

AUGUST 2000

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AUGUST 2000

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

Central Sand and Gravel Company v. Secretary of Labor, MSHA, Docket Nos. CENT 98-230-RM, CENT 99-242-M (Chief Judge Barbour, June 30, 2000)

Eagle Energy, Incorporated v. Secretary of Labor, MSHA, Docket Nos. WEVA 98-72-R, WEVA 98-73-R, WEVA 98-123 (Judge Feldman, July 12, 2000)

Review was denied in the following case during the month of August:

Secretary of Labor, MSHA v. Earl Begley, employed by Manalapan Mining Company, Docket No. KENT 99-233. (Reconsideration of a denial of a Petition for Discretionary Review issued May 30, 2000.)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 3, 2000

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. CENT 99-310-M
 :
STERLING SAND & GRAVEL COMPANY :

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 20, 1999, the Secretary of Labor filed a petition for assessment of civil penalty against Sterling Sand & Gravel Co. ("Sterling"), a subsidiary of Mid-America Redi-Mix, Inc. ("Mid-America"), for six alleged violations of mandatory standards, and proposed a total assessment of \$726. Sterling had filed a request for a hearing but failed to answer the Secretary's petition for assessment. On October 25, 1999, Chief Administrative Law Judge Paul Merlin issued an order to respondent to show cause, directing Sterling to file an answer within 30 days. On November 4, 1999, noting that the penalties had been paid, Chief Judge Merlin issued a decision approving the penalties and dismissing the case. The judge's decision became final 40 days after its issuance, on December 14, 1999. 30 U.S.C. § 823(d)(1).

On May 9, 2000, the Commission received a letter from Marc Westhoff, owner of Mid-America, requesting that the judge's decision approving the penalties and dismissing the case be set aside. Mot. Westhoff states that he purchased Mid-America and its holdings on September 28, 1999. *Id.* Westhoff claims that the check paying the subject penalties was written on August 25, 1999, prior to Westhoff's ownership, but that the check did not clear until October 6, after Westhoff took ownership.¹ *Id.* He seeks reimbursement for this payment because he believes

¹ It appears that Westhoff is stating that although the previous owner of Sterling wrote the check, Westhoff effectively paid the penalties because funds for the check were drawn from Sterling's account after Westhoff assumed ownership.

that he is not responsible for these penalties. *Id.* The Secretary of Labor does not oppose Sterling's request that these proceedings be reopened.

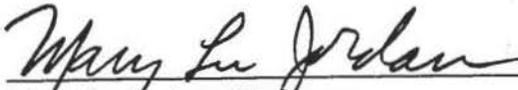
The judge's jurisdiction in this matter terminated when his decision was issued on November 4, 1999. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Commission received Sterling's request on May 9, nearly six months after the judge's decision became a final decision of the Commission.

A final Commission judgment or order may be reopened under Rule 60(b)(1) & (6) of the Federal Rules of Civil Procedure under circumstances such as mistake, inadvertence, excusable neglect, or other reasons justifying relief. *See* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). The Commission has granted requests to reopen where operators have mistakenly paid penalties and shown that they intended to contest the penalties. *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999); *Cyprus Emerald Resources Corp.*, 21 FMSHRC 592, 592-93 (June 1999).

Here, however, Sterling has not alleged that it had intended to contest the penalty that was paid. Instead, Westhoff merely argues that he is not responsible for the payment of the penalty because the subject "citation was written against the old owner, but was paid by me, the new owner." Mot. But Westhoff fails to explain how his purchase of Sterling affected the *company's* responsibility to pay the penalty. We thus conclude that Sterling has failed to set forth grounds justifying relief under Rule 60(b).²

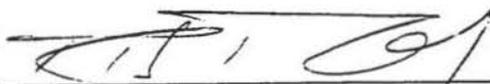
² Whether Westhoff is entitled to reimbursement from the previous owner of Sterling for an unanticipated expense arising under the terms of the sale of the business is an issue of contract or corporate law, not a matter arising under the Mine Act which the Commission may review.

Accordingly, Sterling's request for relief is denied.³


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


Robert H. Beatty, Jr., Commissioner

³ In view of the fact that the Secretary does not oppose Sterling's motion to reopen this matter for a hearing on the merits, Commissioner Marks concludes that the motion should be granted.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 9, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. CENT 2000-299
	:	and 2000-300
GEORGES COLLIERS, INCORPORATED	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 5, 2000, the Commission received from Georges Colliers, Inc. a request to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Georges Colliers.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to so notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its motion, Georges Colliers contends that it intended to file hearing requests because it is experiencing financial hardship and, as a matter of policy, has contested all proposed penalties. Mot. at 1. It asserts that it submitted financial documents to the Department of Labor's Mine Safety and Health Administration's Civil Penalty Compliance Office and was indirectly notified that that office notified the Regional Solicitor's Office that Georges Colliers was entitled to financial hardship consideration. *Id.* at 2. Georges Colliers contends that it either misplaced or misfiled the proposed assessments due to changes in office clerks during the time it received the proposed penalty assessments or that the Civil Penalty Compliance Office lost its hearing request. *Id.* Georges Colliers requests that the Commission reopen the proposed penalty

assessments in the subject proceedings. Georges Colliers attached to its motion copies of the notices of proposed penalty assessments and a demand letter for payment of the penalties from MSHA.¹ Attachs.

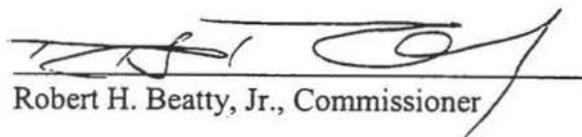
We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Essayons, Inc.*, 20 FMSHRC 786, 788 (Aug. 1998) (remanding final order when operator misplaced proposed penalty notification); *Del Rio, Inc.*, 19 FMSHRC 467, 468 (Mar. 1997) (remanding final order when operator inadvertently misfiled hearing request card); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995) (remanding final order when operator misplaced hearing request card). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

¹ Although Georges Colliers alleges that it may have misplaced or misfiled the proposed penalty assessments, it appears that it subsequently obtained or retrieved copies to submit as attachments to its motion. However, Georges Colliers fails to explain the circumstances of when or how it obtained such copies.

On the basis of the present record, we are unable to evaluate the merits of Georges Colliers' position.² The documents attached to Georges Colliers' motion do not substantiate its allegations that it misplaced or misfiled the proposed penalty assessments or that MSHA misplaced its hearing request. In the interest of justice, we remand the matter for assignment to a judge to determine whether Georges Colliers has met the criteria for relief under Rule 60(b). See *BR&D Enterprises, Inc.*, 22 FMSHRC 479, 481 (Apr. 2000) (remanding where operator claimed it timely sent hearing request, but never received return receipt and, in support, attached copies of correspondences between it and MSHA and a certified mailing receipt which did not indicate the document sent) and *East Arkansas Contractors, Inc.*, 21 FMSHRC 981, 981-82 (Sept. 1999) (remanding where operator failed to file hearing request because of a change in personnel responsible for handling such matters and ensuing mishandling of the proposed penalty notice). Compare *Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 17-18 (Jan. 2000) (granting operator's request to reopen where operator claimed its hearing request was late due to mail delays beyond its control and submitted affidavit, copy of the green card, and a letter from MSHA in support). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Robert H. Beatty, Jr., Commissioner

² In view of the fact that the Secretary does not oppose Georges Colliers' motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

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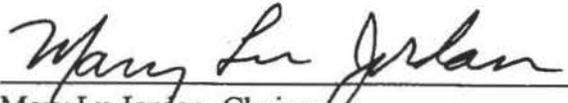
bring his case before a judge, and had offered no explanation for his failure to timely submit a petition for discretionary review. *Id.* at 630. Commissioner Marks dissented, stating that he would have granted Begley's petition. *Id.* at 631.

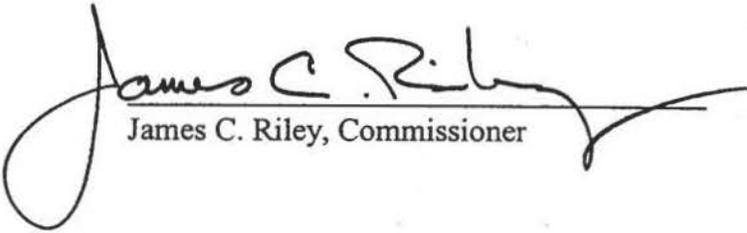
On June 14, 2000, the Commission received from Begley, by counsel, a petition for reconsideration. In his petition, Begley asks the Commission to grant his previously denied petition for discretionary review. *Pet. Recons.* at 1. Begley explains that, although the judge issued his decision in this case on April 19, 2000, he subsequently issued an order on May 5, 2000, amending his April 19 decision and correcting clerical errors. *Id.* Begley asserts that the deadline for filing a petition for discretionary should run from May 5, and that his petition for discretionary review filed on May 25 was timely. *Id.*

Since the Commission issued its order denying his petition for discretionary review on May 30, 2000, the Commission's Procedural Rules required that any petition for reconsideration of this denial be filed within 10 days, or by June 9, 2000. *See* 29 C.F.R. §§ 2700.78(a) ("A petition for reconsideration must be filed with the Commission within 10 days after a decision or order of the Commission."); 2700.5(d) ("When filing is by mail, filing is effective upon mailing."). Begley's petition for reconsideration, however, was filed on June 14, 2000, 5 days after this filing deadline. Begley has offered no explanation for the late filing of his petition for reconsideration.

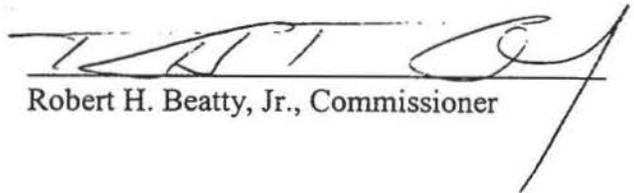
In any event, even if Begley's petition for reconsideration had been timely filed, we would not depart from our prior holding that Begley's petition for discretionary review was untimely. The Commission has held that clerical corrections made subsequent to the issuance of a judge's decision do not toll the period for filing a petition for discretionary review of the judge's decision on the merits. *North American Coal Corp.*, 2 FMSHRC 1694, 1695 (July 1980) (rejecting argument that motion to correct a judge's decision tolls the period for filing a petition for discretionary review, and holding that a petition for discretionary review must be filed within 30 days of the judge's decision on the merits); *see also Capitol Aggregates, Inc.*, 2 FMSHRC 1040, 1041 (May 1980) (holding that once a judge issues his decision, his jurisdiction terminates, and he cannot stay the effect of his decision or reconsider it). The Commission's holding is consistent with federal practice in that a motion to correct non-substantive clerical errors does not toll the period for filing an appeal. *See Harmon v. Harper*, 7 F.3d 1455, 1457 (9th Cir. 1993); *In re Cobb*, 750 F.2d 477, 479 (5th Cir. 1985) ("Corrections under Rule 60(a) [to correct clerical mistakes] do not affect the underlying judgment, and consistent therewith, do not affect the time for filing a notice of appeal.").

Based on the foregoing, we deny Begley's petition for reconsideration as untimely.¹


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


Robert H. Beatty, Jr., Commissioner

¹ Commissioner Marks would accept Begley's petition for reconsideration, and grant Begley's petition for discretionary review.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 30, 2000

DAVID MORALES

v.

ASARCO, INC.

:
:
:
:
:
:

Docket No. WEST 99-188-DM

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioner

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c)(3) (1994). At issue is Commission Administrative Law Judge Richard Manning's decision dismissing the complaint of discrimination filed by David Morales against Asarco, Inc. ("Asarco"). 22 FMSHRC 659, 671 (May 2000) (ALJ). The Commission granted Morales' petition for discretionary review challenging the judge's decision. For the reasons set forth below, we vacate the judge's decision and remand this matter to him to conduct further proceedings consistent with this decision.

Asarco terminated Morales on August 13, 1998. *Id.* at 660. Morales filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that Asarco fired him because on April 7, 1997, he complained to MSHA that fumes in the cab of a truck he was operating were making him sick. *Id.* Morales' complaint was tried before Judge Manning under section 105(c)(3) of the Act. Although the judge found that Morales had engaged in protected activity (22 FMSHRC at 665), he dismissed the discrimination complaint on the grounds that "there is nothing [in the record] to suggest that Mr. Morales was targeted for discharge, that he was being closely watched because of his MSHA complaint, or that his discipline was unusually harsh." *Id.* at 666. The judge concluded: "If I review the evidence presented in this case against the indicia of discriminatory intent frequently relied upon by the Commission, I find that Mr. Morales did not establish that his discharge was motivated in any part by his protected activity." *Id.* at 670.

In his petition for discretionary review, however, Morales alleged that an attempt was made by an Asarco employee to interfere with the testimony of a witness he called, Tony Rivera.

This allegation was supported by notarized statements from Rivera and Rito Orrantia, another witness Morales called. In a Supplemental Memorandum in Opposition to Complainant's Petition for Discretionary Review and Motion for Reconsideration of the Commission's Grant of Review,¹ Asarco "categorically denies" Morales' allegation of witness interference, and avers that the allegation was "raised at trial and rejected based on the evidence." Supp. Opp. at 1-2.

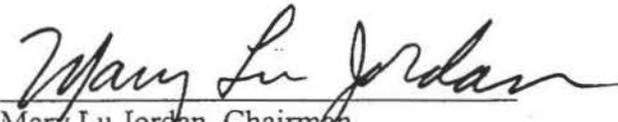
We find that the record does not support Asarco's assertion that the judge addressed Morales' allegation of witness interference. To the contrary, the specific allegation made in the PDR was not brought up before the judge, whose decision is dated May 8, 2000, whereas the Rivera and Orrantia statements are dated May 18, 2000. The allegation is of a serious enough nature, however, that we find good cause exists to consider it on review. *See* 30 U.S.C. § 823(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded the opportunity to pass.").

We are unable, however, to evaluate Morales' allegation. This must be done by the finder of fact in the first instance. We thus remand this case to the judge to determine whether any attempt was made to influence Rivera's testimony as alleged in the petition, and if so, whether any such conduct had a material effect on the outcome of the proceedings before the judge. In considering these questions, the judge may, in his discretion, order further proceedings as appropriate.²

¹ We hereby deny Asarco's motion for reconsideration.

² On August 18, 2000, the Commission received an additional document from Morales containing additional allegations regarding his employment history and termination, and witness intimidation. We have not considered this additional information in reaching our decision. The judge may consider this information on remand, if appropriate.

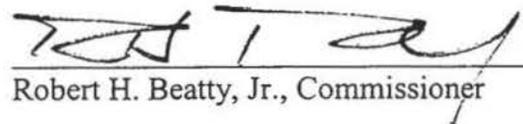
Accordingly, we vacate the judge's decision and remand this matter to him to conduct further proceedings consistent with this decision.³


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


Robert H. Beatty, Jr., Commissioner

³ Morales raises many other issues in his petition for discretionary review that we do not reach at this time. He may, of course, raise these issues again, as appropriate, in a petition for review of the judge's decision on remand, including any parts of the decision we vacate today that the judge reinstates in his remand decision, or that are necessary predicates to the remand decision.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 1, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of	:	
LEONARD M. BERNARDYN,	:	Docket No. PENN 99-158-D
Complainant	:	WILK CD 99-01
	:	
v.	:	Docket No. PENN 99-129-D
	:	WILK CD 99-01
READING ANTHRACITE COMPANY,	:	
Respondent	:	Wadesville Pit
	:	Mine ID 36-01977

DECISION ON REMAND

Appearances: Troy E. Leitzel, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Complainant;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

The Statement of the Case

This discrimination proceeding is before me based on the Commission's decision in this matter, 22 FMSHRC 298 (March 2000) which vacated my initial decision in this case, 21 FMSHRC 819 (July 1999), and remanded this matter for "further analysis" of the issue of whether Respondent had established its affirmative defense that Bernardyn would have been fired in any event based on his unprotected activities i.e., the use of profanity over a C.B. radio, and the use of threatening language he directed at Wapinski, the general superintendent at the site. On May 5, 2000, Respondent filed a brief. The Secretary's brief was received on May 30, 2000. On June 9, 2000 Respondent's reply brief was received.

I. Bernardyn's Statement Constituted a Threat.

According to Bernardyn, after he was stopped by Wapinski for going too slow, he stated, over the C.B. radio, that he was being harassed, and that he was asked to drive faster than warranted by the road conditions. Bernardyn indicated that he did use curse words at the time. He did not contradict or impeach the testimony of Derrick, that he (Bernardyn) used the following language over the C.B. radio "I will get the little f---r".

Bernardyn testified that he had never threatened anybody in his life. I find this general statement insufficient to contradict or impeach Derrick's testimony regarding the specific language used by Bernardyn. Further, although Bernardyn might, in his own mind, have considered the language that he used not to have constituted a threat, I do not find this dispositive of the issue of whether the words used by him constituted an expression of an intent to inflict harm on Wapinski. To the contrary, I find more significant the objective context in which Bernardyn uttered the statement at issue. I note that the statement was made over the C.B. by Bernardyn in an attempt to contact his union representative, in reaction to the incident in which Wapinski stopped him and told him that he was going too slow at a time when Bernardyn had concluded that the road was getting slippery. Also, Bernardyn conceded that he did use curse words at the time, evidencing a degree of animus. Within this framework, I conclude that Bernardyn's statement over the C.B. constituted a threat, i.e., an expression of an intent to inflict harm on another. (See, Webster Third New International Dictionary) (1986 edition)).

II. The 1987 Policy and the 1998 Policy.

In its decision, the Commission noted the dispute between the parties as to which disciplinary policy was in effect at the time of Bernardyn's discharge i.e., a 1987 policy which provided, that, inter alia "[r]efusal to obey orders or failure to carry out instructions or assignments ('Insubordination') to be a serious offense, and that the offending miner would be discharged after "complete exhaustion of disciplinary warnings and suspensions," or a 1998 policy providing that insubordination will result in discharge without exhausting disciplinary warnings and suspensions. In this connection, I note that a letter from Reading's attorney, Howard A. Rosenthal, to Daniel J. Kane, executive board member of the United Mine Workers of America, dated August 4, 1998, states, as pertinent, "... the Company will implement the attached Code of Conduct following the conclusion of the current negotiations and ratification of the new collective bargaining agreement." Hence, the Company committed itself to implement the 1998 policy upon ratification of the new collective bargaining agreement. Jay Berger, District Executive Board Member of the United Mine Workers, testified that the new agreement was not ratified until November 16, 1998, i.e., subsequent to the adverse action taken against Bernardyn. This statement appears to be corroborated in language contained in a letter written by Rosenthal to Kane, dated November 17, 1998, which contains the following language "this letter confirms that the Company has accepted the changes to the Supplemental Memorandum of Agreement dated October 27, 1998, which we understand was ratified, in advance by the

UMWA.” Within this context, I find that it was more probable than not that the 1998 disciplinary policy was not in effect at the time of Bernardyn’s termination.

III. Whether Bernardyn Suffered Disparate Treatment.

I take cognizance of the fact that John Downey, the President of the local union, who had worked for Reading for approximately 20 years until June 1998, indicated that in September 1998, at a grievance hearing that he attended, it “c[a]me out” (Tr. 28, May 18, 1999) that Edward Mitchell, a truck driver employed by Reading, who had alleged he was “forced” to drive a truck not in his classification, directed the following towards his supervisor: “you can s--- my d--- if you think I will drive that truck.” (Tr. 29, May 18, 1999). According to Downey, Mitchell was not discharged by Reading for the use of the profanity, but instead was fired for refusing to perform a job task that was not in his classification. Downey stated that Mitchell was rehired the following day. Also, three other individuals working for Reading who had used profanity directed against their foremen had only been given warnings.

However, based on Derrick’s testimony, that I find credible, inasmuch as it was not impeached or contradicted, that, in contrast to these individuals who just received warnings, Bernardyn used threatening language over the C.B. radio, whereas the other individuals did not use threatening language, and did not broadcast their profanity over the C.B. radio. Further, the other individuals made a profane remark only once, whereas Bernardyn used profanity “non stop” (Tr. 21, May 19, 1999) for approximately 8 to 10 minutes. I thus find that Bernardyn’s conduct was more egregious, and thus not in the same category as the others who were merely warned.

IV. Provocation

The only evidence in the record relating to whether Reading’s agents’ actions or words provoked or incited Bernardyn to curse and issue a threat, is Bernardyn’s testimony that when he was stopped by Wapinski and told that he was going too slow, he explained to Wapinski that it was getting slippery; and Wapinski responded by telling him “get the thing moving and get going”. Wapinski testified that he told Bernardyn “pick it up when and where you can”. It also appears that Bernardyn felt that he was being harassed and expressed this over the C.B.

I find that although Bernardyn may have subjectively felt that he was being harassed by Wapinski, the Secretary has failed to establish that Reading provoked Bernardyn into using profanity and issuing a threat over a C.B. radio. I note that the Secretary did not cite, nor does the record contain, any actions or conduct on the part of any of Reading’s agents that might constitute an act of provocation. Further, the only statement by Reading’s agents that might be seen as provocation, was Wapinski’s response to Bernardyn’s protected activity of slowing down due to poor road conditions wherein he stated “get this thing moving and get going” or “pick it up when and where you can.” I find that the words in these statements are devoid of any threat or expression of any animus toward Bernardyn or his protected activity. I find that Bernardyn’s

unprotected activities, in using profanity for 8 to 10 minutes directed not against Wapinski but over a C.B. radio, and using words constituting a threat over a C.B. radio, to have been out of proportion to the one-time, brief statements Wapinski made to him. I thus find that, within the circumstances of this case viewed in their totality, that it has not been established that any conduct, statements, or actions of Reading's agents constituted a provocation which justified or excused Bernardyn's using profanity, and voicing a threat. ¹

¹The cases cited and relied by the Secretary are in inapposite to the facts presented in the case at bar. In NLRB v. M & B Headwear Co., 349 F 2nd 170 (4th Cir. 1965), the Fourth Circuit upheld the reinstatement of a worker who, after a discriminatory layoff, threatened a supervisor because the unjust and discriminatory treatment of [the worker] gave rise to the antagonistic environment in which these remarks were made. 349 F 2nd supra, at 174. In M & B Headwear, supra, in contrast to the case at bar, the employer had subjected the discharged employee to surveillance when the former was engaging in protected activities. Also, she was transferred to a different job six days after she had engaged in protected activities, and she was told by a supervisor that it was unfair of her to attempt to organize the plant without telling the company's officers. The Court found that there was sufficient evidence to support the Board's conclusion that her layoff was discriminatory. In this context the Court found that the unjust and discriminatory treatment of the worker gave rise to the antagonistic environment in which the worker's subsequent threats and rudeness were made. In contrast, in the case at bar, there is no evidence of any unjust and discriminatory treatment of Bernardyn to lead to a conclusion that any wrongful provocation existed.

Similarly, in NLRB v. Steinerfilm, Inc. 669 F 2nd 845 (1st Cir. 1982), the Court, in upholding the decision of the Board that had held that a discharge of an employee was unlawful, noted that the company had engaged in a series of unfair labor practices, including threats to the discharged employee. Also, the company had issued a warning, which the Court found that the Board was fully justified in concluding had been unlawful. The Court held that the Board could reasonably conclude that the discharged employee's abusive language was an excusable action to the unjustified warning he had received just minutes before, and therefor the discharge was improper. In contrast, in the case at bar, Bernardyn's use of excessive profanity did not follow any unlawful warning or other unlawful act on the part of Respondent.

Lastly, in Trustees of Boston University vs. NLRB 548 F 2nd 391 (1st Cir. 1977), the First Circuit upheld an Administrative Law Judge's decision excusing an employee's misconduct because it was stimulated by the employer's own wrongful conduct. In the instant case, in contrast, it has not been established that Bernardyn's use of profanity and threatening language was stimulated by Respondent's wrongful conduct. Specifically, the plain meaning of the words used by Wapinski in response to Bernardyn's driving slowly due to slippery conditions, do not contain any threat or animus toward Bernardyn relating to his protected activity under the Act, i.e., driving slow due to slippery conditions, and hence were not "wrongful".

