (T. 159). By asking to be put back on D crew, Bird was asking for an exception to the Union Agreement (T. 341).

Haslam had in the past been responsible for management rights under the Labor Agreement. Haslam gave two examples where Respondent moved a worker because of a conflict with his foreman. Respondent also moved a male employee because of a conflict with a female employee. In these instances, the Union filed grievances against the changes (T. 350-351). Bird did not file a grievance with the Union following his shift change from D crew to B crew (T. 340).

**MICHAEL BENNETT**, Respondent's Production Superintendent over the continuous area, has responsibility for administering the absentee grievance procedure for the underground portion of the mine (T. 407-408). Respondent established business justifications for each shift move of Bird (T. 412). Bird was assigned to a continuous miner on D crew after he bid the move in the spring of 1990. Although Bennett did not attend the February 18 Disciplinary hearing, he was aware of Bird's insubordination and pushing allegations (T. 413). Although Respondent tries to work out disputes between hourly employees and supervision, the problems between Bird and Williams were different (T. 413-414). Bennett testified, "I think that there's a problem waiting to happen there. It's been my experience that once there is a problem like

that, it's just a matter of time before it redevelops and worsens" (T. 429). Respondent moved Bird out of harm's way to protect both Bird and Williams (T. 429).

Bennett said that a previous bore miner operator, Mike Robertson, requested to get back on a boring machine. Robertson operated a continuous miner on B crew. The "easiest move ... causing the least disruption" was to switch Bird and Robertson (T. 414). So Bird was moved to B crew.

After the decision to move Bird to B crew, Bennett and Haslam attended a meeting requested by Union representative **TONY TRUJILLO**, which was called because of concerns raised by **FRANCES PAGE**, a black female employee. On a previous occasion, Ms. Page had accused Bird of sexual and racial harassment. When Page learned that Bird was coming back on B crew, she expressed reservations about it (T. 416). B crew consists of approximately 40 production and 30 maintenance and utility employees (T. 416). Respondent had no intention of putting Bird and Page together in the same panel (T. 417). Trujillo acknowledged that the mine was large and that Bird and Page would only see each other at the start and at the end of the shift and he believed that Bird and Page were adults and could work on the same crew without any problem (T. 417). The union agreed and assented to the move of Bird to B crew (T. 417).[5] Bennett told Bird that Page had raised concerns about his sexual and racial harassment of Page while he had previously been on B crew. Bird was told that Respondent expected him to perform his job and to leave Page alone (T. 417-418).

Despite the Union's assurance that Bird and Page were going to act reasonably, in April 1992, Page filed a discrimination complaint alleging that Bird had again sexually and racially harassed her. These allegations were in addition to the allegations Page had made earlier in 1990. Page filed her complaint against Respondent General Chemical because Wyoming law requires General Chemical to provide Page with a workplace free of racial and sexual harassment (T. 151-152, 418-419). As a result of the allegations made by Page in her complaint, Bennett moved Bird from B to C crew. This move was made to avoid potential liability of General Chemical (T. 422-423). In addition, Bird testified that he, the Union, and Page insisted that Bird be moved from B to C crew (T. 85, 146). Bird was told that he would be fired if anything

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[5] William Korhonen, the union President, testified that neither in his mind nor in the mind of the Union was an agreement reached moving Bird to B crew. However, the union did not object in writing and did not grieve the move (T. 443-444).

like Page's allegations arose again (T. 156). It was this move that caused Bird to curse at Mr. Bennett.[6]

The Union attempted to show that Respondent had set Bird up when they put him on B crew (T. 84). Bird testified that Respondent placed him on B crew so Page would file a racial and sexual harassment complaint against Respondent because of Bird (T. 178). However, Bird conceded he was not fired because of Page's complaint (T. 178). Respondent could have fired Bird based on the racial and sexual harassment allegations alone made by Page against Bird (T. 431). Instead, it moved him to C crew (T. 428).

Bird moved to C crew in April 1992 and worked on C crew for about six months until he filed a grievance to be placed full time on a miner (T. 423). There are two bore and five continuous miner operator positions on C crew (T. 423). The period April through October is the heaviest vacation time at the mine (T. 423). Bennett testified that during this time the mine is "not working much. Other times we are not filling all the continuous miner positions." Bennett was breaking up crews during this period, including Bird's (T. 423). Bird was operating a miner during this time about four days each week. In his grievance, Bird requested through the Union that he be assigned to a machine that he could run full time. The Union knew that to grant Bird's wishes Respondent would have to "do away with a continuous miner job to create a position for Mr. Bird." This is exactly what Bennett did (T. 424).

A miner position was available on A crew. The A crew miner operator was on medical leave for about six weeks. Bird was told "that as a result of the changes that were taking place and the grievance that was filed in his behalf," he was being moved to A

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[6] Bennett addressed the Notice of Disciplinary Action to Shane Bird dated April 14, 1992 (Ex. C-7). Bennett testified that this was a written warn- ing issued to Bird for an incident that occurred on April 10, 1992, and that four Union safety representatives were present at the hearing (T. 409).

The April incident occurred when Bird came off shift, and Bennett sent word that he wanted to speak with him about a shift move. Respondent decided to move Bird from B crew to C crew as a result of Page's racial and sexual harassment allegations against Bird. Bennett informed Bird of this decision. Bird re- sponded that the Union told him he was going back to D crew. Bennett told Bird "there was no way we would move him back to D crew because of the incident with Mr. Williams, the pushing incident" (T. 411). Bird became irate and upset, turned to walk away and said, "F . . . you. I need to see a Union rep." Bennett called for a hearing immediately after this incident. As a result of Mr. Bird's use of abusive language, Exhibit C-7 was issued (T. 410-412). Neither Bird nor the Union grieved the April 10 disciplinary hearing (T. 340, 412). Exhibit C-7 makes no reference to moving Bird to another shift.

crew to operate the miner. Bird was told that when the A crew operator returned from medical leave, Bird would have the opportunity to choose either to return to C crew or stay with A Crew. So as a result of Bird's grievance, he moved to A crew until the operator returned from medical leave (T. 425). After the operator returned from medical leave, Bird came to the Company "and said, 'Yes, I want to go back to C crew'." As a result of Bird's own request, in November 1992, the Company moved Bird back to C crew. Bird could have chosen to stay on A crew, but he chose C crew (T. 425).

Approximately five or six weeks prior to the hearing in this matter, Bird came to management and said, "Look, I'm not running the machine all the time on C crew. I would like to be on a miner full time" (T. 426). He was advised that there was a miner open on A crew. Bird said that if he could work with a certain foreman, he would go to A crew. Respondent agreed to his request and made this change for Bird (T. 426). Bird is presently operating a continuous miner on A crew (T. 91).

**BOB TAYLOR**, the union safety steward, claimed he had never heard of Respondent's moving around the 24 miner operators, "unless they go in and request it" (T. 216). Taylor admitted that none of the 23 miners had disobeyed direct orders like Bird had (T. 218). None of the other 23 miner operators have a history of problems like Bird. None of the other 23 have been accused of sexual and racial harassment like Bird. None of the other 23 operators are as controversial as Bird (T. 427).

In summary, Bird was on D crew because he bid on it originally; Bird moved from D to B crew because of his unsatisfactory job performance over a period of time and because of the alleged shoving incident with Williams; Bird moved from B to C crew because he was accused of sexually and racially harassing a black female employee; Bird then moved from C to A crew because the Union filed a grievance on Bird's behalf requesting that "he be assigned a full time miner"; Bird moved from A to C crew because he requested it (T. 427-428); and finally, Bird moved from C back to A crew at his own request (T. 428). Presently, Bird operates a continuous miner at the same rate of pay he was receiving as a bore miner operator on D crew (T. 428). He has received the same rate of pay since the February 17, 1992, incident (T. 105).

## DISCUSSION AND CONCLUSIONS

In order to establish a prima facie case of mine safety discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity, and (2) that the adverse action

complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-1938 (November 1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984 (specifically approving the 'Commission's Pasula-Robinette test); and Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986).

The record is clear that Complainant Bird initially engaged in an activity protected under the Act--complaining to his foreman Danny Williams that conditions in a room he was working in were unsafe and initially refusing to work.[7] Complainant concedes that Williams advised him that he had previously seen the area complained of and considered it safe (T. 54) and that Williams directed him and the crew to continue the work (T. 55; Complainant's Post-Hearing Brief, p. 3).

It is concluded on the circumstances of this case that Mr. Bird's act of turning off the power to the miner when he did not know the circumstances, and then later refusing a direct order to turn the power back on was unreasonable and was not a protected activity under the Act.

It was established that Respondent took adverse action in the form of a written warning to Mr. Bird for failing to comply

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[7] For a work refusal to come within the protection of the Mine Act, the miner must have a good faith, reasonable belief that the work in question is hazardous. Robinette, supra, 3 FMSHRC 801-812. If such belief is reasonable, the mine operator has an obligation to address the danger perceived by the miner. River Hurricane Coal Company, Inc., 5 FMSHRC 1529 (September 1983); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984), aff'd sub nom Brock v. Metric, 766 F.2d 469 (11th Cir. 1985). A miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dis- sipate fears or ensure the safety of the challenged condition. See Ronny Boswell v. National Cement Company 14 FMSHRC 253 (February 1992).

with an order from Williams to turn the power back on at the transformer and to not lock out the miner (see Ex. C-6). Respondent also subsequently transferred Bird to different shifts.

The essential issues then are whether the warning and transfers were discriminatorily motivated or were justified.[8]

The propriety of Respondent's issuance of a written warning to Mr. Bird, after investigation of the room had taken place and after a hearing the following day, is supported in the record. The second written warning received by Bird for using abusive language to a supervisor is irrelevant to this discrimination claim and he failed to prove any nexus of such to his protected activity.

As previously found, Mr. Bird suffered no adverse action as a result of shift changes following his February 17 insubordination; he was moved to B crew to protect him from possible further altercations with his foreman and because of the poor operating performance. Respondent even accommodated his request for vacation with the change in shift. Bird was moved form B to C crew to protect him from claims asserted by Frances Page. He was then moved from C to A crew, A to C crew, and from C back to A at his request. Respondent abolished an operator position to make room for Bird and, as an accommodation, assigned him to work with a foreman with whom Bird had requested to work.

Bird admits that at all times subsequent to his insubordination he has received the same rate of pay and has remained a continuous miner operator. Bird offered no rebuttal evidence and, therefore, failed to carry his burden of proof to establish that he has suffered any unwarranted adverse action as a result of the February incident.

Complainant failed to establish that Respondent acted unreasonably, or in bad faith, in responding to and addressing his safety concern. The United States Court of Appeals for the District of Columbia Circuit in Gilbert v. Federal Mine Safety and Health Review Commission, 866 F.2d 1433 (.D.C. Cir. 1989), has held that "when a miner expresses a reasonable, good faith fear in a hazard, the operator has a corresponding obligation to

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[8] I have credited the version of the facts of Respondent's witnesses based not only on demeanor, but on discrepancies of testimony including those concerning whether the crew received safety training, the fact that the other crew members did return to work when ordered to do so, the fact that Complainant was accommodated in various requests by Respondent, indicating a mild approach to discipline despite an apparently troublesome work history, and since there is no substantial evidence of anti-safety animus on the part of Respondent in this record.

address the perceived danger." Respondent did so here. After Bird left the room and after talking to the crew, Williams had the crew back up and rebolt the area. They could have completed this task had Bird not shut down and locked out the equipment. Safety supervisor **TERRY ADCOCK**, a federal and state certified miner investigator, testified that Mr. Williams' attempted resolution was an accepted safety practice for dealing with high cuts. Further, Mullins, who Bird himself admitted was "fair," concluded Williams made or was attempting to make the room safe to mine. In addition, Bird's fears, if any, were completely satisfied when the decision was made to pull back and make a ventilation turn. These actions fully demonstrate a good faith and reasonable response to Bird's concern.

Respondent thus discharged its duty to respond to Bird's reasonable belief that the work in question was hazardous. Williams never ordered Bird to go back to the room and operate the miner. Williams ordered him to perform solely unprotected activities (turn on the power and not to lock out). In the circumstances here Williams was not required to explain to Bird that the crew was making the room safe to mine. It is immaterial that Williams never communicated to Bird that the crew was rebolting when Bird turned the power off on them. As Respondent contends, Mr. Bird confuses his role in the mine with that of management's.

Bird has failed to establish discriminatory motivation by a preponderance of the evidence. There is no convincing evidence that the adverse action of Respondent was motivated in any part by Bird's limited protected activity.

Discriminatory intent may be proved by circumstantial indicia including: knowledge of protected activity; hostility towards protected activity; coincidence in time between the protected activity and the adverse actions; and disparate treatment of the miner. Respondent responded to Bird's safety concerns and even gave him the benefit of the doubt when it chose not to discipline him more severely when he was insubordinate. Bird has not established by a preponderance of the evidence any of the circumstantial indicia of discriminatory intent.

There is no persuasive evidence that Respondent displayed a specific hostility toward Bird's protected activity. Respondent established convincing evidence to the contrary. Williams and the other supervisors recognized Bird's safety concern and, contrary to Bird's assertion, did not attack or threaten him for raising such concern. Without hesitation or resistance, Williams allowed Bird to leave the room to find a safety steward. Respondent respected Bird's concern enough to pull back the miner and make a ventilation turn. Respondent removed Bird from the mine to protect him from further altercations, paid him for the full day, and bypassed Company policy to grant him vacation so he could make a reasonable transition to his new crew. Respondent

has in the past discharged miners for less insubordination, but chose to discipline Bird with a written warning because he had raised a safety concern. He received a hearing concerning his insubordination. His shift changes did not reflect hostility to protected activity. On the contrary, each move was to protect Bird from harm or to grant his personal request for reassignment. Respondent abolished an operator position to accommodate Bird's request for a move and, as a further accommodation, assigned Bird to work with the foreman with whom Bird requested to work.

Complainant Bird presented no evidence that Respondent had been, in general, hostile to his or others' protected activities.

Although Respondent bears the burden of establishing its affirmative defense, "the ultimate burden of persuasion does not shift from" Mr. Bird. Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

Legitimate business justifications existed for removing Bird from the mine apart from his protected activities. Respondent established that it removed Bird to protect him, not to discipline him. Respondent moved Bird because he refused Williams' direct orders and alleged Williams pushed him. Because Bird had a volatile reputation, Respondent believed in its business judgment that Bird should be removed to protect him from any further altercations and to diffuse the situation. The situation could have escalated to something more severe. Under the restrained inquiry required by the Commission in Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), these justifications for removing Bird from the mine are neither incredible nor implausible.

Likewise, legitimate business justification existed for issuing a written warning to Bird for his insubordination. A business justification for issuing Bird a written warning was for his turning off power to, and locking out, machinery and refusing his foreman's direct orders. Bird's insubordination clearly established Respondent's affirmative defense for issuing this written warning.

As the Commission stated in Bradley v. Belva Coal Company, 4 FMSHRC 981, 991 (June 1982): "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

The record in this matter is convincing that Respondent was motivated for the reasons and justifications it claims. Complainant's evidence was not found to be persuasive that his discipline was due to any alleged expression of safety concerns. Consolidation Coal Co. v. Marshall, supra.

## CONCLUSIONS

Respondent's motivation in reprimanding and reassigning Complainant was for his unprotected activities and the decision to take such adverse action was justified. This adverse action was not wholly or in part discriminatorily motivated. Thus, Complainant has failed to establish a prima facie case of discrimination under Section 105(c) of the Mine Act.

Even assuming arguendo that it was established by a preponderance of the reliable, probative evidence that the adverse actions were motivated in part by protected activities, Respondent established by a clear preponderance of such evidence that it was also motivated by Complainant's unprotected activities and that it would have taken the adverse actions in any event for such. Gravely v. Ranger Fuel Corp., 6 FMSHRC 729 (1984).

## ORDER

Complainant having failed to establish Mine Act discrimination on the part of Respondent, the Complaint herein is found to lack merit and this proceeding is **DISMISSED.**

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Mr. Harry Tuggle, Safety and Health Specialist, Health, Safety and Environment Department, United Steelworkers of America, Five Gateway Center, Pittsburgh, PA 15222 (Certified Mail)

Matthew F. McNulty III, Esq., Bradley R. Cahoon, Esq., VAN COTT, BAGLEY, CORNWALL & McCARTHY, 50 South Main Street, Suite 1600, P.O. Box 45340, Salt Lake City, Utah 84144 (Certified Mail)

Mr. Ronald Shane Bird, 114 South Main, Rock Springs, WY 82901 (Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 8 1993

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| THOMAS P. GATES, Complainant | : | DISCRIMINATION COMPLAINT |
| | : | Docket No. YORK 93-135-DM |
| v. | : | NE-MD-93-06 |
| GOUVERNEUR TALC COMPANY, Respondent | : | #1 Mine<br>Mine ID: 30-00611 |

**DECISION**

Appearances: Thomas P. Gates, pro se, Hailesboro, New York, for Complainant;
James J. Dean, Esq., Putney, Twombly, Hall & Hirson, New York, for Respondent.

Before: Judge Feldman

This matter is before me for consideration based upon a discrimination complaint filed by Thomas P. Gates against the corporate respondent, Gouverneur Talc Company. Gates is bringing this discrimination action in his own behalf pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (the Act). Gates initiated this action after the Mine Safety and Health Administration (MSHA) conducted an investigation and concluded that there was no section 105(c) discrimination violation with respect to Gates' March 2, 1993, employment discharge by the Gouverneur Talc Company.

This case was heard in Watertown, New York, on November 9, 1993. At the hearing Gates called Thomas Cogan and Kevin Hurley, who are officials with Local 4979 of the United Steel Workers of America. Gates also called Harold Boncolln, the respondents' mine superintendent, and Gary Lutz, who was discharged with Gates shortly after they had an altercation on February 10, 1993. The respondent relied upon the testimony of Terry Jacobs, the respondent's safety director, and Greg Holly and Gary Rust, employees of the respondent who witnessed the altercation between Gates and Lutz. At the culmination of the hearing, the parties elected to make closing statements in lieu of filing posthearing briefs. After considering the evidence of record and the closing presentations, I issued a bench decision which is formalized herein.

The chronology of events are not in dispute and can be briefly summarized. Gates' employment with the Gouverneur Talc Company as a maintenance mechanic began in April 1984. As a maintenance mechanic, Gates was responsible for all maintenance with the exception of electrical and vehicle repair. Gates served as a union safety man for approximately one year during the period 1986 through 1988. Gates also served as a United Steel Workers grievance committeeman for local 4979 for approximately four years prior to his discharge on March 2, 1993. As a union committeeman, Gates dealt primarily with contract interpretation issues and was not actively involved in union safety related issues or complaints.

Gates is not alleging that his activities as a union safety man or as a union committeeman in any way contributed to his March 2, 1993, termination. The termination occurred shortly after Gates' February 10, 1993, altercation with Gary Lutz who was also discharged for fighting. (Tr. 21-22). Rather, Gates maintains that the discrimination complaint he filed with the Mine Safety and Health Administration on April 8, 1993, after he was permanently discharged on March 2, 1993, tainted his August 5, 1993, arbitration hearing because the arbitrator heard testimony concerning the fact that the complaint had been filed. (Tr. 22).

Gates' April 8, 1993, discrimination complaint primarily alleges breaches of the union-management labor contract concerning such matters as grievance procedures, eligibility to vacation pay after discharge, and termination of hospital insurance after discharge. The respondent provided testimony on these issues. For example, Lutz' company health insurance was terminated after Gates' health insurance because Lutz received worker compensation benefits as a result of his injuries sustained in the altercation with Gates. The respondent was legally obligated to retain Lutz in its health insurance program while Lutz was a worker compensation recipient.

The focal point of this case is the altercation between Gates and Lutz which occurred on February 10, 1993. On that morning Gates was repairing a cable from approximately 7:00 a.m. until shortly after 8:00 a.m. The mine foreman requested Gates to assist Lutz with repairing track after he finished the cable repair work. However, Gates decided that there was not enough time to travel to Lutz' work area before the 9:00 a.m. break period. Therefore, Gates decided to go to the lunchroom after repairing the cable until the morning break was finished. Lutz became annoyed when he learned that Gates was in the lunchroom. Lutz and Gates argued in the lunchroom at which time Lutz accused Gates of not showing up for work. Lutz also threatened to inform management that he did not want to work with Gates anymore.

After the break, Holly, Rust, Lutz, and Gates traversed the tunnel to the work site. Lutz was unloading material from a flatbed when Gates approached him and repeatedly called him a "snitch" and "squealer." Lutz replied that he had "enough of [Gates'] shit and [Lutz] started towards [Gates]." (Tr. 85). An altercation then ensued, although Lutz has no recollection of the events. According to witnesses Holly and Rust, Lutz went for Gates and the two began pushing and shoving each other. Lutz ultimately fell on his back in the mud across the track and sustained cracked ribs. Lutz was subsequently admitted to the hospital where he experienced heart stoppage which may have been related to his traumatic chest injuries. Lutz required a pacemaker, however, it is not clear whether the cardiac condition was directly related to the injuries sustained at the mine. (Tr. 83).

On February 16, 1993, the respondent served written notice on Gates, pursuant to paragraph 77 of the union agreement, that he was provisionally discharged for fighting with another employee on February 10, 1993. (Res. Ex. 2). Gates contested this action and hearings were held in accordance with the requirement of the union contract. The evidence considered at the hearings included information obtained from witnesses Holly and Rust as well an interview with Lutz in the hospital. On March 2, 1993, Gates' provisional discharge was converted to a permanent discharge. (Res. Ex. 18). A union grievance filed on March 4, 1993, was denied by the respondent. This matter became the subject of an arbitration proceeding. The arbitration hearing was conducted on August 5, 1993. On September 10, 1993, Arbitrator Mona Miller issued a decision wherein she denied the union grievance and concluded that the respondent had discharged Thomas Gates for just cause. (Res. Ex. 19a).

In order to prevail in a discrimination case, the complainant must demonstrate that he participated in protected activity and that there is some nexus between the protected activity and the adverse action complained of. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981). Alleged adverse actions associated with alleged violations of Gates' rights under the union contract, such as issues pertaining to hospital insurance and vacation pay, are beyond the scope of this proceeding. It is clear that the only pertinent adverse action in this matter, i.e., Gates' permanent discharge on March 2, 1993, could not have been related to his subsequent discrimination complaint filed with the Mine Safety and Health Administration on April 8, 1993. Consequently, I issued the following bench decision, with non-substantive edits, dismissing Gates' discrimination complaint.

In addressing the issues in this case, I wish to point out that to prevail on a discrimination complaint under Section 105(c) of the Mine Act, the complainant must demonstrate that he or she has engaged in protected activity, and that the adverse action, in this case Gates' termination, was in some way motivated by the protected activity.

Although Gates indicated that he was a union grievance committeeman from 1989 through his termination on March 2, 1993, and that he was a safety committeeman for approximately one year during the period 1986 through 1988, he has conceded that he was not discriminated against for these activities. Thus, his termination was not in any way motivated by these activities.

Moreover, it is important to note that Gary Lutz, who was also terminated for his role in the altercation in issue, was never a grievance or safety committeeman. Therefore, the fact that Lutz, who had no history of safety related or grievance committee activities, was also terminated is further evidence that Gates was not singled out for his prior safety or union related activities.

The central issue in this proceeding is the February 10 1993, altercation between Gates and Lutz. I am confident that Gates is a sincere individual and that he had no intention of contributing in any way to Lutz' injuries. However, when Gates made remarks about Lutz' being a "snitch," he knew or should reasonably have anticipated that such remarks could result in an altercation. This was apparently the basis for his termination by the respondent.

The thrust of Gates' case is that his discrimination complaint filed April 8, 1993, approximately one month after his permanent discharge on March 2, 1993, somehow tainted his August 5, 1993, arbitration hearing. I find the record devoid of any evidence that the arbitrator's knowledge that Gates had filed a Mine Safety and Health Administration discrimination complaint influenced her arbitration decision. Moreover, it was appropriate to reference Gates' discrimination complaint in the arbitration proceeding as the complaint is relevant to Gates' state of mind and whether Gates felt that the company's discharge was motivated by his alleged past protected activities under the Mine Act rather than his altercation with Lutz.

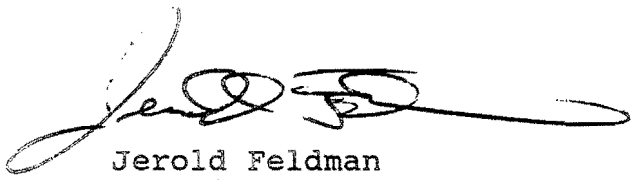
In reaching a conclusion in this case, I note that deciding who was primarily at fault in the altercation between Gates and Lutz is beyond the jurisdiction of this court. My role is not to determine whether Gates, Lutz or both were justly discharged. Rather, my jurisdiction is limited to the issue of whether Gates was discharged for any past activities which can be construed as protected activities under the Mine Act.

In the current case, the only protected activity alleged by Gates is the Mine Safety and Health Administration complaint that he filed. As this complaint was filed after his employment termination had become permanent, I am unable to conclude that Gates' discharge was in any way motivated by his discrimination complaint or any other protected activity. This decision has no bearing on any rights or benefits Gates may claim under any other Federal statute or as a result of any alleged breach of union contract.

In summary, my decision in this matter solely relates to the discrimination issues within the parameters of the Mine Safety and Health Act. As such, Gates' discrimination complaint against the Gouverneur Talc Company is dismissed. (Tr. 159-163).

**ORDER**

Accordingly, the discrimination complaint filed by Thomas P. Gates against the Gouverneur Talc Company in Docket No. YORK 93-135-DM IS **HEREBY DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

Mr. Thomas P. Gates, P.O. Box 134, Hailesboro, NY 13645 (Certified Mail)

James J. Dean, Esq., Putney, Twombly, Hail & Hirson, Bar Building, 36 West 44th Street, New York, NY 10036

Ms. Dana Putman, General Manager, Gouverneur Talc Company, P.O. Box 89, Gouverneur, NY 13642

/ll

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 8 1993

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDINGS |
| | : | Docket No. KENT 93-666 |
| | : | A. C. No. 15-16318-03578 |
| v. | : | |
| | : | Mine No. 6 |
| MANALAPAN MINING COMPANY, INC., Respondent | : | |
| | : | Docket No. KENT 93-670 |
| | : | A. C. No. 15-05423-03731 |
| | : | |
| | : | Docket No. KENT 93-671 |
| | : | A. C. No. 15-05423-03735 |
| | : | |
| | : | Mine No. 1 |
| | : | |
| | : | Docket No. KENT 93-705 |
| | : | A. C. No. 15-16733-03543 |
| | : | |
| | : | Mine No. 7 |

**DECISION APPROVING SETTLEMENT**

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Richard D. Cohelia, Safety Director, Manalapan, Mining Company, Inc., Evarts, Kentucky, for Respondent.

