

SEPTEMBER AND OCTOBER 2010

COMMISSION DECISIONS AND ORDERS

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09-01-2010	Freedom Energy Mining Company	KENT 2010-1352-R	Pg. 1495
09-13-2010	Carneuse Lime & Stone	KENT 2009-949-M	Pg. 1509
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10-27-2010	Sec. Labor o/b/o Harry Lee Beckman v. Mettiki Coal (WV), LLC.	WEVA 2009-1526-D	Pg. 1515
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SEPTEMBER AND OCTOBER 2010

Review was granted in the following cases during the months of September and October 2010:

Secretary of Labor, MSHA v. Big Ridge, Inc., Docket No. LAKE 2009-377, et al. (Judge Melick, August 26, 2010)

Freedom Energy Mining Company v. Secretary of Labor, MSHA, Docket No. KENT 2010-1352-R. (Judge McCarthy, September 1, 2010).

Performance Coal Company v. Secretary of Labor, MSHA, Docket No. WEVA 2010-1190-R. (Judge Miller, September 17, 2010).

Secretary of Labor, MSHA v. Sequoia Energy, LLC., Docket No. KENT 2008-1059. (Judge Feldman, September 21, 2010).

No cases were filed in which review was denied during the months September and October 2010.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 1, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

ARIZONA MATERIALS

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Docket No. WEST 2010-671-M
A.C. No. 02-02867-191421

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 18, 2010, the Commission received from Arizona Materials (“AM”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

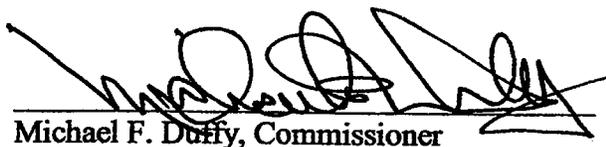
On July 16, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000191421 to AM, proposing penalties for five citations that had been issued to the operator two months earlier. According to AM, it understood that a former safety manager had faxed the contest form to MSHA, but MSHA shows no record of receipt of the contest, and informed AM that such a method of contest is contrary to the directions contained on the assessment.

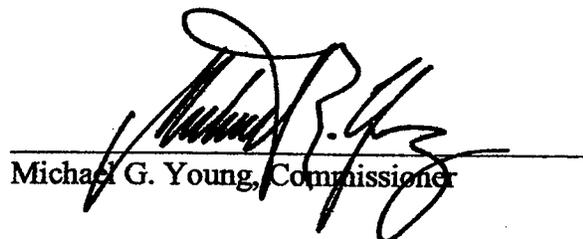
The Secretary opposes the request on the ground that AM's explanation for the failure to file a timely contest is conclusory and thus insufficient to establish grounds for reopening the assessment. The Secretary also states that AM has failed to explain why it did not respond more quickly to an October 8, 2009, delinquency notice, but instead waited until after MSHA had referred the matter to the U.S. Treasury before it made its request to reopen.

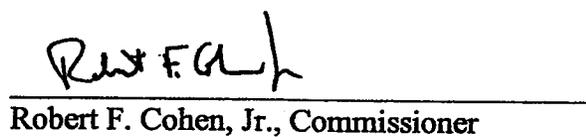
Having reviewed AM's request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Without further elaboration, the operator's explanation has not provided the Commission with an adequate basis to reopen. Accordingly, we hereby deny the request for relief without prejudice. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). The words "without prejudice" mean that AM may submit another request to reopen Assessment No. 000191421 so that it can contest the two proposed penalties.

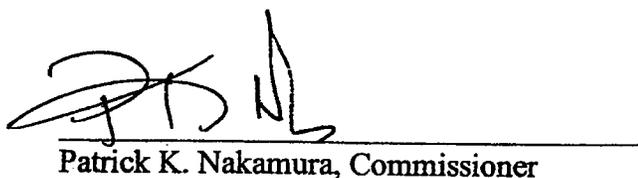
At a minimum, the operator must provide the date on which the former official responsible for this matter left the company, the name of the individual who took over the responsibility for the contest of penalties, and explain why it has an understanding that its former Environmental Health and Safety Manager faxed a request to contest the citations to MSHA, and why AM did not file a motion to reopen as soon as it was alerted to the delinquency by the MSHA delinquency notice dated October 8, 2009. AM should also obtain an affidavit from the former Environmental Health and Safety Manager or explain why it cannot obtain such an affidavit. Any amended or renewed request by AM to reopen Assessment No. 000191421 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

**Lindsay Balmer
Arizonia Materials
3636 S. 43rd Ave.
Phoenix, AZ 85009**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

September 1, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

MOSAIC FERTILIZER LLC

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Docket No. SE 2010-712-M
A.C. No. 08-00835-209758

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

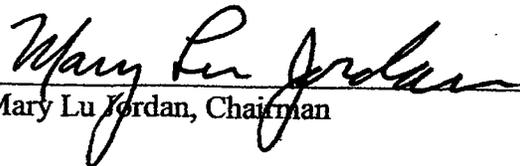
BY THE COMMISSION:

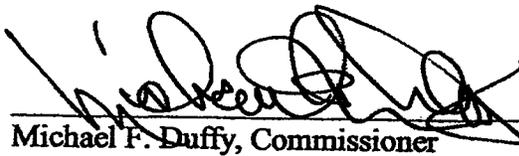
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 3, 2010, the Commission received from Mosaic Fertilizer LLC a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On May 21, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

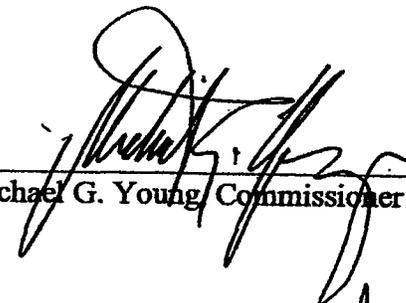
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

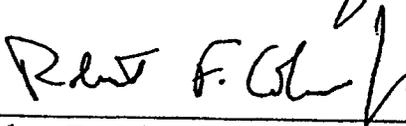
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

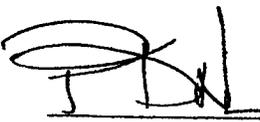
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Mark N. Savit, Esq.
Patton Boggs LLP
1801 California Street, Suite 4900
Denver, CO 80202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 3, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2009-663-M
ADMINISTRATION (MSHA)	:	A.C. No. 14-01477-191032
	:	
v.	:	Docket No. CENT 2009-664-M
	:	A.C. No. 14-01635-191033
NELSON QUARRIES, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).¹ On July 27, 2010, the Secretary of Labor filed two motions to approve settlement in these proceedings. The motions to approve settlement involved Citation Nos. 6447701 and 6447705, which had been issued to Nelson Quarries, Inc. (“Nelson”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). On July 28, 2010, Administrative Law Judge Priscilla Rae issued two decisions granting the motions and ordering Nelson to pay penalties in the sum of \$560 in accordance with the terms of the settlement agreements.

On August 12, 2010, the Judge received from Nelson motions to vacate both decisions approving settlement.² In the motions, Nelson asserts that it did not agree to settle citations in the manner described in the settlement agreements filed by the Secretary and that its representative

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2009-663-M and CENT 2009-664-M, both captioned *Nelson Quarries, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

² In addition, on August 4, 2010, the Judge received in Docket No. CENT 2009-664-M, a Motion to Settle, in which Nelson’s representative states that, after considering the “proposed settlement offers” proffered by MSHA, the operator believes that Citation No. 6447705 should be vacated.

had informed the Secretary's Conference and Litigation Representative ("CLR") before the settlement motions were filed that Nelson had not yet approved of any proposed settlement.

The Judge's jurisdiction over these proceedings terminated when she issued her decisions approving settlement on July 28, 2010. 29 C.F.R. § 2700.69(b). Relief from a Judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Nelson's motions to vacate to constitute timely filed petitions for review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

The Commission has made clear that "[s]ettlement of contested issues is an integral part of dispute resolution under the Mine Act." *Tarmann v. Int'l Salt Co.*, 12 FMSHRC 1, 2 (Jan. 1990) (quoting *Pontiki Coal Corp.*, 8 FMSHRC 668, 674 (May 1986)). In this respect, the Commission has observed that "the record must reflect and the Commission must be assured that a motion for settlement [approval], in fact, represents a genuine agreement between the parties, a true meeting of the minds as to its provisions." *Tarmann*, 12 FMSHRC at 2 (quoting *Peabody Coal Co.*, 8 FMSHRC 1265, 1266 (Sept. 1986)); *see also Wake Stone Corp.*, 27 FMSHRC 289, 290 (Mar. 2005) (vacating decision approving settlement where it was "unclear whether the parties achieved a true meeting of the minds").

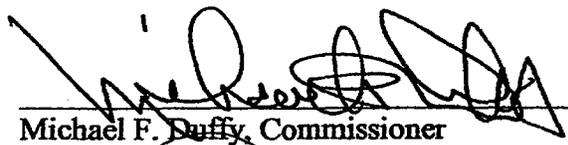
The record in these proceedings includes two letters dated July 27, 2010, from the Secretary's CLR to Nelson stating that the Secretary anticipates that the Judge would not rule on the motion to approve settlement for a 10-day period, and that if Nelson believes that the motion does not correctly state the operator's intentions, Nelson must immediately notify the Judge and the Secretary. The CLR states that if Nelson does not file an objection within 10 days, the Secretary would assume that the motion correctly embodies the settlement agreement reached by the parties.

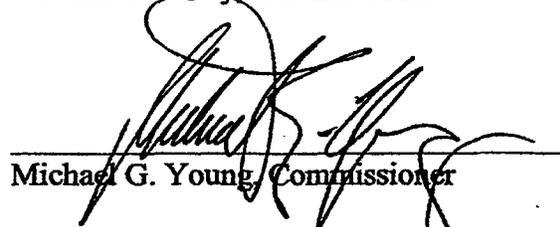
The July 27 letters indicate that the settlement agreements filed by the Secretary do not reflect a true meeting of the minds of the parties. Moreover, the representations made by the CLR are contrary to the provisions of interim Commission Procedural Rule 31, which became effective on May 27, 2010. *See* 75 Fed. Reg. 21,987 (Apr. 27, 2010). Commission Procedural Rule 31(b)(1) provides that the "party filing a motion must certify that the opposing party has reviewed the motion, and has authorized the filing party to represent that the opposing party consents to the granting of the motion and the entry of the proposed order approving settlement."³ *Id.* at 21,989.

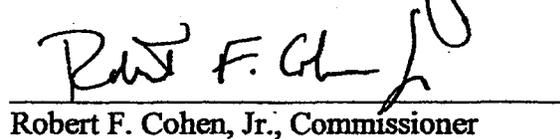
³ We note further that, contrary to the CLR's expectation, the Judge acted on the settlement motions one day after they were received.

Thus, it appears from the record that the Judge's decisions granting the Secretary's motions to approve settlement were based on proffered agreements that had not been ratified by both parties. *See, e.g., Sec'y of Labor on behalf of Pendley v. Highland Mining Co*, 29 FMSHRC 164, 165-66 (Apr. 2007). Accordingly, in the interests of justice, we vacate the Judge's July 28 decisions and remand this matter to her for further proceedings as appropriate. *See RBS, Inc.*, 26 FMSHRC 751 (Sept. 2004).


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Paul M. Nelson
Representative for the Respondent
P.O. Box 334
Jasper, MO 64755
pnelson@keinet.net

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judge Pricilla M. Rae
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 7, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2010-496-M
ADMINISTRATION (MSHA)	:	A.C. No. 51-00171-123842
	:	
v.	:	Docket No. WEST 2010-497-M
	:	A.C. No. 51-00192-123798
HAWAIIAN CEMENT MAUI,	:	
CONCRETE & AGGREGATE DIVISION	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 8, 2010, the Commission received from Hawaiian Cement Maui, Concrete & Aggregate Division (“Hawaiian Cement”) a motion by counsel seeking 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).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On August 1, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment Nos. 000123842 and 000123798 to Hawaiian Cement, proposing civil penalties for various citations, including Citations Nos. 6395603, 6392793, 6395608 and 6395606. Hawaiian Cement states that it filed contests of the four citations, and the contests were subsequently stayed. The operator explains that it was unaware that it was required to contest the penalties in addition to contesting the citations, and that it did not become aware that the assessments had become final orders until after it retained counsel. Hawaiian Cement’s General Manager states that the operator has no record of having received the proposed assessments. In addition, Hawaiian Cement states that it did not receive any delinquency notices which would have alerted it that the deadline for contesting the penalties had passed.

The Secretary opposes Hawaiian Cement's request to reopen. She asserts that the penalty assessments became final Commission orders on September 15, 2007, and that the request to reopen was not received by the Commission until January 8, 2010. The Secretary maintains that because the operator filed its request more than two years after the assessments became final orders, the request should be denied. The Secretary further notes in part that the proposed assessments were delivered by certified mail on August 6, 2007, and signed for by Mark Ambre; that MSHA sent delinquency notices to Hawaiian Cement on November 1, 2007, informing the operator that it had failed to timely contest the proposed penalty assessments; and that MSHA received a check dated November 17, 2007, with a notation to apply payment to the two subject cases.

The operator filed a reply to the Secretary's opposition in which Hawaiian Cement maintains that the Commission should grant its request to reopen. The operator clarifies that after it received the delinquency letters, it sent payment for the penalties listed on the proposed assessments, except for those penalties associated with Citations Nos. 6395603, 6392793, 6395608 and 6395606.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect.¹ See 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also held that a Rule 60(b) motion shall be made within a reasonable time, and for reasons (1), (2),

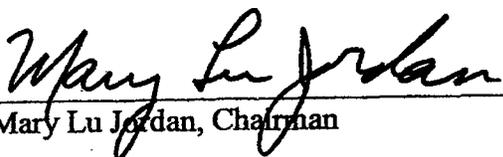
¹ Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for the following reasons:

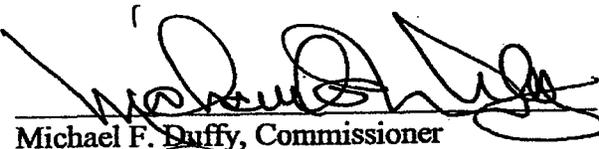
- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence . . . ;
- (3) fraud . . . ;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

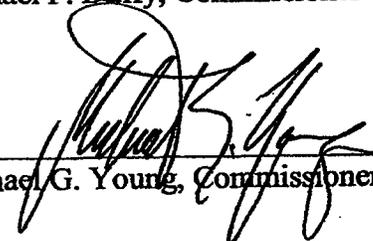
Fed. R. Civ. P. 60(b).

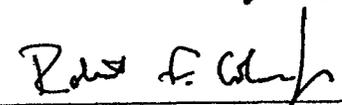
and (3) not more than one year after the judgment, order, or proceeding was entered or taken.² *Celite Corp.*, 28 FMSHRC 105, 106 (Apr. 2006).

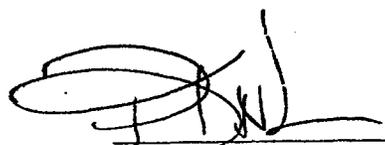
Here, we have been presented with Hawaiian Cement's failure to timely contest the proposed assessments due to its mistake in believing that it did not need to contest the proposed penalties if it had already contested the underlying citations. This misunderstanding falls within the ambit of Rule 60(b)(1). *See generally Celite Corp.*, 28 FMSHRC at 107. However, because Hawaiian Cement waited more than one year to request relief with regard to the penalties associated with Citations Nos. 6395603, 6392793, 6395608 and 6395606, its motion is untimely. *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny Hawaiian Cement's request to reopen.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

² Rule 60(c)(1) provides that “[a] motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.” Fed. R. Civ. P. 60(c)(1).

Distribution:

**Adele L. Abrams, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 9, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. KENT 2010-1179
v. : A.C. No. 15-19253-209348 5RG
 :
BLACK ENERGY, INC. :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 9, 2010, the Commission received from contractor Black Energy, Inc. (“Black Energy”) a motion by counsel seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On January 21, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000209348 to Black Energy. The record indicates that the proposed assessment was not received at that time by Black Energy, but rather only months later, when the contractor requested a copy of the proposed assessment from MSHA after learning from the agency's web site that it was considered delinquent with regard to paying the penalties included on the assessment. Black Energy immediately thereafter filed a notice of contest.

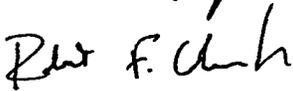
The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed Black Energy's request and the Secretary's response, we conclude that the proposed penalty assessment has not become a final order of the Commission because it was not initially received by Black Energy, and when it was eventually received, the contractor filed a timely notice of contest. Accordingly, we deny the request to reopen as moot and remand this matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

John M. Williams, Esq.
Rajkovich, Williams, Kilpatrick & True, PLLC
2333 Alumni Park Plaza, Suite 310
Lexington, KY 40517

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris, Acting Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

On November 5, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000168103 to FCS. FCS states that it mistakenly paid the assessment after it had a conference on the citations at which MSHA refused to make any changes to the citations and informed FCS that it was strictly liable. FCS states that it erroneously believed that it had no other recourse but to pay the assessment. FCS states that it has been named the defendant in a civil suit involving the incident which is the subject of the citations and was not aware of the legal consequences of its payment of the penalties.

The Secretary opposes FCS's request to reopen. She states that the proposed assessment form, MSHA's regulations, the Commission's Procedural Rules, and the Mine Act all clearly explain the operator's right to contest the citations and assessment and that ignorance of the law is not a sufficient basis for relief. She notes that FCS was represented by counsel at the conference. She also states that FCS failed to explain the 11-month delay in filing its request to reopen. Finally, the Secretary contends that the subsequent adverse legal consequences of FCS's failure to contest the penalty assessment in a timely manner is not a valid excuse for its failure.

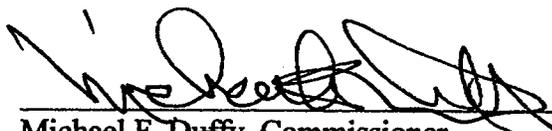
FCS replies that its request to reopen is based on Rule 60(b)(3), which includes "fraud . . . , misrepresentation, or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(3). FCS explains that it was misled by the Secretary's representative and did not understand its contest rights. FCS explains that it had never contested a citation previously and did not know that it could contest the fact of the violation and related findings in challenging the penalty assessment. FCS states that the delay in filing its request to reopen was due to the fact that its misunderstanding only came to light in addressing the related civil suit and that the final order, which is now the basis of the pending civil suit, could adversely affect its ability to remain in business.

Although FCS claims that it mistakenly paid the penalty assessment because it did not understand its right to challenge the violations and related findings in contesting the assessment, it was represented by counsel at the time it had the opportunity to contest the citations and penalty assessment. Moreover, FCS seeks reopening only after it has been named the defendant in a civil suit involving the same matter which is the subject of the citations.

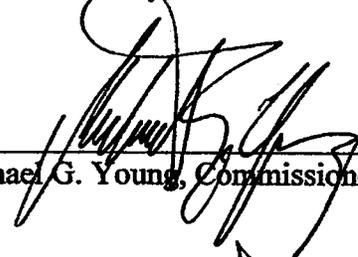
Based on FCS's submissions and because FCS waited over 11 months to request relief with regard to Proposed Assessment No. 000168103, we conclude that FCS has failed to provide an adequate basis for the Commission to reopen the penalty assessment. *See Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062-63 (Dec. 2008) (denying relief because operator's excuse was insufficient); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067-68 (Dec. 2008) (same). Accordingly, we deny FCS's request to reopen.



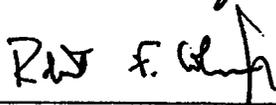
Mary Lu Jordan, Chairman



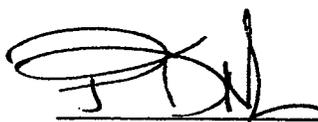
Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

Distribution:

**Adele L. Abrams, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 9, 2010

SECRETARY OF LABOR,	:	Docket No. CENT 2008-735-M
MINE SAFETY AND HEALTH	:	A.C. No. 41-04518-157473
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2008-736-M
	:	A.C. No. 41-04518-140610
v.	:	
	:	Docket No. CENT 2009-612-M
	:	A.C. No. 41-04518-147703
	:	
PETRA MATERIALS	:	Docket No. CENT 2009-681-M
	:	A.C. No. 41-04518-172147

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).¹ On September 5, 2008, July 10, 2009, July 30, 2009, and August 10, 2009, the Commission received from Petra Materials (“Petra”) letters seeking to reopen 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).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim*

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2008-735-M, CENT 2008-736-M, CENT 2009-612-M, and CENT 2009-681-M, all captioned *Petra Materials* and involving similar facts and procedural issues. 29 C.F.R. § 2700.12.

Walter Res., Inc., 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On February 14, April 17, July 17, and December 18, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Penalty Assessment Nos. 000140610 (Docket No. CENT 2008-736-M), 000147703 (Docket No. CENT 2009-612-M), 000157473 (Docket No. CENT 2008-735-M), and 000172147 (Docket No. CENT 2009-681-M), respectively, to Petra for various citations. On September 5, 2008, the Commission received a request to reopen Proposed Assessment Nos. 000140610 and 000157473 (Docket Nos. CENT 2008-736-M and 2008-735-M), in which Petra stated that the date to contest the penalties had passed because it “did not know the procedures.”

On September 30, 2008, the Commission received an opposition from the Secretary, in which the Secretary stated that the operator made no showing of circumstances that warrant reopening. In addition, as to Docket No. CENT 2008-736-M, the Secretary noted that MSHA notified Petra by letter dated May 14, 2008, that it was delinquent in paying the proposed assessment and that Petra failed to explain why it took three months to seek relief.

On January 22, 2009, the Commission issued an order denying without prejudice Petra’s motion to reopen. 31 FMSHRC 47, 49 (Jan. 2009). The Commission explained that Petra failed to provide a sufficiently detailed explanation for its failure to contest Proposed Penalty Assessment Nos. 000140610 and 000157473 and its delay in responding to the delinquency notice. *Id.* The Commission further explained that Petra could submit another request to reopen the penalty assessments. *Id.*

On July 10, 2009, the Commission received a letter from Petra requesting that “cases 2008158701A and 2008201924A” be reopened. Petra explains that it never received the original correspondence, so it failed to contest the proposed penalties prior to the 30-day deadline. It explains that it was unaware that penalties were owed until it received a notice from a private collection agency that had been contracted by the U.S. Department of the Treasury. The case numbers referred to by Petra are Treasury reference numbers and refer to Proposed Assessment No. 000140610 or Docket No. CENT 2008-736-M (No. 2008158701A) and Proposed Assessment No. 000147703 or Docket No. CENT 2008-612-M (No. 2008201924A).

On July 30, 2009, the Commission received from Petra a request to reopen Proposed Assessment No. 000172147 (Docket No. CENT 2009-681-M). In the request, Petra explains that the proposed assessment was mailed to its previous address, although "a change of address was submitted to your office." Petra further states that the operator's address of record at the U.S. Department of Treasury is listed as "1500 E. Fourth Avenue, and it should be 1600 E. Fourth Avenue." It notes that it received a document dated September 10, 2008, regarding Docket Nos. CENT 2008-735-M and CENT 2008-736-M, which showed its correct address so it does not understand why MSHA's correspondence continues to be mailed to its previous address.²

On August 4, 2009, the Commission received the Secretary's opposition to Petra's July 10 motion to reopen. As to Docket No. CENT 2008-736-M, the Secretary notes that the operator's July 10 reason for its failure to timely contest differed from the reason set forth in its September 5 request, and that a motion for reconsideration cannot be based on grounds that could have been raised, but were not raised, in the original motion. The Secretary further states that MSHA's records show that Proposed Assessment No. 000140610 was delivered to the operator's address of record on February 22, 2008, and was signed for by P. Cortez, and that MSHA mailed the delinquency notice. As to Docket No. CENT 2009-612-M, the Secretary states that Petra makes no showing of circumstances that warrant reopening, and that MSHA's records show that Proposed Assessment No. 000147703 was received by the operator on April 21, 2008, and signed for by J. Barlow. Accordingly, the Secretary requests that Petra's request to reopen be denied.

On August 10, 2009, the Commission received a letter from Petra in which Petra requests that "cases 000157473 and 000140610" be reopened and specifies which citations it wishes to contest. The operator further states that its managing office was not properly notified of the citations and assessments because correspondence from MSHA, including delinquency notices, were sent to a Diamondhead Road address instead of to Petra's office address (1600 E. Fourth Avenue), which resulted in delays in the operator's response. Petra further notes that the delinquency notice in Docket No. CENT 2008-736-M was signed for by Patricia Cortez, who was not an agent of the operator. Petra attached various documents to its request, including a letter dated July 25, 2008, addressed to MSHA, enclosing payment for the penalty associated with Proposed Assessment No. 000147703 (Docket No. CENT 2008-612-M), and requesting that MSHA change Petra's address to 1600 East Fourth Avenue. The operator also attached a letter from MSHA to Petra at "1500 4th St." enclosing blank MSHA legal identity forms.

On August 14, 2009, the Commission received a response from the Secretary to Petra's July 30 request to reopen Proposed Assessment No. 000172147 (Docket No. CENT 2009-681-M). In the response the Secretary states that she does not oppose reopening the proposed assessment. She notes, however, that proposed assessments that are mailed to the operator's address of record are properly served, and that the operator should take any steps

² It appears that the September 10 document referred to by Petra is a docketing notice issued by this Commission, rather than by MSHA.

necessary to update its changes of address by submitting an updated Legal Identity Report form with MSHA.

Proposed Penalty Assessment Nos. 000140610 and 000157473 (Docket Nos. CENT 2008-736-M and 2008-735-M, respectively)

Consistent with the operator's statements, it appears from the record that there may have been problems with the operator's receipt of Proposed Assessment Nos. 000140610 and 000157473. The Legal Identification Report filed by the Secretary lists Petra's address of record as a Diamondhead Road address. The operator states that it was not timely in contesting Proposed Assessment Nos. 000140610 and 000157473 because both proposed assessments and delinquency notice as to the former had been sent to the operator's previous address. It appears that the operator attempted to change its address of record with MSHA by letter dated July 25, 2008.

As to Docket No. CENT 2008-736-M, it appears that Proposed Assessment No. 000140610 (issued on February 14, 2008), and MSHA's notice of delinquency (dated May 14, 2008) were sent before the operator attempted to change its address with MSHA. However, Proposed Assessment No. 000140610 may not have been received by the operator if it had been signed for by a person who is not an agent of the operator, as Petra alleges.

As to Docket No. CENT 2008-735-M, it appears that Proposed Assessment No. 000157473 was issued on July 17, 2008, close to the time that the operator attempted to change its address of record with MSHA. The circumstances surrounding the receipt of Proposed Assessment No. 000157473 are not set forth in the record. Thus, it is possible that the operator never received the proposed assessment or that the operator attempted to change its address before the proposed assessment was delivered to the Diamondhead address.

If MSHA sent the proposed assessments to Petra's official address of record and the proposed assessments were received by an agent of the operator, grounds exist for denying Petra's request for relief. *Cf. Harvey Trucking*, 21 FMSHRC 567, 568-69 & n.1 (June 1999) (stating that operator is required to notify MSHA of changes of address). If, however, MSHA mailed the proposed assessment to an incorrect address or if the proposed assessment was received by someone who is not an agent of the operator, the proposed assessments may not have become final Commission orders and Petra's request may be moot.

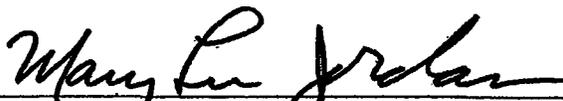
Having reviewed Petra's motions and the Secretary's responses, we remand this matter to the Chief Administrative Law Judge for a determination of whether the proposed assessments became final orders and, if so, whether the final orders should be reopened. The Judge shall order further appropriate proceedings in accordance with principles described herein, the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Proposed Assessment No. 000147703 (Docket No. CENT 2009-612-M)

Although Petra requested in its July 10 letter that cases 2008158701A (Docket No. CENT 2008-736-M) and 2008201924A (Docket No. CENT 2008-612-M) be reopened, it appears from the record that Petra erred in requesting the reopening of Docket No. CENT 2008-612-M. Rather, from its August 10, 2009, correspondence, it appears that Petra had intended to request reopening of Docket Nos. CENT 2008-735-M and 2008-736-M. In fact, Petra attached a letter to its July 10 request that appears to be payment of the only proposed penalty set forth in Proposed Assessment No. 000147703. Accordingly, we find Petra's request to reopen Proposed Assessment No. 000147703 to be moot and hereby deny it.

