NOVEMBER 2002

THERE WERE NO COMMISSION DECISIONS OR ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

NOVEMBER 2002

No cases were filed in which Review was granted during the month of November:

No cases were filed in which Review was denied during the month of November:

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

November 5, 2002

RODNEY WOODRUFF, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2002-163-D
	:	DENV CD 2001-21
v.	:	
	:	Trans Alta Coal Mine
HOLLINGER CONSTRUCTION, INC., Respondent	:	

DECISION

Appearances: Rodney Woodruff, Chehalis, Washington, pro se;
Larry Slaughter, Hollinger Construction, Inc., Longview, Washington, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Rodney Woodruff against Hollinger Construction, Inc., ("Hollinger") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Woodruff alleges that he was forced to quit his job at Hollinger because he was not given a respirator to wear when he was using a torch to cut metal at the mine. An evidentiary hearing was held in Kelso, Washington. For the reasons set forth below, I find that Mr. Woodruff did not establish that Hollinger took any adverse action against him or that he was constructively discharged by Hollinger.

I. SUMMARY OF THE EVIDENCE AND FINDINGS OF FACT

Hollinger is a contractor that was hired by Trans Alta Centralia Mining to expand its heavy media plant (the "plant") at its surface coal mine in Lewis County, Washington. This expansion was a major project that involved about 220 Hollinger employees at its peak. Coal enters the heavy media plant after it has been mined and crushed for sorting and washing. Pipes carry water and reagents used in this process. Hollinger was hired to expand the plant and add new equipment. A major component of the job was to install new piping for the plant.

Hollinger hired pipefitters from the pipefitters union hall to install the new piping. There were about 25 pipefitters working on this project at its peak. The heavy media project

began in about April 2001 and was completed by the end of that year. Mr. Woodruff was hired on May 29, 2001 as a pipefitter through the union hall.

On or about June 12, 2001, Woodruff was assigned to remove nuts and bolts off flanges under a tank, remove the flanges, and weld on new flanges. The top had been removed from the tank, which was about 40 feet above the surface level. To perform this task, Woodruff and his partner, Mark Lyons, were required to work under the tank to remove the nuts, bolts, and flanges and inside the tank to weld on new flanges. They first installed scaffolding under the tank and set up their equipment. Their immediate supervisor was Willy Fick.

Mr. Woodruff decided that the best way to remove the old, rusty nuts and bolts was to cut them with his welding equipment. To do this he would use his welding equipment as a torch while wearing his welder's mask. Woodruff decided that he wanted to wear a respirator while performing this task because he feared that the fumes could be hazardous to his health. He went to a trailer on the site that functioned as Hollinger's tool room. Woodruff testified that he did not want some "high-tech monstrosity" that had to be fit-tested, but just something to "break the fumes." (Tr. 18). He described what he wanted as a "button respirator." Apparently, this type of device consists of a cloth particle mask that has a button on the front through which air is expelled. (Tr. 61). Woodruff was told by a Hollinger employee that the company did not have any respirators in the tool room but that particle masks were available.

Mr. Woodruff went to Mr. Fick to find out how he could get a respirator. According to Woodruff, Fick agreed that the bolts and flanges needed to be cut with a torch but Fick commented that nobody else was using a respirator at the plant. Woodruff responded by saying that maybe everyone else was wrong. Woodruff also testified that at some point in his discussions with Fick, Fick offered to let him perform other unspecified tasks at the project, but that he rejected the offer because he would need a respirator in any event. Woodruff testified that he was upset that Hollinger did not have respirators available for use.

Woodruff testified that when he did not hear back from Fick, he talked to John Lake, Hollinger's safety manager for the heavy media project. Woodruff testified that he left early that day, about 2:30 p.m., and he did not hear back from anyone about obtaining a respirator. Woodruff acknowledged that he had a conversation with Lake about respirators on June 12, but he could not remember the substance of this conversation. (Tr. 30-31, 41-42).

Woodruff arrived at work late on June 13, 2001, at about 9 am, rather than at the 7 am starting time. A meeting was underway concerning how the welding and pipefitting work was to be performed at the project. Woodruff talked to Ken Patrick, a union steward, about respirators soon after he arrived. According to Woodruff, Patrick told him that there were no respirators at the project but that he understood why he wanted one. (Tr. 32). Woodruff replied that if there are no respirators available at the plant, then he is leaving. Woodruff went to Fick, told him he was quitting, and filled out the paperwork to resign from his position.

There is no dispute that Woodruff quit and that he was not involuntarily terminated by Hollinger.

Woodruff testified that he quit because, after his conversation with Patrick, he was convinced that Hollinger was not going to provide him with a respirator. He said that Patrick was usually on top of things and that Patrick told him that Hollinger had a "big meeting" about it and that his safety concerns were not taken seriously by the company. (Tr. 35). Woodruff denied that anyone from Hollinger told him that he could be fit-tested for a respirator if he shaved off his beard. (Tr. 26, 28-29; Ex. C-6).

John Lake, Hollinger's safety manager for the heavy media project, does not dispute that Woodruff asked for a respirator on June 12. Lake testified that he told Fick that Hollinger will provide a respirator to any employee who asks for one but that the employee must be fit-tested first. Lake testified he told Woodruff on the afternoon of June 12 that if he returned to the project the next day with his beard shaved off, he would be fit-tested for a respirator. (Tr. 59-60). Lake stated that an employee with a beard cannot be fit-tested for a respirator.

Lake also testified that Hollinger must comply with safety and health regulations of the State of Washington. Most of the work that Hollinger performs is not regulated by the Department of Labor's Mine Safety and Health Administration ("MSHA") but is subject to the Washington Industrial Safety and Health Act. Lake testified that the company, in accordance with Washington regulations, requires an employee who will be wearing a respirator to first complete a medical evaluation form that is faxed to the medical clinic used by Hollinger to make sure that the employee does not suffer from any medical conditions that would prohibit the use of a respirator. Once the clinic has reviewed the form, the employee is fit-tested for a respirator. Lake testified that Hollinger does not "just pass out" respirators to employees but requires that they be fit-tested. He also testified that Hollinger's employees were advised of this policy during new employee orientation. (Tr. 64). Consequently, employees can pick up particle masks in the tool room, but not respirators.

Lake further testified that the fit-testing kit was at Hollinger's offices, that he retrieved this kit after work on June 12, and that he brought it to the plant on the June 13 so that Woodruff could be fit-tested if he still wanted to wear a respirator. (Tr. 64). Woodruff arrived at the plant with a beard on June 13. Lake stated that when he asked Fick about Woodruff on June 13, Fick told him that Woodruff had quit. Woodruff admits that he did not discuss the respirator issue with Lake on June 13. (Tr. 41).

Larry Slaughter also testified on behalf of Hollinger. He was Hollinger's project manager at the plant. He did not take this position until September 2001, after Woodruff had quit his job. He testified about Hollinger's general safety program. He testified that no respirator was actually needed because the nuts and bolts should have been removed using a wrench, not a torch, and that the area was well ventilated in any event. After Woodruff quit,

the nuts and bolts were removed by other employees using a wrench. The installation of new flanges, however, required welding. There is no evidence as to when this welding occurred.

Woodruff filed for unemployment compensation, which Hollinger did not contest. Because Woodruff quit his job, he had to demonstrate "good cause" for quitting in order to collect unemployment compensation. The administrative law judge for the State of Washington entered findings that Hollinger refused to provide a respirator for Woodruff. (Ex. C-1 ¶ 5). Slaughter testified that Hollinger did not appear at the unemployment compensation hearing or introduce any evidence in that case because of scheduling conflicts and because it did not see any reason to deny Woodruff unemployment compensation.

II. DISCUSSION WITH FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pausla* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

In this case, Mr. Woodruff does not deny that he quit his job, but asserts that he had no choice but to quit when the company refused to provide him with a respirator. Complaining about respiratory protection or asking for a respirator is activity that is protected under section 105(c) of the Mine Act. Thus, Hollinger was prohibited from terminating or otherwise

disciplining him when he asked for a respirator. There is no dispute, however, that Woodruff was not terminated or disciplined. A finding that an employer took adverse action against a miner engaged in protected activity is a necessary element of a complainant's case. Thus, unless Woodruff was constructively discharged, there was no adverse action and there can be no finding of discrimination. *Bryce Dolan v. F & E Erection Company*, 22 FMSHRC 171, 175 (Feb. 2000).

The Commission has determined that a "constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." *Id.* at 176. The "key inquiry" in a constructive discharge case is whether "intolerable conditions existed such that a reasonable miner would have felt compelled to resign." *Id.* "It is the operator's failure to reasonably remedy such conditions that converts the resignation into an adverse action." *Id* .

I find that Woodruff failed to establish that Hollinger created or maintained conditions that were so intolerable that a reasonable miner would have felt compelled to resign. I reach this conclusion for a number of reasons. First, although Woodruff communicated his desire to wear a respirator while using the welder as a cutting torch on June 12, he did not follow through on June 13. When he arrived at the plant at 9 a.m. on June 13, he asked the union steward about a respirator. When the union steward told Woodruff that he would not be issued a respirator, Woodruff quit. He admits that he did not ask Lake about the respirator and he could not remember what was said in his conversation with Fick. (Tr. 41, 43). He simply assumed that he would not be granted the right to wear a respirator, so he quit and left the plant.

I find John Lake's testimony in this case to be especially credible. Lake testified that he advised Woodruff on June 12 that the company did not just hand out respirators because each employee had to be fit-tested for a respirator. It is possible that Woodruff did not hear or comprehend all that was said in this conversation, but he did not take the opportunity to discuss the respirator issue with Lake on June 13 before he quit. Hollinger did not anticipate that anyone would be needing a respirator that early in the project, so the fit-testing equipment was at the company's office. I credit Lake's testimony that he went to the office after work on June 12, picked up the fit-testing equipment, and brought it to the plant on June 13.

Woodruff denied that anyone told him that he could be fit-tested for a respirator. He did acknowledge, however, that before he left work on June 12, Lake and Fick discussed his situation and that he may not have heard everything that was said. He testified that he could not "remember what our exchange of words [were] at that point." (Tr. 27). Woodruff testified, however, that nobody told him "face-to-face" that he could have a respirator. (Tr. 26). Assuming that to be the case, a reasonable miner would have asked Lake for a respirator on June 13 before he resigned from his job. Because Woodruff left work early on June 12 and arrived late on June 13, it was particularly unreasonable for him to rely solely on the statements

of a union steward that respirators were not available, without discussing it with someone from management.

Lake credibly testified that, although there had been a meeting on the morning of June 13 to discuss the welding project, the respirator issue was not discussed and, more importantly, Ken Patrick was not at the meeting. (Tr. 91-93). Woodruff's testimony on this issue was somewhat inconsistent. At first he stated that the meeting was not about respirators. (Tr. 31). Then Woodruff testified that Ken Patrick told him that, at a "big meeting" about welding, Hollinger management said that respirators would not be made available to employees. (Tr. 32-35). Although Woodruff believed that Patrick was "on top of" the respirator issue, Lake testified that John Mitchell, not Ken Patrick, was the safety and health representative for the pipefitters. (Tr. 35, 92).

Woodruff admits that when he initially raised the respirator issue, his supervisor offered him the opportunity to perform other tasks. Woodruff refused this offer because he assumed that he would need a respirator sooner or later. There is no doubt that Hollinger did not have respirators available at the plant at the time Woodruff first requested one, but a reasonable employee would have performed other work until respirators were provided. It is clear that he could have performed work that did not require the use of a respirator for at least a day or so until a respirator was provided. Indeed, after Woodruff quit, other Hollinger employees removed the same nuts and bolts that Woodruff was going to cut off with his welder by using wrenches. A respirator was not necessary for such work.

Slaughter and Lake credibly testified that Hollinger does not keep respirators lying around because a respirator is not as effective if it is not fit-tested. (Tr. 67, 84-85). This fact is especially true with an employee who has a beard, as Woodruff did on June 12 and 13 as well as at the hearing. I credit Lake's testimony that Hollinger requires an employee to obtain medical clearance and to be fit-tested before he can wear a respirator. It is quite clear from the evidence in this case that Hollinger would have allowed Woodruff to perform other work until these requirements were met.

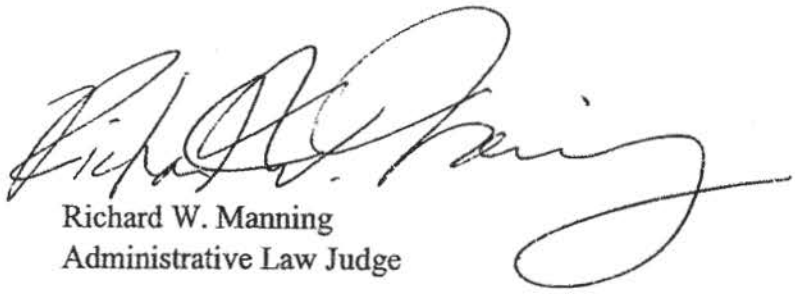
Hollinger did not believe that a respirator was necessary to perform the work that Woodruff was assigned. Hollinger management concluded that most of the work could be performed using wrenches rather than a welder and, more importantly, that the area was well ventilated. Woodruff stated that the investigator for MSHA agreed with Hollinger in this regard. (Tr. 68). Contrary to Woodruff's belief, the company's position that respirators were not required is consistent with its position that it would have fit-tested him for a respirator. Hollinger allows employees to be fitted for respirators in circumstances where its managers believe that respirators are not necessary. (Tr. 93). Later in the year, after Woodruff quit, the welders were fit-tested with respirators in preparation for the installation of the piping system. (Tr. 11, 37).

I hold that Mr. Woodruff failed to establish that Hollinger created or maintained conditions so intolerable that a reasonable miner (employee) would have felt compelled to resign. It is the employer's failure to reasonably remedy a safety or health hazard that converts an employee's resignation into an adverse action. Woodruff did not give Hollinger sufficient opportunity to provide a remedy. Woodruff relied exclusively on the statements of the union steward that respirators would not be provided when he decided to quit. As supported by the testimony presented by Hollinger, the proper and reasonable procedure would have been for Woodruff to discuss the issue with Lake on the morning of June 13 rather than simply quitting. The facts make clear that Hollinger would have provided a respirator once fit-testing requirements were met. Thus, there was no showing that Hollinger took adverse action against Woodruff.

At the hearing, Woodruff relied on the decision of the administrative law judge in the unemployment compensation proceeding before the Washington Employment Security Department to support his case. I admitted that decision as an exhibit in this case and accepted the findings therein as Woodruff's testimony. (Ex. C-1). I am not bound by the findings and conclusions in that decision, however, because standard of proof was different in the unemployment compensation case and because Hollinger did not contest the claim or present any evidence in that case.

III. ORDER

For the reasons set forth above, the discrimination complaint filed by Rodney Woodruff against Hollinger Construction, Inc., under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

November 12, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2002-127-M A.C. No. 13-02194-05501
v.	:	Docket No. CENT 2002-193-M A.C. No. 13-02194-05502
KNAAK SAND, Respondent	:	Docket No. CENT 2002-269-M A.C. No. 13-02194-05503 Knaak Sand

CONSOLIDATION ORDER
AND
DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
James V. Knaak, *pro se*, Eldon, Iowa, for the Respondent.

Before: Judge Feldman

The hearing in these proceedings was conducted in Ottumwa, Iowa, on October 16, 2002. At the hearing the parties moved to consolidate the civil penalty proceedings in Docket Nos. CENT 127-M and CENT 2002-193-M, that had previously been scheduled for hearing, with the civil penalty case in Docket No. CENT 2002-269-M. The parties' motion was granted on the record. Accordingly, these civil penalty matters **ARE CONSOLIDATED**.

These proceedings concern petitions for assessment of civil penalties filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Knaak Sand. The petitions seeks to impose a total civil penalty of $275.00 for five alleged violations of the mandatory safety standards in 30 C.F.R. Parts 50 and 56 of the Secretary's regulations governing surface mines. All of the alleged violations are characterized as non-significant and substantial

(non-S&S). A violation is non-S&S in nature if it is unlikely that the violation will be a factor that contributes to an illness or injury. *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

At the beginning of the hearing, the parties were advised that I would defer my ruling on the five citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. The parties waived the filing of briefs. (Tr. 41-43). This written decision formalizes the bench decision issued with respect to the contested citations. This decision contains an edited version of the bench decision issued at trial with added references to pertinent case law. The bench decision affirmed three of the five subject citations. A total civil penalty of $135.00 shall be imposed.

I. Pertinent Case Law and Penalty Criteria

The bench decision applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In determining the appropriate civil penalty, Section 110(i) provides, in pertinent part:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Knaak Sand, is a sole proprietorship operated by James V. Knaak. Knaak Sand is a small mine operator that is subject to the jurisdiction of the Mine Act. (Tr. 8-13). Knaak Sand has an excellent compliance history in that it has no history of previous violations. (Tr. 26). There is no evidence that the civil penalty proposed by the Secretary in these matters will effect Knaak Sand's ability to continue in business. Finally, the cited violations were not indicative of serious gravity and all of the cited conditions were abated in a timely manner.

II. Findings and Conclusions

James V. Knaak has operated Knaak Sand as a sole proprietorship since 1989. He has no employees. Knaak leases approximately 1000 feet of the river front along the Des Moines River in Eldon, Iowa, where he dredges and screens sand and gravel. The dredging equipment moves up and down the riverbank. The screening plant and stacker conveyor remain stationary. Knaak removes sand and gravel from the riverbed using a bucket that is attached to a link belt dragline. The bucket carries the sand to a sand bar that is located close to the riverbank. The material is raised from the sand bar onto the riverbank above by a Marion dragline. The extracted material is then transported by Hough front-end-loader to a hopper that feeds the material onto a conveyor to the screen plant. There the over-sized rock and the pea rock are separated from the sand which is further cleaned by a sand screw trough that utilizes water pumped from the river to separate debris. The screen plant and conveyor are powered by a generator. After cleaning, the sand is stockpiled by a stacker conveyor. The finished product ultimately is sold to customers and loaded into their haulage trucks.

The citations that are the subject of these proceedings were issued on December 5, 2001, by Mine Safety and Health Administration (MSHA) Inspector Christopher C. Willett. The citations were issued during the course of Willet's regular periodic inspection of the Knaak Sand facility. At the time of the inspection, Willett was accompanied by Gary Cook, a special investigator assigned to MSHA's Duluth, Minnesota office.

A. Docket No. CENT 2002-269-M

1. Citation No. 6152215

Upon arriving at the Knaak Sand facility on December 5, 2001, Willett asked Knaak if he recently had received first aid training. Knaak responded that he had not had any recent training. However, Knaak told Willett he had received first aid training in the past. (Tr. 27). Although Knaak worked alone, Willett believed it was important for Knaak to know how to render first aid in case a customer was injured on Knaak's premises. As a result of the information provided by Knaak, Willett issued Citation No. 6152215 alleging a violation of the mandatory safety standard in 30 C.F.R. § 56.18010 that requires the presence of a currently trained individual capable of performing first aid on all work shifts. Willett designated the alleged violation as non-S&S in nature because Knaak carried a cell phone and ambulance service was located in town only one mile from Knaak's sand facility.

Knaak's sand removal operations were suspended for the winter shortly after Willett's December inspection. Citation No. 6152215 was terminated the following Spring on April 30, 2002, after Willett returned to the facility and Knaak told him that he had read a Red Cross first aid book. Knaak was not required to receive any formal first aid training to terminate the citation.

Willett testified that he had no reason to believe that Knaak had not previously read the Red Cross first aid book. However, he opined the standard was violated because Knaak was not currently trained because he had not read the first aid book recently. Willett considered an individual not currently trained if he had not had first aid training in the previous three years. (Tr. 45).

Knaak testified that he has had extensive first aid training in the past. Knaak stated he first acquired knowledge of first aid when he was an Ottumwa police officer in 1969. He later obtained additional training when he worked for a quarry operator named Douds Stone in the 1980's. Knaak admitted that he hadn't had recent formal training. However, he testified that he is exposed to first aid issues everyday in that he thinks about first aid techniques that may become necessary during the performance of his daily work activities.

The bench decision noted, the Secretary has the burden of proving the alleged violation of a mandatory safety standard by a preponderance of the evidence. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152 (Nov. 1989). Section 56.18010 provides that first aid training shall be made available to all interested employees. As noted, Knaak has no employees. Therefore, he cannot designate anyone other than himself to be the on-site person capable of rendering first aid.

Knaak admits he has not received recent formal first aid training. However, Citation No. 6152215 did not require formal first aid training for termination of the citation. Rather, all that was required was that Knaak read first aid materials. Although he could not recall when he last read about first aid, Knaak indicated he had read such materials in the past. Willett stated the cited standard requiring current first aid training contemplates that such training must have occurred within the last three years. Thus, the Secretary must demonstrate, by a preponderance of the evidence, that Knaak had not read first aid publications within the last three years. On balance, the Secretary has failed to do so. **Accordingly, Citation No. 6152215 shall be vacated.** (Tr. 42-47).

B. Docket No. CENT 2002-127-M

1. Citation No. 6152216

Section 50.30(a), 30 C.F.R. § 50.30(a), of the Secretary's regulations requires surface mine operators to file quarterly employment reports reflecting each "individual working during any day of a calender quarter" on MSHA Form 7000-2. (Gov. Ex. 5). Section 50.30-1(g)(3), 30 C.F.R. § 5030-1(g)(3), provides the instructions for completing MSHA Form 7000-2. Section 50.30-1(g)(3) specifies that Form 7000-2 should reflect "the total hours worked by *all employees* during the quarter covered." (Gov. Ex. 5) (Emphasis added).

Willett determined Knaak was not filing quarterly reports because Knaak Sand was on the non-response list that was kept at MSHA's Denver office. During his December 5, 2001, inspection Willett asked Knaak why he hadn't filed the September 2001 quarterly employment report. Knaak responded that he believed he was not required to complete Form 7000-2 because he did not have any employees. (Tr. 49). Consequently, Willett issued Citation No. 6152216 citing a technical non-S&S violation of the quarterly reporting requirements. The citation was terminated on December 10, 2001, after Knaak filed Form 7000-2 for the September 2001 quarter.

Knaak testified he has filed quarterly reports on an irregular basis. He stated he filed the reports sporadically only when he was asked to file them by MSHA inspectors. Knaak testified:

> . . . I have filed this form many times, and the employees hours are zero. There is (sic) no employees' hours. Why would I be required to file a form when there is no information on that form except zero? . . . I had put down zero, zero, zero and signed it and sent it in. If that's good information. That's nothing but zeroes. They can't seem to understand that I have no employees' hours. This information means nothing. . . . I am not an employee. I own this thing. This equipment belongs to me. This ground belongs to me. (Tr. 54, 56).

Form 7002-2 explicitly requires the mine operator to report "Employee-Hours." (Gov. 5). While it is clear Knaak "works"at the mine, at the hearing the Secretary's counsel and Willett were uncertain regarding whether Knaak was an employee whose hours had to be reported.

In this regard, counsel stated, " I don't have a position whether he is an employee, but he is clearly a miner under the Act . . . ." (Tr. 57). With regard to how Form 7000-2 should be completed with respect to hours worked, Counsel stated "Mr Willett testified it should be [Mr. Knaak's] hours. I don't know. Perhaps it should be zero." (Tr.63). However, counsel asserted that a sole proprietorship without employees should not be exempt from the quarterly filing requirements. (Tr. 62). Willett testified Knaak is an employee who "pays himself." (Tr.60-61).

In the bench decision I emphasized that the issue before me is not whether MSHA has the authority to require Knaak to file a quarterly report, which unquestionably it does. Rather, the issue is whether Citation No. 6152216 should be affirmed. Although MSHA Form 7000-2 only requires the reporting of "employee hours" worked, regulations should be interpreted consistent with their purposes. *Island Creek Coal Company*, 20 FMSHRC 14, 22 (January 1998) (citations omitted).

I agree with the Secretary's interpretation of section 50.30(a) expressed at the hearing that, to maintain records related to mine facility activities and hours worked, even sole proprietorships without employees are required to file quarterly reports. However, when the Secretary seeks to impose a civil penalty based on its interpretation of a regulation, a separate inquiry arises concerning whether the mine operator had "fair notice" of the interpretation it is charged with violating. *Id.* at 24 citing *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). In *Island Creek* the Commission stated:

> "[D]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). An agency's interpretation may be "permissible" but nevertheless fail to provide the notice required under this principle of administrative law to support imposition of a civil sanction. *General Elec.*, 53 F. 3d at 1333-34. The Commission has not required that the operator receive actual notice of the Secretary's interpretation. Instead, the Commission uses an objective test, *i.e.*, "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). 20 FMSHRC at 24.