V. Conclusion

The critical issue to be resolved is the nexus between Bernardyn's protected activity and the adverse action taken against him by Respondent. The disciplinary policy of 1987 in effect when Bernardyn was terminated did not specifically grant Respondent the right to terminate an employee based upon the latter's use of profanity, and the issuance by the latter of a threat against a supervisor. However, the Secretary cannot prevail if the operator establishes that it would have terminated Bernardyn anyway for the unprotected activity alone. (See, Bradley v. Bela Coal Co. 4 FMSHRC 992, 993 (June 1992).² In this connection, I reiterate the finding that I made in the original decision, 21 FMSHRC supra at 823, accepting Derrick's testimony that was not impeached or contracted, that Bernardyn cursed "unstop" over the C.B. radio, and used threatening language directed against Wapinski, his supervisor. Accordingly, I find credible Derrick's testimony that his decision to immediately terminate Bernardino was made when Bernardino cursed and threatened his supervisor over the C.B.. I thus find that Reading has established that it's decision to immediately terminate Bernardino would have been taken in either event based upon Bernardino's unprotected activities, i.e., excessive profanity, and threatening profane language directed over the C.B. radio against his supervisor.

Therefore, for all the above reasons, I find that although the Secretary has established a prima facie case,, Reading has prevailed in establishing it's affirmative defense. I thus conclude that the Secretary has not prevailed in establishing that Bernardyn was discharged in violation of Section 105(c) of the Act. Therefore the Complaint shall be dismissed.

(Footnote 1 continued)

Further, in Boston University, supra, the discharged employee's conduct consisted of being "offensive" on a number of occasions in dealing with supervisors, and brandishing a pair of scissors. (The court, Boston University, supra at 392, n. 2., found the decision of the NLRB that this episode was not perceived as a serious threat, to be a supportable characterization.) In contrast, in the case at bar, the employee misconduct of Bernardyn, was most egregious, as he used profanity for 8 to 10 minutes over the C.B., and issued a verbal threat.

² It thus is not for this forum to determine whether the termination was consistent with agreements (policies) negotiated between the operator and the union.

VI. Order

It is **ORDERED** that the Complaint filed in this case be dismissed, and that this case shall be dismissed.


Avram Weisberger
Administrative Law Judge

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August 3, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 99-244-M
Petitioner	:	A. C. No. 40-00022-05593
v.	:	
	:	
	:	
FRANKLIN INDUSTRIAL MINERALS,	:	Mine: Anderson Mine
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, for the Petitioner,
Timothy Biddle, Esq., Crowell & Moring, Washington, DC for Respondent.

Before: Judge Barbour

This civil penalty proceeding arises under section 105 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815) (Mine Act or Act). The Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) seeks the assessment of a civil penalty against Franklin Industrial Minerals (Franklin) for an alleged violation of 30 C.F.R. §57.9101, a mandatory safety standard for underground metal and nonmetal mines that requires operators of self-propelled mobile equipment to maintain control of the equipment while it is in motion.¹ Franklin was cited for the violation following MSHA's investigation of a fatal accident that occurred at Franklin's Anderson Mine on December 23, 1998. The accident happened when a miner was crushed between a front-end loader (FEL) and a railcar. In addition to alleging a violation, the Secretary charges the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was the result of Franklin's unwarrantable failure to comply with the regulation. The Secretary proposes that Franklin be assessed a civil penalty of \$55,000.

¹ The Secretary originally charged Franklin with a violation of 30 C.F.R. §57.14205, a mandatory safety standard requiring that machinery and equipment not be used beyond the design capacity intended by the manufacturer where such use will create a hazard. A few days before the hearing the Secretary moved to amend her pleadings to allege a violation of section 57.9101. I consulted with counsels and advised them I would hear arguments and would rule on the motion at the hearing. At the start of the hearing counsel for the Secretary stood upon the motion, counsel for Franklin summarized the reasons for the company's opposition, and I granted the motion (Tr. 8-9, 36).

Franklin denies that it violated section 57.9101. Alternatively, it argues the violation was neither S&S nor unwarrantable. The matter was heard in Nashville, Tennessee, and following the hearing counsels filed helpful briefs.

THE ISSUES

The issues are whether Franklin violated section 57.9101; whether the violation was S&S and unwarrantable; and the amount of any civil penalty that must be assessed.

STIPULATIONS

The parties stipulated that Franklin demonstrated good faith in achieving rapid compliance after being cited. They also stipulated that in 1998 the company had sales of approximately \$110,000,000 and employed 620 persons (Tr. 13-14). Based on the stipulations, the Secretary took the position that the company was a large operator, while Franklin maintained that the company was medium in size when compared to other companies in the metal/nonmetal industry (Tr. 13-14). The Secretary also took the position that the proposed penalty would not adversely affect the company's ability to continue in business. The company responded that a "reasonable" penalty would not affect its ability to continue in business (Tr. 17). Finally, the company agreed to the facts stated in the first three pages of the MSHA accident investigation report. (The pages contain sections entitled, *General Information*, *Physical Factors Involved*, and *Description of Accident* (Tr. 18; Exh. P-6 at 1-3)). The company took exception to the conclusions MSHA drew from the facts.

THE FACTS

The Mine and The Equipment Involved In The Accident

The report states as follows² :

The Anderson Mine, an underground crushed stone operation, . . . [is] located about six miles south of Sherwood, Franklin County, Tennessee. . . . The mine [is] normally operated two, ten-hour shifts a day, 5-1/2 days a week. . . .

The operation consists of an underground mine with a surface mill. . . . [Underground b]roken limestone [is] loaded into trucks by [FELs]and [is] transported to the surface where it [is] crushed, sized, and stored in silos [see Tr. 121, 227]. The finished

² Bracketed citations within the quoted passages reference testimony and exhibits that amplify the report.

product [is] shipped by rail and truck to . . . customers.[³]

* * * *

The accident occurred on the surface near the scales at the railcar load-out area[(an area where the railcars are loaded and weighed)]. Three parallel sets of tracks [serve] the load-out area. The first and second sets [are] joined by a switch near the scale [see Exhs. P-42, P-44, P-48]. The scale and silos [are] adjacent to the second set of tracks. Empty [rail]cars [are] parked on the first track and towed to the silos, two at a time, by a ... [FEL] so both [rail]cars [can] be filled simultaneously. Loaded [rail]cars [are] towed over the scales, down the second track[(the middle track)] then switched to the third track where they [are] parked [see Tr. 122, 230].

The second track, where the accident occurred, slope[s] at a maximum of 1.56 %. The first 24 feet of track [drop] 3/4-inch per each 4 feet. The next 100 feet [drop] 1/2-inch per each 4 feet. . . . [Rail]cars were parked on the third track approximately 100 feet from the scale.

The railcar involved in the accident . . . was loaded . . . and was on the second track.

* * *

The . . . [FEL] involved in the accident [see Exh. P-32] . . . [has] an enclosed cab. The . . . [FEL] weigh[s] 52,440 pounds. The [FEL's] bucket measure[s] 57 inches high by 10 feet, 3-inches wide. Eyelets [have] been welded near each end of the bucket for the purpose of attaching a cable to pull railcars on the tracks.

Two, 8-foot by 1-inch choker cables [are] used to tow [a] railcar The cables [are] double-ended and connected with cable clevises. The first cable [is] attached to the eyelets on the loader bucket with pinned clevises [see Exh. P-34]. A second cable [is] attached to the first cable by a swivel clevis so it [can] slide from one end of the bucket to the other in order to tow from

³ Most of the railcars are owned by CSX. CSX picks up the railcars and moves them off of mine property after the railcars have been loaded, weighed, and stored (Tr. 229-230).

either side of the railcar [Id.; see e.g. Exh. P-38]. The other end of the cable [has] an open hook attached with a clevis. The hook [is] connected to a ring located on the side of the railcar [see e.g. Exh. P-43] (Exh. P-6 at 1-2).

At the hearing the procedure for moving the railcars off of the scale was described by Kurt Kiser, the plant manager:

As the [railcar] was being pulled . . . off of the scale, the . . . [FEL] would apply tension to the cable and start the railcar rolling . . . and whenever sufficient movement and momentum had been picked up by the [rail]car, then slack resulted in the cable at which point the ground man [(a miner who was assigned to work with the FEL operator)] would grab the cable, grab the hook and unhook it from the [rail]car, and walk and toss the hook into the bucket of the . . . [FEL]. The railcar would proceed on its own momentum down the inclined part of the track to the storage track (Tr. 231).⁴

Kiser acknowledged that there were times when the ground man was unable to unhook the tow-cable from the railcar and as a result, “the . . . [FEL] operator was required to follow the railcar down the inclined part of the track until such time . . . [as] either the [rail]car came to rest on its own because of the rolling resistance of the [rail]car or . . . the . . . [FEL] operator [had to] apply pressure to the tow-cable along the side of the car to bring the car to a rest” (Tr. 232-233). According to Kiser when the FEL operator applied pressure to the tow-cable and increased the tension of the cable, either the railcar stopped due to the increased tension or it continued to roll past the FEL, pulled the FEL into the side of the railcar, and the resulting collision stopped the railcar (Tr. 234).

The Accident

The accident report described the events of December 23.

Weather on [that] day . . . was cold and wet with rain mixed with sleet. Ground conditions were muddy.

* * *

Brandon Privette (victim) and Gary Gardner, . . . [FEL] operator, reported for work at 5:00 a.m., their normal starting time. They went to the silos to load [railcars]. Several loaded [rail]cars had been left from the previous shift, so they moved those cars

⁴ In tests conducted at the mine after the accident under conditions similar to those on December 23, MSHA determined the average speed of the railcar as it rolled leaving the scales was approximately 100 feet in 22.4 seconds or 3.04 mph (Exh. P 6 at 2).

down the second track. Privette operated the . . . [FEL] loader while Garner rigged the tow-cable and worked the brakes on the [railcars]. After moving the loaded [rail]cars, they began moving empty [rail]cars onto the second track, filling, weighing, and then towing them down the track. At about 7:15 a.m., Thomas Guess arrived and relieved Privette on the . . . [FEL]. Privette assisted him on the ground. Shortly after, Garner left to work elsewhere.

Work proceeded without incident until about 9:00 a.m. when Privette and Guess moved two loaded [rail]cars to the scale. The first car was weighed and towed past the scale. [(Guess continued to back up the FEL to keep pace with the rolling railcar.)] When the second car was weighed, it was determined that more product was needed to make the proper weight. Because the . . . [FEL] could get little traction with no-lug tires and muddy ground, Guess was unable to move both [rail]cars back to the silos. The [rail]cars were then separated and Privette attached the tow-cable to the first [rail]car to move it down the track to join the other loaded [rail]cars. Guess backed [up] the [FEL], towing the [rail]car.

When the [rail]car began to roll freely, the tow-cable became slack and Privette stepped between the slowly moving [FEL] and [the railcar] to unhook the cable. The [rail]car continued to roll approximately 100 feet while Guess tried to maintain enough slack for Privette to unhook the cable. When Guess realized he was about to back into the loaded railcars parked on the third track, he stopped the loader. The [railcar] continued to roll past the . . . [FEL]. When the slack in the cable was taken up abruptly, the side of the . . . [FEL] bucket was jerked against the rail car [see e.g. Exh. P-35, Exh. P-39] crushing Privette.

Guess summoned help and mine personnel administered CPR unsuccessfully. Emergency medical technicians transported Privette to a local hospital where he was pronounced dead on arrival. The immediate cause of death was respiratory arrest caused by [a] major chest crushing injury (Exh. P-6 at 2-3).

Additional Details

Guess's testimony added particulars to the events of December 23. He explained that he and Privette were working as a team that morning. Together they moved approximately 10 railcars off of the scales (Tr. 221). Around 9:00 a.m. two additional railcars were on the track, one had been weighed and one was waiting to be weighed. The cars were coupled. At first the

men attempted to pull the weighed railcar off of the scales and to move the second car onto the scales. However, the FEL could not get sufficient traction, and Guess, who was operating the FEL, could not move the cars. Therefore, the men decided to move one car at a time. They uncoupled the cars and Privette attached a tow-cable to the railcar on the scales. Guess backed up the FEL. It was difficult to get the railcar to move but Guess continued to pull and the railcar began to roll. The tow-cable hook was still attached to the railcar and the FEL had to continue pulling to keep the car rolling. Finally, the railcar began to move more freely. Guess turned and looked to make sure he was not going to back the FEL into the railcars on the storage track (Tr. 217-219).

Guess described what happened next, "I noticed [Privette] trying to run in to unhook . . . [the cable]. And the next thing I [knew], when I turned around, I was being jerked over to him, and I was turning the wheel to keep from hitting him, but it was too late" (Tr. 219-220, see also Tr. 223).

Guess stated that he was unable to keep the FEL from being pulled into the railcar, "Because I was tied to the car with the cable" (Tr.220). He was asked why he did not apply the brakes. He responded, "If I would have slammed on the brakes, it would have more than likely turned the FEL over . . . [b]ecause I was pretty much in an 'L' shape trying to keep [the FEL] from hitting [Privette]" (Id.).

The Towing Procedure and Loss of Control

Volvo Construction Equipment, Inc. (Volvo) manufactured the FEL. Roy Ghrist, Director of Product Integrity for Volvo, testified that he was consulted frequently about safety issues related to the use of Volvo equipment. He stated that he did not believe the procedure used by Franklin to tow and to stop railcars was safe. He objected to the fact that it required a person physically to go between the FEL and the railcar to unhook the tow-cable (Tr. 53, 56). If the railcar rolled past the FEL the force of the railcar on the tow-cable would very quickly pull the FEL and its bucket into the side of the railcar (Tr. 56). The FEL operator could not stop the FEL from hitting the railcar which, according to Ghrist, meant that the FEL operator had lost control of the FEL (Tr. 71).

Dennis Ferlich, of MSHA's technical support division and a participant in MSHA's investigation of the accident, agreed with Ghrist. He too testified that once the railcar passed the FEL and tension was placed on the tow-cable there was nothing an FEL operator could do to prevent the loader from being dragged sideways into the railcar (Tr. 127, 131-132, see also Tr. 92-93).

Not surprisingly, Franklin's witnesses had a different view. For example, Kiser did not believe the FEL's movement represented a loss of control because, as Kiser stated, the FEL operator was, "...performing what he want[ed] to perform and that [was] to position a railcar where he want[ed] to position it" (Tr. 235). Rather than losing control of the FEL, the operator, "was in the process of performing a controlled stop of the railcar" (Tr. 237).

THE VIOLATION

Citation No. 4875742 as amended states:

A fatal accident occurred at this operation . . . when a miner working in the railcar load-out area was crushed between a . . . [FEL] and a loaded railcar. The miner was killed when he stepped between the FEL and the railcar to detach a tow-cable and hook-assembly which was attached to the FEL and hooked to the railcar. The FEL had been modified by the attachment of this tow-cable and hook-assembly to be used to control the movement of loaded railcars along the load-out tracks. This modification and use periodically caused the FEL to be pulled into the railcar when it traveled past the FEL which was still attached to it by the tow-cable and hook-assembly. The FEL operator could not control the FEL when the tow-cable and hook-assembly pulled it into the railcar. The operator knew the practice of moving railcars with the FEL and tow-cable and hook-assembly periodically caused the FEL to be pulled into the railcar. The FEL operator had limited experience and training in the use of the FEL to move railcars (Exh. P 4).

As the Secretary correctly notes, section 57.9101 requires: 1) that the equipment involved is “self-propelled mobile equipment”; 2) that control of the equipment is not maintained by the equipment operator; and 3) that the equipment is in motion when control is not maintained (Sec. Br. 24).

Section 57.9101 is found in Subpart H of Part 57. The term “mobile equipment” used in Subpart H is defined as “Wheeled . . . equipment capable of being moved” (30 C.F.R. §57.9000). The FEL moved on wheels and under its own power. It was both mobile and self-propelled.

The fact that the FEL operator was unable to maintain control of the moving equipment and therefore was in violation of the standard was compellingly described by Guess, “[T]he next thing I [knew] . . . I was being jerked over to . . . [Privette], and I was turning the wheel to keep from hitting him, but it was too late” (Tr. 219-220). Given the situation, there was nothing Guess could do to avoid a violation. As he testified, if he had slammed on the brakes the resulting movement of the FEL could have caused the equipment to overturned. This result also would have represented a loss of control (Tr. 220).

Other Franklin employees agreed that Guess essentially was powerless to control the FEL’s movement. Jon Hannah, an FEL operator who trained Guess, stated that because the FEL operator could not keep going backward indefinitely, at some point the operator had to slow down or apply the brakes. At that time, the railcar could roll past the FEL; could jerk the FEL into the side of the railcar; and the FEL operator could do nothing to prevent it (Tr. 195-196).

Franklin's superintendent of production agreed (Tr. 253).

The focus of the violation is on the movement of the FEL not, as Kiser argued, on an attempted "controlled stop" of the railcar (Tr. 237). The salient points are that as the FEL was pulled toward the railcar the FEL was in motion and its operator could not control the motion. It is true that as a result of the violation Privette was hit and killed, but even if Privette had not gotten between the FEL and the railcar, even if the FEL had only hit the railcar, the FEL's uncontrolled and uncontrollable movement into the side of the railcar would have violated section 57.9101.

The company argues that sections 57.9101 does not apply to a situation in which an FEL tows a loaded railcar because section 57.9101 and its associated sections are titled, *Traffic Safety* and "A plain language reading of . . . [section 57.9101] and a reading of the accompanying traffic safety regulations, make clear that the regulation does not prohibit Franklin's method of stopping railcars" (Franklin Br. 10). It adds, "use of a cable by an FEL to pull a railcar can hardly be considered 'traffic'" (*Id.*). However, and as the Commission has stated, "The headings used in . . . Part [57] are designed for organizational convenience to supply short-hand characterizations of the general subject matter involved in the standards (*Allied Chemical Corp.*, 6FMSHRC 1854, 1856-57 (August 1984)). Therefore, the headings, "do not control over the plain words of the text" (*Id.*). Here, the words of the standard are unambiguous and easy to understand. They were violated when the FEL was jerked into the side of the railcar in a movement Guess was unable to control.

S&S and GRAVITY

A violation is significant and substantial when, based on particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature (*Arch of Kentucky*, 20 FMSHRC 1321, 1329 (December, 1998); *Cyprus Emerald Resources, Inc.*, 20 FMSHRC 790, 816 (August 1998); *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981)). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission held that in order to establish an S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (2) a discrete safety hazard — that is, a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury in question will be of a reasonably serious nature. Evaluation of these elements is made in terms of "continued normal mining operations" (*U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)).

Here, the Secretary met her burden. The violation existed as charged. The hazard contributed to was that the FEL operator could not avoid hitting anyone or anything that came between the FEL and the railcar because the FEL operator had no control over the equipment once it was pulled toward the railcar. Given the weight of the FEL (52,440 pounds) (Exh. P-6 at 1) and the substantial force the railcar exerted on the tow-cable serious injury or death was virtually certain to result.

I recognize that Franklin presented testimony from its then safety director (Tommy Stevens), its mine manager (Kiser), and its superintendent of production and maintenance (Kenneth Clark) that miners were not supposed to go between a moving FEL and a railcar (Tr. 161-162, 237, 270). Stevens testified, "If a loader is hooked to a railcar and they are in a continuous motion, . . . [a miner] shouldn't approach that situation" (Tr. 161-162). He stated this was a "rule" at the mine (Id.). In other words, if the ground man failed to unhook the tow-cable and the FEL continued to back up as the railcar rolled down the track the ground man was to get out of the way. However, the initial attempt to unhook the tow-cable was made while the railcar was beginning to roll. This required the ground man to go between the FEL and the railcar while the railcar was moving. Long time FEL operator, J. C. Wilkinson testified, "You tug on the car, get it to move and then flip the hook out" (Tr. 205).

The fact that a ground man was required to unhook the cable while the railcar was moving (however slowly) meant that if the ground man failed to unhook the cable the railcar could pass the FEL and could jerk the FEL into the railcar and into the ground man if he, for some reason, did not get out of the way. Further, the fact that the practice of towing railcars with FELs had been on-going for some time and without anyone being injured, easily could have lead a ground man to believe that he could approach a railcar even if it had moved away from the scales and down the tracks toward the storage area.

Wilkinson agreed that FELs "occasionally" were pulled into railcars (Tr. 206-207). Given the fact that the towing of railcars made getting between FELs and railcars a familiar and routine procedure to the mine's ground men, I conclude that as mining operations continued it was only a matter of time before a miner would miscalculate and would place himself or herself between an FEL and railcar immediately before or as the FEL was jerked toward the railcar.⁵ To put it another way, I conclude there was a reasonable likelihood miners would be injured or killed unless the towing procedure (and hence the violation) was stopped. Therefore, I find that the violation was S&S.

The Commission recently emphasized that the focus of the gravity criterion is on, "the effect of the hazard if it occurs" (Hubb Corp., 22 FMSHRC 606, 609 (May 2000) (quoting Consolidation Coal Co., 18 FMSHRC 1541, 1550 (September 1996)). In this case the hazard occurred and the death of a miner resulted. If the practice had continued other deaths or serious injuries reasonably could have been expected. This was a very serious violation.

UNWARRANTABLE FAILURE and NEGLIGENCE

The Commission has defined unwarrantable failure as aggravated conduct constituting

⁵ The procedures for towing railcars were not set forth in writing. They were given orally. Privette did not follow the instructions (Tr. 171), and I find no reason apparent in the record why other miners would not have placed themselves in similar danger if the citation had not halted the practice.

more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987)). The Commission also has stated that unwarrantable failure is conduct that is characterized by reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care (Emery, 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (February 1991)).

Several factors must be considered in analyzing whether a violation results from unwarrantable failure. Among these are: “the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the . . . condition, and whether [the] operator has been placed on notice that greater efforts are necessary for compliance” (Mullins and Sons Coal Co., 16 FMSHRC 192, 195 (February 1994)). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a “knew or should have known” test (Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 October 1993)).

I agree with the Secretary that Franklin unwarrantably failed to comply with section 57.9101. The violation was the result of the deliberate decision of Franklin to tow railcars off the scale by using an FEL and a tow-cable. In making this decision, Franklin knew and counted on the fact that if tension applied to the tow-cable did not stop the railcar, the uncontrolled movement of the FEL into the side of the railcar would. The practice of towing railcars had been used at the mine for some time (Tr.191-192, 204, 210-211, 247, 262). The uncontrolled movement of an FEL into a railcar was a common component of the practice (Tr. 206-207). Therefore, over time the practice involved repeated deliberate violations of section 57.9101.

Franklin maintains it was unaware that the uncontrolled movement of the FEL into the side of the railcar was a violation. Stevens believed that when MSHA inspectors came to the mine and inspected surface areas they must have seen the towing procedure in use, yet they never issued a citation based on the procedure (Tr. 260-261). However, neither Stevens nor other Franklin witnesses testified that they knew for a fact that an MSHA inspector actually observed a railcar towed by an FEL (see Tr.261, 268). MSHA supervisor Craig credibly testified that he was not aware of the procedure (Tr. 100). Therefore, I cannot find that MSHA knew about the procedure but failed to recognize that it constituted a violation.

To prevent an accident while the procedure was being undertaken, the company relied on the fact that its miners were trained in the procedure. However, training alone did not meet the company’s duty of care. The oral and on-the-job training that Franklin provided may have lessened chances for a mistake, but it did not eliminate the hazard. Indeed, and as I have found, the procedure left open the possibility that a ground man like Privette would miscalculate and go between the FEL and the railcar. Therefore, the company had a duty either to provide a way to protect an erring miner from a mistake or, if that were not possible, to adopt another procedure that did not require the uncontrolled movement of equipment.

The company did not meet this duty. Rather, Franklin allowed the possibility that the FEL operator, the ground man, or both would make errors of timing or judgement and be unable

to take corrective action. In purposefully adopting a procedure that over time involved repeated violations of section 57.9101 and in failing to fully meet its duty of care to its miners, Franklin was more than ordinarily negligent.