Before: Judge Maurer

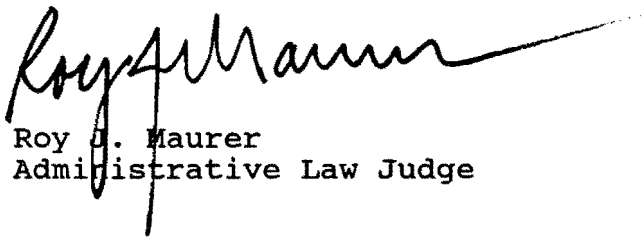
These cases are before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). An evidentiary hearing in these matters was held on November 4, 1993, in London, Kentucky. At the conclusion of that hearing, the parties filed a motion to approve a settlement agreement and to dismiss these cases.

The citations, initial assessments, and the proposed settlement amounts are as follows:

| CITATION/ ORDER NO. | PROPOSED ASSESSMENT | PROPOSED SETTLEMENT |
|---|---|---|
| KENT 93-666 | | |
| 4239039 | $ 793 | $ 520 |
| 4239040 | 690 | 690 |
| 4239181 | 690 | 690 |
| 4239182 | 690 | 100 |
| KENT 93-670 | | |
| 3000222 | 431 | 200 |
| 3000224 | 506 | 506 |
| 3164702 | 431 | 200 |
| 3146703 | 431 | 431 |
| 3164704 | 431 | 431 |
| 3164708 | 690 | 690 |
| 3164709 | 690 | 690 |
| 3164710 | 431 | 428 |
| 3164712 | 431 | 431 |
| 3164713 | 431 | 431 |
| 3164714 | 431 | 431 |
| 3164718 | 431 | 431 |
| KENT 93-671 | | |
| 3164648 | 903 | 900 |
| 3164650 | 903 | 900 |
| 4239362 | 309 | 100 |
| 4239363 | 903 | 900 |
| KENT 93-705 | | |
| 9885266 | 793 | 500 |
| 9885275 | 2173 | 1500 |
| TOTAL | $14,612 | $12,100 |

I have considered the representations and documentation submitted in these cases, as well as the testimony contained in the record of proceedings and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

**WHEREFORE**, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that respondent pay a penalty of $12,100 within 30 days of this order.



Roy J. Maurer
Administrative Law Judge

Distribution:

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

Richard D. Cohelia, Safety Director, Manalapan Mining Company, Inc., Rt. 1, Box 374, Evarts, KY 40828 (Certified Mail)

dcp

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 9, 1993

| | | |
|---|---|---|
| **SECRETARY OF LABOR,** | : | **DISCRIMINATION PROCEEDING** |
| **MINE SAFETY AND HEALTH** | : | |
| **ADMINISTRATION (MSHA),** | : | **Docket No. KENT 93-910-D** |
| **ON BEHALF OF** | : | |
| **HERBERT COLLINS,** | : | **PIKE CD 93-06** |
| **Complainant** | : | |
| | : | |
| **v.** | : | **No. 1 Mine** |
| **J & S COLLIERIES, INC.,** | : | |
| **Respondent** | : | |

## DECISION APPROVING SETTLEMENT

**Before: Judge Merlin**

This case is before me pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement of this matter which states in relevant part:

> 1. Respondent J & S Collieries agrees to pay Complainant Herbert Collins the sum of Five Thousand Dollars ($5,000.00) upon entry of the Order Approving the Settlement, said sum being in payment of all claims, including wages, employee benefits and medical expenses. Mr. Collins agrees to relinquish his rights and claims to reinstatement and/or reemployment with J & S collieries or any other company owned by Clifton Street.
>
> 2. Complainant Collins' employment with J & S Collieries was terminated on February 11, 1993 and he thereafter obtained employment with an unrelated mining operation. Mr. Collins was unemployed for approximately six weeks.
>
> 3. The personnel records maintained by J & S Collieries shall be completely expunged of all information relating to the matters being litigated herein as relates to Mr. Collins.
>
> 4. In the event that J & S Collieries is contacted by a prospective employer of Mr. Collins at any time in the future, J & S Collieries agrees not to give Mr. Collins a negative or unfavorable reference regarding his job performance while employed by J & S Collieries. J & S Collieries agrees to state only Mr. Collins job title(s) and dates of employment when contacted by a prospective employer.

5. J & S Collieries and all other companies with the same ownership will not be required to offer employment and/or reinstatement to Mr. Collins at any time in the future.

6. In light of the difficulties and contingencies necessarily attendant to the litigation of the subject case, the complex factual disputes requiring many witnesses, and the fact that Mr. Collins shall be compensated for any economic loss he may have incurred by the terms of this settlement, the parties and Mr. Collins agree that the proposed settlement of this case is appropriate under the circumstances.

7. In consideration of the willingness of J & S Collieries to resolve this claim by payment of the above sum to Mr. Collins, the Secretary agrees that the appropriate civil penalty shall be Two Hundred Dollars ($200.00).

8. Whereas Section 105(c) of the Mine Act is uniquely designed to benefit the public interest by restitution to those affected by a violation, the Secretary submits that such purposes are fulfilled in this case by the proposed settlement terms.

9. By entering into this Agreement, J & S Collieries, its agents, officers, employees and owners, do not admit that J & S Collieries violated Section 105(c) of the Act or any other provision of the Act.

10. The parties submit that approval of this settlement is in the public interest and will further the remedial purposes of the Mine Act.

11. This Settlement Agreement shall be binding upon the parties hereto and Herbert Collins, and upon each of their respective successors.

Based on the foregoing and noting that both parties have signed the settlement motion, I conclude that the proffered settlement is appropriate under the provisions of the Mine Act.

Accordingly, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that the operator **PAY** the complainant, Herbert Collins, $5,000 immediately.

It is further **ORDERED** that the operator **PAY** a civil penalty of $200 to the Mine Safety and Health Administration within 30 days of the date of this decision.

It is further **ORDERED** that this case be **DISMISSED.**

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Gretchen M. Lucken, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Billy Shelton, Esq., Baird, Baird, Baird & Jones, PSC, 415 Second Street, P. O. Box 351, Pikeville, KY 41502

Mr. Herbert Collins, P. O. Box 37, Shelbaine, KY 41562

Mr. Clifton Street, President, J & S Collieries, P. O. Box 3544, Pikeville, KY 41502

/gl

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 16 1993

| | | |
|---|---|---|
| SLADE VANOVER, Complainant | : | DISCRIMINATION PROCEEDING |
| v. | : | Docket No. KENT 93-359-D |
| | : | BARB CD 93-06 |
| SHAMROCK COAL COMPANY, Respondent | : | |

## DECISION

Appearances: Phyllis L. Robinson, Esq., Hyden, Kentucky, for the Complainant;
Timothy L. Wells, Esq., Neville Smith, Esq., Smith & Wells, Manchester, Kentucky, for the Respondent.

Before: Judge Koutras

## Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed with the Commission on February 23, 1993, by the complainant against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3). The complainant asserts that he was last employed by the respondent as a Longwall Technician, and that in the course of his employment he complained to his supervisors about (1) excessive dust levels, (2) underground detonations while men were working at the face, and (3) the transportation of explosives on a mantrip. The complainant further asserts that he was constructively discharged and/or forced to resign on July 20, 1992, due to these safety complaints being ignored by the respondent.

The complainant filed his initial complaint with the Department of Labor, Mine Safety and Health Administration (MSHA), and after completion of an investigation of the complaint, MSHA advised the complainant that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, the complainant filed a complaint with the Commission.

The respondent filed a timely answer to the complaint denying any discrimination, and asserting that the complainant voluntarily quit his job. A hearing was held in London, Kentucky, and the parties filed posthearing briefs which I have considered in the course of my adjudication of this matter.

## Issue

The principal issue in this case is whether or not the complainant was constructively discharged by the respondent at the time he left his employment because of the alleged failure by the respondent to take any remedial action in response to his safety complaints. Additional issues raised by the parties are identified and disposed of in the course of this decision.

## Applicable Statutory and Regulatory Provisions

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

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

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

## Complainant's Testimony and Evidence

The complainant Slade Vanover testified that he worked for the respondent for twelve and one-half years. He started as a roof bolter, and then worked as a continuous miner operator and a longwall shield technician, beginning in April, 1991. He received longwall training, knew how to perform that job, and he was comfortable doing that job (Tr. 13-18). He stated that when he left his job he realized that he was leaving "one of the best jobs in the area", and that "I thought about that real hard" (Tr. 20). In response to a question an to how long it took him to make his decision, he responded as follows at (Tr. 20):

> A. Well, when I took my vacation two weeks prior to when I actually quit and I thought about it all-- I guess I waited till the last minute before I actually quit.
>
> Q. Can you tell us why you left that job?
>
> A. Because of conditions I was having to work in.

Mr. Vanover stated that he worked as a continuous miner operator for five or six years before becoming a shield technician, and that he made complaints about the dusty conditions. He stated that his complaints were taken care of "most of the time" (Tr. 16, 21).

Mr. Vanover stated that he made his initial complaint about the dust on the longwall in April, 1991, "the week or so we started running coal" on the day shift (Tr. 21). He stated that he complained to mine superintendent Ed Boylen, head maintenance

foreman Jim Tye, longwall coordinator David Hensley, safety director Steve Shell, dust sampler Bill Sizemore, section maintenance foreman Hetch Begley, and supervisor Denny Osborne. He also complained to second shift supervisor Randy Turner and second shift maintenance foreman Wade Blevins (Tr. 22-24). Mr. Vanover stated that he worked for awhile on the second shift and then transferred to the first shift. He complained about the dust on both shifts (Tr. 24).

Mr. Vanover explained that the dusty conditions resulted from insufficient water to keep the dust down, and that "every once in awhile the air was insufficient to blow the dust out" (Tr. 24). In response to questions as to whether Mr. Boylen or Mr. Tye addressed his complaints, Mr. Vanover stated "Nothing, that I seen. They never took care of nothing, none of them didn't do nothing" (Tr. 24-25). He further stated that Mr. Blevins and Mr. Turner tried to control the dust by hanging ventilation curtains, but that they could not correct the lack of water because "they didn't have no help from the people that was running it" (Tr. 25).

Mr. Vanover stated that the shear cutting drum water pressure was supposed to be maintained at approximately 150 to 200 pounds on the sprays, but on one occasion when it was checked the pressure and was only 40 pounds, and foreman Begly "told them to go ahead and run anyway" (Tr. 26).

Mr. Vanover stated that air stream dust helmets were supplied approximately six months after longwall coal production started (Tr. 27). He confirmed that the helmets "helped considerably for a while", but were later insufficient because of the lack of daily filters (Tr. 28-29). Mr. Vanover stated that fellow miners Darryl Brock, James Hacker, Larry Smith, and Manford Roark also complained about the dust (Tr. 29).

Mr. Vanover stated that he also complained about working excessive hours, and at times, he worked seven days a week on ten and twelve hour shifts. He confirmed that the mine is nonunion, and that he was paid overtime and had no complaints about the pay (Tr. 30-31).

Mr. Vanover stated that on June 23 and 24, 1992, "shooting" took place underground, and that this scared him. He was working at the longwall face at that time and he "could feel the jar" of the shot, saw the smoke and dust coming toward him and could smell ammonia from the shot (Tr. 32). He stated that he complained about this but that "they shot the next day, too" (Tr. 33).

Mr. Vanover stated that on June 23, 1992, explosives were improperly handled while he was going out on a mantrip. He stated that "I didn't really know that they were on there at the

time, till they took them off the motor". He explained that he observed Mark Griffy put a bag on the motor but he did not know what was in the bag at the time. He stated that the mantrip was going out with approximately 20 men in it and that "we just went out and they took the powder off". He confirmed that Mr. Griffey and other people told him that the explosives were on the mantrip and that they were transferred to another mantrip. He believed that explosives were required to be kept in self-containers and should not be transported on a mantrip. He stated that this incident scared him and that "I've dealt with powder before. It definitely scared me when I found out about it". (Tr. 34-35). Mr. Vanover stated that he complained about the explosives to Mr. Hensley and that Mr. Hensley said nothing about it and "just kind of shrugged his shoulders" (Tr. 35).

Mr. Vanover stated that he complained about the dust from the beginning of his work on the longwall section, and continued his complaints during the entire time that he worked there. He stated that the conditions did not improve and that "at times, they got worse" (Tr. 35). He stated that the longwall operated with less than 90 percent of the sprays being operative, that there were times when there was no water, and that the water was not always turned on before mining began (Tr. 36).

Mr. Vanover stated that before taking his vacation in July, 1992, he and Mr. Smith specifically complained about the water to Mr. Begley. Mr. Osborne stopped the shear and instructed Mr. Begley to check the water. Mr. Begley found 40 pounds of pressure on the drum and stated that he would fix it on the third shift. Mr. Osborne was told "to go ahead and run anyway", and it was not repaired the next day when he came to work. Mr. Vanover stated that the longwall shear cut in both directions and that he worked downwind of the shear and would be in more dust (Tr. 37).

Mr. Vanover stated that he took his vacation in order to consider whether he wanted to continue working for the respondent. He stated that he thought about "them shooting underground and just the dust. Just fresh air was a big key". These conditions scared him and he stated that "I figured either me or somebody else was going to get killed up there" (Tr. 38). He further stated that "It's just the way they was running, the way they was dong things. They was in a big hurry all the time to do stuff and they didn't take time to see what they was doing" (Tr. 39).

Mr. Vanover stated that he was afraid of a dust explosion, that it affected his health, and that "this is one of the reasons I quit when I did" (Tr. 39). He also had fears that miners would not be evacuated quickly if they were injured because a mantrip was seldom kept at the face area (Tr. 40). He confirmed that Mr. Griffey, a close friend, was killed in an accident at the longwall, but that this incident occurred approximately a month

after he quit, and Mr. Vanover did not believe that it was the result of any of the conditions that he complained about (Tr. 41).

Mr. Vanover stated that he was afraid for his life at the time he quit his job. He stated that he has often observed sparks from the operating longwall shear and that he was concerned about the poor ventilation (Tr. 42). In response to a question as to whether any particular incident constituted the "last straw" that prompted him to say "this is it", he responded as follows at (Tr. 43-44):

A. Well, just that day where they checked the water and there was just forty pounds on it and they said to go ahead and run it anyway. And they give me and Larry a hard time over it. They said we was just trying to be deadbeats.

Q. Who gave you a hard time?

A. Hetch.

Q. Can you remember his words?

A. I can't remember his exact words. He just said, "Go ahead and run it."

* * * * * * *

Q. Were you also afraid when the blasting was going on?

A. Yes, Ma'am. I was more afraid then -- I almost quit then.

Q. While you were thinking about your decision, did you consider whether or not the ventilation might improve; the dust might be controlled?

A. No, I knew it wouldn't be.

Q. How did you know that?

A. I worked for them twelve and a half years. It never changed.

JUDGE KOUTRAS: You mean for twelve and a half years, these conditions went on like this?

THE WITNESS: Well, the things like dust and stuff, that was bad. They never did change.

JUDGE KOUTRAS: In twelve and a half years?

THE WITNESS: Yeah.

Mr. Vanover stated that he threatened to quit to Mr. Begley and Mr. Osborne if the dust conditions were not remedied, and that "they made a joke of it" (Tr. 47). Mr. Vanover explained that he told them that " I would probably take them to court over it", but that he didn't know about which court because "I don't know much about this". He also stated that it "was just kind of a threat. I was trying to get them to do something" (Tr. 48).

Mr. Vanover explained that on the day he quit he started to go to work but instead went to the company office in Manchester and spoke to a lady (Barbara) who was working in the office and told her he was leaving his employment. Company Official Kenny Smith called him later to come back to the office. Mr. Vanover stated that he returned and told Mr. Smith that he quit "because of the dust and they wouldn't work on the water and stuff" (Tr. 49). Mr. Vanover identified a copy of a company "Separation/exit interview" form which states that he was leaving because of "working conditions too dusty at the face" (Exhibit C-A).

Mr. Vanover confirmed that he had previously refused to perform unsafe work 5 or 6 years before he quit, but that he never refused to do any work on the longwall (Tr. 52). He believed that he had no choice at the time he quit his job, and that "it was die or get out" (Tr. 53). He confirmed that he has a pending black lung claim against the respondent (Rejected Exhibit C-B; Tr. 55-56).

On cross-examination, Mr. Vanover stated that it took two or three months to set up the longwall after January, 1991, and that large fans were installed. He stated that he requested his vacation time three or four days before he took it (Tr. 63). He confirmed that the respondent took some corrective action concerning the problems on the continuous miner section, but he did not believe it did enough (Tr. 64).

Mr. Vanover stated that the longwall shields were in working order and had enough water, but he indicated that they were powered by different pumps (Tr. 65). He stated that the respondent used 8 inch water lines to supply the mine with water. He confirmed that the mine had fans large enough to provide the required ventilation and had the equipment and means to control the dust. In his opinion, "they simply didn't get it done" (Tr. 66).

Mr. Vanover stated that he transferred to the first shift in approximately March , 1992. He confirmed that when he worked on the second shift he made dust complaints to foreman Turner and

that Mr. Turner "Tried to do what he could with them" (Tr. 67). He recalled that there were occasions when the longwall was shut down and production was stopped to repair the air and water on the second shift (Tr. 67-68).

Mr. Vanover stated that when Mr. Begley checked the water and found 40 pounds of pressure, production was stopped and Mr. Osborne did address his complaint that day (Tr. 69). Mr. Vanover also confirmed that there were several other occasions when Mr. Osborne and Mr. Turner stopped production at his request to address the lack of water (Tr. 70). He also confirmed that shear operators James Hacker and Bill Wilson shut the shear down due to a lack of water, and he was not aware that Mr. Hacker was ever disciplined for shutting down the shear (Tr. 71).

Mr. Vanover stated that when he moved to the first shift, he worked fewer hours than he did while on the second shift (Tr. 73). He confirmed that he bid for the longwall job and was informed that he would be required to work extra hours when the longwall was being moved or if there were any problems (Tr. 74-75). He further confirmed that the longwall was moved periodically and that more coal was produced on the second shift than on the first shift, and that the people on the second shift "made an attempt to treat you better" than on the first shift (Tr. 78).

Mr. Vanover confirmed that when he gave his deposition he stated that "Randy Turner and them, they was pretty good about, you know, trying to keep you out of the dust and stuff" (Tr. 80). Mr. Vanover confirmed that air stream helmets were furnished to him on both the first and second shifts, but he indicated that his helmet motor wouldn't work during the last few weeks of his employment (Tr. 81-82). He also confirmed that he started complaining about the availability of helmet filters and was not provided more than one filter "right at first" (Tr. 83).

Mr. Vanover stated that he was never told not to work downwind of the shear, but that Mr. Hensley, Mr. Boylen, and Mr. Sizemore told him not to work downwind when an inspector was on the section (Tr. 86). Mr. Vanover further stated that his job required him to be downwind at times, and that "sometimes it was a routine thing, sometimes it wasn't" (Tr. 86). When asked if he were there by his own choice as a matter of routine, he replied " I guess I was" (Tr. 86).

Mr. Vanover stated that when his work required him to be downwind of the shear he would ask the first shift shear operator, who he called "wolfman", to stop the shear for a few minutes, but he wouldn't and kept cutting (Tr. 87). Mr. Vanover could not recall ever asking Mr. Osborne or Mr. Turner to stop production while he was downwind of the shear (Tr. 87). He

confirmed that the respondent's ventilation plan specified that no one be downwind of the shear, but stated that "it was expected of us" (Tr. 87-88). He further confirmed that there were times when he stayed downwind of the shear at the tailgate while the shear proceeded to the headgate to cut coal, to straighten the tail, or push the pan line out (Tr. 88-89).

Mr. Vanover stated that he knew that staying downwind of the shear was contrary to the ventilation plan, and he confirmed that no one ever told him to stay there (Tr. 90). He also confirmed that on one occasion Mr. Begley told him that "you ain't supposed to be back down there anyway", and that he made this statement when he (Vanover) complained about the dust and the lack of water (Tr. 90).

With regard to his complaint about shooting underground, Mr. Vanover stated that he complained to Mr. Hensley the morning after the first shot, but he could not state if his complaint on the second day was before the second shot was made. He confirmed that in his prior March 1993 deposition he stated that he complained after the second day, but that he could not now remember his deposition statement but "guessed" that "it's close to correct" (Tr. 94).

Mr. Vanover stated that "he kind of complained" to Mr. Hensley about the shots, and he explained that "I just told him I didn't like it" (Tr. 95). He reiterated that he could not remember whether he complained before or after the second shot was fired (Tr. 96).

Mr. Vanover explained why he believed the shots were dangerous, and he stated that he was concerned about an explosion and the dust (Tr. 97-98). He confirmed that in his deposition he stated that he was not concerned about a roof fall and that his biggest concern was the dust generated by the shots (Tr. 99-100). He believed that "the way they shot them" was a violation of "something" but he could not state with any certainty if it was illegal (Tr. 101). He could not recall if any further shots were fired subsequent to the two in question (Tr. 102).

With regard to his complaint concerning the transportation of explosives in a mantrip, Mr. Vanover stated as follows (Tr. 102-103):

> Q. All you really saw wa a yellow bag on the man trip. Is that correct?
>
> A. Yes, that is correct.
>
> Q. And you don't know of your own personal knowledge what was in the bag.

A. Well, I don't know whether it was the same bag or not, but prior to that evening, I seen the explosive in the bag.

Q. You don't really know if anything at all was in the bag, do you?

A. No.

Mr. Vanover confirmed that after he quit his job he met with Mr. Smith and Mr. Bauer at "Pete's Minimart" in Leslie County at their request and Mr. Bauer asked him why he had quit. Mr. Vanover stated that he explained his concerns, but he denied that Mr. Bauer offered to have a safety inspector return to the mine with him and to stay on the longwall section with him to determine if there were any problems. Mr. Vanover also denied that Mr. Bauer offered to go himself or to ask Lynberg Rice to go with him (Tr. 105-106). Mr. Vanover further stated as follows at (Tr. 106-107):

Q. What did he say when you made these complaints and told him why you quit?

A. He just said -- I don't remember exactly what he did say. He just said, "If we go back in there, and try to change things, will you come back?" And I told him things wouldn't change; they would be just like they was when I started.

Q. Did you understand him to mean that he would go back with you and try to help you change things?

A. No, sir, I didn't take it that way.

Q. In any event, he asked you if you would return to your employment if your concerns were addressed.

A. That would be a fair statement.

Q. What about Mr. Smith? Did he offer to go underground with you?

A. No, sir.

Q. Did he offer to speak to anybody at Shamrock on your behalf?

A. I don't recall it.

Q. Did you tell Mr. Bauer and Mr. Smith under what circumstances you would return to Shamrock?

A. No, I don't believe so.

Q. Did you tell them that you were intending to enroll in college?

A. Yes, sir. I told them I thought about going to college.

Q. Did you tell them you were done with coal mining?

A. I told them I was done with Shamrock.

On redirect examination, Mr. Vanover stated that during his employment at the mine he did not believe that there was adequate ventilation to control the dust. He stated that the ventilation plan required 34,000 feet of air and that for the year and one half that he worked on the longwall, he believed that the air was adequate for only a one-month period (Tr. 114-117). Mr. Vanover confirmed that he was not aware of any violations that were issued for inadequate air, but the mine was shut down by the inspectors, and he did not know how many times this occurred (Tr. 118).

Mr. Vanover stated that he complained about inadequate air at the face, but that he never specifically mentioned the 34,000 foot plan requirement and never requested an air reading (Tr. 119-120). He confirmed that he has observed foreman take air readings, but did now know if they were taken each time he complained (Tr. 120).

Mr. Vanover had no knowledge as to whether anyone ever refused to work downwind of the shear, and he confirmed that he did not (Tr. 123). He also confirmed that he was not warned about the blasting that occurred on his shift (Tr. 123). Mr. Vanover believed that he met with Mr. Smith and Mr. Bauer before he filed his MSHA complaint in this matter (Tr. 124).

In response to further questions, Mr. Vanover confirmed that the incident concerning the alleged transportation of explosives in the mantrip occurred only one time, and that the underground blasting incident was the only time that had occurred on his shift (Tr. 130). He confirmed that he could not remember how he communicated his complaint concerning the transportation of explosives because "Larry (Smith) was already talking about it. What I complained about was them shooting underground" (Tr. 131). With regard to the detonations underground, he stated that "I knew they shot after I told him" (Tr. 131). He further stated that he wanted to quit over these two incidents and "figured it would happen again somewhere down the line" (Tr. 132).

Mr. Vanover reiterated that when he met with Mr. Smith and Mr. Bauer after he quit he had not yet filed his MSHA complaint and did not tell them that he was thinking about filing a complaint. Although he had filed an unemployment complaint he was not certain whether he filed it before this meeting (Tr. 139-141). He confirmed that when he quit his job he withdrew his company paid profit sharing account of approximately over $56,000 (Tr. 142-143). He confirmed that his unemployment claim was denied and that he received no benefits, and he did not know that it was denied because he left his work voluntarily (Tr. 144).

George D. Smith, testified that in June, 1992, he was employed by the respondent on the day shift. He stated that at the end of his shift and while travelling out of the mine on a mantrip he was seated on one end and heard someone at the other end state "Let's get that dynamite off the motor and put it on that other motor". He could not identify who made the statement (Tr. 146-148).

On cross-examination, Mr. Smith stated that he did not see the dynamite or any container that might have contained dynamite. He did not see Mr. Vanover on the mantrip, and he indicated that the other vehicle was a supply car locomotive and that it was parked at a switch ready to go to the face (Tr. 149-150).

Mr. Smith stated that he did not hear anyone say anything about the alleged transfer of the explosive bag and did not see the bag. (Tr. 152). When asked if someone stated "Let's get that bag off the motor", Mr. Smith replied "They might have said that" (Tr. 153).