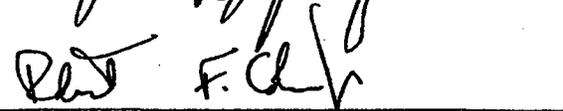
Proposed Assessment No. 000172147 (Docket No. CENT 2009-681-M)

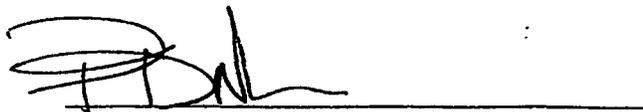
It appears from the record that MSHA sent Proposed Assessment No. 000172147 to an incorrect address. The operator attempted to change its address with MSHA by letter dated July 25, 2008, to "1600 E. Fourth Avenue." However, MSHA sent Proposed Assessment No. 000172147 to "1500 4th St." The operator states that it never received the proposed assessment until it was faxed to Petra on July 22, 2009. We consider Petra's July 30 request to reopen to be a timely contest of Proposed Assessment No. 000172147. Therefore, the proposed assessment did not become a final order of the Commission and the request to reopen is moot. This case, Docket No. CENT 2009-681-M, shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

**Raul Villa
Petra Materials
1600 E. Fourth Ave.
El Paso, TX 79901**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 10, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

VULCAN CONSTRUCTION
MATERIALS, LP

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Docket No. SE 2010-819-M
A.C. No. 31-02087-216623

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

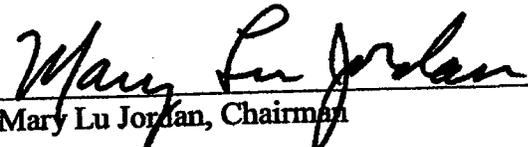
These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 7, 2010, the Commission received from Vulcan Construction Materials, LP, a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On June 30, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

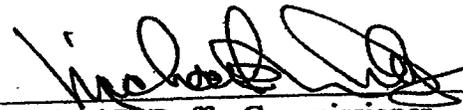
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

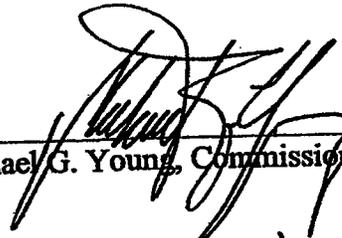
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

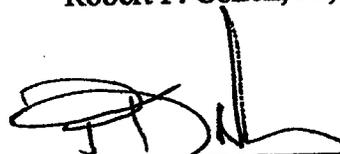
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Bryan M. Moore
Vulcan Materials Co.
11020 David Taylor Dr. #105
Charlotte, NC 28262

W. Christian Schumann, Esq.
Office of the Solicitor, U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris, Acting Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 14, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. YORK 2010-225-M
 : A.C. No. 30-03598-198917
 :
RICHARD C. BUDINE :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

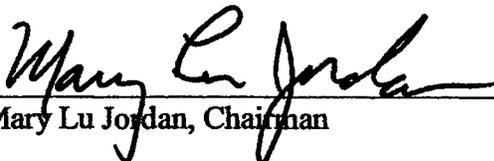
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 26, 2010, the Commission received from the Richard C. Budine a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On May 17, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

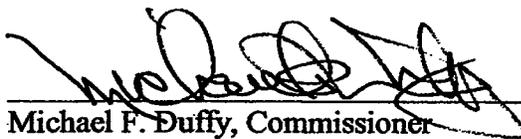
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

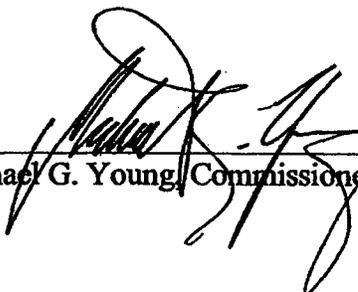
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

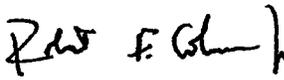
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

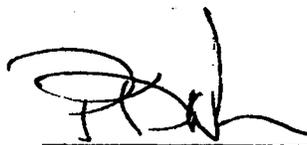
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Richard C. Budine
Owner
259 Old Plant Rd.
Deposit, NY 13754

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris, Acting Chief
Office of Civil Penalty Compliance
MSHA, U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 14, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

ESSROC CEMENT CORPORATION

:
:
:
:
:
:
:
:

Docket No. LAKE 2010-598-M
A.C. No. 12-00066-201813

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

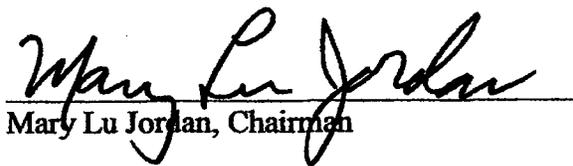
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 1, 2010, the Commission received from Essroc Cement Corporation a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On April 7, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

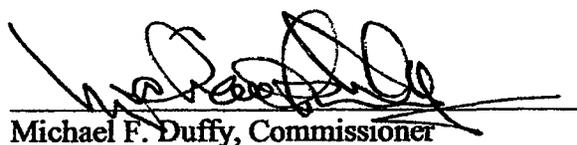
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

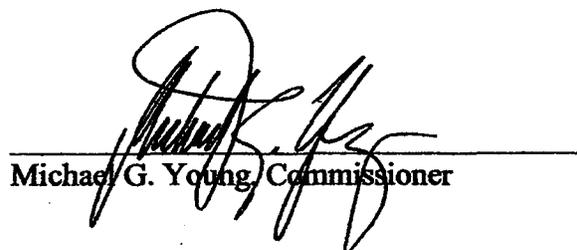
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

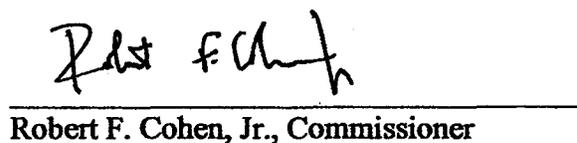
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

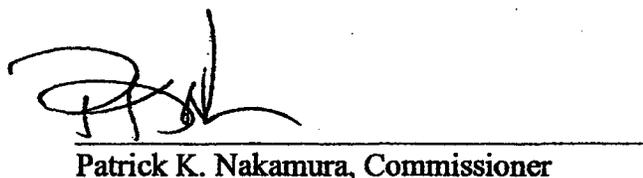
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Danny Lowe, CMSP
Essroc Cement Corp.
1826 South Queen St.
Martinsburg, WV 25402

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris, Acting Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 14, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. CENT 2010-316-M
 : A.C. No. 03-01614-198268 E24
 :
AUSTIN POWDER COMPANY :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 30, 2009, the Commission received from Austin Powder Company (“Austin Powder”) a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 11, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

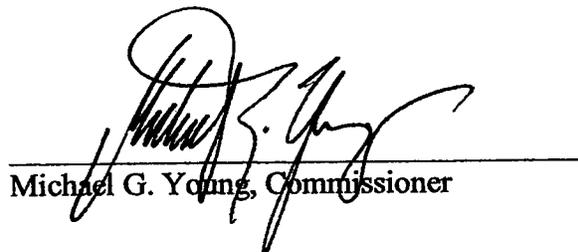
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

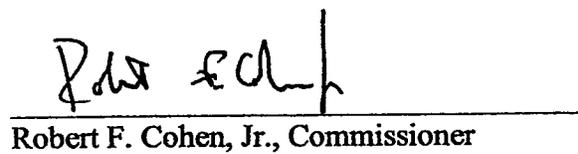
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Nichelle Young, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 14, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-1052-M
v.	:	A.C. No. 04-03489-207509
	:	
SIERRA ROCK PRODUCTS	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

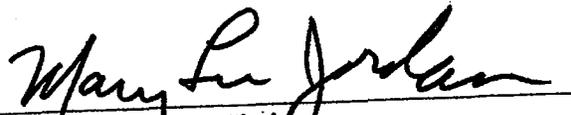
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 20, 2010, the Commission received from Sierra Rock Products a request by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On May 4, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

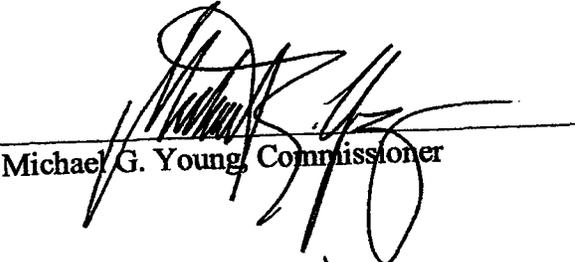
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

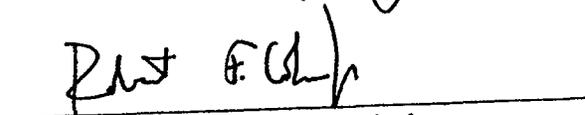
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

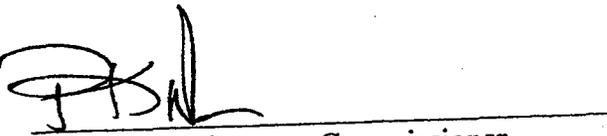
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Kristin R. B. White, Esq.
Jackson Kelly PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 14, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. YORK 2010-118-M
 : A.C. No. 43-00423-196497
 :
CASELLA CONSTRUCTION INC. :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 28, 2009, the Commission received from Casella Construction Inc. (“Casella”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 12, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

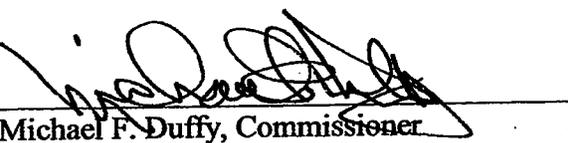
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

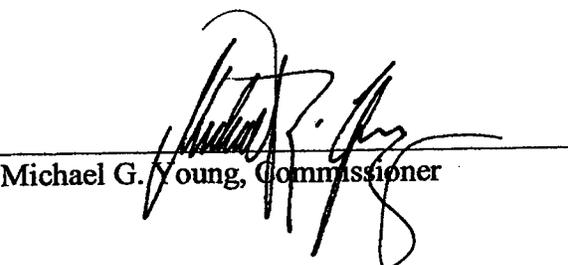
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

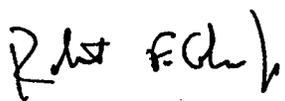
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Joe Matteri
Casella Const., Inc.
8 US Route East
Mendon, VT 057601

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 14, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 2010-1072-M
 : A.C. No. 05-00790-210809
 :
CLIMAX MOLYBDENUM COMPANY :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

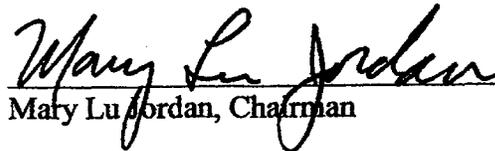
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 23, 2010, the Commission received from Climax Molybdenum Company a request by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On May 11, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

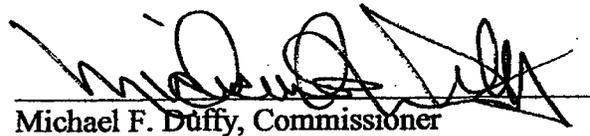
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

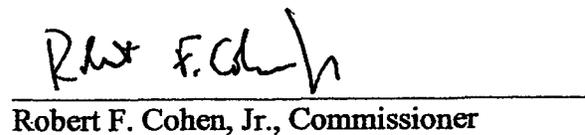
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

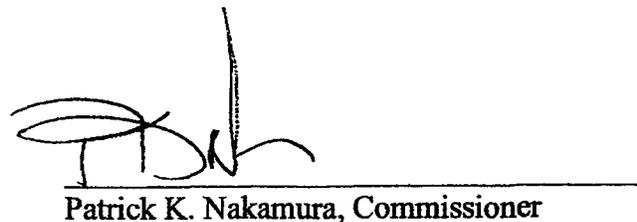
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Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

**Laura E. Beverage, Esq.,
Jackson Kelly PLLC,
1099 18th Street, Suite 2150,
Denver, CO 80202**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
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**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

September 14, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. PENN 2010-172-M
 : A.C. No. 36-00125-194419
 :
KEYSTONE CEMENT COMPANY :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 8, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Keystone Cement Company (“Keystone”) that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

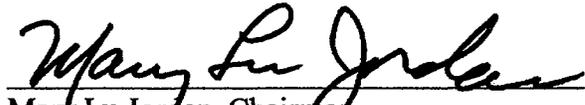
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

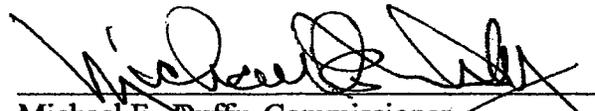
On August 13, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000194419 to Keystone. Keystone asserts that its failure to timely file its contest was the result of confusion because it had submitted a conference request for seven of the citations contained on the proposed assessment. Keystone additionally contends that the error was made by a plant manager without the knowledge of the company's general counsel, who oversees MSHA compliance. Keystone states that it has changed its address of record so that all correspondence will now be sent to the general counsel so as to avoid future mistakes. Keystone promptly filed its motion to reopen after receiving MSHA's rejection of its contest.

The Secretary opposes the request on the ground that the letter acknowledging Keystone's conference request specifically required the operator to contest the penalty assessment and that a conference request does not toll the time to contest a penalty.¹

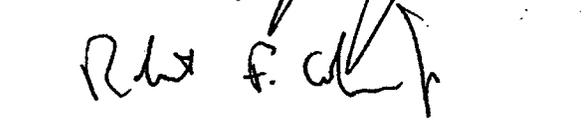
¹ The Secretary initially also opposed the motion to reopen on the ground that the operator was delinquent in its payment of penalties for the citations it was not seeking to reopen in this assessment case, and thus had not acted in good faith. In response, Keystone stated that the failure to pay stemmed from the same problem as above with the plant manager receiving MSHA correspondence, and that it had paid the uncontested assessments after discovering its error. The Secretary then withdrew her assertion that the operator had acted in bad faith.

Having reviewed Keystone's motion and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Jeremiah J. Jowett, III, Esq.
Keystone Cement Co.
320-D Midland Parkway
Summerville, S.C. 29485

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

September 15, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

M & M CLAYS, INC.

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Docket No. SE 2010-744-M
A.C. No. 09-00229-199383

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

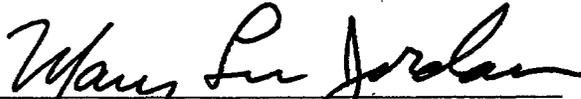
BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 6, 2010, the Commission received from M & M Clays Incorporated a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On May 26, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

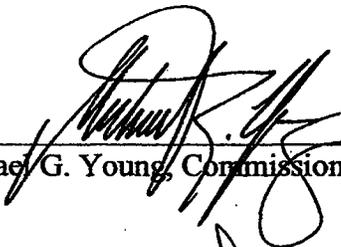
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.¹ Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



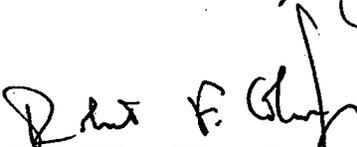
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

¹ We reopen Proposed Assessment No. 000199383 only as to Citation Nos. 6595601, 6595605, 6595610, 6595611, 6595614, 6595615, 6595616, 6595618, 6595619, 6595620, 6595621, and 6595628.

Distribution:

**Gary W. Meir, President
M & M Clays Inc.
159 Railroad St.
P.O. Box 119
McIntyre, GA 31054**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Melanie Garris, Acting Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 14, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

OAK GROVE RESOURCES LLC

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Docket No. SE 2010-788
A.C. No. 01-00851-209778

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

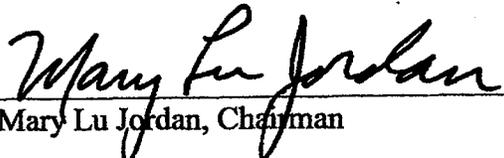
BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 26, 2010, the Commission received from Oak Grove Resources LLC (“Oak Grove”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On June 8, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

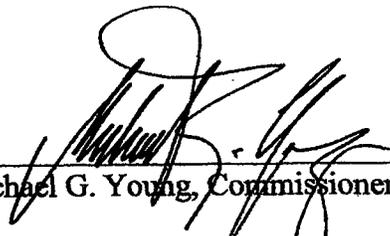
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

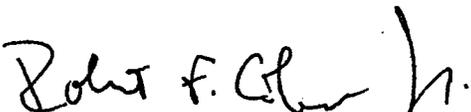
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

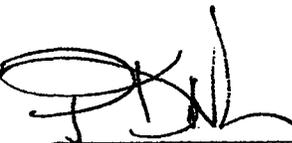
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

**R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Melanie Garris, Acting Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

September 15, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. CENT 2009-760-M
ADMINISTRATION (MSHA), : A.C. No. 41-00906-191553
 :
v. : Docket No. CENT 2009-761-M
 : A.C. No. 41-00906-191553
SHERWIN ALUMINA, LP :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 12, 2009, the Secretary of Labor filed two motions to approve settlement in these proceedings. The motions involved penalty assessments that had been issued to Sherwin Alumina, LP (“Sherwin”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2009-760-M and CENT 2009-761-M, both captioned *Sherwin Alumina, LP*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

Although the Secretary submitted the two settlement agreements simultaneously, orders approving the settlements issued just over two months apart. In Docket No. CENT 2009-760-M, Chief Administrative Law Judge Robert J. Lesnick issued an order on May 27, 2010 that granted the Secretary’s motion and ordered Sherwin to pay \$3,238 in accordance with the terms of the settlement agreement.

Subsequently, on June 9, 2010, Sherwin, through counsel, moved to set aside the settlement agreement filed by the Secretary in Docket No. CENT 2009-761-M.¹ Sherwin alleges

¹ On December 9, 2009, the operator submitted a *pro se* letter to the Commission in which it took issue with the method by which the penalty had been lowered in Docket No. CENT 2009-761-M, though there is no indication that the letter was served on the Secretary. The

that it had not reviewed the agreement, and that it had not agreed to several of its provisions. On June 15, 2010, the Secretary filed a response in opposition to Sherwin's motion, and requested that, "if the Court grants the Respondent's Motion to Set Aside Settlement in CENT 2009-761-M[,] thereby accepting the Respondent's argument that no agreement was reached as to the settlement terms, then the Court must also set aside the settlement that was concurrently reached in CENT 2009-760-M." Sec'y Opp. at [9]. On June 16, 2010, Sherwin filed a response to the Secretary's reply.

On August 16, 2010, Chief Judge Lesnick issued an order granting the motion in Docket No. CENT 2009-761-M and ordering Sherwin to pay \$85,532 in accordance with the terms of the settlement agreement in that docket, without addressing Sherwin's motion to set aside the agreement.

The judge's jurisdiction over these proceedings terminated when he issued his decisions approving settlement on May 27 and August 16, 2010. 29 C.F.R. § 2700.69(b). As to Docket No. CENT 2009-761-M, pursuant to Commission Procedural Rule 71, 29 C.F.R. § 2700.71, and section 113(d)(2)(B) of the Mine Act, 30 U.S.C. § 823(d)(2)(B), on our own motion, we direct review of the August 16, 2010, decision of the judge on the ground that the decision may be contrary to law. Specifically, review is limited to the issue of whether the judge's decision approving settlement was made in accordance with section 110(k) of the Mine Act, 30 U.S.C. § 820(k), and Commission precedent.

As to Docket No. CENT 2009-760-M, under the Mine Act and the Commission's procedural rules, relief from a judge's order may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of an order's issuance, it becomes a final order of the Commission. 30 U.S.C. § 823(d)(1). The judge's order approving settlement became a final order of the Commission on July 6, 2010. In her opposition to Sherwin's motion to set aside the settlement agreement in Docket No. CENT 2009-761-M, the Secretary asserted that she conducted negotiations with Sherwin relating to both dockets, and that if the Commission were to set aside the settlement in Docket No. CENT 2009-761-M, it should do the same in Docket No. CENT 2009-760-M. We construe this statement by the Secretary as a request to reopen the proceedings in Docket No. CENT 2009-760-M.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993). Having reviewed the record in Docket No. CENT 2009-760-M, we remand this matter so that the Commission Administrative Law Judge assigned to determine whether the

operator also states that it filed a similar letter in Docket No. CENT 2009-760-M.

parties agreed to settle Docket No. CENT 2009-761-M may also consider whether the interests of justice require that Docket No. CENT 2009-760-M also be reopened to fully effectuate a settlement agreed upon by the parties, or to fully nullify a settlement approved by the Commission despite an absence of agreement by the parties.

The Commission has made clear that “[s]ettlement of contested issues is an integral part of dispute resolution under the Mine Act.” *Tarmann v. Int’l Salt Co.*, 12 FMSHRC 1, 2 (Jan. 1990) (quoting *Pontiki Coal Corp.*, 8 FMSHRC 668, 674 (May 1986)). In this respect, the Commission has observed that “the record must reflect and the Commission must be assured that a motion for settlement [approval], in fact, represents a genuine agreement between the parties, a true meeting of the minds as to its provisions.” *Tarmann*, 12 FMSHRC at 2 (quoting *Peabody Coal Co.*, 8 FMSHRC 1265, 1266 (Sept. 1986)); *see also Wake Stone Corp.*, 27 FMSHRC 289, 290 (Mar. 2005) (vacating decision approving settlement where it was “unclear whether the parties achieved a true meeting of the minds”).

On the record in these proceedings, Sherwin’s motion to set aside the settlement in Docket No. CENT 2009-761-M asserts that the settlement agreement filed by the Secretary does not reflect a true meeting of the minds of the parties, and that the judge’s order granting the Secretary’s motion to approve settlement may have been based on a proffered agreement that had not been ratified by both parties. *See, e.g., Sec’y of Labor on behalf of Pendley v. Highland Mining Co.*, 29 FMSHRC 164, 165-66 (Apr. 2007). The Secretary disputes this, but further suggests that if the settlement in Docket No. CENT 2009-761-M is set aside, the settlement in the other matter must also be set aside because the parties’ agreements in both matters are complementary.

Accordingly, in the interests of justice, we vacate the judge's May 27 and August 16, 2010, orders and remand these matters to him for further proceedings consistent with this opinion. *See RBS, Inc.*, 26 FMSHRC 751, 752 (Sept. 2004).



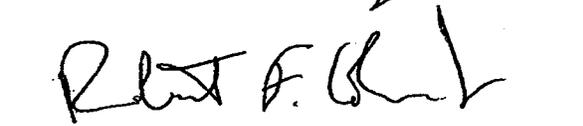
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

Distribution

Adele L. Abrams, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Ronald M. Mesa
Conference & Litigation Representative
U.S. Department of Labor, MSHA
1100 Commerce St., Rm. 4C50
Dallas, TX 75242-0499

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 15, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-1759
ADMINISTRATION (MSHA)	:	A.C. No. 46-09020-180693
	:	
v.	:	Docket No. WEVA 2009-1761
	:	A.C. No. 46-09020-183777
DOUBLE BONUS COAL COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 4, 2009, the Commission received motions seeking to reopen two penalty assessments issued to Double Bonus Coal Company (“Double Bonus”) that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-1759 and WEVA 2008-1761, both captioned *Double Bonus Coal Co.* and involving similar procedural issues. 29 C.F.R. § 2700.12.

§ 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On March 31, 2009, and April 28, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued two proposed penalty assessments to Double Bonus. Double Bonus asserts that it first learned of these penalty assessments when representative, James Bowman was reviewing data on MSHA’s data retrieval system. It claims that MSHA failed to properly serve the proposed assessments because MSHA sent the assessments by U.S. certified mail rather than by Federal Express.

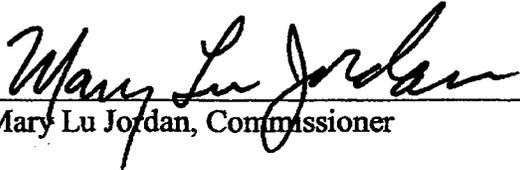
The Secretary opposes reopening and maintains that the proposed penalty assessments were properly delivered via U.S. certified mail to the operator’s legal address of record and were, in fact, received and signed for by the operator. She asserts that the operator in its reopening request in *Double Bonus Coal Co.*, 31 FMSHRC 358 (Mar. 2009), stated that it had difficulties in receiving deliveries at the address at Route 12/3 Pinnacle Creek Road. Because of those difficulties, the Secretary asserts that she used the legal ID address of record.

Double Bonus then filed an answer to the Secretary’s opposition, in which it acknowledged that it received the penalty assessments but claimed that it was expecting penalty assessments to be delivered by Federal Express as a result of a prior MSHA instruction and that delivery by U.S. Mail caused confusion among its personnel. It further claimed that the certified mail may have been overlooked as junk mail.

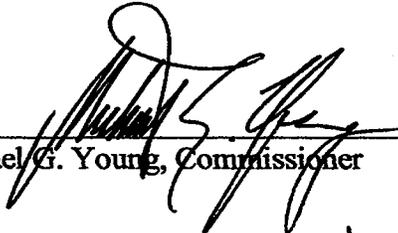
The Secretary filed a reply, contending that the operator’s claim was specious in light of the fact that it “undisputedly received the proposed penalty assessment.” S. Reply at 1.

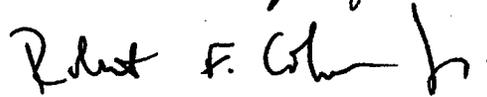
Having reviewed Double Bonus’ requests and the Secretary’s responses, we deny the motions with prejudice. The record reveals that Double Bonus unquestionably received and signed for the proposed assessments. We note that the Commission Procedural Rules expressly authorize the Secretary to utilize certified mail when notifying operators of proposed penalty assessments. 29 C.F.R. § 2700.25. Moreover, we are not persuaded by the operator’s proffered reasons for failing to timely respond to the penalty assessments, i.e., that the certified mail delivery caused confusion and that the operator may have treated its certified mail, the receipt of which was acknowledged by one of its employees, as casually as junk mail. We have held that an inadequate or unreliable system for delivering internal mail does not constitute inadvertence, mistake, or excusable neglect so as to justify reopening of an assessment that has become final under section 105(c) of the Mine Act. *Pinnacle Mining Co.*, 30 FMSHRC 1061 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066 (Dec. 2008).

Accordingly, we conclude that Double Bonus has failed to establish good cause for reopening the proposed penalty assessments and deny its motions with prejudice. *See Highland Mining Co.*, 31 FMSHRC 1313, 1314-15 (Nov. 2009) (denying motion to reopen with prejudice when the operator's security guard signed for the proposed penalty assessment and operator claimed to have never seen it again).


Mary Lu Jordan, Commissioner


Michael P. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

**James F. Bowman
Double Bonus Coal Co.
P.O. Box 99
Midway, WV 25878**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 24, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. CENT 2010-635-M
 : A.C. No. 41-02478-208485-02
 :
UNITED SALT CORPORATION :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

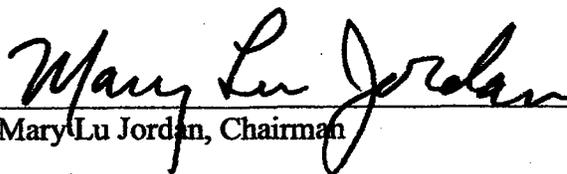
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 21, 2010, the Commission received from United Salt Corporation (“United Salt”) a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On May 7, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

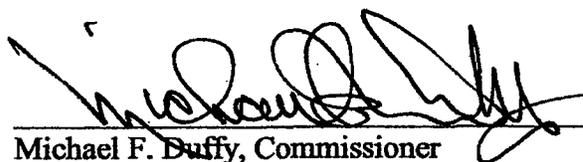
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

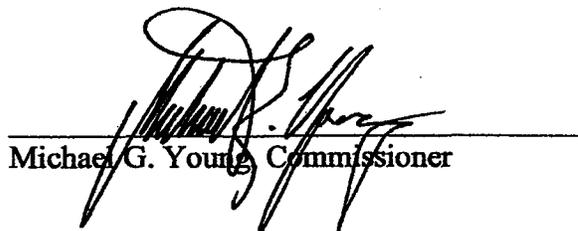
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

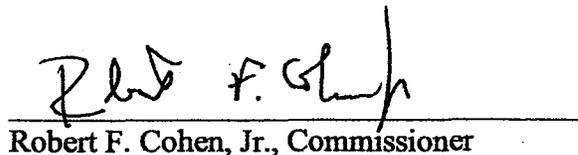
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

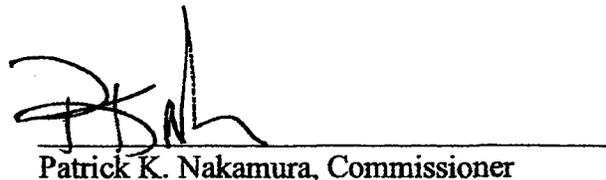
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

**Clif Mower
United Salt Corporation
14002 Warren Ranch Rd.
Hockey, TX 77447**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Melanie Garris, Acting Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

September 28, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2010-501-M
ADMINISTRATION (MSHA)	:	A.C. No. 20-01315-203114
	:	
v.	:	Docket No. LAKE 2010-618-M
	:	A.C. No. 20-02421-206022
BILL SMITH SAND AND GRAVEL	:	
	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).¹ On March 9, 2010, and April 1, 2010, the Commission received from Bill Smith Sand & Gravel requests 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). On March 25, 2010, and April 16, 2010, the Commission received responses from the Secretary of Labor stating that she does not oppose the requests to reopen the assessments.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

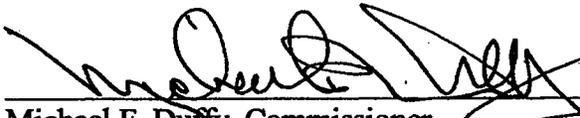
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2010-501-M and LAKE 2010-618-M, both captioned *Bill Smith Sand & Gravel* and both involving similar procedural issues. 29 C.F.R. § 2700.12.

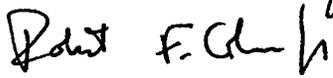
Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of these cases, the operator’s requests, and the Secretary’s responses, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Adele L. Abrams, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris, Acting Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 28, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

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Docket No. WEST 2010-989-M
A.C. No. 05-04434-204801

v.

MAYBELL ENTERPRISES, INC.

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 9, 2010, the Commission received from Maybell Enterprises, Inc., a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On May 3, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

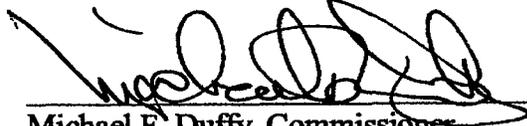
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

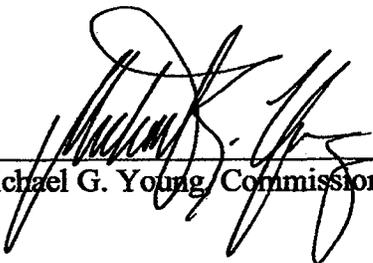
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

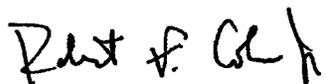
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

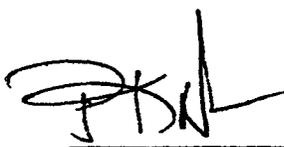
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

**Bret Steele, President
Maybell Enterprises, Inc.
P.O. Box 115
Maybell, CO 81640**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Melanie Garris, Acting Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

September 28, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEVA 2007-448-R
: Order No. 7264179; 04/26/2007
v. :
: :
DYNAMIC ENERGY, INC. :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DECISION

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”), Administrative Law Judge Jacqueline R. Bulluck determined that Dynamic Energy, Inc. (“Dynamic”) violated 30 C.F.R. § 77.1607(b).¹ *Dynamic Energy, Inc.*, 31 FMSHRC 670, 684 (June 2009) (ALJ). Dynamic filed a petition for discretionary review challenging the finding of violation, which the Commission granted. For the reasons that follow, we affirm the judge’s decision.