Applying the "reasonably prudent person" test, it has not been shown that Knaak knew, or should have known, that he was required to file quarterly reports under section 50.30(a) despite his lack of employees. I reach this conclusion based on MSHA's demonstrated uncertainty at the hearing concerning whether Knaak's work hours had to be reported. Accordingly, Knaak lacked the requisite fair notice necessary to satisfy due process. **Consequently, Citation No. 6152216 shall be vacated**. (Tr. 65-68).

2. Citation No. 6152217

During the course of Willett's December 5, 2001, inspection Willett asked Knaak if he had performed periodic continuity and resistance tests to ensure that the electrical equipment was properly grounded. Knaak assured Willett that the required testing had been performed.

However, Knaak did not have any written records identifying the equipment that had been tested or the dates of such tests. Consequently, Willett issued Citation No. 6152217 citing a violation of the mandatory safety standard in 30 C.F.R. § 56.12028. This standard requires that grounding systems shall be tested immediately after installation, repair or modification, and annually thereafter. The standard also requires that records of such testing shall be made available to MSHA inspectors upon request. Willett considered the violation to be a non-S&S paperwork violation that was attributable to a moderate degree of negligence. The Secretary seeks to impose a $55.00 civil penalty. The citation was terminated on December 10, 2001, after Knaak provided continuity and resistance testing records.

Knaak testified that his electric generator had been de-energized because it was not working. Knaak maintained that he had not installed repaired or modified any electrical equipment for a long time. However, Knaak admits that he did not keep resistance and continuity testing records.

Since Willett was unaware of any recent electrical installation, modification or repair, the missing testing records relate to the annual testing that is required by section 56.12028. It is unclear whether the missing records concern recent testing, or annual testing that was performed almost one year ago. It is also unclear whether the records were not kept or whether they were misplaced. However, the record keeping requirement of section 56.12028 is unambiguous. It is undisputed that Knaak failed to satisfy this requirement. Consequently, the Secretary has demonstrated the fact of the cited violation. Turning to the issue of negligence, the bench decision noted, under the Mine Act, operators are strictly liable for violations of the Secretary's safety standards without regard to fault. *Asarco, Inc.*, 8FMSHRC 1632 (Nov. 1986), *aff'd* 868 F. 2d 1195 (10th Cir. 1989). Here, I conclude Knaak's negligence was low given the fact that the dates and circumstances surrounding the unrecorded grounding tests are unknown. **Accordingly, a civil penalty of $40.00 is assessed for Citation No. 6152217.** (Tr. 78-79).

3. Citation No. 6152218

Section 56.15001, 30 C.F.R. § 56.15001, provides, in pertinent part, that "[a]dequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas." Knaak admits he did not have any conventional first aid materials at the mine facility. In this regard, Knaak testified that he had electrical tape and rags that he could use to provide emergency first aid. (Tr. 82). As a consequence of the undisputed lack of first aid materials at the Knaak Sand facility, Willett issued Citation No. 6152218 citing a violation of section 56.15001. The citation was terminated on December 10, 2001, after Willett determined that Knaak had brought a stretcher and blankets to the surface mine facility.

Although Knaak reportedly believes electrical tape and rags are a suitable alternative to blankets and bandages, the bench decision noted that no reasonable person would seriously assert that electrical tape and rags are adequate first aid materials. While I recognize the limited utility of a stretcher when Knaak was alone at the facility, it is possible that first aid materials, including a stretcher or blankets, could be required if a customer sustained injuries or

became ill. Accordingly, the fact of the violation has been demonstrated by the Secretary. Although Willett considered the lack of first aid materials to be serious, he nevertheless designated the violation as non-S&S because there was a medical facility with an ambulance located approximately one mile away. Willett attributed the violation to a moderate degree of negligence. In view of the fact that the circumstances that support the citation essentially are undisputed, **Citation No. 6152218 shall be affirmed and the $55.00 civil penalty proposed by the Secretary shall be imposed**. (Tr. 87-88).

C. Docket No. CENT 2002-193-M

1. Citation No. 6152219

During his December 5, 2001, inspection, Willett observed there was no berm along the riverbank for a distance of approximately 400 feet. There was an approximate ten foot drop-off from the riverbank to the river below. Most of this 400 foot long area was approximately 100 feet wide. Willett testified trucks normally use the roadway one at a time. Thus, the roadway is not used for two-way traffic. (Tr.99-100). Willett conceded an accident was not likely to occur along most areas of the riverbank where the travelable area was 100 feet wide. However, the area between the screen plant with its conveyors and the riverbank was 25 to 50 feet wide. The screen plant area was further narrowed by the stockpile where the distance between the stockpile and the riverbank ranged from 15 to 20 feet. Willett was concerned that a customer's haulage truck could roll over the riverbank while maneuvering to load at the stockpile. (Tr. 94). Under such circumstances the truck driver could sustain serious, if not fatal, injuries.

Consequently, Willett issued Citation No. 6152219 citing a violation of section 56.9300(a), 30 C.F.R. § 56.9300(a). This mandatory safety standard requires berms or guardrails to be constructed on banks of roadways where a drop-off exists of sufficient grade to cause a vehicle to overturn. Willett characterized the violation as non-S&S in nature because the majority of the cited 400 foot length of roadway was extremely wide with the exception of the area between the screen plant with its stockpile and the riverbank. (Tr.90). Willett attributed the violation to a moderate degree of negligence. The citation was terminated on January 16, 2002, after Willett observed that Knaak had installed a berm approximately two feet high for the entire 400 foot length along the riverbank. (Tr. 108).

Knaak testified that he leases an area along the Des Moines River that is 300 feet wide by 1000 feet long. Knaak conceded the need for a berm along the narrow portion of the roadway in that he admitted he had placed rocks and a berm along the riverbank that had washed away. (Tr. 94-95, 102, 107). Knaak does not contend that the rocks or berm had washed away recently. In this regard, he testified the river had not flooded since August 2001. (Tr. 128). Although Knaak acknowledged that a berm was necessary in some limited locations near the screen plant, he stated he was unable to maintain berms in the vicinity of the draglines because the draglines move laterally up and down the riverbank each day during the course of removing sand from the riverbed.

The bench decision noted that section 56.9300(a) requires berms on the banks of roadways where a drop-off could cause a vehicle to overturn. A violation is properly designated as significant and substantial in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the

violation will result in an injury or an illness of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); *National Gypsum*, 3 FMSHRC at 825. Ordinarily, the failure to maintain berms that are intended to prevent a vehicle from driving off an embankment is a significant and substantial violation, which, if uncorrected, is likely to contribute to an accident resulting in serious or fatal injuries. However, in this case, Willett characterized the violation as non-S&S because most of the cited 400 foot length along the riverbank cannot be considered a roadway because it is over 100 feet wide. Knaak has conceded, by virtue of his previous placement of rocks or berms along the riverbank near the screen plant, that the absence of protective measures in this area could cause a truck to overturn. Accordingly, the Secretary has demonstrated the fact of the violation.

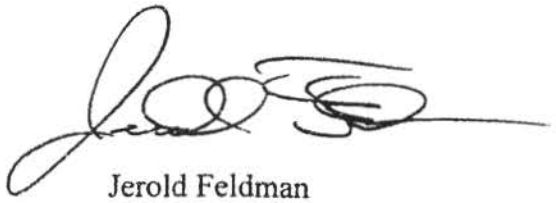
The Secretary has attributed this violation to a moderate degree of negligence. In view of the fact that the area that requires berms is considerably less than the 400 foot length cited in Citation No. 6152219, the degree of negligence associated with the violation is reduced from moderate to low. **Accordingly, Citation No. 6152219 is affirmed and a civil penalty of $40.00 shall be assessed.** (Tr. 130-32).

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation No. 6152215 in Docket No. CENT 2002-269-M, and Citation No. 6152216 in Docket No. CENT 2002-127-M, **ARE VACATED.**

IT IS FURTHER ORDERED that Citation Nos. 6152217 and 6152218 in Docket No. CENT 2002-127-M, and Citation No. 6152219 Docket No. CENT 2002-193-M, **ARE AFFIRMED.**

IT IS FURTHER ORDERED that Knaak Sand **shall pay a total civil penalty of $135.00** in satisfaction of Citation Nos. Citation Nos. 6152217, 6152218 and 6152219. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket Nos. CENT 2002-127-M, CENT 2002-193-M and CENT 2002-269-M **ARE DISMISSED.**



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

November 15, 2002

GUY ADAMS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. PENN 2002-37-D
v.	:	WILK CD 2001-03
	:	
CALVIN V. LENIG COAL	:	
PREPARATION AND SALES, INC.,	:	Calvin Lenig Coal Preparation
Respondent	:	Mine ID 36-07440

DECISION

Appearances: John B. Dougherty, Esq., Ira H. Weinstock, P.C., Harrisburg, Pennsylvania, for the Complainant;
Joseph C. Michetti, Esq., Dluge & Michetti, Trevorton, Pennsylvania, for the Respondent.

Before: Judge Feldman

This case is before me based upon a discrimination complaint filed with this Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(3). The complaint was filed by Guy Adams against the respondent, Calvin V. Lenig Coal Preparation and Sales, Inc. (Lenig).[1] This discrimination matter presents the issue of whether Adams' December 5, 2000, work refusal was protected activity under the Act, and if so, whether his decision to voluntarily quit his job constituted a constructive discharge. *Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 175-80 (Feb. 2000). This case was heard on July 9, 2002, in Harrisburg, Pennsylvania. The parties' post-hearing briefs are of record.

Despite his employment and on-the-job training since July 1994, Adams' discrimination complaint primarily is based on his failure to receive formal classroom new miner's training and annual refresher training with respect to his job as a laborer/weighmaster at Lenig's coal preparation facility. As result of his lack of formal training, Adams asserts his working conditions were intolerable and constituted a constructive discharge because he feared for his safety. Adams also vaguely asserts that he was concerned about a variety of other hazardous

[1] Adams' complaint which serves as the jurisdictional basis for this case was filed with the Secretary of Labor on April 18, 2001, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Adams' complaint was investigated by the Mine Safety and Health Administration (MSHA). On October 19, 2001, MSHA advised Adams that its investigation did not disclose any section 105(c) violations. On October 30, 2001, Adams filed his discrimination complaint with this Commission which is the subject of this proceeding.

conditions associated with his employment. However, there is no credible evidence that these concerns were reasonable, good faith concerns, or, that any such safety concerns were communicated by Adams to the respondent. For the reasons discussed below, Adams' discrimination complaint is dismissed.

I. Findings Of Fact

Calvin V. Lenig Coal Preparation and Sales, Inc., operates a coal preparation facility at a rural location at R.D. 1 in Shamokin, Pennsylvania. The facility, which is located adjacent to the Lenig home, has been operated as a "mom and pop" operation by the Lenig family since 1971. The business was operated as a sole proprietorship prior to the death of Calvin Lenig in October 1997. The business was incorporated in January 1998 following Lenig's death. Diann Lenig-Ferry, Calvin Lenig's widow, is the President of the corporation.[2] Vernon Zerby, Diann Lenig-Ferry's son-in-law, is the corporate Vice-President.

Mr. And Mrs. Lenig started their coal preparation and sales business by purchasing coal from Anthracite Industries, a local coal mine. Coal was delivered to the Lenig facility by truck. At the Lenig preparation plant, the raw coal was loaded onto a car carrier and transported to a shaker screen where it was sized and stockpiled. The Lenigs sold and delivered the finished product to local residents for household coal consumption. To improve the quality of the processed coal, the Lenigs built a hopper, a picking table and a conveyor belt. In the early years, the unprocessed coal would be dumped into the hopper for distribution onto the picking table where rock was removed by the Lenigs and their children. The conveyor then transported the coal to the crusher for final processing. Thereafter, a building was constructed next to the family residence to house a diester table on the lower level that separated finer coal into six different sized shakers. (Tr. 371).

In December 1989, MSHA approved a training plan for the Lenig preparation plant for the facility's two employees. The training plan required eight hours new miner training on site and 16 hours at the South Schuykill County Area Vocational-Technical School. (Comp. Ex. 1; 30 C.F.R. § 46.5). The training plan was approved by MSHA training specialist Joseph W. Fisher. The training plan also identified Diann Lenig as the individual qualified to teach first aid as well as on-site new miner and annual refresher training. (Comp. Ex 1).

In 1994, Lenig purchased and installed a heavy media system on the second floor of the processing building that improved the coal processing at the diester table by mechanically separating pea coal from nut coal and rock. The heavy media system processed coal from a slurry mixture by using conveyors, draglines and magnets to separate the coal. The system included two large vibrators that were installed on the side of the processing building.

When the heavy media system was installed, Calvin Lenig wanted to protect the supporting structure with Rustoleum paint. Lenig's health had been deteriorating since 1988

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[2] For ease of reference, Mrs. Lenig-Ferry will also be referred to in this decision as Mrs. Lenig. (Tr. 36).

when he suffered the first of a series of heart attacks. As a consequence of Lenig's impaired health, in July 1994 Lenig hired Guy Adams to paint the heavy media system. Adams was a neighborhood youth who lived in the area. After the heavy media became operational, Lenig continued to employ Adams as a general laborer and weighmaster and trained him to operate the heavy media system.

Operation of the media system included monitoring the slurry and overseeing the operating controls. In addition to working inside operating the heavy media, Adams occasionally worked outside where he operated the front-end loader to dump coal into the hopper or load trucks. Adams also operated the scale to weigh truckloads of coal. Operating the scale required puling a handle to load the coal into the truck before reading a digital scale to determine the size of the load.

Lenig, his wife and Adams were the only individuals working at the coal preparation plant from 1994 until Lenig's death in October 1997. Mrs. Lenig's son-in-law Vernon Zerby began working at the facility shortly after Calvin Lenig's death.

Mrs. Lenig testified that although she was familiar with the training plan that required formal new miner and refresher training, the only training provided to Adams was on-the-job training by her and her husband. In this regard, the respondent's counsel stipulated that no formal classroom new miner or refresher training was provided to Adams as required by the approved training plan and Part 46 of the Secretary's regulations governing surface facility training. (Tr. 136-38). Mrs. Lenig explained that Adams was familiar with the operation of the heavy media because he was present when the system was installed. She stated her husband taught Adams how to operate the heavy media system. Mrs. Lenig testified that she discussed first aid training with Adams during lunches that she provided to Adams in her house.

Mrs. Lenig admitted that she repeatedly asked Adams to sign MSHA training certificates that reflected that he had completed new miner training, refresher training and first aid training, when, in fact, no formal training had ever been provided. (Tr. 54-66; Comp. Ex. 2). The first time formal training was provided was after Mrs. Lenig was cited by MSHA for failing to provide formal miner training to her son-in-law and another employee in May 2001, approximately six months after Adams had quit his job. The citation was terminated after the employees received training at a local vocational school. It is not clear whether the citation was issued as a result of MSHA's investigation into Adams' April 2001 discrimination complaint.

Mrs. Lenig testified that Adams never complained to her about inadequate training, and to the best of her knowledge, he never complained to MSHA inspectors who periodically visited the facility. Adams does not contend that he ever complained to MSHA about a lack of training.

Adams continued to operate the heavy media equipment and the front end-loader during his tenure at the preparation plant from July 1994 until he quit in December 2000. During this period Adams did not sustain any job related injuries. Adams began operating the truck scale in March 1997. Adams was never injured while performing his weighmaster duties. As noted below, the only injury Adams alleges to have sustained at work was a swollen thumb in 1995.

In addition to Adams' purported concern about his lack of formal training, Adams testified about a variety of other alleged safety related concerns. Adams reported incidents of ball bearings and pipes "flying apart" in the summer of 1999. (Tr. 176-77). Adams also reported incidents of slurry spills that had to be cleaned up. In addition, Adams complained about an accident in 1995 when he allegedly fell off the conveyor and his "thumb swelled up" and he had "coal dirt in [his] elbow." (Tr. 190-91). Finally Adams complained about a reported silt dam overflow into a local creek that occurred in November 2000. This alleged incident posed no danger to Adams who was working on the second floor at the heavy media in the processing house. In short, it has neither been contended nor shown that Adams communicated any safety related concerns to the respondent in the weeks preceding his December 5, 2000, voluntary quit.

Adams testified that he quit his job after going to Mrs. Lenig's residence on the morning of December 5, 2000. Adams testified that he told Lenig that he "wasn't happy there no more." (Tr.204). He stated he told her was "trapped like a puppet." (Tr. 205). He explained he was unhappy because people came to his house when they needed coal and he was "on call all the time." (Tr. 205). He reportedly complained that there were no rules and that he didn't know "what was a hazard and what wasn't." (Tr. 205-06). Significantly, Adams admitted he did not explain to Mrs. Lenig what "problems" he reportedly was experiencing at work when he quit on December 5, 2000. (Tr. 246-47).

Mrs. Lenig and Zerby testified that Adams never complained about maintenance problems or inadequate training. (Tr. 377, 381, 400). Zerby testified ball bearings at the heavy media are in housings and are incapable of becoming hazardous projectiles. Zerby stated malfunctions of equipment were repaired quickly and spills were promptly cleaned to avoid disruptions in production.

The respondent asserts Adams quit his job because December is deer hunting season. Adams testified that, although he wanted to go hunting, he "wasn't going to quit his job because he couldn't go." ((Tr. 246). Despite his alleged safety concerns, Adams admitted he asked Mrs. Lenig to rehire him approximately two weeks after he had quit. (Tr. 261). Adams denied that he filed his April 2001 discrimination complaint because he was disappointed that his unemployment claim had been denied in January 2001. (Tr. 261).

II. Further Findings and Conclusions

a. Timeliness of Complaint

As a preliminary matter, section 105(c)(2) of the Mine Act requires a miner to file a discrimination complaint within 60 days of the alleged discrimination. In this case, Adams is alleging a protected work refusal on December 5, 2000. Consequently, the April 18, 2001, discrimination complaint Adams initially filed with MSHA is untimely. Accordingly, at the hearing the respondent moved to dismiss the complaint. (Tr. 254-58). Although I reserved judgement on this issue, at the hearing I noted the statutory 60 day filing period is not jurisdictional. (Tr. 256-57).

The Commission has consistently held that the time limits for filing discrimination complaints under section 105(c) of the Act may be extended in justifiable circumstances. The Commission has concluded that a miner's ignorance of the applicable time limits may excuse a late-filed discrimination complaint provided the respondent is not prejudiced by the delay. *Secy. o/b/o Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986). Here, the delay was approximately 60 days. Such a minimal delay does not materially prejudice the respondent by requiring it to defend a "stale" claim. Accordingly, the respondent's motion to dismiss on the grounds of untimeliness **IS DENIED**.

b. Adams' Work Refusal

The purpose of the Mine Act is to encourage mine operators and miners to work together to ensure a safe workplace. 30 U.S.C. § 801. In furtherance of this goal, section 105(c) of the Act provides, in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . subject to this Act 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 . . . .

Although section 105(c) of the Act grants miners the right to express safety and health related concerns, it does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the Courts have recognized the right to refuse to work in the face of perceived dangers. *See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519-21 (March 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (August 1990) (citations omitted). Thus, the issues in this matter are whether Adams' December 5, 2000, work refusal was protected by the Act, and if so, whether the working conditions that motivated his refusal to work were intolerable leaving Adams no alternative other than to quit his job.

In order to be protected, work refusals must be based on the miner's "good faith, reasonable belief in a hazardous condition." *Secretary of Labor on behalf of Robinette* v. *United Castle Coal* Co., 3 FMSHRC 803 (April 1981); *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette,* 3 FMSHRC at 807-12 (April 1981); *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). The purpose of the "good faith" belief requirement is to "remove from the Act's protection work refusals involving frauds or other forms of deception." *Robinette*, 3 FMSHRC at 810. Significantly, neither the Commission nor the Courts have extended the right of work refusal to encompass refusals based on violations of standards that do not involve hazardous conditions. *National Cement Company*, 16 FMSHRC 1595, 1599 (August 1994).

For a work refusal to be protected under the Mine Act, a miner should first communicate his safety concerns to some representative of the operator. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982). If the miner expresses a

reasonable, good faith fear concerning safety, the operator has a duty to address the perceived danger. *Metric Constructors, Inc.*, 6 FMSHRC at 230; *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534 (September 1983).

Communication of the safety related concern is an essential prerequisite for a protected work refusal because it provides the mine operator with an opportunity to address the miner's concerns in a way that should alleviate the miner's fears. *Gilbert*, 866 F.2d at 1441; *see also Bush*, 5 FMSHRC at 997-99; *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (February 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *Bush*, 5 FMSHRC at 998-99.

Thus, to establish a protective work refusal a miner must demonstrate: (1) a reasonably held good faith belief that he was exposed to a hazard; and, (2) that his concerns were not addressed despite having communicated them to the mine operator. In this case, Adams has demonstrated neither.

It is undisputed that Lenig's failure to provide new miner and annual refresher training was a violation of Part 46 of the Secretary's training regulations. However, as noted, work refusals based on violations of standards that do not involve hazardous conditions are not protected by the Act. *National Cement,* 16 FMSHRC at 1599. In this regard, it cannot seriously be argued that Adams' failure to receive formal training as a new-hire in July 1994 posed a hazard to Adams during the performance of his laborer and weighmaster duties in December 2000. Surely Adams was competent to perform his job duties given his more than six years of on-the-job work experience. Similarly, Adams' failure to receive formal annual refresher training, given the continuing performance of his duties, has not been shown to have posed a hazard to Adams. In fact, Adams has not asserted that his job training and experience did not provide him with the skills necessary to perform his job. Consequently, there is no basis for concluding that Adams' reported safety related concerns regarding his lack of formal training were reasonable.

While Adams' purported concerns about his lack of formal training do not provide a basis for his discrimination complaint, Adams was not without recourse if he truly feared for his safety. Under such circumstances, Adams could have brought his training concerns to the attention of MSHA officials. In such an event, his expressed concerns would be protected activity under section 105(c) of the Act. Moreover, MSHA would have ensured, as it has already done in this case, that the required Part 46 training was provided.

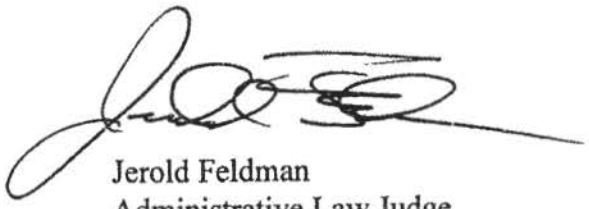
Adams remaining safety related complaints, such as flying pipes and ball bearings, are notably lacking in credibility. Moreover, they are too remote in time to have been a motivating factor in Adams' decision to terminate his employment. While the motivation for Adams' December 5, 2000, work refusal and voluntary quit is unclear and best known to Adams, what is clear is that his decision to leave was not related to any of the alleged safety concerns described by him in this proceeding. Moreover, assuming *arguendo*, Adams' had legitimate safety related concerns, there is no credible evidence that such concerns were communicated to the respondent.

Accordingly, Adams' December 5, 2000, work refusal and voluntary quit are not entitled to the statutory protection afforded to miners under section 105(c) of the Act.

Although I need not address the question of whether Adams' working conditions were intolerable given the unprotected nature of his work refusal, I note that a protected work refusal and intolerable working conditions are inexorably intertwined. If a miner has a reasonable, good faith belief that the continued performance of his job jeopardizes his health or safety, and his concerns are communicated to, and ignored by, his employer, the complaining miner's job conditions are intolerable. Under such circumstances the working conditions are intolerable because the mine operator failed to exercise reasonable attempts to alleviate the miner's fears regardless of the actual existence of the dreaded perceived hazard. On the other hand, if a miner genuinely is not worried about his health or safety, a constructive discharge normally will not lie.

ORDER

In view of the above, the discrimination complaint filed in Docket No. PENN 2002-37-D by Guy Adams against Calvin V. Lenig Coal Preparation and Sales, Inc., **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

November 19, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-65-M
Petitioner	:	A.C. No. 23-02207-05503
	:	
v.	:	Docket No. CENT 2002-184-M
	:	A.C. No. 23-02207-05505
NELSON BROTHERS QUARRIES,	:	
Respondent	:	Jasper Quarry

CONSOLIDATION ORDER
AND
DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Paul M. Nelson, President, Nelson Brothers Quarries, Jasper, Missouri, for the Respondent.