Larry Smith testified that he last worked for the respondent on August 10, 1992, and that he voluntarily left his employment (Tr. 155). He confirmed that he worked on the longwall with Mr. Vanover for four or five months, and previously operated a continuous miner. He stated that he bid for the longwall job and performed various tasks (Tr. 156).

Mr. Smith testified that when the longwall was initially started, the water sprays and air on the section were erratic. He confirmed that he asked for and received an air stream helmet, and initially was supplied with filters, but later had to utilize used filters which were ineffective (Tr. 158).

Mr. Smith stated that he complained about the dust to Mr. Osborne, Mr. Shell, and Mr. Sizemore, and that they responded by telling him that "we'll take care of it" but that "we have to run coal". He stated that the respondent supplied air and water for the sprays when an inspector was in the mine, but that "after he left, you know, it was the same old thing" (Tr. 160). He

confirmed that MSHA inspector Randy Cline issued some citations, but he did not know how many were issued (Tr. 160).

Mr. Smith stated that the longwall shear would make as many as 18 passes when an inspector was not present, and that the mine holds "two or three world records" for longwall production (Tr. 166). He stated that the water sprays worked intermittently from day to day and that three or four repairmen were working at the face on a regular basis, and that production was not stopped to repair the sprays (Tr. 168). He stated that the day he quit he complained to Mr. Begley about the spray pressure and that Mr. Begley cussed him (Tr. 169).

Mr. Smith stated that longwall repairs were made on the third shift, but at no time were the conditions "perfect" when he worked at the longwall and that there was "always something going wrong" (Tr. 171). He stated that he had to work downwind of the shear because it was cutting in both directions (Tr. 172). He confirmed that he complained to Mr. Sizemore and Mr. Shell about the water, the dust, the air, and the dust filters, and that "there was times they would correct it, you know, if an inspector was there" (Tr. 173-174). He also complained about broken roof shield protection, but that nothing was done about this (Tr. 176-178).

Mr. Smith stated that he never contacted an inspector about any of his complaints because "the word got back to the company", and he was not aware that he could make anonymous complaints and was afraid he would lose his job if he complained to an inspector (Tr. 183-184).

Mr. Smith confirmed that he complained once in June or July about shots being fired while the longwall was running and he received no warning about the shot (Tr. 184). With regard to the transportation of dynamite on a mantrip, Mr. Smith stated that it was in a yellow bag and placed on another motor which was going out of the mine (Tr. 185). He stated that "we didn't know it was on there till we got out and switched motors" (Tr. 186).

On cross-examination, Mr. Smith denied that Mr. Edward Bauer ever called him at home after he quit his job, but stated that Mr. Hensly and someone else asked him to come back to work. He confirmed that Mr. Bauer gave him his business card and told him to call him if he had any problems, but that he did not do so because he quit and "was relieved" (Tr. 192-193).

Mr. Smith confirmed that he filed an unemployment claim against the respondent but "gave it up" and never appeared for a scheduled hearing before a referee. He also confirmed that he made no complaints to MSHA or to any state regulatory authority about his problems (Tr. 196-197). Mr. Smith stated that his

memory was clear about the dynamite being transported out of the mine after being moved from one motor to another (Tr. 199).

Mr. Smith stated that after he quit, he visited the MSHA office at Hyden and was interviewed and gave a statement about his complaints. Mr. Vanover's counsel characterized the "complaint" as an "informational complaint" concerning "safety to the other workers". Mr. Smith confirmed that he did not file a discrimination complaint because "It's not going to change. They're not going to do nothing no different" (Tr. 205).

Mr. Smith confirmed that he knew that the respondent's ventilation plan prohibited employees from being downwind of the shear, but stated that he needed to be there to perform assigned work. He confirmed that he has requested a boss to shut the shear down if there was insufficient air or water and that "sometimes they would, and sometimes they wouldn't" (Tr. 220-221).

Jim Tye was called as an adverse witness by the complainant, and testified that he has served as the longwall manager since September, 1992, and that prior to that time he was a maintenance foreman. He confirmed that he worked with Mr. Vanover, and although he confirmed that "we had problems on the wall on occasion", he denied that Mr. Vanover ever complained to him about the water (Tr. 229).

Mr. Tye stated that he was familiar with the ventilation plan and that he enforced it to the best of his ability even though it was not his direct responsibility (Tr. 229). He identified a copy of the longwall dust control plan (Exhibit C-B), and confirmed that it now provides for a minimum of 34,000 cubic feet per minute at the longwall, but that in April, 1991, it only required 24,000 or 25,000 (Tr. 230-231). He confirmed that the mine was out of compliance with the dust requirements at one time and was cited for that, and as a result of the citation, the longwall ventilation plan was upgraded to provide 34,000 feet of air (Tr. 231-232).

Mr. Tye confirmed that the dust control plan required that 90 percent of the water sprays be operational and he was not aware that the respondent has ever been cited for having less than 90 percent operational (Tr. 233).

Mr. Tye denied that Mr. Begley ever informed him that Mr. Vanover had complained to him. He stated that he did not know that Mr. Vanover quit his job until a couple of months after he quit (Tr. 234). He confirmed that he never spoke to Mr. Vanover about coming back to work (Tr. 234).

Mr. Tye stated that there were always problems on the longwall, and he explained as follows at (Tr. 236):

> Q. What did you consider the biggest problem?
>
> A. Well, just the basics. We always have a problem with roof control. We always have a problem with ventilation. We always have a problem with the equipment. It's a continuous, never-ending job.

Mr. Tye stated that although Mr. Vanover did not complain to him about the dust, he spoke to Mr. Vanover about positioning himself to stay adjacent to the shields and not to work inby in the dust. If Mr. Vanover stayed outby the shields he would not be in the dust generated by the shear while it was cutting coal (Tr. 239-240).

Mr. Tye stated that the longwall is targeted for 24,000 tons of "raw product" per day on two production shifts. However this production schedule varies, but it is still high (Tr. 241). Mr. Tye identified production tonnage estimates for March through July, 1992 (Exhibits C-D through H) (Tr. 243-247). He confirmed that as production increases, the amount of dust generated also increases, but this would depend on varying conditions (Tr. 248).

Mr. Tye stated that he does not travel with mine inspectors, and they are usually escorted by a shift foreman or a safety person (Tr. 250). He confirmed that at one time the shear cut in both directions, but after the adoption of a the new dust control plan, the shear now cuts in only one direction from tail to head (Tr. 253). He also confirmed that "trim cuts" and "step cutting" is done to keep the longwall face even. Further, "double cutting" is permitted under the plan for the first 120 feet to "square the face" (Tr. 254-257). Mr. Tye reiterated that he has spoken to Mr. Vanover about working downwind of the shear, and he confirmed that the ventilation plan does not permit anyone to be downwind of the shear and that he has cautioned Mr. Vanover about this (Tr. 258).

Mr. Tye identified a copy of the mine ventilation plan for October, 1991, and subsequent thereto, and he confirmed that the new plan became effective in June, 1992 (Exhibit R-12; Tr. 260-261). He confirmed that the new plan was adopted because of the ventilation problems experienced under the 1991 plan (Tr. 262). He stated that under the new plan, the number of water sprays and water pressure were increased, and one-way cutting was done (Tr. 263).

Mr. Tye stated that the respondent was out of compliance with its ventilation plan only one time under the October 23,

1991, plan and it has been in substantial compliance with the current plan since that time (Tr. 264). He stated that the water pressure on the sprays is currently 200 p.s.i., and 220 gallons of water per minute is sprayed directly on the face as the coal is cut (Tr. 265).

Mr. Tye identified several invoices showing expenditures made by the respondent on certain devices designed to lessen the miner's exposure to dust, and he explained some of the equipment that has been purchased, including an expenditure of $25,000 for a kit, spray beams, and dust helmets at a cost of $532 each, and filters for the helmets (Exhibit R-14 Tr. 266-275). Mr. Tye also explained how water is brought into the mine (Tr. 275-276).

Mr. Tye stated that there have been occasions when shear operators and foremen have stopped production to make ventilation and water repairs and he has never reprimanded anyone for stopping production for this purpose (Tr. 276-277). Mr. Tye confirmed that on one occasion when Mr. Smith complained, the shear was shut down and a cracked drum was repaired (Tr. 278-279).

Mr. Tye confirmed that he was not aware that miners were working downwind of the shield, and that Mr. Vanover was not downwind when he spoke to him about properly positioning himself (Tr. 281). Mr. Tye stated that he did not go underground to confirm Mr. Smith's complaint about the 40 pounds water pressure and he had never previously heard about this allegation and only knew that a spray drum was cracked.

Mr. Tye did not know why it was necessary for anyone to work downwind of the shear while it is cutting, and company guidelines prohibit this (Tr. 293-294). He confirmed that the ventilation plan requires preventive maintenance when less than 90 percent of the water sprays are operational and that corrective action is taken when this is discovered by stopping the shear and taking care of any problem (Tr. 298). Mr. Tye again denied that Mr. Vanover ever complained to him about any dust or water problems (Tr. 299-302).

Daryl V. Brock, longwall technician and shear operator, stated that he has worked on the longwall from the beginning for two and one-half years and worked with Mr. Vanover. Mr. Brock stated that when the longwall was started in June or July, 1991, he complained to section foreman Randy Turner about excessive dust and that the dust conditions remained "severe" after that time, including July, 1992, when Mr. Vanover left his employment (Tr. 302-304). Mr. Brock confirmed that he uses a dust helmet and had problems when he first got one. However, filters are now readily available and he uses one per shift, and this was the case when Mr. Vanover left. He also confirmed that as a matter

of practice, the shear is stopped for major repairs, but not for relatively minor repairs. (Tr. 305).

Mr. Brock stated that the shear does not now cut in both directions, and he indicated that it has "been awhile" since it cut in two directions. He could not recall if it cut in two directions at the time Mr. Vanover last worked at the mine (Tr. 306).

On cross-examination, Mr. Brock stated that there is currently ample water and air at the mine. He confirmed that on one occasion when he and Mr. Vanover complained to foreman Steve Shell while working on the second shift about the dust helmet filters Mr. Shell addressed their concerns, took care of the problem, and had "a positive attitude" (Tr. 307).

Mr. Brock stated that when Mr. Vanover left his job on the first shift he had not worked with him for four or five months and did not know what the conditions were on the shift (Tr. 308). Mr. Brock stated that there were air and dust problems at the time the shear cut in both directions, but when this practice stopped he agreed that ventilation was increased and water pressure on the face was increased. He confirmed that conditions are presently better (Tr. 309-310). He confirmed that he is the only member of his five-man crew who wears a dust helmet (Tr. 311). He also confirmed that everyone complained about the dust and water, including Mr. Vanover (Tr. 312-314).

Manford Roark, formerly employed by the respondent, stated that he left his employment on April 26, 1993, and worked on the second shift as a longwall technician. He did not work with Mr. Vanover when he left his job, but had worked with him before Mr. Vanover transferred to the first shift (Tr. 317-318).

Mr. Roark stated that the conditions on the longwall were "very dusty - most of the time. Sometimes it was normal conditions, not always" and that when an inspector was there "they bumped the water up, made sure we had air" (Tr. 318). He stated that when shooting was done on the second shift, production would stop and men were taken outby the shot area (Tr. 319).

On cross-examination, Mr. Roark denied that he would have testified in this case if he were not subpoened, and he confirmed that he has a pending claim against the respondent for workers' compensation benefits (Tr. 320). He also confirmed that he has advanced black lung and quit his job for his health (Tr. 321).

James E. Hacker, shear operator, testified that he worked with Mr. Vanover and heard him make complaints about the dust conditions to Randy Turner, but to no one else (Tr. 322). Mr. Hacker stated that Mr. Vanover complained about the dust

and water, and he described the dust and water problems (Tr. 323-325). He was not aware that Mr. Vanover ever complained about insufficient air Stream helmet filters (Tr. 325). He confirmed that the air and water conditions have improved since Mr. Vanover left his employment (Tr. 326).

Mr. Hacker stated that it was a practice to stop the shear for repairs to the water supply and to clean the water sprays (Tr. 326). He confirmed that he did not work with Mr. Vanover at the time he left his job, but worked with him three or four months before he left (Tr. 327). Mr. Hacker stated that he would stop the shear if anyone told him it was too dusty and the respondent has never fired anyone for stopping the shear (Tr. 328). He confirmed that he did not wear an air stream helmet because it was too bulky (Tr. 328-329).

Mr. Hacker confirmed that Mr. Vanover complained to him about the water and air. He stated that the shear was cutting in both directions at that time, and that on one pass Mr. Vanover would be inby the shear, and on the second pass he would be behind the shear. However, the cutting plan was changed so that the Shear cut only one way and Mr. Vanover could not legally be behind the shear after this change was made (Tr. 331). However, he indicated that Mr. Vanover had to be there because "the shear would cut coal faster than the shields would advance" (Tr. 332).

With regard to any safety complaints, Mr. Hacker stated as follows at (Tr. 334-336):

Q. Did you or Mr. Vanover -- You said Mr. Vanover did complain to Randy Turner.

A. Yes, Sir. I've complained to Randy.

Q. And what was his reaction?

A. Randy told us that -- Randy would do what he could at the time. If we had an air problem, Randy would go over, make sure the curtains was up to where they needed to be. He would block all the air where the air would come down the face. And there has been times we still wouldn't have the minimum requirement.

Q. What would he do with the water?

A. He would do what he could. He would have the repairman -- which is something that me or him or nobody else on the production end knows anything about, is the fresh water pump. They would try to adjust the pressure.

Q. While the shear was operating?

A. Right. But we had a lot of problems. On the startup, we had a lot of dregs in the lines stopping our filters up and stopping our sprays up.

* * * * * * * *

Q. So you're saying like day to day, there problems were on and off. Is that the way you would characterize it? They would have problems and try to address it?

A. Our section foreman would, Yes.

Q. Was that Turner?

A. Yeah.

Elmer R. Couch, Utility foreman, testified that he has held various jobs at the mine, and helped set up the longwall in 1991, and is familiar with its operation. He confirmed that he was familiar with the dust control plan (Tr. 341-342). Mr. Couch stated that he had no knowledge of the longwall conditions after July, 1992. He confirmed that he had no dust complaints while the longwall was being set up, and returned to work on the longwall two months ago (Tr. 346). Mr. Couch stated that it was not unusual to have dust downwind of the shear when rock is being cut, but the dust plan does not permit anyone to be downwind while the shear is cutting (Tr. 348).

Respondent's Testimony and Evidence

Edward Bauer, respondent's safety director, testified that longwall panel No. 1 was initially cut on April 22, 1991, and that four subsequent panels were cut during the period October 3, 1991, to the present (Tr. 14). He stated that he was familiar with the longwall shields and has observed the longwall in operation, and he confirmed that the roof control plan requires that longwall shields be installed at distances no greater than 18 inches apart (Tr. 16). He did not consider missing side shields to be more that an ordinary mining hazard, and he indicated that replacing a missing side shield before a longwall move would be extremely hazardous because the shield would have to be lowered, and this would expose a wider area of unsupported roof at the face (Tr. 18).

Mr. Bauer testified that he headed the respondent's investigation of the fatal accident concerning Mr. Mark Griffy, and also participated in the MSHA and state investigations. He believed that Mr. Griffey was properly trained, and he confirmed that no training citations were issued to the respondent as the result of this incident (Tr. 18-24). He also confirmed that he conducted an investigation into the underground detonations of June 23 and 24, 1992, and he confirmed that he first learned of

these incidents during a discussion with Larry Smith on the longwall section in August, 1992 (Tr. 25). Mr. Bauer explained that he interviewed employees working on the section to determine what happened and that he requested a meeting and met with MSHA subdistrict manager James Ison on August 24, 1992. Mr. Bauer stated that his investigation disclosed that a single stick of an approved explosive was set off on the day shift in a confined charge approximately 100 to 200 feet outby the longwall face. Mr. Bauer stated that the area had been rock dusted and that proper methane and ventilation checks had been made before the shot. He further stated that a warning was given before the shot, and that the shot fireman gave the standard "Fire in the Hole" voice warning three times (Tr. 25-27).

Mr. Bauer produced a copy of a September 4, 1992, Memorandum from an MSHA inspector to Subdistrict Manager Ison concerning an anonymous telephone complaint received by MSHA concerning safety allegations at the respondent's mine during June 23 and 24, 1992. Mr. Bauer stated that he received the report from MSHA in his capacity of safety director (Tr. 27-29; Exhibit R-1). Mr. Bauer testified that Mr. Isom gave him a copy of the memorandum when he went to his office to discuss the detonation incident (Tr. 33).

Mr. Bauer acknowledged that the longwall had ventilation problems when an excessive dust violation was issued on August 28, 1991, and he explained the action taken by the respondent as a result of this violation. He stated that the mine ventilation was initially changed on October 31, 1991, and that the air velocity on the longwall face was increased from 23,000 c.f.m. to 25,000 c.f.m. A subsequent increase was made to 34,000 c.f.m., on December 3, 1991, and instead of cutting in two directions, the plan was changed to require cutting in one direction. He confirmed that the mine has not had additional problems staying in compliance since December, 1991. He confirmed that from March, 1992, when Mr. Vanover began working the first shift, until he left in July, 1992, only two ventilation violations were issued on the longwall section (Tr. 33-38).

Mr. Bauer confirmed that there are occasions when fewer passes of the longwall shear are made when an inspector is in the mine, and he gave some representative examples from his records, including production downtime (Tr. 52-56). Mr. Bauer stated that downtimes are caused by inspector safety meetings or inspections of the tailgate area which requires a stop in production (Tr. 56-57).

Mr. Bauer stated that he initiated the meeting at Pete's Minimart with Mr. Vanover on August 5, 1992, after assistant personnel director Kenny Smith advised him that Mr. Vanover stated that he left his employment because of excessive dust on the longwall section. Mr. Bauer confirmed that Mr. Smith was also present, and he explained what transpired during the meeting,

including actions that he had taken and certain assurances that he gave Mr. Vanover concerning his dust concerns (Tr. 57-59). Mr. Bauer further explained as follows at Tr. 59-61):

A. After I explained to Mr. Vanover what we had done, we asked if he felt comfortable enough in returning to work at Shamrock, Yes.

Q. What was his reply?

A. He indicated, no, he wasn't.

Q. Did he tell you why he wasn't going to return to work?

A. He indicated he didn't think things would change. And at that point, I asked if we had a person in the safety department go with him -- I even said Steve Shell go with him, at the beginning of the shift, to take air readings and water pressure readings, would that make him feel any better about it?

Q. What did he say?

A. He indicated negatively. He just didn't think things could change. And I asked him, "What if I went in with you at the beginning of every shift to take air readings and water pressure readings?" I said, "We won't start till you feel comfortable."

Q. And the reply?

A. He wasn't interested.

Q. Did you offer anything else?

A. Yes. I finally said, "If Lynberg Rice goes in with you... and at that time, Lynberg was the general manager of operations. . . .If he goes in with you and we take air readings and water pressure readings and we don't start till you feel things are right, would you feel comfortable then?" He indicated he was done with coal mining.

Q. He didn't say what he intended to do?

A. During my conversation, he did not. During his conversation with Kenny Smith, he indicated --

* * * * * * * *

THE WITNESS: After Kenny Smith had reiterated, or I stated, Mr. Vanover indicated he was going to get his money and go to college.

Mr. Bauer further explained that he learned of Mr. Vanover's dust complaint during the exit interview at the end of July, and that August 5, was the earliest date he could arrange a meeting with Mr. Vanover (Tr. 63). Mr. Bauer also explained the action he took after receiving Larry Smith's allegations concerning explosives allegedly carried on a mantrip. He confirmed that he conducted an investigation and also implemented a safe work instruction for handling explosives (Tr. 63-65; Exhibit R-3).

Mr. Bauer stated that he conducts safety training and instructions as part of his job, and that mine personnel are informed as to how to go about expressing safety complaints (Tr. 66-70). He confirmed that shot firemen are required to pass a state certification test, and they are required to have a certain amount of experience in the use of explosives (Tr. 70).

On cross-examination, Mr. Bauer responded to additional questions concerning the longwall section reports (Tr. 72-85). He further testified about the operation of the shear shields, and he confirmed that the longwall machinery is loud and that it is possible that no one heard the shot firer give his verbal warning before firing the shots in question (Tr. 95). He confirmed that his records reflect only one excessive dust violation on the longwall from April, 1991, through the end of July, 1992 (Tr. 95). He also confirmed that the first dust complaint that he was aware of was the one made by Mr. Vanover during his exit interview (Tr. 97).

Mr. Bauer reviewed certain longwall section reports and testified to certain air readings taken periodically during several months in 1991 and 1992, as well as intermittent dust sampling (Tr. 99-111; Exhibit C-J).

Mr. Bauer confirmed that any dust generated by the underground shot in June, 1992, would go by the longwall face (Tr. 113). Mr. Bauer testified about his investigation of the incident concerning explosives being transported on a mantrip. He stated that his investigation was inconclusive and that no one that he interviewed saw explosives or a detonator on the man trip (Tr. 114-117). He stated that Mark Griffey told him that a yellow brattice bag and a green and white coal sampling bag had been placed on top of a man trip, but that he did not see any explosives or detonators on the man trip (Tr. 119).

In response to further question, Mr. Bauer stated that 146 mine inspection shifts were conducted at the mine between January, 1992, and through the end of July, and that only two longwall ventilation citations were received during that time

(Tr. 121). He stated that air readings are taken daily as required, and that the law does not require air readings to appear on longwall section reports, nor is a longwall section report required to be kept (Tr. 122). He identified copies of certain preshift reports (Exhibit R-5), and testified to several recorded air readings. He confirmed that 34,000 c.f.m. of air is required on the longwall face while coal is being mined, and he pointed out additional air reading notations in the preshift reports indicating compliance with the October, 1991, plan requiring 25,000 c.f.m. of air (Tr. 128). Mr. Bauer denied any knowledge of a foreman ever instructing anyone to stay downwind of the shearer while coal was being cut in order to do their job (Tr. 131).

Billie Sizemore, Safety technician, testified that his duties include the monitoring of dust surveys, assisting on safety plans, and accompanying inspectors. He explained the procedures for dust sampling on the longwall, and confirmed that there were dust problems in October, 1991. He also explained the remedial measures taken by the respondent, including the installation of a "spray arm" which provided additional sprays directly on the longwall cutter and the purchase of air stream helmets (Tr. 141-145).

Mr. Sizemore stated that he submits his dust sampling schedule to MSHA in advance of sampling and confirmed that inspectors accompany him during his dust sampling (Tr. 145, 148). He identified reports of dust samples he has submitted to MSHA, including samples for certain designated longwall areas, and he confirmed that the areas have been in compliance for at least a year and the periods shown on the reports (Exhibit R-6, Tr. 149-153).

Mr. Sizemore identified copies of bimonthly dust samples submitted to MSHA for a mechanized mining unit (M.M.U.) for the May/June 1991, sampling cycle, and he confirmed that the unit was in compliance and that the average dust concentration was 1.0, which is below the allowable limit of 2.0 (Exhibit R-7, Tr. 153-154). He identified additional sample surveys for July/August, 1991, and September/October, 1991, and January through June, 1992. He confirmed that the mine was in compliance with MSHA's dust standards during all of these periods, except for September/October, 1991, when there were problems with the face falling out and a lot of rock coming between the shields, and the ventilation plan was revised (Tr. 155-156). He stated that the respondent has not been out of compliance through the time Mr. Vanover left his employment (Tr. 157-158, Exhibit R-8).

Mr. Sizemore stated that the respondent spent $17,347.04, for air stream helmets, filters, and replacement parts from October 1, 1992 to March 25, 1993 (Exhibit R-10, Tr. 160-162).

On cross-examination, Mr. Sizemore testified further about his dust sample results and the production on the longwall (Tr. 163-169). He confirmed that dust complaints were made during September/October, 1991, and they were brought to his attention. He could not recall if the complaints were made by Mr. Vanover (Tr. 171).

Mr. Sizemore stated that according to the mine dust plan no one is supposed to be downwind of the shear when the shear is coming back to the headgate entry cutting coal. He has observed people working downwind of the Shear, and they were cited by an inspector on two occasions because of this (Tr. 171-172, 177-178).

In response to further questions, Mr. Sizemore could not deny that Mr. Vanover ever made any dust complaints, and stated that "I couldn't say he did either. I cannot remember whether he complained to me or not" (Tr. 182). He also could not recall Mr. Vanover complaining to any one else (Tr. 183). He confirmed that there were many complaints about the air during September/October, 1991, but after corrective action was taken by increasing the amount of air, installing additional sprays, and purchasing additional air helmets, the complaints decreased (Tr. 184). He stated that "people are going to complain no matter what you do", and that he has responded by going to the face to check the air and water pressure (Tr. 185). He denied that Mr. Vanover ever complained or spoke to him about transporting explosives underground or shooting underground (Tr. 185).

Hetch Begley, Jr., longwall maintenance foreman, testified that he worked with Mr. Vanover on the first shift at the time he left his employment. Mr. Begley stated that his job involves the maintenance and repair of longwall equipment, including the water sprays. He stated that he has repaired the water sprays on an average of 6 to 12 times a week and that the Shear is shut down when repairs are made (Tr. 187-188). He explained that he has responded to calls to make the repairs or has dispatched his maintenance personnel to do so.

Mr. Begley stated that Mr. Vanover complained to him on several occasions about the dust on the longwall, and that he responded by sending his maintenance people to address the problem. He denied that he ever told Mr. Vanover that repairs were not needed and to "keep running coal". He had no knowledge that any of his personnel ever stated this to Mr. Vanover, and indicated that he would not approve of this if they did (Tr. 190).

Mr. Begley stated that he has observed Mr. Vanover behind the shear, and informed him that it is not permitted by company rules and regulations (Tr. 190). He stated that there was no

reason for anyone to be working behind the shear, and that if work is necessary at that location the shear is supposed to be stopped (Tr. 191).

Mr. Begley stated that on one occasion when Larry Smith complained about low water pressure shortly before he quit, he went to the tailgate and shut the shear down and personally checked the water pressure. After finding it in order, the shear was started up, and Mr. Smith complained again. Mr. Begley checked it a second time, and found that the pressure was low and he shut the shear down again and repaired a broken hose and missing spray (Tr. 193-194).