I.

Factual and Procedural Background

Dynamic owns and operates the Coal Mountain No. 1 Surface Mine (“Coal Mountain”) located in Wyoming County, West Virginia. 31 FMSHRC at 672. As part of the operation, Coal Mountain operates a load out facility which receives truck shipments of coal from several mines in the area operated by Dynamic and affiliated companies. The coal trucks travel to the load out stockpile area on a dirt and gravel haul road, which has a steep grade of 17% to 19% with a sharp

¹ Section 77.1607(b) states that “Mobile equipment operators shall have full control of the equipment while it is in motion.”

switchback curve near the midpoint. *Id.* at 672 n.4, Tr. 109-11.²

On April 25, 2007, Department of Labor's Mine Safety and Health Administration ("MSHA") Inspector Bruce Billups was conducting an inspection of Coal Mountain. 31 FMSHRC at 672. He observed a grader sitting close to a coal haulage truck near the bottom of the mine's main haulage road. *Id.* Billups approached the grader operator and asked him what he was doing. *Id.* The operator told Billups that when haulage trucks lost traction and were unable to ascend to the top of the road, he moved the grader behind the trucks and pushed until the trucks regained enough traction to move on their own. *Id.* (citing Tr. 16). The Inspector informed the grader operator that such pushing was a "bad practice" and that he would discuss the practice with the mine foreman. *Id.* (citing Tr. 16).

Later that day, Inspector Billups met with Foreman Kirby Bragg and informed Bragg that pushing the trucks up the hill with a grader was a violation of section 77.1607(b) and that if he witnessed the practice he would cite the mine. *Id.* at 687. Foreman Bragg and the inspector "openly and honestly disagreed" on the application of the standard. *Id.* at 687-88.

Inspector Billups returned the next day to resume his inspection. *Id.* at 672. As he traveled in his car to the area he intended to inspect, he overheard a haulage truck driver on the mine's Citizen's Band ("CB") radio state that his truck was stuck and needed a push. *Id.* (citing Tr. 20). Billups headed toward the haulage road where he saw the 18-wheel truck. Tr. 20. It had lost traction and could only spin its wheels. *Id.* at 672 (citing Tr. 20). As Billups watched, the grader started to push the truck up the hill. *Id.* (citing Tr. 21). The inspector contacted the foreman to indicate that he was going to issue a withdrawal order. *Id.* (citing Tr. 26, 62-63).

Billups issued Order No. 7264179, which states in relevant part:

The driver of the loaded Kenworth tractor-trailer truck . . . being used at the mine to haul coal over a loose dirt and gravel roadway did not have full control of the truck while it was in motion, in that he had to be pushed upgrade by a 14H Caterpillar motor grader. It is reasonable to think that if this continues the truck driver could be injured The mine foreman of the operator was warned of this violation in a pre-inspection conference on 04-25-2007. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. R-5; 31 FMSHRC at 673. Although the inspector designated the violation as significant and

² MSHA mechanical engineer Ron Medina explained that a 17 percent grade means that for every 100 feet of road, there is an increase in elevation of 17 feet, which is considered fairly steep. Tr. 111.

substantial (“S&S”), the Secretary removed the S&S designation before a hearing was held.³ S. Br. at 2. Dynamic abated the order by agreeing to refrain from assisting coal trucks with the Caterpillar 14H grader. Dynamic began operating smaller ten-wheel trucks on the haulage road which did not require pushing assistance from graders. Tr. 262-63.

Before a penalty was issued, Dynamic filed a notice of contest challenging the order. A hearing was held before Judge Bulluck. The judge found that section 77.1607(b) requires that the operator have “full control of the equipment while it is in motion.” 31 FMSHRC at 684. She relied on the definition of “full” to mean “being at or of the greatest or highest degree” and “control” as having the “power . . . to guide or manage.” *Id.* (citing *Webster’s Third New International Dictionary* (2002) at 919; 496). The judge determined that accordingly “full control” means having “‘complete’ power to guide or manage.” 31 FMSHRC at 684. The judge reasoned that during an assist, the tractor-trailer driver and the grader operator “share control of the truck,” and the truck driver does not possess full control over the truck. *Id.* She concluded that the assist procedure violated section 77.1607(b). *Id.*

The judge determined that this was a moderately serious violation which could lead to an accident that would seriously injure the truck driver but that the chance of injury was remote. 31 FMSHRC at 685. In so doing, the judge credited the testimony of Dynamic’s expert that it was very unlikely that the truck could jackknife and found that the inspector’s concern that a multitude of hazards and injuries could result from the practice was unsubstantiated. *Id.* at 686. The judge also concluded that the violation was a result of moderate negligence and not a result of unwarrantable failure. She modified the Mine Act section 104(d)(2) order to a citation issued pursuant to section 104(a), 30 U.S.C. § 814(a). *Id.* at 688.⁴

II.

Dispositon

Dynamic argues that the judge’s finding of violation is not supported by substantial evidence because the evidence showed that the tractor-trailer truck operator was in “full control” of the truck. PDR at 4; D. Br. at 6; D. Reply Br. at 4. It asserts that the judge ignored the clear weight of the testimony and instead relied on unsubstantiated claims of the Secretary’s witnesses. PDR at 6; D. Br. at 9. Dynamic also contends that the judge’s finding of violation contradicts the credibility findings made in the gravity section of the decision. PDR at 6; D. Br. at 9. It further asserts that the judge’s definition of “full control” is erroneous as it is impractical and fails to

³ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

⁴ Neither the gravity nor the unwarrantable failure issues are before the Commission because the Secretary did not appeal those rulings. S. Br. at 5, n.5.

harmonize with the objectives of the Mine Act. D. Br. at 13; D. Reply Br. at 1. Dynamic additionally maintains that it lacked notice of MSHA's interpretation of the regulation at issue. D. Br. 17-18.

The Secretary responds that the judge's finding of violation is supported by substantial evidence and should be affirmed. S. Br. at 1. She asserts that the truck driver was not in "full control" of the truck while it was being pushed uphill by the grader. *Id.* at 6. The Secretary argues that the plain meaning of having "full control" over a truck is having complete power to guide or manage the truck. *Id.* at 6. She submits that the truck driver did not have "full control" over the truck's acceleration and deceleration during the assist. *Id.* at 9, 10. The Secretary contends that because there is no ambiguity in the term "full control," Dynamic's argument that it did not have reasonable notice of the Secretary's interpretation is misplaced as the issue of notice does not arise where the language of the standard is plain. *Id.* at 6-7. In any event, she asserts that, if there is any ambiguity in the standard, the Secretary's interpretation is reasonable and entitled to deference. *Id.* at 6 n.6.

A. Plain Meaning of Section 77.1607(b)

The Commission has not previously had occasion to construe section 77.1607(b).⁵ Accordingly, the "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("Deference . . . is not in order if the rule's meaning is clear on its face." (quoting

⁵ A number of administrative law judges have interpreted the standard. *Island Creek Coal Co.*, 3 FMSHRC 1265, 1271-73 (May 1981) (ALJ) (determining that trucks that were slipping and sliding were not in full control and rejecting the argument that an accident or near-miss has to occur before a violation arises); *Highwire, Inc.*, 10 FMSHRC 22, 66 (Jan. 1988) (ALJ) (noting that lacking full control does not mean there must be an accident); *Vandalia Res., Inc.*, 25 FMSHRC 390, 397 (July 2003) (ALJ) (finding a violation when two trucks slipped on ice); *Garrett Const. Co.*, 4 FMSHRC 2202, 2202 (Dec. 1982) (ALJ) (finding no violation because of insufficient evidence that the operators lacked full control of their vehicles or went anywhere other than where the operators wanted them to go, even though a collision occurred). Administrative law judge decisions, although instructive, are not binding precedent on the Commission. 29 C.F.R. § 2700.69(d).

Pfizer, Inc. v. Heckler, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

Section 77.1607(b) requires a mobile operator to have “full control [of the equipment] while it is in motion.” “Full” is defined as “being at or of the greatest or highest degree” and the “greatest or highest potential.” *Webster’s Third New International Dictionary* 919 (1993). “Control” is defined as having “the power . . . to guide or manage.” *Id.* at 496. This is the definition upon which the judge based her ruling. 31 FMSHRC at 684. Dynamic relies on the definitions of “full” as “possessing or containing as much or as many as possible or normal,” and “control” as “to have power over.” D. Reply Br. at 2. Based on the terms of the standard, the judge’s construction of requiring the highest degree of control to guide or manage a vehicle appears well supported by the plain language. Hence, we conclude that the judge’s determination that full control means having “complete power to guide or manage” accords with the plain meaning of the standard. 31 FMSHRC at 684.

Dynamic argues that the judge’s holding requiring absolute control is not practical in the real world environment. D. Br. at 13-16. It maintains instead that the standard applies only to vehicles that are out of control or unable to go where the drivers intended. *Id.* It asserts that the truck went where the driver intended and thus was not out of control. *Id.* at 16.

However, Dynamic’s reading that the standard only applies to vehicles dangerously out of control does not comport with the text of the standard. As the Inspector testified, a violation of the standard does not require vehicles to be out of control because “the standard says you [need] full control.” Tr. 97-98.

Accordingly, we affirm the judge’s plain language application of section 77.1607(b). Because the language is plain, it is unnecessary to evaluate the question of whether the standard provides fair notice of its requirements. *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997). In *Bluestone*, the Commission held that where it had determined that the language of a standard is clear and unambiguous, that standard provides operators with fair and adequate notice.⁶

B. Whether Substantial Evidence Supports the Judge’s Determination of Violation

The next question is whether substantial evidence supports the judge’s determination that tractor-trailer truck drivers and grader operators lack full control over their vehicles during an assist. When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305

⁶ In any event, Dynamic had received actual notice that MSHA considered its pushing practice to violate section 77.1607(b). 31 FMSHRC at 672.

U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Under the substantial evidence standard, the “possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Sec’y on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996) (refusing to disturb decision supported by substantial evidence); *Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (providing that Commission is bound to affirm ALJ factual determinations supported by substantial evidence). Additionally, substantial evidence has been found to be more than a scintilla, but less than a preponderance. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolidated Edison*, 305 U.S. at 229 (substantial evidence standard met when the record was not “wholly barren of evidence” to sustain the judge’s finding).

The judge found that when an assist is in progress, the tractor-trailer driver does not have complete power to manage the truck. 31 FMSHRC at 684. She determined that during an assist the tractor-trailer driver and the grader operator share control of the truck, in that both can supply power that causes it to accelerate to the point where its driver can resume full management of the vehicle’s acceleration. *Id.* The judge also held that the facts established that “the tractor-trailer driver and the grader operator share control of the truck’s deceleration.” *Id.*

These findings are supported by the record. The record revealed that when the tractor-trailer reached a particular point on the hill it lacked control over its acceleration. *See* Tr. 20 (Inspector Billups heard over the CB radio that a truck was stuck on the hill and truck driver could not make it on his own and needed a push). *See also* Tr. 32-33 (inspector testified that the tractor-trailer trucks spin out when going uphill and at a certain point, all the wheels’ front and rear axles begin to spin, lose traction, and cannot go further). Similarly, the inspector, with 25 years of experience in the mining industry, testified that the truck driver does not have full control of the truck because he “cedes some of the power to the grader operator.” Tr. 29-30. MSHA’s expert, mechanical engineer Ron Medina, also testified: “What I concluded about the practice was that the driver of the truck does not have full control of the truck because he is giving some of the control of the truck to the grader so it affects his braking, propulsion and his ability to slow the truck down.” Tr. 136, *see also* Tr. 113-14. He also “reached the conclusion that during the practice of pushing the fully loaded coal truck up the hill using a grader, that the haul truck driver does not have full control of the truck. He cedes some of the control to the grader operator.” Tr. 106-07. Dynamic witness Derrick Steele, who was truck driver, would not answer the question whether the truck has lost ability to maneuver when it is starting to spin. Tr. 189-90. Additionally, Dynamic’s expert stated that in order for the truck to regain directional control, the truck needs a push. Tr. 345.

In reaching her holding, the judge explicitly made two credibility determinations. She credited the testimony of truck driver Steele that during an assist, regaining full control of the

truck's ability to accelerate requires the truck driver to keep his foot on the throttle and the grader operator to keep pushing from behind. 31 FMSHRC at 684 n. 21 (citing Tr. 207-11). She further credited the "common sense opinion of the Secretary's expert, Medina, that when the truck driver takes his foot off of the throttle, the force from the grader continues to push the truck forward and consequently, it will 'take a longer time for the [tractor-trailer driver] to slow down or stop.'" *Id.* at n. 22 (citing Tr. 112).

Dynamic takes issue with the judge's conclusions based on these credibility determinations. However, credibility determinations reside in the province of the administrative law judge's discretion, are subject to review only for abuse of that discretion, and cannot be overturned lightly. *See Buck Creek Coal Co.*, 52 F.3d 133, 135 (7th Cir. 1995) (holding that judge did not abuse discretion in crediting inspector with many years of experience whose testimony was common sense); *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1540-41 (Sept. 1992) (providing that "the Commission has often stated 'a judge's credibility resolutions cannot be overturned lightly.'" (citation omitted).

Dynamic also faults the judge for crediting the testimony of the Secretary's witnesses in the finding of violation but not in the gravity section of the decision. However, it is a general rule that a judge need not credit every aspect of one witness' testimony. *See Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 813 (Apr. 1981) (providing that judge may accept some but not all of a witness' testimony). We also are not persuaded to take the extraordinary step of disturbing the judge's credibility resolution based on Dynamic's assertion that the judge's findings in the gravity section of her decision are inconsistent with the finding of violation. D. Br. at 10-11. Dynamic contends that the judge's crediting of its expert that the grader simply did not have enough weight to overcome the truck's weight shows that the truck was in control. 31 FMSHRC at 685 (citing Tr. 318-19). Nonetheless, this finding does not mean that the truck was fully in control during the assist. Moreover, the judge went on to point out that given the disparity in weight, if the tractor-trailer lost its brakes and rolled down the steep hill, it would pose a significant risk not only to the truck driver but to the grader operator as well. *Id.* at 685-86. Similarly, Dynamic's attempt to discount the credibility determinations based on the truck driver Steele's testimony is also unpersuasive. Steele explains that in the assist, the grader pushes the truck until it can navigate on its own. Tr. 207-15. This testimony is consistent with the judge's finding that the truck driver lacks full control during an assist.

Dynamic presented some evidence that could be viewed as fairly detracting from the judge's opinion. For example, Dynamic expert Jose Calonge testified that trucks need assistance because there is not enough traction for the wheels to get going and there is a difference between loss of traction and loss of control. Tr. 310-11. According to Calonge, loss of traction means that the wheels are not biting into the surface whereas loss of control means that you have no control over your vehicle. *Id.* Truck owner Bobby Justice testified that the "the truck is definitely in full control," "you got your brakes, you got your steering . . . all you need is a little assistance." Tr. 175. Similarly, Dynamic presented testimony that the pushing helped the truck stay in control and prevented slipping. Tr. 244-46.

On balance, however, the weight of the evidence clearly supports the judge's conclusion that the truck driver did not have complete power to ascend the haulage road without the assistance of the grader and thus was not in full control. Indeed, the testimony of Dynamic's witnesses indicated that the truck driver could not fully ascend the hill without assistance by the grader. Tr. 310-11, 345. Similarly, the record revealed that due to the pushing from behind by the grader, the truck driver did not have complete control over the time to decelerate or stop the truck. Tr. 112-13. Significantly, we emphasize that the judge's holdings are backed by well reasoned credibility resolutions, which we do not overturn lightly. *Farmer*, 14 FMSHRC at 1540-41.

Finally, Dynamic argues that there is no violation because the pushing is customary in the industry and is a safe and calculated process. D. Br. at 16-17. We are mindful that the record showed that the push was normally performed at low speeds, which decreased the likelihood of injury. Tr. 158-59. Nonetheless, the pushing contravenes the plain terms of the standard requiring full control and therefore is a violation. Additionally, as the judge indicated, an operator may obtain a variance or modification of a mandatory safety standard at its mine upon showing that "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners" 31 FMSHRC at 688 n.26 (citing 30 U.S.C. § 811(c)). Moreover, we note that Dynamic's expert testified that pushing is not the only option to propel the trucks up the hill – the operator also can reduce the grade, pave the road, or use a different set of tires. Tr. 358-59.⁷

In sum, substantial evidence contained in the record supports the conclusion that the truck driver ceded some of his acceleration and deceleration power during the assist and that he therefore was not in full control of his vehicle. Accordingly, we affirm the judge's finding of violation.⁸

⁷ The judge concluded that because the truck driver's loss of full control over the acceleration and deceleration of the truck establishes the violation, it was unnecessary to further examine the alleged loss of control of the truck's braking and steering capacities to resolve the issue. 31 FMSHRC at 684 n.23. Similarly, the Commission need not address Dynamic's arguments with regard to those other capacities of the truck.

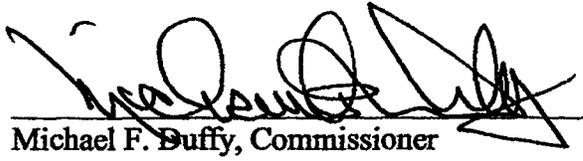
⁸ Because this is a contest proceeding, the penalty is not before the Commission. The associated penalty assessment proceeding is Docket No. WEVA 2008-1356 before Judge Bulluck.

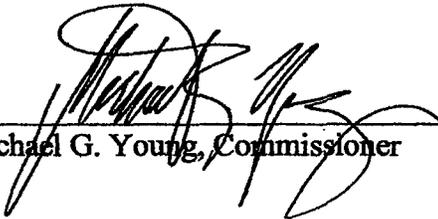
III.

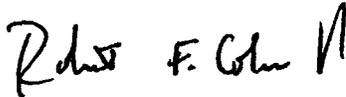
Conclusion

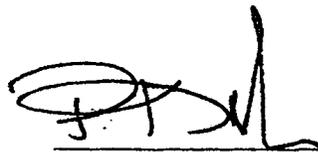
For the foregoing reasons, we affirm the judge's decision.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

**Carol Ann Marunich, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Francine Serafin, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Edward Waldman, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Administrative Law Judge Jacqueline R. Bulluck
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

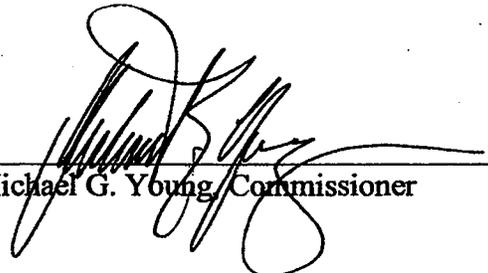
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



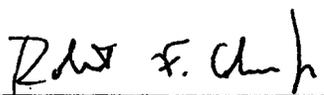
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

Distribution:

Dana M. Svendsen, Esq.
Jackson Kelly PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris, Acting Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 6, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

JOSHUA COAL COMPANY

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Docket No. CENT 2009-602

A.C. No. 34-01062-185628

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On July 15, 2009, the Commission received from Joshua Coal Company (“Joshua”) a letter from the owner seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On May 14, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000185628 to Joshua for five violations totaling \$500. Joshua states that on June 15, 2009, it sent a letter requesting a hearing to MSHA's District Office in Denver, Colorado. It then received a letter from MSHA, dated June 23, 2009, informing it that a safety and health conference would be scheduled once penalties had been assessed and contested. Joshua sent another letter, dated July 14, 2009, to the same MSHA District Office stating its opposition to the citations and noting its intent to contest the penalties. In its letter to the Commission, Joshua described its attempts to contest the penalties, and states that it does not understand when the 30-day period to file its contest began and requests an opportunity for a hearing.

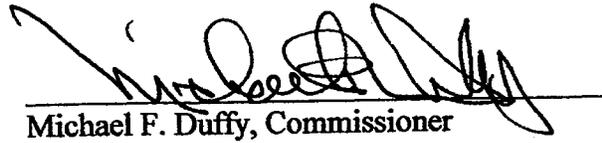
The Secretary indicates that she does not oppose Joshua's request to reopen. She explains that the MSHA District Office was not aware that the proposed penalty assessment had been issued when it received the operator's letter. She urges the operator to take all steps necessary to ensure that future penalty assessments are contested in a timely manner and mailed to the address for the MSHA Civil Penalty Compliance Office in Arlington, Virginia, included in the notice accompanying all proposed assessments.

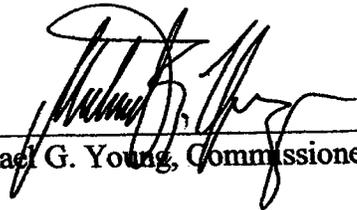
In this case, Joshua had 30 days from its receipt of the Proposed Assessment dated May 14, 2009, within which to file a contest of the assessment. Its June 15, 2009, letter would have been timely, but since it was sent to the wrong MSHA office, the Secretary treated it as not having been filed.¹

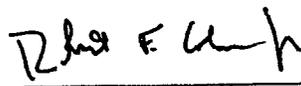
¹ Commissioner Cohen would find that Joshua's contest of the proposed assessment was timely filed.

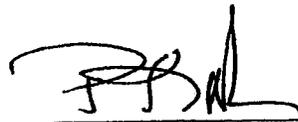
Having reviewed Joshua's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

**Alan Churchill
Joshua Coal Co.
205 Perryman Rd.
Henryetta, OK 74437**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 6, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

MARFORK COAL COMPANY, INC.

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Docket No. WEVA 2010-196
A.C. No. 46-08315-190383

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 10, 2009, the Commission received from Marfork Coal Company, Inc. (“Marfork”) a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

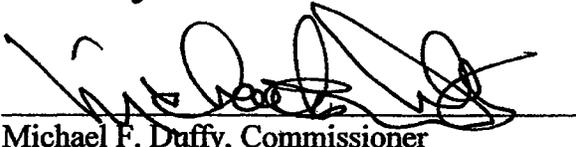
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

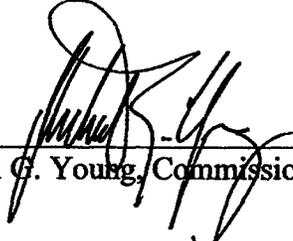
On July 7, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000190383 to Marfork, proposing penalties for 20 violations totaling \$23,788. Marfork contends that it received the proposed assessment on July 14, 2009 and filed its contest form on August 14, 2009, one day late. Marfork claims it did not realize its lateness until it received MSHA's delinquency notice around September 30, 2009.

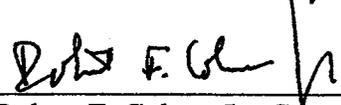
The Secretary of Labor, who does not oppose Marfork's request, states that shortly after receiving the late filing on August 19, 2009, she notified the operator that its contest was untimely and that the assessment had become a final order. The Secretary also contends that "this case has been paid by checks dated August 20, 2009 and November 5, 2009." Marfork did not respond to the Secretary's statement that the penalties in this case have been paid.

Having reviewed Marfork's motion and the Secretary's response, we find the request to reopen to be moot. The operator has paid the penalties in full. Accordingly, this case is dismissed. See *Riverton Investment Corp.*, 31 FMSHRC 1067 (Oct. 2009); *Performance Coal Co.*, 32 FMSHRC 466 (June 2010).


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

**Carol Ann Marunich, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 13, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

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Docket No. WEVA 2007-335

v.

EASTERN ASSOCIATED COAL CORP.

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, Commissioners¹

DECISION

BY: Jordan, Chairman; Young and Cohen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). Eastern Associated Coal Corp. (“Eastern”) was charged by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) with violating the roof control requirements of 30 C.F.R. § 75.202(a).² After a hearing, Judge Avram Weisberger affirmed the violation and its designation as significant and substantial (“S&S”), but concluded that the violation was not attributable to the operator’s unwarrantable failure to comply with the regulation. 31 FMSHRC 174 (Jan. 2009) (ALJ).³

¹ Commissioner Patrick K. Nakamura assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Nakamura has elected not to participate in this matter.

² Section 75.202(a) provides that “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” 30 C.F.R. § 75.202(a).

³ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” The unwarrantable failure terminology is taken from the same section, and establishes more severe

The Commission subsequently granted the Secretary of Labor's petition for discretionary review challenging the judge's determination that the section 75.202(a) violation was not caused by an unwarrantable failure. For the foregoing reasons, we vacate the judge's decision, and remand the case to him so that he can further consider two of the relevant unwarrantable failure factors and whether, in light of all of the relevant factors, Eastern's conduct in violating section 75.202(a) was aggravated under the circumstances.

I.

Factual and Procedural Background

The violation occurred at Eastern's Federal No. 2 Mine, an underground coal mine in West Virginia, where Eastern uses an entry mined in the 1970s to store mine cars. 31 FMSHRC at 174-75; Tr. 68, 132, 150; E. Ex. 1 (main mine map). The entry is approximately 7,000 feet long and 16 feet wide. 31 FMSHRC at 175; Tr. 60, 145, 163-64. The stored cars are ones the mine is not currently using, so the track is referred to as the "7 Right empty track." Tr. 7.

The track consists of two rails running down the center of the entry, spaced 42 inches apart. 31 FMSHRC at 175; Tr. 27-28, 30. A trolley wire that supplies power to vehicles traveling on the rails runs overhead on the side of the entry between the rails and left rib (the "wire side"). 31 FMSHRC at 175; Tr. 26; Gov't Ex. 3-4, 5-8. The other side of the entry, between the rails and the right rib, is used as a walkway for foot traffic (the "walkway side"). 31 FMSHRC at 175; Tr. 28; Gov't Ex. 3-4, 5-8.

Roof control at the time the entry was mined consisted of the installation, every five feet, of three roof bolts, spaced across the center of the entry (and thus over the area of the floor where there are now rails), with straps between the bolts. 31 FMSHRC at 175; Tr. 147-48. The bolts were installed so that the outside bolts were no farther than six feet from the nearest rib, and that remains the maximum allowable distance under Eastern's roof control plan for that part of the mine. Tr. 156. Since the time the entry was mined, supplemental roof support has been added, including additional bolts, straps installed between bolts, and posts and cribs. 31 FMSHRC at 175; Tr. 146, 147-50, 184.

In July 2006, Eastern was mining the Eight Left longwall panel. Tr. 153-54; E. Ex. 1. Various miners would work or travel in the 7 Right empty track entry, such as motormen and the two maintenance men assigned to the area. 31 FMSHRC at 180 n.10; Tr. 115, 117, 146. Roof maintenance would be performed by miners using bolting machines on the tracks when the tracks were unoccupied. Tr. 116, 146, 149. Examiners would travel the entry daily, and, depending on the work to be done, repairmen and pumpers would need to travel and work on both the walkway and wire sides of the entry. 31 FMSHRC at 180; Tr. 146, 166, 171.

sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

On July 17, 2006, Inspector Jason Rinehart, as part of MSHA's quarterly inspection of the mine, walked all the way through the 7 Right empty track. 31 FMSHRC at 174; Tr. 18-23; E. Ex. 1. He was accompanied by both management representative Dan Kurry, the mine's safety supervisor, as well as a miners' representative, Eastern roof bolter Kevin Luketic. 31 FMSHRC at 177, 180 n.9; Tr. 23, 148. Empty cars did not occupy the track on the day of the inspection, as they had been deployed elsewhere. Tr. 78, 144.

As a result of his inspection, Rinehart issued Order No. 6602108 under section 104(d)(2) of the Mine Act, alleging an S&S violation of section 75.202(a) attributable to Eastern's unwarrantable failure to comply with that roof control standard. 31 FMSHRC at 174; Gov't Ex. 1, at 1-2. According to Rinehart, the roof and/or ribs had deteriorated at seven locations in the entry, resulting in the roof not being adequately supported at those locations. 31 FMSHRC at 175; Gov't Ex. 1. The roof deficiencies were enumerated in the order,⁴ and six of the seven were further explained later by Rinehart in his testimony at the hearing later held on this matter. Tr. 27-64; 76-92; 101-04.

To abate the order, Eastern installed a total of 66 bolts and three steel jacks. Tr. 69; Gov't Ex. 1, at 3. The Secretary subsequently proposed a civil penalty assessment of \$4,100 for the violation.

Two types of roof control deficiencies were cited by Rinehart. The most common was sloughage of material off the ribs, which resulted in an expansion of the overall width of the entry. Such expansion increased the distance between the rib and the nearest roof bolts. Tr. 30, 32-33, 58, 64, 77, 164. The increase was approximately a foot in each instance, thus increasing the distance between the rib and the bolts from the original six feet to seven feet. 31 FMSHRC at 177, 180.

The other deficiency was "potting out" of the roof around roof bolts. This occurs when so much roof material falls away from around a bolt that the bearing plate between the bolt and the roof becomes loose. Tr. 38-39, 41-42. Bolts that are loose and bearing plates that are not up against the roof do not provide the intended roof support. 31 FMSHRC at 179; Tr. 38-39, 47-50; Gov't Ex. 4A.

⁴ In the order, locations in the 7 Right empty track were for the most part indicated by "car marker" numbers. Car markers were spaced 21 feet apart and the numbers were in descending order in the direction of Rinehart's inspection route in the entry. 31 FMSHRC at 176 n.4; Tr. 78-79. The only exception is with respect to the first roof deficiency, which was noted to be at the "5-Left rectifier." Tr. 27; Gov't Ex. 1, at 1, & 3. A rectifier is used in mines to convert alternating current to direct current. *Dictionary of Mining, Minerals, and Related Terms* 448 (2d ed. 1997). The reference to the area was outdated, as the area no longer included a rectifier. Tr. 155-56.