CIVIL PENALTY CRITERIA

I have found that the violation was serious and that the company's failure to comply with section 57.9101 was due to more than ordinary negligence. In assessing a civil penalty, the Act mandates that I also consider Franklin's history of previous violations, the size of its business, the effect of the penalty on the company's ability to continue in business, and its good faith in attempting to comply rapidly after being charged (30 U.S.C. §820(i)).

To establish the company's history of previous violations the Secretary offered a computer print-out which shows the history of previously assessed and paid violations at the mine within two years prior to the accident. The report indicates that during this period 32 violations were assessed and paid. It also indicates that there were no previous violations of section 57.9101 (Exh. P-1 at 1). I find this to be a moderate to small previous history.

As I noted previously, the parties stipulated that in 1998 the company had sales of approximately \$110,000,000 and employed 620 persons (Tr. 13-14). I also observe that when she assessed the proposed penalty the Secretary listed the hours worked by the company employees as 866,738 and the hours worked at the mine as 98,740 (Petition for Assessment of Civil Penalty, Exhibit A). Considering these factors and reviewing the way in which the Secretary evaluates the size criterion (see 30 C.F.R. §100.2(b)), I conclude that Franklin is a medium size operator. Further, with annual sales of \$110,000,000, I find that the amount of the penalty that must be assessed for the violation will not affect the company's ability to continue in business. Finally, and as the Secretary stipulated, Franklin abated the violation in good faith (see Tr. 13-14).⁶

The penalty proposed by the Secretary is the maximum allowed by the Act. The civil penalty criteria augur for less. First, Franklin has a small to moderate history of pervious violations. Second, Franklin is medium in size. Third, although the violation was very serious and was due to Franklin's more than ordinary lack of care, the fatal results of the violation were contributed to by Privette's own lack of care. The record supports finding that he placed himself where he should not have been. Although this in no way excuses the violation, its purposefully implementation by Franklin, nor its very serious nature, it recognizes that Privette shared in the blame for the violation's tragic consequences.

Considering all of these factors, I conclude Franklin should be assessed a civil penalty of \$15,000.

⁶ Abatement involved adopting another method of moving railcars off the scale.

ORDER

Within 30 days of the date of this Decision, Franklin is **ORDERED** to pay a civil penalty of \$15,000. Upon payment of the penalty, this proceeding is **DISMISSED**.

David F. Barbour

David F. Barbour
Chief Administrative Law Judge

Distribution: (Certified)

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Timothy Biddle, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, DC 20004-2595

/wd

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
August 4, 2000

SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDINGS
on behalf of	:	
DWAYNE H. HEMENWAY,	:	Docket No. LAKE 2000-41-DM
ALLEN P. BLUEMKE, and	:	Docket No. LAKE 2000-42-DM
ROBERT R. WILLIAMS	:	Docket No. LAKE 2000-43-DM
Complainants	:	
	:	NC MD 99-10
v.	:	NC MD 99-11
	:	NC MD 99-12
HIBBING TACONITE COMPANY	:	
Respondent	:	Mine ID 21-01600
	:	Hibbing Mine

DECISION

Appearances: Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois for Complainants;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Bulluck

These cases concern discrimination proceedings filed pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3). The Secretary, on behalf of Hemenway, Bluemke and Williams, alleges that the miners were unlawfully disciplined on March 5, 1999, for alleged misuse of their Article XIV (Basic Labor Agreement) rights, and seeks expungement of their personnel files of letters of reprimand and all references to the subject protected activity. Additionally, the Secretary seeks orders directing Hibbing Taconite to cease and desist discriminatory activities directed at all miners, posting of a notice of violation, and imposition of a \$3,000.00 civil penalty.

A hearing on the merits was convened on July 17, 2000, in Duluth, Minnesota, during the course of which the parties engaged in discussions and negotiated a settlement. Under the terms of the agreement, Hibbing Taconite is required to take the following action:

1. expunge the personnel files of Hemenway, Bluemke and Williams of letters of discipline;
2. delete any reference to the letters of discipline from the discipline log maintained in the computer record keeping system;

3. post the Motion to Dismiss and Approve Settlement and this Order for 30 days; and
4. pay a civil penalty in the amount of \$100.00 for the discrimination violation.

The settlement was approved at hearing, and that determination is hereby confirmed.

ORDER

The settlement is appropriate and is in the public interest. **WHEREFORE**, the approval of settlement is **GRANTED**, and it is **ORDERED** that Hibbing Taconite comply with terms of the settlement agreement, as set forth above, and pay a civil penalty of \$100.00 within 30 days of the date of this decision. Upon Hibbing Taconite's compliance with all terms of settlement, these proceedings are **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (certified mail)

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St.,
8th Floor, Chicago, IL 60604

Henry Moore, Esq., Buchanan Ingersoll, One Oxford Centre, 301 Grant Street, 20th Floor,
Pittsburgh, PA 15219-1410

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Falls Church, Virginia 22041

August 8, 2000

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of ROGER DALE DAMRON, II	:	Docket No. WEVA 2000-81-D
Complainant	:	HOPE CD 2000-08
	:	
v.	:	Mine No. 1
	:	Mine I.D. No. 46-08564
TRI-COUNTY MINING, INC.,	:	
Respondent	:	

DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Elizabeth Lopes Beason, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Applicant;
Roger L. Kirk, President, Tri-County Mining, Inc., Breedon, West Virginia,
Pro Se.

This case is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Roger Dale Damron, II, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The application seeks reinstatement of Mr. Damron as an employee at Mine No. 1, operated by Tri-County, pending a decision on a discrimination complaint he has filed with MSHA. A hearing was held on August 2, 2000, in Logan, West Virginia. For the reasons set forth below, I grant the application and order Mr. Damron's temporary reinstatement.

At the hearing, the parties announced that an agreement had been arrived at concerning Mr. Damron's application. At the present time, most employees of Tri-County have been laid-off. Only a few have been called back so far. Consequently, the agreement provides, not for the Applicant's immediate reinstatement, but for the order in which he will be recalled to work.

The parties have agreed that Jerry Copley, who is presently laid-off, has been an employee of Tri-County longer than Damron and that, therefore, when Tri-County needs to fill the position of drill operator or truck driver, Copley will be offered the position. If Copley turns it down, it will then be offered to Mr. Damron. If Copley takes the job, Damron will be offered the next position, for which he is qualified, that becomes available. Mr. Damron is qualified as a truck driver, drill operator and general utility worker. When recalled, Mr. Damron agrees that he will perform a pre-operational check on any equipment that he is asked to operate and will report any unsafe condition to the operator, so that the operator has an opportunity to correct the condition.

In accordance with the agreement, I conclude that Mr. Damron's complaint has not been frivolously brought and that he is entitled to be temporarily reinstated as agreed upon.

Order

The motion to approve settlement is **GRANTED**. Tri-County Mining, Inc., is **ORDERED TO REINSTATE** Mr. Damron as provided in the agreement.


T. Todd Hodgdon
Administrative Law Judge

Distribution:

Elizabeth Lopes Beason, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203 (Certified Mail)

Roger L. Kirk, President, Tri-County Mining, Inc., P.O. Box 03, Breedon, WV 25666

/nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
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FALLS CHURCH, VIRGINIA 22041

August 18, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-309-M
Petitioner	:	A. C. No. 35-02761-05521
v.	:	
	:	
PORTABLE ROCK PRODUCTION CO., INC.,	:	
Respondent	:	Portable Rock Production Co., Inc.
	:	(Sears Road Pit)

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Dept. of Labor, Seattle, Washington, for the Petitioner;
E. Jay Perry, Esq., P.O. Box 7126, Eugene, Oregon, for the Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Portable Rock Production Company Inc. (Portable Rock) with three violations of mandatory standards and proposing civil penalties of \$80,000.00 for those violations. The general issue before me is whether Portable Rock violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed concerning the criteria under Section 110(i) of the Act.

On September 2, 1998, bulldozer operator Vernon Smith suffered massive head injuries when the outer edge of the third level bench at Portable Rock's Sears Road Pit failed, causing his bulldozer to overturn. It is undisputed that material had been removed from the second level bench the day before, thereby undercutting and removing adequate support for the third level bench at the location of the bench failure. Smith died of his injuries several days later.

Citation No. 4135309 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3130 and charges as follows:

A fatal accident occurred at this mine on September 2, 1998, when a bulldozer overturned in the pit. When the bulldozer operator traversed the third level bench, the outer edge of the bench failed, causing the bulldozer to overturn.

Removal of material from the second level bench the previous day eliminated adequate support for the third level bench. The mine operator failed to use mining methods that would maintain wall, bank, and slope stability in this area.

The cited standard provides as follows:

Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.

It is undisputed that material had indeed been removed from the second level bench on September 1, 1998, the day before the accident at issue. As a result of such action the third level bench was undercut and rendered unstable for travel by Smith's bulldozer. The failure of the third level bench in this case causing the bulldozer to overturn was a direct result of the Respondent's failure to have maintained the stability of the cited wall. These facts clearly establish a violation of the cited standard.

Since the violation was the direct cause of the fatal accident it was therefore also unquestionably of high gravity and "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

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

See also *Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

While the citation at issue alleges that the violation was the result of “moderate” negligence the Secretary has cited no theories or evidence to support such a conclusion. Indeed, the undisputed evidence does not support a finding of any significant operator negligence. While it is noted that the deceased, Vernon Smith, had previously been a mine superintendent for Portable Rock it is undisputed that he had retired from that position a number of years before and at the time of the accident had been working only as a rank and file bulldozer operator. As such, Smith was not an agent of the operator whose negligent conduct can be imputed to the operator. See *Secretary v. Whayne Supply Company*, 19 FMSHRC 447 (March 1997). While the Commission held in the *Whayne Supply* case that where a rank and file employee has violated the Act, the operator’s supervision training and discipline 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, no evidence in this regard with respect to this violation was presented at hearing.

It is also undisputed that Smith had advised both co-worker Edward Wright and the operator’s agent, crusher foreman Art Squires, that he was about to repair the subject undercut. Smith also told Wright at the end of the shift on the previous day that the following day he would be carrying diesel fuel to the upper bench but would first repair the bench. Moreover, on the morning of the accident Smith confirmed to Squires that he would need to build the road up the hill in order to haul fuel to Wright. Squires was then aware that the bench road had been undermined and that it needed new material to provide support. Squires believed that Smith was the best qualified person to perform this work.

Under the circumstances it is apparent that foreman Squires reasonably and in good faith believed that Smith would remedy the hazardous condition of the third level bench before it would be used as a roadway. Accordingly, I find the operator chargeable with but little negligence and significant weight is given this criterion in determining the appropriate penalty herein.

Citation No. 4135311, issued pursuant to Section 104(d)(1) of the Act,¹ alleges a

¹ Section 104(d)(1) provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator

under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also

“significant and substantial” violation of the standard at 30 C.F.R. § 56.14130(g) and charges as follows:

A fatal accident occurred at this mine on September 2, 1998, when a bulldozer overturned in the pit. The third level bench caved from beneath the bulldozer, causing it to roll 2 ½ times.

The victim was not wearing the seat belt. The mine operator’s failure to require and ensure that the bulldozer operator wore the seat belt is a lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory standard.

The cited standard provides as relevant hereto that “[s]eat belts shall be worn by the equipment operator.”

The Secretary’s proof in this regard is based on circumstantial evidence, primarily observations following the accident. MSHA inspector and special investigator Randall Cardwell, arrived at the mine site at 9:30 on the morning of the accident. Cardwell examined the bulldozer lying on its side below the failed bench and noted that one end of its seat belt was “tucked” beneath the seat. Cardwell also interviewed Portable Rock employee Kenny Johnson who was first on the scene of the accident. Johnson at first stated he could not recall whether he found the deceased wearing the seat belt but later told Cardwell that in fact he did find the deceased “out of his seat belt.” Johnson nevertheless still claimed that he did not know whether the deceased was wearing it. According to Cardwell, on the following day, September 3, 1998, Johnson finally acknowledged to him that the deceased was not wearing a seat belt when he found him.² I am satisfied from the above evidence alone that the Secretary has sustained her burden of proving that Smith had not at the time of his accident been wearing a seat belt. The violation is accordingly proven as charged. Under all the circumstances there is also no doubt that the violation was of high gravity and “significant and substantial.”

caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.”

² While Johnson testified that he could not recall at the time of the hearing whether he found Smith wearing a seat belt I recognize that at the time of his testimony he remained an employee of Portable Rock. I find Inspector Cardwell’s testimony regarding Johnson’s statements to him on the date of the accident and the day after, corroborated by Cardwell’s notes, to be the most reliable and credible evidence on this issue.

I also find the operator chargeable with high negligence based upon the credible evidence of its prior failure to have enforced its policy requiring the use of seat belts against Smith. According to Inspector Cardwell, Portable Rock President, Jack Bessett, admitted during his investigation that he had seen Smith operating without a seat belt on prior occasions and that Smith explained that he wanted to be able to jump free if the equipment rolled over.

According to MSHA supervisory inspector Colin Galloway, Portable Rock Vice-President Lonnie Bessett admitted to him at the September 10, 1998, "closeout conference" that Smith "sometimes wore his seat belts" and asked rhetorically "how do you discipline somebody that's been with the company since it started?" While recognizing that Jack Bessett had apparently retired from active participation in the Portable Rock operations in 1994, his unchallenged admissions, when considered with those of current Vice-President Lonnie Bessett, provide a sufficient foundation from which it may reasonably be inferred that indeed Smith had disregarded the seat belt requirements with impunity and without fear of disciplinary action. Within this framework of evidence I find the operator chargeable with high negligence. The same evidence also supports a finding that the violation was caused by the operator's unwarrantable failure.

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991). Clearly the evidence that both Lonnie and Jack Bessett failed to enforce the seat belt policy against the deceased constitutes a serious lack of reasonable care and reckless disregard within the framework of the cited law.

Order No. 4135313, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14130(i) and charges as follows:

A fatal accident occurred at this mine on September 2, 1998, when a bulldozer overturned in the pit. The seat belts on the bulldozer were not maintained in functional condition in that the belt had been cut or torn 2 ½ inches from the flat metal end, preventing adjustment of the belt to a flat metal end, preventing adjustment of the belt to a longer length. Further, the belt was cut or torn slightly on each edge, approximately 8 inches from the buckle. The mine operator's failure to ensure that the seat belts were properly maintained is a lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory standard.

The cited standard provides that “seat belts shall be maintained in functional condition and replaced when necessary to assure proper performance.”

The Secretary acknowledges in her post-hearing brief that the cited seat belt in fact “did work” and upon testing found that the “buckle components of the belt” held (Petitioner’s Brief at p. 5). At hearing the citing inspector also acknowledged that he was unaware of any mandatory standard governing the length of seat belts, that he was unaware of the length of the seat belt at issue, that he was unaware of the waist size of any of the operator’s employees, that he was unaware of any specific requirement for seat belt strength, that no strength testing had been performed on the seat belt at issue and that he did not know whether the dirt (and presumably also the oil stains) found on the belt had resulted from the accident at issue. The inspector further acknowledged that while he could have photographed both of the alleged cuts or tears in the seat belt he photographed only one. Moreover the barely visible cut or tear shown in the photograph in evidence is not in itself sufficient to demonstrate that the subject seat belt was not maintained in a functional condition or that it should have been replaced to assure proper performance. Under the circumstances I cannot find that the Secretary has sustained her burden of proving the violation at issue. Accordingly, Order No. 4135313 must be vacated.

Civil Penalties

The Act requires that, “[i]n assessing civil monetary penalties, the Commission shall consider” the following six statutory criteria:

[1] the operator’s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator’s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In determining appropriate civil penalties herein I have considered the gravity and negligence findings previously made as to each violation. I have also considered the small size of the operator (approximately 9,282 hours worked at the subject mine in the calendar year prior to the violations, its history of violations (a bad history consisting of 43 paid violations within the two preceding years 21 of which were “significant and substantial”) and the Secretary’s admission that the violative conditions were abated as directed and within the time specified. There is no claim or evidence that even the Secretary’s proposed penalties would affect Respondent’s ability to remain in business. There is a presumption therefore that the penalties herein would not affect its ability to remain in business.

ORDER

Order No. 4135313 is vacated. Citation No. 4135311 is modified to a citation under Section 104(a) of the Act and is affirmed as a "significant and substantial" citation. Citation No. 4135309 is affirmed as a "significant and substantial" citation. Portable Rock Production Company, Inc., is hereby directed to pay civil penalties of \$5,000.00 for the violation charged in Citation No. 4135309 and \$25,000.00 for the violation charged in Citation No. 4135311, within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
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August 23, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-373-M
Petitioner	:	A.C. No. 26-02321-05504
	:	
v.	:	Docket No. WEST 98-375-M
	:	A.C. No. 26-02321-05505
ALTA GOLD COMPANY,	:	
Respondent	:	Griffon Project

DECISION

Appearances: Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Ross E. deLipkau, Esq., Reno, Nevada, for Respondent.

Before: Judge Cetti

These consolidated cases are before me upon Petitions for Assessment of Civil Penalty, filed by the Secretary of Labor (Secretary) seeking the imposition of civil penalties against Alta Gold Company (Alta Gold) based upon three citations alleging violations of mandatory standards which are set forth in Title 30 of the Code of Federal Regulations. Respondent filed timely answers and, pursuant to notice, the consolidated cases were heard in Reno, Nevada. Both parties presented testimony and documentary evidence at the hearing. Post-hearing and reply briefs were filed by both parties.

ISSUES

The issues at the hearing were whether at the time of Inspector Cain's inspection of the Griffon Project mine a violation of 30 C.F.R. § 56.9304(b), as alleged in Citation No. 7963330 in Docket No. WEST 98-375-M, occurred and whether a violation of 30 C.F.R. § 56.9301, as alleged in Citation No. 7963328 in Docket No. WEST 98-373-M, occurred.

If a violation of either or both standards occurred, whether it significantly and substantially contributed to the cause and effect of a mine safety or health hazard.

If a violation of 30 C.F.R. § 56.9304(b) is established, did it result from an unwarrantable failure to comply with the cited standard.

If a violation of a standard is established, what penalty is appropriate, taking into consideration the statutory criteria in section 110(i) of the Act.

STIPULATIONS

1. Respondent, Alta Gold Company (with respect to size) has a total of 189,712 man-hours worked per year. Alta Gold Company owns and operates the Griffon Project mine which is a surface mine with 12,420 man hours worked per year.

2. In the 24 months preceding the issuance of the subject citations, Respondent has had 20 assessed violations. (Tr. 9).

3. The payment of the assessed penalties will not affect the ability of the Respondent to continue in business.

4. Respondent demonstrated good faith in timely abatement of the alleged violations.

5. Respondent withdraws its contest of Citation No. 7963333.

DOCKET NO. WEST 98-375-M

Citation No. 7963330

Inspector Stephen Cain, an experienced MSHA inspector, testified at the hearing that he inspected Respondent's Griffon Project mine on a regular mandated 01 inspection. Inspector Cain waited at the mine site for the arrival of Mr. Rick Stork who was employed by Respondent as a part-time safety director as well as a truck driver. On Mr. Stork's arrival, Inspector Cain requested to inspect the mine's stockpile. Cain found the stockpile to be approximately 176 feet in length and 40 to 45 feet in height. Cain testified the stockpile was composed of loose and unconsolidated blasted ore which was being stockpiled for loading into a crusher located at the bottom of the stockpile. Cain observed that approximately 87 feet along the bottom of the stockpile had been undercut to a height of 10 to 15 feet. He noted that 15 feet is the approximate reach of the loader that was parked at the bottom of the stockpile. This front-end loader had been used to feed the ore to the crusher. At the time of the inspection the loader was parked at the bottom of the stockpile in the undercut area.

After inspecting the stockpile from the bottom, Cain asked to be taken to the top so that he could observe Respondent's dumping operation. He was taken to the top of the stockpile accompanied by Mr. Stork. While on top of the stockpile, he saw a haul truck designated at the hearing as No. 2, pull onto the top of the stockpile, drive along the top of the stockpile, turn in, stop and then back up to the berm at the edge of the stockpile. The driver then lifted the bed of

Truck No. 2 and dumped his load over the edge. Inspector Cain and Mr. Stork walked over to the edge to see where the truck had dumped its load. Cain testified that he observed that the truck's load of ore had been dumped within the 87-foot area that the stockpile was undercut.

Inspector Cain then issued to Alta Gold Citation No. 7963330. That citation charges Alta Gold with a 104(d)(1) violation of the safety standard set forth at Title 30 C.F.R. § 58.9304(b). That standard reads as follows:

§ 58.9304(b)

Where there is evidence that the ground at a dumping location may fail to support the mobile equipment, loads shall be dumped a safe distance back from the edge of the unstable area of the bank.

The citation at item 8 describes the alleged violation as follows:

The haul truck operator (Eloy Crespin), operating company #HF5 haul truck, was observed dumping a load of ore over the edge of the ore stockpile. The area that he was observed dumping over, had been undercut from below by the 988F loader that feeds the crusher. By undercutting the slope and removing the toe of the dump this made the ground unstable. There were haul truck tire tracks present that indicated dumping had taken place earlier in the shift at the same area. This exposed area was approximately 87 feet in length and the height of this dump was approximately (sic) 40-45 feet. The entire dump was approx. 170 feet in length. There were no barriers, warning signs, or other measures used in this area to alert drivers of this hazard. The company had allowed the practice of dumping over undercut material to exist. This is an unwarrantable failure.

The statement that "There were no barriers ---" may be somewhat misleading as there was undisputed evidence that the top edge of the stockpile had the proper required berm that complied with the berm standard applicable for the 50-ton haul trucks that were used to haul and dump the ore at the stockpile.

At the time of the inspection, three haul trucks were observed backing up to the berm and dumping their load. Only one of the three trucks observed dumping, a truck designated No. 2, is charged with dumping over an undercut area of the stockpile. There was no contention that the other two haul trucks dumped over an unstable or undercut area of the stockpile.

Cain testified that the stockpile was unusually high for its length and for the composition of the material which was loose and unconsolidated. He stated that normally with this kind of

material, an operator will form a lower, longer stockpile to maintain stability. Cain added that the higher the stockpile, the more unstable it becomes. Cain was clearly of the opinion that the undercutting of the stockpile for 87 feet along the bottom of the stockpile resulted in the removal of the toe of the stockpile in the undercut area and that removal of the toe compromised the stability of the stockpile to such an extent that, in the words of the standard, it “may fail to support” the weight of the loaded 50-ton haul truck when it backed up to the berm and lifts its bed to dump its load. Under these conditions the cited standard § 56.9304 requires the load to be dumped a safe distance back from the edge of the unstable area.

When the potential hazard was called to management’s attention, Respondent immediately ordered that all the trucks “dump short.” That is the term used to instruct the haul trucks to dump a safe distance away from the edge of the stockpile in the absence of a spotter or other means which would direct haul trucks not to dump over an undercut, unstable portion of the stockpile.

The berm that was in place along the entire dump site area was 3 to 3½ feet high with approximately an angle of repose of 1½ to 1. It was the same angle of repose as the general slope of the stockpile. The haul trucks drove about two feet from the berm which was approximately five feet from the edge of the stockpile. Cain testified he saw signs of instability but conceded he saw no signs of cracking. Asked if he saw any signs of failure, Cain testified “unless it fails, you won’t see any signs of failure.” Cain said he talked to the driver who said drivers were not told where to dump; that they used their own judgment in determining where to dump.