On cross-examination, Mr. Begley reiterated that Mr. Vanover complained to him about the water and dust on several occasions, but he could not recall the exact number (Tr. 198).

John F. Craft, longwall mechanic, testified that he worked with Mr. Vanover on the first and second shifts. He confirmed that the water sprays need servicing or repairs every shift and that Mr. Osborne, Mr. Begley, and the shear operators have been called upon to do this work. He stated that the shear must be shut down to do the work, and he has never told anyone that there were no problems and that they should just keep working. He has never refused to shut down the shear to make repairs, and that "I fix it when it needs fixing. That is my job. I try to find out the problem" (Tr. 203).

On cross-examination, Mr. Craft stated that the decision to shut down the shear is usually made by the production or maintenance foreman, including Mr. Osborne, Mr. Turner, and Mr. Begley (Tr. 203). He stated that the water sprays are regularly serviced twice a shift depending on when the belt is moved (Tr. 204). Mr. Craft confirmed that the broken headgate drum was repaired during the summer of 1992, and it took one to two weeks to receive a replacement part (Tr. 205).

Mr. Craft stated that Mr. Vanover complained to him about the dust and lack of water on the section, and he responded to Mr. Vanover's requests to check the water pumps (Tr. 205). He stated that the shields are maintained and repaired as needed, and he has never had to replace any shields. Side shields have to be maintained at least 18 inches apart, and they are replaced when there is a move to another panel (Tr. 207).

Doyle Roberts, lighthouse attendant, testified about his care and maintenance of the air Stream helmets and filters, and the procedures he follows for making them available to the workforce (Tr. 209-212). He identified several invoices for purchases of the airstream helmet filters that are stocked and available in the supply house and lamp house (Exhibit R-9,

Tr. 212-215). He confirmed that he checks the helmet fans every two weeks and if anyone complains about the fans, he will issue a new one (Tr. 216).

On cross-examination, Mr. Roberts stated that he did not service Mr. Vanover's helmet, and testified further about his servicing of the filters (Tr. 217-220). He explained that he never worked with Mr. Vanover because they were on different shifts, and he was not certain that Mr. Vanover had a helmet (Tr. 221).

Denny Osborne, longwall production foreman, testified that he served in that position since the longwall was started in 1991, and has worked for the respondent for 16 years. He was Mr. Vanover's supervisor on the first shift. He confirmed that there were problems with the water supply sometimes, and that the equipment would be shut down to address the problems, depending on the particular problem. If a water line breaks, he would shut down the equipment, and he did so "probably twice a week" (Tr. 223).

Mr. Osborne could not recall Mr. Vanover ever complaining to him about the dust. He could not recall any dust problems in October, 1991, but did recall a change in the ventilation plan when the cutting was done one way from tail to head (Tr. 224). He denied that shield technicians on his section were required to work downwind of the shear to perform maintenance or to repair a shield problem. He has observed people downwind of the shear, but has informed them they are not to be there and has required them to move out (Tr. 225).

Mr. Osborne stated that the shear operators have the authority to stop the shear, and that the shield technician may request that this be done. He confirmed that he has stopped the shear to fix a dust or water problem (Tr. 226). He has observed Mr. Vanover stay at the tail section while another shield technician went with the cut, but he never warned him about this. He did not know whether Mr. Vanover wore an air stream helmet (Tr. 227). He stated that Mr. Vanover only worked on his shift as part of the crew for two or three months (Tr. 229).

On cross-examination, Mr. Osborne stated that Mr. Vanover took his vacation in July, 1992, and then quit, and he did not complain to him about the dust or lack of water before he took vacation or during the entire time he worked for him (Tr. 230, 234). He did not know why Mr. Vanover quit his job, and never discussed it with him. He knew nothing about any efforts to get Mr. Vanover to come back to work, and he considered him to be a good worker (Tr. 236).

Timothy W. Roberts, Shield technician, testified that he worked with Mr. Vanover on the first shift. He confirmed that

there were problems with the water "sometimes", but that he never complained about the dust or water. He stated that when problems were encountered with the water the respondent "tried to get it fixed" and the shear would be shut down to make repairs. He could not recall Mr. Vanover ever complaining to him about the dust or water pressure (Tr. 239). Mr. Roberts recalled the underground shots on June 23 and 24, 1992, and he did not fear for his safety even though he was closer to the shot than Mr. Vanover (Tr. 239).

On cross-examination, Mr. Roberts stated that he knew that the shots would be fired because he was assigned to watch the break to make sure that no one came through the area. He was in fresh air at the time, and the dust from the explosion went down the longwall face and down the return where Mr. Vanover was working (Tr 241).

Mr. Roberts stated that as a shield technician he tries to keep up with the shear operator and that a couple of times he asked the operator to slow down. He confirmed that he has worked downwind of the shear because "sometimes the shields wouldn't operate right" and he needed to be there to make sure it was operating properly (Tr. 243).

Mr. Roberts recalled that Mr. Vanover and Larry Smith complained about the water pressure on the last days that they worked at the mine. He believed that Mr. Vanover complained to the maintenance foreman, but did not hear the actual complaint and only "heard people talking about him making a complaint" (Tr. 245).

Jeffrey S. Shell, Safety coordinator, testified that his duties include safety training of personnel working on the longwall, including Mr. Vanover. He stated that the training included an explanation of the procedures for making safety complaints and the protections afforded by the Mine Act for personnel making complaints. He also has instructed personnel not to be downwind of the Shear and to stay on the intake side, and he conducts annual refresher training once a year (Tr. 246-249).

On cross-examination, Mr. Shell stated that Mr. Vanover spoke about not having filters for the air steam helmets, but could not recall that he complained about the dust or inadequate water (Tr. 249).

Kenny Smith, assistant personnel manager, identified copies of Mr. Vanover's work time card records that are in his custody (Exhibit R-11). He also identified a copy of Mr. Vanover's exit interview that he prepared and confirmed that he made the notation "Too dusty at the face", and that this is what Mr. Vanover told him (Exhibit "A", Tr. 255). He also identified a job bid sheet and a job posting request for a first shift

longwall technician position that Mr. Vanover made a bid for (Exhibit R-16, Tr. 258). He confirmed that the job posting specified that overtime work would be scheduled as needed, including Sundays (Tr. 258).

Mr. Smith stated that after conducting the exit interview with Mr. Vanover on July 28, 1992, he arranged a meeting with Mr. Vanover and Mr. Bauer at "Pete"s minimart", and the three of them met there on August 5, 1992, at 11:00 a.m., Mr. Smith stated that he and Mr. Bauer spoke to Mr. Vanover about his dust complaints and his reasons for leaving his job (Tr. 261). Mr. Smith further explained as follows at (Tr. 261-262):

> The first thing we asked him, said. "Would you consider to come back to work at Shamrock if the problems were fixed." And Slade said, "Don't much -- Don't think I'm interested in coal mining anymore," I believe is what he said.
>
> And Ed said, "If I were to check into this and it were true, if a safety inspector went with you, would you feel comfortable with it? Then he said, well, how about myself, if I went with you?" and finally, Ed said "Even if Lynberg Rice goes with you, would you feel comfortable with it?"
>
> And as I remember, Slade said, "I just think I'm through with mining coal." He said, "I'm going to go back to school." And at that time, I said, "Slade, where are you gong to go to school?" And he said -- Maybe, I think he said he was going to Eastern.
>
> There is a community college over at Manchester. Actually, it's a center for Eastern Kentucky University. And I asked Slade, I said, "if there is anything you need at Eastern, at Manchester, let me know. I'll be happy to help you or try to help you, if you need some classes or whatever."

And, at (Tr. 268-270):

> Q. So you're telling me it's not unusual to meet with an employee when he claims that here is something that might affect the safety of the mine. Is that what you're telling me?
>
> A. That is what I'm telling you.
>
> Q. Did he ever complain to you before this exit interview or did you have any knowledge of any complaints he may have filed about dust or water?

A. I had none, sir.

Q. How about explosives being transported on the man trip?

A. No, sir.

Q. How about detonations underground?

A. I had never talked to Slade, other than just in a casual manner, before July 28; I mean, just being at the mine site, hello, or whatever.

* * * * * * * *

Q. So you had no inkling that Mr. Vanover was complaining or had any problems until --

A. Not until I talked to him on the twenty-eighth.

On cross-examination, Mr. Smith stated that he could not recall Mr. Vanover stating that "he did not think things would change" during their meeting of August 5, 1992 (Tr. 263). Mr. Smith confirmed that he does not administer the company profit sharing plan, and he "guessed" that it was a retirement fund that is based partially on company profits, and that the company guarantees payment of a percentage of an employees' salary to the plan (Tr. 264).

In response to further questions, Mr. Smith stated that he first heard about any dust complaints by Mr. Vanover on July 28, 1992, during the exit interview. He explained that Mr. Vanover's last day on the job was July 20 or 21, but since he had been on vacation, he did not learn that he had quit until he came in for the exit interview (Tr. 265).

Mr. Vanover was called in rebuttal, and stated that when he left his job he thought about going to college but decided not to because "I would have never made it" (Tr. 272). He confirmed that he told Mr. Smith and Mr. Bauer that he was thinking about going to college when he met with them, and that he had submitted the necessary paperwork to withdraw his profit sharing money which he thought about using for college (Tr. 274).

Mr. Vanover stated that he informed Mr. Osborne before he quit that he was going to take one week of vacation "to think about it, and if I didn't come back the second week, that I would probably quit" (Tr. 276). When asked if he told Mr. Osborne why he was thinking about quitting, Mr. Vanover stated "he already knew", and he confirmed that he had complained to Mr. Osborne and Mr. Begley about the dust, and "mostly about the water pressure" that was insufficient to control the dust at the face (Tr. 277).

Mr. Vanover stated that he worked downwind of the shear to keep up with the shear operator every shift since the longwall was started even though it was contrary to company policy because "I took it that it was my job, that was the way that it was done" (Tr. 277-279). He stated that none of his foreman ever told him not to get out from the area downwind of the shear (Tr. 280).

Mr. Vanover stated that Mr. Begley responded to his dust and water complaints "a few times, but not every time" (Tr. 283). He also stated that he never attempted to shut the shear down himself but that others have done so when it was broken down or completely out of water (Tr. 284). He further stated that a few side shields close to the headgate and tailgate were replaced (Tr. 286).

Mr. Vanover stated that he did not actually see the dynamite on the mantrip, but had seen dynamite in a bag earlier in the day in another entry and he assumed that the person who had it was going to use it to shoot. Mr. Vanover stated that he left the entry to go to the face and saw the bag later, with another bag, on the mantrip. When asked if the bag could have been empty, Mr. Vanover responded "I suppose it could have" (Tr. 288-290). He confirmed that he did not know whether the bag was empty or full when he saw it on the mantrip, and that no one else said anything about it, except for Mark Griffy who commented that the bag was heavy and had something in it (Tr. 290).

When asked if his observation of the bag caused him to quit his job, Mr. Vanover responded "not exactly, but that helped" (Tr. 291). He confirmed that this incident occurred about a month before he quit (Tr. 291).

Larry Smith was called in rebuttal, and he stated that he heard Mr. Vanover make complaints to Mr. Osborne about the water or dust on "Any work day", but not every day (Tr. 294, 297). Mr. Smith stated that he quit his job after receiving a layoff notice (Tr. 301). He stated that he has no bad feelings against the respondent or Mr. Vanover, but commented that "I don't associate with either one of them, the company or him" (Tr. 302).

## Findings and Conclusions

### Fact of Violation

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom.

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

The Complainant's Protected Activity

I conclude and find that Mr. Vanover had a right to complain about mine working conditions and practices that he believed were hazardous to his safety and health, and that any such complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him. Secretary of Labor ex rel Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), Rev'd on other grounds, sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. However, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984)

The Complainant's Complaint Communication to the Respondent

In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate any safety complaints to mine management in order to

afford the operator with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedgmer et al. v. Consolidation Company, 8 FMSHRC 303 (March 1986); Miller v. FMSHRC, 687 F.2d 194 (&th Cir. 1982); Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Sammmons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097.

The evidence establishes that Mr. Vanover was assigned to the longwall section as a second shift shield technician in March or April 1991, an that he transferred to the first shift in March, 1992. He testified that he began complaining about the dust from the time he was assigned to the longwall until he left his job in July, 1992. This is consistent with his March 8, 1993, deposition testimony that he started complaining about the dust approximately a month or so after the longwall started in production (Tr. 8).

Mr. Vanover testified that his dust complaints were made to mine superintendent Ed Boylen, maintenance foreman James Tye, longwall coordinator David Hensly, Safety director Steve Shell, dust sampler Bill Sizemore, maintenance foreman Hetch Begley, and shift supervisor Denny Osborne.

Mr. Begley confirmed that Mr. Vanover complained to him on several occasions about the longwall dust and water problems. Mr. Tye testified that Mr. Vanover never complained to him and that he did not know that Mr. Vanover had quit until two months later. Mr. Sizemore testified that "everyone" complained about the ventilation when the longwall initially was put into production, but he could not recall that Mr. Vanover complained to him or anyone else. Safety coordinator Jeffrey "Steve" Shell testified that Mr. Vanover spoke to him about the lack of dust helmet filters, but he could not recall that Mr. Vanover complained about any dust or water problems. Mr. Osborne could not recall that Mr. Vanover ever complained to him about the dust.

Daryl Brock, longwall technician and Shear operator, testified that everyone complained about the water and dust, including Mr. Vanover. Longwall mechanic John Craft testified that Mr. Vanover complained to him about the dust and lack of water on the longwall section. Shield technician Timothy Roberts recalled that he heard from others that Mr. Vanover had complained about the water pressure on the longwall.

Mr. Vanover testified that he also complained about the longwall dust when he worked on the second shift, and that he complained to shift supervisor Randy Turner and shift maintenance

foreman Wade Blevins. Mr. Turner and Mr. Blevins did not testify in this case. Shear operator James Hacker, who worked with Mr. Vanover for two or three months before he left the job, testified that he heard Mr. Vanover complain about the dusty conditions to Mr. Turner. Mr. Hacker stated that Mr. Vanover also complained to him about the water and ventilation.

Mr. Vanover testified that he complained about working excessive hours. However, I take note of the fact that his original discrimination complain is devoid of any such allegation. I also note the fact that Mr. Vanover voluntarily bid for the job, was compensated with overtime pay, and had no complaints about the pay (Tr. 30-31). Further, at the time the job was posted for bidding, the notice specifically stated that overtime work, including Sunday work, would be scheduled as needed, and that shift schedules may be rotated as necessary. These statements were included as part of the job requirements (Exhibit R-16), and this was confirmed by assistant personnel manager Kenny Smith (Tr. 258). Mr. Vanover himself confirmed that he was aware of these work requirements when he took the job (Tr. 74-75).

I find no credible evidence to establish that Mr. Vanover complained to management about working excessive hours. Even if he had complained, there is no evidence that any such work, even if it were performed, adversely affected Mr. Vanover's health or safety, or was in any way a reason for his leaving his job.

Mr. Vanover testified that after an underground shot was fired on June 23, 1992, he complained about this to Mr. Hensley the next morning, June 24, 1992, and that a second shot was fired that day (Tr. 33, 94). Mr. Vanover could not recall whether he complained before or after the second shot was fired, and when reminded of his deposition testimony that he complained to Mr. Hensley after the second day (Depo. Tr. 14), Mr. Vanover stated that he cold not remember whether he complained before or after the shot on the second day and he "guessed" that his deposition testimony "was close to correct" (Tr. 94).

Mr. Vanover confirmed that he did not complain about the shot on June 23, after it occurred that day because he "didn't see anybody that day" (Tr. 95). He stated that the next day, June 24, he saw Mr. Hensley and "kind of complained about it to him" (Tr. 95). When asked to further explain his complaint to Mr. Hensley, Mr. Vanover stated that "I just told him I didn't like it" (Tr. 95).

Respondent's Safety Director Bauer testified that he first learned about the shots sometime in August, 1992, during a discussion with Larry Smith (Tr. 25). Mr. Hensley did not

testify in this case, and Mr. Vanover's testimony concerning his "complaint" to Mr. Hensley concerning the underground shots in question is unrebutted.

Mr. Vanover testified on direct examination that he also complained to Mr. Hensley about the alleged transportation of explosives underground on a mantrip and that Mr. Hensley "didn't really say nothing about it. He just kind of shrugged his shoulders" (Tr. 35). However, in response to further bench questions, Mr. Vanover stated that he could not remember how he communicated his complaint, and he stated that Larry Smith "was already talking about it", and that he (Vanover) complained about the underground shots (Tr. 131).

Mr. Bauer testified that he learned about the incident in question from Larry Smith after August 5, 1992, (Tr. 61-65), and there is no evidence that Mr. Vanover ever complained to Mr. Bauer or anyone else about the matter.

I find Mr. Vanover's testimony to be rather equivocal and unconvincing to support any conclusion that he did in fact complain directly to Mr. Hensley about the transportation of explosives on a mantrip. Even if he had complained, it would appear to me that it reached management's attention after the fact, and that management responded reasonably when it learned of the incident. Safety Director Bauer testified credibly that he conducted on inquiry into the matter when it was called to his attention by Larry Smith, met with MSHA's sub-district manager to discuss the matter, and implemented a safe work instruction for handling explosives. I also take note of the fact that MSHA responded to an anonymous telephone complaint about the matter made on August 25, 1992, well after Mr. Vanover left his job, and conducted an investigation which included interviews with miners who rode the mantrip on June 23 and 24, 1992. All of the miners who were interviewed stated that no explosives were hauled on the mantrip on the days in question (Exhibit R-1).

Mr. Vanover confirmed that air stream dust helmets were made available at the longwall section and that they were of "considerable help" initially, but were later insufficient because of the lack of new filters every day. Mr. Vanover's complaint about the filters was voiced for the first time at the hearing in this case, and his original complaint did not include or mention any helmet problem. Although the evidence in this case reflects some initial periodic problems concerning a daily supply of fresh helmet filters when the helmets were initially made available on the longwall section, it also shows that helmets were available for use, and that additional helmets and filters were purchased and made available to all miners who wanted them.

Safety Coordinator Steve Shell confirmed that Mr. Vanover spoke to him about not having helmet filters. However, I take note of longwall technician Brock's credible and unrebutted testimony that when he and Mr. Vanover complained to Mr. Shell about the lack of filters on the second shift, Mr. Shell displayed "a positive attitude", addressed their concerns, and took care of the problem (Tr. 307).

Aside from the apparently single isolated complaint to Mr. Shell while working on the second shift, I find no credible evidence that Mr. Vanover complained to mine management about any dust helmet problems at any time close to his quitting his job. Further, I cannot conclude that Mr. Vanover's rather brief concern about the lack of daily helmet filters, had any connection with his leaving his job. I further conclude and find that the respondent addressed Mr. Vanover's concerns by taking reasonably prompt efforts to secure additional helmets and filters, and to make them available to the lighthouse and supply personnel for distribution to the workforce as needed.

I conclude and find that Mr. Vanover timely communicated his complaints about the longwall dust and water problems to maintenance foreman Hetch Begley. I further conclude and find that Mr. Vanover's unrebutted statement to longwall coordinator David Hensley that he "did not like" the underground shooting that took place constituted a communicated safety related complaint. Both of these complaints met the "safety communication" requirements established by the Commission in Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982); Secretary ex rel John Cooley v. Ottowa Silica Company, 6 FMSHRC 516 (March 1984); Gilbert v. Sandy Fork Mining Company, supra; Sammons v. Mine Services Co. 6 FMSHRC 1391 (June 1984).

The Respondent's Responses to the Complainant's Complaints

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

There is no evidence in this case that prior to leaving his job, Mr. Vanover ever refused to work because of his complaints. In a typical "work refusal" case, the critical issue presented is whether or not the complaining miner's belief that a hazard exists is reasonable and made in good faith. Secretary ex rel.

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

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

The Shot Firing Incident

Mr. Vanover confirmed that when he was assigned to the longwall he received longwall training, knew how to perform his job as a longwall technician, and felt comfortable doing his job (Tr. 13-18). Mr. Vanover's deposition testimony reflects that he was aware of the purpose of the blasting which took place on June 23 and 24, 1992, and he acknowledged that the conditions which required blasting had been known and discussed for a week or two (Depo. Tr. 13). When asked what he expected of Mr. Hensley, Mr. Vanover responded "They just shot two days, you know. They (sic) wasn't nothing to be done then. It was already over with" (Depo. Tr. 13).

Mr. Vanover's opinion that the shots were somehow "illegal" is unsupported. To the contrary, the credible and unrebutted evidence presented by the respondent establishes that proper safety procedures were followed in firing the shots, and that the respondent's shot firers are licensed and experienced. Shield technician Roberts, Mr. Vanover's fellow worker on the longwall, testified credibly that he was aware of the shots, that he was assigned to watch the break to insure that no one came through the area, and that he did not fear for his safety, even though he was closer to the shot than Mr. Vanover (Tr. 239).

The credible and unrebutted testimony of respondent's safety director Bauer reflects that he conducted an investigation of the incident after learning about it during a discussion with Larry Smith in August, 1992. Mr. Baurer testified that he determined that a single shot of approved explosive was set off approximately 100 to 200 feet outby the longwall face, and that the area had been rock dusted and proper methane and ventilation checks were made before the shot was fired. He also testified that the standard voice warnings were made by the shot firer.

It would appear from the evidence in this case that the shot or shots which took place in June, 1992, were isolated and controlled incidents, and Mr. Vanover confirmed that he could not recall similar occurrences before or after the time these shots were fired. I also take note of the fact that this incident is not included among the previously noted anonymous complains lodged with MSHA on August 25, 1992, which included the use of explosives and the alleged transportation of explosives on a mantrip. I also note the absence of any testimony from any other miners working at the face at the time of the shots.

Mr. Vanover testified that his greatest concern was the dust generated by the shots in question. Mr. Roberts confirmed that the dust generated by the shots went down the return toward the face area where Mr. Vanover was working and that the dust lasted "maybe for a little while" (Tr. 240). Mr. Vanover was working at the longwall face while coal was being cut and he claimed that he could "feel the jar" of the shot, smelled the amonia used for the shot, and observed the dust generated by the shot coming down the face. There is no evidence that the work taking place at the face was interrupted, that the shots adversely affected the miners working at the face or placed them at risk, or that anyone complained.

Although Mr. Vanover testified that he "almost quit" when the blasting occurred because he was afraid (Tr. 44), he did not do so. Instead, he continued working after the shots were fired, and apparently made no further complaints about the matter. As a matter of fact, Mr. Vanover was unsure as to when he actually complained to Mr. Hensley, and as previously noted, Mr. Vanover acknowledged that he "kind of complained" to Mr. Hensley, and simply told him that he "didn't like it. It seems to me that if Mr. Vanover truly believed that the shots were life threatening and placed him at immediate risk, he would have protested more vigorously or at least decided that it was time to end his employment at that time. Instead, he continued working, requested to go on vacation two or three days before it was to begin, and then took a two-week vacation before deciding not to return to work. Under all of these circumstances, I conclude and find that Mr. Vanover's asserted fears regarding the underground

shot firing in question are not reasonable or credible and were not, wholly, or partially, the proximate cause of this decision to quit his job.

The transportation of Explosives on a Mantrip

I have previously concluded that there is no credible evidence to establish that Mr. Vanover ever complained about the alleged transportation of explosives on a mantrip. Even if he had complained, I further concluded that the respondent acted with reasonable promptness in addressing the matter, and I took note of the fact that an MSHA inquiry failed to disclose any evidence that explosives were transported on a mantrip.

It is uncontradicted that the incident in question, if it occurred, was only a one-time occurrence that was not ignored by the respondent. Further, the evidence presented by Mr. Vanover regarding this incident is somewhat contradictory and raises doubts my mind as to whether any explosives were in fact transported on a mantrip. Mr. Vanover acknowledged that he never actually saw any explosives in the bag that was purportedly used to transport them, and he conceded that the bag could have been empty. Further, although Mr. Vanover testified that the explosives were being transported on an incoming mantrip, Larry Smith testified that they were being transported on a mantrip going out of the mine.

The incident in question allegedly occurred on June 23, 1992, and Mr. Vanover testified that it scared him when he found out about it at the time the bag purportedly containing the explosives were taken off the mantrip he was on that was going out of the mine, and transferred to another mantrip that was going to the face (Tr. 32-35). Mr. Vanover testified that he was told by others that the bag contained "powder" (Tr. 34). He also testified that he was on the mantrip with twenty other miners when the transfer was made. Miner George Smith, who was on the mantrip, testified that the assumed that Mr. Vanover was aboard, but did not see him. Mr. Smith testified that he did not see any dynamite or any dynamite container. Larry Smith, who was on the same mantrip, testified that the bag was transferred to a mantrip going out of the mine, and not to the face as testified by Mr. Vanover and George Smith.

Mr. Vanover testified that the incident "definitely scared" him when he found out about it because he "had dealt with powder before" (Tr. 34). He stated that he "wanted to quit" at that time because he believed it might happen again (Tr. 131-132). He then stated that "I don't know whether I would have quit over that incident" (Tr. 132). When called in rebuttal during the second day of the hearing Mr. Vanover was asked whether this incident caused him to quit his job. He responded "not exactly, but that helped" (Tr. 291). He also acknowledged that the

incident occurred almost a month before he quit, but that "Just a little bit of everything, the dust and stuff", impacted on his decision to quit.

On the facts and evidence here presented, I conclude and find that the respondent did all that was possible to address the complaint brought to its attention by Larry Smith well after the alleged incident in question and after Mr. Vanover quit his job. I further conclude and find that Mr. Vanover's asserted fear over this isolated incident was less than reasonable, particularly since there is no credible, reliable, or probative evidence to establish that explosives were being transported on the mantrip. Even if they were, and even if I were to accept Mr. Vanover's contention that he was frightened, I would find that any fears he had at that time would not have extended to the time he made the ultimate decision to quit. In short, I reject as less than credible or reasonable Mr. Vanover's suggestion that his frightened state of mind when he learned that explosives were transported on a mantrip influenced his decision to quit, or caused him to quit his job approximately one month after that alleged event.