At the hearing, Inspector Rinehart described the dangers of the roof deficiencies, both with respect to any roof weakened because a wider area was unsupported due to rib sloughage as well as any roof weakened because potting out had lessened the support provided by the roof bolts. According to Rinehart, both conditions increased the likelihood that material would fall from the roof, putting miners immediately below at risk. 31 FMSHRC at 175-76; Tr. 30-31, 51.

Rinehart further alleged that falling roof material could pull out the bolts in the roof, increasing the area of roof that was subject to roof falls. Tr. 31, 82. Inadequately supported roof near intersections was particularly susceptible to this problem, according to Rinehart. 31 FMSHRC at 176; Tr. 51-52.

The judge affirmed the order alleging a violation of section 75.202(a) on the ground that a preponderance of the evidence established that a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided additional roof support in each of the areas in question. 31 FMSHRC at 179-81. The judge further found that the violation was S&S. *Id.* at 181-83.

With regard to whether the violation of section 75.202(a) was attributable to Eastern's unwarrantable failure, the judge found that the condition of the roof was obvious and, based on his S&S finding, posed a high degree of danger to miners. *Id.* at 184, 185. He also concluded that the conditions had existed for more than a few days, though there was insufficient evidence regarding their existence "beyond that limited time period." *Id.* The judge further found that the area affected by the cited conditions was not extensive in comparison with the total roof in the entry, and that Eastern was neither aware of the conditions nor had been put on notice that greater compliance efforts on its part were required. *Id.* at 185. As a result, the judge held that it had not been shown that the violation was the result of Eastern's unwarrantable failure, and assessed a penalty of \$3,000. *Id.* at 186.

II.

Disposition

The Secretary, who adopted her petition for discretionary review as her opening brief, urges the Commission to reverse the judge on the question of whether the violation was attributable to Eastern's unwarrantable failure and to remand the case for a recalculation of the penalty. PDR at 7, 13-14. The Secretary argues that reversal is appropriate because the judge's factual findings were flawed with respect to the extent of the violative conditions, Eastern's knowledge of the conditions, and the operator's knowledge that greater compliance efforts were necessary on its part. *Id.* at 7-11; S. Reply Br. at 1-5. The Secretary also maintains that the existence of the roof conditions for more than a few days weighs in favor of finding those conditions unwarrantable. *Id.* at 12-13.

Eastern responds that the judge's conclusion that the violation was not attributable to unwarrantable failure is amply supported by substantial evidence, and that all of the Secretary's contentions would require the Commission to impermissibly reweigh evidence. E. Br. at 2, 10, 13-24. Eastern further argues that the judge's findings that the conditions were obvious and posed a high degree of danger are not supported by substantial evidence. *Id.* at 25-30.

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. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. A judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

Here, the judge addressed all of the relevant factors, and the Secretary does not take issue with the relative weights he placed on those factors in concluding that the violation was not unwarrantable. Rather, the Secretary challenges the judge's conclusions as to four of the factors, arguing that the record evidence does not support the judge's conclusions.⁵ In turn, while

⁵ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh*

defending those findings, Eastern takes issue with findings the judge made as to two factors that he concluded were aggravating in this instance. Consequently, we address these six factors.⁶

A. The Extent of the Violative Conditions

The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1351-52. Below, the judge found the violation not to be extensive, based on his calculation that the areas of the roof described in the order as being inadequately supported because of the rib sloughage or potting out were not significant in comparison to the total of approximately 112,000 square feet of roof in the 7 Right empty track. 31 FMSHRC at 183-84.

On review, the Secretary argues that the judge erred in calculating the actual area of roof that was inadequately supported. With respect to the instances of rib sloughage, the Secretary maintains that the judge should have calculated the area of inadequately supported roof to include not just the immediate area of additional roof resulting from the rib sloughage, but rather the entire width of the entry. This is because, in finding a violation and concluding that it was S&S, the judge had credited Rinehart's testimony that the increases in width in the entry due to such sloughage weakened the roof support from rib to rib in those locations. PDR at 8-9 (citing 31 FMSHRC at 179-80). The Secretary also takes issue with the judge's calculation of the area of roof affected by the potting out around the roof bolts, arguing that the judge took into account only two of the three such areas described in the order. *Id.* at 9-10. According to the Secretary, altogether the judge was off by nearly a factor of seven in his calculation of the total area of roof that should have been considered inadequately supported in this instance. *Id.* at 10.

Eastern responds that calculating the extent of the violation using the entire width of the entry would convert the factor into one directed at the degree of hazard, when the factor is actually directed at the obviousness of a violation. E. Br. at 15-16. Eastern argues that even using the Secretary's method of calculation, the total area that was affected was still quite small compared to the total area of roof in the entry, and that the number of bolts compromised or subject to compromise by the potting out, as well as the number of additional bolts installed to abate the order, are relatively few in comparison to the 4,200 bolts that were initially installed in the entry. *Id.* at 17-19.

In her reply brief, the Secretary objects to Eastern's characterization of the purpose of the extensiveness criteria in the unwarrantable failure analysis. S. Reply Br. at 4. According to the

Coal Co., 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁶ With regard to the seventh factor the judge addressed, Eastern's efforts to abate the violative conditions, the Secretary did not argue below that those efforts were deficient. 31 FMSHRC at 185. Accordingly, the judge did not consider it an aggravating factor. *Id.*

Secretary, the purpose of the criteria is to take into account the scope or magnitude of a violation, and other factors already account for a violation's obviousness and danger. *Id.*

We agree with the Secretary that the purpose of taking the extensiveness of a violation into account under the unwarrantability analysis is not to give additional consideration to the factors of danger or obviousness, but rather to factor in the scope or magnitude of a violation. *See Peabody*, 14 FMSHRC at 1261 (holding that five accumulations of loose coal and coal dust were extensive); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988) (listing different roof control deficiencies where operator was charged with an unwarrantable violation of predecessor to section 75.202). Other unwarrantable failure factors already take the danger posed by a violation into account, and whether the violation was obvious.

We also agree with the Secretary that the judge's analysis contains errors. For instance, the judge acknowledged that there were three areas of roof cited as having potted out, but he only included in his calculation the square footage of two of them. *See* 31 FMSHRC at 183.

More fundamentally, however, we reject the judge's analysis that the question of the extensiveness of a roof control violation should be addressed by simply measuring the area of inadequately supported roof and comparing it to the relevant area examined by the inspector. Here the judge used the size of the entire entry as a basis for determining extensiveness. While the entry was dedicated to the storage of empty cars, that consideration does not mandate that the entire entry should thus serve as the area of comparison for determining extensiveness. The nature of mine roof is such that roof over a mile away that is in good condition does not lessen the degree of violation posed by roof needing repair that is immediately overhead.

As explained in the preamble to MSHA's roof control regulations, roof control in mines is quite idiosyncratic. *See* 53 Fed. Reg. 2354 (Jan. 27, 1988) ("Prevention or control of roof falls continues to be a difficult task because of the variety of conditions encountered in coal mines that can affect the stability of various types of strata."). That there are a myriad number of different types of mine roofs is why, under 30 C.F.R. § 75.220, each mine is required to submit, have approved by MSHA, and follow a roof control plan tailored to that mine. *See* 53 Fed. Reg. at 2369 ("The roof control plan concept, which has been used effectively throughout the coal mining industry, grew out of a need for flexibility to address the unique conditions of each mine."). Thus, the question of whether a roof control violation can be considered "extensive" in a particular mine should not be resolved simply by comparing the area of roof immediately affected by the violative condition with the area of the relevant entries or section. *See IO*, 31 FMSHRC at 1352 (more than 15 unsupported or inadequately supported kettle bottoms in the roof of a mechanized mining unit section totaling approximately 2100 linear feet can be found to be extensive). Not all roof control violations should be presumed to have the same effect because not all mine roofs are the same.

Using the entirety of the entry as the sole basis for comparison also tends to obscure where in the entry the bad roof was found. Three of the instances of sloughage that Rinehart cited included 54 linear feet within an approximately 100 linear foot area. Gov't Ex. 1, 6-8 (specifying

sloughage at car marker numbers 110 to 108, 108 to 107, and 105). The violative conditions thus could easily be considered much more extensive within this smaller (approximately 1700 square foot) area, and the judge should have taken this into account in his analysis of the extensiveness of the violation. *See IO*, 31 FMSHRC at 1352 (remanding unwarrantability issue to take distribution of roof plan violations into account).

Another relevant consideration in determining whether the roof control violation could be considered extensive is the abatement measure taken to terminate the citation. In this case it was 66 roof bolts and three steel jacks. Gov't Ex. 1, at 3. The Secretary argued that the number of bolts and jacks established that the violation was extensive in this instance, but the judge did not address the issue, instead relying solely on his calculation of relative area of roof in the entry affected by the cited conditions. *See* 31 FMSHRC at 183-84. The number of roof bolts installed, and the employment of jacks, is too significant in this instance to ignore in analyzing whether the violation was extensive.⁷ *See Peabody*, 14 FMSHRC at 1263 (extensiveness shown by significant abatement efforts that were required to terminate citation).

Consequently, we are remanding this case to the judge for a finding on whether the extensiveness of the violation was an aggravating factor. The judge's analysis of the factor should not be limited to just a mathematical calculation of the roof area impacted by the violation in comparison to the size of the roof in the 7 Right empty track, but rather should take into account a wider scope of the circumstances surrounding the violation. Because the issue of extensiveness involves the degree of the violation, it ultimately is a fact question concerning the material increase in the degree of risk to miners posed by the violation. Various considerations, such as those previously discussed, are relevant to that question.

Remand will also permit the judge to resolve a clear contradiction in his decision with respect to the extensiveness of the sloughage. For purposes of determining whether the cited conditions constituted a violation of section 75.202(a), the judge accepted the Secretary's position that the widening of the entry due to sloughage led not only to an inadequately supported roof in the area of the extra foot of roof between the rib and the bolts, but it also "compromise[d] the integrity of the roof support system." 31 FMSHRC at 180 (increase of one foot in roof must be considered in context of the bolt support system's design to create compression from rib to rib).⁸

⁷ While Eastern argues that there is no evidence that all the additional bolts and jacks were used to abate the roof control violation (E. Br. at 19), if some were used in areas of the entry that were not cited by Rinehart, it was incumbent upon Eastern to show that at trial. It made no attempt to do so.

⁸ Eastern questions whether the judge should have credited Rinehart's testimony regarding the effect a wider roof would have had in this instance, given the inspector's qualifications and his failure to take into account the additional roof support that Eastern had installed, both throughout the entry and in some of the areas cited in particular. E. Br. at 16-17. The Secretary maintains that, given Rinehart's education, experience, and training, the judge

Yet when he calculated the extent of the violation in determining that it was not unwarrantable, the judge only took into account the extra foot of unsupported roof resulting from the sloughage. *Id.* at 183. Given the judge's findings crediting Rinehart's testimony that the roof support system was compromised in the areas of sloughage, it follows that the judge must address whether the entire width of the entry in these areas should be considered as to extensiveness. *See Consol, 22 FMSHRC* at 362-63 (instructing that on remand scope of unwarrantability analysis must match scope of violation).

Our dissenting colleague correctly notes that we are not to substitute a competing version of the facts for a view reasonably reached by the judge. Slip op. at 19 n.3 (citing *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983)). Yet our quarrel is not with the judge's view of the facts – given that he accepted in its entirety the Secretary's evidence that the roof conditions cited constituted a violation, and that he also found that the violation was an obvious hazard that presented a high degree of danger to miners. Rather, we take exception to his misapprehension of how those facts must be applied to determine whether the violative condition was so extensive as to constitute an aggravating factor for purposes of determining whether Eastern's conduct rose to the level of being an unwarrantable failure. A conclusion may not be said to be supported by substantial evidence where the judge has not applied a correct legal standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997) (remanding unwarrantable failure determination where judge employed an incorrect legal analysis with respect to certain

correctly credited Rinehart regarding the effect that an increase in the width of the entry has across the entry, S. Reply Br. at 3-4.

The Commission has recognized that a judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has also recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *Id.* at 1881 n.80; *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Here, the judge had more than adequate grounds to credit Rinehart on the issue, because Kurry conceded on cross-examination that the additional one foot of roof resulted in the amount of roof exceeding the original design of the roof support system with regard to those locations where rib sloughage had been found. 31 FMSHRC at 180; Tr. 164. In addition, while Eastern is correct that at car marker No. 239 two additional posts had been installed, that was not an area in which the Secretary relied upon the rib sloughage to argue that there was roof stress across the entire width of the entry. S. Reply Br. at 3.

record evidence). Even if a simple calculation of area were an appropriate metric for determining extensiveness – and we have held (and our colleague’s dissent acknowledges, slip op. at 18) that it is not – the judge’s formulation on the extensiveness issue dilutes the threat posed by the hazard by using an unreasonably large area as the denominator for his calculation. Thus, his view of the facts may not be considered to have been reasonably reached because it does not attach any realistic proportion to the threat the condition posed to miners working in proximity to the hazard.

Furthermore, given the judge’s finding that the hazard was highly dangerous and obvious, the extensiveness must be weighed appropriately in the context of those factors, as well as the duration factor and the other factors found to be in mitigation or aggravation. *Jim Walter Res., Inc.*, 21 FMSHRC 740, 744-45 (July 1999). It is not possible for us to adequately review the conclusion reached by the judge without his appropriate application of each of the relevant factors. Nor is it appropriate for us to infer a conclusion that he has not reached on one of the factors, and then to further infer, solely from his finding that the hazard did not result from the operator’s unwarrantable failure, that he must have appropriately applied this missing factor.

B. The Duration of the Violative Conditions

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration evidence of cited conditions). In his decision, the judge, referring to Rinehart’s estimate that the conditions had existed for a week because the sloughage and potting out processes were gradual ones, concluded that the “conditions had existed for more than a few days.” 31 FMSHRC at 184 (citing Tr. 72). The judge further held that there was “insufficient evidence regarding their existence beyond that limited time period.” *Id.* at 185.

As the Secretary states in her brief, it is not clear from the foregoing statements whether the judge found the duration of the violative conditions to weigh in favor of, or against, the conclusion that the violation was unwarrantable. PDR at 11-12. However, we read the judge’s decision as holding that in order for the duration of the violative conditions to establish unwarrantability in this instance, that duration would have had to be longer than the Secretary had established.

We cannot uphold the judge on this factor because, in reaching this conclusion, he did not address the testimony of Luketic that the conditions had been present for at least a week. Tr. 126-27. Because the case is being remanded for the judge to correct errors in his analysis of the extensiveness factor, the issue of the duration of the violation may become a more important factor regarding whether the judge finds on remand that the violation was attributable to Eastern’s unwarrantable failure. Consequently, on remand the judge should also reexamine the issue of the duration of the violation.

C. Eastern's Knowledge of the Existence of the Violation and Whether It Had Been Put on Notice That Greater Compliance Efforts Were Necessary

We address these two factors together because the Secretary cites the same evidence as establishing both factors. The judge found that the Secretary had failed to establish that Eastern had knowledge of the violative conditions or that the operator had been put on notice of the need for greater efforts by it to achieve compliance with section 75.202(a). 31 FMSHRC at 185. The judge concluded that it was significant that the record contained no evidence that Eastern had actual knowledge of the cited conditions. *Id.* The judge was further persuaded by the lack of a history of roof falls in the entry at issue and the fact that MSHA had not previously communicated to Eastern that it needed to make additional efforts to comply with section 75.202(a). *Id.*

The Secretary argues that the judge's findings are erroneous, based on Kurry's testimony that he knew that the roof in the entry had been subject to normal weathering over the previous 30 years. PDR at 10 (citing Tr. 150). Eastern responds that it acted conscientiously to counter the normal weathering of the roof in question by providing additional roof support over the years where it was needed throughout the entry. E. Br. at 22.

Nothing in the record establishes that Eastern knew of the violative conditions for which it was cited. The Secretary made no attempt to establish actual knowledge of the cited conditions. Moreover, the operator's knowledge that the roof was subject to normal weathering does not necessarily lead to the conclusion that the operator should have known of the cited conditions. The Secretary made no attempt to show that Eastern's overall roof maintenance in the entry was insufficient; she only established that the operator had failed to detect the conditions that were cited in this instance. Thus, the Secretary failed to establish the predicate circumstances necessary to conclude that Eastern reasonably should have known of the violative conditions. *See Emery*, 9 FMSHRC at 2002-04; *compare Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010) (operator's knowledge of the specifics of its operations should have led it to conclude that violation charged would eventually occur).

The Secretary also argues that Eastern's experience in maintaining the roof in the entry put it on notice that greater efforts at compliance were necessary with respect to the roof. The Secretary specifically points to the 15 supplemental roof bolts the operator installed in the entry on the day prior to the inspection. PDR at 11. However, the Secretary made no attempt to show that MSHA had put Eastern on notice that its roof maintenance efforts were inadequate, either through the citation issuance process or more informally, by a warning from an MSHA representative.⁹

⁹ The Commission has stated that repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001) ("a high number of past violations of section 75.400 serve to

Moreover, we view the evidence of Eastern's efforts to combat the weathering process not as an aggravating factor, but rather as a mitigating one. The new roof bolts installed during the prior day were just the most recent supplemental roof control measure taken by Eastern in that entry. As Kurry detailed, additional roof bolts, steel and wooden straps, and posts and cribs had been installed over the years in the entry since its original mining. Tr. 146-49. To agree to the Secretary's suggestion and hold Eastern's efforts against it in this instance would not further the cause of safety. Consequently, we affirm the judge's conclusions as to Eastern's lack of knowledge of the violation and the lack of prior notice to Eastern that greater efforts at compliance were necessary.

D. Whether the Violative Conditions Were Obvious

The judge found that the roof conditions were obvious, because Inspector Rinehart testified that he could see the conditions when he walked up the entry, and Eastern safety supervisor Kurry, who accompanied Rinehart, did not contradict that testimony. 31 FMSHRC at 184. Eastern argues that the record does not support the judge's conclusion regarding the obviousness of the roof conditions.¹⁰ According to Eastern, when there are cars on the track, examiners have to travel on the walkway side of the track, and thus would have difficulty detecting any expansion of the roof on the wire side of the track. E. Br. at 29.

Substantial evidence supports the judge's finding that the conditions were obvious. Only one of the cited seven instances of inadequately supported roof solely involved conditions on the wire side of the track. Gov't Ex. 1, 3-4, 5-8. There is no record evidence that the presence of the cars would have obscured the other conditions cited, which involved, in whole or part, roof potting out over the track or walkway-side rib sloughage.

Moreover, the evidence is that the conditions on the wire side would not have been so obscured once the cars were moved. The number of cars in the entry varied from zero to 200 (Tr. 132-33), and the amount at any time was clearly controlled by Eastern. When the operator's

place an operator on notice that it has a recurring safety problem in need of correction.”) (citations omitted). The purpose of evaluating the number of past violations is to determine the degree to which those violations have “engendered in the operator a heightened awareness of a serious . . . problem.” *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (citing *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994)). The Commission has also recognized that “past discussions with MSHA” about a problem “serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.” *Id.* (citing *Consolidation Coal*, 23 FMSHRC at 595).

¹⁰ As the party defending the judge's determination that the violation was not attributable to unwarrantable failure, Eastern can argue bases that the judge rejected in support of that determination. See *Sec'y on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 14 FMSHRC 1549, 1552 n.2 (Sept. 1992).

actions have caused a condition not to be obvious, the Commission has not been persuaded that the lack of obviousness is a mitigating factor in the determining whether a violation is attributable to the operator's unwarrantable failure. *See Coal River*, 32 FMSHRC at 94.

Eastern also maintains that the judge should not have found the violative conditions to be obvious because Eastern's personnel believed that roof in the entry was well-supported and safe. E. Br. at 29-30. Regardless of the overall condition of the roof, however, Eastern had a duty to protect miners from areas of the roof that were inadequately supported. Furthermore, on direct examination, Eastern safety director Kurry, who accompanied Rinehart, had an opportunity to dispute Rinehart's account of the deficiencies he found in Eastern's roof control measures. But Kurry agreed with Rinehart's measurements of the distances. Tr. 162. On cross-examination, Kurry went further, and stated that the distances between the ribs and the nearest bolt in the areas affected by sloughage exceeded the maximum distance permitted by the mine's roof control plan. Tr. 167. Consequently, we affirm the judge's conclusion that the violation was obvious.

E. The Degree of Danger Posed by the Violative Conditions

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were "highly dangerous").

Here, the judge, referencing his S&S findings, came to the conclusion that the violative roof conditions posed a high degree of danger to miners. 31 FMSHRC at 184. Eastern argues that the degree of danger at the time of the inspection was not nearly as high as the judge found. E. Br. at 26-28.

The judge's S&S findings focused partly on the danger posed to miners should roof conditions continue to deteriorate over time without being addressed. *See* 31 FMSHRC at 182-83. While it may not be clear that the roof conditions would have continued to deteriorate under normal operations, which are presumed in an S&S analysis, the judge's ultimate conclusion does not require such a finding. The judge's S&S findings are adequately supported by evidence of the present danger that miners faced.

The judge found that miners were working and traveling in the entry. *Id.* He also took into account the size of the materials that had already fallen from the roof. *Id.* According to Rinehart, there were softball- and basketball-sized pieces on the mine floor in the areas of inadequately supported roof. *See id.* at 179; Tr. 39. The judge also correctly noted that in one of the areas where roof potting had occurred, some bolts were loose, and their bearing plates were no

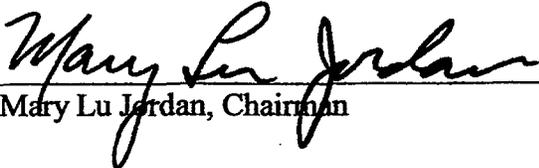
longer in contact with the roof, and thus were not providing support. 31 FMSHRC at 179, 182; Tr. 38-42; Gov't Ex. 4A.

Moreover, elsewhere in his decision the judge does not qualify his description of the dangers posed by the roof conditions as only occurring at some point in the future. *See* 31 FMSHRC at 179-80. Accordingly, we affirm the judge's finding that the danger posed to miners by the violative conditions was an aggravating factor in this case.

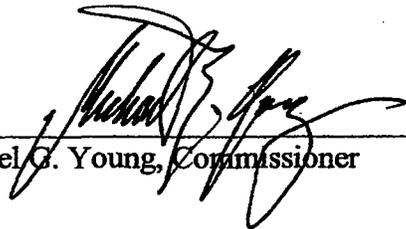
III.

Conclusion

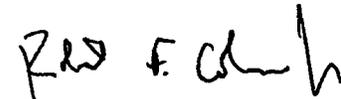
For the foregoing reasons, we vacate and remand the judge's conclusion as to whether the section 75.202 violation was attributable to Eastern's unwarrantable failure, the issue of the operator's degree of negligence in connection with the violation, and the amount of the penalty the judge assessed for that violation. On remand the judge should reexamine the factors of extensiveness and duration of the violation and then determine whether the Secretary has established that the violation of section 75.202(a) was attributable to Eastern's unwarrantable failure. Should he reach a different conclusion than in his original decision, he would also need to reassess the penalty for the violation.



Mary Lu Jordan, Chairman



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

Commissioner Duffy, dissenting:

Because I cannot agree remand is justified in this instance, I must respectfully dissent from the decision of my colleagues.

The question before the judge was whether the Secretary had established that Eastern's violation of the roof control requirements of 30 C.F.R. § 75.202(a) was attributable to the operator's unwarrantable failure. *See Peabody Coal Co.*, 18 FMSHRC 494, 499 (Apr. 1996) (citing *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (Oct. 1993)). Consequently, the judge analyzed each of the many factors that the Commission requires its judges to review each time a citation or order is alleged to result from an operator's unwarrantable failure. 31 FMSHRC at 183-85; *see also* slip op. at 5. After doing so, he concluded that Eastern's degree of negligence in connection with the roof control violation did not reach the level of aggravated conduct that constitutes unwarrantable failure under the Mine Act. 31 FMSHRC at 185-86.

In the face of such an analysis and holding, the only issue this case presents is whether the judge's ultimate conclusion is supported by substantial evidence. *See* 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

In my opinion, the majority errs in concluding that, because the judge's analysis as to one of the seven factors he examined was faulty (the extent of the violative condition), and the judge failed to expressly address all of the record testimony with respect to another factor (the duration of the violation), the case must be remanded for a cure of these defects. The majority's approach entirely ignores whether substantial evidence supports the judge's *overall* conclusion that the Secretary failed to establish that the violation was attributable to unwarrantable failure.

Taking the duration of the violation factor first, I cannot agree with the majority that the judge's analysis of this factor falls short of what we expect of our judges. The majority instructs the judge that on remand he needs to address the testimony of miners' representative Luketic that the violative condition had been present for at least a week. Slip op. at 10 (citing Tr. 126-27). However, a careful reading of the judge's decision and the record reveals that it is not surprising that the judge did not consider this testimony, because the judge did not credit *any* of Luketic's testimony on the evidence of Eastern's alleged unwarrantable failure. The judge only credited Luketic's testimony regarding the existence of the condition, and then just partially so. *See* 31 FMSHRC at 180 n.9.

The judge had ample opportunity to credit Luketic on the unwarrantable failure evidence, but passed in every instance. For instance, Luketic stated that Eastern had "neglected" roof

control in the 7 Right empty track. Tr. 120. As both the judge concluded and the Commission concurred, the evidence is quite to the contrary. *See* 31 FMSHRC at 184-85; slip op. at 11-12.¹

Moreover, with regard to the duration factor, the judge stated that “there is insufficient evidence” the violative condition existed beyond a few days. 31 FMSHRC at 185. I read this as a barely veiled finding refusing to credit Luketic’s testimony that the violation had existed for a week or more.

The judge also ignored Luketic’s testimony that cut in favor of the operator with regard to unwarrantable failure. Luketic testified that big lumps of coal had *not* fallen out of the areas of inadequately supported roof to the mine floor. Tr. 127. The judge instead credited Rinehart regarding the material that had fallen from the roof. *See* 31 FMSHRC at 179, 182. Rinehart testified that he observed softball- and basketball-size roof pieces on the mine floor (Tr. 39), and the judge relied on that testimony to find the violation to be S&S and thus be an aggravating factor in his unwarrantable failure analysis, as it established that the violation posed a high degree of danger to miners. *See* 31 FMSHRC at 182, 184. If remand for the judge to consider Luketic’s testimony is called for with respect to the duration factor, it is thus also called for with respect to the danger factor, to resolve the conflict between Luketic’s testimony and Rinehart’s testimony on the material that had fallen from the roof.

In light of the foregoing, I can only conclude that the judge made an implicit negative credibility finding as to Luketic’s testimony on the unwarrantable failure evidence. This, of course was well within the judge’s discretion to do.² Because the Secretary has advanced no

¹ Eastern was cited for a roof control violation in an area of the mine, the Right 7 empty track, in which it had no history of such violations before, and there is not an iota of evidence that MSHA had put the operator on notice that greater roof control efforts were needed there. *See* 31 FMSHRC at 184-85. As the majority finds, this was not a coincidence. The operator had an ongoing roof maintenance program in that area of the mine. *See* slip op. at 12. I thus agree with the majority that this mitigates Eastern’s level of negligence in this instance. That the Secretary believed that she had to attempt to convert a mitigating factor into an aggravating factor in order to establish unwarrantability in this instance, first below and then on review, undermines her credibility here. As the majority properly concludes, the primary consideration under the Mine Act is furthering the cause of safety. *Id.* It appears that may have been forgotten by the Secretary in formulating her litigation strategy in this case.

² A judge’s credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge “has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting

reason to overturn this credibility resolution, I do not join my colleagues in remanding the case to the judge to merely do explicitly what he clearly did implicitly in his original decision.

That leaves only the factor of the extent of the violation at issue in this case. I agree with the majority that the judge's approach to determining the extent of the violation – calculating the square footage of inadequately supported roof and dividing it by the entirety of roof in the relevant area of the Right 7 empty track – should not be countenanced. Slip op. at 7. Roof control in a mine is too idiosyncratic a subject to properly capture the extent of the condition with such a formulaic analysis.

However, I do not believe that the Commission's unwarrantable failure precedent necessarily requires that a case be remanded for a judge to correct an analytical error he made with respect to a single individual factor. Moreover, I cannot agree that the more complex analysis of the extensiveness factor that the Commission apparently expects upon remand will lead to an improved decision the second time around. See slip op. at 7-8.

First of all, remand is only necessary if the error the judge made was not harmless to his overall conclusion. As I believe the judge's failure to conduct a more exhaustive analysis of the extent of the violation does not significantly detract from his overall conclusion that the violation was not unwarrantable, I do not believe that remand is necessary in this instance.

My belief in that regard is buttressed by the substance of the majority's remand. While the majority points out the evidence the judge could consider in this instance with regard to the extensiveness of the violation, it hardly provides clear instructions to the judge as to how to conduct an extensiveness analysis. See *id.* That is perfectly understandable, because of the nature of roof control violations. Unlike, for instance, accumulation violations, there are no readily accepted and calculable standards for determining whether roof control violations should be considered extensive.

Accordingly, it is much less complicated, and thus appropriate, to look at a roof control violation in question in the context of Commission precedent. In *Quinland Coals, Inc.*, 10 FMSHRC 705 (June 1988), the Commission, in affirming the judge that a roof control violation was attributable to the operator's unwarrantable failure, stated that:

The conditions indicating that the roof was not adequately supported were extensive and visually obvious. The judge credited the inspector's testimony that, in addition to the broken posts that had not been replaced and were lying on the floor of the entry, there was a large roof fall near the intersection of the entry and the crosscut, there were cracks in the roof running from the intersection

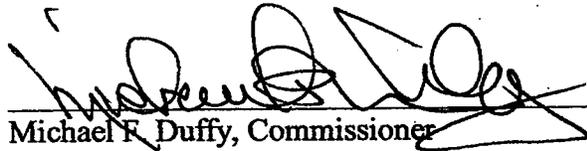
Ona Corp. v. NLRB, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

to and over the seal, and one side of the seal was being crushed by the weight of the roof.