Alta Gold contends that all three of the haul truck dumps that Inspector Cain and Mr. Stork observed at the time of the inspection took place over stable, properly bermed ground. To support its position, Respondent presented the testimony of Mr. Stork and the written statement of Mr. Crespin who was the driver of the haul truck designated No. 2. Mr. Crespin’s written statement was received at Respondent’s Ex. 4 over objection by Petitioner. The main weakness of Mr. Crespin’s statement is the fact there was no opportunity to cross-examine Mr. Crespin. His written statement which remains mere hearsay is as follows:

THE MEETING BETWEEN ,MSHA AND MYSELF, WAS MOSTLY, ABOUT WHAT THE FORMAN DOSE, (Sic) HE ASKED ME IF ANY OF THE SUPERVISORS TOLD ME WHERE TO DUMP THAT DAY, I TOLD HIM NO, THEN HE ASKED IF THE SPOT WHERE I DUMPED WAS UNDERCUT, AND I TOLD HIM IT WAS NOT, THAT THE MOST THE LOADER COULD OF TAKEN OUT OF THAT SPOT WAS ONE BUCKET FULL.
HE ALSO WANTED TO KNOW IF THE FORMAN CHECKS THE DUMPS AND HOW MANY TIMES A DAY THEY DO IT, I TOLD HIM THAT THEY DO CHECK THE DUMPS, HOW MANY TIMES A DAY, I DID NOT KNOW, BECAUSE A DRIVER DON’T SPEND THAT MUCH TIME AT THE DUMP. HE ALSO WANTED TO KNOW WHAT WE DO WHEN THE DUMP LOOKS UNSAFE, I TOLD HIM WE DUMP ON TOP, AT THE END OF THE MEETING, HE ASKED ME IF I HAD ANYTHING TO SAY,
I TOLD HIM DO YOU REALLY BELIEVE, THAT I WOULD JEOPARDY (Sic) MY LIFE AND DUMP OVER A SPOT THATS UNDERCUT. HE SAID I GUESS NOT.

This is the statement Mr. Crespin gave his employer summarizing his interview with the Inspector.

Mr. Stork presented testimony indicating that only a small part of the alleged 87-foot undercut section was in fact undercut; that only a bucketful of ore was removed by the loader so that only a small portion of the toe of the stockpile was removed in the area where the No. 2 truck dumped its load. Mr. Stork was of the opinion that the stockpile was stable and safe. He pointed out that there were no stress fractures at the dump site and, furthermore, no truck dumped over any undercut area. Mr. Stork testified that No. 2 truck dumped its load just next to and not directly above the area of the stockpile where the loader had taken a bucketful of ore out of the bottom toe of the stockpile. Mr. Stork explained that as the dumped ore cascaded down the stockpile, a portion of the dumped load drifted into the undercut area where the bucketful of ore at the toe of stockpile had been removed. He testified that when Truck No. 2 dumped its load, the truck was on stable ground and a portion of the load spilled or drifted over into the area at the bottom of the stockpile where a bucketful of ore had been removed.

Stork testified that in normal circumstances, the dozer operator after trimming the dump, stays at the dump site to spot the haul trucks and to direct the haul trucks where he wants them to dump. Asked as to why the dozer was not up at the dump site at the time of Cain's inspection, Stork testified:

A. Yes. In normal circumstances, we have a dozer operator up on that dump approximately 90 to 95 percent of the time.

Q. All right. Could you explain why the dozer operator wasn't on the dump when inspector Cain and you visited the site in April of last year?

A. The dozer operator had been present on the dump until shortly after Mr. Cain arrived on the property. Rudy Montoya, the foreman, had just went (sic) through a safety inspection about a month and a half, two months before out at the Kinsley project by Mr. Cain, and Mr. Cain has got a way on his inspections of being very forceful, sometimes arrogant -- "intimidating" is the words that I've gotten from some of the people -- the way that they felt that he conducts his safety investigations.

Rudy knew that we had a pit above that was covered, the haul road into it was covered in with snow because it was snowing that day, and he felt that if Mr. Cain was wanting to go out and to do the inspections like he'd done at Kinsley, would go into the pit and inspect it, and he went down and pulled the dozer off of the dump to take him up there specifically to clean a haul road out in the pit so that, if we went in to inspect it, we would have a clean road and not a snow-packed road to do it.

Had Rudy not been so jumpy, worried about what the

inspector might want to inspect, what he's going to think, that dozer would have been left on that dump and it would have been there directing every load over. (Tr. 128-129).

Stork also testified that the area at the top of the stockpile dump was stable and compacted. Asked as to why that was so, he testified:

As the trucks roll over it, completely loaded, the wheel motion of the trucks rolling over the ore compacts that ore tight, and that — the type of material that we have at Griffon, we have the dirt — the ore, once it's been blasted, has got anywhere from small rock up to six-inch rock in it, sometimes a little bit bigger, with the fine dirt, with a tremendous amount of clay, with a little bit of moisture in it.

As the truck rolls over it, the top of that dump gets so hard that sometimes when we need to trim it, the dozer actually has to sink his rippers into the dirt to cut it and rip it so that he can push it. (Tr. 133-134).

With respect to the top of the stockpile, Stork also testified:

There was no signs of settling in the dump which is an indication of an unstable dump, there was no stress cracks, which is an indication of an unstable dump, and when the trucks ran across it, there was no settling, no cracking, no vibrations, no movement.

It had to be stable or it would have moved. (Tr. 134).

Stork testified that the area of the stockpile where the No. 2 haul truck operator made his dump was stable. Asked as to reasons why he determined it was stable he testified:

A. The fact that the dozer had just trimmed that whole face of that dump that morning, pushed off all loose materials from it, had reestablished a new berm that morning, and the surface showed no signs of stress cracks in it, the truck where Eloy backed up to did not sink into the dump, did not settle the dump, it did not cause any stress cracks to appear in the dump after he dumped there.

When he pulled away from it, it was just as good as condition after he dumped there as before he ever backed into it.

Q. Okay.

A. And it had to be stable to be able to do that. (Tr. 141).

Cain, on the other hand, testified that although he was not a geologist or a mining engineer he had a high school diploma and 1½ years of formal college. Prior to his employment with MSHA he worked eight years in the mining industry. He has taken special training courses in stockpile safety. He described the courses as follows:

A. They would do with the inspecting, the stability, the composition of the stockpiles, how to design a proper stockpile, how to maintain a stockpile, how to make sure that the stockpile can be dumped on, and that it doesn't present a hazard.

Q. And did you also take a course in haulage awareness training?

A. Yes, I did.

Q. And what were the details of that? Or describe that training.

A. Well, that training is, it talks about where haul trucks operate, haul roads, on top of waste dumps, stockpiles, how to properly dump over stockpiles, how to maintain a dumping location, where the truck should dump.

Mr. Stork testified there was a good solid berm all across the face of the dump. The ore had a tremendous amount of clay and a little moisture. The trucks and dozer running over the top of the stockpile, compacted it down. Stork said there was no sign of settling in the dump and there were no stress cracks, which is an indication of an unstable dump and when the trucks run across the top of the dump there was "no settling, no cracking, and no vibration, no movement." (Tr. 134).

Obviously, Cain and Stork differed in their perception of the facts and even more on their evaluation on the stability of the ground at the dumping location from which truck designated No. 2 dumped its load. On evaluation of all the evidence and particularly on considering the experience and training of Inspector Cain with respect to maintaining stability of the ground at a stockpile dumping location, I find that a preponderance of the evidence establishes a violation of the cited standard. Because of Inspector Cain's experience and specialized training in stockpile stability, I credit his testimony with respect to the potential lack of stability of the dumping site at the location where the operator of the haul truck designated No. 2 made its dump. I find the hazard was not obvious and management was not aware of the hazard. I find the negligence was moderate rather than high.

Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the

violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981).

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

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

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

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

I find the testimony of Inspector Cain established the four elements of the *Mathies* formula for designating the violation S&S. Certainly with respect to the third and fourth elements of the *Mathies* formula the most likely result for the operator of the truck falling 40 feet from the top of the stockpile would be serious or fatal injuries.

Although I concur with the inspector’s finding that the violation was S&S, I reject the finding that the violation resulted from an unwarrantable failure of the operator.

Unwarrantable Failure

The Commission stated in a number of cases the factors applicable to determining whether a violation was the result of unwarrantable failure. In *Windsor Coal Co.*, 21 FMSHRC 997, 1000, (Sept. 1999), the Commission stated that the unwarrantable failure terminology is

taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* At 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* At 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

The Commission explained that a number of factors are relevant in determining whether a violation is the result of an operator’s unwarrantable failure, such as the extensiveness of the violative condition, the length of time that the violative condition existed; whether the violative condition is obvious or conspicuous; the operator’s efforts to eliminate the violative condition; and whether an operator was placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992), *Beth Energy Mines Inc., Kitt Energy Corp.*, 6 FMSHRC. Upon evaluation of the evidence presented and consideration of the above factors, I find the preponderance of the evidence fails to establish aggravating conduct. The unwarrantable failure finding in this citation shall be deleted.

The citation, as modified, is affirmed.

Citation No. 7963333

This citation charges Alta Gold with the violation of 30 C.F.R. § 56.14100(b) for having an unoperable front light and a rear light on the 580E Case backhoe. The citation stated injury was unlikely; the violation was not S&S; and the negligence was high. The proposed penalty was \$800.00.

At the hearing Alta Gold withdrew its contest to the citation and offered no evidence; it did not dispute liability and accepted the citation and the proposed penalty. Both the citation and its proposed penalty are affirmed.

DOCKET NO. WEST 98-373-M

Citation No. 7963328

This citation charges Alta Gold with a S&S violation of 30 C.F.R. § 56.9301 and proposed a penalty of \$3,000.00.

The citation, item 8, describes the cited condition or practice as follows:

The loader operator (Biff Braman) was observed driving the 988F loader over and on to the metal bumper block at the feed hopper for the crusher. The bumper block had been buried with material (dirt) and no longer served as a restraint. The hopper sits approximately 60 feet above the ground level below. The hopper was approximately 15 feet long by 15 feet wide and was full of material. The dirt had become a ramp into the hopper and the operator drove the loader up on top of it. This presented a hazard of loader overtraveling feed area.

The cited standard 30 C.F.R. § 56.9301. That standard reads as follows:

§ 56.9301 Dump site restraints.

Berms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.

The 998 front-end loader takes a bucketful of material from the stockpile and drives up to the feeder hopper where the loader operator stops and dumps the load into the feed hopper. From there the material travels, gravity fed, into the crusher below.

Inspector Cain testified the company designed the feed hopper with a three-foot high metal bumper block. The bumper block has a three-foot high metal restraining bar. The three-foot high bar consisted of an eight inch diameter metal pipe. Its purpose is to prevent the front-end loader from overtraveling the spot where it dumps its load into the feed hopper. That area is approximately 30 to 60 feet above the ground below. The purpose of the bumper block is to prevent the loader from overtraveling and going into the feed hopper or even further on downhill, which would result in serious injury to the operator.

At the time of the alleged violation, Inspector Cain and Mr. Stork were in the control room next to the feed hopper. Cain testified he observed a loader that drove right up to the feeder hopper area and kept going, traveling up on top of the bumper block where the driver stopped the loader by using his brakes. Cain testified that he stepped out of the control room and examined the area to see what the problem was. He found that material dropping from the front-end loader bucket had been allowed to accumulate over time until it made a ramp leading up to and covering the three-foot high bumper block so there was nothing to impede the wheels of the loader. The accumulation of material had buried the bumper block so it could no longer serve its purpose as an impeding device.

Cain stated that when he observed the loader coming to stop on top of the bumper block, he issued an imminent danger order. Management then asked what they could do to correct the situation and continue with production. Cain told them they could install an adequate earth berm

to serve as a restraining or impeding device. To terminate the violation Alta Gold installed a three-foot earth berm on top of the buried metal bumper block that reached mid-axle height of the loader.

Mr. Stork's testimony as to the facts was different than that given by Inspector Cain. Stork testified that the distance from the feed hopper to ground below was 31 feet 6 inches and not 60 feet. Stork and Cain observed only one run of the loader to the feed hopper. Stork testified that there was an earth berm on top of the metal bumper block. When the loader, traveling too fast, came up to the feeder hopper, the loader bounced and came to a stop on top of the "dirt berm" which the loader had "flattened out." Stork stepped out of the control room and told the driver he was driving too fast. Stork also told him to get a bucketful of dirt to replace the berm which the loader had flattened out. Stork stated that the metal bumper block referenced by Cain in the citation was no longer in use at the time of the inspection. Management had decided to bury it with earth and material and put a dirt berm on top of it. Thus the company, by design, decided to use a dirt berm on top of the buried metal bumper block as an impeding device.

After Stork completed his testimony, Cain was called on redirect and testified there was no earth berm on top of the metal bumper block which was buried. There was a little bit of dirt over the top of the metal bar that you could wipe away with your shoe. He could see the top of the metal bar that constituted the top portion of the buried metal bumper block.

On evaluation of the evidence I find, even under Respondent's testimony, that the so-called earthen berm was so unsubstantial that it was wiped out and cleaned off and had to be "reestablished 10 to 15 times a day." (Tr. 251).

On evaluation of the evidence, I find there may have been some dirt on top of the buried metal bumper block but not of sufficient substance to qualify as an impeding device, as that term is used in the standard cited. I find that a preponderance of the evidence established the violation of the cited standard 30 C.F.R. § 56.9301.

Based on Inspector Cain's testimony I find that the Secretary established the four elements of the *Mathies* formula for finding the violation is significant and substantial. I therefore agree with Inspector Cain that the violation is S&S.

This citation, as modified, is affirmed.

Appropriate Civil Penalties

The Judge is required by Commission Rule 30, 29 C.F.R. § 2700.30, as well as by the Mine Act itself, to consider the statutory criteria set forth in § 110(i) of the Mine Act in determining the appropriate civil penalty to each violation.

Section 110(i) provides in relevant 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.

Size of Operator and Ability to Continue in Business

The parties stipulated at the hearing that Respondent, Alta Gold Company, with respect to the size of its business, has a total of 189,712 man hours worked per year. Alta Gold Company owns and operates the Griffon Project mine, which is a surface mine with 12,420 man hours worked per year.

Based upon this stipulation of hours worked, I find the business of its operator medium size. In addition, I find in the absence of any evidence to the contrary, that appropriate penalties will not affect the operator's ability to continue in business.

Negligence

With respect to both contested violations, I find the negligence to be moderate. I find that the operator was unaware that it was in violation of either standard. Perhaps the operator should have known it was in violation but it did not. Management had good faith but a mistaken belief that they were not in violation of the safety standard in either of the contested cases.

History of Previous Violations

Alta Gold's history of previous violations is not excessive. It was stipulated that in the 24 months preceding the issuance of the subject citations, Respondent has had 20 assessed violations. There is no evidence that any of the violations established in this case were repeat violations.

Gravity

The Commission stated that the gravity penalty criterion contained in § 110(i) of the Mine Act requires an evaluation of the seriousness of the violations and that the focus of the gravity criterion is on, "the effect of the hazard if it occurs" (*Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000) (quoting *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996)). In this case the hazard, fortunately, did not result in any injury whatsoever but the effect of the hazard, if it occurred, would have been a serious injury or death. Consequently, the degree of gravity in both violations is relatively high.

Good Faith and Rapid Compliance

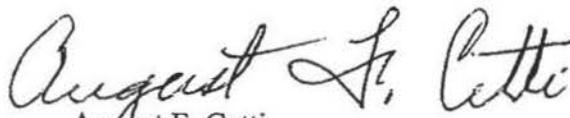
I find the operator, without question, demonstrated good faith in attempting and achieving rapid compliance after notification of the violation with respect to both violations; there was unhesitating, immediate compliance after notification of the violations.

On the basis of my foregoing findings and conclusions and my *de novo* consideration of the civil penalty assessment criteria found in § 110(i) of the Act, I conclude and find that the following penalty assessments are reasonable and appropriate for the violations that have been affirmed in these proceedings:

<u>Citation No.</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
7963330	58.9304(b)	\$1,200.00
7963333	56.14100(b)	800.00
7963328	56.9301	<u>1,500.00</u>
	TOTAL	\$3,500.00

ORDER

Accordingly, it is **ORDERED** that Citation No. 7963330 be modified to amend the negligence factor from "high" to "moderate" and to delete the unwarrantable failure finding. It is further **ORDERED** that Citation No. 7963328 be modified to amend the "gravity" factor from "highly likely" to "reasonably likely." The finding of a violation which is significant and substantial is **AFFIRMED** in both Citation Nos. 7963330 and 7963328 and both citations, as modified above, are **AFFIRMED**. It is further **ORDERED** that Citation No. 7963333, as written, is also **AFFIRMED**. It is further **ORDERED** that Alta Gold pay the Secretary of Labor a civil penalty of \$3,500.00 within 30 days of this decision and order.


August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
August 23, 2000

RAG CUMBERLAND RESOURCES LP,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. PENN 99-195-R
	:	Order No. 7075043; 4/9/99
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH,	:	Docket No. PENN 99-196-R
ADMINISTRATION (MSHA),	:	Citation No. 7075044; 4/9/99
Respondent	:	
	:	Cumberland Mine
	:	Mine ID 36-05018
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2000-134
Petitioner	:	A. C. No. 36-05018-04187
v.	:	
	:	Cumberland Mine
RAG CUMBERLAND RESOURCES	:	
CORPORATION,	:	
Respondent	:	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant;
Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Respondent.

Before: Judge Feldman

This contest proceeding, heard on April 25 through April 26, 2000, in Fairmont, West Virginia, arose as a consequence of an April 9, 1999, incident that occurred at RAG Cumberland Resources LP's (RAG's) Cumberland Mine.¹ The incident concerned a collision

¹ The contestant has filed an unopposed motion to change the captioned contestant from RAG Cumberland Resources Corporation, formerly Cyprus Cumberland Resources, to RAG Cumberland Resources LP. The contestant's motion is granted. Reference herein to RAG Cumberland Resources LP (RAG) includes reference to all of the predecessor corporate entities.

at a mantrip station involving two incoming mantrips that were coupled together, with a cricket that was about to depart the station to travel into the mine. The mantrips were operated by Paul Taylor, an hourly employee, who, at the time of this incident, was completing his shift and exiting the mine. The incident was observed by Mine Safety and Health Administration (MSHA) Inspector James Conrad.

Upon witnessing this incident, Conrad issued 104(a) Citation No. 7075044 alleging a significant and substantial (S&S) violation of a safeguard that requires mantrips to be controlled within the limits of visibility. Conrad also issued 107(a) imminent danger Order No. 7075043 based on his belief that Paul Taylor had “a practice” of operating mantrips at unsafe speeds.

Section 3(j) of the Mine Act defines an imminent danger as “the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated . . .” 30 U.S.C. § 802(j). Thus, a central issue in this proceeding is whether a miner’s negligent act, once completed, can provide a basis for the issuance of an imminent danger order under section 107(a) of the Mine Act based on an MSHA inspector’s belief that the miner’s negligence will reoccur.

On July 7, 2000, the civil penalty proceeding concerning 104(a) Citation No. 7075044 docketed as PENN 2000-134 was assigned to me for disposition. The Secretary seeks to impose a civil penalty of \$5,000 for Taylor’s alleged failure to adequately control the mantrip. RAG has filed a motion to consolidate PENN 2000-134 with the contest proceeding in PENN 99-196-R challenging Citation No. 7075044. The Secretary does not oppose RAG’s motion. Good cause having been shown, the civil penalty matter in PENN 2000-134 **IS HEREBY CONSOLIDATED** with the related contest matter in PENN 99-196-R, and a decision on the merits of the Secretary’s civil penalty proposal is contained herein.

The parties’ proposed findings and conclusions have been considered in the disposition of this matter. For the reasons discussed below, 107(a) imminent danger Order No. 7075043 shall be vacated, and a reduced \$2,400 civil penalty shall be imposed for 104(a) Citation No. 7075044.

I. Findings of Fact

On October 25, 1993, MSHA Inspector Frank Terrett, who is now retired, witnessed a collision of haulage vehicles at the Cumberland Mine that was similar to the subject incident witnessed by Conrad on April 9, 1999. At the time of the October 25, 1993, incident, Terrett was sitting underground in a mantrip at the No. 3 Portal waiting to enter the mine to perform a routine

inspection. The No. 3 Portal was a heavily traveled area where mantrips entered and exited the mine. The maximum speed of a mantrip traveling on level ground is approximately 15 miles per hour. (Tr. 207).² While waiting to enter the mine, Terrett's mantrip was struck by an incoming mantrip that was traveling at an excessive speed. Terrett sustained a neck injury as a result of the collision that required him to "wear a neck brace for a week." (Tr. 48).

As a result of the October 25, 1993, incident, Terrett issued Notice to Provide Safeguard No. 3655679 for the Cumberland Mine. The safeguard stated that all mantrips shall be operated at speeds consistent with the conditions and the equipment used, and that mantrips shall be controlled so that they can be stopped within the limits of visibility. (Gov. Ex. 5).

These matters concern a similar mantrip incident that occurred at the Cumberland Mine at the beginning of the day shift on April 9, 1999, approximately 5½ years after the incident involving inspector Terrett. On the morning of April 9, 1999, an inspection party consisting of MSHA Inspector James Conrad, Michael Konosky, the company safety representative, and Lloyd Blair, the union safety representative, entered the mine using the elevator at the No. 6 Portal. (Tr. 78-80). They proceeded a short distance along the manway to the haulage track where they intended to obtain transportation into the mine. (Tr. 78; Joint Ex. 2). A second inspection party, consisting of MSHA Inspector Joe Hardy, company representative Pat Maher, and miner representative Randy Bedilion, followed behind Conrad's party. (Tr. 261, 265).

Both the No. 3 and No. 6 Portals are used to provide access into the mine. However, since 1966 the No. 6 Portal area, a relatively new area, has been the main portal where the majority of the miners enter the mine. (Tr. 146-7). The No. 6 Portal was designed so that mine vehicles would travel a loop off the main haulage in order to load and unload passengers. (Tr. 146-7, 403-4). The area around the No. 6 mantrip portal station where miners enter and exit track vehicles is relatively flat. (K. 9). To arrive at the station, vehicles traveled up a hill from the main haulage. (K. 9, 14). Unlike the No. 6 Portal, the No. 3 Portal, which was previously used as the primary entry to the mine, had no such loop, and mine vehicles loaded and unloaded right on the main haulage. (Tr. 147).

On April 9, 1999, a portion of the loop off the main haulage was closed in order to install additional support to the ribs (Tr. 215, 360; Joint Ex. 2). For that reason, mine vehicles traveled the short distance to and from the main haulage using track that approached the station as both incoming and outgoing track. *Id.*

² References to the hearing transcript are designated by "Tr." followed by the page number. Michael Konosky was unable to attend the hearing due to a death in the family. The record was kept open so that Konosky could be deposed. Konosky was deposed on June 14, 2000. References to the Konosky deposition transcript are designated by "K." followed by the page number.

The No. 6 Portal is an area of high congestion during shift changes. For example, 100 miners work the midnight shift, and 125 miners are assigned to the day shift. (Tr. 235). Between 7:30 a.m. and 9:30 a.m., the crews on the departing midnight shift and the arriving day shift arrive at the station at staggered intervals to reduce the traffic in the No. 6 bottom area. (Tr. 104, 147, 271, 288). Thus, the Cumberland Mine uses a "hot seat" changeout system for its production crews, *i.e.*, the crew going off shift does not leave the producing section until the oncoming crew arrives at the section. (Tr. 104 107). The crews coming out of the mine arrive at the No. 6 bottom at different times depending on the length of time it takes to travel from their work areas. (Tr. 107; K: 10).

Mine inspectors generally wait until after 9:00 a.m. in the morning to enter the mine when congestion eases at the No. 6 Portal. (Tr. 109, 421). When Conrad, Konosky and Blair arrived at the No. 6 Portal at approximately 9:00 a.m. on April 9, 1999, there was no mine vehicle parked at the mantrip station. Konosky went to get a mine jeep or "cricket" from a battery charging station. (Tr. 78-9). Konosky returned with a cricket and pulled into the curve where mantrips load and unload. (K.10; Joint Ex. 2). He observed two mantrips coupled together coming up from the main haulage. (K. 10). He thought the mantrips might be traveling too fast so he flagged them with his light. (K. 11). When he did not get an immediate response, Konosky quickly exited from the cricket in case the mantrip collided with the cricket. (K. 11). Konosky first sought safety in a manhole before going to an area behind a set of concrete block piers at the entrance to the portal entry where Conrad and others were waiting. (Tr. 276; K. 11). The cricket was capable of rolling if bumped because Konosky had not set the brakes on the cricket. (K. 11).