Before: Judge Feldman

The hearing in these proceedings was conducted in Springfield, Missouri on July 23, 2002. As a preliminary matter, at the hearing the Secretary, in the interest of judicial economy, moved to consolidate the civil penalty proceeding in Docket No. CENT 2002-65-M, that had previously been scheduled for hearing, with the civil penalty case in Docket No. CENT 2002-184-M. The Secretary's motion was granted on the record. Accordingly, these civil penalty matters **ARE CONSOLIDATED**.

These matters concern petitions for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Nelson Brothers Quarries (Nelson Brothers). The petitions seek to impose a total civil penalty of $1,798.00 for nine alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing metal and nonmetal surface mines that were cited by MSHA Inspector Wesley Lee Hackworth. Only one of the nine alleged violative conditions was characterized as significant and substantial (S&S) in nature. A violation is properly designated as S&S if it is reasonably likely that the hazard contributed to by the violation will result in an illness or injury of a reasonably serious nature. *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

The Secretary issued 104(b) withdrawal orders for eight of the nine cited violations in these proceedings. Section 104(a) of the Mine Act, 30 U.S.C. § 814(a), provides, in pertinent part, that a citation issued for an alleged violation of the Secretary's mandatory safety standards ". . . shall fix a reasonable time for the abatement of the [cited] violation." Section 104(b) of the Mine Act, 30 U.S.C. § 814(b), authorizes the Secretary to issue an order requiring the mine operator to immediately withdraw all persons affected by the cited violative condition if the condition is not totally abated within the time period originally set forth, or subsequently extended, by the Secretary.

I. Pertinent Penalty Criteria

This decision applies the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

> The Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Commission judges make *de novo* findings with respect to the penalty criteria in section 110(i) based on the record in adjudicatory proceedings, and they are not bound by the Secretary's proposed civil penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Separate civil penalties are not assessed for 104(b) withdrawal orders. Notwithstanding the *de novo* nature of these proceedings, it is worth noting that, in instances where 104(b) orders are issued, the Secretary does not apply the 30% proposed penalty reduction the operator ordinarily would receive for good faith abatement efforts.

Applying the general statutory penalty criteria, Nelson Brothers is a small mine operator with only two or three employees. The parties have stipulated that Nelson Brothers is subject to the jurisdiction of the Mine Act. (Joint Stip., Ex. 1; Tr. 8). Nelson Brothers has an excellent compliance history in that there is no evidence of any history of violations since operations began at the Jasper Quarry in July 2000. *Id.* It is not contended that the total $1,798.00 civil penalty proposed by the Secretary will negatively impact Nelson Brothers' ability to continue in business. The Secretary has stipulated that Nelson Brothers does not have a relevant history of failing to timely abate citations in that only one 104(b) order was issued during the previous 13 years at any of the mine facilities it has operated. (Tr. 86). The propriety of the 104(b) orders that are in issue in these matters is discussed below.

II. Contest of the 104(b) Orders

Section 105(d) of the Mine Act requires a mine operator to contest a citation or order within 30 days of its issuance. 30 U.S.C. § 815(d). Alternatively, section 105(a) permits an operator to postpone its contest of a citation or order until 30 days after the issuance of the proposed assessment of a civil penalty. 30 U.S.C. § 815(a). The Secretary asserts that 104(b) orders that are not immediately contested pursuant to section 105(d) are not subject to challenge in a civil penalty proceeding under 105(a) because they do not contain special findings. The term "special findings" refers to facts alleged in a citation or order under section 104(d) that could expose a mine operator to a possible withdrawal order before a penalty could be proposed. 30 U.S.C. § 814(d); *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.10 (Sept. 1987).

Commission Rule 20 and Commission Rule 21 implement the statutory provisions of sections 105(d) and (a), respectively. Commission Rule 20 requires an operator to file a notice of contest with the Secretary ". . . within 30 days of receipt by the operator of the contested citation or order. . . ." 29 C.F.R. §§ 2700.20(a)(iii) and 27.00.20(b). Alternatively, under Rule 21, the operator may decline to immediately contest a citation or order, but rather wait to challenge *"the fact of violation* or any special findings contained in the citation or order . . .," including assertions of S&S and unwarrantability. (Emphasis added). 29 C.F.R. § 2700.21.

Significantly, the Mine Act does not permit the Commission to stay the abatement requirements of a citation during litigation. 30 U.S.C. §§ 814(b) and (h), 815(b)(1)(A) and (B)(2). Thus, absent exceptional circumstances that may warrant an expedited hearing, the vast majority of 104(b) orders are abated long before a civil penalty is proposed. In such cases where abatement has occurred, the Commission long ago recognized that the operator may have no need to immediately file a notice of contest, and that it understandably may wait to challenge the citation or order until the civil penalty phase. *Energy Fuels Corporation*, 1 FMSHRC 299, 307 (May 1979). However, the Commission also noted, if continued abatement was expensive, an operator may desire an early hearing to contest the validity of the cited violation in an effort to eliminate the continued need for abatement. *Id.*

In *Energy Fuels*, the Secretary sought to preclude the operator, who had abated a citation that contained special findings of S&S and unwarrantable failure,[1] from immediately contesting the citation. *Id.* at 299. Ironically, in *Energy Fuels*, the Secretary urged the Commission that "sound adjudicative practice mandates that piecemeal adjudications be avoided, and that all issues in a case [should] be tried simultaneously." *Id.* at 306. Although *Energy Fuels,* held that an operator has a statutory right to an immediate contest, even if a citation has

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[1] The term "unwarrantable failure" is taken from section 104(d) of the Mine Act and refers to circumstances where a violation is attributable to a mine operator's serious lack of care. Generally, the Commission considers unwarrantable conduct to be aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987).

been abated, the Commission noted, absent a need for an immediate hearing, it is preferable for operators to postpone contests until a penalty is proposed. *Id.* at 308.

While *Energy Fuels* involved a contest of a citation with special findings, there is no substantive difference in the current proceedings with respect to the goal of avoiding inefficient and repetitive litigation. In fact, the Commission already has rejected the Secretary's proffered interpretation of section 105 that operators are statutorily required to file a contest rather than waiting to challenge citations or orders in a civil penalty proceeding. *Quinland Coals*, 9 FMSHRC at 1620. In *Quinland Coals* the Commission stated:

> The contest provisions of section 105 are an interrelated whole. We have consistently construed section 105 to encourage substantive review rather than to foreclose it. *See, e.g., Energy Fuels Corp.*, 1 FMSHRC 299, 309 (May 1979). The statutory scheme for review set forth in section 105 provides for an operator's contest of citations, orders, and proposed assessment of civil penalties. Generally, it affords the operator two avenues of review. Not only may the operator "contest" a citation or order within 30 days of receipt thereof, 30 U.S.C. § 815(d), but he also may initiate a contest following the Secretary's subsequent proposed assessment of a civil penalty within 30 days of the Secretary's notification of the penalty proposal. 30 U.S.C. § 815(a).
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> . . . .
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> There is no dispute that the fact of violation may be placed in issue by the operator in a civil penalty proceeding regardless of whether the operator had availed itself of the opportunity to contest the citation or order in which the allegation of violation is contained. The Commission also has held that the procedural propriety of the issuance of a withdrawal order does not affect the allegation of a violation contained in the order. *Island Creek Coal Co.*, 2 FMSHRC 279, 280 (February 1980); *Van Mulvehill Coal Co.*, 2 FMSHRC 283, 284 (February 1980). The allegation of violation survives and if proven must be subject to the assessment of a civil penalty. 30 U.S.C. § 820(a); *Tazco, Inc.*, 3 FMSHRC 1895, 1896-98 (August 1981); *See also Co-op Mining Co.*, 2 FMSHRC 3475, 3475-76 (December 1980). Similarly, since the alleged violation survives, findings incidental to the violation survive as well.

9 FMSHRC at 1620-22. (Footnote omitted).

In the final analysis, the subject withdrawal orders were issued pursuant to section 104 of the Mine Act. Commission Rule 21 broadly provides that the failure to contest an "order issued under section 104 of the Act" does not preclude challenging the order in a civil penalty proceeding. By its terms, Rule 21 does not limit its applicability only to certain orders issued pursuant to section 104. Rather, Rule 21 expressly permits challenge of an order where *the fact of violation* is questioned. The fact of a violation and findings incidental to the violation are fundamental issues in a 104(b) challenge. Obviously, if the underlying violation is not supported

by the facts, the 104(b) order lacks validity. Consequently, neither section 105 nor the Commission's Rules preclude Nelson Brothers' from challenging the validity of the subject orders in these civil penalty proceedings.

Notwithstanding the above discussion, the Secretary's assertion that a 104(b) challenge is precluded in a civil penalty proceeding is inconsistent with the Secretary's assessment procedures. The Proposed Assessments that serve as the basis for these proceedings, issued by MSHA's Office of Assessments, cite civil penalties for the subject eight combined 104(a) citations and 104(b) orders. The Proposed Assessments specify that there is a 30 day period to contest the proposed assessments. Nothing in the Proposed Assessments reflects that an operator is precluded from challenging the listed 104(b) orders.

III. Criteria for 104(b) Orders

Section 104(a) of the Mine Act provides that a citation issued by the Secretary ". . . shall fix a reasonable time for the abatement of the [cited] violation." 30 U.S.C. § 814(a). Section 104(b) provides that if on follow-up inspection the Secretary finds:

> (1) that a violation described in a citation issued pursuant to subsection (a) 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, [she] shall . . . promptly issue an order requiring the operator . . . to immediately cause all persons [affected] . . . to be withdrawn . . . until . . . the Secretary determines that such violation has been abated.

In contesting a 104(b) order, the operator may challenge the reasonableness of the time set for abatement, or, the Secretary's failure to extend that time. *Energy West Mining Company*, 18 FMSHRC 565, 568 (April 1996) (citations omitted). Neither the Mine Act nor the legislative history address the extent of an inspector's inquiry into whether an extension of the abatement period should be granted. *Id.* at 569. The Commission has recognized that whether or not to extend the time for abatement is committed to the Secretary's enforcement discretion. *Id.* Therefore, in reviewing an operator's challenge to the Secretary's failure to extend an abatement period, the proper inquiry is whether the mine inspector abused his discretion in issuing the 104(b) order. *Id.* In addressing this question, the Commission has noted that a considerable body of precedent, arising under the 1969 Coal Act and continuing under the 1977 Mine Act, has recognized that the degree of danger that any extension of abatement time would cause miners is a relevant factor in determining whether such an extension should have been granted. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (November 1989).

In these proceedings, seven of eight 104(b) withdrawal orders prosecuted by the Secretary were issued for failure to timely abate violations that were characterized as non-significant and substantial because they were not reasonably likely to contribute to an injury. In order to prevail,

in instances where the cited unabated violation lacks gravity, the Secretary must show a lack of diligence by the operator in attempting to meet the Secretary's abatement schedule. *Youghiogheny and Ohio Coal Company*, 8 FMSHRC 330, 339 (March 1986) (ALJ) *citing Consolidation Coal Company*, BARB 76-143 (1976).

Ordinarily, I would be reluctant to interfere with the Secretary's broad discretion to issue 104(b) orders because such orders are an effective method of achieving compliance. However, the harsh withdrawal sanction in 104(b) orders normally is reserved for instances where operators fail to timely abate hazardous conditions. When 104(b) orders casually are issued for non-hazardous conditions, as they were in seven instances in these proceedings, the effectiveness of such withdrawal orders is undermined.

Moreover, the initial two day abatement period established for abating the numerous citations issued by inspector Hackworth was illusory. Thus, the "extensions" of the initial two day termination period fixed in the 104(b) orders in issue were, in effect, the only termination dates established for abatement. While I recognize that Nelson Brothers could have demonstrated greater zeal in its efforts to abate some of the numerous cited non-hazardous conditions, the refusal to extend termination dates, even in instances where some abatement efforts had been performed, demonstrates a regrettable lack of restraint by the Secretary.

IV. Background

Nelson Brothers Quarries is a corporation that operates the Jasper Quarry, a small surface limestone facility located in Jasper, Missouri. Paul M. Nelson is the President and his brother John B. Nelson is the Vice-President.[2] The quarry operates only during daylight hours and there are no lights illuminating the facility. The quarry normally employs two or three people. Nelson and mine foreman Ralph Carter were the only individuals operating equipment at the quarry when the mine was inspected in March 2001. (Tr. 37). Hackworth testified there was a third employee who was sometimes at the quarry during subsequent inspections. (Tr. 18-19).

Limestone extraction is accomplished by blasting in the quarry pit. During March 2001, Nelson operated a 560 Hough pay loader to load the limestone removed from the pit into a haulage truck. Nelson then drove the haulage truck from the pit to the crusher where the material was crushed and screened. After the limestone was processed, Carter operated a Caterpillar 966B front-end loader to stockpile the finished product and load the product into customer trucks.

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[2] All references to "Nelson" in this decision concern Paul M. Nelson who represented the respondent in this matter and who was present during the subject inspections.

V. Findings and Conclusions

A. Docket No. CENT 2002-65-M

1. Citation No. 6205054 and 104(b) Order No. 6205167

Inspector Hackworth arrived at the Jasper Quarry on March 13, 2001, to perform a routine inspection. Hackworth was accompanied by Nelson. Hackworth inspected the Hough 560 pay loader that normally was operated by Nelson in the pit. Hackworth determined the brakes on the pay loader were functioning properly. However, Hackworth noted the back-up alarm did not operate when the vehicle was put in reverse. Nelson admitted that the back-up alarm had not been working for approximately one week. (Tr. 21). Nelson told Hackworth that he had purchased the necessary replacement switch required to activate the alarm although he had not yet installed it. (Tr.23).

As a result of Hackworth's observations, he issued Citation No. 6205054 citing a violation of the mandatory safety standard in 30 C.F.R. § 56.14132(a) that requires audible warning devices on mobile equipment to be maintained in functional condition. Hackworth attributed the inoperative warning device to a high degree of negligence because Nelson had not repaired the condition despite his awareness of it. Hackworth concluded the inoperative back-up alarm was not reasonably likely to contribute to an injury because Nelson used the loader to fill the haulage truck before he exited the loader to drive the truck to the crusher. Consequently, no one in the pit was exposed to being struck by the loader. Thus, Hackworth determined the cited condition was non-significant and substantial. (Tr. 25-26, 45).

Hackworth gave Nelson Brothers two days to repair the back-up alarm. Thus, Hackworth specified March 15, 2001, as the termination date for Citation No. 6205054. Hackworth returned to the mine on April 19, 2001, and found that the back-up alarm had not been repaired. Hackworth extended the termination date until April 26, 2001, because additional time was required to complete installation of the new switch. Installation involved rewiring from the switch to the audible warning horn located on the rear of the loader.

Hackworth returned to the quarry on May 16, 2001, and observed that, although Nelson had installed wiring from the switch to the vicinity of the horn at the back of the vehicle, the wiring remained unconnected and the horn still was not functional. Consequently, Hackworth issued 104(b) Order No. 6205167 requiring the immediate withdrawal from service of the Hough pay loader until the back-up alarm was repaired. Hackworth terminated the 104(b) order on May 30, 2001, after he determined the warning device had been repaired and the pay loader was returned to service.

With respect to the degree of negligence, Hackworth stated he considered the negligence to be high because the condition was permitted to exist for approximately one week. However,

as discussed above, Hackworth admitted there really was no hazard caused by the inoperable warning device because Nelson was alone in the pit. (Tr. 47).

In challenging the reasonableness of the abatement period, it is significant that Hackworth conceded he issued 26 citations March 13, 2001, and, that virtually all of the cited conditions initially had March 15, 2001, as the termination date. (Tr. 177). Most of the cited conditions were non-S&S in nature. Hackworth admitted a two day termination period may not have been realistic for all of the cited conditions, particularly when there were only two employees present at the mine site to correct the conditions. (Tr. 40-41). The Secretary seeks to minimize the apparent burden placed on Nelson Brothers to abate all the cited conditions within two days by explaining that: "*Only* twenty-two citations required that further action be taken to abate the violations (emphasis added)." (*Sec. Br.*, p.1).

Both Carter and Nelson testified that the repair delay occurred because the existing wiring kept shorting out the switch. To repair the condition a new switch had to be ordered and new wiring had to be installed. (Tr. 53-55, 62-63).

As a threshold matter, Nelson admits the back-up alarm on the Hough loader was inoperable. Consequently, the fact of the violation is not in dispute. With respect to the degree of negligence, the Secretary does not argue that the back-up alarm was inoperable for considerably more than the one week period asserted by Nelson Brothers. Thus, the question is whether Nelson's failure to attempt to make the necessary repair within one week, alone, constitutes high negligence.

In evaluating the degree of negligence, it is instructive to focus on the foreseeability and degree of risk posed to mine personnel by the violative conduct. Here, the Secretary concedes that the violation exposed no one to a risk of injury. Thus, the Secretary's reliance on Nelson Brothers' one week delay in addressing the inoperable back-up alarm does not provide a basis for demonstrating high negligence. Rather, the degree of negligence attributable to Nelson Brothers for this non-significant and substantial violation is moderate.

With respect to 104(b) Order No. 6205167, the initial March 15, 2001, termination date was illusory given the fact that it is undisputed that 22 citations had to be abated in two days by only two employees.[3] Thus, the April 26, 2001, extended termination date was, in reality, the initial termination date. Hackworth's failure to extend the termination date further must be viewed in the context of the non-hazardous nature of the violation, and Nelson Brothers' demonstrated efforts to rewire the back-up alarm switch. Under these circumstances, Hackworth's failure to grant a reasonable extension of the abatement period constitutes an abuse of discretion. **Accordingly,104(b) Order No. 6205167 shall be vacated.**

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[3] As noted at the hearing, I am not suggesting that having only two employees at a mine site justifies a delay in abating hazardous conditions. (Tr. 202-211). However, in the present case the vast majority of the cited conditions were considered to be non-hazardous.

In view of the above, **104(a) Citation No. 6205054 is affirmed**. The Secretary seeks to impose a civil penalty of $371.00 for the combined citation and 104(b) withdrawal order. As previously noted, the Secretary explained that when a 104(b) order is issued, the 30 % reduction in proposed civil penalty for good faith abatement is inapplicable. (Tr. 36-37). Considering the low gravity, moderate negligence, and the vacated 104(b) order, **a civil penalty of $75.00 shall be assessed for Citation No. 6205054**.

2. Citation No. 6205055 and 104(b) Order No. 6205168

Hackworth also noted that there were no windshield wipers or front lights on the Hough loader. He also determined that the air pressure gauge on the loader was inoperable. As a consequence of his observations, Hackworth issued Citation No. 6205055 citing a violation of the mandatory standard in 30 C.F.R. § 56.14100(b). This safety standard provides, in pertinent part, that: "*Defects . . . that affect safety* shall be corrected in a timely manner to prevent the creation of a hazard to persons." (Emphasis added). Hackworth concluded the cited conditions were unlikely to contribute to an injury. Thus, he characterized the violation as non-S&S in nature. Hackworth attributed the violation to a moderate degree of negligence.

Broadly worded safety standards such as section 56.14100(b) must apply to a myriad of circumstances. *Kerr McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981). That is why the applicability of such standards must be analyzed on a case-by-case basis. Here, as discussed below in the next citation, Hackworth cited the Hough loader for not having a windshield. Putting aside the issue of the propriety of a missing windshield, the fact remains that the failure to have windshield wipers on a vehicle that does not have a windshield is not a safety defect.

With respect to front headlights, it is undisputed that there are no lights installed at the Jasper Quarry and there are no mine operations at the mine site after dark. Front-end loaders normally travel at the quarry at speeds of approximately three to five miles per hour. (Tr. 128). Depending on their intended use, front-end loaders are not always manufactured and equipped with headlights. (Tr. 92-95; Resp. Exs. 1, 2). I recognize that it can be argued that headlights may be useful at dusk. However, headlights under these circumstances may encourage hazardous operation after quarry operations should cease because the quarry is not illuminated.

The Secretary, assuming that quarry operations would occur during extremely foggy conditions, asserts that such conditions also require headlights. However, given Nelson Brothers' limited daylight hours of operation, neither the remote possibility of severe fog enveloping the quarry, nor a total eclipse of the sun, provide an adequate basis for concluding an absence of front-end loader headlights is a "defect affecting safety" under section 56.14100(b). It should be noted, I am not suggesting that headlights on front-end loaders are not prudent. I simply am concluding that they are not required by the terms of section 56.14100(b). If the Secretary wishes to require that *all mobile equipment* must have operational headlights, even if the equipment is operated in surface mines only during daylight hours, she should do so in a notice and comment rule making proceeding.

Finally, Citation No. 6205055 cites an inoperable air pressure gauge. Nelson Brothers asserts without contradiction, that the brake system on the Hough loader is designed to release the parking brake at 45 PSI and release the service brake at 70 PSI. Thus, Nelson Brothers maintains that a sudden loss of air pressure would bring the loader to a halt. Consequently, Nelson Brothers argues that the inoperable air pressure gauge is not a defect affecting safety.

Unlike the absence of windshield wipers and headlights that are not necessary under the circumstances of this case, Nelson Brothers has failed to demonstrate that the air pressure gauge provided by the manufacturer is superfluous. Although the absence of an air pressure reading is unlikely to result in catastrophic brake failure, the Secretary has not characterized this condition as likely to contribute to injury. Although injury is an unlikely consequence, I cannot conclude that an inoperable air pressure gauge does not affect safety. However, the non-functioning air pressure gauge is indicative of low rather than moderate negligence. **Accordingly, Citation No. 6205055 is affirmed.**

Hackworth initially specified March 15, 2001, as the termination date for Citation No. 6205055. On April 19, 2001, Hackworth returned to the Jasper Quarry and determined although the air gauge had been repaired, additional time was required to complete the headlight and wiper installation. Consequently, Hackworth extended the termination date until April 26, 2001. When Hackworth returned on May 16, 2001, he found that, although wiring had been installed for headlights, the headlights still were not operational. As a result, Hackworth issued 104(b) Order No. 6205168 causing the Hough loader to immediately be removed from service. The order was terminated on May 30, 2001, when Hackworth determined the headlights and windshield wipers had been installed.

Nelson Brothers timely repaired the air pressure gauge. Since 104(b) Order No. 6205168 was issued for failure to timely abate the headlight and windshield conditions that have been determined not to be violations, **104(b) Order No. 6205168 shall be vacated**.

With respect to the appropriate civil penalty, the lack of gravity, low negligence and timely abatement of the defective air pressure gauge warrant reducing the $162.00 penalty initially proposed by the Secretary. **Accordingly, a civil penalty of $55.00 shall be assessed for Citation No. 6205055.**

3. Citation No. 6205056 and 104(b) Order No. 6205169

As noted above, Hackworth also issued Citation No. 6205056 for an alleged violation of 30 C.F.R. § 56.14103(b) because the front windshield and the left side door glass were missing from the Hough loader. Section 56.14103(b) provides:

> If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed.

> Damaged *windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions* which would affect the ability of the equipment operator to safely operate the equipment. (Emphasis added).

In apparent recognition of the condition precedent, *i.e.*, that windows must be installed if they expose the equipment operator to hazardous environmental conditions, Hackworth stated in Citation No. 6205056 that the missing windows ". . . created a hazard of the operator losing his hearing or having lung problems." (Gov. Ex. 4). Thus, Hackworth initially characterized the cited missing glass as S&S in nature. However, Citation No. 6205056 was subsequently modified on March 19, 2001, to reflect the cited condition was not S&S. In this regard, the modification noted: "The Citation is modified *to better reflect* the likelihood of injury." (Emphasis added). (Gov. Ex. 4, p.2).

Since the Secretary does not assert the absence of the windshield or left side glass was reasonably likely to contribute to injury or illness, there is an inadequate basis for concluding that Section 56.14103(b) requires installation of the missing glass. Accordingly, **Citation No. 6205056 shall be vacated**. Having vacated the citation, **104(b) Order No. 6205169** issued by Hackworth on May 16, 2001, for Nelson Brothers' alleged failure to timely abate Citation No. 6205056 **is also vacated**.

I note parenthetically, that although a need for a windshield has not been shown in these circumstances, the mandatory safety standard in 30 C.F.R. § 14106 requires front-end loaders to be equipped with protective structures if a loader operator is exposed to a hazard from falling objects. The Secretary has not alleged a falling object hazard in this case.