The Longwall Dust Problems

Mr. Vanover confirmed that he transferred to the longwall first shift in approximately March of 1992, some four months prior to his quitting on July 20, 1992. He testified that at the time he was contemplating whether to quit his job, he did not believe that the dust and ventilation conditions would ever improve because they had existed unchanged for the entire twelve-and-one-half years that he worked for the respondent (Tr. 43-44). I find this testimony to be rather incredible and totally lacking in evidentiary support. It is also contrary to Mr. Vanover's sworn deposition testimony of March 8, 1993, where he testified that prior to his assignment to the longwall section he never had any problems with the respondent regarding any safety matters and had no complaints before he took the job of longwall technician (Depo. Tr. 5). Mr. Vanover further testified that the first time he ever complained to anyone about dust was "shortly after" or "about a month and a half" after the longwall was placed in production (Depo. Tr. 8).

In stark contrast to his general overall indictment of the respondent's efforts to address his complaints, Mr. Vanover confirmed that foremen Blevins and Turner made an effort to control the dust by hanging ventilation curtains, and that Mr. Turner tried his best to address his dust complaints (Tr. 25, 67). Mr. Vanover also confirmed that there were several occasions when Mr. Osborne and Mr. Turner stopped production at his request to address the lack of water, and that shear operators James Hacker and Bill Wilson shut the shear down for a lack of water. During his deposition testimony, Mr. Vanover

stated that "Randy Turner and them, they was pretty good about, you know, trying to keep you out of the dust and stuff" (Depo. Tr. 16).

Mr. Vanover testified that shortly before taking his vacation he complained to Mr. Begley about the lack of water pressure on one of the drum sprays. Mr. Osborne responded by stopping the shear and instructing Mr. Begley to check the water pressure. Mr. Begley found only 40 pounds of pressure and indicated that it would be repaired on the third shift and allowed it to continue to be operated. Mr. Vanover asserted that it was not repaired when he came to work the next morning, and he indicated that this incident was the "last straw" that prompted his decision to quit (Tr. 43-44). However, on cross-examination, Mr. Vanover admitted that longwall production did in fact stop and that Mr. Osborne addressed his complaint about the lack of water pressure (Tr. 69-70). Mr. Begley testified credibly that he checked he water pressure on two occasions on the day in question and that he shut the shear down and repaired a broken and missing water spray (Tr. 193-194).

Mr. Vanover confirmed that there were other occasions when Mr. Osborne and Mr. Turner stopped production of his request to address water problems, and that shear operators James Hacker and Bill Wilson also shut the shear down for similar problems (Tr. 69-70). Mr. Hacker confirmed that it was a practice to stop the shear to clean or repair the water sprays, and that he would stop it if anyone complained about the dust (Tr. 326, 328).

Mr. Vanover confirmed that the longwall shields were in working order and had sufficient water, that 8 inch water lines were used to supply the mine with water, and that the mine had fans large enough to provide the required ventilation and that the equipment and the means to control the dust were available (Tr. 65-66). Notwithstanding all of this, Mr. Vanover was of the opinion that the respondent just "didn't get it done" (Tr. 66).

Mr. Vanover's principal complaint about the dust appears to be the asserted lack of sufficient water pressure on the longwall sprays to keep the dust down. Mr. Vanover alluded to insufficient air, but he indicated that "every once in awhile the air was insufficient to blow the dust out" (Tr. 24). Although it is true that the longwall shear cut in both directions at one time, which increased the dust conditions, this practice was discontinued before Mr. Vanover quit and the dust control plan was amended and provided for face passes to be made in only one direction from the tailpiece to the headpiece, except for the last 120 feet at the tailgate where the cut is allowed to be made from the headpiece to the tailpiece.

Longwall manager Tye testified credibly that the new ventilation and dust control plan became effective in June, 1992,

and that it was adopted because of the ventilation problems experienced under the 1991 plan. Mr. Tye confirmed that the new plan, which was in effect at least a month before Mr. Vanover quit, provided for an increase in the number of water sprays, increased water pressure on the sprays, and only one directional cutting on the face. Mr. Tye also confirmed that the respondent took additional measures to lessen the miner's exposure to dust, including the purchase of additional dust control and protective equipment. Under all of these circumstances, it appear to me that the dust conditions which had existed at one time on the longwall under the prior plan when two-directional cutting was being done, had improved at least a month or so before Mr. Vanover decided not to return to work.

Although shear operator Brock stated that the dust conditions were still "severe" at the time Mr. Vanover quit, he confirmed that "there is plenty of air and water currently" at the mine. He also confirmed that he worked on a different shift when Mr. Vanover left, had not worked with him for at least four or five months prior to his quitting, and that he had no personal knowledge of the mine conditions on the first shift at the time Mr. Vanover quit (Tr. 308). Mr. Brock also confirmed that at the time one-directional cutting was adopted, the respondent installed additional water systems and increased the water and ventilation pressures at the face (Tr. 309). Although Mr. Brock stated that it was dusty "when the first longwall panels were being mined", he confirmed that "step-by step" improvements were made and that the conditions "definitely improved" (Tr. 310, 314).

Heavy concentrations of dust downwind of a shear that is cutting coal at the face is not, in my view, unusual. The increased concentrations of dust downwind of the shear would appear to be a normal and inherent by-product of the longwall mining method in use, and the ventilation plan should provide the necessary provisions to insure adequate dust control. That is why I believe the respondent's longwall dust control plan (Exhibit G-B), prohibits longwall personnel from positioning themselves downwind of the shear while coal is being cut or downwind of the shields when they are being moved.

Larry Smith testified that the respondent would only respond to the dust and water problems when an inspector was present, and he suggested that he quit over these conditions. However, when called in rebuttal after the first day of the hearing, Mr. Smith admitted that he quit after receiving a layoff notice. He also confirmed that he filed an unemployment claim against the respondent but abandoned his claim after he failed to appear at a hearing before a referee. Having viewed Mr. Smith's demeanor in the course of the hearing, and notwithstanding his assertion that he had "no bad feelings" against the respondent, I believe that quite the opposite is true. Mr. Smith appeared hostile and

antagonistic toward the respondent and I believe that he would color his testimony to place the respondent in the worse possible light. In short, I find him to be a less than credible witness.

Contrary to Mr. Vanover's suggestion that the respondent expected its employees to work downwind of the shear, the respondent's credible and unrebutted evidence establishes quite the opposite. Longwall manager Tye testified that he cautioned Mr. Vanover about going downwind of the shear and working there in the dust (Tr. 90, 239-40, 259). Mr. Tye believed that Mr. Vanover would not be exposed to excessive dust if he stayed outby the shear and the area downwind.

Mr. Begley and Mr. Osborne denied that anyone was required to be downwind of the shear in order to perform work. Mr. Osborne confirmed that he has observed people downwind of the shear and ordered them out after informing them they were not to be there (Tr. 225). Mr. Sizemore confirmed that on two occasions, an inspector has cited employees after observing them downwind of the shear.

Mr. Begley confirmed that after observing Mr. Vanover downwind of the shear, he ordered him out and informed him that this was not permitted (Tr. 190). Mr. Vanover confirmed that on one occasion Mr. Begley told him that he was not to be downwind of shear (Tr. 90).

I find no credible evidence to establish that Mr. Vanover was required or assigned to work downwind of the shear while it was cutting coal at the face. Although he suggested during his direct testimony that he was consistently required to work downwind of the shear in the dust, on cross-examination he testified that this only occurred "at times", and when asked if this were a matter of routine or personal choice, he replied "I guess it was" (Tr. 86). Further, when called in rebuttal during the second day of the hearing, Mr. Vanover changed his story and stated that he worked downwind of the shear <u>on every shift</u> since the longwall started in production because he thought this was part of his job (Tr. 278-279). I find Mr. Vanover's assertion that he was required to work downwind of the shear on every shift because he was required to as a part of his job to be lacking in evidentiary support, and it casts reasonable doubts in my mind on his credibility.

The respondent's credible evidence establishes that working downwind of the shear is contrary to the approved ventilation and dust control plan and company work rules. Mr. Vanover acknowledged that he was aware of these prohibitions, and I reject as less than credible his suggestion that he worked downwind of the Shear with the full knowledge and consent of management because it was expected of him or was required as part

of his job. Indeed, Mr. Vanover testified that no one ever told him to go downwind of the shear (Tr. 90).

Mr. Hacker confirmed that Mr. Vanover would be downwind of the shear at the time it was cutting in both directions, but that it would be illegal for him to be there after the one-directional cutting was adopted (Tr. 330). Although Mr. Hacker believed that Mr. Vanover needed to be downwind to advance the shields and to keep up with his fast paced cutting, he confirmed that if asked to do so by the shield technician because of a dust or other problem, he would stop the shear (Tr. 328). He confirmed that he and Mr. Vanover are friends and that if Mr. Vanover wanted him to shut the shear down because of a problem he would have done so (Tr. 332).

While it may be true that some technicians had difficulty keeping up with the pace of the shear that was cutting the face, particularly during the time that cuts were being made in both directions, I find no credible evidence that Mr. Vanover had such a problem when he decided to quit. I take note of the fact that Mr. Hacker was not working on the same shift as Mr. Vanover at the time Mr. Vanover quit. Mr. Hacker indicated that he had not worked with Mr. Vanover for three or four months before he quit (Tr. 327). Under the circumstances, any problems that Mr. Vanover may have had keeping up with Mr. Hacker would have occurred well before he quit, and I find it less than credible and unreasonable for him to have believed that he would have encountered the same problems if he had returned to work.

The respondent has acknowledged that it had some longwall ventilation problems that resulted in an excessive dust violation on August 28, 1991. However, Mr. Bauer's credible and unrebutted testimony reflects that as a result of this violation, ventilation changes were made in October, and December, 1991, increasing the amount of air on the face, and the two-directional face cutting was discontinued. Mr. Bauer further indicated that only two dust violations were issued from March, 1992, when Mr. Vanover was first assigned to the first shift, until he left in July, 1992, and that the mine has been in substantial compliance with the dust plans since December, 1991. He also indicated that the mine received only one excessive dust violation on the longwall section from April, 1991, through the end of July, 1992.

Although Mr. Vanover indicated that "every once in awhile the air was insufficient to blow the dust out", there is no evidence that this was a problem when he decided to quit, and he confirmed that he was unaware of any violations issued at the mine for inadequate air ventilation (Tr. 118).

Safety technician Sizemore testified credibly about the remedial measures taken by the respondent as a result of the

October, 1991, dust problems. With the exception of the September/October, 1991, dust sampling cycle on the longwall, Mr. Sizemore's unrebutted testimony reflects that the mine was in compliance with MSHA's allowable respirable dust limitations before and after the September/October, 1991, period, and from January through June, 1992. Under all of these circumstances, I have difficulty accepting as reasonable and credible Mr. Vanover's contention that he feared for his life because of the dust conditions on the longwall at the time he decided to quit his job.

The evidence establishes that Mr. Vanover's meeting with Mr. Smith and Mr. Bauer took place before he filed his discrimination complaint with MSHA. In the absence of any evidence to the contrary, I cannot conclude that the respondent had any ulterior motive in seeking the meeting other than to learn from Mr. Vanover why he left his job. Mr. Vanover could have refused to meet with Mr. Smith and Mr. Bauer, but he did not. I find Mr. Bauer's explanation as to why he sought the meeting to be credible and plausible. I also find that Mr. Bauer's offer to Mr. Vanover to return to work was bona fide and made in good faith.

After a careful review and consideration of all of the evidence in this case, I cannot conclude that the respondent maintained the longwall in such a condition, or allowed conditions on the longwall to deteriorate to the point where it would have made it intolerable for Mr. Vanover to continue on in his employment or to return to work.

The evidence in this case establishes that Mr. Vanover requested to take leave two or three days before he left work for a two-week vacation. At the conclusion of his vacation, and after waiting "until the last minute" (Tr. 20), he decided to quit his job. As a matter of fact, Mr. Vanover started to return to work, but instead, drove to the respondent's main office and told a lady in the office that he was quitting (Tr. 48-49).

Mr. Vanover asserted that he took his vacation to consider whether to return to work. Given the fact that his refusal to accept management's offer to return to work was based on his belief that nothing would ever change at the mine, I find it rather strange that Mr. Vanover needed more time to ponder the question. It seems to me that if he truly feared for his life, or truly harbored a fear that to return to work would place him at risk, he would have quit sooner than he did. His failure to do so casts doubts in my mind regarding the credibility and reasonableness of his asserted reasons for quitting and not returning to work.

During his direct testimony, Mr. Vanover acknowledged that when he met with Mr. Bauer and Mr. Smith he informed them that he

intended to enroll in college and that he "was done with Shamrock" (Tr. 20). When called in rebuttal the second day of the trial, Mr. Vanover was rather equivocal and evasive about his plans to attend college, and although he admitted to a high school education, he indicated that he "would never had made it" in college and knew that he could not read or write well enough for college work (Tr. 272). Mr. Vanover asserted that he had been thinking about attending college "off and on" over a period of time (Tr. 274). It seems to me that if he had any reservations about his ability to succeed in college, he would have realized this sooner than he claimed he did.

I conclude and find that Mr. Vanover voluntarily quit his job for reasons other than a fear for his life, his health, or his safety. Having withdrawn approximately $56,000, from his profit sharing account that was completely paid for by the respondent, I believe that Mr. Vanover decided it was time to end his mining career and to seek to enroll in college to further his education and to better himself.

## ORDER

In view of the foregoing findings and conclusions, I conclude and find that Mr. Vanover has failed to make a case of discrimination pursuant to section 105(c) of the Act, and that he has failed to establish by a preponderance of the credible and probative evidence adduced in this matter that the circumstances under which he voluntarily quit his job and refused the respondent's offer to return to work constituted a constructive discharge within the meaning of the anti-discrimination provisions of the Act. Accordingly, his claims for relief ARE DENIED, and his complaint IS DISMISSED.

George A. Koutras
George A. Koutras
Administrative Law Judge

Distribution:

Phyllis L. Robinson, Esq., P.O. Box 952, Hayden, KY 41749 (Certified Mail)

Timothy L. Wells, Esq., Smith & Wells, P.O. Box 447, Manchester, KY 40962 (Certified Mail)

/ml

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5267/FAX (303) 844-5268

DEC 17 1993

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|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. WEST 92-314-M |
| | : | A.C. No. 04-01924-05527 |
| | : | |
| | : | Docket No. WEST 92-319-M |
| v. | : | A.C. No. 04-01924-05529 |
| | : | |
| | : | Docket No. WEST 92-389-M |
| JAMIESON COMPANY, Respondent | : | A.C. No. 04-01924-05530 |
| | : | |
| | : | Pleasanton Pit and Mill |

## DECISION

Appearances: Jan N. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner; William R. Pedder, Esq., Alameda, California, for Respondent.

Before: Judge Lasher

In these three proceedings, the Secretary of Labor (MSHA) originally sought assessment of penalties for a total of seven Citations pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1977).

After the commencement of hearing in Pleasanton, California, on May 26, 1993, MSHA moved to vacate Citation No. 3912067 in Docket No. WEST 92-314-M, for good and sufficient reason and based thereon this Citation was vacated from the bench (T. 35-38). That disposition is here **AFFIRMED**. The six remaining citations were litigated.

## Preliminary Penalty Assessment Criteria Findings

Based on stipulations received at the hearing, it is found that Respondent is a medium-sized, one plant, 50-employee, sand and gravel operation with a history of 36 previous violations

during the pertinent two-year period preceding the issuance of the citations involved in these proceedings. It is also found that Respondent proceeded in good faith after notification of any violations found to abate such promptly and that Respondent's ability to continue in business would not be adversely affected by imposition of reasonable penalties for any violations found herein.

## The Two Safety Standards Involved

30 C.F.R. § 56.14107 is the regulation involved in Citations numbered 3912068, 3912072, 3912077, 3912079, and 3912080. It provides:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

30 C.F.R. § 56.12008 is the regulation involved in Citation No. 3912075. It provides:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Respondent challenges the occurrence of the violations charged by Petitioner, Petitioner's position on negligence and gravity, and the "Significant and Substantial" (S&S) designations indicated on three of the Citations.

## Docket No. WEST 92-314-M

### Citation No. 3912068 (T.38-79)

This violation consists of a piece of metal which had been welded at the end of the shaft on the head pulley not being guarded (T.45, 50, 60-61, 70-71, 75). The shaft with the piece welded to it is a moving machine part and is thus covered by the regulation (T. 46). The welding piece protruded 1/16 of an inch (T. 58).

The hazard created was that a workman's sleeve could be caught in the moving part resulting in loss of a finger or arm, a permanently disabling injury (T. 47-51). It was unlikely that the hazard would have occurred (T. 51, 61-64, 65) since the only reason an employee would come in close proximity to the hazard would be for maintenance or for oiling the gearbox (T. 56-58, 70-71, 75).

Respondent's witness, Operations Manager Richard Kelly, concedes that the part in question was not guarded (T. 60-61). While he felt that the condition would not pose a danger since the gear box should be locked out before maintenance was performed, Mr. Kelly also conceded that accidents have occurred where lockout procedures have not been followed (T. 62, 64).

It is concluded that the violation occurred as charged in the Citation except that the welded piece stuck out only 1/16th of an inch.

The violation was obvious and involved, as indicated by the Inspector, moderate negligence. The violation, which is not charged to be (S&S), was not likely to result in an injury but did pose the threat of serious bodily harm had the hazard envisioned come to fruition. Accordingly, the violation is found to be moderately serious.

A penalty of $50 is **ASSESSED**.

Citation No. 3912080 (T. 79-123)

This Citation, not designated S&S, alleges that the tail pulley on the No. 2 feeder was not "adequately" guarded in that the guard was "too far back."

Respondent contends that the guard system was that which had been approved by another inspector previously in early 1991 and that the guard is in compliance with the standard in question.

The Inspector who issued the Citation testified that the face of the pulley was approximately 12 inches from the edge of the guard which was a "dangerous" distance since a person's sleeve could become entangled (T. 83). The pinch point was 20-32 inches (T. 84-85) from the edge of the guard. This, again, was a distance which could be reached by a person's arm or shovel (T. 84, 87, 91-92, 95). The hazard of entanglement could result in loss of a body part (arm). The violation was observable by management (T. 88, 114) and thus a result of moderate negligence (T. 88, 114) and thus a result of moderate negligence (T. 88) since it had existed for some time (T. 88-89).

Petitioner established three of the four prerequisites of a "Significant and Substantial" violation by establishing that there was a violation of the safety standard cited; that there was a discrete safety hazard (entanglement and loss of a body part) contributed to by the violation; and that there was a reasonable likelihood that any injury would be of a reasonably serious nature (loss of an arm). Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). There was no showing, however, of a reasonable likelihood that the hazard contributed to would result in an injury, that is, the third prerequisite of Mathies. Petitioner's only evidence was the weak testimony of the Inspector at pages 86 and 87 of the transcript which is insufficiently clear as to its meaning. Such testimony is rejected as remote and not probative. On the other hand, the testimony of Respondent's witness, that there was only a mere possibility of injury was clearer and more credible and such is credited. The S&S designation will be stricken.

Since it was not reasonably likely that an injury would have occurred--even though such injury would have been serious in nature--the gravity of the violation will be deemed only moderately serious.

Respondent established that to abate a prior citation some six months previously (T. 106) it installed the guarding system cited in the instant Citation and there had been no changes either to the guards or to the location of the pulley during the interim (T. 106-110). I find and infer from Respondent's evidence that MSHA approved the subject guarding system in approving the manner of abatement of the previous violation. In Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), the Commission generally rejected the doctrine of equitable estoppel. However, it also viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which can be considered in mitigation of penalty, stating:

> The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power and Light Co. v. United States, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against the government in some circumstances. See, for example, United States v. Georgia-Pacific Co., 521 F.2d 92, 95-103 (9th Circ. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability

> without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it.
>
> Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty ... .

Accordingly, the doctrine of equitable estoppel will not be applied to the enforcement action of the Secretary here. However, the Respondent's evidence in this connection will be considered in mitigation of penalty.

After consideration of such, and in view of the modifications in the severity of the violation discussed above, a penalty of $10.00 is found appropriate and is here **ASSESSED.**

**Citation No. 3912075 (T. 124-141)**

This Citation, as modified, charges that the electrical cable for the vibrator on the sand tank was not properly fitted where it came out of the main switch box. The occurrence of the violation was clearly established.[1]

The hazard was that a person could trip on the cable which was lying on the ground and pull it out of the electrical box since it was secured only with tape instead of a clamp (T. 126, 127, 133). Had such hazard occurred, electrocution could result (T. 127, 129). Since the only miners who had occasion to work in proximity to the hazard were electricians, the likelihood of injury was unlikely and the Inspector did not designate the violation as "S&S" (T. 127-128, 134). Only moderate negligence was involved in the commission of this violation (T. 128, 134). The condition was obvious (T, 127) and should have been checked by management (T. 128).

Although the occurrence of injury was not likely, had such an injury occurred, the injury could have been fatal. The violation is found to be moderately serious and a penalty of $50 (T. 140) is found appropriate and here **ASSESSED.**

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[1] Respondent produced no witnesses.

## Docket No. WEST 92-319-M

### Citation 3912072 (T. 141-192)

This citation, as modified, is designated "Significant and Substantial" and charges that the drive chain on the No. 2 scrubber was not adequately guarded to prevent a person from contacting the chain and becoming entangled. Respondent, as previously noted, challenges the occurrence of the violation, the "S&S " designation, and the degree of gravity charged. The violation itself was clearly established. The drive chain in question was not adequately guarded since there was a gate--not a guard--used to prevent exposure (T. 145, 146, 147, 148). The entire drive chain was a hazard since a person could get entangled (by sleeve or pant's leg) anywhere along the chain (T. 146). The walkway was less than seven feet from the hazard (T. 178). Persons could reach the exposed moving chain by opening the gate (T. 147) or by stepping over the motor (T. 149, 151, 161) and there was footprint evidence observed by the Inspector that persons had done so (T. 150, 153).

Employees were exposed to the hazard on a daily basis to perform maintenance work (T. 145, 154, 163, 191-192). Had an injury occurred from the hazard contributed to by the violation such would have been permanently disabling or fatal (T. 155). It is concluded that a violation occurred and that such was "Significant and Substantial," since as noted herein, there was a reasonable likelihood that an injury would have occurred due to the frequency of exposure, the ease of exposure, and the proximity of exposure to a considerable hazard, and the evidence that there had been exposure to such as evidenced by the footprints observed by the Inspector. The other elements of Mathies, supra, have been delineated herein above. The violation is found to be serious.

The violation was visible and obvious and the Inspector's determination of moderate negligence is found warranted. A penalty of $400 is found appropriate and is here **ASSESSED**.

## Docket No. WEST 92-389-M

### Citation No. 3912077 (T. 192-221)

This "S&S" Citation alleges that the tail pulley on the No. 14 conveyor belt was not adequately guarded.

While there was a guard in place, it was not adequate since the nip point on the tail pulley could be reached (T. 196, 202). Thus, assuming as Respondent maintains (T.214, 217), that the

distance from the edge of the guard to the nip point was 34 inches, a miner could reach the nip point or could reach it with a tool (T. 197, 198, 199, 200, 211).

It was not reasonably likely that a workman would sustain injury from contacting the nip point (T. 200, 201) even though employees did engage in "cleaning material spillage" on a daily basis. There was only a "possibility" that an employee might try to dislodge materials by reaching into the hazardous area deliberately (T. 200, 201) and such latter factor would be the result of "an extremely conscious effort" (T. 214, 215). Official notice is taken that a person with an advertised 34-inch shirt sleeve length would not actually have an arm- and hand-length of 34 inches (see T. 214-215, 218-218), but rather approximately 30 inches.

The conditions described constitute a violation of the standard, and resulted from a moderate degree of negligence on the part of Respondent (T. 203) since it was obvious and since supervision failed to check the installation of the guard to determine if it had been installed correctly (T. 203, 204).

Based on the foregoing findings, it is found that the violation was only moderately serious since it was unlikely that injury would ensue from exposure to the hazard. The "gravity" of the violation indicated in the citation will be modified to reflect this change and to delete the "S&S" designation. Upon consideration of the various penalty assessment factors, a penalty of $50 is here **ASSESSED**.

Citation No. 3912079 (T. 222-245)

This "S&S" Citation charges that the tail pulley on the No. 28 conveyor belt was not adequately guarded to prevent a person from getting his hand or shovel caught. The violation was clearly established.

The nip point was only 25 inches from the guard (T. 231, 241) and this created a hazard since it could be contacted by a miner (T. 226), since a miner possibly could reach it by bending down or kneeling and then by leaning forward and reaching it with his body or a tool (T. 226, 238-239, 245). The nip point could not be reached by a standing person (T. 242).

The hazard was in an area where miners performed cleaning duties (T. 227). Miners were exposed to the hazard on a daily basis (T. 227). Had an injury occurred as a result of the hazard contributed to by the violation, it could have resulted in the loss of a miner's arm (T. 228) or other serious injury (T. 229).

Moderate negligence was involved since the violation should have been observable by management (T. 228, 240).

From the evidence of record it is concluded that it was possible but not "reasonably likely" that an injury would occur as a result of the occurrence of the hazard contributed to by the violation (T. 237-239, 242, 245). The record lacks probative evidence of the third element of the Mathies "S&S" formula and this designation on the citation will be stricken. Likewise, the gravity of the violation will be modified to show that an injury would be "unlikely" to occur.

Upon consideration of the various mandatory assessment factors, a penalty of $50 is found appropriate and is here **ASSESSED**.

## ORDER

1. Citation No. 3912067 in Docket No. WEST 92-314-M is **VACATED**.

2. Citation No. 3912080 in Docket No. WEST 92-314-M is **MODIFIED** to change the "Gravity" designation in paragraph 10 A thereof from "Reasonably Likely" to "Unlikely"; and to delete the "Significant and Substantial" designation in paragraph 10C.

3. Citation No. 3912077 In Docket No WEST 92-389-M is **MODIFIED** to change the "Gravity" designation in paragraph 10A thereof from "Reasonably Likely" to "Unlikely and to delete the "Significant and Substantial" designation in paragraph 10C.

4. Citation No. 3912079 in Docket No. WEST 92-389-M is **MODIFIED** to change the "Gravity" designation in paragraph 10A thereof from "Reasonably Likely" to "Unlikely" and to delete the "Significant and Substantial" designation in paragraph 10C.