The approaching mantrips were coupled together because the battery in the second mantrip was low. (Tr. 357). The front mantrip was operated by Paul Taylor, an hourly employee (Tr. 83-4, 209, 271). The other miners on the crew were in the front mantrip. (Tr. 358). A foreman, Joe Kushner, was in the operator's seat of the second mantrip. (Tr. 83-4, 209, 271). Although Kushner could apply the brakes on the second mantrip to slow the coupled vehicles, Kushner's vision was obscured by the front mantrip. Thus, the cricket could not be seen from the second mantrip. (Tr. 277, 364). In this regard, Conrad testified Kushner was not aware that Taylor had hit the jeep although Kushner apparently was aware that something had happened. (Tr. 160). Consequently, Kushner relied on Taylor to avoid colliding with other vehicles as their mantrips approached the station.

Konosky and union representatives Blair and Bedilion observed the mantrips as they entered the station. They all agreed the mantrips were going "too fast." (Tr. 263, 265, 276; K. 21; Gov. Ex. 12). For example, Konosky stated the mantrips were traveling "a little bit too fast," and, ". . . they were coming fast enough . . . I flagged him and he kept on coming, so I got off the motor and got in the clear." (K. 11, 21). Blair testified Konosky told him that he knew the mantrips were not going to stop so he "bailed off" the jeep. (Tr. 205-06). Safety manager Robert Bohach also stated that Konosky told him he "bailed out" of the jeep. (Tr. 414). Bohach admitted Konosky probably did so to avoid injury. (Tr. 414-15).

As the mantrips reached the unloading point they contacted the cricket causing it to roll down the track. The cricket is approximately 10 feet long. Konosky estimated the cricket rolled one length, or approximately 10 feet. (K. 11). Blair and Bedilion's contemporaneous notes reflect the jeep traveled approximately 3 lengths, or 30 feet after being struck. (Tr. 178, 265, 292-93, 360-61, 405; Gov. Ex. 12). Conrad testified that the mantrip had ". . . struck [the jeep] violently . . . and Mr. Konosky had exited the jeep at a faster than normal speed in order to get off the jeep so he would not be in the vehicle whenever it was struck." (Tr. 80-81).

No one was injured as a result of the collision, and neither the cricket nor the mantrips sustained any damage. (Tr. 174, 209, 219, 405). The cricket is rated as a one ton vehicle. The coupled mantrips are considerably larger and are each rated as five ton vehicles. (Tr. 208-09). Given the disparity in the vehicles' size, apparently the miners riding with Taylor in the first mantrip, and Kushner riding in the second mantrip, were not immediately aware that the cricket had been struck until it was brought to their attention. (Tr. 161, 209-10, 363-4; Gov. Ex. 18, pp. 7-8).

As Taylor exited the mantrip, Conrad observed Konosky approach Taylor to admonish him about the collision. Conrad and Konosky are related by marriage. Their wives are sisters. Thus, Conrad and Konosky are brother-in-laws. (Tr. 200). Taylor responded to Konosky with profanity and said he was going home. (Tr. 81, 159, 219, 271; K. 14-15). Conrad, having observed this incident from behind the piers in the manway, was upset by Taylor's attitude towards his brother-in-law. (Tr. 82). Conrad testified:

The men that were in the mantrip that was coming into the bottom that stuck the cricket, especially the operator, he jumped off the motor and proceeded [from] the mantrip. Mr. Konosky questioned [Taylor] as to what he was doing. And [Taylor], the operator, came back with obscenities and continued on towards the mine bottom.

There was nobody that asked any questions as to whether anybody was hurt. Everybody piled out and continued on over to the elevator. Nobody was concerned with whether or not people were injured or whether or not anybody was involved or what condition they were in. There seemed to be no remorse at all as far as the actions they took or what had transpired, and they proceeded out. Because of the fact that I was very, very upset with the situation as far as the way the people responded, we traveled up the elevator to the surface and proceeded to go to the mine office.

(Tr. 81).

Conrad accompanied Konosky on the elevator to the surface and he asked Konosky if he would "take care of" the situation. (Tr. 81, K. 15). Conrad went to the mine foreman's office where he issued to Konosky an imminent danger order and an accompanying citation.

Imminent danger Order No. 7075043, was issued pursuant to Section 107(a) of the Act, 30 U.S.C. § 817(a). Under the heading "Condition or Practice" the Order alleged as follows:

The following practice constitutes an imminent danger.

Two man trip motors coupled together and being approached by the midnight crews off of the midnight shift approached the No. 6 shaft man trip station at an unusual high rate of speed where [people] regularly load and unload man trips. Several persons were standing around in the area at the time the man trip started around the corner where the cement piers are located and struck a jeep that was parked there. The two man-trip motors had approximately 10 people in them when they struck the jeep. (75.1403-7(f) citation issued) The two man-trip motors were not being operated at a safe speed when approaching the No. 6 man-trip station or were not being controlled so as to stop the motors within the limits of viability [sic] before striking another vehicle.

(Gov. Ex. 6).

The only basis for Conrad's issuance of imminent danger Order No. 7075043 was Taylor's operation of the mantrip on the morning of April 9, 1999. (Tr. 164-6, 184; Gov. Ex. 6). Conrad did not interview Taylor or Kushner, or obtain any information from mine management prior to issuing the 107(a) imminent danger order. (Tr. 159). In addition, Conrad had never seen Taylor operate a mantrip before. *Id.* Despite Conrad's lack of knowledge about Taylor's past behavior, Conrad concluded Taylor's failure to control the mantrip was representative of Taylor's normal manner of operation "because of the way [Taylor] responded in this situation." (Tr. 159, 165-6). Thus, Conrad's belief that Taylor had a practice of operating mantrips at excessive speeds was based on Taylor's lack of contrition and remorse. (81-85; 166).

On April 9, 1999, Conrad also issued Citation No. 7075044, pursuant to Section 104(a) of the Act, 30 U.S.C. § 814(a). It alleged an S&S violation of the provisions of 30 C.F.R. § 75.1403-7(f) concerning safeguards that was attributable to moderate negligence. Citation No. 7075044 stated:

The following condition was a contributing factor to immanent (sic) danger Order No. 7075043 issued on April 9, 1999. Two man-trip motors that were coupled together approached the No. 6 air shaft man-trip station. They approached at a rate of speed that could not be controlled and/or stopped within the limits of viability (sic). The man-trips, with approximately 10 people in them from the midnight shift, stuck (sic) a jeep that was

parked on the corner.
There is no abatement (sic) time fixed to this citation since
it is part of the order.

(Gov. Ex. 7).

Initially, Citation No. 7075044 did not cite the safeguard on which it was based. Conrad modified Citation No. 7075044 on April 22, 1999, to reflect the citation was based on a violation of safeguard No. 3655679 issued as a result of the October 25, 1993, incident involving MSHA Inspector Frank Terrett discussed above. (Gov. Ex. 7). Safeguard No. 3655679 states:

The #112 Track mounted self-propelled personnel carrier was not being operated at a safe speed. The #112 personnel carrier was enroute to the bottom at the end of [the] shift with 10 persons aboard when it hit into mantrip parked at bottom for men to enter mine.

This is a notice to provide safeguard that all trips including trailers and sleds shall be operated at speeds consistent with conditions and the equipment used, and shall be so controlled that they can be stopped within the limits of visibility.

(Gov. Ex. 5).

RAG filed its Notice of Contest for Citation No. 7075044 on May 10, 1999. Following RAG's contest, after consultation with the Secretary's counsel, on August 19, 1999, Conrad again modified Citation No. 7075044 to increase RAG's degree of negligence from moderate to high. (Tr. 169; Gov. Ex. 7). Conrad based the increase in culpability "upon further review of previous haulage incidents and accidents that have occurred at this mine and within the industry" (Gov. Ex. 7). Conrad testified he believed the history of haulage incidents at the Cumberland Mine appeared to be "a little bit higher than normal." (Tr. 110, 168). However, Conrad admitted he did not compare the history of haulage incidents at the Cumberland Mine with other mines. (Tr. 168). Notwithstanding the October 1993 incident involving Terrett, there is no evidence of a reportable injury from a haulage collision at the Cumberland Mine since Terrett's safeguard was issued in 1993. (Tr. 171-72; Gov. Ex. 9).

Despite MSHA's assertion that there was a continuing condition or practice of unsafe operation of mantrips, RAG was not cited for any violation of the subject safeguard during the intervening 5½ year period beginning with its issuance by Terrett on October 23, 1993, until the Taylor incident on April 9, 1999. (Joint Stip., Nos. 17-18). The absence of a relevant history of violations is particularly significant in view of MSHA's admitted continuing presence at the

Cumberland Mine during regular triple A quarterly inspections during which time inspectors would regularly ride track vehicles departing from portal stations.

Finally, three day disciplinary suspensions were imposed on Taylor and Kushner for their roles in the April 9, 1999, incident. (Tr. 364). Similarly, the miners responsible for the October 1993 incident involving Terrett were also suspended for three days shortly after the collision described in Terrett's safeguard. (Gov. Ex. 3). In the past, RAG has disciplined other miners for violation of its haulage safety policies, and it has posted safety messages on haulage practices for personnel training. (Tr. 398-401; Gov. Exs. 2, 3).

II. Further Findings and Conclusions

A. Imminent Danger Order No. Order No. 7075043

Imminent danger Order No. 7075043 was issued pursuant to section 107(a) of the Mine Act. Section 107(a) provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area *until* an authorized representative of the Secretary determines that *such an imminent danger and the conditions or practices which caused such imminent danger no longer exist*. The issuance of an order under this subsection shall not preclude the issuance of a citation under Section 104 or the proposing of a penalty under section 110. (Emphasis added).

As a threshold matter, neither the Secretary, nor the evidence, suggests RAG had a policy or practice of reckless mantrip operation, or otherwise encouraged or condoned such operation. In this regard, union representatives Blair, Riggi and Bedilion all testified they were regular operators of mantrips, and that they operated mantrips safely. (Tr. 221, 223 237, 247, 274, 297-98). Although Blair, Riggi and Bedilion opined some miners operate mantrips too fast, Conrad's testimony reflects the imminent danger order was directed exclusively at Taylor.

Assuming, solely for the sake of argument, that the aftermath of Taylor's mantrip operation, *i.e.*, a person's completed negligent act, can constitute an imminent danger, the plain statutory language requires the continued exposure of miners to a hazardous "condition or practice" in order to warrant the issuance of an imminent danger order. In this regard, section 3(j) of the Mine Act defines an imminent danger as "the existence of any condition or practice in

a coal or other mine which could reasonably be expected to cause death or serious physical harm *before such condition or practice can be abated . . .*” 30 U.S.C. § 802(j) (emphasis added).

In *Wyoming Fuel Company*, 14 FMSHRC 1282 (August 1992), the Commission stated the appropriate analysis for determining the validity of an imminent danger order is whether the preponderance of the evidence shows “. . . that the condition or practices, as observed by the inspectors, could reasonably be expected to cause death or serious physical harm, before the conditions or practices could be eliminated.” 14 FMSHRC at 1291. In *Wyoming Fuel*, the Commission noted that there must be a degree of imminence to support a 107(a) order noting that the word “imminent” is defined as “ready to take place: near at hand: impending . . . hanging threateningly over one’s head: menacingly near.” *Id.* at 1290 citing *Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (October 1991).

In view of the potential imminence of danger, the Commission has repeatedly recognized that an inspector must be accorded considerable discretion in determining whether to issue a 107(a) withdrawal order because “an inspector must act with dispatch to eliminate conditions that create an imminent danger.” 14 FMSHRC at 1291 (citations omitted). However, although far reaching, an inspector’s discretion to issue 107(a) orders is not unfettered. Rather, the apparent imminence of danger is a prerequisite to empowering the inspector with the broad discretion to issue 107(a) withdrawal orders.

Here, even if we assume Taylor was inclined to strike other vehicles, the inescapable fact is that, at the time of the alleged imminent danger, Taylor had exited the mantrip to depart from the mine at the end of his shift. Taylor was not scheduled to return to the Cumberland Mine for at least 16 hours. Thus, at the time Conrad issued the imminent danger order at 8:40 a.m. on April 9, 1999, Taylor’s alleged “practice” of recklessly operating mantrips posed a hazard to no one because Taylor had already exited the mine for the surface. The imminent danger was abated 50 minutes later at 9:30 a.m. after Taylor and Kushner were instructed about the safe operation of mantrips. (Gov. Ex. 6). However, there was no continuing threat to miners during the interim 50 minute period from 8:40 a.m. through 9:30 a.m. given Taylor’s departure from the mine. Thus, Conrad’s issuance of 107(a) Order No. 7075043 constituted an abuse of discretion.

The above discussion assumed, for the sake of argument, that Taylor’s conduct was properly characterized as a “condition or practice.” However, if a miner’s negligent act, once completed, could provide the basis for an imminent danger solely on the assumption that his negligence will reoccur, virtually any violation of the Secretary’s mandatory safety standards could be characterized as an imminent danger. Like the boy who cried wolf, such an approach trivializes the rationale for section 107(a), and, in so doing, undermines the Secretary’s authority to issue imminent danger orders.

Finally, I do not question inspector Conrad's sincerity. In the heat of the moment, Conrad understandably was upset over Taylor's apparent lack of contrition, particularly in view of his brother-in-law's exposure to potential injury. However, it is difficult to understand why the Secretary, despite the benefit of hindsight, continues to adhere to her assertion that the circumstances in this case constitute a violation of section 107(a).³ Accordingly, 107(a) imminent danger Order No. 7075043 shall be vacated.

B. 104(a) Citation No. 7075044

a. Fact of Violation

In *Southern Ohio Coal Company*, 14 FMSHRC 1 (January 1992), the Commission addressed the statutory and regulatory basis for the Secretary's general authority to issue safeguards pursuant to the criteria governing safeguards in sections 75.1403-2 through 75.1403-11. The Commission stated:

A safeguard may be issued to minimize transportation hazards only in underground coal mines. An inspector's decision to issue a notice to provide safeguards must be based on his consideration of the specific conditions at the particular mine. The requirement that the inspector identify a specific transportation hazard at a mine before issuing a safeguard flows from the language of section 314(b), authorizing the issuance of a safeguard that is "adequate, in the judgment of an authorized representative of the Secretary," to minimize a transportation hazard. (Emphasis in original). Section 75.1403-1(a) further clarifies that consideration of the specific conditions giving rise to a hazard requires inspectors to issue safeguards on a mine-by-mine basis. Further, safeguards may be enforced at a mine only after the operator is advised in writing that a specific safeguard will be required as of a specified date. Section 75.1403-1(b). MSHA's current *Program Policy Manual* ("Manual") states that the criteria of sections 75.1403-2 through -11 are not mandatory standards:

It must be remembered that these criteria are not mandatory. If an authorized representative of the Secretary determines that a transportation hazard exists and the hazard is not covered by a

³ The Secretary does not assert that RAG had "a practice" of operating mantrips at unsafe speeds. Rather, the thrust of the Secretary's case is that Taylor was the imminent danger. While the Secretary could have argued that Taylor's conduct constituted an unwarrantable failure warranting a 104(d) withdrawal order, there is no statutory authority under section 107(a) for designating an individual as an imminent danger.

mandatory regulation, the authorized representative must issue a safeguard notice, allowing time to comply before a 104(a) citation can be issued. . . .

Manual, Volume 5, Part 75, pp. 125-26.

14 FMSHRC at 7 (footnote omitted).

An inspector's use of the safeguard provision is not limited by the statute, the regulations, or the *Policy Manual* to hazards that are "unique" or "peculiar" to a mine. *Id.* Rather, a safeguard is valid so long as it addresses specific conditions at a particular mine, regardless of whether similar safeguards are issued at other mines. *Id.* at 14.

104(a) Citation No. 7075044 alleges an S&S violation of the provisions of 30 C.F.R. § 75.1403-7(f) concerning safeguards. Citation No. 7075044 states:

The following condition was a contributing factor to an immanent (sic) danger Order No. 7075043 issued on April 9, 1999. Two man trip motors that were coupled together approached the No. 6 air shaft man trip station. They approached *at a rate of speed that could not be controlled and/or stopped within the limits of viability* (sic). The man trips, with approximately 10 people in them from the midnight shift, stuck (sic) a jeep that was parked on the corner.

There is no abetment (sic) time fixed to this citation since it is part of the order.

(Gov. Ex. 7) (emphasis added).

Initially, Citation No. 7075044 did not cite the safeguard on which it was based. As previously noted, Citation No. 7075044 was modified on April 22, 1999, to reflect the citation was based on a violation of safeguard No. 3655679 issued as a result of the October 25, 1993, incident involving inspector Terrett. (Gov. Ex. 7). Safeguard No. 3655679 states:

The #112 Track mounted self propelled personnel carrier was not being operated at a safe speed. The #112 personnel carrier was enroute to the bottom at the end of [the] shift with 10 persons aboard when it hit into mantrip parked at bottom for men to enter mine.

This is a notice to provide safeguard that all trips

including trailers and sleds *shall be operated at speeds consistent with conditions and the equipment used, and shall be so controlled that they can be stopped within the limits of visibility.*

(Gov. Ex. 5) (emphasis added).

The thrust of the cited safeguard is that mine vehicles should be operated at speeds commensurate with the limits of visibility. Terrett's safeguard was issued as a consequence of the October 25, 1993, incident that occurred in the No. 3 Portal where the same haulage track was used for both incoming and outgoing mine vehicles. Similarly, the April 9, 1999, incident observed by Conrad occurred when the No. 6 Portal track temporarily was used for both incoming and outgoing traffic because incoming traffic was diverted as a consequence of rib maintenance in the incoming track entry. Obviously, an incoming vehicle approaching a station containing a parked vehicle must be operated in a controlled manner to avoid the hazards associated with a head-on collision. Taylor's failure to avoid contact by his two 5 ton rated mantrips with the considerably lighter cricket clearly constitutes a violation of the cited October 25, 1993, safeguard. Thus, the Secretary has prevailed on the issue of the fact of the violation cited in 104(a) Citation No. 7075044.

b. Significant and Substantial

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. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained its *Mathies* criteria as follows:

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

Resolution of whether a particular violation of a mandatory safety standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (August 1985). Thus, consideration must be given to, both the time frame that a violative condition existed prior to the issuance of citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (November 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986).

Turning to the S&S *Mathies* criteria, the first element of *Mathies* is satisfied since, as noted above, Taylor's failure to control his mantrip constituted a violation of the cited safeguard. Furthermore, the collision of two five-ton vehicles with a stationary one ton-vehicle clearly exposes occupants of both vehicles, particularly occupants of the stationary lighter vehicle, to a measure of danger. Thus, the second element of *Mathies* is also met.

The remaining *Mathies* criteria require the Secretary to demonstrate, by a preponderance of the evidence, that there is a reasonable likelihood of serious 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). Common sense suggests that it is reasonably likely that the transfer of energy from moving, coupled, ten-ton rated mantrips to a stationary one-ton cricket, even at a relatively slow speed, will result in serious musculoskeletal injury to the neck, back or limbs of occupants in the lighter, stationary vehicle. Konosky's own testimony reflects he "bailed out" of the cricket in fear for his safety.

The likelihood of serious injury is further reflected by the approximate 30 feet distance the cricket traveled after it was struck by the mantrip. Finally, the neck injuries sustained by Terrett as a result of the October 25, 1993, incident demonstrate the likelihood that serious injury will result from the collision hazard contributed to by the subject safeguard violation. Accordingly, the Secretary's S&S designation in 104(a) Citation No. 7075044 shall be affirmed.

III. Civil Penalty

It is well settled that the Commission assesses civil penalties *de novo* and is not bound by the Secretary's proposed assessments. *Topper Coal Co.*, 20 FMSHRC 344, 350 n.8 (April 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291, (March 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). In determining the appropriate civil penalty to be assessed, Commission Rule 30,

29 C.F.R. § 2700.30, requires the Judge to consider the statutory criteria set forth in 110(i) of the Mine Act, 30 U.S.C. § 820(i). Section 110(i) provides, in pertinent part, in assessing civil penalties:

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

a. Size of Operator and Ability to Remain in Business

The parties have stipulated that RAG and its affiliated companies produced over 78.9 million tons of bituminous coal, 6.3 million tons of which was produced at the Cumberland Mine. (Joint Stip.). Thus, RAG is a large mine operator and the imposition of a civil penalty in this matter will not affect RAG's ability to remain in business.

b. Negligence

With respect to negligence, it is noteworthy that the safeguard violation cited in 104(a) Citation No. 7075044 was initially attributed to RAG's moderate negligence. The citation was modified to reflect culpability of high negligence in contemplation of litigation after RAG contested the Citation. While the Secretary may modify a citation after it is contested, the Secretary bears the burden of demonstrating the modification is supported by the evidence. Here Conrad testified the increase in the degree of the operator's negligence was based on the history of haulage accidents at the Cumberland Mine that appeared to be "a little bit higher than normal." However, Conrad conceded he did not compare the history of haulage accidents at the Cumberland Mine with other mines. Moreover, the history of haulage incidents at the Cumberland mine does not reflect a significant history of accidents attributable to excessive speed.

The Mine Act is a strict liability statute. Thus, operators are strictly liable for their employees' violative conduct. *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (November 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462 (August 1982) ("*SOCCO*"). Thus, while it is true that hourly employee Taylor's conduct, for which a three day suspension was imposed, evidenced a significant degree of negligence given the two-way nature of the track, and the high traffic in the vicinity of the No. 6 Portal, it does not necessarily follow that Taylor's negligence must be imputed to RAG.

Once liability is determined, the negligent actions of an operator's "agent"⁵ are imputable to the operator for the purpose of assessing civil penalties. *Mettiki Coal Corporation*, 13 FMSHRC 760, 772 (May 1991); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-98; (February 1991); *SOCCO*, 4 FMSHRC at 1463-64. However, "[t]he conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes." *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995). "Rather, the operator's supervision, training, and disciplining of [rank-and-file] miners is relevant." *Id. citing SOCCO*, 4 FMSHRC at 1464; *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261 (March 1988).

There is no evidence that Taylor was serving in a management capacity at the time of the April 9, 1999, incident. Moreover, although foreman Kushner was operating the second mantrip that was coupled with Taylor's mantrip, Conrad admitted that Kushner could not see the cricket as the mantrips approached the station because Kushner's vision was obscured. In fact, Conrad concluded Kushner was not even aware of the collision although he knew "something" had happened. Since Kushner could not have anticipated the collision, or known that Taylor was not in control of the mantrip, there is no basis for imputing Taylor's negligence based on inadequate supervision.

Moreover, there is no evidence of inadequate training or discipline of RAG's miners in view of Taylor's three day suspension, and RAG's history of posting safety notices on the proper methods of operating haulage vehicles. Although the Secretary presented testimony by safety committeemen that Taylor purportedly had a tendency of operating mantrips, that have a maximum speed of approximately 15 miles an hour on level ground, "too fast," there is no evidence of any history of haulage accidents or relevant citations involving Taylor. Accordingly, there is no basis for imputing Taylor's negligence to RAG. Consequently, a low degree of negligence is the appropriate degree of negligence that should be attributable to RAG for the cited safeguard violation.

c. Gravity

The gravity penalty criteria contained in section 110(i) requires an evaluation of the seriousness of the violation. *Hubb Corporation*, 22 FMSHRC 606, 609 (May 2000) *citing Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (September 1996); *Sellersburg*, 5 FMSHRC at 294-95. In evaluating the seriousness of a violation, the Commission focuses on "the affect of a hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. Here, it is reasonably likely that serious injury will occur to the occupants of haulage vehicles if incoming mantrips collide with stationary vehicles waiting to depart portal stations. Consequently, the cited violation is serious in gravity.