4. Citation No. 6205059 and 104(b) Order No. 6205170

On March 13, 2001, Hackworth also inspected the Caterpillar 966B front-end loader that was normally operated by foreman Ralph Carter to load limestone material into customer trucks. Hackworth noted the Caterpillar loader also did not have operational headlights. Consequently, Hackworth issued Citation No. 6205059 citing an alleged violation of section 56.14100(b). As previously noted, this safety standard requires defects that affect safety to be corrected in a timely manner. Hackworth characterized the cited condition as non-S&S and attributable to Nelson Brothers' moderate degree of negligence.

As discussed, the operative consideration is whether the absence of headlights on the Caterpillar loader constitutes a defect that affects safety. It is undisputed that the Jasper Quarry only operates during daylight hours. In this regard, 30 C.F.R. § 56.17001 requires illumination sufficient to provide safe working conditions of loading and dumping sites, as well as work areas. The Secretary does not contend that Nelson Brothers' reliance on natural daylight for illumination of the quarry violates the provisions of section 56.17001. Yet the Secretary maintains natural daylight is insufficient for safe operation of the front-end loader.

Consistent with the discussion concerning the absence of headlights on the Hough loader, the Secretary has failed to demonstrate, by a preponderance of the evidence, that the absence of headlights on the Caterpillar loader affects safety. **Accordingly, 104(a) Citation No. 6205059 and 104(b) Order No. 6205170** issued by Hackworth for Nelson Brothers' alleged failure to timely abate Citation No. 6205059 **are vacated**.

My conclusion that headlights are not required under these circumstances should be narrowly construed to apply to front-end loaders given their limited area of operation at very low speed. I am not suggesting that haulage trucks do not require headlights under the facts of this case.

5. Citation No. 6205060 and 104(b) Order No. 6205171

Hackworth also cited the Caterpillar loader in Citation No. 6205060 for an alleged violation of section 56.14103(b). Consistent with his actions in issuing Citation No. 6205056 for the missing glass on the Hough front-end loader, Hackworth initially characterized the missing side window of the Caterpillar loader as S&S because it was likely to contribute to the hearing loss or respiratory illness of the loader operator. However, the citation was later modified to non-S&S.

As previously discussed, to establish the fact of occurrence of a section 56.14103(b) violation, the Secretary must demonstrate that an absence of glass "expose[s] the equipment operator to hazardous environmental conditions." The Secretary does not assert that it is reasonably likely that such a hazard exists. **Accordingly, 104(a) Citation No. 6205060 and 104(b) Order No. 6205171** issued by Hackworth for Nelson Brothers' alleged failure to timely abate Citation No. 6205060 **are vacated**.

6. Citation No. 6205063 and 104(b) Order No. 6205172

During the course of his March 13, 2001, inspection, Hackworth noted that the Jasper Quarry lacked toilet facilities. Consequently, Hackworth issued Citation No. 6205063 citing a non-S&S violation of the mandatory standard in 30 C.F.R. 56.20008(a). This standard provides that "[t]oilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel." After setting March 13, 2001, as the initial termination date, Hackworth extended the termination date until April 26, 2001.

Nelson Brothers admits that it relied on toilet facilities located in the nearest town that is located approximately one mile from the quarry. To abate the citation Nelson brought an outhouse to the mine that was built by his uncle in 1956. (Tr. 179). However, the outhouse lacked a door. On April 19, 2001, noting the continued absence of an outhouse door, Hackworth extended the abatement period until April 26, 2001. When the door had not yet been installed on Hackworth's return to the quarry on May 16, 2001, predictably, Hackworth issued 104(b) Order

No. 6205172 against the offending outhouse. One shudders to imagine the enforcement actions necessary to ensure the immediate withdrawal of the persons affected by this "violative" condition.

I recognize there may be instances where toilet facility conditions raise serious enforcement concerns. However, this is not such an instance. Although this bathroom facility lacked a door, it was located in a secluded quarry, and, it primarily was used only by Carter and Nelson. The issuance of a 104(b) order in this circumstance is illustrative of the degree of discretion exercised on behalf of the Secretary in these matters. The withdrawal order ultimately was terminated on May 23, 2001, after Hackworth determined a door capable of being locked from the inside had been installed.

The Secretary proposed a civil penalty of $139.00. At the hearing, I urged the parties to settle this situation. Nelson agreed to pay a $55.00 civil penalty, and the Secretary mercifully agreed to withdraw the 104(b) order. (Tr. 178-83). Accordingly, pursuant to the parties' agreement, **Nelson Brothers shall pay a $55.00 civil penalty in satisfaction of Citation No. 6205063, and, 104(b) Order No. 6205172 is vacated**.

7. Citation No. 6205067 and 104(b) Order No. 6205173

Hackworth also inspected the shaker screen on March 13, 2001. The shaker screen is held in place by wedges that are driven into slotted bolts that cause tension against the screen. Hackworth noted that there was no working platform to service the shaker screen. To maintain or remove the screen, employees had to stand on ladders that were placed against the steel framework of the v-belt drive assembly and the steel frames of the discharge conveyors that carry material from underneath the shaker. Hackworth and Nelson estimated that the wedges and bolts that held the screen in place were located approximately ten to twelve feet above the ground. (Tr. 186-88).

As a result of Hackworth's observations, he issued Citation No. 6205067 citing a violation of the mandatory safety standard in 30 C.F.R. § 56.11001 that requires a safe means of access to all working places. Hackworth was concerned that relying on ladders to service the shaker screen was hazardous. Specifically, Hackworth was concerned about the potential instability caused by standing on a ladder while using both hands to remove wedges and bolts. In such event, a fall could occur resulting in serious or disabling injuries. Consequently, Hackworth designated the cited violation as significant and substantial. He concluded the cited condition was due to a moderate degree of negligence. Although significant construction was required to abate the violation, Hackworth allowed only three days, until March 16, 2001, for termination of the citation.

Hackworth returned to the quarry on April 19, 2001, at which time he noted that construction had begun on a work platform adjacent to the shaker screen. Nelson had begun welding supports to the steel framework that would serve as the support base for the platform.

However, Nelson requested additional time to complete construction because welding had been delayed by rainy conditions. Nelson provided written assurances that the shaker screen would not be accessed by ladder while construction continued. (Gov. Ex. 9). Accordingly, Hackworth extended the abatement period until April 26, 2001.

Upon Hackworth's return on May 16, 2001, he observed that five angle iron floor braces had been welded on both the north and south sides of the screen. Although a total of ten floor braces had been welded, welding was incomplete because only one welding pass had been made for each brace. Consequently, Hackworth issued 104(b) Order No. 6205173 requiring the immediate withdrawal of the shaker screen from service. Hackworth terminated the withdrawal order on May 30, 2001, after he determined that welding had been completed and walkways had been installed on the north and south sides of the screen.

Nelson Brothers does not dispute the fact of the cited violation. (*Resp. Br.*, p.3). However, it challenges the S&S designation because maintenance or replacement of the shaker screen was not expected to occur in the foreseeable future. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); *Cement Division, National Gypsum*, 3 FMSHRC at 825.

The Commission has explained an S&S finding requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). The Commission has also emphasized it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *Id.* at 1868. The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

The likelihood of injury posed by the violative condition must be viewed in the context of continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (August 1985). Consideration should be given to both the time the violative condition existed before the citation was issued and the time it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 12 (January 1986).

Maintenance requirements by nature are unpredictable and can arise at any time. In its post-hearing brief, Nelson Brothers admits walkways around the shaker screen were planned. However, installation of the walkways was delayed until financing was available and the time necessary to perform the installation could be found. (*Resp. Br.*, p.3). Under these circumstances, given the need for shaker screen service at any time in the context of ongoing

quarry operations, it is reasonably likely that a ladder accident will occur from elevations from as high as twelve feet, resulting in injuries of a reasonably serious nature. **Accordingly, Citation No. 6205067 citing a significant and substantial violation of the mandatory safety standard in 30 C.F.R. § 56.11001 is affirmed.**

With respect to 104(b) Order No. 6205173, as noted, the issue is whether Hackworth's failure to extend the abatement period beyond April 26, 2001, was an abuse of discretion. The initial termination date of March 16, 2001, provided Nelson Brothers with three days to abate the cited condition. Hackworth testified:

> Q. How much time did you give Mr. Nelson to terminate this particular citation?
>
> A. . . . I realized he would have to do quite a bit of work, so I give (sic) him three days. (Tr. 189).

As a preliminary matter, I do not view the initial March 16, 2001, termination date as reasonable given the welding and construction that was required to abate this condition, not to mention the numerous additional citations that required termination. Thus, the April 26, 2001, termination date must be considered as an initial termination dated. The focus shifts to whether it was an abuse of discretion not to grant an additional extension. As noted, resolving this question requires an analysis of the danger posed by granting an extension, and the degree of diligence demonstrated by Nelson Brothers in attempting to meet Hackworth's abatement schedule. *Clinchfield Coal Co.*, 11 FMSHRC at 2128; *Youghiogheny and Ohio Coal Co.*, 8 FMSHRC at 339.

With respect to the danger an extension of the abatement time would cause, Hackworth testified that the shaker screen was not changed very often, and, that changing screens "probably [is] not a real frequent thing . . . ." (Tr. 191, 200). Hackworth equated the need for changing the screen to the need for changing a car battery in that both are dictated by their frequency of use. (Tr. 199-200). To mitigate any danger, Hackworth testified that Nelson provided written assurances that, in the unlikely event the screen had to be changed before the work platform was installed, Nelson Brothers would use scaffolding rather than ladders to service the screen. (Tr.193; Gov. Ex. 9). Thus, on balance, the evidence does not reflect that a significant risk of injury would have been created by granting a reasonable extension of the April 26, 2001, termination date.

Regarding the diligence of abatement efforts, when Hackworth observed the shaker screen framework on April 19, 2001, Nelson had begun to weld angle irons to support the walkway. Hackworth gave Nelson an additional week to finish construction and established a termination date of April 26, 2001. When Hackworth returned on May 16, 2001, a total of ten floor braces had been welded to the steel structures on the north and south sides of the screen. (Gov. Ex. 10). However, final welding passes had not been completed on all of the brace supports and the platform and railing had not yet been installed. Hackworth refused to extend the termination date and issued 104(b) Order No. 6205173. The 104(b) order was terminated on May 30, 2001, after construction was completed.

As noted, the evidence does not reflect that a significant risk of injury would have been created by granting a reasonable extension of the April 26, 2001, termination date. Moreover, the welding of ten angle iron braces in preparation for installation of the required work platform evidenced a degree of diligence that was a significant good faith effort to achieve compliance. Thus, I cannot conclude the failure to grant a reasonable extension beyond the April 26, 2001 termination date was an exercise of sound discretion. **Accordingly, 104(b) Order No. 6205173 shall be vacated**.

The Secretary seeks to impose a $264.00 civil penalty for Citation No. 6205067. Given the Secretary's failure to demonstrate a lack of good faith abatement efforts as an aggravating factor, **a civil penalty of $185.00 shall be imposed for Citation No. 6205067**.

8. Citation No. 6205175

During Hackworth's follow-up inspection on May 16, 2001, he observed an oxygen cylinder that was stored at the north end of the office trailer. Hackworth noted that the cylinder did not have a cover or cap over the valve. Consequently, Hackworth issued Citation No. 6205175 citing a non-S&S violation of the mandatory standard in 30 C.F.R. § 56.16006. This standard provides: "*Valves on compressed gas cylinders* shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use." (Emphasis added). Hackworth attributed the alleged violation to a moderate degree of negligence.

Significantly, Citation No. 6205175 noted, "[t]he operator stated that the cylinder was empty." (Gov. 11). Hackworth testified he had no reason to doubt that the cylinder was, in fact, empty. (Tr. 230). The citation was terminated on May 23, 2001, after Hackworth determined that Nelson Brothers had returned the cited cylinder to the supplier. The Secretary seeks to impose a $55.00 civil penalty for this citation.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002) (Citations omitted). If however, a standard is ambiguous, deference is owed the Secretary's reasonable interpretation of the regulation. *Id.* Here, the term "compressed gas cylinder" in section 56.16006 is ambiguous and requires interpretation because it is not clear that this term includes an empty cylinder.

A regulation must be interpreted to harmonize with its intended purpose. *Id.* Hackworth testified that the regulatory purpose of requiring a valve cover in section 56.16006 is to prevent the valve assembly from becoming a projectile fueled by the sudden release of compressed gas if the gas cylinder was struck or fell. (Tr. 222-24). Thus, the intent of section 56.16006 is to require valve covers on cylinders containing compressed gas. The Secretary does not dispute that the cited cylinder was empty. Thus, there was no propellant in the cylinder. Consequently, the

Secretary's application of section 56.16006 to the facts of this case is impermissible because it does not further the regulation's intended purpose. Accordingly, the Secretary has failed to demonstrate the fact of the alleged violation. Therefore, **Citation No. 6205175 shall be vacated.**

B. Docket No. CENT 2002-184-M

1. Citation No. 6205075 and 104(b) Order No. 6205174

During Hackworth's March 13, 2001, inspection he noted that the entire length of the conveyor belt system at the crushing plant was not visible from the control booth because the shaker screen obscured a portion of the conveyor. As a conveyor start-up warning system, Nelson told Hackworth that he used visual hand signals to communicate to Carter in the control booth that the beltline was clear. (Tr. 238). Although Hackworth initially accepted this method of hand signaling, upon his return to his office Hackworth concluded this procedure did not satisfy the safety provisions of 30 C.F.R. § 56.14201(b). (Tr. 242). Consequently, Hackworth issued Citation No. 6205075. Section 56.14201(b) provides, in pertinent part:

> When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning *shall be installed* and operated to warn persons that the conveyor will be started." (Emphasis added).

Hackworth considered the violation to be non-S&S because, while not as effective as an audible warning system, he believed Nelson's visual warning system was a method of ensuring conveyor belt safety. (Tr. 255). Hackworth attributed the violation to a moderate degree of negligence. Hackworth established March 25, 2001, as the termination date. The Secretary seeks to impose a civil penalty of $215.00 for Citation No. 6205075.

Nelson does not deny that the entire conveyor was not visible from the control booth. Rather, Nelson maintains the hand signal warning method satisfies the cited safety standard. However, the hand signal method is ineffective if the control operator does not see anyone in the vicinity of the belt. Under such circumstances, the control operator may be unable to resist the temptation to start the belt because he is convinced no one is around. Under such circumstances, an individual in the belt area that is obscured from view by the shaker screen is at risk. The terms of section 56.14201(b) apply because it is undisputed that a portion of the belt is obstructed from view. Under such circumstances, the cited mandatory standard requires the *installation* of a warning system. Thus, Nelson's alternative hand signal system does not satisfy the standard. **Accordingly, Citation No. 6205075 shall be affirmed.**

Upon Hackworth's return to the quarry on April 19, 2001, he determined that a conveyor start-up warning system had still not been installed. Nelson informed Hackworth that he was having difficulty locating a 120 volt alarm to install at the beltline. Consequently, Hackworth extended the termination date until April 26, 2001. Hackworth returned to the quarry on May 16,

2001, and determined that no action had been taken to install the warning system. When asked why nothing had been done, Nelson informed Hackworth that he had forgotten about it. (Tr. 243; Gov. Ex 13). Consequently, on May 16, 2001, Hackworth issued 104(b) Order No. 6205174 that required the immediate suspension of conveyor operations. The order was terminated on May 23, 2001, after a 120 volt start-up alarm was installed at the crusher control booth.

As discussed, weighing the abuse of discretion issue with respect to a 104(b) withdrawal order requires considering whether an extension of the abatement period would expose personnel to risk, and whether the mine operator demonstrated diligence in attempting to meet the established abatement schedule.

In this case, there apparently was no significant danger posed by extending the abatement date past April 26, 2001, as Hackworth had designated the condition as non-S&S. However, here, unlike other 104(b) orders considered in this proceeding, Nelson Brothers failed to demonstrate any diligent efforts to comply to warrant an extension of the abatement period. Rather, it failed to timely install the audible warning system because Nelson forgot to do it. Under such circumstances, it cannot be said that Hackworth's failure to extend the abatement period beyond April 26, 2001, evidenced an abuse of discretion. **Accordingly, 104(b) Order No. 6205174 shall be affirmed. The $215.00 civil penalty proposed by the Secretary for Citation No. 6205075 shall be assessed.**

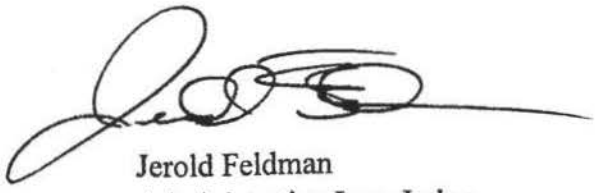
ORDER

Consistent with this Decision, **IT IS ORDERED** that 104(a) Citation Nos. 6205054, 6205055, 6205063 and 6205067 in Docket No. CENT 2002-65-M **ARE AFFIRMED**.

IT IS FURTHER ORDERED that 104(a) Citation Nos. 6205056, 6205059, 6205060 and 6205175, **AND**, 104(B) Order Nos. 6205167, 6205168, 6205169, 6205170, 6205171, 6205172 and 6205173 in Docket No. CENT 2002-65-M **ARE VACATED.**

IT IS FURTHER ORDERED that 104(a) Citation No. 6205075 and 104(b) Order No. 6205174 in Docket No. CENT 2002-184-M **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Nelson Brothers Quarry **shall pay a total civil penalty of $585.00** in satisfaction of 104(a) Citation Nos. 6205054, 6205055, 6205063 and 6205067 in Docket No. CENT 2002-65-M and 104(a) Citation No. 6205075 in Docket No. CENT 2002-184-M. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket Nos. CENT 2002-65-M and CENT 2002-184-M **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, NW
Suite 9500
Washington, DC 20001

November 22, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001- 416
Petitioner	:	A.C. No. 15-15851-03515
	:	
v.	:	
	:	
JORDAN CONSTRUCTION,	:	
Respondent	:	Mine No. 1

DECISION

Before: Judge Schroeder

Appearances: Brian Dougherty, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
Larry Jordan, Owner, Jordan, Construction Company, Box 230, Blaine, Kentucky, *pro se.*

This case is before me on a Petition by the Secretary to assess a Civil Penalty for alleged violations of mine safety regulations. The Petition alleges three violations for which the Secretary seeks a total Civil Penalty of $4,000.00. After prehearing development, a hearing was held in Prestonburg, Kentucky on March 12, 2002. An opportunity for post hearing written arguments was given to the parties. After careful study of the record and arguments, I have reached the factual and legal conclusions discussed below.

Issues Presented

The hearing held in this case concerned the alleged violation of safety regulations that are directed at the segment of the mining industry known as auger mining. This is an activity in which the extracted material is removed from the ground using a large rotating bit, usually driven horizontally from a prepared work site that appears similar to a strip mine. The regulations at issue are the following:

30 C.F.R. § 77.1503(b) **Overhangs**

> (b) No work shall be done under any overhang and, when a crew is engaged in connecting or disconnecting auger sections under a highwall, at least one person shall be assigned to observe the highwall for possible movement. (Emphasis added)

30 C.F.R. § 77.1000 **Ground Control Plan**

> Each operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability. (Emphasis added)

30 C.F.R. § 77.1006(b) **Escape**

> (b) Except as provided in paragraph (c) of this section, men shall not work between equipment and the highwall or spoil bank where the equipment may hinder escape from falls or slides. (Emphasis added)

> (c) Special safety precautions shall be taken when men are required to perform repair work between immobilized equipment and the highwall or spoil bank and such equipment may hinder escape from falls or slides. (Emphasis added)

The basic jurisdictional facts were stipulated at the hearing. Exhibit JX-1 My task now is to determine whether the Secretary has established in the record each of the elements of a violation of one or more of these regulations and if so, the appropriate penalty for each such violation. The issue of appropriate penalty amount raises the further issue of whether any particular penalty sum would make it impossible for the Respondent to continue in business as the Respondent now conducts it.

Factual Findings

Auger mining is generally defined as a mining method used by strip-mine operators when the overburden gets too thick to be removed economically. Large-diameter, spaced holes are drilled up to 200 feet into the coal bed by an auger. Like a bit used for drilling into wood, this consists of a cutting head with screw like extensions. As the auger turns, the head breaks the coal and the screw carriers the coal back into the open work area where it is loaded onto a truck or a conveyor. (See, Dictionary of Mining, Mineral and related terms, Department of the Interior)

Auger coal mining as conducted by the Respondent is quite similar to this general definition. Johnson Construction does not perform strip mining but has a long term relationship with a strip miner. Johnson Construction has one drilling machine which requires two people to operate. Johnson Construction has only two employees. The machine is not self propelled. It must be pulled from place to place to drill successive holes into a coal seam. When operating, the auger machine is typically located 10 to 15 feet from the highwall face. In this gap the coal is carried away from the hole and the machine helper works to add or remove segments of auger.

The auger process begins with removal of overburden to expose the coal seam and create a bench upon which the auger machine can be operated. Removal of the overburden typically involves drilling a line of holes to contain explosives to shatter the overburden. Testimony differed significantly on the capability of the drill rig used here. The MSHA Inspector, Ms. Wanda Hinkle, testified that the older model drill rig present could only drill perpendicular holes since it did not have hydraulic lifts to tilt the drill. Mr. Johnson testified the use of jacks and blocks enabled the drill to be offset a significant amount from the perpendicular. I credit Mr. Johnson's testimony because of his greater familiarity with the equipment and my experience with the extent to which field ingenuity can expand the rated capacity of equipment. This issue is of significance only because the ground control plan applicable to Johnson Construction required the highwall to be inclined at 95 degrees, apparently an attempt to reduce overhangs on the highwall. I will assume that the highwall observed by Ms. Hinkle during her inspection on November 14, 2000, was created using drilled shot holes placed at approximately 95 degrees.

Ms. Hinkle testified she arrived at the Johnson Construction site when no work was being performed. She observed the auger machine in place at the bottom of the highwall. On the wall she observed 18 drilled holes facing the machine and above these holes she observed an overhang that she considered dangerous. She did not observe any large quantity of fallen rock at the base of the highwall. She took the time to measure several of the web structures between the holes. Tr. 27 - 30.

Ms. Hinkle testified she observed an overhang of rocky materials about half way up the 40 foot highwall. The overhang seemed to her to protrude approximately 6 feet and to extend across the highwall approximately 40 feet. Tr. 41 - 44. This overhang was observed to be directly above approximately 18 auger holes drilled by Johnson Construction on a previous day. Ms. Hinkle used a tape to measure the horizontal extent of the holes and measured several of the webs between holes. She determined the 18 holes and the related 17 webs totaled 39 feet. She determined the webs varied from 3 to 8 inches. These measurements apparently prompted her to make reference to the Johnson Construction Ground Control Plan. Secretary's Exhibit 7.

Mr. Johnson's testimony on the presence of an overhang differed from Ms. Hinkle's testimony only as a matter of emphasis. He indicated the highwall had been drilled and excavated properly but that rock had fallen out of the highwall to create a cave inset into the highwall. Accepting the testimony of either witness it is undisputed that a substantial mass of material in the highwall had no vertical support, i.e the "cave" ceiling. Material above the work

area without vertical support is the practical definition of an overhang. I find as a matter of fact that a substantial overhang existed on the highwall at the place Johnson Construction conducted auger mining operations.

The presence of a substantial overhang on the highwall illustrates the importance of the spacing of auger holes under the Ground Control Plan.[1] As the auger holes are drilled, the vertical support for the highwall is gradually weakened. Unless the spacing of the holes leaves sufficient web material between the holes, the vertical support for the highwall will fail and portions of the wall will fall. The Ground Control Plan is Secretary's Exhibit 5. On page 6, the Plan clearly specifies that 26" holes will be drilled so as to assure a minimum of 8" of web material between holes. Mr. Johnson testified, and I accept this part of his testimony, that the vibration encountered in boring a hole means that a hole bored with a 26" bit will be significantly wider than 26". This enlargement of the auger hole will always be at the expense of the thickness of the web material. This means that each hole and web requires three feet of the highwall (26" + 8" + 2" = 36"). At this rate, 18 holes with related web would consume 54 feet, not the 39 feet measured by the MSHA inspector. This means one or both of two things would need to be true; (1) the holes are less than 26", or (2) the webs average less than 8" thick. Mr. Johnson testified that both things were true. In addition, Mr. Johnson testified the holes were drilled in a "fan" pattern rather than parallel to each other. Resp. Ex. G. This had the effect of making the web material thinner at the surface of the highwall but thickening farther into the highwall. The justification for the "fan" pattern was to reduce the number of times the auger machine would need to be moved rather than rotated. A consequence of this "rotation" of the auger would be that for some holes the machine would have a significant incline to the face of the highwall. Whether that incline would interfere with the opportunity to escape material falling from the highwall is the subject of another claim.