10 FMSHRC at 708. In contrast, in *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission reversed a judge's finding of unwarrantable failure because the violation only involved four roof bolt bearing plates that had popped off in a track entry in which the operator had been diligent in its roof control efforts. *Id.* at 2004-05.

Here, the extent of the roof control violation in the 7 Right empty track fell somewhere in between those two cases, as it was clearly less than in *Quinland Coals*, but greater than in *Emery*. Because there is substantial evidence in the record to support the conclusion that the violation was closer in extent to *Emery* than it was to *Quinland Coals*, I would not remand the case to the judge for additional analysis.³

For the foregoing reasons I thus dissent from the decision remanding this case, and would instead affirm the judge on the ground that substantial evidence supports his conclusion that the Secretary did not establish that the roof control violation was attributable to Eastern's unwarrantable failure in this instance.


Michael F. Duffy, Commissioner

³ If the judge had determined that the Eastern roof control violation was extensive, I would have found substantial evidence in the record to uphold that determination, given the number of instances of sloughage and potting out noted by Inspector Rinehart. However, the judge found that the violation was *not* extensive, and the only question is whether the evidence in the record supports that finding. In applying the substantial evidence standard, the Commission may not "substitute a competing view of the facts for the view that the ALJ reasonably reached," even if there is also support in the record for the Commission's own view. *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

Distribution

**R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222**

**Whitney G. Clegg, Esq.
Jackson Kelly, PLLC
1144 Market St., Suite 400
P.O. Box 871
Wheeling, WV 26003**

**Edward Waldman, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 20, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

TRIVETTE TRUCKING

:
: Docket No. KENT 2010-1062
: A.C. No. 15-18784-214933 Q080
:
: Docket No. KENT 2010-1063
: A.C. No. 15-18823-214934 Q080
:
: Docket No. KENT 2010-1064
: A.C. No. 15-17360-214926 Q080

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 18, 2010, the Commission received from Trivette Trucking (“Trivette”) motions made by counsel to reopen three 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).¹ On June 4, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the requests to reopen.

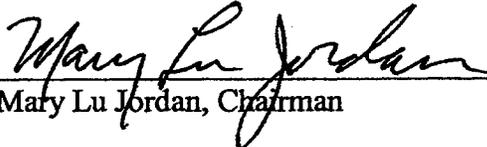
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

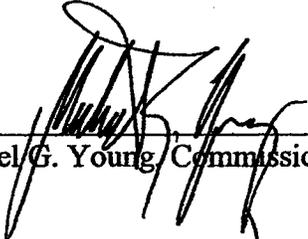
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2010-1062, KENT 2010-1063, and KENT 2010-1064, all captioned *Trivette Trucking*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

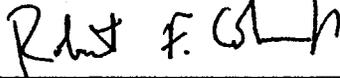
Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

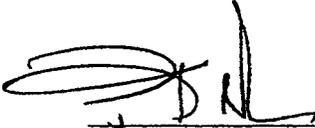
Having reviewed the facts and circumstances of this case, the operator’s requests, and the Secretary’s response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

**Billy R. Shelton, Esq.,
Jones, Walters, Turner & Shelton PLLC
151 N. Eagle Creek Drive, Suite 310
Lexington, KY 40509**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001**

October 20, 2010

SECRETARY OF LABOR,	:	Docket Nos.	WEVA 2007-460
MINE SAFETY AND HEALTH	:		WEVA 2007-470
ADMINISTRATION (MSHA),	:		WEVA 2007-576
	:		WEVA 2007-608
	:		WEVA 2007-672
v.	:		WEVA 2007-767
	:		WEVA 2008-249
PERFORMANCE COAL COMPANY	:		WEVA 2008-888
	:		WEVA 2008-889
	:		WEVA 2008-890
	:		WEVA 2008-891
	:		WEVA 2008-892
	:		WEVA 2009-129
	:		WEVA 2009-281
	:		WEVA 2009-282
	:		WEVA 2009-283
	:		WEVA 2009-831

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). On June 2, 2010, Administrative Law Judge Margaret Miller issued orders granting in part and denying in part a motion to stay 44 dockets involving Performance Coal Company (“Performance”) filed by the Secretary of Labor. Unpublished Orders dated June 2, 2010.¹ The Secretary filed unopposed petitions for discretionary review seeking review of the Judge’s order denying the stay as to 17 of the dockets.

¹ The Judge issued seven orders granting in part and denying in part the Secretary’s motion to stay in these proceedings. For purposes of this order, they are collectively referred to as the “June 2 Order.”

On June 30, 2010, we issued an order that directed the matter for review, consolidated the proceedings for purposes of our review, and suspended the proceedings before the Judge. For the reasons that follow, we vacate our direction for review.

I.

Factual and Procedural Background

Performance operates the Upper Big Branch Mine (“UBB”) in Raleigh, West Virginia. On April 5, 2010, that mine experienced a major explosion involving multiple fatalities. On May 17, 2010, the Secretary filed a motion to stay 44 dockets involving citations and orders issued to Performance by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) at UBB. The Secretary explained that R. Booth Goodwin, II, Assistant United States Attorney (“AUSA”) for the Southern District of West Virginia, sent Douglas White, the Associate Regional Solicitor for the Department of Labor, a letter dated May 14, 2010, stating that the U.S. Attorney’s office is currently conducting a criminal investigation of violations that have occurred at UBB.

In the May 14 letter, the AUSA requested that MSHA petition the Judge for a “stay of the pending civil actions pertaining to UBB until the criminal matters are resolved, as well as any other cases that are subsequently docketed.” S. Mot. to Stay, Ex. B at 1. The AUSA stated that a number of cases pending before the Commission potentially constitute separate violations of the provisions of the Mine Act setting forth criminal penalties for willful and knowing violations (*see* 30 U.S.C. § 820(c), (d)), and that each violation may also provide evidence that other violations were committed willfully and knowingly. *Id.* He further explained that each violation may provide a context that would be lacking if each were considered separately, and that the violations may involve identical factual issues. *Id.* at 1-2.

On May 20, 2010, Judge Miller heard argument on the Secretary’s motion to stay. The Secretary’s counsel noted that the criminal investigation conducted by the U.S. Attorney’s office is much broader than the MSHA accident investigation. Tr. 6-7. She stated that, given the five-year criminal statute of limitations, the U.S. Attorney’s investigation encompasses the previous five years. Tr. 7. The Secretary’s counsel stated that the date of the earliest alleged violation at issue in the MSHA proceedings is June 3, 2006. Tr. 7. Therefore, all of the violations at issue in the proceedings before the Commission are within the scope of the criminal investigation. Tr. 7. The Secretary’s counsel suggested that since the explosion at UBB was the worst disaster in 40 years, the scope of the criminal investigation will most likely be comprehensive and thorough. Tr. 20-21.

The Secretary’s counsel further noted that continuing the civil proceedings before the Commission might prejudice, or interfere with, the criminal investigation and any potential prosecution. Tr. 13-14. She noted that liberal civil discovery procedures may provide criminal defendants with access to materials that would not be available to them under more limited

criminal discovery rules. Tr. 13. The Secretary's counsel also stated that the Secretary may not be able to fully develop the Secretary's case and effectively prosecute the civil proceedings if she is met with Fifth Amendment objections during discovery or at a hearing. Tr. 14-15.

The operator's counsel agreed with the Secretary's argument that staying the Commission proceedings would be appropriate. Tr. 21. The operator's counsel stated that although Performance itself would not invoke a Fifth Amendment right, mine managers would invoke their Fifth Amendment rights and the company might not have any fact witnesses to present its defense in the civil proceedings. Tr. 24-26. The operator's counsel also clarified that the parties were asking for more of a temporary stay than a blanket stay. Tr. 21-22. She stated that if the cases were stayed approximately six months, the parties could revisit the older cases and determine whether any grand jury investigation had taken place at that time. Tr. 22.

In considering the motion to stay, the Judge applied the following five factors set forth in *Buck Creek Coal Co.*, 17 FMSHRC 500, 503 (Apr. 1995) for determining whether a Commission case should be stayed because of the pendency of a related criminal investigation or prosecution. Those factors are: (1) the commonality of evidence in the civil and criminal matters; (2) the timing of the stay request; (3) prejudice to the litigants; (4) the efficient use of agency resources; and (5) the public interest. June 2 Order at 2. The Judge stated that the "threshold issue" in determining whether to stay a proceeding pending before a Commission Judge is whether there is a commonality of evidence between the civil and criminal matters. *Id.* at 2. The judge noted that the Secretary was unable to provide information about the criminal investigation, such as which violations were being investigated, the focus of the investigation, or the length of the investigation. *Id.* Although she acknowledged that both parties claimed that they would be prejudiced by a denial of the stay, the Judge concluded that the Secretary had failed to "meet the threshold issue," particularly with regard to violations that occurred in 2006 and 2007. *Id.* Accordingly, the Judge denied the stay as to the 17 dockets that involved citations and orders issued before January 1, 2009. *Id.* at 2, 3. The Judge left "the door open for the United States Attorney to present further evidence regarding the necessity of a stay for the earlier cases, either by supplemental motion or *in camera* review." *Id.* at 3.

II.

Disposition

In the unopposed petitions, the Secretary argues that the Judge abused her discretion by denying the stay as to the 17 dockets. She asserts that the Judge misapplied all five *Buck Creek* factors. PDR at 11-19. The Secretary submits that, although the Judge's June 2 Order is not a final disposition of the proceedings, the Commission may review the order under the collateral order doctrine. *Id.* at 8-11. Because we conclude that the Judge's June 2 Order is not presently

reviewable under the collateral order doctrine, we do not reach the Secretary's arguments that the Judge erred in applying the *Buck Creek* factors.²

The collateral order doctrine is a practical construction of the final judgment rule which has been applied in federal courts. The final judgment rule, as set forth in 28 U.S.C. § 1291, permits appeal only from "all *final* decisions" of a district court. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Supreme Court recognized that appeals of a small class of decisions which appear interlocutory in nature must be permitted if those decisions "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. The Court cautioned, however, that appeal gives an upper court "a power of review, not one of intervention." *Id.* Thus, if a matter remains "open, unfinished or inconclusive," there may be no "intrusion by appeal." *Id.*

The Supreme Court has clarified that there are three prongs that must be satisfied under the collateral order doctrine. Specifically, an order that does not conclude an action may nonetheless be immediately appealable if it: (1) conclusively determines a disputed question; (2) resolves an important issue separate from the merits of the action; and (3) is effectively unreviewable on an appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). In order to be reviewable, the order must satisfy all three requirements. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987). The Supreme Court has "warned" that the issue of appealability must be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted).

The Commission has not previously applied the collateral order doctrine to immediately review a non-final Judge's order. We conclude that we should not do so in these proceedings because the first prong of the collateral order doctrine, that the order "conclusively determine" a disputed question, has not been satisfied.

That the order "'conclusively determine a disputed question,' has been interpreted to mean that the district court has clearly said its last word on the subject." 19 James Wm. Moore et al., *Moore's Federal Practice* ¶ 202.07[1], at 202-28 (3d ed. 2010) ("*Moore's*"). The Supreme Court

² We note, however, that consideration of the *Buck Creek* factors involves a balancing test in which the factors are weighed against each other in order to determine whether the *balance* favors a stay. See, e.g., *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995). No single factor is meant to be dispositive, so that the lack of evidence on a single factor at a preliminary stage of proceedings does not necessarily indicate that proceedings should not be stayed. Rather, that factor is weighed with other factors, and if available evidence weighs in favor of a stay, the stay should be granted. The *Buck Creek* factors must also be weighed against a background of coordinated and consistent government action between agencies.

has “allowed collateral order review where there was ‘no basis to suppose that the District Judge contemplated any reconsideration of his decision,’ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12-13 . . . (1983), and prohibited it where the relevant order was left ‘subject to revision.’ [*Coopers & Lybrand*, 437 U.S. at 469].” *Harris v. Kellogg Brown & Root Svcs., Inc.*, ___ F.3d ___, 2010 WL 3222089 at *3 (3d Cir. 2010). Thus, “[t]entative’ rulings can never satisfy the ‘conclusively determined’ requirement.” *Id.*, quoting *Digital Equip.*, 511 U.S. at 869 n.2; *Coopers & Lybrand*, 437 U.S. at 469 n.11; *Cohen*, 337 U.S. at 546.

The Supreme Court has addressed the first prong of the collateral order doctrine in the context of motions to stay federal litigation pending the resolution of parallel state proceedings. In *Moses H. Cone*,³ the Supreme Court found immediately appealable a district court’s order granting a motion to stay litigation in federal court pending the resolution of the same issue in a concurrent state court proceeding. The Supreme Court “contrasted two kinds of nonfinal orders: those that are “‘inherently tentative,’ . . . and those that, although technically amendable, are made ‘with the expectation that they will be the final word on the subject addressed.’” 460 U.S. at 12-13 & n.14. The Court concluded that the order granting the stay of litigation in that case was not tentative because such an order contemplated that the state proceeding would be an adequate vehicle for the resolution of the issues between the parties. *Id.* at 28.

In contrast, in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*,⁴ the Supreme Court recognized that the decision in that case to *deny* a stay was inherently tentative and did not satisfy the first prong of the collateral order doctrine. The Court stated that a district court that denied the motion did not “necessarily contemplate” that the decision would close the matter for all time. 485 U.S. at 278. It opined that given the nature of the factors considered in that case and “the natural tendency of courts to attempt to eliminate matters that need not be decided from their dockets, a district court usually will expect to revisit and reassess an order denying a stay in light of events occurring in the normal course of litigation.” *Id.* Similarly, in *Sinclair Oil Corp. v. Amoco Production Co.*, 982 F.2d 437, 441 (10th Cir. 1992), the Court determined that the district court’s motion denying a stay was not immediately appealable because it was expected that the district court would “revisit and reassess” its order.

Here, we conclude that Judge Miller’s denial of the stay was tentative in nature. In her written order, the Judge explicitly stated, “I leave the door open for the United States Attorney to present further evidence regarding the necessity of a stay for the earlier cases, either by supplemental motion or *in camera* review.” June 2 Order at 3. In addition, during the hearing,

³ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), *superseded by statute on other grounds as stated in Bradford-Scott Data v. Physician Computer Network*, 128 F.3d 504, 506 (7th Cir. 1997).

⁴ *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88 (1988), *superseded by statute on other grounds as stated in In re Piper Funds, Inc. v. Piper Capital Mgmt., Inc.*, 71 F.3d 298, 300 (8th Cir. 1995).

the Judge repeatedly noted that she was denying the stay “at this point,” but that she was willing to review any evidence provided by the U.S. Attorney. Tr. 37 (“I’m leaving it open a little bit, if the U.S. Attorney wants to be a little more forthcoming with what they’re doing.”), 42, 73, 88.

We do not find persuasive the parties’ argument that the Judge’s denial of the stay motion was conclusive because the U.S. Attorney “has not provided any further information to the ALJ, and has informed the Secretary that he does not intend to do so.” PDR at 10. The Judge would likely revisit and reassess her motion denying the stay during the normal course of litigation, as more specific information becomes available through the investigative process.

Because we conclude that the first prong of the collateral order doctrine has not been satisfied, we need not reach the remaining two prongs. Accordingly, we conclude that the Judge’s June 2 orders are not reviewable under the collateral order doctrine.⁵

⁵ We also need not reach the question of whether the Secretary’s petitions for discretionary review may be deemed to be petitions for interlocutory review under Commission Procedural Rule 76, 29 C.F.R. § 2700.76. Rule 76(a)(2) provides in part that the Commission may grant interlocutory review “upon a determination that the Judge’s interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding.” 29 C.F.R. § 2700.76(a)(2). The parties have conceded that the petitions cannot properly be considered as seeking interlocutory review under Rule 76, stating that, “The ALJ’s order here does not involve a ‘controlling question of law.’” PDR at 8 n.3.

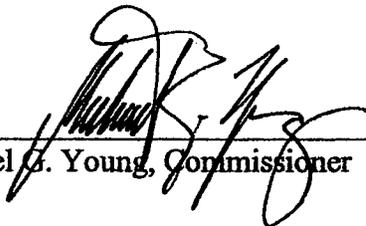
III.

Conclusion

For the foregoing reasons, we hereby vacate the direction for review that we issued on June 30, 2010, our consolidation of these proceedings, and our stay of proceedings before the Judge.⁶


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

⁶ Given the amount of time that has passed since the issuance of the June 2 orders, we suggest that judicial economy might be served if the parties informed the Judge of the current status of the MSHA and criminal investigations, including any facts that might support a renewed motion to stay.

Distribution:

**Carol Ann Marunich, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501**

**Edward Waldman, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Administrative Law Judge Margaret A. Miller
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1244 Speer Blvd., Suite 280
Denver, CO 80204**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 21, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEVA 2010-992
 : A.C. No. 46-04955-212816
 :
LONG BRANCH ENERGY :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 6, 2010, the Commission received from Long Branch Energy (“Long Branch”) a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

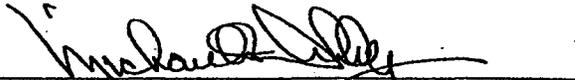
On March 3, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000212816 to Long Branch proposing penalties for 10 citations, including Citation Nos. 8078978, 8078979, and 8078980. The operator states that it intended to contest the penalties associated with Citation Nos. 8078978, 8078979, and 8078980, but that the assessment form was misplaced. It explains that the failure to timely contest the proposed penalties was "the result of inadvertence or a mistake."

The Secretary opposes the request to reopen. She states that Long Branch's explanation for the failure to file a timely contest is conclusory and thus insufficient to establish grounds for reopening the assessment. The Secretary also notes that the operator has filed another reopening request describing a similar procedural failure.

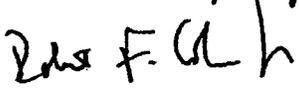
Having reviewed Long Branch's request, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Without further elaboration, the operator's explanation has not provided the Commission with an adequate basis to reopen. Accordingly, we hereby deny the request for relief without prejudice. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). The words "without prejudice" mean that Long Branch may submit another request to reopen Assessment No. 000212816.

At a minimum, the operator must provide an explanation of how it normally contests proposed penalties and specific information regarding why that process did not work in this instance. Any amended or renewed request by Long Branch to reopen Assessment No. 000212816 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Melissa Robinson, Esq.
Jackson Kelly PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris, Acting Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 21, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. CENT 2010-673-M
 : A.C. No. 39-00012-212991
 :
L.G. EVERIST, INC. :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 3, 2010, the Commission received from L.G. Everist, Inc. (“Everist”) a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

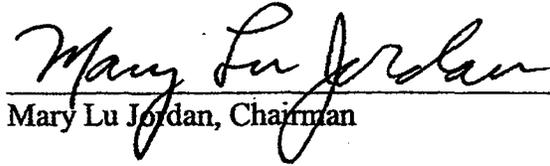
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On March 4, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000212991 to Everist for eight citations and one order that MSHA had issued to the operator in January of this year. Everist states that it intended to contest one of the proposed penalties, but "due to inadvertence and mistake by Company personnel," the proposed assessment form was not processed in a timely manner.

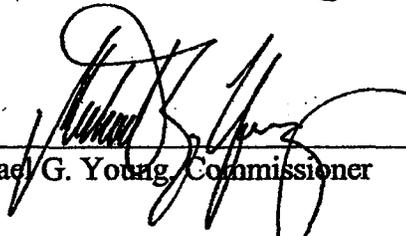
The Secretary opposes the request to reopen on the basis that the operator has made no showing of the exceptional circumstances that warrant reopening. She states that the operator's conclusory statement that the assessment form was not timely processed due to "inadvertence and mistake" is insufficient to justify reopening.

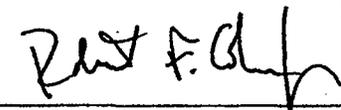
Having reviewed Everist's request and the Secretary's response, we conclude that Everist has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The operator's explanation that it failed to file a timely contest due to "inadvertence and mistake" by company personnel without any further elaboration, does not provide the Commission with an adequate basis to justify reopening of the assessment. Accordingly, we deny without prejudice Everist's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

Any amended or renewed request by Everist to reopen Assessment No. 000212991 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution:

Laura E. Beverage, Esq.
Jackson Kelly PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 21, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEVA 2008-804
: A.C. No. 46-04168-142950
v. :
: :
WOLF RUN MINING COMPANY :

BEFORE: Jordan, Chairman; Duffy and Young, Commissioners¹

DECISION

BY: Jordan, Chairman; Young, Commissioner

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”), Administrative Law Judge Jerold Feldman determined that a violation of a safeguard notice, issued pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and 30 C.F.R. § 75.1403, may properly be designated as significant and substantial (“S&S”).² *Wolf Run Mining Co.*, 30 FMSHRC 1198 (Dec. 2008) (ALJ) and 31 FMSHRC 306 (Feb. 2009) (ALJ). The mine operator filed a petition for discretionary review challenging the judge’s determination, which the Commission granted. For the reasons that follow, we affirm the judge’s determination.

¹ Commissioner Cohen took no part in the consideration of the petition for discretionary review (“PDR”) and has recused himself from the case. Commissioner Nakamura assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Nakamura has elected not to participate in this matter.

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

I.

Factual and Procedural Background

On June 27, 2000, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Notice of Safeguard No. 7095089 at the Sentinel Mine located in West Virginia and operated by Wolf Run Mining Company ("Wolf Run"). 31 FMSHRC at 306. Safeguard No. 7095089 cited the criterion in 30 C.F.R. § 75.1403-5(j) that requires suitable crossing facilities where persons cross over or under moving conveyor belts. The safeguard notice was issued pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and 30 C.F.R. § 75.1403.³ The language of section 314(b) of the Mine Act and the language of 30 C.F.R. § 75.1403 are identical. Both provisions state:

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

Nearly eight years later, MSHA Inspector Jeffrey Maxwell issued Citation No. 6606199⁴ to Wolf Run after he determined that someone had crossed under a return belt that was suspended 24 inches above the mine floor. 31 FMSHRC at 308. There was no belt crossover

³ The procedures by which an authorized representative of the Secretary may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. § 75.1403-1(b):

The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to section 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

Moreover, 30 C.F.R. §§ 75.1403-2 through 75.1403-11 set forth specific "criteria" which guide authorized representatives in requiring safeguards. Section 75.1403-5 is entitled: "Criteria-Belt conveyors," and section 75.1403-5(j) states:

Persons should not cross moving belt conveyors, except where suitable crossing facilities are provided.

⁴ Citation No. 6606199 states that "[a] suitable crossing facility is not being provided where miners are required to cross the moving # 5 [belt] coal conveyor belt at # 20 block. The bottom of the return belt is 24 inches from the mine floor, and there is evidence that miners have been crossing under the moving coal conveyor belt at this location." The citation alleged a violation under 30 C.F.R. § 75.1403-5(j).

provided at this location. *Id.* The citation alleged a violation of Safeguard No. 7095089 because a suitable crossing facility was not provided to enable miners to safely cross over a moving conveyor belt. The violation was designated as S&S based on the Secretary's assertion that the cited condition was "reasonably likely" to contribute to an accident that would result in a serious injury. *Id.* at 306-07. To terminate the citation, Wolf Run installed an aluminum crossover at the cited location. *Id.* at 308.

Wolf Run contested the citation and the case was assigned to Judge Feldman. On October 30, 2008, before the case was heard, the Secretary filed a motion to modify the citation seeking to insert Mine Act section 314(b) and to amend existing language from 30 C.F.R. § 75.1403-5(j) to 30 C.F.R. § 75.1403. Wolf Run then filed an opposition to the Secretary's modification motion and a motion for partial summary judgment, claiming that the S&S designation should not be applied to a violation of a safeguard notice.

On December 18, 2008, the judge issued an Order Denying the Secretary's Motion to Amend as Moot and Order Denying Respondent's Motion for Partial Summary Decision. 30 FMSHRC 1198. The judge ruled that the Secretary did not need to replace the safeguard criterion set forth in section 75.1403-5(j) with Mine Act section 314(b) and section 75.1403. *Id.* at 1199. He reasoned that the Secretary's authority to issue safeguard notices under section 314(b) of the Mine Act, which is codified in section 75.1403 of the regulations, is inseparable from the safeguard criteria set forth in section 75.1403-2 through 75.1403-11. *Id.*

In denying Wolf Run's summary judgment motion, the judge determined that safeguard notices are issued as an interim mandatory safety standard under section 314(b) of title III of the Act, and that a "mandatory health or safety standard" under section 3(1) of the Act, 30 U.S.C. § 802(1), includes an interim mandatory standard promulgated in Title III. *Id.* at 1200. Section 3(1) provides that "'mandatory health or safety standard' means the interim mandatory health or safety standards established by titles II and III of this Act, and the standards promulgated pursuant to title I of this Act." The judge also relied on the language of section 301(a), 30 U.S.C. § 861(a), which states that interim mandatory safety standards in sections 302 to 318 "shall be enforced in the same manner and to the same extent as any mandatory standard." *Id.* at 1200.

In order to facilitate review of the judge's decision on the S&S issue, the Secretary and Wolf Run filed a Joint Motion for Final Decision on February 18, 2009. There the parties stipulated that a violation of section 75.1403 occurred, that the gravity level was "reasonably likely" to result in "lost work days or restricted duty" injury for one miner, that the negligence level was "moderate," and that the proposed "penalty of \$1,304 [was] appropriate" and "would not affect the ability of the operator to continue in business." *Jt. Mot.* at 3. On February 26, 2009, the judge granted the joint motion. 31 FMSHRC 306. He reiterated his previous determination that "it is appropriate to designate safeguard violations as significant and substantial," and found that "it is reasonably likely that the hazard posed by crawling under, or

climbing over, a moving beltline will result in an accident causing serious injury.” *Id.* at 309. As a result, the judge found the violation to be S&S and imposed a penalty of \$1,304. *Id.*⁵

II.

Disposition

Wolf Run argues that the judge erred by holding that safeguard notices qualify as mandatory standards which can be designated as S&S. PDR at 4. It submits that Wolf Run violated a safeguard, not section 314(b) of the Act or 30 C.F.R. § 75.1403. PDR at 8; WR Br. at 7; WR Reply Br. at 6. Wolf Run argues that section 314(b) is simply a grant of regulatory authority to the Secretary and establishes no standard or obligation with which a mine operator must comply. WR Reply Br. at 5. It asserts that because safeguard notices are not plainly defined as mandatory standards under section 3(1), they cannot serve as the basis for S&S designations. PDR at 9. In addition, Wolf Run claims that safeguard notices do not qualify as mandatory standards because they are issued without notice-and-comment rulemaking. *Id.* at 6-7.

The Secretary responds that a violation of section 314(b) and 30 C.F.R. § 75.1403 can be designated as S&S because they constitute “mandatory safety standards” under the Mine Act. S. Br. at 13. She counters that the standard violated in section 314(b) of the Act and 30 C.F.R. § 75.1403 is the requirement that “operators provide safeguards judged adequate by a representative of the Secretary. . . .” *Id.* at 15 n.9. The Secretary also maintains that the Act does not require mandatory safety standards to be promulgated pursuant to notice-and-comment rulemaking, but only to fall within the statutory definition of “mandatory safety standard” set forth in section 3(1), which the safeguard provisions do. *Id.* at 16-17. Thus, she urges the Commission to affirm the judge’s determination that a violation of a safeguard notice may be designated as S&S based on the plain meaning of the Mine Act. *Id.* at 20. Alternatively, the Secretary asserts that, if the Commission concludes that the statute is not plain, the Commission should affirm the Secretary’s interpretation as “eminently reasonable.” *Id.*

A. Does the Mine Act Directly Address Whether a Safeguard Notice Qualifies as a Mandatory Safety Standard, a Violation of Which May Be Designated as S&S

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is

⁵ Judge Feldman noted that Judge Zielinski had issued two orders regarding the propriety of designating safeguard violations as S&S that conflicted with his decision. *Big Ridge, Inc.*, 30 FMSHRC 1172 (Nov. 2008) (ALJ); *Cumberland Res. LP*, 30 FMSHRC 1180 (Dec. 2008) (ALJ) (interim orders granting partial summary judgments to operators and denying the Secretary’s motions to amend). 31 FMSHRC at 308.

clear and unambiguous, effect must be given to its language. See *Chevron*, 467 U.S. at 842-43; accord *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). In ascertaining the plain meaning of the statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue. *Id.*; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. See *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

Section 104(d)(1) of the Mine Act provides that a violation can be designated as S&S only if it is a violation of a "mandatory health or safety standard."⁶ The primary statutory interpretation issue presented by this case is whether Congress directly spoke to the question of whether a violation of section 314(b) of the Act is a violation of a mandatory safety standard and therefore can constitute an S&S violation.

Sections 3(l) and 301(a) of the Act both address the question of what constitutes a mandatory safety standard. Section 3(l) defines the key term "mandatory health or safety standard" as "the interim mandatory health or safety standards, established by titles II and III of this Act, and the standards promulgated pursuant to title I of this Act." 30 U.S.C. § 802(l). Moreover, section 301(a) of the Act provides in pertinent part that "[t]he provisions of sections 302 through 318 of . . . [title III] shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act" 30 U.S.C. § 861(a). Section 301(a) further provides that sections 302 through 318 "shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of this Act." Thus, the statutory language clearly states that the provisions of sections 302 through 318 of title III, unless superseded, are enforced as mandatory standards.

⁶ Section 104(d)(1), 30 U.S. C. § 814(d)(1) states in pertinent part:

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, . . . 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 . . . , he shall include such finding in any citation . . . [emphasis added].

Because section 314(b) is one of the subsections contained within sections 302 through 318 of title III, we conclude that the clear language of the Act dictates that the provisions of section 314(b) constitute a mandatory safety standard. Moreover, we find no language in the Act that would create any exception for section 314(b) in this regard.