⁵ Section 3(e) of the Mine Act defines "agent" as "any person charged with responsibility for the operation of all or a part of a . . . mine or the supervision of the miners in a . . . mine . . ." 30 U.S.C. § 802(e).

d. History of Previous Violations

During the two year period preceding the subject violation from April 9, 1997, through April 8, 1999, approximately 600 violations were cited at the Cumberland Mine. Of these 600 violations, approximately 60 violations were for safeguard infractions of section 75.1403. The majority of these safeguard violations were designated as non-S&S. In applying the history of prior violations penalty criterion, the Commission has noted that it is the operator's general history of violations, not just its history of similar violations, that should be considered. *Cantera Green*, 22 FMSHRC 616, 623 (May 2000) (citations omitted). The history of approximately 600 violations cited at the Cumberland Mine during the approximate 24 month period preceding the issuance of the subject 104(a) citation on April 9, 1999, constitutes an extensive violative history.

e. Good Faith Efforts at Abatement

There is no evidence to suggest that RAG did not timely abate the cited safeguard violation.

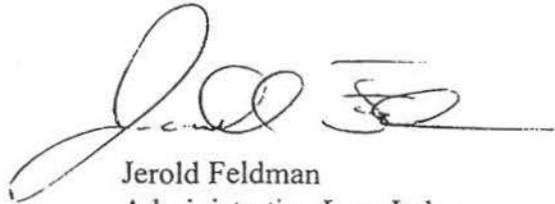
In summary, invalidating the alleged imminent danger condition, and lowering the degree of negligence attributable to RAG, are factors that justify a reduction in civil penalty. However, the history of excessive violations at the Cumberland Mine is an aggravating factor. Thus, on balance, the Secretary's proposed \$5,000 civil penalty shall be reduced to \$2,400.

ORDER

Accordingly, **IT IS ORDERED** that 107(a) imminent danger Order No. 7075043 **IS VACATED**. Consequently, the contest in Docket No. PENN 99-195-R **IS GRANTED**.

IT IS FURTHER ORDERED 104(a) Citation No. 7075044 **IS MODIFIED** to reflect the degree of negligence associated with the cited violation is low. **IT IS FURTHER ORDERED** that 104(a) Citation No. 7075044, as modified, **IS AFFIRMED**. Consequently, the contest in Docket No. PENN 99-196-R **IS DENIED**.

IT IS FURTHER ORDERED that RAG Cumberland Resources LP **SHALL PAY** a civil penalty of \$2,400 in satisfaction of 104(a) Citation No. 7075044. Payment shall be made within 40 days of the date of this decision. Upon timely payment of the \$2,400 civil penalty, **IT IS ORDERED** that the contest proceedings in Docket Nos. PENN 99-195-R and PENN 99-196-R, and the civil penalty matter in Docket No. PENN 2000-134, **ARE DISMISSED**.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', is written over a horizontal line.

Jerold Feldman
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

August 28, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-242-DM
on behalf of CURTIS STAHL,	:	
Complainant	:	MSHA Case No. WE MD 98-18
v.	:	
	:	Belle Vista Pit
A & K EARTH MOVERS, INC.,	:	
Respondent	:	Mine ID 26-02046

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, and Christopher B. Wilkinson, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Complainant; Richard L. Elmore, Esq., Hale, Lane, Peek, Dennison, Howard & Anderson, Reno, Nevada, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Curtis Stahl, against A & K Earthmovers, Inc., pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Sparks, Nevada on August 15, 2000. For the reasons set forth below, I approve the settlement agreement offered by the parties at the hearing.

The parties announced at the outset of the hearing that they had agreed to settle this case and all other pending cases between the Secretary and A & K.¹ With regard to Stahl, the agreement provides that: (1) A & K will pay him \$15,000.00 in complete satisfaction of any and all claims he has against the company; (2) Stahl waives his claim for permanent reinstatement;

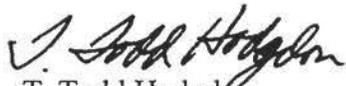
¹ The other cases are a discrimination complaint filed against the company by Eleuterio Jacinto, Case No. WE MD 98-18; a civil penalty case, Docket No. WEST 99-43-M; and two 110(c), 30 U.S.C. § 820(c), cases against A & K supervisors, Joe Hess, Docket No. WEST 2000-216-M, and Bryan Wade, Docket No. WEST 2000-200-M. With the exception of the discrimination case, all of the cases are pending before Judge Cetti.

(3) A & K will amend Stahl's employment records to delete any reference to his termination and, on inquiry from third parties, will provide only his dates of employment; and (4) Stahl's temporary reinstatement terminates as of the date of the hearing. As part of the agreement, the Secretary also agreed to dismiss the civil penalty proceeding filed in connection with the discrimination complaint.

After assuring that all parties understood, and agreed to, the settlement, I accepted the agreement finding that it was both appropriate under the Act and in the public interest. (Tr. 8-11)

Order

Accordingly, the motion for approval of settlement is **GRANTED** and the parties are **ORDERED** to carry out their obligations as set out in the agreement. It is **FURTHER ORDERED** that the Order of Temporary Reinstatement, issued on February 18, 2000, in Docket No. WEST 2000-145-DM,² is **DISSOLVED**, *nunc pro tunc*, on August 15, 2000. It is **FURTHER ORDERED** that this proceeding is **DISMISSED** with prejudice.



T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

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Richard L. Elmore, Esq., Hale Lane Peek Dennison Howard and Anderson, 100 West Liberty Street, Tenth Floor, Reno, NV 89501

/nt

² *Secretary on behalf of Stahl v. A & K Earthmovers, Inc.*, 22 FMSHRC 233 (February 2000).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

August 29, 2000

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, on behalf of	:	
DEWAYNE YORK,	:	Docket No. KENT 2000-255-D
Complainant	:	BARB-CD-2000-06
v.	:	
	:	
BR&D ENTERPRISES, INC,	:	Mine ID 15-18028
Respondent	:	

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Joseph B. Luckett, Esq., Associate Regional Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant:
J. P. Cline, III, Esq., Middlesboro, Kentucky, for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Dewayne York 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, BR&D Enterprises, Inc., (BR&D) to reinstate York 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 Pineville, Kentucky, on August 23, 2000. For the reasons set forth below, I grant the application and order Mr. York's temporary reinstatement.

Summary of the Evidence

Dewayne York had been employed by BR&D for approximately seven of his ten years as a miner. He worked at the #3 mine for 12-14 months prior to being terminated on May 25, 2000, and held the position of roof bolter operator on the #1 shift at the time of his discharge. By all accounts, York was a good worker and there were no complaints about his work performance.

York testified that from the time he started working at the #3 mine, BR&D followed a mining procedure that violated its approved roof control plan, in that miners would enter intersections that had not been properly supported. The work crew in a section of the mine consisted of twelve men, four of whom operated two roof bolting machines, or “pinners”, referred to as the “intake” and “return” pinners. The power cables of the “intake” pinner ran along the right, or intake, side of the mine entries, and those of the “return” pinner ran along the left or “return” side. York and Charlie Price operated the “intake” pinner. After the continuous mining machine had driven an entry past where a crosscut would be made and the area had been bolted, the miner would then make a 32 foot deep cut at the face, back away from the face into the previously mined area and make another cut by turning right and starting the crosscut. While that area of the entry had been bolted, the newly created intersection was considered unsupported and BR&D’s approved roof control plan specified that no miners were allowed to enter it until temporary supports, or two rows of bolts, had been installed in the newly created crosscut.¹ The intake pinner would normally bolt the crosscut, because its power cables ran along the right side of the entry and the return pinner would bolt the new cut at the face of the entry, its cables being hung along the left side of the entry.

York testified that, rather than wait for the intake pinner to install two rows of bolts in the crosscut, the return pinner and its crew would travel through the unsupported intersection to bolt the new cut at the face. York himself also entered the unsupported intersection to help hang the power cable for the return pinner. He testified that he tolerated this procedure until early April, 2000, when they encountered “draw rock”² presenting unstable roof conditions. At that time, he refused to continue with the procedure and insisted that two rows of bolts be placed in the opening of the crosscut before he and other miners entered the intersection. He claims that the return pinner was idle while the two rows of bolts were being installed in the crosscut and that production fell as a result. In addition to his complaints about violation of the roof control plan, which were also voiced by other bolter operators, he testified that he complained to his foreman, Jackie Jagers, about excessive dust attributable to a failure to install line curtain and excessively wide and deep cuts made by the continuous miner. He acknowledged on cross examination that he did not attempt to bring his safety concerns to MSHA officials and did not speak directly to any other management officials about them.

¹ The roof control plan provided that: “Openings that create an intersection will be supported by permanent supports or be supported with two rows of temporary supports on 5-foot centers across the opening before any work or travel in the intersection.”

² Draw rock, or “draw slate” is “soft slate, shale, or rock approx. 2 in. (5.08 cm) to 2 ft. (0.61 m) in thickness, above the coal, and which falls with the coal or soon after the coal is removed.” AMERICAN GEOLOGICAL INSTITUTE, A DICTIONARY OF MINING, MINERAL AND RELATED TERMS 168 (2d ed. 1996).

Jaggers testified that neither York nor any other miner had ever made such complaints to him and further denied that he had ever advised the mine superintendent or president of any such complaints. Randy Phelps, the mine superintendent testified that he had no knowledge of any complaints made by York and that he had never discussed complaints with Jagger or Stanley Ditty, the president and an owner of BR&D. Ditty testified that no-one had ever advised him that York or any other miner had made safety complaints.

On May 25, 2000, there was an unusually heavy rainstorm that caused flooding and power outages at the #3 mine and the adjacent #4 mine. York and the other miners arrived about 6:00 a.m., and waited at the mine site. York testified that it was his and the other miners' understanding from prior experience that they would not be paid until they actually started working. They tired of waiting and were repeatedly advised by management that the power would be restored in a few minutes, predictions that proved unfounded. By 9:00 a.m., the power had not been restored and some of the miners decided to leave the mine site. York left because of his belief that he was not being paid and the person that he rode with to the mine was leaving. They proceeded to the home of one of the miner's, where they could observe the road to the mine and see whether other miners also left. In all, some thirteen miners, including York, left the site.

Stanley Ditty testified that the purchaser of the mine's coal was in need of coal at that time and he was intent on producing coal that day as soon as power was restored.³ He wanted the miners to stay at the site and communicated that desire to the superintendent, Phelps. He also testified that miners were not normally paid until they reached the coal face, but it was his long-standing practice to pay miners that stayed at a mine site at his request, at least from the time of the request.

On May 25, 2000, Ditty arrived at the mine site between 9:00 and 9:30 a.m. He determined, without consulting Phelps or Jaggers, that he would discipline the absent miners by suspending them until the following Tuesday, and began to call the homes of the miners who had left. He had a conversation with York's wife, Dejuana,⁴ and later spoke with York himself. The specifics of the conversations are disputed. Ditty testified that he inquired about York's whereabouts and informed Mrs. York that her husband had left the mine and was being suspended, that she stated that he wasn't happy working at that mine, to which he responded that he was free to find another job. Mrs. York denied making any comment about her husband's happiness on the job and testified that Ditty did not tell her about a suspension, just that her husband had been fired.

³ Power was restored later that morning and coal was produced that day at the #3 mine. Coal was not produced that day at the #4 mine which was lower in elevation and more severely flooded. Some of the miners at the #4 mine had also left the site.

⁴ Ditty testified that he called York's home and spoke to his wife. Mrs. York testified that she was at work that morning and received a call from her son, who advised that Ditty was looking for York. She then called the mine site and spoke to Ditty.

Ditty testified that York called him at the mine that morning.⁵ Ditty asked why York had left the mine and was told that he didn't think he was being paid. Ditty questioned how York could believe that, asked him to cite an example, and told him he was suspending York and the other miners who had left the site. York protested the suspensions as unfair, then cursed Ditty and told him he would see him in court. York denied cursing Ditty and testified that he was told that he had been terminated and that the other miners who had left had been suspended, to which he responded that he would see Mr. Ditty in court. Ditty also denied that production could have been reduced as a result of York's claimed change in roof bolting procedures because he had excess roof bolting capacity, i.e. two roof bolters where other operators had only one, and that requiring the return pinner to wait while bolts were installed at the entrance of the crosscut would not have delayed other operations. He stated that he was advised, only in preparation for the hearing, that some miners indicated that they had followed the unlawful practice described by York, but did so in order to get longer breaks.

York filed a complaint of discrimination with MSHA on May 26, 2000, alleging that he had been discharged for making safety complaints.

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.

⁵ Mrs. York attempted to reach her husband by calling the wives of two miners who worked with York and was eventually successful in getting a message to him to call Mr. Ditty.

“The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought.” *Secretary on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 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; *Secretary on behalf of Bussanich v. Centralia Mining Company*, 22 FMSHRC 153, 157 (February, 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. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary 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). Applicant here has presented sufficient evidence on each of the elements of a *prima facie* case to establish that his claim, on the record of this temporary reinstatement proceeding, is not frivolous.

York’s testimony that he made numerous complaints to his foreman, though contradicted, would be sufficient to establish a *prima facie* case that he engaged in protected activity⁶ and easily passes the lower threshold applicable here. It is undisputed that York suffered adverse action, i.e. he was terminated, while the other miners who had left the mine site received only suspensions. Recognizing that the asserted independent justification for the termination, York’s cursing of Ditty, is also directly controverted, Respondent’s primary argument in opposing temporary reinstatement is that the termination could not have been the product of unlawful motivation because York presented no direct evidence that Ditty had been informed that York had made safety complaints and that Respondent presented testimony establishing that he had not been so informed. However, there is enough circumstantial evidence on the issue of whether Ditty was aware of York’s claimed protected activity to raise an issue as to unlawful motivation and meet the non-frivolous test. Ditty described himself as a “hands-on person” who was closely

⁶ 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.

involved in the mining operations under his control. He monitored production reports and would have been aware of any reductions and the reasons therefore. If there was a fall-off in production as a result of changes in roof bolting procedures prompted by York's actions, it is highly likely that Ditty would have been familiar with all of the pertinent facts. Similarly, if York had made safety complaints, as he claims, there is a reasonable inference that mine managers, including Ditty, would have been aware of them.

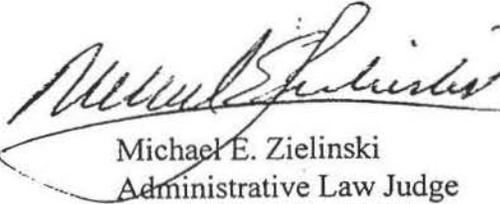
The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Secretary on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999). Consequently, the Commission 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.* As noted above, there is circumstantial evidence that Ditty would have been aware of any protected activity by York and the proximity in time of any such knowledge and the claimed adverse action is sufficient to raise an inference of unlawful motivation.

On the other hand, BR&D has presented credible evidence that York had not engaged in protected activity, that at the time of the termination Ditty had no knowledge of any protected activity by York, and, that there was an independent justification for the termination. These issues are hotly contested and cannot, and should not, be resolved at this stage of the proceedings. The investigation of York's 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 Complainant establishes that his 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 York's complaint is not entirely without merit and conclude that his discrimination complaint has not been frivolously brought.

ORDER

The Application for Temporary Reinstatement is **GRANTED**. BR&D Enterprises, Inc., is **ORDERED TO REINSTATE** Mr. York to the position that he held immediately prior to May 25, 2000, 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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

August 31, 2000

EASTERN ASSOCIATED COAL CORP.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2000-98-R
v.	:	Order No. 7185736; 8/7/2000
	:	
SECRETARY OF LABOR, MINE SAFETY	:	Rock Lick Prep Plant
AND HEALTH ADMINISTRATION,	:	Mine ID 46-06448
Respondent	:	

DECISION GRANTING CONTESTANT'S MOTION TO DISMISS

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant;
Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, and Dana Hosch, MSHA, U.S. Department of Labor, Mt. Hope, West Virginia, for the Respondent.

Before: Judge Weisberger

I. Introduction

This case is before me based upon a notice of contest and motion to expedite, filed by Eastern Associate Coal Corporation ("Eastern"), challenging the issuance by the Secretary of Labor ("Secretary") of an order, under Section 107(a) of the Federal Mine Safety and Health Act of 1977 ("the Act"), that had been issued to Eastern on August 7, 2000, regarding an aspect of its operation at the Rock Lick Preparation Plant.¹ The Rock Lick Preparation Plant at issue processes coal and maintains stockpiles (surge piles). Coal is delivered to the surge piles by stacker tubes (loaders)

¹The order was issued orally by MSHA inspector Sherman Lee Slaughter to Eastern's agents over the telephone on August 7, 2000, and was reduced to writing and served on August 8, 2000.

Pursuant to a telephone conference call between the undersigned and attorneys for both sides on August 10, 2000, the case was scheduled to be heard in Charleston, West Virginia, on August 16 and 17, 2000.

located above the piles. The coal then comes out of windows on the side of stacker tubes to accumulate on the piles. Coal is removed from the piles by the action of vibrating feeders located at the bottom of the piles which cause the coal in the pile to drop, in a cone shaped area, known as a withdrawal area, through the feeders onto a conveyor belt. The width of the cone, at its widest point, at the top of the pile, is dependent upon the height of the pile.

II. The Secretary's Case

MSHA inspector Sherman Lee Slaughter, inspected the subject site on June 27, 2000. He entered reclaim tubes located under the piles in order to observe the feeders which are located in the tubes and could not otherwise be observed. He indicated that most of the feeders did not have gates. According to Slaughter, in discussions with Eastern's agents at the time, he ascertained that Eastern did not have any procedures to determine if a cavity or void existed in the pile above the feeder, before a bulldozer would be allowed to operate on the pile. He also noted that the bulldozers had only one radio, an F.M. mobile radio, and did not have any back-up communication. Slaughter also found that the bulldozer operators did not have any way to shut-off either the feeders or the stacker tubes from the bulldozer. Also, although there were cameras on the site, the operators of the feeders could not see the bulldozer operators all the time they were on the piles. He stated that it was understood that a bulldozer would not operate over an inactive feeder or over a withdrawal area. He did not see any evidence of any cavities or voids in the piles, and concluded that the conditions and practices at the site did not create an imminent danger. Nor did he issue any citation or order as a consequence of his inspection on June 27, 2000.

Slaughter indicated that on Monday, August 7, 2000, he received a telephone call from the Madison MSHA office, advising him that an incident had occurred on August 5, at the Rock Lick Plant. Slaughter telephoned Jerry Swanson, Eastern's operations manager at the plant, who advised him that on August 5, after the feeder was started on the Eagle raw coal pile, it was noted that it was plugged, that coal was not going through the feeder, and it was determined that there was a cavity. According to Slaughter, Swanson told him that a bulldozer operator was directed to use a bulldozer to dig into the pile in order to open the void to allow coal to be released through the feeder. After the bulldozer made several passes it slid down into an opening in the pile, and the foreman told the bulldozer operator to get out of the bulldozer and walk away from the area. A second bulldozer was then sent to push coal into the opening in order to stabilize the pile. After approximately 9 to 10 passes, the second bulldozer backed off 75 feet and the first bulldozer fell into the opening. Slaughter concluded that because this pile was plugged, he expected others to be plugged. However, he did not explain this conclusion nor did he provide the basis for it. On August 7, at 2:45 p.m., Slaughter issued an imminent danger order to Swanson, over the telephone, prohibiting bulldozers from being operated in the withdrawal area. He indicated that he had issued the order because the conditions that he described could reasonably cause a person to become injured before the conditions were abated.

Slaughter explained that he issued the order orally because he did not want to wait until he got to the mine due to "imminency". He said he indicated to Swanson that he needed to come to the mine immediately. Swanson asked him to come to the mine the next morning between 8:30 a.m. and 9:00 a.m. because the persons that Slaughter needed to talk to would be present at that time, and Slaughter agreed. Slaughter indicated that although on August 7, he had concluded that the danger was imminent, he still wanted to go to the site in order to evaluate all the conditions and to ensure that they were as described to him on August 7. He also delayed the issuance of the withdrawal order because he sought information from the company regarding angles of the withdrawal area, and heights of the piles so that he could describe on the withdrawal order the specific area from which miners and equipment were to be withdrawn.

When Slaughter arrived at the mine on August 8, and Eastern's agents asked for a written order, he told them that he needed to talk to the bulldozer operators prior to his giving them a written order, in order to find out exactly what the facts were.

Slaughter indicated that in conversations with the bulldozer operators on August 8, he was informed that there was a verification system for active feeders as operators would be advised when the feeders would be activated and when coal would start to move in the withdrawal area. The bulldozer operators would then know that there were not any cavities in that pile. However, they indicated that there was no verification system to advise them of cavities in piles served by inactive feeders. The operators confirmed that they only had one radio in each bulldozer, that they did not have any remote controls in the bulldozers to shut-off the feeders and stacker tubes, and that cameras were unable to transmit views of miners at all times when working on the piles. Also, the bulldozer operators advised him that they were unable to determine the distance of their bulldozers from the feeder. Nor were they able to determine the height of the piles.

Slaughter indicated that the instant written order was finally served by him at 6:30 p.m., August 8, and that some of the delay was caused by the need to have a typewritten computer generated form, and there were problems with the office computer.

Slaughter explained that if the coal in the pile becomes compacted due to the operation of the bulldozer on the top surface, a layer of compacted coal can occur, called a bridge. In such an event, if the feeder is activated, loose coal below the bridge will flow toward the feeder creating a void or cavity below the bridge. Once a feeder is activated, and if no coal flows through the feeder, it can indicate blockage in the feeder by large pieces of coal, or can indicate existence of a void in the pile. In addition, Slaughter explained that vibration could still occur within the feeder as a consequence of equipment riding on the top of the pile, or as a result of vibration in an adjacent feeder, even though the vibrator had not been turned on. In such an event, even if a feeder had not been turned on, a void or cavity could result if a bridge had been created due to compaction. Should a bulldozer be operated over the withdrawal area of a feeder that is not active, and should a void exist below the surface in the pile, the bulldozer could then fall into the cavity fatality injuring the operator. He referred to various accidents that had been documented

by MSHA involving vehicles falling into cavities at other mines, resulting in a fatality or a serious injury.

According to Slaughter, the following conditions and practices created an imminent danger: (1) not all the vibrating feeders had gates or other means to prevent gravity flow, (2) the piles at issue were known to plug and have cavities, (3) there was no back-up system of communication as the equipment that operated at the top of the piles had only one radio whose antenna could be knocked off if the dozer slid when falling down a cavity, (4) there were no cameras sufficient to see the bulldozer operators at all times on the pile, (5) there was no remote system in the bulldozers to allow the operators to shut-off feeders and stacker tubes, and (6) that generally cavities occur over feeders. He described the practices that created the imminent danger along with the conditions as follows: (1) there was not any system to determine if there was a cavity above an inactive feeder, before allowing the operator to travel within a withdrawal area of any feeder in the pile, which would create a danger if a cavity existed, as the bulldozer could fall, resulting in the operator getting covered with coal and possibly suffocating, and, (2) the practice of operators working within the angle of withdrawal when pushing coal to an active feeder and ringing (benching) coal above inactive feeders.

Specifically, with regard to his conclusion that the various dangers that existed were imminent, he stated, in various points in his testimony, as follows: (1) that bulldozers were used to push coal away from the stacker tubes and to move fines from the top of the pile over the edges to get at the coal in the lower parts of the pile, (2) that on August 7, because he was informed that the bulldozer had fallen into a cavity, he therefore concluded that the bulldozer was being operated within the withdrawal area of the feeder in a pile that it was working on, and that therefore bulldozers operate in withdrawal areas of other piles, (3) that he knew cavities existed in the piles at Rock Lick, (4) that he knew the work procedures used exposed the bulldozer operators to working within the withdrawal areas that had cavities, and therefore it was reasonable to expect that a bulldozer operator could receive a serious injury before the work procedures were changed, (5) that he was concerned about a potential for a cavity but not the existence of an actual cavity, and (6) that an imminent danger did not depend upon the existence of cavities the day the order was issued but upon knowing that cavities do occur and that it was reasonable to expect that they will occur again before work procedures or conditions change. He was asked his opinion regarding the probability of cavities occurring within a short period of time, and he answered that it could be expected at any time i.e., at any moment. However, he did not elaborate upon or explain the basis for this opinion.