Mr. Johnson testified that at the time of the MSHA inspection his auger machine was running a 22" bit rather than a 26" bit. He produced sales receipts for materials used in the subsequent fabrication of a 26" bit. The sales receipts were dated after the MSHA inspection. The MSHA inspector had measured the thickness of some of the webs between holes but did not indicate she had measured the dimensions of the holes. The lack of direct evidence of the size of the holes makes it necessary to examine credibility of the competing witnesses.

The MSHA investigator relied upon the ground control plan for the size of the holes. Her concern was to determine whether the web material was adequate to support the highwall, particularly in light of her conclusion that the highwall contained an overhang. The industry standard for web thickness is expressed in terms of a percentage of the diameter of the adjacent

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[1]The Ground Control Plan appears to be a regulatory control document whose function and importance was largely lost as time past. Two entries on document are total duplication. The plan used by Johnson Construction was approved by MSHA almost 6 years prior to the events at issue here and never updated. Mr. Johnson testified many of the requirements of the plan had been long forgotten.

auger hole. The bigger the hole the thicker the web must be to meet the standard. To the contrary, Mr. Johnson is motivated to find smaller auger holes since that would only require thinner webs under the standard.

Mr. Johnson is caught on the horns of a real dilemma. He must argue he has complied with his Ground Control Plan. But his Plan contemplates the use of a 26" auger bit. If he contends he has used a 26" bit then his webs are clearly too thin. If I accept the testimony of the MSHA inspector on only the lateral measurement of 18 auger holes, i.e. 18 holes covered 39 feet, then I must conclude that even if Mr. Johnson was using a 22" bit then the average web dimension was less than 5". That probably means a few webs were more than 5" but many were not that thick. On both grounds I conclude the Respondent was not complying with the terms of the applicable Ground Control Plan. I believe the thinness of the webs at the entrance to the holes was probably a result of the "fan" drill method, an issue not addressed in the Ground Control Plan. Hence the webs were probably of adequate thickness within several feet of the highwall surface. But those few feet are critical for stability of the highwall.

On the issue of whether the placement of the auger machine constituted an unacceptable impairment of the ability of the crew to escape a rock fall from the highwall, the testimony was only ambiguous in small details. There is no dispute that the auger machine was placed so as to form an acute angle with the highwall to perform repair work on the machine in the space between the highwall and the machine. What is not clear is whether the repair work required the efforts of one person or two. This is important because the regulation contemplates that when such a machine placement is required, special safety precautions are required. These precautions can be as simple as detailing one person to watch the highwall for signs of impending falls. If Johnson Construction took such precautions, then no violation would have occurred. I find the record is insufficient to resolve that question.

Analysis

It is well settled that the Secretary has the initial burden of proof of each element of a claim for assessment of a Civil Penalty. Satisfaction of that burden of proof imposes upon the Respondent the obligation of going forward with evidence in rebuttal or face judgment in favor of the Secretary. Only when it has been determined that the Secretary has met that burden without persuasive rebuttal does it become necessary to determine an appropriate amount of Civil Penalty. With this framework in mind I will now consider each of the claims made by the Secretary.

1. Overhang under 30 C.F.R. § 77.1503(b)

As discussed above, I have found as a fact that an overhang existed in the highwall above the location at which Johnson Construction performed work as an auger miner. The Respondent has offered no evidence in rebuttal of this charge other than to question the seriousness of the risks involved for the two miners involved. The Secretary has proposed a Civil Penalty of

$1,000.00 for this violation because of the direct supervision of the work by the owner, a mine operator of significant experience.

Mr. Johnson testified he has operated his auger mining business in essentially the same way for 20 years without a serious accident. He appears to be more complacent with the risks than willful in his violations. The Civil Penalty imposed for this violation should be no more than the economic consequence necessary to call Mr. Johnson's attention to the need for compliance.

2. Failure to Follow Ground Control Plan under 30 C.F.R. § 77.1000

As discussed above, I have found as a fact that the Respondent failed to follow the approved Ground Control Plan in failing to allow adequate web material between holes. That the thickness of the web material several feet into the highwall may have satisfied applicable industry standards is not rebuttal to the claimed violation. Support of the highwall at the point of fracture for rock falls is the purpose and objective of the requirement for adequate web material. The Secretary has proposed a Civil Penalty of $1,500.00 for this violation because of the direct supervision of the work by the owner, a mine operator of significant experience.

Mr. Johnson argued this violation amounts to no more than "paper work" technicality. The consequences of this violation need to be severe enough to persuade Mr. Johnson that the regulatory requirement to plan his work and work to his plan is significant and substantial.

3. Failure to Secure Escape Route under 30 C.F.R. § 77.1006(b)

As discussed above, I found that the Secretary has failed to prove that the Respondent failed to take special precautions against hazards during maintenance work for which the auger machine might represent an impairment of escape routes from a rock fall. Because of this failure of proof, I will dismiss this claim.

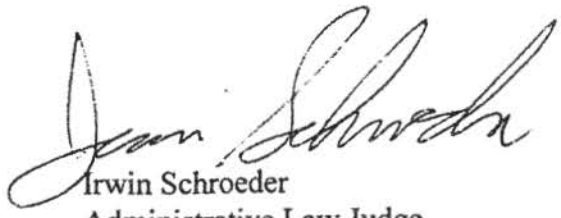
Amount of Civil Penalty

Jordon Construction is a very small mine operator. Testimony was undisputed that total net income from mine operations in the year 2000 was $37,500.00. Tr. 271. The Secretary has proposed Civil Penalties that total $2,500.00 for the two violations I have accepted. If I agreed with the Secretary's proposal, the Civil Penalty would represent almost seven percent of net income for that year. I consider that rate to be excessive. If applied to larger producers in this industry it would be considered confiscatory.

In that light I conclude that a Civil Penalty of $250.00 is appropriate for the Overhang violation and a Civil Penalty of $500.00 is appropriate for a violation of the Ground Control Plan requirement. This makes a total Civil Penalty in this case of $750.00.

ORDER

For the reasons stated above, I find the Respondent has violated mine safety regulations contained in 30 C.F.R. §§ 77.1000 and 77.1503(b) but has not been shown to have violated the mine safety regulation in 30 C.F.R. § 77.1006(b). Respondent is directed to pay a Civil Penalty of $750.00 for these violations within 40 days of the date of this Order.



Irwin Schroeder
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

November 25, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, ON BEHALF OF THOMAS SULLIVAN,	:	TEMPORARY REINSTATEMENT PROCEEDING
Complainant	:	Docket No. CENT 2003-43-DM
v.	:	SC-MD 03-02
	:	
3M COMPANY, INC., AND ITS SUCCESSORS,	:	3M Little Rock Granite Plant
Respondent	:	Mine ID 03-00426

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Jennine R. Lunceford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner,
Charles C. High, Jr., Esq., KEMP SMITH, P.C., El Paso, Texas, for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Thomas Sullivan pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(2). The application seeks an order requiring Respondent, 3M Company, Inc. ("3M"), to reinstate Sullivan as an employee, pending completion of a formal investigation and final decision on the merits of a discrimination complaint he has filed with the Mine Safety and Health Administration (MSHA). A hearing on the application was held in Little Rock, Arkansas, on November 15, 2002. For the reasons set forth below, I grant the application and order Sullivan's temporary reinstatement.

Summary of the Evidence

Thomas Sullivan had been employed by 3M since 1994 and worked in a number of jobs, most recently as an auxiliary utility operator on the third shift. His job duties were to operate heavy equipment, either a front end loader or haul truck, do general clean-up, and substitute for other workers who were absent. Immediately before his discharge, he was operating a haul truck removing a waste product called "donnafill" from the plant to one of two dump sites. He also was assigned to cover half of the shift of a first shift miner who was absent for several days. His normal working hours were from 11:00 p.m. until 7:00 a.m.. For approximately 10 days, he also worked four additional hours on overtime, from 7:00 a.m. to 11:00 a.m. Sullivan was regarded as a good worker and, generally, got along well with his immediate supervisors. He had had

some attendance problems that led to a three-day suspension prior to 2000, and had also received a suspension in 1996 for allegedly sleeping on the job. Minor disciplinary matters, such as those incidents, were to have been removed from his personnel file after one year. A union grievance filed regarding the sleeping allegation resulted in a settlement wherein 3M agreed to reduce the suspension from three to two days and to immediately remove the incident from Sullivan's personnel file. Ex. C-4. Otherwise, Sullivan's work record was good.

In the summer of 2002, Sullivan became a member of 3M's Safety Committee. As a member of the safety committee, he participated in monthly "in-house" safety inspections, in which a union member and management representative would tour a portion of the facility and note any potential health or safety hazards. The committee would continue to monitor remedial efforts with respect to such items. In the three to four month period prior to his discharge, there was an increase in the number of repetitive safety hazards being reported. In addition, 3M had been the subject of anonymous complaints to MSHA regarding alleged violations. Tr. 44, 56. Those complaints resulted in inspections and the issuance of citations. Tr. 154-57. In the summer of 2002, an MSHA inspection resulted in a closure order for a portion of 3M's plant. Tr. 256-57.

Sullivan became a steward for his labor union in 1995. He later was elected as an officer, and has served as Finance Secretary since 1998. He has participated in negotiations of the union's collective bargaining agreement. As a union officer, Sullivan was involved in any grievance that reached the forth stage of the contest process. He also was involved in resolving informal grievances that arose on the third shift, some involving safety issues. Approximately three or four weeks prior to his termination, he became involved in a dispute between management and another miner on the third shift. A screw conveyor had fallen onto the machine the miner was operating and wires were still attached to it. Management wanted the miner to continue to operate his machine until electricians on the first shift could disconnect the conveyor. The miner did not want to operate the machine until the electricity to the screw conveyor was disconnected. Sullivan was instrumental in having the conveyor disconnected before work proceeded. Tr. 20.

His involvement in union contract negotiations caused him to interact with 3M management. The union's contract expires on December 14, 2002. In preparation for negotiations, Sullivan requested certain information, by memorandum dated July 30, 2002, including "copies of the past three years dust monitoring data to include percent of free flowing crystalline silica content." Ex. C-2. On September 11, 2002, in advance of the specified due date of September 15, 2002, 3M responded to the request. However, the response did not include some of the requested data, referring to records of dust monitoring at the perimeter of the plant that were required as a result of litigation initiated by nearby residents. Tr. 111. The union officers did not believe that the response was complete and decided to file an unfair labor practice charge with the National Labor Relations Board. Tr. 54. No NLRB charge was filed prior to Sullivan's termination.

On Wednesday, September 18, 2002, Sullivan was working four hours of overtime on the first shift driving a haul truck dumping waste. Waste was dumped at one of two sites, referred to as "Freeman" and "Reynolds." Freeman was closer to the 3M plant, but was also being used by other truckers. Reynolds was a little farther away, across a state highway, but could be reached without encountering delays from truck traffic at the Freeman site. 3M had determined to discontinue using the Reynolds site and was preparing to environmentally reclaim the area. Truckloads of topsoil had been dumped there. It was to be spread out and seeded. There was no clear directive to the haul truck operators to cease using the Reynolds site. Sullivan testified, without contradiction, that he had not been instructed to stop using the Reynolds site. Tr. 24-25, 232. He had been working twelve hour shifts for several days and was tired. He began "nodding off" while driving to the Reynolds dump site and decided to take his morning break after dumping a load shortly after 9:00 a.m. He backed his truck up to a berm surrounding the site, dumped his load, rolled the cab's windows down, shut the engine off, laid down on his side in the cab of the truck and closed his eyes. He testified that he was not sleeping, and was monitoring radio communications.

About 9:30 a.m., Newell Page, the Crusher/Screener Superintendent, and Layland Watson, the Product Manager, traveled to the Reynold's dump site, ostensibly to ascertain the status of the topsoil/seeding. They testified that they observed Sullivan's truck and proceeded to investigate, wondering why it was there and whether the truck was disabled. Tr. 226-27. Page climbed a ladder and looked into the windshield. Watson climbed a ladder on the passenger side and looked into the cab through the window. They observed Sullivan, lying across the driver's and passenger's seats, with his eyes closed, apparently asleep. Tr. 227, 249. Watson and Page testified that they both called Sullivan's name twice and when he failed to respond Page rapped on the windshield and called out again, whereupon, Sullivan opened his eyes and stated "I wasn't sleeping," and, after seeing Watson, said "oh no" or "oh crap." Tr. 250. Watson told Sullivan to turn in his badge and go home. He rode back to the plant with Watson and Page. Sullivan was placed on suspension and told that he would be contacted regarding further action.

About 30 minutes after returning home, Sullivan received a call from Page requesting that he come back to the plant and submit a statement regarding the incident. He returned to the plant, and, with the assistance of a union representative, submitted a statement to 3M. Ex. R-4. He was then told that he would be contacted with further information regarding his status. The following Monday, September 23, 2002, he was discharged.

3M's "Guide to Conduct" provides that, among examples of misconduct that "may result in corrective action and/or disciplinary action up to and including discharge," is "sleeping on the job, or lying down for the purpose of rest in any area of the facility." Ex. R-1.

The disciplinary committee considered the available evidence and decided to recommend that Sullivan be discharged for sleeping on the job. Discharge decisions, unlike lesser disciplinary actions, are made at 3M's regional office in St. Paul, Minnesota. A memorandum regarding the disciplinary action, dated September 19, 2002, from Wayne Martin, 3M Little

Rock's Director of Human Resources, explained the committee's determination as follows:

> The committee discussed the issue at length. We considered similar situations and past practice. We discussed the seven tests of just cause. Because this was Tommy's second incident of sleeping on the job (10/18/96) and because this was a deliberate act of making a bed (stretched across both seats) for the purpose of sleeping on the job, the committee was unanimous in its decision to terminate his employment with 3M Little Rock.

Ex. C-5, R-7.

A memorandum, dated September 20, 2002, recommending the termination also referred to the 1996 incident and described the past practice as: "Research found several examples of employees found sleeping on the job. The results seem to point to a past practice of 3 day suspension for those who 'dozed off' while at their work stations and termination for those who made a deliberate effort to make a bed for the purpose of sleeping." Ex. C-6, R-8.

The research referred to in the memorandum was far from comprehensive. 3M did not maintain compilations of disciplinary actions in one location. Tr. 215. Its past practice of discipline in sleeping cases was determined by probing the recollections of the current members of the disciplinary committee, some of whom had limited tenure on the committee. Tr. 141, 163, 215. Subsequently, Martin prepared a table of discipline for sleeping incidents, purporting to include all such cases back to 1996. Tr. 139, 145. The table was not used in arriving at the recommendation to terminate Sullivan but, according to Martin, "most of the incidents reflected in the table had been discussed." Tr. 144. The table did not include several incidents that were the subject of testimony at the hearing. One individual was terminated in 1995 and two others, who received a written reprimand in 2001, were not included in the table.

Sullivan believed, based upon his knowledge of prior disciplinary actions involving allegations of sleeping on the job, that his conduct should result in no more than a three day suspension. Because of the expiration of time, and the settlement agreement entered into with respect to his 1996 sleeping incident, he believed that the current charge should have been considered a first offense and, if 3M had handled his case consistent with past practice, a less severe penalty would have resulted. Sullivan's personnel file apparently included a reference to the 1996 incident, but not a copy of the settlement agreement specifying that the incident be immediately removed from his file. A copy of the agreement was located in the union's files and was given to Martin, who allegedly remarked that "this should make a lot of difference." Tr. 61, 295.

Sullivan filed a complaint of discrimination with MSHA on September 27, 2002, alleging that he had been discharged for making safety complaints. He also filed an unfair labor practice charge with the NLRB, on September 24, 2002, alleging that his termination was in response to his union activities. That case remains pending.

Findings of Fact and Conclusions of Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination. Commission Rule 45(d), 29 C.F.R. § 2700.45(d), states:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

"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." *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Company,* 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (Aug. 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). The Secretary

has presented sufficient evidence on each of the elements of a *prima facie* case to establish that the claim, on the record of this temporary reinstatement proceeding, is not frivolous.

Sullivan's activities on the safety committee involved calling attention to potential health and safety hazards that required follow-up by 3M.[1] His union activities resulted in his becoming involved in informal grievances involving safety issues. In addition, his request for information regarding the monitoring of silica dust was related to his and other miners' health. The Secretary has presented substantial evidence that Sullivan engaged in protected activity through his position on the safety committee and as a union official. It is not disputed that Sullivan suffered adverse action, having been discharged on September 23, 2002.

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.* 3M had knowledge of Sullivan's ongoing protected activity, which occurred in relatively close proximity to the adverse action. There had been an increase in the number of hazards reported by the safety committee and a number of MSHA hazard investigations may have been attributable to the union's activities. Gatewood testified that on one of his visits to the plant to investigate a hazard complaint the plant manager remarked that the union was responsible for MSHA's increased activity at the plant. Tr. 154-55. There is also not insubstantial evidence that Sullivan may have received disparate treatment in the disciplinary process.

3M argues that Sullivan's termination was entirely consistent with its policy and past practice, and that the evidence does not raise a colorable claim that he was discharged for any reason other than that he was caught sleeping on the job. Although the issue of disparate treatment is usually encountered in addressing an operator's affirmative defense,[2] Respondent argues that there is no evidence that Sullivan was subjected to disparate treatment and that his discharge was entirely consistent with 3M's established policy. The difficulty with its position, however, is that there is considerable uncertainty that the "policy" articulated by Martin was as established as 3M claims. The September 20, 2002, memorandum, itself, describes the policy in equivocal terms. Martin acknowledged that he was unaware of any prior articulation of the policy in the terminology that he used. Tr. 212-13. It is also apparent that Martin's articulation

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[1] A complaint made to an operator or its agent of "an alleged danger or safety or health violation" is specifically described as protected activity in § 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1).

[2] *See Ankrom v. Wolcottville Sand & Gravel Corp.*, 22 FMSHRC 137, 141-42 (Feb. 2000).

of what the past practice "seemed to be," was not based upon a thorough or exhaustive investigation of prior disciplinary incidents over an extended period of time. Rather, he canvassed the current members of the disciplinary committee, relying upon their recollections to identify other such instances, which proved to be somewhat inaccurate. There remains some uncertainty regarding the factual circumstances of prior incidents and whether they, in fact, conform to the past practice, as articulated.

Sullivan, who had been involved in union grievances, testified that he was aware of more than a dozen sleeping incidents that were not on Martin's chart. Tr. 126-29. Gatewood also testified that, in the course of his ongoing investigation, he had acquired a considerable amount of information suggesting that Martin's articulation of the policy was not accurate. Tr. 164-66. He has requested additional documentation from 3M, but has not yet received it. Tr. 144-45.

3M's explanation for the reference to Sullivan's 1996 sleeping incident could also be viewed as suspect. Pursuant to the settlement agreement, reference to that incident should have been removed from his personnel file and should have played no part in the disciplinary process, as Martin acknowledged. Tr. 138. Watson testified that the incident was discussed by the disciplinary committee, but that there was agreement that it could not be considered. Tr. 258. Martin explained that it was referred to in the recommendation to the corporate office only to show that Sullivan was aware of the consequences of sleeping. Tr. 198. However, neither of the memoranda regarding the decision of the committee contain such a qualification, and there is no evidence that the erroneous inclusion of the reference or the terms of the settlement agreement were ever transmitted to the corporate decision-makers. Sullivan did not claim that he was unaware of 3M's written policy prohibiting sleeping. Ex. R-4. Gatewood also noted that there was never any question that Sullivan was aware that sleeping on the job could lead to discipline. Tr. 169. It would not be unreasonable to draw an inference that inclusion of the reference to the prior incident, and failure to notify the corporate office of the settlement agreement, were intended to assure favorable action on the recommendation and were motivated, at least in part, by Sullivan's protected activities.

On the other hand, 3M has presented evidence that it had a clear written policy that sleeping on the job could result in disciplinary action, and Sullivan candidly admitted that it would have been reasonable for Watson and Page to believe that he was sleeping. Tr. 102. The termination decision was made by an official in St. Paul, Minnesota, who was less familiar with Sullivan's protected activities. Despite the uncertainty about accuracy of Martin's articulation of 3M's past practice, other 3M employees who had made beds for the purpose of sleeping had been terminated for sleeping on the job, although the Secretary disputes that those individuals were situated similarly to Sullivan. These issues are hotly contested and cannot, and should not, be resolved at this stage of the proceedings. A comprehensive investigation of 3M's past practice in disciplinary actions involving allegations of sleeping on the job has not been completed. Nor is it clear, at this juncture, how much knowledge corporate decision maker(s) had of Sullivan's protected activities, what degree of independence they exercise on such recommendations, and whether the outcome would have been different had the reference to the 1996 incident not been

included in the recommendation. The investigation of Sullivan's MSHA complaint has not yet been concluded and no formal complaint of discrimination has been filed on his behalf. The purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Secretary establishes that the complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.*, 920 F.2d at 744. Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision, since he retains the services of the employee until a final decision on the merits is rendered. *Id.* 920 F.2d at 748, n.11.

I find that there is reasonable cause to believe that Sullivan may have been discriminated against as alleged in his complaint, and conclude that the Application for Temporary Reinstatement has not been frivolously brought.

ORDER

The Application for Temporary Reinstatement is **GRANTED**. 3M Company, Inc. is **ORDERED TO REINSTATE** Sullivan to the position that he held prior to September 23, 2002, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.

Michael E. Zielinski
Administrative Law Judge

Distribution:(Certified Mail & Facsimile)

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

November 26, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2001-370-M A.C. No. 41-00071-005504
v.	:	
LEXICON, INC., d/b/a SCHUECK STEEL COMPANY Respondent	:	Docket No. CENT 2002-49-M A.C. No. 41-00071-05505 3NC
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT-2002-13-M A.C. No. 41-00071-05501 3NC
v.	:	
LEXICON, INC., Respondent	:	Midlothian Quarry and Plant

DECISION

Appearances: Brian A. Duncan, Esq., and Madeleine T. Le, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Alicia Sienne Voltmer, Esq., and David P. Poole, Esq., Hunton & Williams, Dallas, Texas, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Lexicon, Inc., d/b/a Schueck Steel Company (Schueck), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege three violations of the Secretary's mandatory health and safety standards and seek penalties of $70,000.00. A hearing was held in Dallas, Texas. For the reasons set forth below, I affirm the citations, as modified, and assess a civil penalty of $43,000.00.

Procedural Matters

At the beginning of the hearing, the Respondent's Motion for Partial Summary Decision was denied. (Tr. 5-9.) In addition, the Secretary's motion to amend the name of the Respondent in Docket Nos. CENT 2001-370-M and CENT 2002-49-M to be *Lexicon, Inc., d/b/a Schueck Steel Company* rather than *Schueck Steel Company* was granted over the Respondent's objection. (Tr. 9-13.) Finally, the Secretary's unopposed motion to dismiss Docket No. CENT 2002-13-M, because the sole citation in that proceeding had been vacated, was granted. (Tr. 13-16.) Consequently, this decision addresses only Citation No. 7889352 in Docket No. CENT 2001-370-M and Citation Nos. 7899407 and 7899408 in Docket No. CENT 2002-49-M.

Background

TXI operates the Midlothian Quarry and Plant in Midlothian, Texas. Limestone is mined from the open pit quarry and then processed at the plant into cement products. In 2000, TXI was having major construction performed at the plant. TIC-The Industrial Company of Steamboat Springs was the general contractor and Schueck, a steel fabricator, was one of 12 subcontractors performing work at the facility. Among other projects, Schueck was constructing the steel structure for a finishing mill.

On June 23, 2000, Mario Lopez Albarran, a Schueck employee, stepped on an unsecured piece of steel grating, on what was known as the "719 level" of the mill, and fell through the floor almost 50 feet to his death. MSHA began its investigation of the accident that same day.