5. Respondent **SHALL PAY** to the Secretary of Labor within 30 days form the date of issuance hereof the penalties herein-above assessed in the total sum of $510.00.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Jan M. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105-2999 (Certified Mail)

William R. Pedder, Esq., a Professional Corporation, 2447 Santa Clara Avenue, Suite 201, Alameda, CA 94501 (Certified Mail)

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 20 1993

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| CONSOLIDATION COAL COMPANY, INCORPORATED, Contestant | : | CONTEST PROCEEDING |
| v. | : | Docket No. WEVA 92-873-R |
| | : | Order No. 3717931; 4/21/92 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Arkwright Mine No. 1 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDINGS |
| | : | Docket No. WEVA 92-1066 |
| | : | A.C. No. 46-01452-03867 |
| v. | : | |
| | : | Docket No. WEVA 92-1094 |
| CONSOLIDATION COAL COMPANY INCORPORATED, Respondent | : | A.C. No. 46-01452-03868 |

**DECISION**

Appearances: Daniel E. Rogers, Esq., Consolidation Coal Company, Inc., Pittsburgh, Pennsylvania, for Contestant/Respondent; Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent/Petitioner.

Before: Judge Barbour

In these consolidated cases arising under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. 801 et seq., Consolidation Coal Company, Inc. ("Consol") is contesting the validity of an order issued pursuant to section 104(d)(2) of the Act. 30 U.S.C. 814(d)(2). The order alleges a "significant and substantial" violation of mandatory safety standard 30 C.F.R. § 75.1725(a) caused by Consol's "unwarrantable failure" to comply with such standard. The order was issued shortly after the issuance of a citation alleging a S&S violation of the same standard. Consol also is disputing the validity of the this citation. A hearing was held in Morgantown, West Virginia.

At the commencement of the hearing and as relevant to these matters the parties stipulated as follows:

1. Consol is the owner and operator of the Arkwright No. 1 Mine.

2. The operations of Consol are subject to the jurisdiction of the Mine Act.

3. This case is under the jurisdiction of the Commission and its ALJs pursuant to sections 105 and 113 of the Mine Act.

4. The individual whose signature appears in block 22 of Citation No. 3717929 and Order No. 3717931 was acting in his official capacity as an authorized representative of the Secretary.

5. True copies of the citation and order were served on Consol or its agent as required by the Mine Act.

6. The total proposed penalty will not affect Consol's ability to continue in business.

7. The copies of the citation and order attached to the Secretary's petition for civil penalty are authentic with all appropriate modifications or abatements.

Tr. 11-13.

## FACTUAL AND PROCEDURAL BACKGROUND

During the midnight to 8:00 a.m. shift on April 21, 1992, MSHA Inspector Richard McDorman conducted a regular inspection at Consol's Arkwright No. 1 Mine, an underground coal mine, located in Monongalia County, West Virginia.

McDorman was accompanied by Consol's safety escort Harold Moore and miners' representative Denise Russell. After the group visited the 11 left longwall section, they arrived at a crosscut wherein the main south high voltage splitter box[1] was located. McDorman observed that four bolts were missing from the lids on top of the splitter box and other bolts were broken off in their threaded holes. Pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), McDorman issued Citation No. 3717929, because the splitter box was not maintained in safe operating condition in accordance with section 75.1725(a), a mandatory safety standard for underground coal mines. Section 1725(a) provides:

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[1]A splitter box allows a single incoming power cable to be split or divided to accommodate two separate output power cables.

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

Moore lifted a lid with one bolt missing to see what needed to be repaired and the incoming power to the splitter box was immediately "knocked" by a "finger" safety switch installed in the lid. After the power went off, McDorman told Moore he should not restore power to the splitter box.

Moore went to the paging telephone located at the tenant bore hole[2] to call the maintenance shop to report what had happened and he heard people on the paging telephone and on the jeep radio "hollering" that they had lost power. According to Moore, Gary Neely, the shift foreman, indicated that the supply motormen had lost power to operate the locomotives on the supply tracks. Motormen hollered that the locomotives were losing the air on their brakes. Gary Samples, the foreman on 11 left longwall section, yelled that he needed power. The tippleman had only partial power. All the belts had gone down. All AC power was off and most DC power was off. Moore told the shop that he needed a mechanic to come look at the splitter box.

Moore returned to the splitter box and told McDorman that he needed to turn the power back on for the safety of Consol's employees. Moore explained that there was no problem with the splitter box, the 11 left longwall needed power, and miners were stranded on sections without vehicles to transport them in case of injury. McDorman warned Moore that turning the power back on would violate section 1725(a) and that he would write another violation. When the mechanics arrived, Moore directed them to turn the power back.[3]

About 15 minutes after the power had been restored, Robert Lauklin, the maintenance foreman, arrived at the splitter box, sent one of the mechanics to the shop for parts, and then had another mechanic knock off the power so the lids on the splitter box could be fixed.

McDorman told Moore he was ready to go and they went to the mine safety office. Pursuant to section 104(d)(2) of the Mine Act, McDorman then issued Order No. 3717931 because Moore had known the splitter box was in unsafe operating condition, had known the requirements of section 1725(a), and nonetheless had

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[2]The tenant bore hole brings power from above ground to the bottom of the mine. At the bottom, there is a power set to turn the power on and off and a circuit breaker. The power cable goes to the splitter box located approximately 100 feet (one crosscut away) from the tenant bore hole.

[3]The mechanics are electrically certified by the state.

ordered the splitter box into operation, creating the same likelihood and severity of potential injury that existed when the citation was issued.

**CITATION NO. 3717929**

McDorman issued Citation No. 3717929 for failure to maintain the splitter in safe operating condition. In his opinion, the lid to the splitter box did not have a sufficient number of bolts to prevent it from being lifted. According to testimony at the hearing, the splitter box is a yellow[4] metal box approximately 15 to 22 feet long, 4-1/2 to 10 feet wide, and 3-1/2 to 4-1/2 feet high, with three to five lids on top weighing 20 to 70 pounds each. One-half to three-eighth-inch bolts keep the lids securely attached atop the splitter box. The splitter box receives high voltage power, i.e., 7200 volts AC, and separates the power to supply two sections of the mine. A 4 aught (4/0) cable enters one end of the splitter box supplying power. Two similar cables exit the other end. There is a layer of insulation around the 4/0 cable until it enters the splitter box. Inside the box, the insulation is removed and there are bare high voltage wires connected to metal bus bars, or termination points. Both of the ongoing cables are connected to the same bus bars or connection points. There are high voltage warning signs at the splitter box and the cable is fenced to keep people away from it.

McDorman testified that he never has seen a splitter box without some type of retaining device on the lids. Michael Kalich, an MSHA electrical inspector, testified that he never has observed a splitter box without its lids bolted or welded to the framework of the splitter box. McDorman testified that there were three lids on top of the splitter box weighing about 20 pounds each and there was one bolt on each side of each lid, i.e., two bolts per lid or 6 bolts per splitter box. McDorman stated that since he found four missing bolts, one lid had no bolts to prevent it from being removed. Moore testified that there were five lids on top of the splitter box weighing 40 to 60 pounds each and there were two bolts on each side of each lid, i.e., four bolts per lid. Lauklin testified that there were about five lids on top of the splitter box weighing about 60 to 70 pounds each and there was one bolt on each side of each lid, i.e., two bolts per lid. Regardless of the number of lids on top of the splitter box and the number of bolts in each lid, it is undisputed that Moore was able to lift one lid.

When the splitter box is energized, no one is permitted to lift a lid. The splitter box has to be deenergized before a lid is raised by going outby the splitter box to the next device that would deenergize the cable that feeds the splitter box and then

[4]All electrical installations at the mine are painted yellow.

deenergizing, locking, tagging, and grounding it to bleed off the capacity charge[5] to the cable before opening the lid. Under these conditions, a certified electrician is permitted to unbolt and remove a lid.

Each lid on the splitter box is equipped with a lid switch, which is a safety device to deenergize incoming power to the splitter box when a lid is lifted. When the lid is down, the finger-style switch is bent and the circuit is closed. When the lid is lifted, the spring-loaded lid switch raises to a vertical position and opens the circuit which deenergizes the power at its source. Lid switches are generally made of plastic or metal and they fail on occasion. Inspector McDorman has seen lid switches that did not work on several occasions on similar high voltage splitter boxes. Kalich has encountered eight switches that did not work.

If a lid switch did not work or did not operate the circuit properly, then the components inside the splitter box would not be deenergized. They would carry the full voltage of the system. Even if the lid switch worked properly and turned off the power, the high voltage cable would still have a capacity charge in it that would continue to energize the components of the splitter box.[6]

**THE VIOLATION**

As noted, Section 75.1725(a) requires stationary equipment to be maintained in safe operating condition and unsafe equipment to be removed from service immediately. I find lifting the lid could allow a person's hand or arm into the splitter box, and injury ranging from a slight electrical shock to an electrocution could result. I conclude therefore that the missing bolts, which facilitated unauthorized lifting of the lid of the splitter box, rendered the equipment unsafe and therefore that Consol violated mandatory safety section 75.1725(a) as charged in the citation.

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[5]After the power is turned off and before the cable is grounded, the high voltage cable stores a capacity charge that continues to energize components of the splitter box.

[6]One could reasonably expect to find from 0 to 100 milliamps in capacity charge on the cable. A 50 milliamp shock would be severe enough for a person to lose feeling in his hand. Further, if the charge was a 100 milliamp shock, under wet conditions, it could be fatal.

**S&S**

A "significant and substantial" violation exists if the "violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. 814(d). The Commission has held that a violation is significant and substantial within the meaning of section 104(d)(1) if, based on the particular facts surrounding the violation, there exists a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

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

The Commission also has held that the significant and substantial nature of a violation must be determined in the context of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573-1574 (July 1984). The Commission has emphasized that "the contribution of the violation to the cause and effect of a mine safety hazard is what must be significant and substantial." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) (emphasis omitted).

The hazard presented by the absence of bolts is unauthorized entry into the splitter box, which could result in electrical burns, electrical shock, or electrocution. Kalich testified that since 1970, there have been 70 miner fatalities involving high voltage and since 1985, there have been 2 fatalities involving miners who opened boxes while the circuits were energized. In one instance, the lid switch did not work. In the other the circuit was defective. In addition, there have been fatalities due to unauthorized access of high voltage equipment, e.g., a belt cleaner entered a high voltage compartment and was electrocuted and a utility man entered a high voltage room and was electrocuted. I credit Kalich's testimony and I find that even if the lid switch worked and deenergized the power, while the potential severity of an injury might be lessened, the likelihood of an injury occurring would not be reduced because of the capacity charge on the cable. Thus, the unbolted lid contributed to an electrical shock hazard and whether the shock

was caused directly by the current or by the capacity charge the resulting injury was reasonably likely to be serious in nature.

In addition to the underlying violation, the discrete safety hazard and the reasonably serious nature of the potential injury caused by the violation, I conclude that the injury was reasonably likely to occur.[7] The missing bolts facilitated and encouraged unauthorized entry in that in the event of a malfunction requiring entry into the box, the temptation would have been for a miner immediately to raise the lid and correct the problem rather than to wait for a certified electrician to unbolt the lid and begin repair work. I am convinced this ease of access made an electrical injury reasonably likely, which I assume is why the lids were bolted in the first place. In other words, based on the occasional failure of lid switches, the possible presence of a capacity charge on the cable, and the previous fatalities resulting from unauthorized entry into other high voltage boxes, I find that a reasonable likelihood existed that unauthorized entry into the splitter box would have resulted in a serious injury if normal mining operations had continued, and I find that the violation was S&S.

## CIVIL PENALTY

Because a significant electrical injury or even a fatality could have resulted for the violation; I conclude the violation was serious. In addition, I agree with McDorman that it was due to Consol's negligence. The mine has a large history of previous violations. The Secretary has proposed a civil penalty of $288 for the violation. Given the gravity of the violation, the mine's large history of previous violations and Consol's large size, I conclude that a civil penalty of $500 is appropriate.

## ORDER NO. 3717931

Inspector McDorman issued Order No. 3717931 for putting the cited splitter box back into operation following its removal from service minutes earlier pursuant to the citation. Moore knew that McDorman considered the splitter box to be in unsafe operating condition and that turning the power back on would violate section 1725(a). However, Moore testified that he ordered the splitter box back into operation to alleviate safety concerns in other areas of the mine. The violation in the order was attributed to a high degree of negligence on Consol's part.

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[7]The splitter box is located 25 to 35 feet away from the supply track.

## THE VIOLATION

Moore decided unilaterally to restore power to the splitter box without first having the lid bolts replaced. In so doing he returned the splitter box to service in an unsafe condition. Because the splitter box was then not maintained in safe operating condition, McDorman was right to again cite Consol for a violation of section 75.1725(a). I conclude that issuance of the separate order alleging a violation of the same standard was valid and that the violation existed as charged.

## S&S

The second violation of section 75.1725(a) was not S&S in that injury was not reasonably likely to occur. Rather, entry into the splitter box by untrained and unauthorized personnel was highly unlikely after the power was restored. The condition of the splitter box was known to everyone, McDorman was on the scene and repair work was underway within 15 or 20 minutes.

## UNWARRANTABLE FAILURE

Under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), a finding of "unwarrantable failure" may be made if a violation is caused by the operator's unwarrantable failure to comply with a mandatory safety standard. The Commission has defined unwarrantable failure as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny and Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). In Emery Mining the Commission stated:

> 'Unwarrantable' is defined as 'not justifiable' or 'inexcusable.' 'Failure' is defined as 'neglect of an assigned, expected, or appropriate action.' Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ... [N]egligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention.' Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention.

9 FMSHRC at 2001.

Withdrawing the splitter box from service shut down power on the entire south side of the mine. Moore intentionally placed the cited splitter box back into service to remedy safety concerns and Moore told McDorman that he would turn the power

back on and take another violation rather than jeopardize the safety of his employees.

One and one-half hours before citing the splitter box, McDorman had visited the 11 left longwall section and had spoken with miners who told him that the shields were digging into the soft bottom. Roof rock that was in the pan line of the longwall indicated to McDorman that roof conditions were poor, but he did not observe any unsafe roof conditions that would have required the longwall to continue operations after the splitter box shut down power. On the other hand, Moore testified that in the previous 2 to 3 weeks, the longwall had been mined continuously every shift except on Sundays to try to keep control of the bad roof. Moore stated that the longwall was in a major fault area with extremely bad bottom and roof conditions, and large rocks and loose shale were falling into the pan line and over the top of the pan line out into the walkways. He also stated that the shields could not advance and the tailgate was impassable. Moore testified that in this situation, the rock was removed by running the longwall to keep the pan line moving until the rock was small enough to go into the crusher. Otherwise, the rock had to be broken with a sledgehammer or blown up with rock blaster powder. Moore stated that if power was lost on the longwall the roof conditions could have worsened, exposing miners to falling rock and to the danger's inherent in trying to break or shoot the rock.

On the paging telephone and jeep radio, Moore heard miners' concerns about having lost power. Moore heard that the locomotives could not be operated on the supply tracks. He also heard the motormen expressing concern about the locomotives' brakes. Moore testified that this was a safety problem for the locomotives and the supply cars they were pulling because of the possibility of runaways. The equipment could run either towards a working section, a power center or could have derailed.[8] Moore also was concerned that miners were stranded on sections without vehicles to transport them in case of injury. Moore struck me as a conscientious supervisor and I credit his testimony.

Under these circumstances, I conclude that Consol's negligence in restoring the cited splitter box to service was mitigated by Moore's legitimate safety concerns. I do not believe that the violation resulted from Consol's indifference or serious lack of reasonable care. Rather, Consol was diligent in

[8]A Consol mechanic testified that all the sections are on an incline.

trying to minimize the hazard at the splitter box[9] while at the same time, minimizing other possible mine safety hazards resulting from the power outage. I conclude that the second violation of section 75.1725(a) was not the result of Consol's "unwarrantable failure" to comply with the standard.

## CIVIL PENALTY

For the reasons set forth above, I find the violation was not serious and was the result of less than ordinary negligence on Consol's part. As noted, the mine has a large history of previous violations and Consol is large in size. The Secretary has proposed a civil penalty of $1700 for the S&S violation caused by Consol's "unwarrantable failure" to comply in Order No. 3717931. Given the fact that I have found the violation to be neither S&S nor "unwarrantable" and taking into consideration the civil penalty criteria just mentioned, I conclude that a civil penalty of $250 is appropriate.

## ORDER

Accordingly, Citation No. 3717929 is AFFIRMED and a civil penalty of $500 is assessed for the violation of section 75.1725(a). The Secretary is ordered to MODIFY Order No. 3717931 to a section 104(a) citation and to delete the S&S and "unwarrantable" findings. A civil penalty of $250 is assessed for the violation of section 75.1725(a). Consol is ORDERED to pay the civil penalties and the Secretary is ORDERED to make the modifications within thirty (30) days of this decision and upon receipt of payment and modification of the order, these matters are DISMISSED.

David F Barbour

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

[9]Lauklin asked Moore if he could station a mechanic at the energized splitter box until the bolts were fixed so no one could get into it and McDorman said that would not suffice.

Distribution:

Daniel E. Rogers, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 21, 1993

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA)<br>Petitioner | : | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. YORK 93-138-M<br>A. C. No. 19-00288-05507 |
| v. | : | Docket No. YORK 93-143-M<br>A. C. No. 19-00288-05508 |
| **BENEVENTO SAND AND GRAVEL,**<br>Respondent | : | North Wilmington<br>Quarry & Mill |

## DECISION

**Appearances:** **Gail E. Glick, Esq., Office of the Solicitor, U. S. Department of Labor, Boston, Massachusetts, for Petitioner;**

**Joseph H. Murphy, Esq., Benevento Sand & Gravel, Andover, Massachusetts, for Respondent.**

**Before:** **Judge Merlin**

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against Benevento Sand and Gravel under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820.

A hearing was held on December 1, 1993. Prior to going on the record, there was a pre-hearing conference between counsel and the undersigned. As a result of the off the record conference, counsel for both parties agreed to submit the alleged violations on stipulated facts and findings (Tr. 6-7).

The parties also agreed to several general stipulations as follows (Tr. 6):

(1) the operator is the owner and operator of the subject mine;

(2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

(3) I have jurisdiction of these cases;

(4) the inspector who issued the subject citations and orders was a duly authorized representative of the Secretary of Labor;

(5) true and correct copies of the subject citations and orders were properly served upon the operator;

With respect to size, good faith abatement, prior history of violations and the effect payment would have on the operator's ability to continue in business, the Solicitor stated the following:

> * * * The operator, in this case, is a small operator. It is a family business of sole proprietorship. There are a total of 11 employees in the operation. The history with respect to violations under the Federal Mine Safety and Health Act, there have been penalties and violations that have been assessed. And in fact there have been violations of the very same items and regulations that are currently cited in these two cases. However, the violations both previously and in this particular case have always been promptly abated and none of these violations have resulted in any disabling injuries or any fatalities.
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> * * *
>
> In fact, they have demonstrated an excellent record in terms of accidents and injuries. Moreover, the operator has always made an honest attempt to comply with the standards in general. The payment of the amounts, in the view of the Secretary of Labor, is that it would affect the employer's ability to do business (Tr. 7-8).

With respect to the effect payment would have on the operator's business, operator's counsel made this representation:

> If it may please the court, with regard to the original sums set out in the original special assessments, those would have created a great burden on the ongoing operations of Benevento Sand & Gravel. As the Solicitor has stated, they are a small family-owned company. They do approximately $1.5 million dollars in annual sales. And they have approximately annual profit of $100,000. Both Mr. Charles Benevento and Mr. John Benevento have significant personal financial problems arising from different business dealings and Mr. John Benevento has extensive property tax that he is unable to pay for the land he cannot develop and Mr. Charles Benevento has suffered from the general economic downturn with regard to the business and construction in this area. It is unlikely that the business could have continued in the manner it is now, if the original sums were so enforced (Tr. 8-9).

The Solicitor accepted the foregoing representations by operator's counsel (Tr. 9).

The stipulations and representations of the Solicitor and operator's counsel are **ACCEPTED.**

**YORK 93-138-M**

Six alleged violations are involved in this docket number. Five of these were issued pursuant to section 104(d)(1) of the Act, allegedly resulting from unwarrantable failure on the part of operator.

Citation No. 4079716 was issued under section 104(d)(1) for a violation of 30 C.F.R. § 56.14132(a) because the automatic reverse activated signal alarm provided for the CAT 769 haul truck, Company number E-3, did not function when tested. The violation was designated significant and substantial and negligence was assessed as high. The Solicitor advised that injury was reasonably likely because of vehicular traffic on the roadway and the fact that the view to the rear of the truck was obstructed approximately 75 to 80 feet (Tr. 13-14). The Solicitor's representations were agreed to by operator's counsel (Tr. 14).

On the record I held as follows with respect to this citation:

> Based upon the Solicitor's representations agreed to by operator's counsel, I affirm the 104(d)(1) citation and find the violation was significant and substantial and resulted from unwarrantable failure on the part of the operator. Penalty proceedings before the Commission are de novo. [Sellersburg Stone Co., 5 FMSHRC 287, 290-93 (March 1983), aff'd, 736 F.2d 1147, 151-52 (7th Cir. 1984).] I am not bound by the proposed penalty assessments of the Mine Safety and Health Administration. I am obliged to take into account the six criteria set forth in Section 110(i) of the Act. And I now do so. In affirming the 104(d)(1) citation, I find there was a high degree of negligence and that the violation attained the degree of gravity required by the Commission for the significant and substantial designation.
>
> In addition, I take into account the operator's financial condition and I note the representation of operator's counsel that payment of the originally assessed penalties would affect the operator's ability to continue in business. I further note the representation of the Solicitor to the effect that the operator has a prior history which in its entirety is good and that it has no fatalities or serious injuries. I note,

too, that this is the first occasion where this operator has been before the Commission. Taking into account all of the criteria of Section 110(i) of the Act, I assess a penalty of $1,500 for this violation (Tr. 14-15).

I adhere to the foregoing findings, conclusions and assessment.

Order No. 4079717 was issued under section 104(d)(1) for a violation of 30 C.F.R. § 56.14132(a) because the automatic reverse activated signal alarm (back-up alarm) provided for the CAT haul truck 769B, Company number E-2, did not function when tested. The violation was designated significant and substantial and negligence was assessed as high. According to the Solicitor injury was reasonably likely because of traffic in the area, the steep grade on the roadway and the fact that the haul truck had an obstructed view to the rear. The basis for the negligence evaluation was that two violations for the same standard had been issued (Tr. 16-18). Operator's counsel noted the rapid abatement after the citation was issued (Tr. 17-18).

I affirmed this 104(d)(1) order on the record and found the violation was significant and substantial and resulted from unwarrantable failure on the part of the operator (Tr. 18-19).

In addition, on the record I held as follows with respect to the order:

> As I previously stated, taking into account all of the factors mandated under Section 110(i), including the ability to continue in business, size, and overall prior history, I determine that the appropriate penalty assessed for this order is $1,500 (Tr. 19).

I adhere to the foregoing findings, conclusions and assessment.

Order No. 4230581 was issued under section 104(d)(1) for a violation of 30 C.F.R. § 56.14131(a) because the operator of the CAT 769 haul truck company No. E-2 was observed operating this piece of mobile equipment without wearing the seat belt that was provided. The order was designated significant and substantial and negligence was assessed as high. The Solicitor stated that there was a reasonable likelihood of injury because of the road conditions, the steepness of the road grade with two-way traffic, the size of the truck involved, and the fact the operator has to negotiate a 90 degree turn in a short space. The Solicitor further stated that the evaluation of negligence was justified because the operator had no seat belt policy and the employees admitted they received no training with respect to seat belts

(Tr. 19-21). The Solicitor's representations were agreed to by operator's counsel (Tr. 21).

On the record I held as follows with respect to this order:

> This of course is a very serious violation and based upon the representations, the order undoubtedly was properly issued because the violation was significant and substantial. There was an unwarrantable failure on the operator's part. The operator has a duty to see that the policies, the requirements of the Act are put into effect and seat belts are one of those requirements. It doesn't matter what the state law, says. Federal law takes precedence over state law unless there is some direction in the law to the contrary. So that is the way it is. The operator has to understand it. But again, I take into account all of the factors I mentioned before and most particularly, the fact that this operator has not been before the Commission previously. Again, I take note of the fact that high penalty assessments originally proposed by the Secretary might well impair the operator's ability to continue in business. Therefore, I determine as appropriate and assess a penalty for this violation the sum of $3,000, which although it represents a 50 percent reduction from the Secretary's proposal, nevertheless remains a substantial sum (Tr. 21-22).

I adhere to the foregoing findings, conclusions and assessment.

Order No. 4280582 was issued as a 104(d)(1) order for a violation of 30 C.F.R. § 56.9200(d) because an employee was observed riding on top of the fuel tank on the Trojan 5500 loader between the operator station and the ladder. The employee was being transported from the salvage yard to the Quarry shop. The violation was designated significant and substantial and negligence was assessed as high. The Solicitor advised that injury was reasonably likely because the employee could fall off the loader (Tr. 22-24). Operator's counsel stated that the individual riding on the tank was a mechanic who was checking for an equipment defect. Also counsel advised that the road being traveled was wide and level with very limited traffic and that the machine was going very slowly, but he admitted the violation was dangerous (Tr. 24-25).

On the record, I held the following with respect to this order:

> Based upon the representations of both counsel I find that the order was properly issued because the

violation was significant and substantial and, therefore, that it presented the reasonable likelihood of serious injury from the hazard. The individual could have fallen off and suffered a very serious injury. So although I take note of the operator's counsel's representations, the violation remains significant and substantial. I also find that it was the result of an unwarrantable failure. The loader was being operated by the operator himself. I again take note of all of the factors set forth in Section 110(i) of the Act, i.e., the violation was undoubtedly serious and resulted from high negligence. However, I also take into account the operator's financial situation, its size, and its overall history. Since I have previously set forth these items in detail, I will not again repeat them. Based thereon I determine as appropriate and assess a penalty of $3,500 for this violation. Although this assessment represents a substantial reduction from the proposed assessment, it remains a significant amount and is, I believe, consistent with the purposes of the statute (Tr. 25-26).

I adhere to the foregoing findings, conclusions and assessment.