Raymond Butler who operates a bulldozer on the site, stated that it is his procedure to fill an emptying withdrawal area before he moves to work on the next feeder, in order to avoid a void over an inactive feeder. He said that there was a void in the piles about 3 to 4 months ago.

David Stover, a bulldozer operator clarified that on August 5, he exited his bulldozer after it had been pulled 10 feet sideways into a cavity when he was attempting to cut into the pile sideways to get the coal to fall through a cavity. He testified that after the second bulldozer

arrived and made about a dozen pushes attempting to fill up this hole, a second hole developed. The second bulldozer operator got out of the bulldozer, and the bulldozer slid into the hole backwards.

Dr. Kelvin Ke-Kang Wu, a professional engineer with a doctorate in mining engineering majoring in rock mechanics, and minoring in rock/soil mechanics, has extensive experience in the area of safety issues regarding surge piles. He described various hazards caused by cavities. He indicated that cavities result if the pile becomes compacted by weight. Other factors causing cavities are moisture, the presence of fines in raw coals, and the effect of freezing temperatures. Assuming the existence of the following facts he opined, in essence, that there was reasonable potential that these conditions and practices could lead to a serious injury or death before they are abated: (1) the presence of three clean coal stockpiles, and three raw coal stockpiles, all with vibration feeders under them, (2) the presence of a total of thirty-three feeders, most of which do not have gates, (3) the absence of a system to verify that there are no cavities above inactive feeders before bulldozer operators travel over these inactive feeders, (4) the creation of voids two weeks prior to the date in question over all feeders in the raw coal piles that had six feeders, (5) the occurrence of an incident wherein the bulldozer operator attempted to eliminate a void by digging into a pile, and the bulldozer slid sideways 10 feet into a cavity and the bulldozer operator was able to get out to safe ground, and a second bulldozer started to fill in the void that the first bulldozer had started to slide into but a second void opened up and the second bulldozer continued to fill in the void and sank backwards into the void, and that the voids were over two adjacent feeders, (6) that there were instances in the past where voids were created over feeders at this plant, and (7) that in one incident a bulldozer went nose down, partially in the void, but no one was hurt, and (8) that there is evidence of generally good communication between the bulldozer operators and the load-out operator, but that the bulldozers have only one radio.

Wu was asked whether these conditions and practices have a reasonable potential to cause a fatality or serious injury within a short period of time. He answered that if proper communication equipment is not provided, the operator will have only a slim chance to escape should the bulldozer fall into a cavity, that there is a possibility of the glass windows and windshield on the bulldozer breaking and the operator suffocating if the bulldozer is buried and it takes a long time to dig it out, and that not all cabs have extra strong reinforced glass. He was asked his opinion on the likelihood that a void will occur. He answered that every surge pile has that potential, and that the likelihood is affected by the type of materials in the pile, the properties of the material, how long the pile has been in existence, (that the longer it is in existence the more it can become compacted based on its own weight), weather conditions, and the type of equipment operating on the pile. He then was asked whether the fact that two voids occurred two weeks prior to the date at issue is a factor in evaluating likelihood, and he stated that if the first void is known and the bulldozer sinks into it, it means he was too close. Regarding the second void he opined that its existence was not known and therefore there was not enough information. He also indicated that the amount of voids in a pile depends on the amount of coal drawn out of the pile and how fast it is drawn out. Also, there are piles that do not have any voids.

Hence, the gravamen of his testimony, speaks to the gravity of the dangerous conditions, and the degree of danger. However, it does not address the main issue as to whether, on the date the order was issued, August 7, the danger, i.e., the existence of cavities, was imminent.

At the conclusion of the Secretary's case, Eastern made a motion for a summary decision. After listening to arguments from both counsel a decision was made granting the motion.

III. Evaluation

The following sets forth the oral decision made on the motion at the hearing, with the exception of minor changes not related to matters of substance.

1. The Case Law

In dealing with the motion raised by the Operator and the reply by the Secretary, the first step is to ascertain the proper standard to be applied in reaching a decision as to whether or not the Secretary has sustained its burden of establishing that there existed an imminent danger as defined in Section 3(j) of the Act. The Secretary cited Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F. 2nd 741 and (7th Cir. 1974), and Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App. 493 F. 2nd, 277 (4th Cir. 1974). It is significant to note that both those cases were decided under the predecessor of the existing Act, namely they were decided under the Coal Act of 1969. The controlling Act in the case at bar is the Federal Mine Safety and Health Act of 1977. There's been considerable commission law subsequent to the enactment of the Act and I rely upon Commission law in this regard in determining the standard to be set when evaluating an imminent danger.

In reviewing the Commission cases, I note one of the leading cases, Utah Power & Light Co., 13 FMSHRC 1617 (1991) cited by both counsel. The Commission, first of all, in Utah Power & Light Co., supra, at 1621 reviewed the legislative history of the term "imminent danger" as found in the Act, and concluded based upon its review of the legislative history, as follows: "Thus the hazard to be protected against by the withdrawal order, must be impending, so as to require the immediate withdrawal of miners." (Emphasis added.) Continuing further, at 1622, the Commission held that to support a finding of imminent danger, the inspector must determine "whether the condition presents an impending threat to life and limb". (Emphasis added) The Commission went on to state that only by limiting Section 107(a) withdrawal orders to such impending threats does the imminent danger provision

assume its proper function under the Mine Act. Critically, the Commission in Utah Power and Light, *supra*, at 1622, distinguished an imminent danger withdrawal order from a significant and substantial determination as follows:

If the imminent danger provisions of the Act are interpreted to include any hazard that has the potential to cause a serious accident at some future time, the distinction is lost between a hazard that creates an imminent danger, and a violative condition that 'is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.'

The Commission in Utah Power & Light Co., *supra*, clarified its earlier ruling in Rochester & Pittsburgh, 11 FMSHRC 2159 (November 1989). In Rochester & Pittsburgh, *supra*, the Commission, in discussing imminent danger used the phrase, "at any time". In explaining that phrase, the Commission, in Utah Power & Light Co., *supra*, stated as follows: "the Commission used the phrase, 'at any time,' in the sense of, 'at any moment.'" (Emphasis added)

In summarizing, the Commission, in Utah Power & Light Co., *supra*, at 1622, held as follows: "To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time," (Emphasis added)

Following Utah Power and Light, *supra*, the Commission issued Wyoming Fuel Co., 14 FMSHRC 1282 (1992). In Wyoming Fuel, *supra*, the Commission noted its previous decision in Rochester & Pittsburgh, *supra*, a 1989 decision which had quoted from Eastern Associated Coal Corporation, *supra*, 277, 278, as follows: "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Leaving it just like that, one might have the impression that the Commission was retreating somewhat from its

earlier pronouncement in Utah Power & Light Co., supra, linking the term “imminent danger” to a degree of imminence, in other words, a time-related situation. That is not the case. In Wyoming Fuel, supra, in the paragraph following the Commission’s quote from Eastern Associated Coal, Supra, the Commission, at 14 FMSHRC supra, at 1290, discussed its previous ruling in Utah Power & Light Co., supra and stated that it had held in Utah Power & Light Co., supra, that, “there must be some degree of imminence to support a Section 107(a) order.” (Emphasis added.) The Commission in Wyoming Fuel, supra, at 1290, reiterated that in Utah Power & Light Co., supra, at 1621 the Commission had “noted that the word ‘imminent’, is defined as ready to take place: near at hand: impending ...: hanging threateningly over one’s head: menacingly near.”

In Wyoming Fuel, supra, at 1290 - 1291, the Commission, in further discussing its prior decision in Utah Power & Light Co., supra, stated that it had previously determined, referring, to Utah Power & Light Co., supra, “that the legislative history of the imminent danger provision supported the conclusion that, ‘the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners” (Emphasis added). It appears at least through Wyoming Fuel, supra, that the Commission was maintaining its holding that imminent danger means an imminence of something occurring within a short period of time.

In Island Creek, 15 FMSHRC 339, (1993), the Commission noted its prior holding in Wyoming Fuel, supra, at 1291, that in imminent danger cases the judge must determine, “whether a preponderance of the evidence showed that the conditions or practices, as observed by the inspector could reasonably be expected to cause death or serious physical harm before the conditions or practices could be eliminated.” (Island Creek, supra, at 346). It might be construed that the Commission was retreating from its position that, as stressed by Utah Power and Light, supra, some degree of imminence was required to establish an imminent danger, since Utah Power and Light, supra, was discussed in its decision prior to its discussion of Wyoming Fuel, supra. However, in the most recent discussion by the Commission of imminent danger Blue Bayou Sand and Gravel, 18 FMSHRC 853 (1996) the Commission, after reviewing the definition in the Act of imminent danger and noting language from its prior decision in Rochester &

Pittsburgh, 11 FMSHRC supra at 2163, quoted the following language it had set forth in Rochester & Pittsburgh, supra, at 2163: “an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” Blue Bayou, supra, at 858. However, it is very important to note that in the same paragraph, the Commission in Blue Bayou, supra, at 858, the most recent commission decision on imminent danger explained as follows quoting from Utah Power and Light, supra: “[t]he Commission has explained that ‘[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.’ (Emphasis added.) Utah Power & Light Co., 13 FMSHRC 1617, 1622 (October 1991) (“U P & L”).”

I conclude that Commission doctrine, at this point in time, requires, regarding the existence of an imminent danger, that it be established by a preponderance of the evidence, that a hazardous condition or practice has a reasonable potential to cause death or serious injury within a short period of time. And this is to be distinguished from a significant and substantial determination that looks at a broad continuum of a reasonable likelihood of an injury producing event occurring, assuming continuing normal mining operations. In contrast, a withdrawal is much more limited. The incident, the hazardous condition or practice, that can cause death or serious injury must have a reasonable potential of occurring, not throughout this entire continuum, but within a short period of time.

2. Discussion

The question now is, what is the evidence in the record of an injury producing event occurring within a short period of time, considering the conditions and practices cited by the inspector. Of all the different factors, conditions and practices discussed by the inspector and referred to by Counsel, one stands out. It is the sine qua non of all these different practices and conditions. Namely, the existence of a cavity. Without a cavity there is no danger. A practice of perhaps having a system or communication that might be deficient, a condition of perhaps not having sufficient cameras, or not having a backup radio, all become insignificant if there is not a reasonable potential of an injury production event occurring

within a short period of time. In this case, the only practice or condition that has any potential of causing serious injury or death is a cavity. Everything else flows from the existence of a cavity. The other factors, if present, and go to the degree of injury, and the seriousness of injury. But first there must be an injury, i.e., there must be a cavity. Therefore, it must be established that there was a reasonable potential of the existence of a cavity on August 7.

In evaluating the Secretary's case, I first note the inspector's testimony. On direct examination he discussed imminence. He concluded that an injury producing event, i.e., a cavity was imminent, because on his visit to the site on June 27, he was told by an agent of the company, that the company knew cavities existed in the Rock Lick piles. However, on cross examination, he indicated that on August 8, there was no plugging, that he did not know if there were cavities when he issued his order, but that his concern was the potential for cavities, not the actual cavity indicated in any pile with a feeder. Potential for cavities is not the issue. Potential for cavity creation over any time is not the issue. The issue is potential for a cavity within a short period of time.

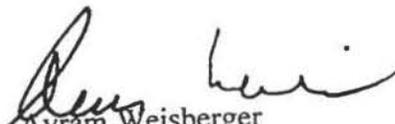
The inspector was asked his opinion regarding the probability of a dangerous condition occurring within a short period of time, i.e., a cavity occurring within a short period of time. He indicated that a cavity can be "expected at any time", and he indicated "any time" is equated with "any moment", i.e., that cavities could occur at any moment. But he did not explain the basis for his opinion.

Dr. Wu, the expert in the particular areas that we are concerned with, was asked, in essence, to assume the existence of the various practices and conditions that the inspector testified to, and to state his opinion whether there was a reasonable potential that an incident involving a void will occur, causing death or serious injury within a short period of time. He answered, yes. However, in explaining his answer, he discussed the problems with rescue after an incident, and that there would be a danger of suffocation, or being buried by coal should the bulldozer's glass windows break. He was asked the question again, and basically rephrased his answer, but again referred to the short period of time to allow for successful rescue of a bulldozer operator after falling

into a cavity. He explained, in his answer, that bulldozer cabs do not all have stronger glass and that it is more likely that the glass will break and suffocation will result if a bulldozer operator does not exit the cab in time. His answer related to the degree of injury and gravity, but did not address the key issue which is the occurrence in of a cavity within a short period of time. Both the inspector and the expert testified to various factors that could create a bridge which could lead to a cavity e.g., moisture, freezing the type of material in the pile, the time of the feeder's operation cycle, and the presence of vehicles on top of the pile. However, Dr. Wu did not explain what the specifics in the case were, and why these specifics would lead to a conclusion that a cavity would result in a short period time.² Thus, I find that the Secretary has not established its case by a preponderance of the evidence and the motion is granted.

ORDER

It is **ORDERED** that the Notice of Contest be sustained, and that Withdrawal Order No. 7185736 be dismissed.


Avram Weisberger
Administrative Law Judge

²In the oral decision at the hearing it was inadvertently omitted that I take cognizance of testimony relating to the existence of two cavities on August 5. However, in evaluating whether it thus, can reasonably be inferred that cavities existed or were imminent on August 7, it is important to note that Dr. Wu, the Secretary's expert, was asked to explain how the occurrence of the voids, less than two weeks before the date at issue, "factor[ed]" into his opinion regarding the likelihood of a void occurring, and he replied as follows: "It factor in my opinion is if you know there's one void, you send one bulldozer to excavate it and it sinks in. That means it's just too close to that hole, the voids. Then the second void was not know. If he had known, he won't drive on the second void. So there's some misinformation or the information is not adequate as possible void, the area which might --- should be concerned." (Sic.) I thus find that Dr. Wu did not explain whether the occurrence of two voids on August 5, increased the likelihood of occurrence of cavities on August 7, the date at issue. Thus, giving most weight to Dr. Wu's testimony, based on his expertise and experience, the preponderance of the evidence does not establish that from the occurrence of voids on August 5, it might reasonably be inferred that voids existed or were imminent on August 7, the date the order was issued.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 31, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-19-M
Petitioner	:	A.C. No. 35-02969-05506
v.	:	
	:	Docket No. WEST 99-105-M
WEATHERS CRUSHING, INC.,	:	A.C. No. 35-02969-05508
Respondent	:	
	:	Weathers Portable
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-361-M
Petitioner	:	A.C. No. 35-02969-05509 A
v.	:	
	:	Weathers Portable
DARWIN WEATHERS, employed	:	
by WEATHERS CRUSHING, INC.,	:	
Respondent	:	

DECISION

Appearances: William Kates, Eq., U.S. Department of Labor, Office of the Solicitor, Seattle, Washington for Petitioner;
Roger Luedtke, Esq., Schwabe Williamson & Wyatt P.C., Portland, Oregon, for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against Weathers Crushing, Incorporated ("Weathers Crushing") and Darwin Weathers, president of Weathers Crushing, pursuant to sections 105(d) and 110(c), respectively, of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 801 *et seq.*, as a result of a fatality that occurred at the Weathers Portable mine facility on April 30, 1998.

A hearing was held in Medford, Oregon. The post-hearing briefs are of record. For the reasons set forth below, Citation Nos. 4135307, 4135310 and Order No. 4135308 shall be AFFIRMED, as issued, Order No. 4135309 shall be DISMISSED, and Darwin Weathers, as corporate officer, shall be ordered to pay a civil penalty.

I. Stipulations

The parties stipulated to the following facts:

1. The Respondent, Weathers Crushing, Incorporated, is and at all times material hereto, was a corporation with a mailing address of 6070 Rock Way, Central Point, Oregon 97502.

2. The Respondent, Weathers Crushing, Incorporated, is and at all times material hereto, was the owner and operator of certain portable crushing machinery and equipment used at various mine sites in Oregon and several years ago, in Northern California.

3. On or about April 30, 1998, the Respondent, Weathers Crushing, Incorporated, was operating such portable crushing machinery and equipment on a temporary basis at the mine facility known as the Weathers Portable and located at the pit known as the Brick Pile Quarry in the Rogue River National Forrest, approximately 25 miles southeast of Central Point, Oregon.

4. The Weathers Portable facility, identified above, was, on April 30, 1998, a mine subject to the Mine Act, in that its operations and products enter of affect commerce.

5. The site of the alleged violations at issue in these cases is the aforesaid Weathers Portable mine facility.

6. The Respondent, Darwin Weathers, an individual, is and at all times material hereto, was the president of Weathers Crushing, Incorporated.

7. The Respondent, Weathers Crushing, Incorporated, has a history of two assessed violations, having two inspection days in the 24 months prior to the violations at issue herein.

8. At the aforesaid Weathers Portable mine facility, there were approximately 5,973 hours worked in the calendar year prior to the violations at issue herein.

II. Factual Background

Weathers Crushing began operating the cited portable jaw crusher at its Weathers Portable mine facility on or about April 21, 1998 (Tr. 44-45). On the morning of April 30, 1998,

when the fatality occurred, Darwin Weathers, Dan Berkey and Richard Nelson were working at the mine site (Tr. 25-26). Weathers had hired Nelson to operate the rock crusher, as a replacement for his son, Jeff Weathers, who had recently broken his ankle, and this was Nelson's first day on the job (Tr. 57, 85). Jeff Weathers and Dan Berkey had both worked with Nelson previously, and Nelson had talked to Darwin Weathers on a few occasions about coming to work for him, indicating that he had worked on a rock crusher and around other heavy equipment on another job (Tr. 58, 85-86, 123). The record is vague as to the extent of Nelson's experience on rock crushers, except that he had worked in Susanville, California and New Mexico (Tr. 57, 79). Prior to being hired by Weathers, Nelson had been an automobile mechanic (Tr. 58).

Dan Berkey had driven himself and Richard Nelson to the job site (Tr. 108, 122). Weathers spent ten to thirty minutes with Nelson on the operator's platform, instructing him on the operation of the jaw crusher and watching him perform, and ultimately instructed Nelson to get his attention on the front-end loader, should any problems occur that would require his assistance (Tr. 78, 82, 86-87, 101, 122). Following Weathers' instruction, Berkey went up on the platform with Nelson and showed him how to operate the crusher (Tr. 122-23). In response to Nelson's mention of using a pry bar to clear blockages in the crusher, Berkey told Nelson that "that wouldn't be a good idea," because "if you stick it in there and everything breaks loose, it's going to take that pry bar and slam it back at you and hit you with it (Tr. 82-82, 123)." Before he left the platform, however, Berkey did instruct Nelson on methods of clearing obstructions with a running crusher, including breaking off corners of rocks with a sledge hammer and, like Weathers, advised Nelson that "if he had any problems, to let [him] know so [he] could go over there and show him (Tr. 79-81, 124)."

At approximately 9:45 a.m., 2 ½ hours after Nelson had begun working, Weathers was operating the front-end loader supplying rock to the jaw crusher, Berkey was removing sticks and other foreign objects from the conveyor belt to the cone crusher, and Nelson was operating the jaw crusher (Tr. 25-26, 35, 56-57, 79, 91, 124). Weathers became concerned when he lost view of Nelson, and rushed to the jaw crusher, closely followed by Berkey, who had seen Nelson's hat fly up in the air (Tr. 66, 95-96, 125-26). Weathers and Berkey found Nelson injured, lying in the right side of the feeder, just in front of the jaw crusher (Tr. 25, 30-32, 119; Ex. P-4). The jaw crusher was still running, but the feeder had been turned off (Tr. 64, 94-95, 109). Weathers directed Berkey to administer first aid to Nelson, while he radioed for help in his pick-up truck (Tr. 64). The sledge hammer head had been hurled 37 ½ feet from the jaw crusher into a pile of muck, and its badly splintered handle was found on one of the conveyor belts, having passed through the cone crusher (Tr. 58-60; Exs. P-10, P-11). Neither Weathers nor Berkey actually witnessed the accident.

The Jackson County Sheriff's Department was dispatched and took photographs of the accident scene, and Fire and Rescue emergency medical personnel attempted to resuscitate Nelson for approximately one hour, after which he was transported by ambulance to Rogue Valley Medical Center, where he was pronounced dead (Tr. 60-62; Exs. P-4, P-5, P-6, P-12, P-13, P-14). At the Medical Center, marijuana in a plastic bag and a marijuana pipe were found in

Nelson's jeans pocket by an emergency room nurse, and Nelson tested "presumptive positive" for benzodiazepines and cannabinoids (Tr. 68; Ex.P-15).

MSHA Inspector Randy Cardwell and Darwin Weathers met at Weathers' home in Medford at 7:00 that evening, discussed the accident and traveled to the mine together, so that Cardwell could secure the site (Tr. 12-15). Cardwell observed that the feeder was empty, and was told by Weathers that, after the accident, they had run the remainder of the rock through the crusher, before shutting down the plant and leaving the mine (Tr. 28-30). Weathers expressed his opinion to Cardwell that Nelson had been hit in the face with the head of a sledge hammer, and showed him where Nelson had fallen in the feeder (Tr.13,15, 24-25).

On the following morning, May 1st, MSHA accident investigation team members Collin Galloway, David Brabank and Randy Cardwell, accompanied by Jackson County Medical Examiner Sherman Spencer, Weathers and Berkey conducted an investigation of the fatality at the mine site (Tr. 30, 35-36, 77-78). Galloway climbed up onto the operator's platform, took several photographs, and noticed the absence of a pair of guard chains, intended as a barrier between the operator's platform and the pan feeder (Tr. 41-44; Exs. P-1, P-2, P-3). Weathers looked for the chains after the inspector brought the matter to his attention, but was unable to find them (Tr. 43-44, 91, 102-04).

As a result of the investigation, Galloway issued two citations and two orders.

III. Findings of Fact and Conclusions of Law

A. Citation No. 4135307

1. Fact of Violation

104(d)(1) Citation No. 4135307 charges a violation of 30 C.F.R. § 56.14105, describing the condition or practice as follows:

A fatal accident occurred at this mine on April 30, 1998, when the crusher operator attempted to dislodge rocks which would not go through the jaw crusher. The crusher operator was using a 12-pound sledge hammer to dislodge the rocks, and was struck in the face when the head of the hammer was forcibly ejected from the crusher. The crusher had not been shut off and blocked against hazardous motion. Darwin Weathers, owner, knew or had reason to know the procedure was used to clear blockages while the crusher was operating. This is an unwarrantable failure to comply with a mandatory safety standard.

30 C.F.R. § 56.14105 provides that: "Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons

are effectively protected from hazardous motion.”

The Commission broadly interprets “repairs or maintenance of machinery or equipment” to encompass activities of breaking up and removing rocks clogging a crusher. *Walker Stone Company, Inc.*, 19 FMSHRC 48, 51 (January 1997), *aff’d* 156 F.3d 1076 (10th Cir. 1998). It is undisputed that the crusher was running and the feeder had been turned off by Nelson when he was fatally injured. One of the Jackson County Sheriff Department photographs, taken contemporaneous with the accident and before the feeder had been “run out,” depicts large rocks lying flat at the end of the feeder just above the jaw crusher, establishing the likelihood of a jammed feeder (Ex. P-13; Tr. 61-63). This photograph supports Weathers Crushing’s position that Nelson had been attempting to loosen rock blockage in the feeder with the sledge hammer, rather than in the crusher, itself (Tr. 65-66, 118-120; Resp. Br. at 4). A “bridge” or blockage in the feeder prevents rock from falling into the jaws of the crusher, but does not impede the actual motion of the crusher (Tr. 94, 114-15).

Weathers Crushing argues, therefore, that if Nelson is found to have been “repairing or maintaining” the feeder, it follows that he had complied with the standard, because he had turned it off. It is this reasoning, however, that totally frustrates the safety promoting purpose of the standard. The fault in Weathers Crushing’s position lies in considering the feeder and crusher as two separate entities, operating independent of each other. On the contrary, they operate as a unit, wherein the walls of the feeder are angled and its plates vibrate to jog rock down into the jaws of the crusher, which reduces the rock to the size to which the dies have been adjusted (Tr. 49-51). In effect, the feeder is the gateway to the crusher, such that objects in the feeder are openly exposed to the crusher’s jaws.