MSHA Field Office Supervisor James Thomas was assigned as head of the investigation team. The rest of the team was made up of Special Investigator Fred L. Gatewood, George Gardner, an engineer, and Hilario Palacios, a training specialist. Prior to the investigators arrival at the site, assistant district manager Michael Davis issued an oral 103(k) order, 30 U.S.C. § 813(k), over the telephone to Dale Hanks, TXI's Safety Manager.[1] On his arrival, Inspector Gatewood issued the 103(k) order in writing. The order, No. 7889351, stated that:

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[1] Section 103(k) provides that:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

> A fatal accident occurred at the Finish Mill #6 area of the plant. An employee of contractor Schueck Steel fell about 40 feet from an upper level deck to the concrete floor at ground level. This order is issued to assure the safety of all persons in the immediate area of this accident, including both the upper level deck and the concrete floor beneath it. The operator shall obtain approval from MSHA before resuming activity of any kind in these areas.

(Govt. Ex. 4.)

On June 25, 2000, Steve Dineen, Lexicon, Inc.'s, Safety Director, and Scotty Burgess, Schueck's onsite Safety Coordinator, spent about an hour and fifteen minutes on the 719 level. Believing that this violated the 103(k) order, Inspector Gatewood issued Citation No. 7889352 to Schueck on June 26, 2000.

Following the conclusion of the investigation, Inspector Gatewood issued two additional citations to Schueck on September 6, 2000. Citation No. 7899407 alleged a violation of section 56.15005 of the Secretary's regulations, 30 C.F.R. § 56.15005, for failing to use a safety belt and lines. Citation No. 7899408 charged a violation of section 56.20011, 30 C.F.R. § 56.20011, because the area of the unsecured grating was neither barricaded nor posted with warning signs.

These three citations were contested at the hearing. In addition, the parties have filed Proposed Findings of Fact and Conclusions of Law setting out their positions. The citations are discussed below, *seriatim*.

Findings of Fact and Conclusions of Law

Citation No. 7899407

This citation alleges a violation of section 56.15005 because: "A fatal accident occurred at this operation on June 23, 2000 when a contractor's employee fell 50 feet after stepping on an unsecured floor grating at 719 level of the new finish mill. The victim was not tied off with a safety belt and line." (Govt. Ex. 1.) Section 56.15005 requires that: "Safety belts and lines shall be worn when persons work where there is a danger of falling . . . ." With regard to this violation, the parties have stipulated that: "Mario Lopez Albarran was not tied off when he fell from the 719 level." (Tr. 18.) In addition to the stipulation, the evidence is undisputed that Albarran was wearing a safety harness, but not tied-off with a safety line.

The Act provides that an operator is liable for the violative acts of its employees. *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991). Therefore, I conclude that Schueck violated section 56.15005 as alleged.

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

There is little doubt that this violation was S&S. The only argument that Respondent makes on this issue is the conclusory statement that "the complete lack of negligence in connection with this citation precludes a finding that the alleged violation was 'significant and substantial.'" (Resp. Br. at 20.) As is set out above, however, negligence is not one of the *Mathies* criteria.

Turning to those criteria, I make the following findings: (1) there is a violation of a safety standard, section 56.15005; (2) failing to tie off with a safety line where there is a danger of falling contributes to the danger of falling; (3) there is a reasonable likelihood one will fall from an area which is not otherwise protected against falling and that falling will result in an injury; and (4) there is a reasonable likelihood that the injury will be reasonably serious in nature. Clearly, the failure to tie-off was a significant contributing cause to the fatal accident, making it "significant and substantial." *Walker Stone Co., Inc.*, 19 FMSHRC 48, 53 (January 1997). Accordingly, I so conclude.

Negligence

Inspector Gatewood determined that this violation was the result of "high" negligence on the part of the operator. Undoubtedly, Albarran was highly negligent. However, as the Respondent has noted, the Commission has long held that the negligence of a "rank-and-file" miner cannot be imputed to the operator for penalty assessment purposes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982) (*SOCCO*). Rather, to find the operator negligent, "where a rank-and-file employee has violated the Act [or the Secretary's regulations], *the operator's* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Whayne Supply Co.*, 19 FMSHRC 447, 452-53 (March 1997); *SOCCO* at 1464.

The Secretary argues, with regard to this issue, that: (1) Joe Rodriguez, the crew foreman had not been trained as a foreman and, as a result, Schueck's tie-off policy was not enforced; (2) Employees were rarely, if ever, monitored for safety compliance; (3) Albarran was observed not being tied-off and Rodriguez did nothing about it; and (4) It was impossible for employees to stay tied-off all of the time because of the length of their lanyards and the location of the safety lines. Significantly, the Secretary has failed to cite evidence in the record to support any of these assertions. Perhaps this is because the record establishes that Schueck did take reasonable steps to prevent Albarran's conduct.

All of the Schueck management personnel, Dineen, Burgess, Kelly McGill (Site Manager) and Rodriguez, testified that: (1) Schueck had a written fall protection program (Resp. Ex. J); (2) there was a "one hundred percent" tie off policy at the finish mill; (3) the policy stressed during the initial training given to miners at the site and reinforced in weekly and daily safety meetings; (4) supervisors, particularly Burgess, were continually on the look-out to make sure the men were tied-off; (5) there were signs on the site reminding employees that the project was a one hundred percent tie-off area; (6) it was well known that being caught not tied-off could result in firing; and (7) personnel had been disciplined for not being tied-off.[2]

This testimony was corroborated by miners Abraham Grisham and Darwinn J. Reid. Grisham stated that he and everyone else knew there was a one hundred percent tie-off policy at the job site and that failure tie-off could result in termination. (Tr. 152.) He also said that weekly safety meetings were held on Monday mornings and translated into Spanish. (Tr. 154.) Finally, he related that Burgess tried to sneak-up on the miners to make sure that they were tied-off. (Tr. 151.)

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[2] Schueck offered into evidence four written warnings given to employees at the Midlothian site for not being tied-off. (Resp. Ex. G.) However, none of them were employees working at the finish mill. (Tr. 345-46.)

Reid also testified that he knew that the company had a one hundred percent tie-off policy. (Tr. 183.) He asserted that Rodriguez had safety meetings every morning, in both English and Spanish (Tr. 184.) In addition, Reid testified that at the bottom of the stairs going up the finish mill structure there was a sign advising that the mill was a one hundred percent tie-off area. (Tr. 178, 199-200.) Further, he agreed with Grisham that Burgess checked on the crew to make sure that they were tied-off, including trying to sneak-up on them. (Tr. 182-83.)

There was one witness who disagreed with part of this testimony, Alejandro Lopez, Albarran's brother. He claimed that Rodriguez did not hold safety meetings every day, although he did admit to weekly meetings. He further testified that he was aware of the one hundred percent tie-off policy, but maintained that the company did not enforce the policy. In addition to being Albarran's brother, Lopez is also a party to a wrongful death action being brought in Texas against Schueck as the result of Albarran's death. (Resp. Ex. UU.) Thus, his testimony on these issues must be viewed with some skepticism.

The other reasons given by the Secretary for imputing Albarran's negligence to Schueck are either incorrect or insignificant. For example, it is not surprising that Rodriguez was not given any formal training before being made a crew foreman. The Secretary has not shown that such training is customary in the field and I suspect that it is not. The fact is that while Rodriquez was a novice foreman, he was not a novice in the steel business.

Furthermore, there is no evidence that Rodriguez knew Albarran was sometimes not tied-off and did nothing about it. Grisham testified that he told Rodriguez that Albarran had not tied-off and that "then they just started talking the Spanish." (Tr. 142-43.) Surprisingly, neither side asked Rodriguez whether he had been told that Albarran was not tying-off and, if so, what he did about it. Finally, there is no evidence, other than from Lopez, that the tie-offs furnished the Schueck employees were not long enough.

On the day he fell, Albarran was wearing a safety harness and, for reasons known only to him, unhooked his safety line and walked across the unsecured grating. Even if I found Lopez' evidence to be entirely credible, which as noted above I do not, the weight of the credible evidence supports a finding that Schueck had made reasonable efforts in supervision, training and discipline to make sure that its employees were tied-off when working at heights.

Therefore, I conclude that Albarran's negligence cannot be imputed to Schueck for this violation. I will reassess the penalty accordingly.

Citation No. 7899408

This citation charges a violation of section 56.20011 in that:

> A fatal accident occurred at this operation on June 23, 2000 when a contractor's employee fell 50 feet after stepping on an unsecured floor grating at 719 level of the new finish mill. The unstable floor grating had not been barricaded and posted with warning signs. Foreman Joe Rodriquez and superintendent Bobby Hightower engaged in aggravated conduct constituting more than ordinary negligence. They knew that the floor grating was not secured and that steel was missing but they did not barricade the hazard or post warning signs. This was an unwarrantable failure to comply with a mandatory safety standard.

(Govt. Ex. 2.) Section 56.20011 requires that: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches."

The undisputed evidence concerning this violation is that near the end of the workday on the day before the accident, Albarran laid out the steel grating in question, and, in doing so, became aware that there was no steel beam below to support it. He, as well as Grisham and Reid, reported this fact to Rodriguez. In fact, Grisham went so far as to suggest that the area be barricaded. Rodriguez discussed the matter with Bobby Hightower, but neither took any action to have the area barricaded or have warning signs posted.

In interpreting a general standard, such as this one, the Commission has held that the appropriate test for determining whether a set of factual circumstances comes within the scope of the standard is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). Applying the test to this case, the question is whether a reasonably prudent person would have recognized that the grating over the missing steel beam was an area where a safety hazard was not "immediately obvious." The Respondent argues that "the missing steel beneath the grating was an obvious hazard for an experienced iron worker" and that, therefore, the hazard was immediately obvious. (Resp. Br. at 24.) As discussed below, I find that the hazard was not "immediately obvious."

The term "immediately obvious" is not defined in the regulations. Nor does there appear to be any caselaw defining it. While there are several definitions of "immediately" in the dictionary, the one that is most pertinent to the rule is "without interval of time: without delay." *Webster's Third New International Dictionary* 1129 (1993) (*Webster's*). The most germane definitions of "obvious" are: "Capable of easy perception: a: readily perceived by the senses . . .

b: readily and easily perceived by the sensibilities or mind: requiring very little insight or reflection to perceive, recognize, or comprehend . . . c: easily understood: requiring no thought or consideration to understand or analyze." *Webster's* at 1559. Thus, a hazard which is immediately obvious is one that can be readily perceived, recognized or comprehended, with no thought or consideration to understand or analyze and without delay.

The company's reliance on whether the missing beam was immediately obvious to experienced iron workers is misplaced. In the first place, even if the missing beam was immediately obvious, that does not mean that the hazard of falling through the grating was immediately obvious.

In the second place, the testimony of the "experienced iron workers" at the hearing was not unanimous that it was obvious that a steel beam was missing beneath the grating. Grisham testified:

> Q. Was it obvious that if you're walking across the top of the grating that a piece of steel was missing if you didn't know it?
>
> A. You probably wouldn't see it.
>
> JUDGE HODGDON: You say you probably wouldn't see it?
>
> THE WITNESS: No, because where the beam comes together, that beam, you probably won't see it unless you – not tied of at 100 percent, you just step on it, and that beam would be teeter-tottering, and you go down with it.

(Tr. 145.) He also stated: "I already came back down to Joe and told him we're missing a beam up there. If we lay that grating down like that on the floor, somebody will easily walk up to it and just fall right through there . . . ." (Tr. 137.) Reid testified: "When you're up there, you can like hardly see. It will be just like there's nothing wrong with it." (Tr. 174-75.) When asked specifically if you could see the missing beam when standing on top of the grating, he responded: "No." (Tr. 175.)

Furthermore, even an experienced iron worker may suffer a lapse of attentiveness which could result in a fall. In a case involving section 57.15-5, 30 C.F.R. § 57.15-5,[3] the operator argued " that the skill of a miner is a relevant factor in determining whether there is a danger of falling because the miner's skill defines the scope of the hazard presented." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). The Commission rejected that argument, stating:

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[3] 30 C.F.R. § 57.15-5 was a predecessor of 30 C.F.R. § 57.15005, which is identical to 30 C.F.R. § 56.15005, set out in the discussion of the previous citation.

> We find that such a subjective approach ignores the inherent vagaries of human behavior. Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall. The specific purpose of 30 C.F.R. § 57.15-5 is the prevention of dangerous falls. By adopting an objective interpretation of the standard and requiring a positive means of protection whenever a danger of falling exists, even a skilled miner is protected from injury.

Id. (citation omitted).

Here, either the hazard was not immediately obvious, or Albarran intentionally walked over the unsupported grating. Since there is no evidence to suggest that the latter was the case, I conclude that the hazard was not immediately obvious. This is because a hazard is not immediately obvious unless it is readily apparent to an inattentive, experienced miner, as well as to an inexperienced miner. Albarran was an experienced steel worker, who had apparently put down the very unsupported grating that he stepped on and later reported it to his foreman, yet he walked on it and fell through. A barricade would have prevented this from happening.

Accepting Schueck's subjective approach would defeat the safety purposes of the rule. By adopting an objective interpretation of section 56.20011 and requiring a positive means of protection whenever a hazard is not immediately obvious, even an experienced steel worker is protected from injury.

I find that a reasonably prudent person familiar with the mining industry and the protective purposes of section 56.20011 would have recognized that a barricade was required around the unsupported grating on the 719 level. Consequently, I conclude that Schueck violated section 56.20011 by not barricading the area.

Significant and Substantial

The inspector found this violation to be S&S. A review of the *Mathies* criteria, *supra* at 4, shows that that finding was correct. There was a violation of a safety standard. The violation caused a distinct safety hazard, that is, the danger of falling through unsupported grating. There was a reasonable likelihood, if not barricaded, that someone would walk on the unsupported grating and fall through, and that falling through the unsupported grating would result in an injury. Lastly, there was a reasonable likelihood that the injury would be reasonably serious.

In this instance, the injury was death. However, since this was a one hundred percent tie-off area, it was not reasonably likely that a miner who was not tied-off would walk over the grating. Nonetheless, as Inspector Gatewood testified, "falling with a lanyard on doesn't guarantee that you're not going to be injured." (Tr. 392.) A six to eight foot free fall before hitting the end of the tie-off would cause reasonably serious injuries, such as, lacerations,

contusions, strains or sprains, and broken bones. In addition, if the grating fell after the miner, it could strike him on the way down, or he could swing and hit a beam, both of which could cause much more serious injuries. Consequently, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

The inspector also found that this violation resulted from the company's unwarrantable failure to comply with the regulation. The term "unwarrantable failure" is taken from section 104(d)(1) of the Act, which assigns more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply . . . mandatory health or safety standards."

The Commission has held that unwarrantable failure is 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 & Ohio Coal Co.*, 9 FMSHRC at 2010. "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

As discussed above, Rodriguez knew the night before the accident that there was unsupported grating on the 719 level. He conveyed this information to the site superintendent. Rodriguez testified that he told his crew during the morning safety briefing that there was a steel beam missing and that no one but Reid and Pablo Lopez Albarran were to go to the 719 level, but neither supervisor took any action to barricade the area.

Grisham testified that when he told Rodriguez about the missing beam, he also advised him that: "If a beam is missing like that, we should run a red tape line, just the corner section, so nobody would go through it or walk through that red barricade." (Tr. 139.) Grisham also stated that Rodriguez did not say to the crew "that no one's supposed to go onto the 719 level." (Tr. 146.)

Schueck argues that because "Rodriguez not only warned his crew on the morning of the accident about the missing steel, but also restricted access to the area to the welders," the violation was not unwarrantable. (Resp. Br. at 26.) The company also asserts that MSHA's completion of 110(c), 30 U.S.C. § 820(c), investigations without charging Rodriguez or

Hightower supports a conclusion that the violation was not unwarrantable.[4] I find that the evidence does not support the company's position.

Respondent's argument concerning the dropping of the section 110(c) cases is without merit. Section 110(c) requires that the violation be knowingly authorized, ordered or carried out. An unwarrantable failure does not have to be knowing. In addition, the Secretary's determination not to bring cases under section 110(c) can be for reasons having nothing to do with whether the case can be proved or not. Further, the Secretary is free to conclude that a 110(c) case is appropriate and still decide not to bring it. Therefore, I find that the Secretary's determination not to prosecute the section 110(c) cases is not probative of whether Schueck unwarrantably failed to comply with this regulation. *Cf. Fort Scott Fertilizer*, 17 FMSHRC at 1117.

The Commission has established several factors as being determinative of whether a violation is unwarrantable, including:

> [T]he extent of a violative condition, the length of time it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. *E.g., Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

Cyprus Emerald Resources Corp., 20 FMSHRC 790, 813 (August 1998).

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[4] Section 110(c) 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 . . . that may be imposed upon a person under subsections (a) and (d)."

In this case, the danger caused by the unsecured grating was obvious and was reported to management by at least three miners. Even if the supervisors assumed that the worst that could happen was that someone who was tied-off would fall through the grating, that still had the potential for significant injury. Further, even a rank-and-file miner (Grisham) knew what action should be taken and advised Rodriguez to barricade the area. Instead, that advice was ignored and a miner was killed. Rodriguez' admonition to his miners not to go to the 719 level, if in fact it was made, was insufficient in view of the danger involved. Accordingly, I conclude that Schueck demonstrated a serious lack of reasonable care and, therefore, unwarrantably failed to comply with section 56.20011.[5]

Citation No. 7889352

This citation alleges that:

> Two contractor employees violated the 103(k) order 7889351 that was issued on June 23, 2000. The Site Safety Supervisor for Schueck Steel, Scotty Burgess, man-lifted Corporate Safety Director, Steven Dineen, to the 719 level of the Finish Mill during the afternoon of June 25. The two of them then walked onto the 719 level, inspected the area and took some measurements. Dineen had twice been denied approval by MSHA to perform these tasks because unsafe conditions still existed and safe recovery procedures had not yet been approved.

(Govt. Ex. 3.) This situation appears to have arisen because of misunderstanding.

Thomas, the head of the investigation team, testified that Dineen asked him two times if he could go up to the 719 level. He said the first time was sometime before lunch on Saturday, "[a]fter we had modified the order for them to do some clean-up on the lower level."[6] (Tr. 446.) Thomas related that he told Dineen "no" and explained to him "that we hadn't determined that it was safe, that the grating was – none of the grating had been secured; there were still holes in the floor, and we hadn't really completed our investigation." (Tr. 446.) Thomas said that the second request was made on Sunday, "sometime before lunch," and he again told Dineen, "No." (Tr. 447.) He denied that Dineen ever asked him a third time. Thomas did testify, however, that there was a "third conversation," "when we modified the order that morning for them to clean up

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[5] In reaching conclusions on this citation, I have given the greatest weight to the testimony of Reid and Grisham, who, since they no longer work for Schueck, were the only witnesses with no stake in the outcome of the proceeding.

[6] The 103(k) order was modified at 10:50 a.m. "to allow the removal of materials, equipment, and other items from the ground level of Finish Mill #6 in the vicinity of the fatal accident . . . ." (Govt. Ex. 4, p.3.)

the lower level. Now, if you're counting that as one of the conversations, then there was [*sic*] three, but there was [*sic*] only two conversations with Mr. Dineen asking to go up to the 719 level." (Tr. 456.)

Inspector Gatewood testified that he and Thomas "were probably together 95 percent of the time." (Tr. 381.) He said that:

> At 10:50 in the morning on Saturday – and the reason I know the 10:50 is because that's the time of the modification to the order, to allow the clean-up – Mr. Dineen, Mr. Hanks and Mr. Strong came and asked specifically to remove some materials and the blood and so on from the base of the cooling tower, and that permission was granted at exactly 10:50 a.m. on Saturday morning.

(Tr. 382.) He went on to say that a few minutes later, Dineen came to them by himself and asked if he could go up to the 719 level. He testified that Thomas told Dineen, "No." (Tr. 387.)

Gatewood testified that Dineen approached them a second time on Sunday morning between 9:00 a.m. and 11:00 a.m. and again asked for permission to go up to the 719 level. He said that Thomas responded: "No. And he gave him two conditions on before he would ever approve anything. One, that Mr. Dineen would have to have our prior approval, and, two, that we wanted to be present when it happened." (Tr. 388.) Finally, Gatewood asserted that he had not witnessed a third conversation concerning such a request between Thomas and Dineen.

Dineen testified that he made three requests of Thomas to go up to the 719 level and the third time Thomas gave him permission to do so. He said that:

> [T]he first time was Saturday morning when we were – you know, after we had gotten down there and done our ground inspection. It was right before lunch. And one of the inspectors, I believe, went up – there might have been one or two went up before lunch, and the other one went up after lunch, and then I asked him again sometime around – maybe an hour after we got back down there after lunch."

(Tr. 344.) With regard to the third time, he testified:

> On Saturday afternoon towards the end of the day, we were sitting in the TIC trailer, and a third time I asked Mr. Thomas if we [could] go back out there and get it cleaned up. And I figured that since their inspection was done, appeared to be – their onsite, direct inspection appeared to be concluded, that now would be the best opportunity to try and get that permission to go back in.

> I didn't want to, you know – didn't want to perform any work; I just wanted to make sure that everything was cleaned up, and that there was no other immediate hazards that might occur, such as, you know, teetering or grating that might fall in the middle of the night or while somebody else might be down there, things like that.
>
> So I asked Mr. [Thomas] at the end of the day on Saturday in this meeting if we could have permission to go back up there, if now would be a good time, and I was told that he would release the area for inspection, and so I went out there Saturday morning – or Sunday morning with Scotty. We met out there at six o'clock, cleaned up the ground area, and then started working our way up.

(Tr. 284.)

McGill testified that he was in TXI's office between 3:00 and 4:00 on Saturday afternoon with Dineen, Thomas, Gatewood and Hanks and that "we were sitting around, going over the results of the investigation, and Mr. Thomas said that he'd release the area for clean-up and inspection." (Tr. 483-84.)

Dineen and Burgess went up to the 719 level "about 1:00 or 1:30" on Sunday afternoon. (Tr. 330-31.) They spent one hour and 15 minutes on that level. (Tr. 18.) During that time, Dineen observed Gardner below and called to him to warn him that they were up there and to put his hard hat on in case they knocked something off. (Tr. 286-87.) Indeed, the parties stipulated that while Dineen and Burgess were up there, they were observed by both Gardner and Palacios, neither of whom ordered them to come down. (Tr. 18.)

The next day, Dineen was called down to the MSHA trailer and given a citation for violating the 103(k) order. He said that he told Thomas that:

> I thought I was within the rights, that I thought I was part of the accident investigation team, that he had released the area to me for inspection and clean-up, and that's what we did. We went up; we inspected the area. We cleaned up the area down below with the results of the accident, the bodily fluids. Okay.
>
> That we had gone up on top of the cement cooler. We looked at that, and we found some blood and some scalp, some hair, on top of the cement cooler handrail, and we cleaned that up, and that we had gone up top to make sure that everything was secure, that nothing could fall, took some measurements and some pictures, and we came down.

(Tr. 290-91.) He also testified that he told Thomas that: "You released the area to me last night; you told me that we could go up and do inspection and clean-up. And he said, No; what I told you was you could go into the area below and clean up the body fluids." (Tr. 345.)

Gatewood testified that when Dineen was given the citation:

> [t]he notes I took indicate that he said, I thought I heard somebody talking about releasing the order.
>
> . . . .
>
> He made a couple of comments. He said he needed to take measurements and other things, in order to, I think he said at that time, to refute gross negligence on the part of Schueck Steel. He added that he thought it was okay, since he was part of the investigation team, and then the previous statement I made about he thought he had heard us talking about releasing the order.

(Tr. 390.) He claimed that Dineen did not say anything about Thomas "giving him authority to be up there." (Tr. 390.)

This testimony is difficult to reconcile. Dineen insists that he asked the MSHA investigators a third time if he could go up to the 719 level and that that time they gave him permission. Thomas and Gatewood insist that Dineen only asked them twice and that he was refused both times. There is no reason to believe that Thomas and Gatewood were not telling the truth. To find otherwise would be to conclude that they gave Dineen permission and then lied about it and gave him a citation. There is nothing in the record to indicate either that this is what occurred or, if it did occur, why the inspectors would do such a thing. Consequently, I find that neither inspector gave Dineen permission to go to the 719 level on Sunday.

On the other hand, Dineen's actions were not those of a man who knew he was violating the order. Rather than go up surreptitiously, he went to the 719 level in broad daylight, spend one hour and fifteen minutes up there and while there, deliberately attracted the attention of Gardner. Nevertheless, since this citation directly involves him and an adverse finding could also affect his future with the company, he had more reason to shade the truth than did the inspectors.