The question then becomes whether a violation of a safeguard notice issued by an MSHA inspector constitutes a violation of section 314(b) and thus is a violation of a mandatory safety standard. A review of the relevant statutory language in combination with the Secretary's regulatory approach in implementing section 314(b) convinces us that a violation of a safeguard notice is a violation of section 314(b) and therefore is a violation of a mandatory safety standard.

The Secretary, in implementing section 314(b), chose to use the mechanism of a safeguard notice to inform the operator in question what she determined constitutes an "adequate" safeguard for the particular situation involved. 30 C.F.R. § 75.1403-1. Accordingly, an operator's failure to comply with a safeguard notice issued by an MSHA inspector is necessarily a failure to comply with section 314(b) and therefore is a violation of a mandatory safety standard. As a result, it is irrelevant whether the citation in a given case alleges the violation of the safeguard notice itself or a violation of section 314(b) and 30 C.F.R. § 75.1403.⁷ In either event, the basic allegation is that the operator has failed to comply with its obligation under section 314(b) to provide an adequate safeguard. We conclude that the language of section 314(b) and the relationship between that subsection and safeguard notices issued pursuant to it establish a safeguard notice as a mandatory safety standard for purposes of enforcing section 314(b).

Our holding is consistent with the Commission's treatment of provisions in roof control and ventilation plans that are derived from other interim mandatory standards contained in title III of the Mine Act, i.e., section 302(a) (roof control plans) and section 303(o) (ventilation plans), "as mandatory standards." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *see also UMWA Intern. Union v. Dole*, 870 F.2d 662, 667 n.7 (D.C. Cir. 1989) ("[t]he requirements of these plans are enforceable as if they were mandatory standards") (quoting S. Rep. No. 95-181, at 25 (1977) *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978)). Accordingly, the Commission routinely evaluates whether violations of provisions of mine-specific plans are S&S or a result of unwarrantable failure under Mine Act section 104(d). *See, e.g., IO Coal Co.*, 31 FMSHRC 1346, 1349, 1361 (Dec. 2009) (judge found provision of roof control plan to be S&S and Commission remanded the unwarrantability issue).

Our recognition of extra-regulatory mandatory standards under the direction of title III of the Mine Act is well-settled law. In *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976), the court reasoned that a "mandatory standard" can reasonably be read to include provisions of plans whose adoption is explicitly required under an existing mandatory standard."

⁷ For this reason, we find it unnecessary to address the Secretary's motion to amend the citation in this case to include an explicit reference to section 314(b).

The court held that provisions of a ventilation system and methane and dust control plans were enforceable “as though they were mandatory standards.” 536 F.2d at 402-09. The *Zeigler* holding was explicitly approved by Congress when it enacted the Mine Act. *Dole*, 870 F.2d at 667 n.7. This reasoning applies with equal force to the case at bar, and our holding is consistent with Congressional intent to treat safeguards whose adoption is explicitly compelled by the existing mandatory standards of section 314(b) and 30 C.F.R. § 75.1403, as mandatory standards.

In light of the clear language of the Mine Act that defines mandatory safety standards as those “interim mandatory safety standards established by titles II and III,” we are not persuaded by Wolf Run’s assertion that, because safeguard notices are issued by MSHA inspectors, they do not fall under the definition of a mandatory safety standard. A safeguard notice is derived from, and authorized by, section 314(b), and is established by title III of the Mine Act. Section 314(b) expressly delegates “an authorized representative of the Secretary” with the authority to require that the operator provide certain safeguards. 30 U.S.C. § 874(b). Indeed, the safeguard notice is the Secretary’s mechanism for realizing Congress’ command that safeguards “shall be provided” by the operator. *Id.*⁸

We similarly reject Wolf Run’s argument that section 314(b) is a general grant of authority that places no specific obligations upon an operator, but only on the Secretary. WR Br. at 12; Oral Arg. Tr. at 18-19. Wolf Run’s characterization of section 314(b) cannot be squared with the statutory language. All the paragraphs in section 314 impose requirements on an operator using the passive voice. For example, paragraph (e) states that “[e]ach locomotive and haulage car . . . shall be equipped with automatic brakes . . .” Paragraph (b) is no different from the other paragraphs in this respect. It mandates that “[o]ther safeguards adequate . . . to minimize hazards with respect to transportation of men and materials shall be provided.” This language clearly

⁸ Commissioner Young shares Commissioner Duffy’s concerns about safeguard notices “issued on a random basis by an individual inspector acting unilaterally without provision for Secretarial or Commission Review” and the potential for hazards to remain unaddressed because a safeguard was not required at a given mine (slip op. at 13-14). However, whether this is a wise policy choice or not, it is in fact, a choice made by Congress and embedded in the statute. See 30 U.S.C. § 874(b) (Congress’ command that “Other safeguards adequate, *in the judgment of an authorized representative of the Secretary*, to minimize hazards with respect to transportation of men and materials shall be provided.” (emphasis added)). Notwithstanding Commissioner Duffy’s thoughtful observations about the benefits of uniformity, permanence and thorough consideration of safety concerns that would be better served by formal rulemaking to impose final and detailed standards in this area, the statute itself is a pure delegation from Congress to the Secretary, and the responsibility for providing improved standards is hers alone under section 101 of the Mine Act. See 30 U.S.C. § 811(a) (“The Secretary shall . . . develop, promulgate, and revise . . . improved mandatory health or safety standards for the protection of life and prevention of injuries in . . . mines.”).

imposes a requirement upon *operators*. Accordingly, we reject the operator's attempt to carve out an exception for section 314(b) as the only subsection in those sections not to qualify as a mandatory safety standard.⁹

Wolf Run seeks to rely on the D.C. Circuit's decision in *Cyprus Emerald Res. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999), which held that "the statute does not authorize [MSHA] to designate as [S&S] a violation of a regulation such as 50.11(b) that is not a mandatory health or safety standard." *Cyprus Emerald*, however, dealt with a 30 C.F.R. Part 50 regulation promulgated under section 508, 30 U.S.C. § 957. Unlike safeguard notices, Part 50 regulations do not fall within the definition of interim mandatory standards as involved here. Hence, there is a clear distinction between the regulation at issue in *Cyprus Emerald* and a safeguard notice that is established by section 314(b), title III of the Act. In fact, the language of the Mine Act itself, just as it did in *Cyprus Emerald*, compels the conclusion here. 195 F.3d at 45. The Mine Act requires that interim mandatory standards established by Title III be treated exactly like mandatory standards, which means they can be subject to S&S designation.

We likewise are not persuaded by Wolf Run's reliance on certain language contained in the underlying Commission decision in *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 808-09 n.22 (Aug. 1998), *rev'd*, 195 F.3d 42 (D.C. Cir. 1999), in which the majority stated that "[a] safeguard, because it is not issued pursuant to the procedures set forth in section 101(a) of the Mine Act, does not meet the statutory definition of a mandatory health or safety standard." In *Cyprus Emerald*, the Commission concluded that a violation of a Part 50 regulation, which did not meet the statutory definition of a mandatory health and safety standard, could be designated as S&S. 20 FMSHRC at 809. Although Wolf Run relies heavily on the statement, its arguments are unavailing for two reasons. First, the standard at issue *does* "meet the statutory definition of a mandatory health and safety standard" because as noted previously (*supra* at 6), section 314(b) is expressly identified as such by the Act itself. Second, the precise issue of whether a safeguard notice is a mandatory safety standard was not before the Commission, was not fully briefed by the parties, and has never been squarely addressed by the Commission. Accordingly, the majority's statement in *Cyprus Emerald* should be regarded as dicta.¹⁰

Additionally, we find without merit Wolf Run's argument that safeguard notices do not qualify as mandatory health and safety standards because they are not promulgated through notice-

⁹ The fact that Congress chose to give MSHA inspectors an express role in ensuring that section 314(b) is implemented does not in any way change the overall requirement set forth in section 314(b) that *operators* must provide "adequate" safeguards regarding the "transportation of men and materials."

¹⁰ Moreover, the majority's statement focused on its belief that a safeguard notice is not a mandatory health or safety standard because it is not promulgated under title I of the Act. 20 FMSHRC at 808-09 n.22. The majority did not address the possibility that a safeguard notice could be a mandatory health or safety standard because it is established by title III of the Act.

and-comment rulemaking pursuant to section 101 of the Act, 30 U.S.C. § 811. WR Br. at 9. We agree with the Secretary that the Act does not require mandatory safety standards to be promulgated pursuant to notice-and-comment rulemaking but only to fall within the statutory definition set forth in section 3(l). S. Br. at 16-17.

In summary, we conclude that Congress did directly address the question of whether a violation of section 314(b) constitutes a violation of a mandatory safety standard. The relevant statutory language provides that section 314(b) falls within the section 3(l) definition of a mandatory safety standard because it is an interim mandatory safety standard contained in title III of the Act. As a result, any violation of section 314(b) is a violation of a mandatory safety standard. Because a proven violation of a safeguard notice is necessarily a violation of section 314(b), it follows that the violation of a safeguard notice is a violation of a mandatory safety standard and can constitute an S&S violation.

B. Whether the Mine Act May Be Reasonably Interpreted Such that Safeguard Notices Qualify as Mandatory Safety Standards Subject to S&S Designation

If there were any doubt as to whether the Mine Act expressly provides that a safeguard notice established by section 314(b) qualifies as an interim mandatory standard and should be treated as mandatory safety standard, we conclude that it is certainly reasonable for the Secretary to construe the Mine Act such that safeguard notice violations may be subject to S&S designation. *See Chevron*, 467 U.S. at 843-44; *Sec’y of Labor v. National Cement Co. of California*, 573 F.3d 788, 792-97 (D.C. Cir. 2009); *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13.¹¹

As discussed *supra* at 5-6, the language and structure of the Mine Act itself support the interpretation that safeguard notices issued pursuant to section 314(b) qualify as interim mandatory safety standards, and are in turn mandatory safety standards subject to an S&S designation. 30 U.S.C. §§ 802(l), 861(a), 874(b). Similarly, the legislative history of the provision also supports a reading of section 314(b) that would most promote safety. *See Jim Walter Res., Inc.*, 7 FMSHRC 493, 496 (Apr. 1985) (citing S. Rep. No. 91-411, at 81 (1969), reprinted in Senate Subcomm on Labor, Comm. on Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 207 (1975)). The Commission emphasized that “the very purpose of [the safeguard provisions] – the elimination of transportation-related hazards – militates against” a narrow interpretation of section 314(b). *Jim*

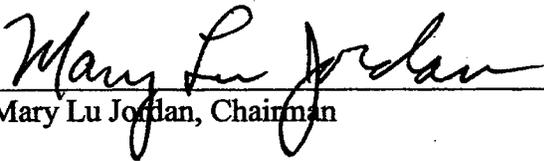
¹¹ Deference is accorded to “an agency’s interpretation of the statute it is charged with administering when that interpretation is reasonable.” *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency’s interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Technologies, Inc. v. Sec’y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), cert. denied, 520 U.S. 1209 (1997) (citing *Chevron*, 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

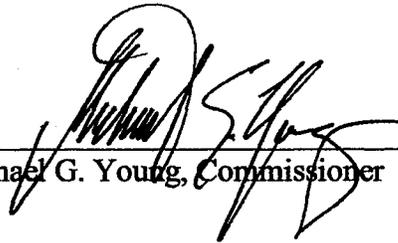
Walter Res., 7 FMSHRC at 498 (rejecting the assertion that section 314(b) only applies to one type of belt conveyor). Accordingly, even if we were to determine that the statutory language was not clear, we would affirm the judge and the Secretary's reasonable interpretation of the Act that violations of safeguards may be properly designated as S&S.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision and hold that safeguard notices established and issued pursuant to section 314(b), title III of the Mine Act, qualify as interim mandatory safety standards and thereby constitute mandatory safety standards under the definition of section 3(l) of the Act. We conclude that the Secretary may properly designate violations of safeguard notices as S&S violations.


Mary Lu Jordan, Chairman


Michael G. Young, Commissioner

Commissioner Duffy, dissenting:

I dissent from my colleagues, and would reverse the judge's decision that the violation of the safeguard noticed previously issued to Wolf Run can be designated as significant and substantial ("S&S").

This case presents an issue that one would have expected to have been resolved decades ago. Indeed, it has been nearly 41 years since Congress authorized individual coal mine inspectors to require certain safety measures, called "safeguards," to address conditions not otherwise covered by the interim safety standards contained in Title III of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"), or improved mandatory safety and health standards adopted by the Secretary through notice-and-comment rulemaking. *See* Pub. L. No. 91-173, 83 Stat. 742, 786. Yet, four decades into the heightened federal enforcement of mine safety and health, including the passage of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act" or "Act") and its reauthorization of Title III of the Coal Act, the Commission, only now, is being asked to specifically address whether a failure to comply with a notice to provide a safeguard can be deemed "significant and substantial" ("S&S"), a designation for certain safety and health violations first employed in the Coal Act and carried over to the Mine Act.

Despite this passage of time and intervening legislation, we have no more insight into the meaning and application of the safeguard system than we did under the Coal Act. The language of the safeguard provision, remains the same, the language of 30 C.F.R. § 75.1403 remains the same, and the definition of "mandatory safety or health standard" remains the same.

The statutory design is relatively simple. Congress, first in section 104 of the Coal Act and then in section 104 of the Mine Act, provided that *only* those violations of a "mandatory health or safety standard" can be designated as S&S. *See* 30 U.S.C. § 814(d)(1). In both statutes it also defined "mandatory health or safety standard" to mean "the interim mandatory health or safety standards established by titles II or III or this Act, and the standards promulgated pursuant to title I of this Act." 30 U.S.C. § 802(l).

In section 104(a) of the Mine Act, however, Congress provided that a citation can be issued for a violation of the Act or of a mandatory health or safety standard, *or* of any rule, order, or regulation promulgated pursuant to the Act. 30 U.S.C. § 814(a).

It is this contrast between the violation of a mine safety and health requirement and the smaller universe of such violations that can be designated S&S that provided the crux of the D.C. Circuit's opinion in *Cyprus Emerald Resources, Inc. v. FMSHRC*, 195 F.3d 42 (D.C. Cir. 1999). The court held that if a requirement is not, by definition, a mandatory health or safety standard, it cannot be designated S&S under section 104(d) or (e) of the Mine Act.

Thus, 30 C.F.R. §75.1403-5(j) is not a mandatory health or safety standard because it was neither enacted as an interim mandatory safety standard by Congress in either Act, nor was it promulgated as a mandatory safety standard by the Secretary pursuant to section 101 of the Act. By its very wording, section 75.1403-5(j) is a hortatory criterion, not a mandatory standard, as it is invoked on an informal basis by an individual mine inspector without provision for immediate pre-enforcement review as would be the case with a mandatory health or safety standard adopted through notice-and-comment rulemaking.

Moreover, this Commission has explicitly held that safeguards are not mandatory health or safety standards. In its decision taking an expansive view of which Mine Act violations could be designated S&S that was later overturned by the court in *Cyprus Emerald*, the Commission stated that, “[i]ronically, the regulation that was violated in *Mathies* was not a ‘mandatory health or safety standard,’ as that term is defined in section 3(l) of the Act. The *Mathies* citation involved a failure to comply with a safeguard notice.” *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 808 (Aug. 1998). The Commission further concluded that “[a] safeguard, because it is not issued pursuant to the procedures set forth in section 101(a) of the Mine Act, does not meet the statutory definition of a mandatory health or safety standard.” *Id.* at 808 n.22. The Commission went on to hold that “[a]ccordingly, the *Mathies* decision, involving precisely these criteria, does not restrict the Secretary to applying an S&S designation only to a citation involving a mandatory safety or health standard.” *Id.* at 809.

It was this ultimate holding that the D.C. Circuit explicitly reversed in its decision on appeal. *See* 195 F.3d at 45-46. Although the position of the Commission majority in *Cyprus Emerald* was adopted in service to its position that regulations issued pursuant to section 508 of the Mine Act, i.e., accident reporting requirements, could be deemed S&S, I read the court’s reversal as applicable to all regulatory requirements that do not fall within the precise statutory definition of “mandatory health or safety standard.” That would include notices to provide safeguards.

The Secretary argues, and my colleagues agree, that a violation of a notice to provide a safeguard can be designated S&S because it is derived from section 314(b) of the Act or its verbatim iteration in MSHA’s regulations, i.e., 30 C.F.R. § 75.1403. S. Br. at 13-20; slip op. at 5-6. Neither of those provisions can be considered a mandatory health or safety standard that imposes discrete obligations on an underground coal mine operator. They delegate authority to individual mine inspectors to issue notices to provide safeguards, but provide no binding norms nor adequate notice to mine operators as to what conduct is expected of them.

The Secretary would have us amend the citation here to allege a violation of section 314(b) of the Act and 30 C.F.R. § 75.1403. S. Br. at 8-12. In my view, that would make no difference. Allowing section 75.1403-5(j) to fly under the colors of section 314(b) of the Act *does not* transform a notice to adopt a criterion invoked by a single inspector, acting alone, into a

mandatory safety standard as defined by Congress and as understood by the D.C. Circuit in *Cyprus Emerald*.¹

I also cannot agree that a notice to provide a safeguard is analogous to a provision in a underground mine plan that addresses ventilation or roof control. *See slip op.* at 6-7. It is true that such plan provisions do not appear in Title III of the Act, nor are they promulgated as mandatory health or safety standards under section 101 of the Act, yet the D.C. Circuit in *Ziegler Coal Co. v. Kleppe*, 536 F.2d 398 (D.C. Cir. 1976), nevertheless concluded that a plan provision could be enforced as a mandatory standard.

However, there are a number of reasons not to read the court's reasoning in *Ziegler Coal* to extend to safeguard notices. First, *Ziegler Coal* was decided in 1976 without the judicial gloss applied by the same court 23 years later in *Cyprus Emerald*.

Second, the issue surrounding the mine plan provision in *Ziegler Coal* was whether it was enforceable *at all*, not whether a violation of the provision *could be designated S&S*. *See* 536 F.2d at 401 (operator challenged applicability of section 104(b)'s notice of violation process, the Coal Act equivalent of a section 104(a) citation under the Mine Act). Here, there is no dispute that safeguards are enforceable under section 104(a); the issue is whether failure to comply with a notice to provide safeguard can be S&S, a much different issue.

Third, the genesis of a mine plan provision is wholly distinguishable from that of a notice to provide safeguard. All underground coal mine operators are required under Title III of the Act to adopt roof and ventilation control plans, the ultimate plan provisions are established through negotiations between the mine operator and the MSHA District Office for the mine, and such plans are systematically reviewed every six months. *See* 30 U.S.C. §§ 862(a), 863(o); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 906-07 (May 1987). If the parties reach an impasse, there is provision for the issuance of a technical citation to allow for Commission review of the dispute. *See, e.g., Twentymile Coal Co.*, 30 FMSHRC 736 (Aug. 2008).

In stark contrast, a safeguard notice is issued on a random basis by an individual inspector acting unilaterally without provision for Secretarial or Commission review. The legitimacy of the notice to provide a safeguard and its application to conditions in the mine cannot be determined

¹ The dissenting Commissioners in *Cyprus Emerald* sought to distinguish between safeguards and Part 50 regulations by making the same argument the Secretary makes here, i.e., that safeguards issued pursuant to section 314(b) of the Act assume the patina of mandatory health and safety standards because section 314(b) appears in a Title captioned "Interim Mandatory Safety Standards for Underground Coal Mines." *See* 20 FMSHRC at 826, 829 n.3 (Commissioners Riley and Verheggen, dissenting in part). It was that specific argument that led the Commission majority in *Cyprus Emerald* to counter that a safeguard does not meet the statutory definition of "a mandatory health or safety standard." *See id.* at 808-09 n.22.

unless and until the provisions of the notice are violated. *See* 30 C.F.R. § 75.1403-1(b); *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985).

Thus, in my opinion the potential for arbitrariness in the safeguard system precludes it from being considered analogous to the mine plan adoption and approval system specifically mandated in Title III of the Act. Accordingly, on that basis I would reverse the judge and hold that a violation of a notice to provide safeguard, while subject to sanction through the issuance of a citation under section 104(a) of the Act, cannot be deemed S&S for purposes of section 104(d) or (e) of the Act, because the notice to provide a safeguard is not a mandatory health or safety standard as defined in section 3(l) of the Act.

The Secretary has expressed concern that if safeguard notices are not deemed to be mandatory health or safety standards, the full panoply of Mine Act enforcement sanctions, i.e., unwarrantable failure closure orders or pattern of violation closure orders, would not be available to her. *See Cumberland Coal Res., LP*, 30 FMSHRC 1180, 1185 (Dec. 2008) (ALJ). An identical argument was presented in the *Cyprus Emerald* case and the D.C. Circuit responded that “[i]f the Secretary of Labor finds a particular practice or condition so dangerous as to require the sanctions provided in section 104(d) and (e), she may promulgate an appropriate mandatory standard under section 101 [of the Mine Act], 30 U.S.C. § 811, the violation of which may properly be found ‘significant and substantial.’” 195 F.3d at 46.

Moreover, as far back as 1992 the Commission noted that MSHA had acknowledged the need for specific mandatory safety standards for the transportation of miners and materials in underground coal mines. *See Southern Ohio Coal Co.*, 14 FMSHRC 1, 16 (Jan. 1992) (“*SOCCO II*”) (citing the then most recent MSHA Semiannual Regulatory Agenda). The Commission went on to “strongly suggest that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating transportation hazards.” *Id.* In the 18 years since, nothing has been done.

The Commission’s concern in *SOCCO II* was not an idle one. Transportation of persons and materials is an integral part of the mineral extraction process. Haulage accidents consistently rank at or near the top of causes for mine fatalities and serious injuries. *See* MSHA Fatality Statistics (<http://www.msha.gov/stats/charts/chartshome.htm>) (accessed Oct. 19, 2010). Consequently, surface coal miners and both surface and underground hardrock miners are protected from death and serious injury by comprehensive mandatory transportation and materials handling standards in Parts 77, 56, and 57, respectively, of Title 30 of the Code of Federal Regulations.

The lesser protection provided to underground coal miners is illustrated by the content of Subpart O of 30 C.F.R. Part 75, entitled “Hoisting and Mantrips,” which sets forth the regulatory scheme for addressing the transportation of miners and materials in underground coal mines. There are mandatory standards applicable to hoists, locomotives, and wire ropes. All other

aspects of transportation and haulage are addressed by section 75.1403, which authorizes safeguards and contains 11 sets of criteria, *not mandatory standards*.

Many of the criteria are common sense, best practices that read suspiciously like actual mandatory safety standards set forth in 30 C.F.R. Parts 77, 56, and 57, applicable to coal and hardrock mines. For example, section 75.1403-10(l) states: “All self-propelled rubber-tired haulage equipment should be equipped with well-maintained brakes, lights, and a warning device.” 30 C.F.R. § 75.1403-10(l).

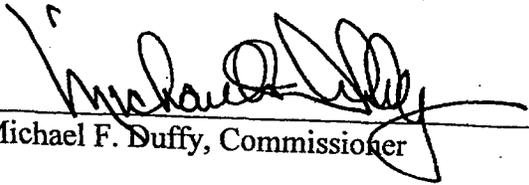
While that requirement has universal application even beyond the mining environment, it is not a mandatory standard applicable to all underground coal mines. It is only applicable in those mines where an inspector has ordered it through a notice to provide a safeguard. Numerous other criteria set forth under section 75.1403 fall within the same category— common sense rules of the road that have never been promulgated as mandatory standards since they were first published in 1970.²

Why these criteria have not been made mandatory during 40 years of mine safety enforcement and eight Presidential administrations appears to be lost in the mists of regulatory lassitude, but the implications are troubling. Under the current safeguard regime, it is possible for miners to be killed or seriously injured without any enforcement consequences. The underground coal mine operator, post-accident, is not cited but, rather, is given a notice which requires it to take such measures prospectively that operators at surface coal mines and all hardrock mines are already required to do through mandatory safety standards.

Given this hole in the enforcement net and the threat it poses to miner safety, I find it difficult to credit the Secretary’s complaint that not designating notices to provide safeguards as mandatory safety health and safety standards constrains her ability to ensure miner safety. The Commission in *SOCCO II* and the D.C. Circuit in *Cyprus Emerald* told the Secretary what she can do to avoid this problem. She and her predecessors have had 40 years to take action, and have not done so. I simply do not believe it is in the best interest of underground coal miners’ safety for the Commission to serve as an enabler and permit the Secretary to continue a slapdash approach to regulating transportation and haulage in underground coal mines.

² There may be one exception: 30 C.F.R. § 75.1403-10(a) provides that reflectors or headlights need not be required on loads pulled by animals. I trust that exemption is no longer necessary.

Thus, in addition to reversing the judge on legal grounds, there are sound safety policy reasons for not finding that notices to provide safeguards are mandatory safety standards as defined in section 3(l) of the Act and as addressed in section 104(d) and (e) of the Act.



Michael F. Duffy, Commissioner

Distribution:

**R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222**

**Samuel Lord, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Administrative Law Judge Jerold Feldman
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 22, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2010-225
ADMINISTRATION (MSHA)	:	A.C. No. 46-08596-177524 HFT
	:	
v.	:	Docket No. WEVA 2010-226
	:	A.C. No. 46-09070-188924 HFT
HARVEY TRUCKING, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 10, 2009, the Commission received from Harvey Trucking, Inc. (“Harvey Trucking”) requests 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).¹ On December 8 and 9, 2009, the Commission received responses from the Secretary of Labor stating that she does not oppose the requests to reopen the assessments.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2010-225 and WEVA 2010-226, both captioned *Harvey Trucking, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

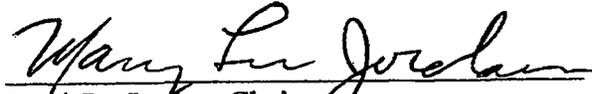
In Docket No. WEVA 2010-225, Harvey Trucking states that it mailed a request to reopen Proposed Assessment No. 000177524 on July 6, 2009, and attaches an undated copy of that letter to its current request. In that letter, Harvey Trucking states that it did not receive the proposed assessment because during the time MSHA sent the assessment, its office was closed for a period of time due to an illness. The Secretary, who does not oppose Harvey Trucking’s request, explains that the assessment was delivered on March 3, 2009, and became final on April 2, 2009. On May 20, 2009, MSHA notified the operator that the assessment was delinquent.

In Docket No. WEVA 2010-226, Harvey Trucking contends that it mailed the contest form on August 17, 2009, but according to the Secretary, the assessment had become final on July 30, 2009. On September 17, 2009, MSHA notified the operator that the assessment was delinquent. The Secretary indicates that she does not oppose this request.

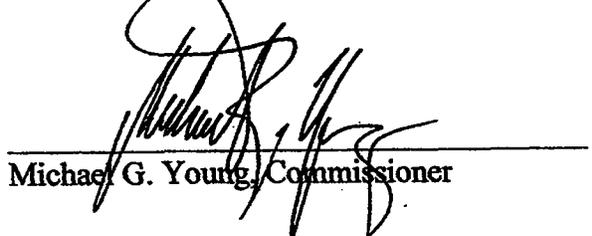
Having reviewed Harvey Trucking’s requests to reopen and the Secretary’s responses, we conclude that the operator has not provided sufficiently detailed explanations for its failure to timely contest the proposed penalty assessments. Harvey Trucking’s general statement that the office was closed for a period of time due to an illness does not provide the Commission with an adequate basis to reopen without further elaboration. In Docket No. WEVA 2010-226, Harvey Trucking has failed to provide any explanation for its failure to timely file a contest of the assessment. Furthermore, Harvey Trucking has failed to explain why it delayed approximately six weeks and seven weeks respectively in responding to the delinquency notices sent by MSHA.² Accordingly, we hereby deny without prejudice Harvey Trucking’s requests. *See Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).

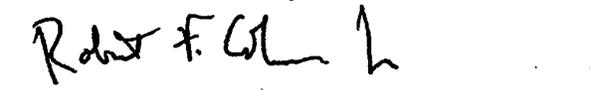
² In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator’s receipt of a delinquency notice and the operator’s filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009).

The words “without prejudice” mean Harvey Trucking may submit another request to reopen these cases so that it can contest the citations and penalty assessments.³ Any such request must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

³ If Harvey Trucking submits another request to reopen these cases, it must establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of “good cause” may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Harvey Trucking should include a full description of the facts supporting its claim of “good cause,” including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen these cases. Harvey Trucking should also include copies of all documents supporting its request to reopen these cases.

Distribution:

**Denese Richmond
Harvey Trucking, Inc.
5383 Ashford Nellis Rd.
Ashford, WV 25009**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

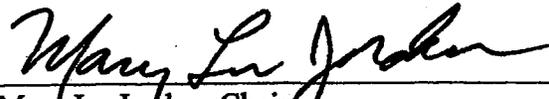
**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

On June 30, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000189657 to Aracoma. Aracoma states that it had recently changed its procedure for processing proposed assessments, bringing the function in-house. It states that it received and processed the assessment according to this new procedure and on July 24, 2009, placed the marked-up assessment for contest in its internal mail dropoff location for pickup to be brought to the local U.S. post office. Aracoma contends that it learned that the assessment was delinquent when it received MSHA's delinquency notice dated September 24, 2009. Aracoma speculates that a delay in mail pickup must have occurred, resulting in the assessment being mailed on the next business day, which was July 27, 2009.

The Secretary opposes Aracoma's request to reopen. She states that Aracoma's inadequate and unreliable internal office procedures do not constitute grounds for relief under Rule 60(b). She notes that the contested assessment was postmarked September 2, 2009, contrary to Aracoma's contention that the mailing of the assessment was delayed by a few days.

Given the unexplained time gap between Aracoma's internal processing of the assessment and the date the assessment was actually mailed, we cannot conclude that its failure to timely contest this assessment amounts to mistake or inadvertence warranting relief. Moreover, even after the Secretary's identification of Aracoma's erroneous assumption, Aracoma provided no explanation for the one-month time delay in mailing the assessment. In addition, given the amount of the penalty assessment at stake, over \$200,000, we conclude that Aracoma's delay in filing a request to reopen two months after its discovery of the delinquency was too long under the circumstances.