Although speculation, since there were no eyewitnesses to the accident, it is likely that Nelson entered the feeder after he had turned it off, and in attempting to clear the obstruction in the feeder, dropped the sledge hammer, or somehow put it in contact with the running jaw crusher, which spit the hammerhead back at him, resulting in the fatal blow to his face. It is abundantly evident that had the crusher been turned off and blocked against hazardous motion, the accident would have been avoided. When considering that Nelson, himself, could have slipped and fallen into the moving jaws, it is clear that both feeder and crusher must be turned off and blocked against motion when working in either component.

Accordingly, having found that Nelson was required to turn off both jaw crusher and feeder, and block them against hazardous motion when he was unblocking the feeder, I conclude that Weathers Crushing violated section 56.14105.

2. Significant and Substantial

Section 104(d) of the Act designates a violation “significant and substantial” (“S&S”) when it is “of such a 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 the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *See also 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* 9 FMSHRC 2015, 2021 (December 1987)(*approving Mathies criteria*). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of “continued mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding the violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998).

Inspector Galloway determined that the violation was S&S. Clearly, the hazard of working in and around the feeder and jaw crusher, without turning off the power and blocking the hazardous motion of both components, was a significant contributing cause of Nelson’s fatal accident. Therefore, I conclude that the violation was S&S.

3. Unwarrantable Failure

“Unwarrantable failure” is aggravated conduct consisting of more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a serious lack of reasonable care. *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

The Commission has provided a practical framework in which to analyze whether a violation resulted from unwarrantable failure. Among the factors to be considered are “the extensiveness of the violation, the length of time the violative condition has existed, the operator’s efforts to eliminate the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance.” *Mullins and Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a “knew or should have known” test. *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

The practice of using a sledge hammer to break off corners of obstructive rocks in feeders was standard operating procedure at Weathers Crushing, and demonstrated by Berkey to Nelson during Nelson’s new employee indoctrination. Indeed, Weathers testified that he had been in the rock crushing business for 23 years, had routinely engaged in the practice that ultimately killed

Nelson, and had taught his son, a company employee of 15 years, to employ the same technique (Tr. 88-90, 93, 99-100, 108-09, 111-12). The danger of working in and around the jaw crusher while it is running is, or should be, visibly evident. Tragically, Nelson performed as he had been instructed, to the extent that he worked in the feeder with the sledge hammer, in close proximity to the running crusher. It is irrelevant whether negligence or inadvertence on Nelson's part caused the sledge hammer to make contact with the crusher, because the danger arose from exposure to the moving machinery, rather than the activity in or around it. It is my finding, therefore, that Weathers Crushing's conduct in instructing Nelson to place himself in and around heavy, running equipment demonstrated a serious lack of reasonable care that was more than ordinary negligence. Consequently, I find that the Secretary has proven that the violation was the result of Weathers Crushing's unwarrantable failure to comply with the standard.

5. Penalty

While the Secretary has proposed a civil penalty of \$25,000.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(j). *See Sellesburg Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F. 2d 1147 (7th Cir. 1984).

Weathers Crushing is a small operator, with an overall history of violations that is not an aggravating factor in assessing an appropriate penalty (Tr. 6). As stipulated, the proposed civil penalty will not affect Weathers Crushing's ability to continue in business (Tr. 127-28).

The remaining criteria involve consideration of the gravity of the violation and the negligence of Weathers Crushing in causing it. Considering that Nelson was fatally injured, I find the gravity of the violation to be very serious. In assessing the level of negligence attributable to Weathers Crushing, since Nelson was a rank-and-file employee, I have considered the operator's supervision and training of Nelson, and have determined that the operator not only failed to take reasonable steps to prevent Nelson's violative conduct, but encouraged it. *See Secretary of Labor v. Southern Ohio Coal Co.*, 4 FMSHRC 1458, 1464 (1982). Accordingly, and consistent with my conclusion that the violation resulted from Weathers Crushing's unwarrantable failure to comply with the standard, I ascribe high negligence to the operator. Therefore, having considered Weathers Crushing's small size, seriousness of violation, high degree of negligence, good faith abatement and no other mitigating factors, I conclude that the \$25,000.00 penalty, as proposed by the Secretary, is appropriate.

The Secretary has charged Darwin Weathers under section 110(c) for a violation of 30 C.F.R. § 56.14105, and has proposed a civil of penalty of \$250.00. Section 110(c) of the Mine Act provides that whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the

existence of a violative condition.” *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff’d on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). Section 110(c) liability is predicated on aggravated conduct that constitutes more than ordinary negligence. *Bethenergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

Darwin Weathers, as president and owner of Weathers Crushing, had been in the rock crushing business for 23 years, and despite assertions that using sledge hammers to clear obstructions, with crushers running, had been a longstanding practice in his company, without incident, the danger that the standard is intended to avoid and the standard of care required should have been evident to him (Tr. 88-91, 92-93, 96-101). It is equally clear that Weathers knowingly authorized Berkey to indoctrinate Nelson in dangerous work procedures (Tr.122-24). Weathers’ lack of due care was aggravated by the fact that he had hired Nelson without taking steps to ascertain his level of experience on rock crushers (Tr. 57-58, 78-80). Consequently, the Secretary has established that Darwin Weathers engaged in aggravated conduct constituting more than ordinary negligence, and a civil penalty is warranted. The parties have stipulated that the proposed penalty will not adversely affect Weathers’ personal financial status (Tr. 130). Accordingly, the Secretary’s proposed penalty of \$250.00 is appropriate.

B. Order No. 4135308

1. Fact of Violation

104(d)(1) Order No. 4135308 charges a violation of 30 C.F.R. § 56.18006, describing the condition or practice as follows:

A fatal accident occurred at the mine on April 30, 1998, when the crusher operator attempted to dislodge rocks which would not go through the jaw crusher. The crusher operator was using a 12-pound sledge hammer to dislodge the rocks and was struck in the face when the head of the hammer was forcibly ejected from the crusher. The crusher had not been shut off and blocked against hazardous motion. The crusher operator had been on the job for about 2 ½ hours and had not been indoctrinated in safety rules and safe working procedures. This is an unwarrantable failure to comply with a mandatory safety standard.

30 C.F.R. § 56.18006 provides that “New employees shall be indoctrinated in safety rules and safe work procedures.”

It is abundantly clear from the record that Weathers hired Nelson with insufficient knowledge of Nelson’s experience in operating rock crushers and other heavy equipment, and that little time was spent training him to operate the jaw crusher, based on the assumption that Nelson knew what he was doing. Moreover, what indoctrination Nelson was given familiarized him with unsafe work procedures, after which he was essentially cast adrift. The fact that Weathers and Berkey made themselves available to Nelson in the event of a problem, presumed that Nelson had the experience to recognize when he needed help. It would appear that Nelson

did not view the blockage as a problem requiring assistance, since he had been instructed on how to resolve it himself with the sledge hammer. Unfortunately, to the extent that Nelson exposed himself to the hazardous motion of the jaw crusher when he moved about the feeder, he was performing his duties precisely as he had been instructed. Consequently, it is my finding that Nelson's indoctrination in safety rules and safe work procedures was sorely lacking, and I conclude, therefore, that Weathers Crushing violated section 56.18006.

2. Significant and Substantial

Inspector Galloway found this violation to be S&S. In view of Nelson's fatal injuries, this violation satisfies the *Mathies* criteria. "Clearly, it was a significant contributing cause to the fatal accident." 156 F. 3d. at 1084-85. Consequently, I conclude that the violation was S&S.

3. Unwarrantable Failure

Referring to the unwarrantable failure analysis respecting the previous citation, and having found that the operator demonstrated a serious lack of reasonable care in supervising and training Nelson to perform his duties safely, I conclude that the Secretary has proven that the violation was the result of Weathers Crushing's unwarrantable failure to comply with the standard.

4. Penalty

I have considered the six penalty criteria set forth in section 110(i) of the Act, and have discussed my analysis under the previous citation. Accordingly, I find that the \$20,000.00 penalty proposed by the Secretary is appropriate.

C. Order No. 4135309

1. Fact of Violation

104(d)(2) Order No. 4135309 charges a violation of 30 C.F.R. § 56.11012, and describes the condition or practice as follows:

A fatal accident occurred at this mine on April 30, 1998, when the crusher operator attempted to dislodge rocks which would not go through the jaw crusher. The chains used as railing or barriers around the elevated work deck on the jaw crusher were not in place. Hooks were welded to the vertical supports, but the chains were missing, which created an opening approximately 40 inches high and 40 inches wide through which a person could fall either on the feed ramp, a distance of 10 feet, or into the jaw crusher. This is an unwarrantable failure to comply with a mandatory standard.

30 C.F.R. § 56.11012 provides that “Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.”

When MSHA’s accident investigation team arrived at the mine site the morning of May 1st, no mining was being conducted, having ceased on April 30th subsequent to the accident, and after the material remaining in the feeder had been run through the crusher (Tr. 16-17, 28-30). Weathers testified credibly that he was aware that he was required to have the guard chains in place, that he was unaware that they were missing while the jaw crusher was operating, and that he was unable to locate them at the mine site when Inspector Galloway informed him that they were missing (Tr. 91, 102-03).

The Secretary raises several questions as to why the chains were never found, if they had existed when the portable crusher was set up in the first place (Sec. Br. at 10). The questions lose most of their significance in light of the activity that took place on the portable crusher immediately following the accident. Numerous personnel had been dispatched to the site, county deputy sheriffs and emergency medical technicians, who had climbed up onto the operator’s platform and into the feeder attempting to save Nelson’s life, and had left behind a substantial amount of medical debris (Tr. 91, 103-04; Exs. P-4, P-5, P-12, P-13). Moreover, the evidence indicates that the guard chains were not a contributing factor to this accident--Nelson deliberately entered the feeder from the operator’s platform. Crediting Weathers’ testimony that the guard chains were in place prior to the accident, I find that intervening variables, beyond the operator’s control, contaminated the accident scene, so as to make a determination of what happened to the chains, without further investigation, virtually impossible. It is my conclusion, therefore, that the Secretary has failed to prove, by a preponderance of the evidence, that Weathers Crushing violated section 56.11012.

D: Citation No. 4135310

1. Fact of Violation

104(a) Citation No. 4135310 charges a violation of 30 C.F.R. § 56.20001, describing the condition or practice as follows:

A fatal accident occurred at this mine on April 30, 1998, when the crusher operator attempted to dislodge rocks which would not go through the jaw crusher. He was using a 12-pound sledge hammer to dislodge the rocks, and was struck in the face when the head of the hammer was forcibly ejected from the crusher, which had not been shut off and blocked against hazardous motion. The Jackson County, Oregon Chief Deputy Medical Examiner reported that a marijuana pipe and a plastic bag containing marijuana were found on the victim’s person upon

arrival at the hospital. This information was obtained from the Medical Examiner's Report received on June 22, 1998. The citation is issued 7/16/98.

30 C.F.R. § 56.20001 requires that "Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job." The evidence establishes that Nelson brought marijuana and a marijuana pipe to the mine site and that he tested positive for drug usage. There is no evidence that Weathers Crushing knew of Nelson's conduct. The Mine Act imposes strict liability on mine operators for violation of standards, irrespective of fault. *Western Fuels-Utah v. Fed. Mine Safety & Health*, 870 F.2d 711 (D.C. Cir. 1989); *Rock of Ages Corp.*, 20 FMSHRC 106, 114 (February 1998); *Wyoming Fuel Co.*, 16 FMSHRC 19, 21 (January 1994). As the Commission has stated, "the principle of liability without fault requires a finding of liability even in instances where the violation resulted from unpreventable employee misconduct." *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261 (March 1998). Consequently, I conclude that the Secretary has met her burden of establishing a violation of section 56.20001, despite my finding that Nelson's drug possession and use were unknown to Weathers Crushing.

2. Penalty

I have considered the six penalty criteria set forth in section 110(i) of the Mine Act, including the evidence that Weathers Crushing had a written drug policy that it had given to Nelson as a new employee, and that there was no indication that Nelson was under the influence of drugs while he was working at the mine (Tr. 104-05; Ex. R-1). I, therefore, ascribe no negligence to the operator, and conclude that the \$50.00 penalty, as proposed by the Secretary, is appropriate.

ORDER

Accordingly, it is **ORDERED** that Citation Nos. 4135307, 4135310 and Order No. 4135308 are **AFFIRMED**, Order No. 4135309 is **DISMISSED**, and Darwin Weathers is **ORDERED TO PAY** a penalty of \$250.00, and Weathers Crushing is **ORDERED TO PAY** a penalty of \$45,000.00 within 30 days of the date of this decision. Upon receipt of payment, these cases are **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

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/nt

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

August 2, 2000

DARWIN STRATTON & SON INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2000-371-RM
	:	Order No. 7966584; 4/24/2000
	:	
	:	Docket No. WEST 2000-372-RM
	:	Citation No. 7966585; 4/22/2000
	:	
	:	Docket No. WEST 2000-373-RM
	:	Order No. 7966587; 4/22/2000
v.	:	
	:	Docket No. WEST 2000-374-RM
	:	Citation No. 7941252; 4/26/2000
	:	
	:	Docket No. WEST 2000-375-RM
	:	Order No. 7941253; 4/26/2000
	:	
	:	Docket No. WEST 2000-376-RM
	:	Order No. 7941254; 4/26/2000
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2000-377-RM
ADMINISTRATION (MSHA),	:	Order No. 7941255; 4/26/2000
Respondent	:	
	:	Docket No. WEST 2000-378-RM
	:	Order No. 7941256; 4/26/2000
	:	
	:	Docket No. WEST 2000-379-RM
	:	Order No. 7941257; 4/26/2000
	:	
	:	Docket No. WEST 2000-380-RM
	:	Order No. 7941258; 4/26/2000
	:	
	:	Docket No. WEST 2000-381-RM
	:	Order No. 7941259; 4/26/2000
	:	
	:	Docket No. WEST 2000-382-RM
	:	Order No. 7941260; 4/26/2000

: Docket No. WEST 2000-383-RM
: Citation No. 7941261; 4/26/2000
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: Docket No. WEST 2000-384-RM
: Citation No. 7941262; 4/26/2000
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: Docket No. WEST 2000-385-RM
: Order No. 7941263; 4/26/2000
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: Docket No. WEST 2000-386-RM
: Order No. 7941264; 4/26/2000
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: Docket No. WEST 2000-387-RM
: Order No. 7941265; 4/27/2000
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: Docket No. WEST 2000-388-RM
: Order No. 7941266; 4/26/2000
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: Order No. 7941267; 4/26/2000
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: Order No. 7941268; 4/26/2000
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: Docket No. WEST 2000-391-RM
: Citation No. 7941269; 4/27/2000
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: Docket No. WEST 2000-392-RM
: Citation No. 7941270; 4/27/2000
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: Docket No. WEST 2000-393-RM
: Order No. 7941271; 4/27/2000
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: Docket No. WEST 2000-394-RM
: Order No. 7941272; 4/27/2000
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: Docket No. WEST 2000-395-RM
: Citation No. 7941273; 4/27/2000
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: Docket No. WEST 2000-396-RM
: Citation No. 7941274; 4/27/2000

: Docket No. WEST 2000-397-RM
: Order No. 7941275; 4/27/2000
:
: Docket No. WEST 2000-398-RM
: Citation No. 7941276; 4/27/2000
:
: Docket No. WEST 2000-443-RM
: Order No. 7966588; 4/22/2000
:
: Rattlesnake Pit
: Mine ID 42-02283

**ORDER TO RESPOND TO SECRETARY OF LABOR'S
MOTION FOR SUMMARY DECISION**

The Secretary of Labor filed a motion for summary decision on the issue of whether the Department of Labor's Mine Safety and Health Administration ("MSHA") has jurisdiction over the Rattlesnake Pit. Under the Commission's Procedural Rules, Darwin Stratton & Son, Inc., has 10 days to respond to the Secretary's motion. 29 C.F.R. § 2700.10. Darwin Stratton must mail its response to the Secretary's motion to me on or before **August 15, 2000**.

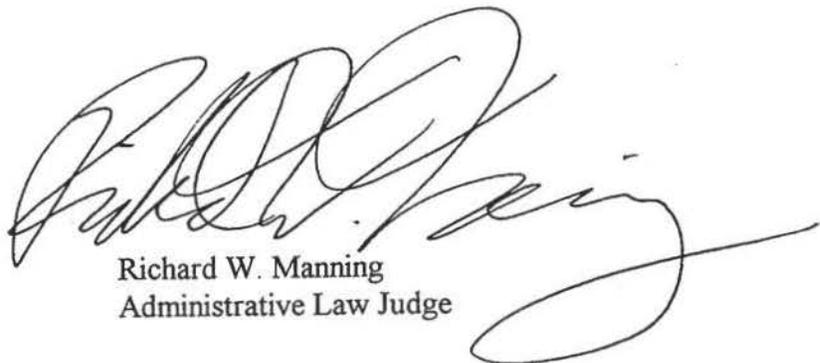
The Commission's summary decision rule provides that a "motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material facts; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Commission's procedural rule further states that a motion for summary decision must be supported. The Secretary of Labor attached an affidavit of MSHA Inspector Dennis Harsh in support of its motion. In the affidavit, Inspector Harsh sets forth facts, based on his personal knowledge, to support the Secretary's position that the Rattlesnake Pit is a mine subject to the jurisdiction of MSHA.

The Commission's procedural rule provides that "when a motion for summary decision is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for a hearing." 29 C.F.R. § 2700.67(c). It also states that "if a party does not respond, summary decision, if appropriate, shall be entered against him." *Id.*

As applied in these cases, this procedural rule requires Darwin Stratton to respond to the Secretary's motion if it continues to believe that MSHA is without jurisdiction to inspect the Rattlesnake Pit and issue citations for violations of safety standards. Its response must set forth specific facts to show that MSHA is without jurisdiction. Simply arguing that MSHA does not or should not have jurisdiction over the Rattlesnake Pit is not sufficient.

As I have stated in the past, these cases involve a fatality and the Secretary may subsequently propose high monetary penalties. Because the issues raised in the cases may have significant implications for Darwin Stratton & Son, Inc, it should seriously consider hiring an attorney to represent it in these cases. Darwin Stratton's conduct in these cases indicates to me that it does not understand the importance of these cases. For example, using a rubber stamp, it stamped "Not Accepted" six times on correspondence it received from counsel for the Secretary of Labor on July 27th and mailed a copy to me. It also stamped "Without Dishonor U.C.C. 3-505" on this same document. Using rubber stamps on documents will not have any bearing on the results in these cases. In addition, the Uniform Commercial Code is not applicable to these proceedings, including section 3-505.

As I have previously stated, MSHA has not proposed monetary penalties for the citations and orders it issued at the Rattlesnake Pit. Until these penalties are proposed, settlement is more difficult. If Darwin Stratton continues to treat these cases in a frivolous manner, I may cancel the hearing set for October 3rd and stay the cases until civil penalty cases have been filed. At that time, Darwin Stratton will know what its potential monetary liability is and the parties will be in a better position to discuss settlement. Darwin Stratton should understand that it will not be able to challenge any citations a second time in a civil penalty case that I affirm following a pre-penalty hearing. If the cases are stayed, on the other hand, all issues can be considered at one hearing.



Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 10, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-242-DM
on behalf of CURTIS STAHL,	:	MSHA Case No. WE MD 98-18
Complainant	:	
v.	:	
	:	
A & K EARTH MOVERS, INC.,	:	Belle Vista Pit
Respondent	:	Mine ID 26-02046

ORDER GRANTING, IN PART,
AND
DENYING, IN PART, MOTION TO COMPEL

This case is before me on a Complaint of Discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Respondent filed a request for production of documents and interrogatories with the Secretary. In responding to those requests, the Secretary redacted certain language from statements and otherwise refused to provide information based on the "informant's privilege." The respondent has filed a motion to compel the information that the Secretary claims is covered by the privilege. The Secretary opposes the motion. For the reasons set forth below, the motion is granted, in part, and denied, in part.

Commission Rule 61, 29 C.F.R. § 2700.61, provides that: "A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner." This rule codifies the long established right of the government to withhold from disclosure the identity of any person who provides information about violations of the law to government officials. *Roviaro v. U.S.*, 353 U.S. 53 (1957); *Bright Coal Co.*, 6 FMSHRC 2520, 2524 (November 1984). It is the name of the informant, not the contents of the statement, that is protected, unless disclosure of the contents would tend to reveal the identity of the informant. *Asarco, Inc.*, 12 FMSHRC 2548, 2554 (December 1990) (*Asarco I*) (citing *Roviaro* at 60).

It is apparent from the motion and response, as well as telephone conference calls with the both counsel and the judge, that the controversy, in this case, concerns two statements given to the Mine Safety and Health Administration (MSHA) investigator investigating Mr. Stahl's complaint. The first is the statement of Eleuterio Jacinto made on August 18, 1998. It consists of five pages. Words have been redacted from two sentences on page three of the statement. The second statement is a Memorandum of Interview dated January 14, 1999. It contains three pages.

The identity of the interviewee, his address and telephone number have been redacted on the first page. About half of the questions and answers on the second page of the statement have been redacted.

In its response to the motion, the Secretary has provided unredacted copies of the statements for *in camera* review. Based on a review of the Jacinto statement, I conclude that both of the redactions would disclose the identity of an informant and, therefore, are covered by the informant's privilege. Turning to the January 14 memorandum, I conclude that most of the redacted language either identifies the informant or would tend to reveal his identity. However, I conclude that the question and answer in lines nine and ten, the first four redacted words in line 25, and the questions and answers in lines 27 through 30 neither identify the informant nor tend to reveal his identity.¹ This conclusion is based both on the words themselves and the fact that counsel for the Secretary was unable to articulate how they came within the privilege when asked about the language during a conference call. Accordingly, I will order that the indicated words and lines be revealed to counsel for the Respondent.

Finding that the informant's privilege is applicable does not end the matter. As the Commission has said, "if the judge concludes that the privilege is applicable, he should next conduct a balancing test to determine whether the respondents' need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest." *Bright*, 6 FMSHRC at 2526. The burden is on the Respondent to show that disclosure of the statements is necessary to a fair determination of the case. *Id.* Factors to be considered in conducting the balancing test include: (1) whether the Secretary is in sole control of the requested material, (2) whether the material is already within the Respondent's control, and (3) whether the Respondent has other avenues available from which to obtain the "substantial equivalent of the requested material." *Id.*

In connection with these criteria, the Commission has held that having access to the same individuals with knowledge of the facts as the Secretary's investigators and being able to question them in the same manner, under *subpoena*, if necessary, means that the Respondent does have other avenues available from which to obtain the information. *Asarco, Inc.*, 14 FMSHRC 1323, 1331 (August 1992) (*Asarco II*). Consequently, I conclude that A & K can get substantially the same information contained in these statements by interviewing, or deposing, miners who worked at the Bella Vista Pit during the period of June and July 1998.

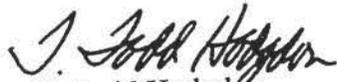
Based on the above, I conclude that the Respondent has not shown that disclosure of the statements is necessary to a fair determination in this case. In addition, I note that on August 11, 2000, counsel for the Secretary must furnish to the Respondent the names of the miner witnesses he intends to call at the hearing. If either of these informants is to be a witness, the Secretary must also provide the complete statement of the witness to counsel for the Respondent, for the purpose of refreshing the witness' recollection or impeaching his credibility at the trial. *Id.* Thus,

¹ Lines are counted from the top of the page. Only lines containing words are counted.

if the Respondent has not already undertaken to interview, or depose, the miners at the Bella Vista Pit, it will have the statements it desires.

Order

As discussed above, the Motion to Compel is **GRANTED** to the extent that the Secretary is **ORDERED** to provide to the Respondent the questions and answers found on lines 9, 10, 27-30 and the four words beginning on line 25 of the January 14, 1999, statement. In all other respects, the Motion to Compel is **DENIED**.



T. Todd Hodgden
Administrative Law Judge
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