Order No. 4280583 was issued as a 104(d)(1) order for a violation of 30 C.F.R. § 56.14130(g) because the operator of the Trojan 5500 front end loader was observed operating it without using the seat belt provided. The violation was designated significant and substantial and negligence was assessed as high. Operator's counsel advised that the terrain where the loader was operated was flat, the loader was not operating for a long period of time and the machine was going slowly (Tr. 28). Based upon these factors, the Solicitor agreed to modify the order by deleting the significant and substantial designation (Tr. 28).

On the record I held as follows with respect to this order:

I accept that proposed modification. It seems to me it is appropriate in light of the fact that the piece of equipment was operating on level ground and that it was going at a slow rate of speed. The circumstances under which this violation occurred, are plainly different from those under which the prior Order 4230581 was issued for seat belt violation. The terrain there was steep and had sharp turns. I do find, however, that the violation remains a serious one. Although the circumstances do not rise to the level required by the Commission for the existence of significant and substantial, in particular the reasonable likelihood requirement identified by the Solicitor, the

violation nevertheless was serious. There was a possibility of serious injury which supports a finding of gravity. I further find that the operator was guilty of unwarrantable failure for the reasons set forth by the Solicitor. I, therefore, find appropriate and assess a penalty of $2,500 for this citation in light of all of the factors in Section 110(i) I discussed previously (Tr. 28-29).

I adhere to the foregoing findings, conclusions and assessment.

Citation No. 4079713 was issued for a violation of 30 C.F.R. § 56.14130(i) because the seat belt provided for the Trojan 5500 was not maintained in a functional condition. The violation was designated significant and substantial and negligence was assessed as moderate. The Solicitor agreed to modify this citation by deleting the significant and substantial designation. The reason for the modification was that the vehicle in question was parked at the time of the inspection and the defective belt could easily be replaced or repaired (Tr. 10-11).

On the record I held as follows with respect to this citation, "In view of the deletion of the significant and substantial designation I find appropriate and I assess a penalty of $167." (Tr. 12).

I adhere to the foregoing determination and assessment.

**YORK 93-143-M**

Citation No. 4079712 was issued under section 104(a) for a violation of 30 C.F.R. § 56.14132(a) because the automatic reverse activated signal alarm provided for the Trojan 5500 was not maintained in a functional condition. The violation was designated significant and substantial and negligence was assessed as moderate. Operator's counsel advised that at the time of the inspection the vehicle was not in operation and was set aside to be repaired (Tr. 32). The Solicitor agreed based upon operator's counsel representation to modify the citation by deleting the significant and substantial designation (Tr. 32).

On the record I held as follows with respect to this citation:

> Based upon the representation I accept that proposal. The S & S designation is deleted. In light of all of the factors to be considered under Section 110(i) I find a penalty of $250 is appropriate. I hereby assess that penalty for this violation (Tr. 32).

I adhere to the foregoing findings, conclusions and assessment.

Citation No. 4079715 was issued for a violation of 30 C.F.R. § 56.14107(a) because the head pulley guard provided for the No. 3 conveyor was not adequate. The violation was designated significant and substantial and negligence was assessed as moderate. According to the Solicitor, injury was reasonably likely because the head pulley is openly accessible to any person who walks on the walkway which abuts this pulley. The walkway was available for the purpose of accessing the pulley for maintenance (Tr. 34-35). Operator's counsel advised that at the time of the inspection, the pulley guard was in the process of being made and the violation was quickly abated. Based upon these representations the Solicitor agreed to modify the citation by reducing negligence from moderate to low (Tr. 35).

On the record I held as follows with respect to this citation:

> I accept that modification. I believe it is appropriate. In light of the representations, the violation remains, however, significant and substantial. In light of these negligence and gravity findings and in light of the other factors set forth in Section 110(i) of the Act, as discussed previously, I find appropriate and assess a penalty of $250 for this violation (Tr. 35-36).

I adhere to the foregoing findings, conclusions and assessment.

## ORDERS

It is **ORDERED** that the fact of the violation for Citation and Order Nos. 4079716, 4079717, 4280581, 4280582, 4280583 and 4079713 in Docket No. YORK 93-138-M and Citation Nos. 4079712 and 4079715 in Docket No. YORK 93-143-M be **AFFIRMED**.

It is further **ORDERED** that the significant and substantial designations for Citation and Order Nos. 4079716, 4079717, 4280581, and 4280582 in Docket No. YORK 93-138-M and Citation No. 4079715 in YORK 93-143-M be **AFFIRMED**.

It is further **ORDERED** that the unwarrantable failure finding for Citation and Order Nos. 4079716, 4079717, 4280581, 4280582, and 4280583 in Docket No. YORK 93-138-M be **AFFIRMED**.

It is further **ORDERED** that Order and Citation Nos. 4280583 and 4079713 in Docket No. YORK 93-138-M and Citation No. 4079712 in YORK 93-143-M be **MODIFIED** by deleting the significant and substantial designations.

It is further **ORDERED** that Citation No. 4079715 in Docket No. YORK 93-143-M be **MODIFIED** by reducing negligence from moderate to low.

It is further **ORDERED** that the penalty assessments for the violations in Docket Nos. YORK 93-138-M and YORK 93-143-M be as follows:

**YORK 93-138-M**

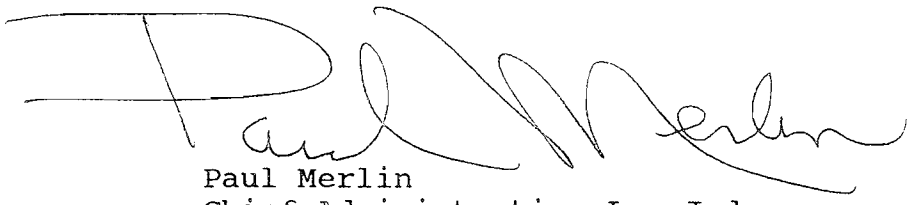
| Citation/Order No. | Penalty Assessment |
|---|---|
| 4079716 | $1,500 |
| 4079717 | $1,500 |
| 4280581 | $3,000 |
| 4280582 | $3,500 |
| 4280583 | $2,500 |
| 4079713 | $ 167 |

**YORK 93-143-M**

| Citation/Order No. | Penalty Assessment |
|---|---|
| 4079712 | $ 250 |
| 4079715 | $ 250 |

It is further **ORDERED** that the operator **PAY** the above assessed penalties within 30 days of the date of this decision.

It is further **ORDERED** that these cases be and are hereby **DISMISSED**.



Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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

Joseph H. Murphy, Esq., McCabe and O'Brien, PC., Benevento Sand & Gravel, Andover, MA 01810

/gl

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

DEC 30 1993

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 93-369<br>A.C. No. 15-14074-03634 |
| v. | : | |
| | : | Martwick UG |
| PEABODY COAL COMPANY, Respondent | : | |

## DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
Carl B. Boyd, Jr., Esq., Henderson, Kentucky, for Respondent.

Before: Judge Amchan:

## STATEMENT OF THE CASE

### I. The Grounding Violation

MSHA Inspector Darold Gamblin conducted an inspection of Respondent's Martwick underground mine on December 14, 1992 (Tr. 10-11). Upon reaching the 3 South Panel entries he encountered an electrical transformer supplying power to the equipment in the entries (Jt. Exh. 1). At the transformer, he observed a power cable coupler, or cathead, that was being used to plug a cable running to a belt feeder transfer point into the transformer (Tr. 11 - 14). This cathead consists of two large metal parts. One is a female receptacle that is mounted on the transformer; the other is a male part to which the cable is attached, which is plugged into the female part (Tr. 8 - 9, 11 - 14, Jt. Exh. 4).

The cathead has an internal grounding device and an external grounding device. The internal grounding device would prevent an employee from being shocked or electrocuted by the cable, if the cable insulation were to break. However, the metal casing of the cathead might become energized unless the external grounding device is properly connected (Tr. 14 - 15).

The external grounding device consists of two wires, one is attached to the male portion of the cathead; the other to the transformer or to the female portion of the cathead (Tr. 25, Jt. Exh. 4). In order to perform its function, the two wires must be connected to each other; when Mr. Gamblin observed them, they were disconnected (Tr. 25).

As the result of this observation, Mr. Gamblin issued Respondent Citation No. 3417313 alleging a violation of 30 C.F.R. § 75.701. This standard requires that:

> Metallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary.[1]

The Secretary proposed a civil penalty of $189 for this alleged violation. Respondent concedes that a violation of the standard occurred but takes issue with Inspector Gamblin's characterization of the violation as "significant and substantial (Tr. 7, Jt. Exh. 1)."

The Commission formula for a "significant and substantial" violation was set forth in Mathies Coal Co. 6 FMSHRC 1 (January 1984):

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

As in most cases litigated under this test, it is exclusively the third criteria, the likelihood of injury that is in question in the instant case. The totality of the Secretary's evidence on this point is as follows:

> Question: In the usual course of mining, how could parts of this belt feeder cathead have become energized or hot or alive?

---

[1]This standard was enacted as part of 1969 Coal Act and is also found at 30 U.S.C. § 867.

Answer: If the insulation of the cable entering the cable coupler become broke down or through -- these are drug all over the bottom when they're moving the power. You know, the internal parts come in contact with the casing.

Question: And based on your experience, then, what would have happened if a miner had come into contact with the energized or hot parts of that belt feed cathead?

Answer: Injury would be reasonably likely.

Question: What kind of injury could someone suffer?

Answer: Electric shock (Tr. 17 - 18)

Question: How likely was it that the condition would lead to injury or illness if mining continued, if the mining process continued?

Answer: Reasonably likely. (Tr. 26)

Later, Inspector Gamblin explained that while normal practice would be to shut off the power by turning off the breaker on the transformer--before unplugging the cathead, this is not always done (Tr. 66-67,72). If the breaker is not turned off, the internal grounding device should protect the employee if it's functioning properly. The external ground is a back-up system which protects the employee from electrical shock if the internal ground is defective (Tr. 72-74).

Not surprisingly, Respondent disagrees with Inspector's Gamblin's opinion that injury is reasonably likely. Alan Perks, Peabody's Chief Maintenance Engineer, testified that normal mining procedure is to turn off the circuit breaker on the transformer before disconnecting the cathead. This, he believes, would eliminate any risk of injury (Tr. 88). Moreover, he stated that even if an employee were to disregard the normal practice it would be unlikely that he would be shocked:

I believe that there is a sufficient electrical connection by the mechanical interference fitting in these laches [of the two parts of the cathead] that if the shell became energized, the electrical current would flow through these connections and operate the ground trip relay of the transformer which would, in turn, kill the circuit breaker feeding power to this unit...

I view this [the external ground wires] as, I guess, an additional safety device. I think there is enough

electrical connection here to trip it under most situations, this [the external ground] just being an additional safety backup (Tr. 83).

Mr. Perks, who has a B. S. degree in electrical engineering from the University of Maryland, performed continuity testing on a cathead similar to the one cited by Mr. Gamblin (Tr. 83-84, 94-95). These tests indicated good continuity between the two parts of the cathead (Tr. 84). In Mr. Perks' opinion, this indicates that, if the metal casing of the cathead became energized, there would be sufficient transfer of current to operate the ground trip relay and shut off the circuit breaker on the transformer (Tr. 84).

**APPLICATION OF THE MATHIES TEST**

Determining the likelihood that injury will occur, the third element of the Mathies test, is a very difficult task. Injuries are normally the result of accidents, which by definition, are unusual occurrences. Before embarking upon the task required by Mathies I note that under the analogous provision of the Occupational Safety and Health Act, consideration of the likelihood of injury is precluded.

Section 104(d)(1) of the Federal Mine Safety and Health Act distinguishes between violations that "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" and violations that do not. MSHA, pursuant to its regulations at 30 C.F.R. § 100.4, generally assesses a $50 civil penalty for violations that are "non S&S."

Section 17(k) of the OSH Act, 29 U.S.C. 666(k), defines a "serious" violation for which higher penalties are proposed than for "other-than-serious" violations. See OSHA Field Operations Manual, 3 BNA Occupational Safety and Health Reporter pages 77:2507 and 77:2701 et. seq.. A "serious" violation is one which exists "...if there is a substantial probability that death or serious physical harm could result from a condition which exists...in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

The Occupational Safety and Health Review Commission and the Courts of Appeals have repeatedly held that only the seriousness of an injury should one occur, not the likelihood of an injury occurring is to be considered in determining whether or not an OSHA violation is "serious." The Court of Appeals for the Ninth Circuit observed:

Where violation of a regulation renders an accident resulting in death or serious injury possible, however, even

> if not probable, Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey the regulation. California Stevedore and Ballast Company v. OSHRC, 517 F.2d 986 (9th Cir. 1975).

The proposition that the likelihood of injury is irrelevant to whether an OSHA violation is "serious" has been reaffirmed on many occasions. Communications, Inc., 7 BNA OSHC 1598, 1602 (R.C. 1979); Trumid Construction Co., 14 BNA OSHC 1784, 1789 (R.C. 1990); Department of Labor v. Kerr-McGee, __ F.2d __, 15 BNA OSHC 2070 (9th Cir. 1993); East Texas Motor Freight, Inc. v. OSHRC, 671 F. 2d 845, 849 (5th Cir. 1982); Kent Nowlin Construction Co. v. OSHRC, 648 F. 2d 1278, 1282 (10th Cir. 1981). The probability of injury is considered in proposing OSHA penalties, although a higher penalty will be proposed for a "serious" violation than an "other-than-serious" violation, other considerations being equal, OSHA Field Operations Manual, supra.

The purpose of civil penalties under both the Mine Safety and Health Act and the OSH Act is to encourage future compliance. Characterizing a violation as "non-significant and substantial" and assessing a $50 penalty hardly provides an incentive for the mine operator to make any greater effort to comply with the cited standard. Indeed, the import of Mr. Perks' testimony is that the standard at 30 C.F.R. § 75.701 serves virtually no useful purpose in protecting miners. If the regulation is as unimportant as his testimony indicates, there is no reason why Respondent should make any particular effort to assure that the external ground wires on its catheads stay connected.[2]

It would appear contrary to purposes of the Mine Act to assess such minimal penalties as are called for under 30 C.F.R. § 100.4, if these violations may one day cause serious injury to a miner. In precluding consideration of the likelihood of an accident from the determination of whether a violation is serious, the OSHA case law is consistent with the statutory purpose of preventing accidents. Since the purposes of the Mine Safety and Health Act and OSHA are essentially identical, there

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[2]On the other hand, Mr. Perks' testimony is that there is sufficient electrical connection between the laches of the cathead to trip the circuit breaker in most situations. This suggests that there may be situations in which the functioning of the external ground may be the difference between life and death. Furthermore, Mr. Perks' testimony relies upon an "after-the-fact" determination that the electrical connection on a cathead, different than the one cited, was sufficient to trip the circuit breaker.

should not be such a tremendous disparity in the case law under the two statutes unless there is a good rationale for such differences.

The undersigned believes greater harmonization of the tests for a "serious" violation under OSHA and a "significant and substantial" violation under the Mine Act is possible and desirable. In U. S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984), the Commission made it clear that "significant and substantial" is not to be determined solely upon conditions as they existed at the time the citation was issued, but should also consider "continued normal mining operations."

If MSHA promulgated a mandatory safety standard requiring the metal casings of electrical equipment to be grounded, it must have done so under the assumption that under normal mining conditions injuries would occur unless the standard was followed. I, therefore, assume that unless the record indicates that the conditions cited do not pose the hazard to which the standard is directed, that sooner or later, at this mine or at another, noncompliance with the standard will result in injury. As I see nothing in this record that indicates that the conditions for which Citation No. 3417313 was issued were distinguishable from the concerns for which 30 C.F.R. § 75.701 was promulgated, I conclude that the injury was reasonably likely in the context of continued normal mining operations and that the violation was "significant and substantial."

I recognize that this decision is somewhat inconsistent with the rationale of the Commission's decision in Cement Division, National Gypsum Company, 4 FMSHRC 822 (April 1981). In that case, the Commission held for the first time that an "S&S" violation requires a showing that there exists a reasonable likelihood that the hazard will result in an injury of a reasonably serious nature. Part of its rationale was a concern that interpreting the significant and substantial language in sections 104(d) and (e) to encompass almost all violations would render that language virtually superfluous 4 FMSHRC at 826. However, the later U.S. Steel Mining decision is itself not entirely consistent with National Gypsum.

The vast majority of the Secretary's regulations are directed to hazards that will cause serious injury. If noncompliance with any one of these regulations persists industry-wide, serious injury is likely to occur. As U.S. Steel

Mining is a more recent decision than National Gypsum, I feel obligated to follow it where the two opinions are not completely harmonious.[3]

Many accidents result from several things going wrong at once. For this reason, a number of MSHA standards call for back-up safety devices. Without the refinement to National Gypsum and Mathies provided by the U.S. Steel Mining decision, the fact finder in adjudicating a case under one of these standards, is forced to speculate on the likelihood of several factors coming together at one time to produce injury. Otherwise violation of a standard requiring back-up protection would be "S&S" only in situations in which these factors are already present. In the latter situation, "significant and substantial" is hardly distinguishable from imminent danger.

The import of the National Gypsum test without the gloss of U.S. Steel Mining is that a violation of standards like those cited in the instant case, which provide "back-up" or secondary safety protection, could never be "S&S" unless a variety of factors combined to make injury imminent. To categorize all violations of these standards as "non S&S" is to invite lassitude by operators in complying with their terms and is totally inconsistent with the purposes of this statute.

**THE UNMARKED CATHEAD**

During his inspection of December 14, 1992, Inspector Gamblin also noticed two catheads by which the cables leading to the two continuous mining machines were plugged into the transformer. One of the catheads was marked to indicate the machine to which its cable was attached and the other was not marked (Tr. 36, 42). Mr. Gamblin issued Respondent Citation No. 3417315 alleging a violation of 30 C.F.R. § 75.601. That standard provides:

> ...Disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and such devices shall be equipped or designed in such a manner that it can be determined by visual observation that the power is disconnected.

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[3]I would also note that the National Gypsum decision is predicated in part on the concern of what might happen with regard to section 104(e)'s pattern provisions if "significant and substantial" were interpreted broadly. Commissioner Lawson noted in his dissent in Phillips Uranium Corp., 4 FMSHRC 549, 560 (April 1982) that there had been no enforcement action taken by MSHA under section 104(e). As best as the undersigned can determine from reported Commission and ALJ decisions, that is still true.

As was the case with the prior citation, Respondent concedes that the violation occurred and takes issues only with MSHA's characterization of the violation as "significant and substantial (Tr. 7)." As was true with the prior citation, it is the third element of the Mathies test, the likelihood of injury that is at issue. The penalty proposed for this violation was also $189.

Inspector Gamblin believes it is reasonably likely that an employee could attempt to work on a mining machine for which he or she mistakenly believed the power was disconnected due to the lack of identification markings on the one cathead (Tr. 40, 50, 56, 60-63). If this were to happen, the employee could be shocked or injured by the cutting head of the continuous miner (Tr. 40). Respondent contends that there are several reasons why an injury would be unlikely. First of all, an employee could determine which cathead belonged to which continuous miner by the process of elimination. By looking at the cathead which was marked, an employee would know that the unmarked cathead belonged to other continuous mining machine (Tr. 52).

The two catheads could also be easily distinguished by the fact that one was much cleaner than the other (Tr. 53). The reason that Respondent had two continuous mining machines in the section was that it was in the process of replacing one with the other, which had been recently rebuilt (Tr. 89). The older machine was to remain in the section with the rebuilt machine for only two or three days until Peabody was satisfied that the rebuilt machine functioned properly (Tr. 92, 103). Because the older machine had been in the section for quite a while, the cathead for its trailing cable was much dirtier than the cathead for the newer machine (Tr. 106 - 107).

Finally, Respondent contends that injury is unlikely because normal practice is for an employee to follow a trailing cable back to the transformer to make sure he unplugs the right one (Tr. 90). Moreover, Peabody company policy is that the individual employee who performs work on the continuous mining machine is to disconnect and lock out the power himself or herself (Tr. 109). This, according to Respondent, would make it very unlikely that an employee could be injured while working on a continuous miner because he or she thought the power was disconnected.

As with the prior citation, I have to assume that MSHA, in promulgating 30 C.F.R. § 75.601 concluded that, if disconnecting devices are not plainly marked and identified, that, in the normal course of mining operations, an employee may be injured. Even if injury is likely to occur only once every ten or twenty years somewhere in the United States due to the violation of the standard, I would conclude that injury is "reasonably likely" within the meaning of the Mathies test.

The Commission in U.S. Steel Mining Company, Inc., 6 FMSHRC 1834, 1836 1838 (August 1984) found a violation of section 75.601 to be "significant and substantial." It is useful to analyze that decision to see if the facts in that case are distinguishable from the instant case. There were two unmarked trailing cable plugs (which I assume are the same thing as catheads) at the time of the citation at U.S. Steel's mine, however they were very different in size and appearance. There were also marked catheads which the Commission found could be mistaken for the unmarked catheads.

The Commission rejected the company's argument that the "process of elimination" made it unlikely that the unmarked catheads would be confused with marked catheads. Indeed the Commission appeared to reject any factor depending on human behavior as negating likelihood. See footnote 4 on page 1838. A great deal of importance was placed on a fatal accident at the same mine in 1979 which resulted from the mix-up of catheads for two shuttle cars.

In all the factors present in the 1984 case, I can only discern one which distinguishes the instant situation in any meaningful way. That is the fact that the older continuous miner in the instant case was to be in the section for only two or three days and its cathead was noticeably dirtier than that of the rebuilt continuous miner.

I do not find this distinction sufficient to find the instant violation to be non S&S. The standard does not require marking and identification only when there is equipment that can be confused. I can only conclude that, when promulgating the standard, MSHA concluded that marking and identification of catheads was necessary to prevent injury in every situation in which they could be plugged in or disconnected from a power source. To find otherwise would be to question the wisdom of the standard which I believe neither I nor the Respondent is entitled to do--after the regulation has been properly promulgated.

Finally, to find that injury is unlikely due to relative cleanliness of the catheads would require the undersigned to speculate that an employee would in every situation make the logical connection between the appearance of the cathead and its connection to the new or old mining machine. I see no basis for concluding that this connection would necessarily be made.

## ORDER

I affirm Citation Nos. 3417313 and 3417315 as "significant and substantial" violations. Considering the statutory factors enumerated in section 110(i) of the Act, particularly the low to moderate negligence of Respondent, its good faith in correcting

the violations, and the gravity of the violation, I assess a $189 penalty for each violation. Payment shall be made within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

Distribution:

Anne T. Knauff, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Carl Boyd, Jr., Esq., 120 N. Ingram St., Suite A, Henderson, KY 42420 (Certified Mail)

/jf

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 30 1993

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>On Behalf of CARROLL JOHNSON,<br>Complainant | : | DISCRIMINATION PROCEEDING<br><br>Docket No. SE 93-182-D<br>BARB CD-92-20 |
| and | : | No. 7 Mine |
| UNITED MINE WORKERS OF<br>AMERICA (UMWA),<br>Intervenor | : | |
| v. | : | |
| JIM WALTER RESOURCES,<br>INCORPORATED,<br>Respondent | : | |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. SE 93-104<br>A. C. No. 01-01401-03938 |
| and | : | No. 7 Mine |
| UNITED MINE WORKERS OF<br>AMERICA (UMWA),<br>Intervenor | : | |
| v. | : | |
| JIM WALTER RESOURCES, INC.,<br>Respondent | : | |

## DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Complainant and Petitioner;
Barry Woodbrey, Esq., United Mine Workers of America (UMWA), for Intervenor;
David M. Smith, Esq., and Mark Strength, Esq., Meynard, Cooper and Gale, Birmingham, Alabama, and R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Birmingham, Alabama, for Respondent.

Before: Judge Weisberger

## Statement of the Case

The above captioned cases commenced by the Secretary, involve an alleged violation by Jim Walter Resources, Inc., (Respondent) of Section 103(f) of the Federal Mine Safety and Health Act of 1977 ("the Act"), and an alleged violation of Section 105(c)(1) of the Act. On March 19, 1993, the Secretary (Complainant) filed a motion for approval of settlement regarding both these cases. The United Mine Workers of America (UMWA), Intervenor, filed a response in opposition to the motion. Respondent filed a submission in support of the motion. On April 26, 1993, an order was issued denying the motion to approve settlement. Pursuant to notice, the cases were scheduled and heard in Birmingham, Alabama, on July 20 and 21, 1993. On September 23, 1993 the Secretary filed a brief. Respondent and Intervenor each filed their briefs on September 28, 1993. On October 1, 1993, the Secretary filed a reply brief. Respondent's response was received on October 12, 1993.

I.

## Findings of Fact

1. Jim Walter Resources, Inc., Respondent, operates Mine No. 7, an underground coal mine.

2. At Mine No. 7, coal is mined on a continuous miner section and on two longwall sections.

3. In October 1991, Carroll Johnson, a miner, and chairman of the union safety committee at the subject mine, received safety complaints from miners regarding respirable dust on the longwall sections. In response, he requested a Section 103(g) inspection, on October 22, 1991, pursuant to the Section 103(g) inspection at the No. 1 Longwall Section. Citation No. 2805274 was issued to Respondent, alleging excessive respirable dust. The time to abate the violation was set for November 17, 1991 and subsequently extended to November 22, 1991.

4. On November 22, 1991, Respondent was issued a Section 104(b), Order (No. 3805276), alleging excessive respirable dust on the No. 1 Longwall Section.

5. On November 23, 1991, MSHA and Respondent agreed to 15 changes[1] and adjustments to control dust on the No. 1 Longwall, including the placement of additional sprays, and fog-jet sprays. Also, one of the changes required a decrease in one of the diameters of the opening on the drum sprays, and the maintenance of "... a minimum of 70% operating." (Exh. G-4, par. N) (sic).

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[1] These changes were made to the original Dust Control Plan.

6. The Section 104(b) Order, supra, was modified on November 23, 1991, to allow production to resume on the No. 1 Longwall Section "... to evaluate the changes and adjustments made to the approved ventilation methane and dust control plan and collect respirable dust samples." (Exh. G-3).

7. On November 23, 1991, MSHA Inspector Terry Gaither, and Milton Zimmerman an MSHA Supervisor Coal Mine Inspector, went to the No. 1 Longwall to evaluate the agreed upon changes and adjustments to the Dust Control Plan ("Plan"), and to determine if the Operator was in compliance with the respirable dust regulatory standards.