Based on the foregoing, we conclude that Aracoma has failed to provide an adequate basis for the Commission to reopen the penalty assessment. See *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062-63 (Dec. 2008) (denying relief because operator's excuse was insufficient); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067-68 (Dec. 2008) (same). Accordingly, we deny Aracoma's request to reopen.



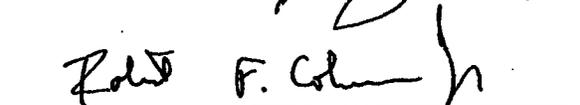
Mary Lu Joydan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

Distribution:

**Max L. Corley, III, Esq.
Dinsmore & Shohl, LLP
P. O. Box 11887
900 Lee Street, Suite 600
Charleston, WV 25339**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

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601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 28, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2009-812
ADMINISTRATION (MSHA)	:	A.C. No. 01-00851-183518
	:	
v.	:	Docket No. SE 2009-850
	:	A.C. No. 01-00851-186278
OAK GROVE RESOURCES, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 14, 2009, and August 27, 2009, the Commission received from Oak Grove Resources, LLC (“Oak Grove”) motions made by counsel to reopen 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).¹

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2009-812-M and SE 2009-850, both captioned *Oak Grove Resources, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

With respect to Docket No. SE 2009-812, on April 24, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Penalty Assessment No. 000183518 to Oak Grove, which proposed penalties of \$298,900 for three orders. In its motion to reopen the assessment, Oak Grove acknowledges that the proposed assessment was not contested within 30 days because of a miscommunication regarding who was to file the contest between the safety director and a Mr. Blevins, whose relationship to Oak Grove is unclear. Oak Grove had filed pre-penalty contests of the three orders at issue. Oak Grove does not indicate information regarding how it learned of the delinquency nor provide the delinquency notice from MSHA. We note that the orders became final orders of the Commission on May 29, 2009, and that Oak Grove filed its motion to reopen more than two and half months after the penalties had become final.

With respect to Docket No. SE 2009-850, on June 1, 2009, MSHA issued Proposed Penalty Assessment No. 000186278 to Oak Grove, which proposed penalties of \$77,000 for two orders. In its motion to reopen, Oak Grove states that the reason for failing to timely file a contest was a miscommunication regarding who would file the contest between its counsel and its safety director. We note that the orders became final on July 6, 2009. Oak Grove does not provide any indication of how it learned of the delinquency, nor does it provide the notice of delinquency from MSHA. It filed its motion to reopen nearly two months after the penalties had become final.

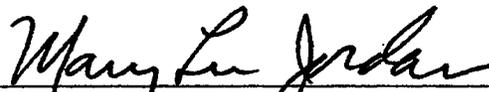
The Secretary opposes the reopening of both proposed assessments on the ground that inadequate or unreliable internal procedures do not constitute an adequate excuse for reopening. She argues that the large amounts of the penalties involved indicate that the operator’s internal procedures were particularly inadequate.

Both assessments were issued within a period of a little over six weeks, and Oak Grove has provided a very similar reason for its failure to timely contest them, i.e., lack of communication with an outside party. We have held that an inadequate or unreliable system for delivering internal mail does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment which has become final under section 105(c) of the Mine Act. *Pinnacle Mining Co.*, 30 FMSHRC 1061,1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008).

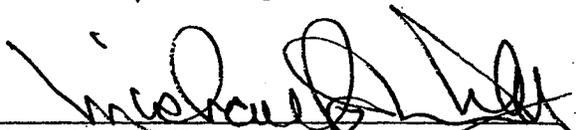
Consequently, we hereby deny without prejudice the motions to reopen these three assessments. Should Oak Grove renew its reopening requests, it must do so within 30 days, and fully explain the circumstances in the two failures to timely contest the proposed assessments. It

must also address what it has done to ensure that it responds to proposed assessments in a timely manner, in order to avoid a repeat of the mistakes it outlined in its two motions.

In addition, Oak Grove fails to explain when and how it learned of the delinquency as to both assessments. In the context of penalty assessments, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice or other notification from MSHA and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). As set forth in *Highland Mining Co.*, 31 FMSHRC 1313, 1317 (Nov. 2009), motions to reopen filed more than 30 days after receipt of delinquency information from MSHA should include an explanation for the delay in seeking reopening. The lack of such an explanation is grounds for the Commission to deny the motion. Oak Grove should provide a full explanation as to why it waited so long after the orders became final to file the motions to reopen.



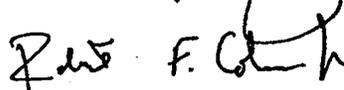
Mary Lu Jordan, Chairman



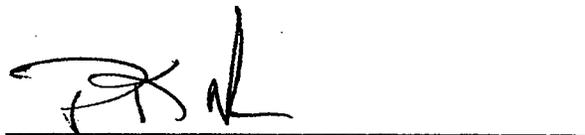
Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

Distribution:

**R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222**

**W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
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601 New Jersey Avenue, N.W., Suite 9500
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of a July 2002 near-fatal, 77-hour entrapment of nine miners at the Quecreek No. 1 Mine.³ In response to cross motions for summary decision, Chief Administrative Law Judge Robert J. Lesnick affirmed the citations against PBS and Musser and ordered a hearing on proposed penalties. 28 FMSHRC 699, 718-19 (Jul. 2006) (ALJ).⁴ In a subsequent decision, the Chief Judge concluded that Musser and PBS acted in a grossly negligent manner, determined that the violations were significant and substantial (“S&S”), and imposed the maximum penalties allowed by the Mine Act. 30 FMSHRC 1087, 1095-96 (Nov. 2008) (ALJ). PBS and Musser filed petitions to review the judge’s decisions, and the Commission granted both petitions. For the reasons that follow, we affirm, in part, and vacate and remand, in part, the judge’s decisions.

I.

Factual and Procedural Background

A. The Mine Inundation

Beginning in 2001, Black Wolf Coal Company, Inc. (“Black Wolf”) operated the Quecreek No. 1 Mine, an underground coal mine in Somerset County, Pennsylvania. 28 FMSHRC at 700-01; Stip. 23. Black Wolf employed 61 miners, 55 of whom worked underground. 28 FMSHRC at 700-01; Stip. 24. The mains, which consisted of seven entries, were driven down dip (at a lower elevation level) from the portals, and coal was produced in the 1-Left and 2-Left sections. 28 FMSHRC at 701; Stips. 16, 18. Mining was conducted by use of remote-controlled continuous mining machines that loaded coal directly into electrically operated shuttle cars, which carried the coal to a conveyor belt for transport out of the mine. Stip. 19.

On July 24, 2002, at 8:45 p.m., miners working in the 1-Left section broke through the working face into the room of an abandoned coal mine known as the Harrison No. 2 Mine. 28 FMSHRC at 701. The breakthrough resulted in a serious inundation of water from the Harrison No. 2 Mine, which was located up dip (at a higher elevation) from the Quecreek No. 1 Mine. *Id.* Nine miners were able to escape by wading through chest-high water and changing their route several times when they encountered impassable areas, while nine other miners were trapped underground. *Id.*; Tr. 393. Although the trapped miners retreated to the highest possible elevation and attempted to build a barricade against the rising water, the flooding reached a height of four feet at their last refuge point. Tr. 395-96. In addition to the hazard of drowning, the trapped miners suffered hypothermia and difficulty breathing as a result of low oxygen content in the atmosphere. Tr. 397. The nine miners wrote last notes to their loved ones, which

³ Black Wolf Coal Company, Inc., the operator of the Quecreek No. 1 Mine when the entrapment occurred, was also issued a citation and entered into a settlement agreement with the Secretary just before the hearing in the proceeding. Tr. 9-10.

⁴ PBS and Musser filed petitions for interlocutory review of the Judge’s initial decision of July 21, 2006, which the Commission denied. Unpublished Order, dated Feb. 15, 2007.

they placed in a waterproof container, and tied themselves together so that when they were at last overtaken by the water, they would be found together. Tr. 396. The nine trapped miners were ultimately rescued, following dramatic rescue efforts over a four-day period. 28 FMSHRC at 701.

B. Events Leading to the Permitting of the Quecreek Mine

Prior to the opening of a mine in Pennsylvania, a mine operator must apply for permits from state and federal authorities. *Id.* For the Quecreek No. 1 Mine, beginning in 1994, the Double C Coal Company (“Double C”) initiated the application process with the Pennsylvania Department of Environmental Protection (DEP). *Id.* PBS subsequently acquired the Quecreek Mine No. 1 from Double C⁵ and contracted with Musser to prepare a permit application for submission to DEP. *Id.*

Pennsylvania state law requires that operators must survey the workings of their mines and create accurate maps of their mines with accurate boundaries of adjoining mines. *Id.* at 702; Stip. 34. In addition, an engineer must certify the map. 28 FMSHRC at 702. There were a total of four abandoned coal mines around the Quecreek permit area, including Harrison No. 2 Mine. Tr. 249. The Harrison No. 2 Mine was located in the same coal seam and immediately up dip from the Quecreek No. 1 Mine boundary. 28 FMSHRC at 702. Part of Musser’s work in preparing the permit application was researching and showing the location of these abandoned mine works adjacent to the planned Quecreek No. 1 Mine. 28 FMSHRC at 701-02; Stip. 12.

Prior to the closing of the Harrison No. 2 Mine, which began operating in 1913, Consol Energy, Inc. (“Consol”) had purchased the mine’s coal reserves. 28 FMSHRC at 702; Stip. 28. Consol leased the coal reserves to Saxman Coal and Coke Company (“Saxman”), which operated the mine. 28 FMSHRC at 702; Stip. 48. Saxman provided updated mine maps of the Harrison No. 2 Mine to Consol on a biannual basis. 28 FMSHRC at 702. When the mine was closed in 1963, Saxman was required to supply a final mine map to the state of Pennsylvania. *Id.* After the mine was closed, it was abandoned and sealed and became flooded. *Id.* Consequently, during the state permitting process for the Quecreek No. 1 Mine, the Harrison No. 2 Mine could not be surveyed. *Id.* These circumstances led both Musser and PBS to conduct searches for maps of the Harrison No. 2 Mine. *Id.*

Although records indicated that the superintendent of the Harrison No. 2 Mine supplied final mine closing information and a final mine map to state authorities, the DEP did not have a final mine map in its archives when the Quecreek No. 1 Mine was planned and permitted. *Id.* at 703. Indeed, none of the four abandoned mines surrounding the Quecreek mine had final

⁵ The parties’ stipulations provide that the Quecreek No. 1 Mine was “initially opened” by PBS and RoxCoal, Inc., which are both identified as subsidiaries of Mincorp, Inc. Stips. 13, 20. In 2001, PBS contracted with Black Wolf for Black Wolf to conduct underground mining at Quecreek. 28 FMSHRC at 701; Stip. 23.

certified maps that were used in preparing the permit application for Quecreek. Tr. 249. Musser and PBS tried over a multi-year period to locate maps of the Harrison No. 2 Mine through visits to state and federal governmental offices and by contacting individuals connected to the mine. 28 FMSHRC at 702-03. For instance, PBS and Musser located a map of the Harrison No. 2 Mine at the Department of Interior's Office of Surface Mining ("OSM") office in Greentree, Pennsylvania ("the Greentree map"). *Id.* at 703. The Greentree map was not dated nor marked final, but it was the most current map of the mine that could be located at the state or federal mine map repositories. *Id.*; *see* Gov't Ex. 9; Stips 63, 64, and Jt. Ex. 3-4 (these copies of the Greentree map are dated; the original copy that Musser and PBS obtained is not).

In addition, PBS personnel reviewed maps at an MSHA district office and two DEP offices. Stips. 59, 60. Musser employees also retrieved maps from DEP offices. Stip. 61. Many of the maps that PBS and Musser uncovered were older ones and not useful for drawing the final boundaries of the Harrison No. 2 Mine on the Quecreek No. 1 Mine permit application maps. 28 FMSHRC at 703.

Musser contacted Consol because it had owned the coal reserves at the Harrison No. 2 Mine. Musser expected that Consol would have had accurate maps of the coal removed from the mine for purposes of checking its royalties. *Id.* A Consol employee at its facility in Library, Pennsylvania, located a map of the Harrison No. 2 Mine and provided a copy to Musser. *Id.*; Stip. 65. The map proved to be inaccurate because it showed coal reserves that had been mined. 30 FMSHRC at 1089; Tr. 44-46. Musser and PBS subsequently obtained a second map from Consol. 30 FMSHRC at 1089; 28 FMSHRC at 703. This map was neither dated, certified by an engineer, nor marked final. *Id.* This second Consol map showed the most extensive workings of the Harrison No. 2 Mine of any map located and was accepted as the final map. *Id.*

Musser, with the concurrence of PBS, used the second Consol map, Gov't Ex. 3, to draw in the boundaries of the Harrison No. 2 Mine on the Quecreek permit map. 30 FMSHRC at 1089; 28 FMSHRC at 703. The Harrison No. 2 Mine boundary on the permit map determined the extent of the development of the Quecreek No. 1 Mine, the limit of which was a 200-foot "hydraulic" barrier when there was an unsurveyed adjacent mine. 30 FMSHRC at 1089; 28 FMSHRC at 715; Tr. 653. Musser engineer Ed Secor certified the permit map. 28 FMSHRC at 703; *see* Gov't Ex. 5.

On February 28, 1998, the permit application for the Quecreek No. 1 Mine was submitted to the DEP. 28 FMSHRC at 701. During the DEP review of the application, DEP staff members conducted their own search for mine maps to confirm the accuracy of the mine map submitted with the application. Stip. 64. The most current map of the Harrison No. 2 Mine that could be located at the state and federal repositories was the Greentree map. *Id.* Based on the application prepared by Musser and submitted by PBS, including the mine map with the Harrison No. 2 Mine boundaries as reflected in the second Consol map, the DEP issued a permit for the Quecreek No. 1 Mine on March 13, 1999. 28 FMSHRC at 701; Stip. 73.

Once Musser engineer Secor certified the state permit map, all further maps created during the permitting process accepted the information (such as the boundary of the Harrison No. 2 Mine) on the prior sealed maps as complete. Stip. 87. The Musser permit map, including the placement of the Harrison No. 2 Mine and the established 200-foot hydraulic barrier, was used as the basis for maps submitted to MSHA, including the mine map required under 30 C.F.R. § 75.1200. 30 FMSHRC at 1089; Tr. 591-97.

C. The MSHA Investigation and Subsequent Citations

After the breakthrough from the Quecreek Mine into the Harrison No. 2 Mine, MSHA conducted a search for Harrison mine maps. Stip. 77. It was determined that the second Consol map, upon which Musser had relied in drawing on the permit map the boundaries of the Harrison No. 2 Mine, was not a final map and showed mining only through approximately 1961, while mining operations had continued through 1963. Stip. 67.

During MSHA's investigation, it was also ascertained that the Greentree map of the Harrison No. 2 Mine that appeared to be the most recent map filed with state or federal authorities prior to its closing, was actually a map from 1957. Stip. 78. Due to a filing error at OSM, a portion of the map that had a date of 1957 on it was not supplied to PBS and Musser when they obtained the Greentree map. 28 FMSHRC at 703. See Stips. 63, 78-81.

In determining whether the operator of the Harrison No. 2 Mine complied with state law in submitting a final mine map,⁶ MSHA identified John Kimmel as the superintendent and engineer for Saxman at the Harrison Mine. 28 FMSHRC at 703. Records indicated that Kimmel had submitted final mine maps for other mines in the area when they closed. *Id.* However, the Commonwealth of Pennsylvania had no record of a final mine map for the Harrison No. 2 Mine. *Id.*

In August 2002, MSHA discovered a final mine map at a museum, the Windber Coal Heritage Center. *Id.* at 703-04. MSHA investigators traveled to the museum and went to the museum's attic to examine old un-cataloged maps. Stip. 86. The family of a deceased Pennsylvania mine inspector, C.H. Maize, who had inspected the Harrison No. 2 Mine, had donated a map in his possession to the museum in June 2002. Stip. 84. The map was not available to the public prior to July 24, 2002, the date of the Quecreek inundation. Stip. 86. A note on the outside of the map indicated that it was the "final" mine map, and it had a date of 1964. Stip. 82. This map ("the Windber map") was the final mine map presented by Saxman to the state, and it was signed and dated by state inspector Maize. Stips. 82, 86; PBS Ex. 19.

⁶ The Mine Act, 30 U.S.C. § 312(c), and the Secretary's regulations, 30 C.F.R. §§ 75.1204 to 75.1204-1, now require that an operator file a final mine map with the MSHA district office that is accurate up to the time of closure. The Harrison No. 2 Mine closed in 1963, well before the effective date of either the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et. seq. ("Coal Act") or the Mine Act.

However, the Windber map was not certified by a surveyor or engineer, as required by state law, and the map did not show mining in the room at the Harrison No. 2 Mine where the breakthrough from the Quecreek No. 1 Mine had occurred. 28 FMSHRC at 704. MSHA investigators never located a final certified map of the Harrison No. 2 Mine nor any map that showed mining in the Harrison No. 2 Mine where the actual breakthrough occurred. *Id.*

A second mine map that was identical to the Windber map was located after the conclusion of MSHA's investigation. This map was found in the storage area in an attorney's office at Consol. Stips. 99, 102. The box containing the map was marked with the name of an environmental matter under investigation by the U. S. Environmental Protection Agency. Stip. 102. The map was not cataloged and had been placed in the storage area in the mid-1990's. Stips. 101-02. During a review of the stored boxes for possible donation to an educational institution, documents relating to Quecreek were discovered, and MSHA was contacted. Stips. 103-04. In July 2004, MSHA examined the contents of the box and located a map identical to the Windber map, along with a letter from state inspector Maize reminding Saxman of its obligation under state law to supply a final mine map 60 days after mine closure. Stips. 105-07.

At the completion of its investigation, on August 12, 2003, MSHA issued citations to Black Wolf, Musser, and PBS that charged each with violating 30 C.F.R. § 75.1200. That section provides:

The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale. Such map shall show:

- (a) The active workings;
- (b) All pillared, worked out, and abandoned areas, except as provided in this section;
- (c) Entries and aircourses with the direction of airflow indicated by arrows;
- (d) Contour lines of all elevations;
- (e) Elevations of all main and cross or side entries;
- (f) Dip of the coalbed;
- (g) Escapeways;
- (h) *Adjacent mine workings within 1,000 feet;*
- (i) Mines above or below;
- (j) Water pools above; and
- (k) Either producing or abandoned oil and gas wells located within 500 feet of such mine and any underground area of such mine; and

(l) Such other information as the Secretary may require. Such map shall identify those areas of the mine which have been pillared, worked out, or abandoned, which are inaccessible or cannot be entered safely and on which no information is available.

30 C.F.R. § 75.1200 (emphases added).

In substantially similar citations, MSHA charged Musser and PBS with violating the standard because the workings of the Harrison No. 2 Mine “were not accurately and completely shown on the mine map.” The citations further specified that the operator’s mine map showed the Harrison No. 2 Mine to be 450 feet away from where the breakthrough occurred and “the primary cause of the accident was the use of an undated and uncertified mine map of the Harrison No. 2 Mine that did not show the complete and final mine workings.” The citations further stated that Musser and PBS had improperly relied on the second Consol map as the most up-to-date map even though it was not dated or represented as a final map. Finally, the citations stated that, even though the Windber map would not have been available to Musser, “other information . . . would indicate that the boundaries used were questionable.” The citations specified that the violations were S&S; that the gravity of the violations was high; and that PBS and Musser were moderately negligent. Docket Nos. PENN 2004-152 and PENN 2004-158, Pets. for Assessment of Civ. Pen. (Exs. A, citations dated Aug. 12, 2003). The Secretary proposed penalties of \$5,000 each against PBS and Musser. *Id.*

PBS and Musser filed notices of contests, and the case was assigned to the Chief Judge. In response to motions for summary decision from the Secretary, PBS, and Musser, the judge, on July 21, 2006, issued a decision addressing whether PBS and Musser violated section 75.1200.

With regard to PBS, the judge noted that the Mine Act is a strict liability statute and that the language of the regulation is clear. 28 FMSHRC at 706. Among other things, section 75.1200 requires an operator to show on a mine map adjacent mine workings that are within 1000 feet. *Id.* at 707. The judge found that the mine map at the Queecreek No. 1 Mine did not accurately show the workings of the abandoned Harrison No. 2 Mine. *Id.* Therefore, the judge concluded that PBS violated the standard when it depicted inaccurate boundaries of the abandoned mine on the map. *Id.* at 707-08. The judge did not address PBS’s degree of negligence nor the appropriateness of the proposed penalty because of outstanding questions of material fact that could only be resolved following a hearing. Thus, he denied summary decision on those issues. *Id.* at 709-11.

In response to Musser’s argument that it was not an operator subject to the jurisdiction of the Mine Act, the judge held that Musser was an independent contractor providing engineering services to the mine that were more than *de minimis*. *Id.* at 711-14. The judge concluded that Musser violated section 75.1200 because it was in a position to prevent the errors on the mine map submitted to MSHA in that “Musser created, certified, and sealed the permit map, on which the section 75.1200 map was based.” *Id.* at 714-16. On the issue of Musser’s negligence, the

judge concluded, as he had with PBS, that he could not determine the degree of Musser's negligence or the penalty assessment without a hearing.⁷ *Id.* at 716-18.

Following a hearing, the judge issued a second decision on November 3, 2008, addressing the degree of negligence of PBS and Musser in committing the violations, whether the violations were S&S, and the amount of penalties. 30 FMSHRC at 1087. With regard to negligence, the judge concluded that PBS and Musser acted in "a grossly negligent manner." *Id.* at 1092-94. The judge reasoned that PBS and Musser were aware that they had received contradictory maps from Consol, that final certified maps are rarely available, and that the Harrison No. 2 Mine was at a higher elevation and full of water. *Id.* Rather than take additional precautions such as placing a notation on the mine map indicating uncertainty about the boundaries, PBS and Musser chose instead "to play Russian roulette with the lives of miners." *Id.* at 1093-94. The judge also concluded that the violations were S&S, noting in particular that the death of the nine miners was a near certainty but for a dramatic rescue. *Id.* at 1095. Finally, in addressing the proposed penalties, the judge found that the violations were "of the utmost gravity," *id.* at 1091-92, and he imposed the maximum penalty of \$55,000 against PBS and Musser. *Id.* at 1095.

II.

Disposition

PBS challenges the judge's reading of section 75.1200 in finding a violation because the judge's decision requires PBS to comply with the "impossible" requirement of producing an accurate map with the boundaries of the abandoned and sealed Harrison No. 2 Mine when there was no complete final mine map available from any source. PBS Br. at 15-16. PBS argues that the judge's reading of the standard misinterpreted section 75.1200 to mandate "accurate and up-to-date" information about the abandoned Harrison No. 2 Mine when the regulation only requires such information about the operator's own mine. *Id.* at 16-17. PBS also contends that the judge's reading of the standard is inconsistent with the regulatory scheme. *Id.* at 18-20. In support of its position, PBS also notes that the Secretary's regulation for ventilation plan maps, 30 C.F.R. § 75.372(c) (which may be satisfied by a mine map prepared under section 75.1200), requires boundaries of only "known" mine workings, which is consistent with Pennsylvania regulations. PBS Reply Br. at 5. PBS further argues that the judge erred when he required PBS to annotate the mine map to indicate uncertainty about the boundaries of the adjacent abandoned mine. PBS Br. at 19-25; PBS Reply Br. at 7-9. PBS states that it was not aware of such a requirement under section 75.1200 and therefore lacked notice. PBS Br. at 25-26; PBS Reply Br.

⁷ The judge concluded that Black Wolf, as the operator of the Quecreek No. 1 Mine, was jointly liable with the independent contractors, PBS and Musser, for the violation of section 75.1200. *Id.* at 717-18. As previously noted, Black Wolf settled with the Secretary and is no longer in the proceeding. The judge approved a settlement in which Black Wolf was ordered to pay \$4100, the amount that the Secretary had proposed in its penalty against Black Wolf. Unpublished Order, Docket No. PENN 2004-157 (Nov. 3, 2008).

at 9. PBS takes issue with the judge's finding that PBS's level of negligence was very high or "gross," noting that the Secretary only alleged that the level of negligence was "moderate." PBS Br. at 26-31. PBS also asserts that the violation was not S&S. *Id.* at 31-33. Finally, PBS contends that the judge's increase in the Secretary's proposed penalty was improper and that he failed to provide an adequate explanation for departing from the proposed amount. *Id.* at 33-34.

Musser initially argues that it is not an "operator" within the meaning of the Mine Act and therefore that MSHA has no jurisdiction over it. M. Br. at 6-15; M. Reply Br. at 8-12. Musser contends that a mine must exist before Mine Act jurisdiction attaches, and that Quecreek No. 1 Mine was not in existence at the time Musser performed services. M. Br. at 7-11. Musser further argues that it did not violate section 75.1200 because it never created any map of the Quecreek No. 1 Mine, M. Reply Br. at 6-7, and never certified the section 75.1200 map nor submitted it to MSHA. M. Br. at 16-17. Musser asserts that it played no role in making sure an up-to-date map was kept at the mine, M. Br. at 16, and that it could not have met the requirements of section 75.1200 because there was no "mine" in existence at the time it prepared the state permit map. M. Reply Br. at 6-7. Musser challenges the judge's S&S determination because he failed to correctly apply the test set forth in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). M. Br. at 17-18. Musser asserts that the judge's finding that Musser acted in a grossly negligent manner is contrary to the record evidence, clearly erroneous, and that the judge ignored mitigating factors in his determination. *Id.* at 19-25. Musser further challenges the judge's negligence holding because it was based on Musser's failure to place a warning or notation on the state permit map, when such a disclaimer would have been inappropriate. M. Br. at 21-22; M. Reply Br. at 2-3. Musser finally argues that the Commission should reverse the judge's penalty assessment because he failed to properly consider whether the increased penalty was appropriate to Musser's size and whether it would affect its ability to continue in business. M. Br. at 25-26.

In response, the Secretary argues that Musser failed to raise either before the judge or in its PDR that it was not covered by the Mine Act. S. Br. at 12-13, 15-16. The Secretary further argues that Musser provided sufficient services to the Quecreek mine to be an "independent contractor" under the Act. *Id.* at 14-18. With regard to the regulatory requirement to provide an accurate mine map showing adjacent mine workings, the Secretary argues that the standard is plain and that Musser and PBS violated it when they failed to show the correct boundaries of the Harrison No. 2 Mine. *Id.* at 18-20. In response to Musser's and PBS's argument that they did not have adequate notice of the standard's requirements, the Secretary asserts that a reasonably prudent operator would have understood that a mine map that indicates there were no immediately adjacent workings, when in fact, that information was unknown, is not "accurate." *Id.* at 24-25. The Secretary argues that the judge's S&S determination is correct under *Mathies*. *Id.* at 26-30. The Secretary states that the judge's finding of gross negligence is supported legally and factually. *Id.* at 30-39. In the assessment of penalties against Musser and PBS, the Secretary states that a remand to the judge for a further analysis of the penalties and two of the penalty criteria in section 110(i), size of business and ability to continue in business, is necessary. *Id.* at 41-42.

A. Musser's Status as an Operator/Independent Contractor under the Mine Act⁸

Section 3(d) of the Mine Act expanded the definition of "operator" in the Coal Act, and defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). The phrase "independent contractor" is not defined in the Mine Act, but MSHA regulations define it as an entity that "contracts to perform services . . . at a mine." 30 C.F.R. § 45.2(c). The Secretary cited Musser as an operator based on the independent contractor clause of section 3(d).⁹

Musser challenges MSHA's authority to issue it a citation under the Mine Act. M. Br. at 6-17. It essentially argues that before there can be jurisdiction over it, there must, pursuant to section 3(d), be a "mine" in existence from which minerals are being extracted, and that in this case, the actions for which it was cited occurred years before there was a mine. *Id.* at 6-9 & n.4. Musser additionally argues that MSHA lacked jurisdiction to issue the citation because its work was not performed at the prospective mine site, and hence, was not "at such mine" within the meaning of 30 U.S.C. § 802(d).

Initially, we disagree with the Secretary that Musser has not adequately preserved the issue for review. In its petition for discretionary review, Musser identifies the first issue for review in the following words, "There is no Mine Act jurisdiction." M. PDR at 6. Musser states in its petition that it is not an "operator," which includes "any independent contractor performing services," within the meaning of section 3(d) of the Act. *Id.* Musser's identification and treatment of the issue in its PDR largely parallels the judge's discussion of the issue that he titled, "Musser - Jurisdiction" in his first decision. 28 FMSHRC at 711. In any event, Musser's arguments regarding its status as an operator and independent contractor under section 3(d) are clearly related to those presented to the judge, M. Reply Br. on Mot. for Sum. Dec. at 1-5, and can be considered by the Commission. See *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998), *aff'd in part on other grounds*, 170 F.3d 148 (2nd Cir. 1999) (addressing unwarrantable failure findings not specifically raised in a PDR because the arguments were sufficiently related to the negligence issue in the PDR); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10-11 n.7 (Jan. 1994) (holding that the arguments raised on review were sufficiently related to those presented to the judge, as they enlarged the initial contention to the judge by presenting an additional rationale).

⁸ Chairman Jordan joins Commissioner Cohen in Part II.A. of this opinion.

⁹ In response to Musser's argument based on *Berwind Natural Resources Corp.*, 21 FMSHRC 1284 (Dec. 1999), an argument which Musser now seems to have abandoned, the Judge correctly pointed out that a majority of Commissioners concluded that the engineering firm in *Berwind* could have been cited as an independent contractor. 28 FMSHRC at 711-12.