In addition to these two diametrically opposed interpretations, there is a third possibility – that the parties misunderstood one another. Dineen testified that Thomas said he was releasing the "area" for inspection. If so, it is entirely possible that Thomas meant the "area" he had already released, the bottom level, but Dineen heard what he wanted to hear, the "area" being the entire accident area. By giving Dineen the benefit of the doubt, on this point, the most reasonable conclusion as to what occurred can be reached.

This does not mean, however, that Dineen was, in fact, given permission to access the 719 level, or that he did not violate the 103(k) order, it only means that there are mitigating circumstances to explain the violation. Accordingly, I conclude that Schueck, through Dineen and Burgess, violated the 103(k) order as alleged.

Significant and Substantial

Inspector Gatewood found this violation to be S&S. However, as section 104(d)(1) clearly states, only violations of "mandatory health or safety standard[s]" can be S&S. Section 3(l) of the Act, 30 U.S.C. § 802(l), defines "mandatory health or safety standard" as, "the interim mandatory health or safety standards established by titles II or III of the Act, and the standards promulgated pursuant to title I of this Act." Since this citation involves a violation of the Act and not a mandatory health or safety standard, it cannot be S&S. *Cyprus Cumberland Resources v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). Therefore, I conclude that the violation was not "significant and substantial."

Equitable Relief

As it did in its Motion for Partial Summary Decision, Schueck requests in its brief that "equitable relief be granted in the form of requiring MSHA to retract and/or revise its investigation report and accompanying sketch to accurately reflect the undisputed facts of the accident." (Resp. Br. at 34.) This request is beyond the scope of this proceeding. Therefore, I deny it.

Civil Penalty Assessment

The Secretary has proposed penalties of $70,000.00 for these three violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

With respect to the penalty criteria, the pleadings indicate that Schueck is a moderately sized company. It has no history of previous violations. (Resp. Ex. K, Tr. 561.) As there is no evidence that the payment of the penalties in these cases would adversely affect Schueck's ability to remain in business, I find that payment of the penalties would not have such an effect. Further, I find that the company acted in good faith in attempting to achieve rapid compliance in abating the violations.

Turning to the individual citations, with regard to Citation No. 7899407, the failure to tie-off, I find that the violation was of the most serious gravity since it resulted in a death. As indicated above, however, I find that the company was not negligent. Taking all of the penalty

criteria into consideration, I assess a penalty of $5,000.00 instead of the $25,000.00 proposed by the Secretary.

Turning to Citation No. 7899408, the failure to barricade, I find that the gravity of the violation was serious, although not as serious as that found by the Secretary, in view of Schueck's one hundred percent tie-off policy. While a serious injury was foreseeable if the unsecured grating was not barricaded, the resulting injury, from falling to the end of the tie-off, would most likely result in lost workdays or restricted duty, as set out in the discussion of S&S for this citation, *supra* at 9-10. I also find that the company demonstrated high negligence in unwarrantably failing to comply with the regulation. Accordingly, taking all of the penalty criteria into consideration, I assess a penalty of $35,000.00 rather than the $40,000.00 proposed by the Secretary.

Finally, with regard to citation No. 7889352, while I find that the gravity of the violation was not so serious from an injury standpoint, I do find it to be a grave violation in that it challenges MSHA's authority. The Act provides in section 103(k) that it is MSHA, not the operator, who is in charge at an accident investigation. Consequently, MSHA's orders must be followed. While the failure to do so in this case apparently resulted from a misunderstanding, the violation is still serious.

Turning to negligence, in view of the apparent misunderstanding, I find that the negligence involved in this violation was "moderate" instead of "high" as alleged by the Secretary. Therefore, taking all of the penalty criteria into consideration, I assess a penalty of $3,000.00 instead of the $5,000.00 proposed by the Secretary.

Order

Docket No. CENT 2002-13-M is **DISMISSED**. With regard to Docket No. CENT 2002-49-M, Citation No. 7899407 is **MODIFIED**, by reducing the level of negligence from "high" to "none," and is **AFFIRMED** as modified, and Citation No. 7899408 is **AFFIRMED**. Citation No. 7889352, in Docket No. CENT 2001-370-M, is **MODIFIED** by deleting the S&S designation and reducing the level of negligence from "high" to "moderate" and is **AFFIRMED** as modified. Lexicon, Inc. d/b/a Schueck Steel Company is **ORDERED TO PAY** a civil penalty of **$43,000.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVE., N.W., Suite 9500
WASHINGTON, D.C. 20001

November 27, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, on behalf of	:	
DANIEL E. MCCLERNAN,	:	Docket No. LAKE 2001-58-DM
Complainant	:	NC MD 2000-40
v.	:	
	:	Hoyt Lakes Plant
LAKEHEAD CONSTRUCTORS, INC.,	:	Mine ID 21-00256 AQS
Respondent	:	

DECISION

Appearances: Barbara A. Goldberg, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Complainant,
Joseph J. Mihalek, Esq., Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota, for Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by the Secretary of Labor on behalf of Daniel McClernan under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("the Act"). The Secretary alleges that Lakehead Constructors, Inc. ("Lakehead") discriminated against McClernan by refusing to pay him for time spent attending an MSHA training class and in retaliating against him for filing a complaint of discrimination with MSHA. A hearing was held in Duluth, Minnesota. Following receipt of the hearing transcript, the parties submitted briefs. For the reasons set forth below, I find that Lakehead discriminated against McClernan and award back pay and other equitable relief. I also impose civil penalties in the amount of $12,500.00 against Lakehead for its violations of the Act.

Findings of Fact

Lakehead is a heavy industrial contractor that performs construction and maintenance work for various companies, some of which operate mines. When Lakehead, an independent contractor, performs work at a mine site, it is an "operator" subject to the Act. 30 U.S.C. § 802(d). Many of Lakehead's jobs are of short duration, and it does not maintain a large permanent work force. It contracts with local unions to obtain tradesmen for its various projects. One such contract is with the International Union of Operating Engineers, Local No. 49 ("Union" or "Local 49"). Operating engineers are workers who operate heavy equipment, such as cranes or fork-lift trucks, and are typically referred to as operators. McClernan was an operating engineer

and a member of Local 49 at all relevant times.

Lakehead's process of staffing a new project typically took three to four weeks. The managers reviewed the scope of work and determined the number of men required from the various trades, identifying any special skills or qualifications needed. That information was passed on to Lakehead's human resources manager, Brian Johnson, who identified and hired union members who had the skills needed and were available to work on the project. Tr. 272-74. He typically consulted with the prospective job superintendent and/or shift foremen to ascertain whether they had particular workers they wanted for their crews, and generally attempted to hire those individuals. Tr. 87-88, 307. Lakehead was not required to request the referral of operating engineers from Local 49. It could simply call an operator directly if he had worked for Lakehead within the past 12 months. It could also call an operator directly if he had worked for Lakehead within the past five years, but had to notify the Union of the contact. Lakehead could also contact the Union, which would refer men from a list of out-of-work members. Tr. 174. Union members were not obligated to work for Lakehead and Lakehead could reject a referred worker for any non-discriminatory reason. Because of the direct contact option, many operators worked virtually continuously for Lakehead, without having to move up through the Union's hiring list. Tr. 273. Union members are paid by Lakehead only for hours worked. They are not paid for hours taken off for illness, personal or other reasons. Tr. 220.

Union members who work for Lakehead at a mine site are "miners."[1] Under the Act, 30 U.S.C. § 825, miners are required to have initial training and annual refresher training. An operator is required to provide required training to its miners. Such training must be given during normal working hours and miners are entitled to compensation at their normal rate of pay while attending the training. If the training is given at a location other than their normal place of work, miners are entitled to compensation for additional costs they may incur in attending the training. Operators are required to maintain, at the mine site, certificates for each miner, verifying that the miner has completed required training courses and has undergone refresher training within the past 12 months.

Prior to January 1999, Lakehead had provided MSHA training to tradesmen it hired to work on mine property and paid them at their regular hourly rate for the time spent in training sessions. It passed the cost of these payments through to the mining companies for which it had contracted to perform work. Beginning as early as 1997, some of those companies objected to paying for the cost of training. In response, Lakehead notified the unions and union members that, beginning in 1999, it would no longer provide MSHA training and that it would not pay union members for attending MSHA training courses. Rather, it would insist that tradesmen have all necessary MSHA training as a condition of eligibility for employment on mine properties. Lakehead also insisted that union members working for it on mine property, whose training certificates were about to expire, obtain annual refresher training on their own. Tr. 222-

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[1] The Act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g).

25. Local 49 had been providing MSHA training to its non-working members. It then undertook to provide MSHA training to its members who were currently employed and needed annual refresher training to maintain their eligibility to work as miners. Tr. 255. Some other unions apparently negotiated increases in wage and benefit packages to compensate, at least in part, for the increased training expense. Some unions also provided a stipend to members attending training. Tr. 226-27. Some operators continued to compensate Union members for time spent in training. Tr. 171. Local 49 did not negotiate an increase in payments and did not provide a stipend to members who attend training.

McClernan was a member of Local 49 and a skilled operator of various types of heavy construction equipment. He was especially skilled in operation of a "pipe grapple," a multi-controlled hydraulic crane that is particularly useful in installing and removing large pipes in confined spaces. Tr. 40-41, 90, 171. McClernan first worked for Lakehead in 1974, but began working for it steadily in 1995, frequently at taconite plant "shutdowns." Like several other skilled operators, McClernan was typically hired through direct contact by Lakehead, rather than by Union referral. Tr. 28.

McClernan was working for Lakehead in July of 1999, at another job, when he was transferred to a job at the LTV Hoyte Lakes mine. He had undergone MSHA refresher training in December of 1998, and was certified as having completed all required training courses. That training class was provided by Lakehead at a local hotel meeting facility and he was paid his normal hourly rate for the time spent in attending it. He had received Lakehead's notice that it would no longer provide MSHA training and that it would no longer pay union members for attending training. In December of 1999, as his training certificate was about to expire, he notified Lakehead's human resources manager, Johnson, that he needed to attend MSHA refresher training. Johnson told him that Local 49 was going to give an MSHA refresher training course on December 28, 1999, and that he could or should attend it. Johnson also arranged for another operator to replace McClernan while he attended the training. Tr. 32-33, 291. McClernan worked as a miner at the LTV site on December 27, 1999. He attended training at the Union's hall on December 28, 1999, and returned to work as a miner at the LTV site on December 29, 1999, where he worked until February 17, 2000.

McClernan was not paid for the time he spent in training. There was no request for pay processed by the job superintendent, who kept the records of time worked by men on that job. Lakehead's records for December 29, 1999, show McClernan as being absent, and that the operator's work was performed by another union member brought in to replace him for that day. McClernan knew, from Lakehead's prior notices, that it would not pay him for time spent in MSHA training. For that reason, he initiated his request for compensation by filing his complaint of discrimination with MSHA on February 4, 2000. Tr. 36; ex. C-2.

About the same time, three other operators, Danny Butler, Alan Randall and Steve Karpik, also filed complaints alleging that Lakehead discriminated against them by failing to pay them for time spent in MSHA training. A week or two after filing the complaints each of them

was called by Johnson. McClernan, Butler, Randall and Karpik all testified that Johnson told them, in essence, that unless they withdrew their complaints they would not work for Lakehead on mine property again. Tr. 41-44, 81, 136, 142, 148-49. In the course of their conversations, Butler, Randall and Karpik advised Johnson that they would withdraw their complaints, which they subsequently did. McClernan did not initially decide to withdraw his complaint. However, when Johnson called him the following day to advise him that the other three operators had agreed to withdraw their complaints, he decided that he "didn't want to hang out there by [him]self," and told Johnson that he would withdraw his complaint, which he did on February 23, 2000. Tr. 79; ex. C-3. The withdrawal request form contains language indicating that the request is being made "voluntarily and without coercion from anyone." Ex. C-3. It also refers to a statement of reasons for the request, but no reason was stated by McClernan on the form. In a subsequent statement to an MSHA investigator, McClernan indicated that the reason he withdrew the complaint was because Johnson told him that Hallberg had said that if he ever wanted to work in the mines again he needed to drop his complaint. Ex. R-20. He explained that he did not feel threatened "physically," but did feel threatened financially. Tr. 79-83.

Johnson's calls were made at the instance of Dennis Hallberg, Lakehead's president and chief executive officer, who was on vacation at the time. Hallberg was notified of the complaints during a phone conversation with John Lohse, Lakehead's equipment manager. Lohse testified that Hallberg told him to have Johnson call each of the complainants and tell them that they could not work for Lakehead at a mine site without MSHA training, that Lakehead was not going to provide the training, and that Lakehead would not pay them for attending training. Hallberg, Lohse and Johnson testified, essentially consistently, that the message Hallberg directed to be conveyed was as stated above, that there were no threats made to any of the four operators, and that there was nothing said about withdrawing the complaints. Tr. 235, 281-85, 363-66.

Thomas Pariseau, Local 49's president, testified that when he learned of Johnson's calls, he phoned Johnson, who confirmed that he had told the four operators that they would not work for Lakehead on mine property again unless they dropped their complaints. Tr. 202-03. In the aftermath of the phone calls and the withdrawal of the complaints, McClernan received a letter from Hallberg, dated March 8, 2000, stating that he had a right to pursue discrimination complaints without fear of retaliation or reprisal. Ex. R-6. Hallberg did not recall the reason that the letter was sent, e.g., whether it resulted from MSHA's reaction to the incidents that prompted withdrawal of the complaints. Tr. 245.

On February 17, 2000, McClernan was told by the job superintendent that he was laid off, effective that day, from the LTV project. Tr. 39. Lakehead claims that there was no more operator work to be done. Tr. 277-78. McClernan testified that there was operator work remaining to be done at LTV, and that he observed that work being done by boilermakers in April. No other operator worked the LTV job after McClernan was laid off. The LTV project had originally been scheduled to last through May of 2000, but LTV obtained a waiver of a regulatory requirement that the project was designed, in part, to address, and it determined not to proceed with part of the job.

Lakehead was scheduled to perform work at USX's Minntac plant during two "shutdowns" that were to start in February and March of 2000. Taconite mines in the area must periodically replace pipes and conduct other heavy maintenance activities, which require shutting down part of their plant operations. To minimize the shutdown time, work proceeds around the clock, seven days a week. For shutdowns, Lakehead employs two crews, each working twelve-hour shifts. The pipe grapple was typically used on those projects because of the need to replace large pipes mounted overhead between support beams. Dan Tomassoni, who had been a foreman on five or six prior shutdowns, was assigned to be the second shift foreman on those jobs. Consistent with past practice, Dale Zifco, the job superintendent, asked him which particular tradesmen he wanted for his crew. Tomassoni requested that McClernan be hired as the operating engineer. Tomassoni's recommendations were generally honored, and Zifco responded affirmatively to the request and passed it on to Johnson. Tr. 87-88, 310. Tomassoni had requested McClernan on every shutdown on which he was a foreman, and Lakehead had agreed with his choice "wholeheartedly" in the past. Tr. 89. Tomassoni was comfortable with McClernan's skills and knew that he worked well with other members of the prospective crew. Tr. 87-91. A day or two after Tomassoni had requested that McClernan be hired, he inquired of Zifco whether he was going to get McClernan for his crew. Zifco replied that McClernan was not going to be on the crew and that he did not want to discuss the matter further. Tr. 98-100, 318.

McClernan, who had worked ten consecutive shutdowns at Minntac, expected to work the Minntac jobs, the first of which was expected to start on February 27 or 28, 2000. Tr. 39, 45. He testified that Johnson told him he would be working those jobs. Tr. 39-40. Johnson had no recollection of such a conversation. Tr. 292. McClernan was not hired for either of the Minntac shutdowns, the first of which started on February 28, 2000, and the second on March 26, 2000. Ex. C-6.

There were a total of 14 operators working on each shutdown, seven per shift. The operator hired to work on the second shift for the February shutdown was not experienced with the grapple and had some difficulty performing basic tasks with it. None of the other operators on that shift were skilled in use of the grapple. Tomassoni determined, for safety reasons, that his crew would not use the grapple, and Zifco agreed. Tr. 94-96, 103, 115, 319-22. They performed the work using hand rigging, a considerably more labor intense and time consuming process. Tr. 94-97. Tomassoni testified that he again inquired of Zifco why he couldn't get McClernan to operate the grapple and was told that the decision was made at "headquarters," i.e., Hallberg's office. Tr. 99-100. He also stated that a day or two after the project started, he overheard a conversation between Zifco and a boilermaker foreman in which Zifco stated that the reason that McClernan was not hired was "because of the MSHA deal."[2] Tr. 98-102. Zifco recalled a subsequent inquiry, but stated that, to the best of his recollection, McClernan was

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[2] Lakehead's counsel attempted to impeach Tomassoni with portions of his deposition, wherein Tomassoni did not mention that comment. However, the questions were not addressed to conversations that Tomassoni overheard. Tr. 119-125.

unavailable for the job. Tr. 318-19.

On March 1, 2000, after not being hired to work on the Minntac shutdown, despite having withdrawn his MSHA complaint, McClernan went to Lakehead's offices to discuss the matter with Johnson. He encountered Hallberg in a hallway outside of Johnson's office and a heated exchange took place. The parties' contentions regarding that exchange mirror those of the Johnson phone calls. McClernan testified that Hallberg repeated the threat that he would never work for Lakehead again and Hallberg testified that he repeated the message that McClernan needed MSHA training to work on mine sites and that Lakehead was not going to provide the training or pay him for attending it. Tr. 43-44, 238-39. McClernan also testified that, following the exchange and Hallberg's departure, Johnson remarked "Now you can see why I couldn't call you." Tr. 44. Johnson denied making that statement. Tr. 304.

While McClernan did not work the Minntac shutdowns, he did work for Lakehead on other occasions. On March 6, 2000, he worked one 16-hour shift at a paper mill. Lakehead had requested a referral from Local 49 and McClernan's name had risen to the top of the out-of-work list. Tr. 46, 370. In April of 2000, McClernan obtained a job with another employer for the remainder of the year. While he was working that job, he turned down offers of employment from Lakehead. On April 13, 2000, McClernan filed a second complaint with MSHA, reasserting his claim of discrimination for Lakehead's failure to pay him for attending the December 28, 1999, MSHA training course, and asserting a new claim that Lakehead retaliated against him for filing the original complaint. Ex. C-4. He later worked for Lakehead at two shutdowns at the Minntac plant in February of 2001. Thereafter, he got a job with a contractor on a multi-year highway project, and told Lakehead that he would be unavailable for work for the foreseeable future.

Conclusions of Law - Further Findings of Fact

Compensation for Time Spent in Training

The Act requires that each operator have a health and safety training program that provides new surface miners with 24 hours of training and all miners with eight hours of refresher training "no less frequently than once each 12 months." 30 U.S.C. § 825(a). Subsection (b) specifies that:

> Any health and safety training provided under [§825(a)] shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

The Secretary maintains that McClernan was a miner with a right to training and compensation under the Act. Lakehead argues that McClernan was neither a miner nor its employee on the day of the training session, and that it had no obligation to provide training or compensation for time spent in training.

This is not the first challenge to Lakehead's policy of not paying for MSHA training. In *Sasse v. Lakehead Constructors, Inc.*, 23 FMSHRC 525 (May 2001) (ALJ), I held that members of a pipefitters union who attended MSHA training the day before reporting to Lakehead's mine job-site were not "miners" entitled to compensation, and that Lakehead had not discriminated against them by refusing to pay them for time spent attending training. The claimants in those consolidated cases were applicants for employment at the time they attended the training session, and were not yet employed by Lakehead or working at a mine site.

As noted in *Sasse*, judicial and Commission precedent frame the ultimate issue on this allegation as whether McClernan was a miner who had training rights under the Act. In *Emery Mining Corp. v. Secretary of Labor*, 783 F.2d 155 (10th Cir. 1986), the court reversed a Commission decision requiring payment of persons who voluntarily obtained MSHA training prior to becoming employed as miners by Emery Mining Corporation. The claimants in that case had been advised by a state employment agency to secure MSHA training to enhance their chances of employment. They obtained the training at their own expense, were subsequently hired by Emery and sought compensation for time spent in training and other expenses. The court held that the clear wording of the Act restricted entitlement to compensation to "miners" and, since it was undisputed that the complainants there were not miners or employed by Emery at the time they obtained the training, Emery had no obligation under the Act to compensate them. The court observed that "[n]othing in the Act or the legislative history suggests that a new employee must be paid wages and expenses for the time spent in a course he voluntarily took prior to the time he was employed." *Id.* at 159.

The United States Court of Appeals for the District of Columbia Circuit interpreted the term "miner" in a related context in *Brock on behalf of Williams v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987). In *Brock*, the court affirmed decisions by the Commission denying claims by striking miners that they had been discriminated against when the operators passed them over and recalled strikers who had obtained MSHA training on their own initiative while on strike, thereby satisfying the Act's training requirements. The court stated: "We therefore join the Commission and the Tenth Circuit [in *Emery*] in holding that an individual is not a 'miner' who can claim a training right under [30 U.S.C. § 825(a)] unless he or she is *employed* in a mine." *Id.* at 1149 (emphasis in original). *See also Cyprus Empire Corp.*, 15 FMSHRC 10 (Jan. 1993) (miners who go on strike are not working in a mine, exposed to the hazards of mining, and are not included within the Act's definition of "miners" even though they retain their status as employees of the operator under the National Labor Relations Act).

In *Secretary of Labor on behalf of Aleshire v. Westmoreland Coal Co.*, 11 FMSHRC 960 (June 1989), the Commission held that individuals who had been laid off by Westmoreland Coal Company, and who Westmoreland had advised would enhance their chances of being recalled if

they obtained MSHA training, were not entitled to compensation for time spent in training prior to being recalled. The Commission found "no persuasive basis upon which to distinguish this case from the Tenth Circuit's decision in *Emery* and in the absence of contrary judicial precedent [followed] that decision." *Id.* at 964.

In contrast to the claimants in the above decisions, McClernan was employed by Lakehead, working in a mine, essentially continuously from August of 1999 to December 27, 1999, and was expected to continue in that job for several months. He was clearly a miner, within the meaning of the Act. As a miner, he possessed the right to annual refresher training provided by the operator, and the right not to be discharged or otherwise discriminated against for refusing to work without having received the training, or if ordered withdrawn from the mine site by the Secretary. *See Brock, supra,* 822 F.2d at 1147. He was also entitled to compensation for time spent in training, pursuant to 30 U.S.C. § 825(b).

Respondent argues that, regardless of the fact that McClernan worked as an employee for Lakehead at the LTV mine up to December 27 and on December 29, and thereafter, he did not work for Lakehead on mine property and was not a miner or its employee on December 28, 1999, when he attended MSHA training. This argument is based upon its position that because of the nature of the employment relationship, McClernan was a miner and its employee only during the hours that he actually worked at the mine site. In essence, he was discharged each day upon departing work and re-hired the next day when he reported to the job site. I reject Lakehead's proposed hour-to-hour determination of McClernan's status as a miner. He was not an applicant for employment, and did not lose his status as a miner by going on strike or being laid-off. He certainly did not lose his status as a miner, and his rights under the Act, when he departed the mine site at the end of his shift on December 27, 1999. Lakehead, as an operator, had a statutory obligation to provide training to its miners and to compensate them for attending it. It could not avoid those obligations by discharging – or as Lakehead might characterize it, not rehiring – McClernan when his training certificate expired.

Respondent's position on McClernan's status as an employee on the date he attended training finds questionable support in the record and, in any event, is not dispositive.[3] As noted above, McClernan was a miner and was entitled to training and compensation under the Act. His right to compensation was not affected by whether he was "considered" an employee on the day he attended training, or whether he was entitled to compensation under the union contract for days that he was absent from the work site. As the Commission reiterated in *Westmoreland*, "the Mine Act is a health and safety statute, not an employment statute." 11 FMSHRC at 964. Rights bestowed and obligations mandated by the Act are not to be determined through interpretation of private contractual agreements, such as employment or collective bargaining contracts. *Id.*

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[3] Hallberg testified that union members were not "considered" to be employees of Lakehead, on days that they do not perform work for it. Tr. 220. McClernan, on the other hand, "considered" that he was Lakehead's employee on December 28, 1999, the day he attended the MSHA training. Tr. 34.