8. Johnson, as the representative authorized by miners, ("walkaround") accompanied the MSHA inspectors on November 23, 1991 on their inspection.

## II.

## Further Findings of Fact and Discussion

### A. Discrimination under Section 105(c)

An analysis of the specific events that transpired during the time period in question is to be made based upon the principles established by the Commission in Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 817 (1981). In Robinette, the Commission held that to establish a prima facie case of discrimination under Section 105(c) of the Act, a miner has the burden of proving that (1) he or she engaged in protected activity and (2) the adverse action complained of was motivated "in any part" by the protected activity. The operator may rebut the prima facie case by showing either that no protected activity occurred, or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone.

#### 1. Johnson's version

According to Johnson, on November 23, 1991, prior to the start of production at the subject site, air readings were taken, and the spray pressure was noted. Johnson said that once production was started, he followed the shearer to see if the sprays were working properly. Johnson related that some sprays appeared clogged, and he asked the shearer operator if they were

clogged. According to Johnson, the latter's response was "yeah they're acting up a little again." (Tr. 138). Johnson stated that he mentioned to Thom Parrott, who was the longwall coordinator, that it "looked" to him "like the sprays may not be at seventy percent as required." (Tr. 138). Johnson said that in response Parrott "shrugged his shoulders," and did not say anything. (Tr. 139). Johnson said that he then told MSHA Inspector Terry Gaither, who in turn told Parrott that the sprays may have to be cleaned, and "you are getting quite a few stopping up." (Tr. 140) (sic)). According to Johnson, at that point Parrott agreed, and the sprays were shut down and cleaned.

According to Johnson, about 15 or 20 minutes after he had pointed out the clogged sprays to Parrott, Parrott asked to see him alone. Johnson said that Parrott then told him that he was not on his own inspection, was not an inspector, and was to "quit pointing things out." (Tr. 143) Further, according to Johnson, Parrott told him that he had not been staying in the immediate vicinity of the inspectors, and that he (Parrott) did not want to catch him away from them again. Johnson stated that his response was to say "Ah come on." (Tr. 144), but that he may have said that phrase harshly. He said he then walked away to the dinner hole. Contemporaneous notes taken by Johnson, in essence, corroborate the version he testified to at the hearing.

Johnson further testified, in essence, that at approximately 1:00 p.m., the inspectors stopped to talk to a miner. He said that when they stopped he was approximately 15 to 20 feet ahead of them, and he stopped and looked at the shearer. According to Johnson, while he was waiting for the inspectors, Parrott approached, and told him that he was being relieved of his duties. Johnson said that Parrott told him that he was relieving him of his duties because he was not staying in the immediate vicinity of the inspector. According to Johnson, after he was relieved of his duties, Parrott said that he wanted to talk to him "alone with Danny Watts." (Tr. 157)(sic) Parrott did not tell him why he wanted to talk to him. Johnson said that he did not go to talk to Parrott because he was afraid.

2. Parrott's version

According to Parrott, at approximately 9:43 a.m., on November 23, Johnson was observed looking at the shearer at the tailgate. Parrott said that the shearer was down at the time, and the inspectors were 250 and 300 feet away. Parrott indicated that this was the first time that he had seen a safety committeeman or a walkaround "go off on his own like that." (Tr. 458). Parrott called Richard Donnelly, who was the Deputy Mine Manager at the subject mine, and asked him if it was legal or within Respondent's work rules for Johnson to leave the general vicinity of the inspectors, and Donnelly said "no."

(Tr. 458) Donnelly told Parrott to take Johnson aside, and not to confront him, but to tell him not to make his own inspection. According to Parrott, after he spoke to Donnelly, he found Johnson alone at the headgate drive. Parrott said he told Johnson that he was not to wander off and make his inspection, and that it was company policy for him to remain with the inspectors. Parrott said that Johnson's response was as follows: "Under the Act, I have full access to this mine, I can come and go as I damn well please and I will." (Tr. 461). According to Parrott, Johnson further said "If this is something personal, maybe you and I can step off the property after the shift and settle it." (Tr. 461) Parrott said that Johnson then "got angry" and went to the dinner hole. (Tr. 461).

Parrott stated, in essence, that the next time he saw Johnson, he was "around the corner ... out of sight of the inspectors" (Tr. 463). He indicated that Johnson was 30 or 40 feet from the inspectors. Parrott said that he gave Johnson a 464) Parrott stated that Johnson became "real argumentative." (Tr. 464) According to Parrott, Johnson said that "he did not give a damn what I said" (Tr. 464), and pointed out that the inspectors were only 15 feet away. Parrott said he then requested Johnson to step away, as he wanted to explain to him that if he would disobey an order, he would be suspended. Parrott said that Johnson refused the request and at that point he told Johnson that he was giving him a "direct order" to walk over to him (Parrott) (Tr. 465). According to Parrott, Johnson said "do you really want me to put some heat on your ass do you want me to come down here and inspect this longwall." (Tr. 467). Parrott said he then used the term "direct order" and asked Johnson if he understood what follows by disobeying a "direct order". Parrott said Johnson responded by saying he did not care. At that point, Parrott informed Johnson that he was being suspended with the intent to discharge for insubordination.

3. Discussion

a. Protected Activities

In essence, Respondent argues, inter alia, that the Secretary has failed to establish a prima facie case in that he has not proven that Johnson was engaged in any protected activities. Specifically, Respondent argues that there is no evidence that Johnson was out of the presence of the inspectors for the purpose of aiding the inspectors. Respondent also argues that there is not any evidence that Johnson left the inspection party at the request of the inspectors. For the reasons that follow, I find that the Secretary has established that Johnson was engaged in protected activities.

The Section 105(c) discrimination complaint filed by the Secretary is based upon an alleged discrimination against Johnson while he was exercising rights under Section 103(f) of the Act. Section 103(f) of the Act, as pertinent, provides that an authorized representative of miners shall be given an opportunity to accompany an inspector during an inspection" ... for the purpose of aiding such inspection ... ." The Legislative History of Section 103(f) supra, indicates the importance of the right of miners' representatives to accompany an inspector. Congress concluded that participation of miners in inspections "will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness." (Legislative History, at 616, supra). The language of Section 103(f) of the Act supra, indicates that the right of a representative to "accompany" an inspector is "for the purpose of aiding such inspection."

(1) **Aiding the Inspection**

Milton Zimmerman, a supervisory coal mine inspector, testified that, in general, a safety committeeman (representative of miners) assists in a dust inspection by checking sprays, talking with miners, and checking if the shields are being washed. Although neither Zimmerman, nor MSHA Inspector Terry Gaither, made any specific request of Johnson to do anything to aid them in the inspection, Zimmerman remarked as follows "... it didn't make any difference whether Mr. Johnson was with me or whether he was on a tailgate because he was assisting us on the inspection. And had he been on the tailgate or longwall which is 1000 feet away, he was assisting on the inspection." (Tr. 69). Based on this testimony, I find that Johnson's presence in the inspection party was aiding the inspection.

(2) **Accompanying the Inspector**

Webster's Third New International Dictionary (1986 edition) defines "accompany" as follows: "(1) to go with or attend as an associate or accompany; go along with." "With" is defined, inter alia as follows ... "4a ... used as a function word to indicate one that shares in an action, transaction, or arrangement." Applying the common meaning of the word "accompany," I find that there is no requirement in Section 103(f) for a representative of miners to be within a specific distance from the inspectors. It is sufficient if the representative "shares in an action." I find that Johnson, in the locations observed by Parrott, was part of the general action of the inspection. It would be unduly restrictive to find that a miner's representative is beyond the scope of Section 103(f) supra, unless he is at a location at the specific request of an inspector, or engaged in a specific action to aid the inspector at the latter's request. To the contrary,

as explained by Zimmerman, Johnson's presence in the general area was aiding the inspectors. Accordingly, broadly construing Section 103(f) supra, [2] I find that given the framework of the specific inspection at issue, i.e., to evaluate the effectiveness of the changes to the Plan, Johnson's presence on the section other than within a few feet of the inspectors was within the scope of Section 103(f) rights. Hence, I conclude that Johnson was engaged in protected activities on November 23.

b. Motivation

(1) Johnson's version

In essence, according to Johnson, when he was at the headgate at the beginning of the shift, he told Parrott that it looked to him "that the sprays may not be at 70 percent as required." (Tr. 138). Johnson's contemporaneous notes also indicate that at 10:30 a.m., he pointed out as follows: "less than 70 percent sprays on H.G.". Johnson indicated that Parrott did not say anything, but that approximately 15 or 20 minutes later, Parrott told him that he was not to be on his own inspection, and to quit pointing things out. In contrast, Parrott stated that Johnson did not point out that 70 percent of the sprays were not operating. He also denied telling Johnson that he (Johnson) was pointing things out to the inspectors. Parrott also stated that he was not aware that Johnson was pointing things out to the inspectors on the longwall. In this connection, Respondent argues that no other witness corroborated Johnson's testimony that he had pointed things out,[3] and no citation was issued on the basis of any alleged insufficient sprays. In this connection, Zimmerman indicated that Johnson did not tell him that anything was wrong with the sprays. However, the version testified by Johnson finds corroboration in the

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[2] In general, Congress manifested its intent that the scope of protected activities under Section 105(c) be broadly interpreted (S. Rep. No. 95-181, 95th Cong., 2d Sess., reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 ("Legislative History"). Given this intent, it might be reasoned that Congress similarly intended a broad interpretation to be accorded rights under Section 103(f) supra, where these are the basis of protected activities under Section 105(c) supra.

[3] Johnson said that he told MSHA Inspector Terry Gaither that he thought that some of the sprays were "stopping" up (Tr. 140). Gaither did not testify to corroborate Johnson. Based on my observations of Johnson's demeanor, I find his testimony credible on this point.

testimony of Richard Donnelly, who was the deputy mine manager. Donnelly indicated that when Parrott called him between 10 and 11:00 a.m., on November 22, to ask him if a safety committeeman is allowed to make his own inspection, Parrott told him that Johnson was pointing things out to the inspectors. Hence, for these reasons, and also based upon my observation of the witnesses' demeanor, I accept the version testified by Johnson, and find that he did point out problems with the sprays.

According to Johnson, at approximately 1:00 p.m., when he was about 15 or 20 feet ahead the inspectors, Parrott told him that he was relieved of his duties for not staying in the immediate vicinity of the inspectors.

(2) Parrott's version

According to Parrott, when he initially advised Johnson that it was the company's "position" (Tr. 460) that he remain with the inspectors, Johnson said "if this is something personal, maybe you and I can step off the property after the shift and settle it." (Tr. 461). Parrott testified at the second time when he spoke to Johnson and gave him a "direct order" to stay with the inspectors, Johnson stated as follows "do you really want me to put some heat on your ass, do you want me to come down here and inspect this longwall." (Tr. 467). On direct examination Parrott maintained that the fact that Johnson defied an order to stay with the inspectors did not have anything to do with the decision to suspend Johnson. He further said, in essence, that Johnson's position vis-a-vis the inspectors did not result in his discharge. Parrott said that Johnson's refusal to come over and discuss the situation with him was the main reason for the suspension in combination with threats that Johnson had made.

Parrott's contemporaneous notes corroborate his testimony that he had given Johnson "direct orders" to stay with the inspectors. However, the notes do not indicate that he gave Johnson a "direct order" to come to him and discuss the situation. On cross-examination Parrott indicated that he was not sure if he used the words "direct order" when he told Johnson to walk over to him. Parrott also indicated that he could not be sure if used the words "direct order", since he did not write it in his notes. In either event, it is critical to note that on cross-examination Parrott indicated that the fact that Johnson defied his "direct order" to stay with the inspectors "... was tied in" to the decision to suspended him. (Tr. 527).

Donnelly testified that, in the second conversation he had with Parrott on November 23, the latter informed him that he had a "confrontation" with Johnson and had told Johnson "that he was again making his own inspection." (Tr. 350) (sic). According to Donnelly, Parrott then informed him that he had told Johnson "several times" to come and talk to him "about it" and Johnson

refused. (Tr. 351). Donnelly further stated as follows: "And as a result of that, Thom (Parrott) informed me that he had given him five days with intent and relieved him of his job duties." (Tr. 351). Donnelly stated that he told Parrott that he wasn't sure if he agreed with him and he in turn contacted Willis Coates, the mine manager of No. 7 Mine, and J.T. Piper, the senior vice president of operations, to "discuss it." (Tr. 352). Neither Coates, nor Piper testified. Donnelly did not testify either as to specifically what he told Coates and Piper, or what he asked them. Neither did Donnelly testify to what Coates and Piper told him. Donnelly indicated that after speaking with Piper and Coates he informed Parrott to have Johnson "go to the end of the track." (Tr. 354). He stated that he also told John Looney, the mine foreman, who was Parrott's superior, that there was a personnel problem, and that he should go to the longwall and Parrott would explain it to him. (Tr. 354). Subsequently, at the beginning of Johnson's shift on November 25, 1991, Donnelly instructed Looney to administer to Johnson a five day suspension with intent to discharge. In the RECORD OF DISCIPLINARY ACTION served on Johnson, Donnelly had Looney state the following under the heading REASON FOR DISCIPLINARY ACTION:

> Work Rule #7 Work Rule #1
> Employee refused a direct order [4]
> Employee threatened supervisor & company. (Exh. G-19).

Donnelly indicated that the fact that Johnson had been given a "direct order" to stay with the inspectors and not to be making his own inspection was not the reason why he instructed Looney to give Johnson a five day suspension with intent to discharge. (Tr. 416). In the context of his directions to Looney, Donnelly was asked whether he considered the fact that Johnson had disobeyed an order to stay with the inspector, and had disobeyed an order not to be making his own inspection, and he answered as follows: "I'd answer that no." (Tr. 416). However, in earlier cross-examination he was asked whether it was true that one of the bases for the disciplinary action was that Johnson refused a "direct order" from Parrott not to be making his own inspection, and he answered as follows: "That is part of the circumstances that lead up to my feeling that he was insubordinate, yeah." (Tr. 415).

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[4] Donnelly said that the order that was referred to was the "direct order" given to Johnson to walk away from the miners who had gathered so that Parrott could discuss the matter with him.

(3) Conclusions

Given the above sequence of events, as set forth in the testimony of Johnson that I accept, and considering the testimony of Parrott and Donnelly on cross-examination, I conclude that the decision by Parrott to discipline Johnson, which was apparently affirmed by Donnelly, was motivated in part by Johnson's refusal to follow Parrott's order to stay with the inspectors. In this connection, I have concluded above, II(A)(3)(a) infra, that Johnson was engaged in protected activities, and was not outside the scope of these activities when he was not in the immediate vicinity of the inspectors. According to the testimony of Parrott on cross-examination, the fact that Johnson defied his order to stay with the inspectors was "tied in" to the decision to suspended him. Considering this testimony and the sequence of events, presented herein, I conclude that it has not been established that Respondent would have fired Johnson for his unprotected activities alone, i.e., the threats he allegedly made to Parrott, and his refusal to follow an order to walk over to Parrott and discuss the problems that had arisen that morning. [5] Hence, I find that the Secretary has established a prima facie case which has not been rebutted by Respondent. Nor has Respondent established an affirmative defense.

c. Penalty

In essence, Intervenor argues for the imposition of a $10,000 penalty based upon the history of violations, negligence, and the lack of good faith of Respondent in abating the violation.[6]

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[5] As correctly argued by the Secretary, the fact that Johnson did not remain in the immediate vicinity of the inspectors, which was not outside the scope of protected activities, was the catalyst which triggered the subsequent orders given to him by Parrott to step over and talk to him. In other words, this order, and the prior direct order given by Parrott to Johnson to stay with the inspectors and not to conduct his own investigation were inseparable. The defiance of either of these orders alone cannot be isolated as a independent motive for the discharge.

[6] The Secretary seeks to bring to my attention Secretary of Labor on behalf of Donald B. Carson v. Jim Walter Resources, Inc. 15 FMSHRC 1992 (September 29, 1993 (Judge Maurer), and Secretary of Labor on behalf of James Johnson and UMWA v. Jim Walter Resources, Inc., 15 FMSHRC _____ (Docket No. SE 93-127-D, November 18, 1993) (Judge Fauver). Neither of these cases involve the same violation as the case at bar, i.e., Section

(1) History of Previous Violations

Intervenor urges that cognizance be taken of adverse actions of Respondent against UMWA officials. In this connection, Intervenor refers to the testimony of Darrell Dewberry, District No. 20 union executive board member that when he was a member of the Union Safety Committee, he had been disciplined in 1981, for reporting adverse roof conditions. Dewberry filed a Section 105(c) complaint that subsequently was settled. Also, Dewberry testified that Union Safety Committeeman Don Nelson had been disciplined for reporting an unsafe condition. A Section 105(c) complaint was subsequently brought by the Secretary on behalf of Nelson. That case was subsequently settled, and a decision was issued by Commission Judge Melick approving the settlement which required Respondent to pay a penalty of $2,000. Intervenor further cites the testimony of Larry Spencer that he was disciplined for filing a safety complaint in April, 1991. Spencer filed a Section 105(c) complaint which was subsequently withdrawn when a grievance filed by him was resolved. Also, Tommy Boyd, a member of the safety committee testified that he was disciplined in 1989 by Parrott because he asked that a methane monitor be calibrated. Boyd did not file a Section 105(c) complaint.

Among the factors required to be taken into account in assessing a penalty by a Commission Judge is an operator's "history of previous violations" (Section 110(i) of the Act)). In evaluating the congressional intent in enacting this phrase, I note the following language set forth in the report issued by the Senate Committee on Human Resources on the bill that became the Act: "In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard particularly within a matter of a few inspections, should result in a substantial increase in the amount of the penalty to be assessed." (S. Rep. No. 181 at 43, Legislative History, at 631). (emphasis added). In considering what evidence is to be taken into account in evaluating an operator's "history of previous violations," I initially note that in order for a record of an incident to be considered part of a "history of previous violations," this incident must result in a citation that has not been vacated,[7]

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103(g), nor the engagement in the same protected activities that were retaliated against. Accordingly, they were not accorded much weight in evaluating Respondent's history of previous violations or the gravity of the violations found herein.

[7] See, Youghiogheny and Ohio Coal Company, 7 FMSHRC 200, at 203 (1985).

or at least there must be a "final determination" by the Secretary that a violation has occurred (See, Peggs Run Coal Company, Inc.,) 5 IBMA 144, 150 (September 22, 1975).

I find that the testimony relied on by Intervenor is insufficient to increase the appropriate penalty on the basis of Respondent's history of previous violations. In this connection, I note that Intervenor has not cited any "history of previous violations" similar to the one at issue, i.e., interference with the right of a walkaround who was not in the immediate vicinity of the inspectors.

(2) Negligence and Good Faith in Abatement

After Parrott ordered Johnson to go to the end of the track, Zimmerman was informed that Johnson had been relieved. Zimmerman informed Donnelly and Parrott that the inspection could not be continued without miner representation, and that the "b"[8] order would be reinstated. In essence, Parrott asked Johnson and Zimmerman to name a replacement to serve as the walkaround, and they each refused. Zimmerman issued a citation alleging a violation of Section 103(f). Zimmerman informed Parrott and Donnelly that if miner representation was not allowed, he was going to reinstate the "b" order.[9]

The following Monday, Johnson reported for work and was instructed to go to see the foreman. Based on Donnelly's instructions, Johnson was then given a notice of a five day suspension with intent to discharge. The following day, Willis Coates, the mine manager, called Darrell Dewberry, the UMWA District No. 20 executive board member, and requested him to tell Johnson to report work for his next shift. Dewberry was further told to inform Johnson that Respondent would compensate him for all lost wages. Johnson was in fact so compensated.

The violation of Section 105(c), supra, initially occurred on November 23, when Parrott ordered Johnson to leave the work area. On Johnson's next regular shift on November 25, further

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[8] On November 22, 1991, Respondent was issued a Section 104(b), Order (No. 3805276), alleging excessive respirable dust on the No. 1 Longwall Section.

[9] According to Parrott, Zimmerman informed him that he was going to issue a citation and then told them they had 15 minutes to obey it or "it becomes a "b" order." (Tr. 472). According to Parrott at that point he then called Donnelly who told him to reinstate Johnson.

adverse action was taken against him when he was suspended for five days with intent to discharge. However, the following day, Johnson was reinstated and subsequently compensated for all lost wages. Hence, Johnson did not incur any damages as a consequence of the discriminatory action taken against him by Respondent.[10]

Based on all the above, I conclude that a penalty of $2,000 is appropriate for the Section 105(c) violation.

d. Relief

It is ordered as follows:

1. Respondent and its agents shall comply with Section 103(f), and shall cease and desist from seeking to intimidate Complainant and other members of the Health and Safety Committee from asserting rights under Section 103(f) supra.

2. Respondent shall post a notice on the mine bulletin board stating that it will not violate Section 105(c) supra, in the future.

3. Respondent shall expunge and destroy all reference, and copies of all documents, from any and all records of Respondent related to Complainant about the events and actions which took place from November 23 through November 26, 1991.

4. Respondent shall pay $2,000 within 30 days of this decision, as a civil penalty for the violation of Section 105(c), supra.

B. Violation of Section 103(f)

In essence, Section 103(f) of the Act provides for a representative of miners to accompany inspectors to aid in their inspection. The legislative history of Section 103(f) manifests the importance that Congress placed on this right as it found that such participation "will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness." Legislative History, supra, at 616-617. As set forth above, II(A)(3)(a)(1) infra, Zimmerman indicated in general, how a walkaround aids an inspection. When

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[10] I note Intervenor's concern that does not counteract the chilling effect of his suspension on miners who might be reluctant to voice safety concerns reasoning that if a Union walkaround can be fired for engaging in protected activities, then the operator would not hesitate to fire them for similarly engaging in protected activities. I find this argument to be too speculative.

617. As set forth above, II(A)(3)(a)(1) infra, Zimmerman indicated in general, how a walkaround aids an inspection. When Johnson was observed by Parrott he was not in the immediate vicinity of the inspectors. Parrott did not inquiry of him why he was not with the inspectors, or why he was located where he was. I found, above, II(A)(3)(a) infra, that Section 103(f) does not require a walkaround to be, at all times, in the immediate vicinity of the inspectors. I also found, above II(A)(3)(b) infra, that when Parrott relieved Johnson of his duties on November 23, he was motivated, in part, by Johnson's refusal to follow his order to stay with the inspectors. I thus, find Parrott's action interfered with Johnson right's as a walkaround under Section 103(f), and hence Section 103(f) was violated.

1. Penalty

I find that Johnson was reinstated as a walkaround after Zimmerman threatened Respondent with the issuance of a "b" order unless Johnson would be reinstated as a walkaround. This fact is important in assessing Respondent's good faith in abating the violation. Also considering Respondent's negligence as discussed above, II(A)(3)(c)(2) infra, I conclude that a penalty of $1000 is appropriate.

2. Relief

It is ordered that Respondent pay, within 30 days of this Decision, $1,000 as a civil penalty for the violation of Section 103(f), supra.

Avram Weisberger
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 150, 100 Centerview Drive, Chambers Building, Highpoint Office Center, Birmingham, Alabama 35203 (Certified Mail)

Barry A. Woodbrey, Jr., Esq., United Mine Workers of America, 900 Fifteenth Street, N.W., Washington, D.C. (Certified Mail)

R. Stanley Morrow, Esq., Jim Walter Resources, Inc., P.O. Box 133, Brookwood, AL 35444 (Certified Mail)

David M. Smith, Esq., and Mark Strength, Esq., Maynard, Cooper & Gale, 1901 Sixth Avenue, North, 2400 AmSouth, Harbert Plaza, Birmingham, Alabama 35203-2602 (Certified Mail)

/efw

# ADMINISTRATIVE LAW JUDGE ORDERS

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

DEC 21 1993

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|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. Lake 93-165 |
| | : | A.C. No. 33-00941-03757 |
| v. | : | |
| | : | Saginaw Mine |
| SAGINAW MINING COMPANY, Respondent | : | |

**ORDER DISAPPROVING SETTLEMENT**
**ORDER TO SUBMIT INFORMATION**

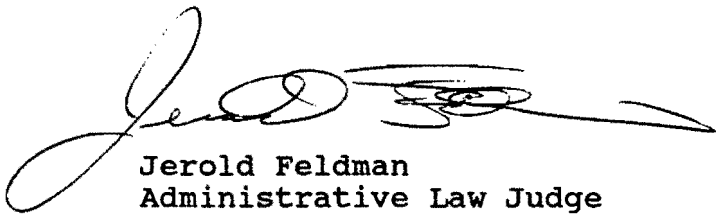
Before: Judge Feldman

This case is before me based upon a petition for assessment of civil penalties filed by the Secretary pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). 30 U.S.C. § 801 et seq. The Secretary has filed a motion for the approval of settlement concerning the three citations in issue. These citations concern a fatal roof-fall accident that occurred at the Saginaw Mine on October 23, 1991. A mine foreman suffered fatal injuries and a construction foreman suffered serious injuries as a result of this accident. The Secretary seeks my approval of reductions in the total proposed civil penalties from $21,000 to $15,000.

The motion before me contains no specific rationale or evidence of mitigating circumstances that would support the proposed reduction in civil penalties. Section 110(k), 30 U.S.C. § 820(k), requires Commission approval of any settlement agreement in this matter. The Commission must consider whether the terms of the proposed settlement are consistent with the six statutory criteria set forth in Section 110(i) of the Act, 30 U.S.C. 820(i). See Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

Based upon the absence of supporting information in the Secretary's motion, particularly in this case which involves a fatality, I am unable to conclude that the suggested penalty reduction is appropriate. Accordingly, **IT IS ORDERED** that the motion for approval for settlement **IS DENIED. IT IS FURTHER ORDERED** that the parties shall provide additional information specific to each citation supporting their motion for reduction

in civil penalty. The information provided should specifically address the mitigating circumstances, if any, that warrant a reduction in penalties. This information should be provided within 30 days of the date of this order. Failure to timely provide the requested information will result in the scheduling of this case for hearing.



Jerold Feldman
Administrative Law Judge

Distribution:

Maureen M. Cafferkey, Esq., Office of the Solicitor, U. S. Department of Labor, 881 Federal Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

George Basara, Esq., Polito & Smock, Four Gateway Center, Suite 400, Pittsburgh, PA 15222 (Certified Mail)

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