Similarly, McClernan did not lose his rights to training and compensation because the training session was given at a non-mine site. The Act, 30 U.S.C. § 825(b), provides that: "If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training." The Secretary's regulations also recognize that conference or educational facilities may often provide a more suitable training environment than a mine site. Under the regulations, an operator can fulfill its obligation to provide training by participating in "training programs conducted by MSHA, or may participate in MSHA approved training programs conducted by State or other Federal agencies, or associations of mine operators, miners' representatives, other mine operators, private associations, or educational institutions." 30 C.F.R. § 48.24. The training class at issue was provided in the Union's hall because Lakehead had "arranged" with the Union to provide the training. Previous classes conducted by Lakehead were held in hotel conference rooms. Under Lakehead's position, an operator could completely avoid the Act's compensation-for-training requirement by providing the training at a non-mine site, an outcome blatantly inconsistent with the letter and purpose of the Act and regulations.

I find that Lakehead's failure to compensate McClernan for time spent in MSHA refresher training on December 28, 1999, violated the Act.

The Retaliation Claims

A complainant alleging discrimination under the Act typically establishes a prima facie case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 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 way motivated by protected activity. *See Robinette*, 3 FMSHRC at 818, n. 20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

McClernan engaged in protected activity when he filed a complaint of discrimination with MSHA regarding Lakehead's failure to compensate him for time spent in training.[4] The

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[4] "No person shall . . . in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under . . . this chapter." 30 U.S.C. § 815(c)(1).

Secretary claims that he suffered adverse action by being threatened with loss of employment opportunities if he failed to withdraw his complaint, being discharged from the LTV job one week early, and not being hired for the Minntac shutdowns in February and March of 2000. Lakehead disputes the claims of adverse action and unlawful motivation, denying that threats were made, and alleging that the timing of McClernan's departure from the LTV job was due solely to business considerations, and that he was not hired for the Minntac shutdowns because he was expected to be working on the LTV job when the crews for those jobs were assembled.

Threats of Adverse Action

I find that Respondent threatened McClernan with economic loss because he filed a complaint with MSHA seeking compensation for time spent in training. I credit the testimony of McClernan, Butler, Karpik and Randall, and find that they were called by Johnson and told to drop their complaints if they wanted to work for Lakehead on mine property again. This was a substantial threat because Lakehead was, by far, the largest contractor in the area and a substantial portion of the work for which it hired operators was on mine property. Approximately 90% of the work Butler did for Lakehead was on mine property. Tr. 136. Butler, Karpik and Randall told Johnson during the calls that they would withdraw their complaints and promptly did so. McClernan decided to do so the following day. The only reasonable explanation for those actions is that Johnson conveyed a clear message that their livelihoods were at stake if they continued to pursue their complaints. Butler, who had worked for Lakehead regularly, has only worked about 10 days for Lakehead since filing his complaint, and stated that he wished that he had pursued it. Tr. 137-38. Randall and Karpik had both worked steadily for Lakehead for several years and were working for Lakehead at the time they testified. They maintained that one of the reasons that they decided to withdraw their complaints was that they thought they were merely filing a union grievance, not a "federal class action lawsuit," as Johnson described the complaint to Karpik. Tr. 142, 148, 157. I find that those explanations were attempts at graceful retreats, rather than expressions of true motivation. It is significant that both Karpik and Randall confirmed the threatening nature of Johnson's calls. Moreover, I credit Pariseau's testimony that Johnson confirmed the nature of the calls in a conversation with him. Tr. 203.

In addition, Lakehead's characterization of the nature of the conversations and the motivation for the calls strikes me as being unlikely. According to Hallberg, Johnson was to call the four men and tell them that they needed MSHA training to work on mine property, and that Lakehead was not going to supply the training and was not going to pay them for attending it. There is no satisfactory explanation as to why Lakehead would call the complainants directly to convey this message. There certainly was no question that, under the Act, the operators needed MSHA training to work on mine property. There was also no question about Lakehead's stance on whether it would supply training and whether it would pay miners for attending it. Lakehead's position had been made abundantly clear for over a year in discussions with the various trade unions and Lakehead had provided personal and public notification of its position long before. McClernan and Karpik testified that they understood, at the time they attended training, that Lakehead would not voluntarily compensate them. Tr. 60, 158. There simply was

little or no reason to call the complainants to convey that message. While Johnson explained that he wanted to find out how the complaints came about, it was Hallberg who decided that the calls should be made and it was not for that purpose. The same considerations lead me to find that Hallberg also threatened McClernan during the March 1, 2000, encounter. I accept McClernan's testimony regarding that event, and also find that Johnson remarked "Now you can see why I couldn't call you" after Hallberg had departed.

There is ample evidence of adverse action in the form of threats of lost employment opportunities, motivated by McClernan's filing of his MSHA discrimination complaint. I find that Lakehead, through Hallberg and Johnson, threatened McClernan with loss of employment opportunities and that the threat was motivated entirely by McClernan's filing of the MSHA discrimination complaint. Lakehead's threats, motivated by McClernan's protected activity, violated the Act. *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982).

The Other Retaliation Claims

McClernan has restricted his claims of retaliation based upon loss of employment, and his claim for back pay, to the period between February 17, 2000, when he was laid off from the LTV job, through the completion of the second Minntac shutdown. He claims that, were it not for Lakehead's retaliation, he would have worked one more week at the LTV job, and then would have worked both of the Minntac shutdowns. Lakehead contends that his layoff from the LTV job was due to the absence of operator work, and that he was not hired for the Minntac shutdowns because he was working the LTV job when the Minntac crews were put together and was expected to be working that job during the time of the shutdowns.

McClernan testified that he was laid off of the LTV job, without notice, on February 17, 2000, one week after the Johnson calls.[5] Tr. 37, 72. There is a conflict in the evidence as to whether there was operator work remaining to be performed on the LTV job. McClernan testified that there were tasks remaining that would normally have been done by an operator and that he observed that work being done when he visited the site in April. Tr. 37-38. Lakehead introduced evidence that there was no more operator work to be done on that project and that there was no operator on the LTV job after McClernan was laid off. Tr. 277-78. I find McClernan's version more likely to be accurate. While there was evidence that the LTV job ended earlier than expected, because LTV obtained a waiver of a regulatory requirement, work continued well past February 17, 2000, the date of McClernan's departure. It seems likely that, if operator work was winding down, as Lakehead contends, there would have been some discussion with McClernan about his status and impending departure from the job a few days before his services would no longer have been needed. McClernan, however, testified that his employment was terminated without prior notice. Lakehead did not introduce any evidence to counter that

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[5] McClernan's MSHA complaint was filed on February 4, 2000, and was subsequently sent to Lakehead. Johnson called McClernan on or about February 9 and 10, 2000. McClernan did not withdraw his complaint until February 23, 2000.

assertion or to show that the shortening of the LTV job necessitated an abrupt curtailment of McClernan's work. I find that while there was no other operator employed on the LTV job after McClernan departed, there was work remaining that would have been done by McClernan from February 17, 2000, until the first Minntac shutdown started. I also find that the reason that McClernan's work on the LTV job was terminated was because of the filing of his original MSHA complaint.

I also credit McClernan's testimony, and find that he was told by Johnson, in essence, that he would be working the Minntac shutdowns, the first beginning on February 28, 2000. He had worked ten prior shutdowns and was considered by Tomassoni to be part of that crew. He was one of the few operators who could competently operate the pipe grapple, a particularly useful piece of equipment on that type of job.[6] Since Lakehead terminated his employment on February 17, 2000, it knew that he was available for that job. I find that the work crews for the Minntac job were assembled during the week before the job was to start, when McClernan was available. Lakehead had performed numerous similar shutdowns at the Minntac plant and did not need extensive time to determine the size and makeup of its work crews. Tomassoni and Pariseau testified that the crew for the Minntac shutdown was being assembled during the week before the job started. Tr. 110, 176. Again, Lakehead introduced no compelling evidence to the contrary. Johnson did not specify when he assembled the crews for the Minntac shutdowns. He did testify that he did not find out that the LTV job was being reduced in scope until after the crews were put together. Tr. 275-77. However, he most likely didn't learn about the curtailment of the LTV job until March or April of 2000. The job was originally going to run through May and he didn't find out about the reduction in scope until a few days before what turned out to be the last phase of the project was wrapping up. *Id.* As noted above, McClernan observed the job in progress in April. Lohse testified that he kept a detailed log of contacts made to operators when it was his responsibility to secure their services later in the year 2000. While it is unknown whether Johnson kept such a log, he made no reference to a log or any other written record to clarify when the crews were put together.

I find that Lakehead discriminated against McClernan by not hiring him for the February Minntac shutdown because he filed a complaint with MSHA seeking compensation for time spent in training. That discriminatory action also extended to the March Minntac shutdown. As Johnson explained, the crews for the February and March shutdowns were the same, which was the normal practice. Tr. 277.

Lakehead argues that the fact that it continued to employ and/or subsequently employed McClernan, and the other operators who filed MSHA complaints indicates that the alleged

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[6] Zifco testified that about six operators were competent with the grapple, at least as of when he testified. Tr 312-13. Johnson stated that "quite a few" operators were competent to operate the grapple. Tr. 278. However, none of the seven operators hired for the second shift of the Minntac shutdown were skilled in operating the grapple and it wasn't used on that shift. Karpik testified that Butler or McClernan usually operated the grapple. Tr. 159.

threats were not made and the retaliation did not occur. The case of Karpik is illustrative. He was not working for Lakehead when he received the Johnson call. Tr. 149. When he withdrew his complaint a couple of days after the call, he had been hired by Lakehead and was working at the time. Tr. 155-56. However, he had told Johnson during the call that he would withdraw his complaint. Tr. 162. Consequently, while he was hired by Lakehead while his complaint was pending, he had committed to withdrawing it. That he was hired and subsequently worked for Lakehead after agreeing promptly to withdraw his complaint, having explained that he hadn't intended to initiate a "federal class action lawsuit," does little to establish that the threat to McClernan was not made, or that the retaliation did not occur. The same is true for Randall. Butler, as noted previously, experienced a considerable reduction in the work he performed for Lakehead.

McClernan also stood on a somewhat different footing than the others. He did not initially agree to withdraw his complaint. He did so, only after being called a second time by Johnson, who told him that the other three had agreed to withdraw their complaints. He also may have been viewed by Lakehead as the instigator of the MSHA complaints. As Johnson explained, a lot of union members "grumbled" about Lakehead's training policy, but no one filed an MSHA complaint until McClernan did. Tr. 282. As noted above, McClernan's encounter with Hallberg on March 1, 2000, established that there was considerable hostility regarding the complaint, even after McClernan had withdrawn it. While Lakehead did employ McClernan for one shift on March 6, 2000, it did not call him directly for that job, even though it knew that he was no longer working for Lakehead. Lakehead typically phoned operators that had worked for it in the past five years directly, resorting to referrals from the Union only when it had exhausted that supply. It offered no explanation as to why it did not seek to contact McClernan for that job. Lakehead could refuse operators referred by the Union, but only for non-discriminatory reasons, and it is unclear how urgent Lakehead's need to fill that shift was. The subsequent offers of employment Lakehead made to McClernan may well have been attributable to a desire to reduce its exposure with respect to his re-asserted MSHA complaint and/or whatever prompted the March 8, 2000, letter advising McClernan that he had a right to pursue discrimination complaints without fear of retaliation or reprisal.

I find that Lakehead retaliated against McClernan by discharging him from the LTV job one week early and by refusing to hire him for the two Minntac shutdowns because of the filing of his MSHA complaint.

Remedy

Back Pay

McClernan is entitled to back pay, plus interest, for the time he spent in training, the week that his employment at the LTV job was prematurely terminated, and the hours that he would have worked at the two Minntac shutdowns. Back pay calculations were performed by Pariseau, based upon his knowledge of the union contract, reported hours worked by operators on the Minntac shutdowns and other available information. Complainant's exhibit 6 reflects back pay

calculations for those periods, using two alternative assumptions for the Minntac shutdowns. McClernan's gross hourly rate, as specified by the union contract, was $31.84 per hour, which consisted of $24.84 in wages and $7.00 in benefits. Tr. 36, 179-81. For regular overtime, the wage rate is multiplied by 1.5 and the benefit rate is added, yielding a gross hourly rate of $44.26. For Sundays, the hourly rate is doubled and the benefit rate is added, yielding a gross hourly rate of $56.68. Tr. 179-82. For the eight hours he spent in training, McClernan is entitled to $254.72. For the week of February 17, 2000, when he would have worked at the LTV job, he is entitled to five days of pay for eight regular and two overtime hours per day, for a total of $1,716.20. Tr. 185-86; ex. C-6.

The Secretary offered two alternative calculations of back pay for the Minntac shutdowns. The first was based upon an assumption that McClernan would have been designated as the union steward on those jobs. Union stewards generally work more hours than other operators. Tr. 208. For the first calculation, it was assumed that McClernan would have worked the same number of hours that the actual union steward worked on those jobs. For the second, it was assumed that he would have worked the average number of hours worked on those jobs by all operators. Lakehead argues that it would be speculation to assume that McClernan would have worked more hours than the operator who worked the fewest number of hours. I find that the "union steward" assumption best establishes the amount of back pay to which McClernan is entitled. Pariseau's uncontradicted testimony was that he had the authority to designate the union steward on the Minntac shutdowns, and that he would have designated McClernan as the steward, had he been working. Tr. 187-88. Using the "union steward" model and the total number of hours worked by Karpik, the steward on those jobs, McClernan would have worked the equivalent of 19.5 consecutive days for the first shutdown, beginning on February 28, 2000, and 16 days for the second shutdown, beginning on March 26, 2000. The total gross pay he would have earned for the Minntac shutdowns would have been $16,718.52. From this must be deducted the gross pay he earned while working for Lakehead on March 6, 2000, i.e., one 16-hour shift, a total of $608.80. The total of back pay that McClernan is entitled to for the training, early discharge from the LTV job, and the Minntac shutdowns is $18,080.64, plus interest.

Civil Penalties

The Secretary has proposed a civil penalty in the amount of $6,000.00 for Lakehead's failure to compensate McClernan for time spent in training, and an additional $6,000.00 for its retaliation in the form of threats and denial of employment. Lakehead is the largest heavy construction contractor in the area and had 245,948 hours worked on mine property in calendar year 1999, making it a medium-sized operator. Its violation history, as set forth in exhibit C-7, is relatively unremarkable, and includes no violations of the Act's discrimination provisions. Lakehead does not argue that its ability to remain in business would be threatened by the imposition of penalties in the amounts proposed by the Secretary.

As to the compensation for training violation, the Secretary argues that Lakehead completely disregarded its training obligations under the Act, and its negligence should be regarded as high. She also argues that the gravity of the violation should be found to be serious,

because it was likely to have a chilling effect on miners, discouraging them from getting required refresher training. The Secretary also contends that Lakehead exhibited bad faith by not attempting to achieve compliance, after being notified of the violation. Lakehead, aside from arguing that it did not violate the Act, contends that it was entitled to secure an interpretation of the law on its training obligations, and that it has already been penalized by having to expend money on its defense to the Secretary's allegations.

I find that Lakehead's negligence was no more than moderate. In response to mine owners' objections to paying for MSHA training, it determined that it would no longer provide such training and would not compensate individuals for attending it. While it ceased holding its own training courses, it did secure a concession from the Union to provide refresher training to miners working for it. Its position as to union members not yet hired was sustained in *Sasse*, *supra*. I also find, as to gravity, that the violation was not as serious as the Secretary maintains. There is no evidence that Lakehead's decision to cease compensating individuals for time spent in training had any chilling effect, either on McClernan or any other miner. On the contrary, Union members were well aware that they needed to keep current on their MSHA training in order to be qualified to work on mine property, and made sure to get required training, which was provided free of charge by the Union. The only evidence of individuals foregoing training, and actual or potential employment opportunities, was to the effect that union members who had traveled from other jurisdictions where there was little or no mine work, might forgo refresher training and further employment if they had only a day or two left on the job. Tr. 259. I also agree with Lakehead that its litigation of this case is not evidence of bad faith. While it did not establish good faith by agreeing to pay McClernan for time spent in training after being notified of the Secretary's determination that it had violated the Act, it should not be penalized for seeking a ruling on its position. The Secretary has not pointed to another avenue through which Lakehead could have obtained a ruling from the Commission.

Upon consideration of the common penalty factors addressed above and the negligence, gravity and good faith considerations, as discussed in the preceding paragraph, I find that a civil penalty in the amount of $2,500.00 would be appropriate for this violation. Whatever expense Lakehead has incurred in litigating this claim has not been considered in determining this penalty.

As to the retaliation claims, I find that the threat of loss of employment conveyed to McClernan after the filing of his original MSHA complaint, his early and precipitous termination from the LTV job and the failure to hire him for the Minntac shutdowns, were blatantly discriminatory and evidence a reckless disregard for miners' rights under the Act. This was a violation of serious gravity, likely to have a chilling effect on other miners. Under the existing hiring system, Lakehead was free to choose among any Union members who had worked for it within the past 5 years, and it was by far the largest such employer in the area. The open hostility that it exhibited toward McClernan, in response to his exercise of his rights under the Act, no doubt had a chilling effect on any person who depended upon Lakehead's offers of employment for his livelihood. The effects of Lakehead's violations may have been reduced somewhat by its subsequent offers of employment to McClernan and its actual hiring of McClernan after April of

2000. However, the impact of its treatment of McClernan is likely to have a chilling effect on other miners' exercise of their rights for years to come. As with the training violation, Lakehead cannot be penalized for litigating this aspect of the case. However, I find that it failed to exhibit good faith in attempting to achieve compliance, after being notified of the Secretary's determination that it had violated the Act.

Upon consideration of the common factors discussed above, and the negligence, gravity and good faith factors, I find that a penalty in an amount greater than that proposed by the Secretary should be imposed. I find that a civil penalty in the amount of $10,000.00 would be appropriate for the retaliation violation. The cost of Lakehead's defense of this action has not been considered in determining the amount of the penalty.

ORDER

Based upon the foregoing, I find that Lakehead discriminated against McClernan, in violation of the Act, by refusing to compensate him for time spent in annual refresher training, and in retaliating against him by threatening him with loss of employment opportunities if he did not withdraw his discrimination complaint, by terminating him from the LTV job, and by failing to hire him for the Minntac shutdowns that started in February and March of 2000. Accordingly, it is **ORDERED** that:

Back Pay

Respondent shall pay McClernan $18,080.64 representing back pay for 8 hours spent in training on December 28, 1999, back pay for the week of February 17, 2000, that he would have received for working on the LTV job and back pay that he would have received for working on the two Minntac shutdowns. To this amount interest shall be added to the date of payment under the formula established in *Secretary on behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-05 (Nov. 1988).[7] Payment shall be made within 30 days of the issuance of this decision.

Posting of Notice

Respondent shall post in a prominent place at any mine site where it performs work, in a location where all its miners can read it, a notice stating that:

1. Individuals working for it on mine property are "miners," as defined in the Mine Safety and Health Act of 1977, and that as miners, they have a right to refresher training required by the Act, that Lakehead is obligated to provide that

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[7] Deductions from gross pay may be made for withholdings required by law. In addition, the benefits portion of the back pay award, plus appropriate interest, may be paid directly to the Union, if consistent with the collective bargaining agreement.

training to any miner working for it, and is also obligated to pay such miners at their normal hourly rate for time spent in training.

2. Lakehead was found to have discriminated against McClernan, in violation of the Act, by refusing to compensate him for time spent in annual refresher training on December 28, 1999, in threatening him with loss of employment opportunities if he did not withdraw the discrimination complaint he filed with MSHA, in retaliating against him for filing the complaint by terminating him one week early from a job at LTV, and by failing to hire him for shutdowns at the Minntac plant that started in February and March of 2000.

3. Lakehead, its officers and agents will not discriminate against any miner who exercises rights under the Act.

The notice shall be posted within 30 days on any mine property on which Lakehead is performing work, or on which it performs work within the twelve-month period following issuance of this decision. It shall remain posted for a period of 30 days, or until the end of the job, whichever is shorter.

Civil Penalties

Respondent shall pay civil penalties in the total amount of $12,500.00, within 30 days.

Michael E. Zielinski
Administrative Law Judge

Distribution:

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

November 21, 2002

JAMES WOMACK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. WEST 2002-138-DM
	:	WE MD 01-17
GRAYMONT WESTERN US,	:	
Respondent	:	Tacoma Plant
	:	Mine ID 45-03290

ORDER REQUESTING ADDITIONAL INFORMATION

The hearing in this matter was conducted in Seattle, Washington on October 2 and October 3, 2002. James Womack began working for Graymont Western US (Graymont) on January 13, 1987. The record reflects Womack initially sustained a work related injury to his lower back on July 26, 1999. (Comp. Ex. 1). Womack also sustained work related burn injuries to his neck, face, back and arms on August 4, 1999. (Comp. Ex. 2). Womack received reimbursement of expenses for medical treatment and medicine for his job related injuries from the State of Washington Department of Labor and Industries (L&I) under Claim No. X445116. (Resp. Ex. 9).

Womack continued to work as a kiln operator while he received L&I benefits for the treatment of his back condition. However, Womack was placed on light-duty in recognition of his physical limitations. Graymont placed Womack on medical leave on September 21, 2001, after Womack's doctor, Gary Henriksen, provided information that the Flexeril and Darvocet prescribed for Womack "may cause drowsiness." (Comp. Ex. 9). Womack was awarded L&I disability compensation benefits as of the date he was put on medical leave. Womack's eligibility for L&I compensation was terminated effective July 8, 2002, after the medications he was taking for his back condition were discontinued.

On August 14, 2002, Womack's union representative furnished Graymont with Womack's latest ability-to-work report. Dr. Henriksen imposed lifting, pulling, and pushing restrictions of 35 pounds. Henriksen's report noted: "Patient is on NO medications that will impair his balance, judgement, or reaction time." (Comp. Ex. 20). At the hearing, Graymont stated that it was unable to determine if Womack was physically capable of returning to his job because it had not received sufficient information about his current medical condition. The record was left open for Womack to provide Graymont with additional information.

Womack provided an additional statement from Henriksen dated October 7, 2002. Henriksen, repeating Womack's limitations of lifting no more than 35 pounds, indicated Womack was capable of moderate activity levels. Henriksen expressed concern regarding Womack's ability, given the nature of his back impairment, to push or pull heavy ash balls from the kiln with a 20 foot poker.

In a letter dated October 18, 2002, Graymont informed Womack that it had hired a certified rehabilitation counselor to perform a kiln operator job analysis. Based on the job analysis and the information provide by Dr. Henriksen, Graymont concluded Womack could not perform the essential elements of the kiln operator job with or without a reasonable accommodation. Consequently, Womack's employment was terminated effective October 22, 2002.

Thus, a central post-hearing issue in this proceeding is whether Graymont's termination of Womack is a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(1). Section 105(c)(1) of the Act provides, in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . subject to this Act 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 . . . .

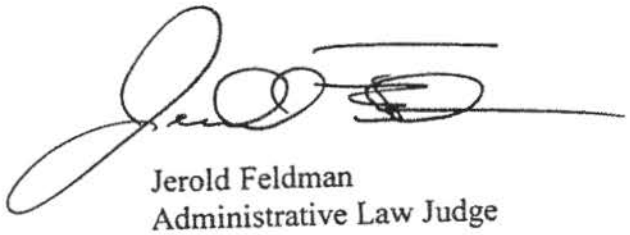
Womack contends that Graymont's decision to terminate his employment rather than reinstate him to the restricted duties he had performed in the past is motivated by activities he engaged in that are protected by section 105(c) of the Act. As a general proposition, Womack has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Act. In order to establish a *prima facie* case, Womack must demonstrate that he participated in protected safety related activity, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Graymont may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Graymont may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity, and, that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

In view of the fact that Graymont's decision to terminate Womack occurred after the initial hearing, it is necessary for **both parties** to furnish additional documentation. In this regard, the record reflects that L&I reports concerning Womack's medical condition and treatment were sent to both Womack and Graymont. Accordingly, the parties are requested to provide the following:

> **ALL Copies** of reports received from L&I with respect to medical diagnoses, physical limitations, and reimbursements for medical treatment and medicine during the period from July 1999 to the present.
>
> **ALL Copies** of physician examination reports and ability-to-work reports for Womack provided to Graymont, including all physician reports detailing Womack's physical limitations, during the period from July 1999 to the present.

IT IS ORDERED that the above information be provided **within 21 days of the date of this Order**. Womack should provide copies of the documentation submitted in response to this Order to Graymont's counsel. After the above information is received from both parties, I will schedule a telephone conference to determine if the hearing should be reconvened, or, whether post-hearing briefs should be filed.



Jerold Feldman
Administrative Law Judge

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