In finding that Musser was an “independent contractor performing services . . . at [a] mine” under section 3(d), the judge relied on *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990), *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 999-1000 (10th Cir. 1996), and *Northern Illinois Steel Supply Co. v. Secretary of Labor*, 294 F.3d 844, 848-49 (7th Cir. 2002), which hold in effect that section 3(d) covers any independent contractor performing more than *de minimis* services at a mine. See 28 FMSHRC at 712-14. The judge’s analysis of this issue is correct.¹⁰

First, clearly Musser was an independent contractor which performed engineering services for PBS in connection with the Quecreek No. 1 Mine. It prepared the original permit application including the maps that were an integral part of securing a mining permit from state and federal authorities. Stips. 11, 12. Once Musser engineer Secor certified the state permit application map that indicated the boundaries of the Harrison No. 2 Mine, all future mine maps, including mine maps submitted to MSHA, were prepared using that map as the “base map.” 30 FMSHRC at 1089. Substantial evidence supports the judge on this point.¹¹ Tr. 59-60, 194, 335, 377-82.

The next inquiry is whether Musser was performing services “at a mine.” Relying on the Commission’s decision in *Paul v. P.B.-K.B.B., Inc.*, 7 FMSHRC 1784 (Nov. 1985), *aff’d*, 812 F.2d 717, 720 (D.C. Cir. 1987), Musser argues, M. Br. at 7-8, that there can be no Mine Act jurisdiction if there is no mine in existence. In *Paul*, the Commission dismissed a section 105(c) discrimination complaint because the individual was not working at a “mine,” and was involved

¹⁰ Commissioner Cohen notes that previous Commission cases have utilized a cumbersome and obscure two-pronged test for determining whether an independent contractor is an operator under section 3(d). First, the Commission has reviewed the independent contractor’s “proximity” to the mining process and determined whether its work is “sufficiently related” to it. *Otis Elevator Co.*, 11 FMSHRC 1896, 1902 (Oct. 1989), *aff’d* 921 F.2d 1285 (D.C. Cir. 1990). Next, the Commission has considered “the extent of [the contractor’s] presence at the mine.” *Id.* By contrast, the D.C. Circuit in *Otis Elevator*, the 10th Circuit in *Joy Technologies*, and the 7th Circuit in *Northern Illinois* have adopted an approach based on the plain meaning of the statute. This approach to section 3(d) is also advocated by the Secretary. S. Br. at 18 n.15. Commissioner Cohen believes this view is more straightforward and in keeping with the language of the Mine Act. He notes that no court has endorsed the Commission’s analysis of the independent contractor component of section 3(d). Consequently, he suggests that our older precedent in this area merits reexamination by the Commission.

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

in design and exploratory activity that was “simply too far removed from what reasonably can be regarded as mining activity in order to qualify for Mine Act coverage.” 7 FMSHRC at 1788.

However, Musser’s argument ignores an essential provision of the Mine Act that is applicable in this proceeding. Section 3(h)(1) of the Act defines “mine” as including “lands . . . or other property . . . used in, or *to be used in*, or resulting from, the work of extracting such minerals from their natural deposits.” 30 U.S.C. § 803(h)(1) (emphases added).¹² The significant distinction between *Paul* and this case is that in *Paul*, the engineer was preparing designs to explore the feasibility of storage of nuclear waste in shafts constructed in underground salt formations, but no prospective mine site was involved. Further, in *Paul*, “[t]he design never left the drawing board. It was never implemented.” 7 FMSHRC at 1787. Thus, the “mine” was wholly conceptual in nature. As the D.C. Circuit noted, “[c]onceptual designs do not endanger lives or property; any hazards they pose, prior at least to their final approval or the initial stages of their implementation, are purely hypothetical. The Act was not designed to regulate *ideas*.” 812 F.2d at 720.

Here, in contrast, the site for the mine had been selected, and Musser’s work was in relation to that specific site. The Quecreek No. 1 Mine was located at that site. Thus, we conclude that the absence of a mine from which minerals were being extracted at the time of Musser’s work is not dispositive of Musser’s status as an independent contractor. *See* 7 FMSHRC at 1785, 1788.¹³

¹² We disagree with Musser’s assertion, stated at oral argument before the Commission, Oral Arg. Tr. 57-58, that MSHA has no jurisdiction over any actions taken by an operator before ground is broken for a new mine.

¹³ We also reject Musser’s argument based on the language of section 4 of the Mine Act, that it is not subject to the Act because “[a]t the time of the acts for which Musser was cited, there was no ‘mine, the products of which enter[ed] commerce or the operations or products of which affect[ed] commerce.’” M. Br. at 8-9, quoting 30 U.S.C. § 803; Oral Arg. Tr. 50. Musser relies on *Paul* for the proposition that this section of the Act “says nothing about the *prospective effects* of commerce.” M. Br. at 9, quoting 812 F.2d at 720 n.3 (emphasis in brief). Musser’s reliance is misplaced. Musser ignores the fact that the services Musser performed (which, as discussed below, included surveying, field investigations, and water sampling at the mine site), were contemporaneous “operations . . . which affect commerce.” *See United States v. Lake*, 985 F.2d 265, 269 (6th Cir. 1993) (holding that the operation of a mine whose coal was sold locally, and which purchased mining supplies from a local dealer and consumed commercially produced electricity, were sufficient to prove that “operations or products” of the mine affected interstate commerce under the Act); *Sec’y of Interior v. Shingara*, 418 F. Supp. 693 (M.D. Pa. 1976) (holding that defendants’ mining activities fell within the coverage of the Act based in part on their purchase of items of equipment and an insurance policy produced by out-of-state sources which “affects commerce”); *see also D.A.S. Sand & Gravel, Inc.*, 386 F.3d 460 (2nd Cir. 2004)

Musser's second argument as to jurisdiction is that its work was not actually performed at the prospective mine site. In response, the Secretary argues that the words "at such mine" are applicable if the services related to the mine site even if Musser performed them somewhere else. S. Br. at 15-17. The words "at such mine" in section 3(d) are ambiguous, and we conclude that the Secretary's interpretation is reasonable and thus entitled to deference under the *Chevron II* standard. *Chevron U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 842-44 (1984).

Even without according deference to the Secretary's interpretation of the words "at such mine," there is substantial evidence to support the finding that Musser's work was performed, in part, at the mine site. This conclusion is supported by Musser's time records contained in Musser Exhibit 4. These time records indicate repeated visits to the mine site for work related to the permitting process, including surveying, field investigations, and water sampling. See M. Ex. 4. These types of visits were acknowledged by Musser's counsel at oral argument. Oral Arg. Tr. 44-45. Moreover, the services performed by Musser, which determine whether it is subject to MSHA jurisdiction include all of the work performed by Musser in connection with submitting the permit application to the Pennsylvania Department of Environmental Protection in 1998. This work was much more extensive than just the work of locating the boundaries of the Harrison No. 2 Mine and placing them on the Module 19.2 permit map. The specific work relating to the Harrison Mine boundaries is the only work relevant to the citation in this case, but it is the totality of the work Musser performed in preparing the permit application which must be considered on the jurisdiction issue.¹⁴

Our examination of Musser's activities does not end here. We must determine whether its contact was so infrequent or *de minimis* that it would be difficult to conclude that services were being performed. *Northern Illinois*, 294 F.3d at 848-49. Musser's engineering services for RoxCoal, PBS, and Black Wolf were extensive in time and substantial in content. Musser's time records reflect work on a monthly, weekly, or more frequent basis, throughout 1992 to 1999. See M. Ex. 4. As the judge found, 28 FMSHRC at 714, Musser's activities included "engineering support, mapping, and surveying services" that were performed to meet the operational needs of the mine. Substantial evidence supports the judge in this regard. Accordingly, the services provided by Musser were not *de minimis*, unlike the contractor in *Northern Illinois*.

Finally, in considering the role of Musser in the pre-extraction, operational activities at the Quecreek mine, it is consistent with the purposes of the Mine Act to conclude that Musser is an operator. As the Commission has noted, Congress' inclusion of language in section 3(d) to include independent contractors under the definition of "operator" represents an intentional

(affirming Commission holding that the Mine Act applies to mines the products of which are sold entirely intrastate).

¹⁴ However, we reject the Secretary's argument that the work performed by Musser at the Quecreek Mine in 2001 and 2002 is relevant to establishing jurisdiction for work performed up to submission of the Pennsylvania permit application in 1998.

expansion in the coverage of the statutory term. *Bulk Transp. Services, Inc.*, 13 FMSHRC 1354, 1357 (Sept. 1991). Moreover, according to the Senate Report, “[I]t is the Committee’s intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation.” S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor Comm. on Human Res., *Legislative History of the Federal Mine Safety & Health Act of 1977*, at 602 (1978). Indeed, if we did not find coverage of Musser under the Act, we would reach the anomalous result that a mine owner performing the same work as an independent contractor would be covered, but the contractor would not.

B. Whether Section 75.1200 Was Violated

PBS and Musser were cited for violating section 75.1200, 30 C.F.R. § 75.1200. Section 75.1200 is a standard that has its origin in, and closely tracks, section 312 of the Mine Act, which provides that “[t]he operator of a coal mine shall have . . . an accurate and up-to-date map” that shows “adjacent mine workings within one thousand feet.” 30 U.S.C. § 872.¹⁵

1. Liability of PBS¹⁶

In agreement with the judge, we conclude that the language of section 312 of the Mine Act and the regulation, 30 C.F.R. § 75.1200, is clear in requiring a coal mine operator to maintain an “accurate” mine map showing adjacent mine workings, including abandoned workings within 1000 feet. The judge correctly determined that PBS violated 30 C.F.R. § 75.1200. PBS violated the standard’s requirement of an accurate map because, as the judge pointed out, “[t]o say that the operator’s map was inaccurate would be an understatement. If the operator’s map were accurate, the Harrison No. 2 Mine workings would not have been intersected because the Harrison No. 2 Mine really would have been approximately 450 feet away, as indicated on the operator’s map.” 28 FMSHRC at 706. Accordingly, as the judge noted, if the Quecreek mine map had been “accurate,” no breakthrough would have occurred. *Id.*

PBS raises a number of defenses regarding this liability issue. First, PBS argues that section 75.1200’s requirement for an “accurate” mine map only applies to the mine “being mapped and operated.” PBS Br. at 16-17. It asserts that the regulation does not require an “accurate and up-to-date map” of the adjacent workings (in this case, of the Harrison No. 2 Mine).

¹⁵ Section 312(a) of the Coal Act had similar wording, requiring accurate and up-to-date mine maps including “adjacent mine workings within one thousand feet.” 30 U.S.C. § 872(a) (1976).

¹⁶ Chairman Jordan and Commissioner Duffy join Commissioner Cohen in Part II.B.1. of this opinion.

We reject this contention, as the framework and language of the standard are clear that it does.¹⁷ Quoting section 312(a) of the Act, the regulation states: “The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, *an accurate and up-to-date map* of such mine drawn on scale.” 30 C.F.R. § 75.1200 (emphasis added). The regulation goes on to state, “[*s*]uch map shall show” and then enumerates specific items which must be shown. *Id.* (emphasis added). Of the 12 items listed, eight (the first seven and the last) refer to the operator’s mine, while the other four items, including “(h) Adjacent mine workings within 1,000 feet,” do not refer to the operator’s mine. PBS’s assertion that the requirement of accuracy of the mine map applies to the eight specified items relating to the operator’s mine but not to the remaining four items has no basis in the statutory or regulatory language, which makes no such distinction. PBS’s argument contravenes the well-known principle that a statutory or regulatory provision must be construed “as a whole, giving comprehensive, harmonious treatment to all provisions.” *Morton Int’l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996). Certainly, it would trivialize the requirement of an accurate mine map to carve out an exception for the boundaries of adjacent mines.

Moreover, the legislative history of the Coal Act, which, as mentioned previously, contains the predecessor provision to section 312 of the Mine Act, makes clear that the requirement of an accurate mine map applies to workings adjacent to the mine. As stated in the Senate Report, “[r]ecent inundation accidents . . . point up the need for the accurate mapping of mines. Active mines often cut through into adjacent mines, or worked[-]out and abandoned areas of the same mine, because of the lack of maps or because of inaccurate maps.” S. Rep. 91-411, at 82 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 208 (1975). Hence, the operator’s argument that the regulation does not require “accurate” mapping of the adjacent mine workings within 1,000 feet is groundless.

PBS also challenges the judge’s finding of a violation because the judge’s reading of the regulation “requires what is impossible,” as no final complete mine map of the Harrison No. 2 Mine was available, and because it was impossible to survey the abandoned and flooded mine. PBS Br. at 15-16.

In support of its argument, PBS cites four cases – *Rock of Ages Corp.*, 20 FMSHRC 106, 122 (Feb. 1998); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Dantran, Inc.*

¹⁷ The “language of a regulation . . . is the starting point for its interpretation.” *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

v. Department of Labor, 171 F.3d 58, 65 (1st Cir. 1999); and *Walker Stone Co. v. Secretary of Labor*, 156 F.3d 1076, 1082 (10th Cir. 1998). However, none of these cases stand for the proposition advanced by PBS. Rather, they stand for the principle that a statute or regulation may not be construed so as to lead to absurd results.

In any event, PBS's argument that the citation in this case required it to do the "impossible" because the precise location of the Harrison No. 2 Mine workings was unknown ignores the precept that "operators may be held liable for violations of mandatory safety [standards] under the Mine Act even if they did not have knowledge of facts giving rise to the violation." S. Br. at 20, citing *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2nd Cir. 1999); see also *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1183-84 (9th Cir. 1998). As noted by the Second Circuit, this is consistent with the purpose of the Mine Act because it encourages "greater vigilance" and avoids creating an incentive for operators "to avoid gaining knowledge." *Rock of Ages*, 170 F.3d at 155.

Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." *Id.* at 1636. Thus, because the standard requires that the operator maintain an "accurate and up-to-date map," it follows that if the mine map fails to meet these requirements, the operator has violated the standard, regardless of whether it did everything possible to locate an accurate historical map of adjacent mine workings.

We also reject PBS's assertion that the judge's interpretation of the regulation (requiring an operator to accurately depict the workings of an abandoned adjacent mine even if it is not possible for the operator to survey the abandoned mine) is inconsistent with the regulatory scheme. PBS Br. at 18-19. PBS first relies on 30 C.F.R. § 75.1200-2, which addresses the surveying of mine property. PBS reasons that this standard equates the accuracy of a mine map with the accuracy of an operator's survey methods. *Id.* However, references to the methodology of surveying in other MSHA regulations do not vitiate the plain language of section 75.1200(h), which requires an "accurate and up-to-date map" of adjacent mine workings within 1,000 feet.

PBS also relies on borehole regulations (30 C.F.R. § 75.388) that, according to PBS, have more stringent requirements in areas of a mine not shown by surveys. PBS contends that the different requirements involving the drilling of boreholes in advance of mining¹⁸ recognize that

¹⁸ PBS compares 30 C.F.R. § 75.388(a)(1), which requires boreholes in advance of mining when the working place approaches "[t]o within 50 feet of any area located in the mine as shown by surveys that are certified by a registered engineer or registered surveyor unless the area has been preshift examined," with 30 C.F.R. § 75.388(a)(3), which requires boreholes in advance of mining when the working place approaches "[t]o within 200 feet of any mine workings of an

some adjacent mines cannot be accurately mapped, and so build in a 200-foot borehole drilling requirement as a replacement for accurate mapping. *Id.* at 19. However, the requirement for boreholes in advance of mining when the working place approaches to within 200 feet of any mine workings of an adjacent mine located in the same coal bed (unless the mine workings have been preshift examined), 30 C.F.R. § 75.388(a)(3), does not displace the requirement for an accurate map of adjacent mine workings within 1,000 feet. Rather, this is an additional safety precaution which provides additional protection from breakthroughs.¹⁹ The fact that section 75.388(a)(1) requires borehole drilling when the working place approaches to within 50 feet of an area “located in the mine as shown by surveys that are certified by a registered engineer or registered surveyor” is irrelevant. This provision relates to mining coming close to an already-mined area within the operator’s mine rather than an adjacent mine.

PBS also contends that under MSHA’s regulations governing ventilation maps, 30 C.F.R. § 75.372(b)(3), an operator need only show “known” mine workings in the same seam and that Pennsylvania state law only requires “known workings of . . . abandoned, underground or surface mines,” on permit application maps, 25 Pa. Code. § 89.154(a)(4). PBS Reply Br. at 5. PBS notes that pursuant to C.F.R. § 75.372(c), MSHA accepts a mine map prepared under 30 C.F.R. § 75.1200 as fulfilling the requirements of a ventilation map under 30 C.F.R. § 75.372(b). *Id.* However, neither section 75.372(b)(3) nor the Pennsylvania environmental statute supplants the plain language requirements of section 75.1200(h). PBS appears to accept the premise that the language of 30 C.F.R. § 75.372(b)(3), with its reference to “known mine workings,” is less stringent than 30 C.F.R. § 75.1200(h), which omits the word “known.” The fact that the Secretary accepts the more rigorous provision of section 75.1200 as satisfying section 75.372(b)(3) can in no way be interpreted to imply the inverse – that the Secretary intended to accept a watered-down version of a section 75.1200 mine map to satisfy section 75.1200. If anything, comparison of section 75.1200 with section 75.372 supports the judge’s conclusion that the plain meaning of section 75.1200 requires an accurate depiction of adjacent mine workings within 1,000 feet.

Additionally, PBS takes issue with the judge’s findings that the Quecreek Mine map would have been “accurate” within the meaning of section 75.1200 if it had been drafted so as to show uncertainty regarding the location of workings in the Harrison No. 2 Mine. 28 FMSHRC at 707. PBS argues that it had no notice of a requirement that, when the precise boundaries of an adjacent mine are uncertain, it must show the uncertainty on its mine map by using dotted lines or other form of disclaimer. PBS Br. at 20-26. However, we need not reach the issue of whether a mine map depicting an uncertain area becomes “accurate” if it shows the uncertainty. As stated

adjacent mine located in the same coalbed unless the mine workings have been preshift examined.”

¹⁹ If the Quecreek Mine map had been less inaccurate, e.g., 180 feet wrong rather than 450 feet, then the borehole requirement of section 75.388(a)(3) would have avoided the disaster which occurred on July 24, 2002. However, the gross inaccuracy of the mine map here meant that the 200-foot borehole requirement, by itself, was not sufficient to prevent the inundation.

supra, the plain meaning of section 75.1200 is that a mine map's depiction of the workings of an adjacent mine within 1,000 feet must be accurate.²⁰

An operator in the position of PBS in this case – recognizing the existence of an abandoned mine up dip of its proposed mine, but uncertain of the boundaries of the abandoned mine because of the lack of a final, dated, and certified map of the abandoned mine – is not without means to operate its mine legally and safely. The Mine Act envisions situations in which

²⁰ Chairman Jordan believes it is necessary to address the judge's holding that, had the map at issue merely indicated uncertainty about the mined out area, it would have met the requirement for an accurate map under 30 C.F.R. § 75.1200. According to the judge, such map "would have 'accurately' shown that adjacent mine workings existed, and would have 'accurately' shown that the exact location of those workings was not known." 28 FMSHRC at 707. The judge indicated this was the construction urged by the Secretary, and indeed the Secretary has maintained this position on appeal, stating that compliance with the regulation could have been achieved "simply by indicating in some way on the map that the exact location of the adjacent workings in the Harrison No. 2 Mine was unknown." S. Br. at 21.

The judge considered this construction of 75.1200 to be in accord with a "plain reading of the text" as well as "in line with the purpose of the Act" because, as he explained, "[i]f there had been some indication on the map that the location of mine workings in the Harrison No. 2 [M]ine w[as] unknown, the miners would most certainly have proceeded with more caution." 28 FMSHRC at 707. Moreover, the judge concluded, "[t]his reading of the text does not lead to the absurd result of requiring operators to produce exact depictions of inaccessible mine workings." *Id.*

Putting aside for the moment the issue of whether it is reasonable to assume that the miners (particularly at an unorganized mine) would actually see the mine map, collectively realize the need to implement extra precautions, and then be in a position to determine which precautions were advisable, the fact remains that under the judge's holding, those miners have no recourse if their employer declines to address their concerns. If the miners went to MSHA, that agency could not insist on any precautions since, under the judge's (and apparently the Secretary's) construction of section 75.1200, the operator is considered to be in compliance with that standard merely by indicating on the map that it is not certain where a particular boundary is located. An operator who disagreed with the need to implement certain precautions, and whose miners subsequently broke through into flooded workings, would not be considered to have violated section 75.1200's requirement of an accurate mine map as long as the map indicated the operator's uncertainty about the location of the adjacent flooded workings. Chairman Jordan respectfully suggests that this is the absurd result that should be avoided. She therefore rejects the Secretary's argument, which was adopted by the judge, that a map with incorrect boundaries may nevertheless comply with section 75.1200's requirement for an "accurate and up-to-date map" as long as the map indicated those boundaries might be wrong. She believes such construction is not consistent with either the language or purpose of the standard.

an operator is permitted to deviate from a standard's requirements, if adequate alternative precautions are implemented. Section 101(c) of the Mine Act authorizes the Secretary to modify the application of any mandatory safety standard to a particular mine if she finds that "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard." 30 U.S.C. § 811(c). An operator in the situation of PBS in this case may petition the Secretary, pursuant to section 101(c), to modify the strict application of 30 C.F.R. § 75.1200. In the petition, the operator could explain what steps it would put in place, in other words, what "alternative method" it is proposing to implement, so that miners would have the same level of protection as is afforded by compliance with the standard. Thus, in the absence of a final, dated certified map of an adjacent mine, the operator could propose procedures such as horizontal drilling at the face in advance of the mining, as suggested by Black Wolf President David Rebeck, Tr. 280-81, and MSHA expert Stanley Michalek, Tr. 429.

Hence, we reject PBS's defenses and conclude that it violated section 75.1200 when it failed to maintain an accurate mine map.

2. Liability of Musser²¹

Musser appeals the judge's conclusion that it violated 30 C.F.R. § 75.1200 by preparing the Pennsylvania DEP environmental permit application for the Queecreek No. 1 Mine, including a map showing the location of abandoned mine workings adjacent to the planned mine. 28 FMSHRC at 714-16. In his decision finding Musser liable, the Judge reasoned that the Musser environmental permit map, including the location of the Harrison No. 2 Mine, was used as a basis for the maps required to be prepared under 30 C.F.R. § 75.1200; that the Mine Act is a strict liability statute; that the Secretary has wide discretion to proceed against an owner-operator, its contractor, or both; and that Musser was in a position to prevent the errors on the section 75.1200 map submitted to MSHA. *Id.*

Musser argues that it never certified or submitted a map to MSHA under section 75.1200. M. Br. at 16. Musser further contends that its certification of the maps submitted to the Pennsylvania DEP was guided solely by state requirements under which it appropriately certified the maps and boundaries. *Id.* at 16-17. At its essence, Musser's primary argument is that its state environmental permit work was too attenuated to the map preparation and submission required under section 75.1200 for Musser to be held responsible. In response, the Secretary argues that section 75.1200 has no words that would limit its application to an operator involved with preparing or certifying maps for MSHA, and thus Musser committed a violation because it prepared the state permit map upon which the section 75.1200 map was based. S. Br. at 23.

²¹ Commissioner Duffy joins Commissioner Cohen in Part II.B.2. of this opinion.

Previously, Chairman Jordan and Commissioner Cohen found that Musser's services as an independent contractor at the mine justified the judge's conclusion that Musser was an "operator" of the mine pursuant to section 3(d) of the Mine Act, 30 U.S.C. § 802(d). However, the fact that Musser was an "operator," together with the fact that Musser prepared the Pennsylvania environmental map, is not sufficient to justify the conclusion that Musser is liable for a violation of section 75.1200. As we noted in *Joy Technologies, Inc.*, 17 FMSHRC 1303, 1309 (Aug. 1995), *aff'd*, 99 F.3d 991 (10th Cir. 1996), an independent contractor will not be held responsible for a violation where it exercised no control. As recently stated by the D.C. Circuit in *Secretary of Labor v. National Cement Co. of California*, 573 F.3d 788, 795 (D.C. Cir. 2009), "strict liability means liability without fault. . . . It does not mean liability for things that occur outside one's control or supervision."

The citation issued to Musser states that the information it supplied "was used by PBS to show the Harrison No. 2 boundary on the map required by 30 C.F.R. § 75.1200 for the Quecreek No. 1 Mine." Stip. 96. Section 104(a) of the Mine Act limits citations to an operator that has "violated" the Act or any mandatory standard. 30 U.S.C. § 814(a). The liability of Musser in this case is a very close question. The issue is whether an engineering firm which produced a map under a state environmental permit statute is liable for a violation under the Mine Act when information on the state map was carried over to the section 75.1200 mine map, and was erroneous. If Musser had itself participated in the actual preparation of the section 75.1200 mine map, we would have no problem in upholding the violation. But the issue presented by Musser's involvement in the inundation at the Quecreek No. 1 Mine is a matter of first impression.

We conclude that the company's preparation of the Pennsylvania environmental permit map was too attenuated a circumstance to justify imposition of liability for the erroneous mine map under 30 C.F.R. § 75.1200, even though the location and boundaries of the Harrison No. 2 Mine were identical on both maps. Musser was not involved with the preparation or submission of the section 75.1200 mine map to MSHA. It had no direct control over the submission of the map to MSHA.²²

As noted *supra* at 17, the Pennsylvania environmental statute under which the permit application was submitted differs from 30 C.F.R. § 75.1200, in that it only requires "[t]he location and extent of known workings of active, inactive or abandoned, underground or surface mines" to be shown on permit application maps. 25 Pa. Code § 89.154(a)(4) (emphasis added). Thus, it would appear that Musser may have been in compliance with the Pennsylvania statute under which it prepared the permit map, since the mine workings in the Harrison No. 2 Mine which were erroneously placed on the permit map were not "known" from any map which Musser was able to locate. It would be anomalous to hold that Musser violated a statute under which it did not

²² As a verb, "control" has been defined as "[t]o exercise authority or dominating influence over; direct; regulate." *The American Heritage Dictionary of the English Language, New College Edition* 290 (1976).

prepare the map when it arguably complied with the statute which was applicable to the map it did prepare.

Moreover, although Musser engineer Secor was the person who certified the Pennsylvania environmental permit map, PBS was fully involved in the process of producing it. PBS vice-president Joseph Gallo testified that he “approved” the boundary lines for the Harrison No. 2 Mine that appeared on the state permit map. Tr. 247. Clearly, PBS knew what Musser knew with regard to the boundaries of the Harrison No. 2 Mine at the time of submission of the state permit map. Tr. 144-46. Both Gallo and PBS chief mining engineer John Yonkoske testified that PBS then continued to search for maps of adjacent mines after Musser submitted the state environmental permit application. Tr. 189-92, 227, 235-36, 321-22. Thus, in preparing the section 75.1200 mine map, PBS concluded independently from Musser that the location and boundaries of the Harrison No. 2 Mine were correctly placed.

The judge rested his conclusion that Musser was liable on the finding:

Musser was in a position to prevent the errors on the section 75.1200 map because Musser created, certified, and sealed the permit map, on which the section 75.1200 map was based. Musser knew that even though its map would not specifically be submitted to MSHA for the requirements of section 75.1200, the research and plotting of the Harrison No. 2 Mine and the hydraulic barrier line would be used in creating future maps of the Quecreek No. 1 Mine. By sealing the permit map, Musser verified the map’s accuracy.

28 FMSHRC at 716. Essentially, this is a conclusion based on the concept of foreseeability. The argument is that because it was foreseeable that the location and boundaries of the Harrison No. 2 Mine placed on the permit map would then be placed on the section 75.1200 mine map (a conclusion with which we do not disagree), Musser committed a violation under the Mine Act because of the inaccuracy of the mine map.

The concept of foreseeability of injury as a basis for finding negligence has long been an integral part of Anglo-American tort law. See W. Page Keeton et al., *Prosser and Keeton on Torts*, § 43, at 280 (5th ed. 1984) (“*Prosser*”). However, tort law is inherently different from the law of governmental regulation. Tort law

is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally

The law of torts, then, is concerned with the allocation of losses arising out of human activities The purpose of the law of torts is to adjust these losses, and to afford compensation for

injuries sustained by one person as the result of the conduct of another.

Id., § 1, at 5-6. In contrast, the concepts underlying governmental regulation such as the Mine Act do not include allocation of losses or compensation to a person injured by the actions of another.²³ Penalties under the Mine Act are payable to the public via payment to the federal government. Whether or not a penalty is imposed under the Mine Act (although not the amount of the penalty) is determined by whether the operator committed a violation of the Act, which is a matter of strict liability. Section 110(a) is specific in this regard: “The operator of a coal or other mine in which a violation occurs . . . shall be assessed a civil penalty . . .” 30 U.S.C. § 820(a). The issue of negligence is not part of the analysis of whether or not a violation of the Act occurred under section 110(a).²⁴ The rationale for strict liability under the Mine Act is that “it is a common regulatory practice to impose a kind of strict liability on the employer as an incentive for him to take all practicable measures to ensure the workers’ safety.” *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893 (5th Cir. 1982).

Consequently, the foreseeability of the potential injury caused by an operator’s conduct is rarely, if ever, a factor in determining whether a strict liability penalty is assessed under section 110(a). Rather, the issue in Mine Act litigation is usually whether an operator or its contractor is subject to a statutory or regulatory provision, and if so, whether there was compliance with the applicable legal mandate. Indeed, the Commission has emphatically rejected a proposed “unforeseeable employee misconduct exception” to the principle of liability without fault, declaring that “[s]uch an exception . . . would vitiate the underlying principle.” *Western Fuels-Utah Inc.*, 10 FMSHRC 256, 261 (Mar. 1988). If unforeseeable conduct may not be used as a defense to liability under the Mine Act, then conversely, the foreseeability of injury caused by an actor’s conduct should not generally be relevant to establish liability.

We have found very few precedents from other areas of federal administrative law. However, it is instructive to compare two cases, both of which involve the liability of an engineering firm under the Clean Water Act, 33 U.S.C. § 1251 et seq. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, provides that a person or other entity must obtain a permit from the

²³ Thus, our conclusion that Musser is not liable for a violation of the Mine Act does not resolve the question of whether Musser may be liable under tort law to miners and their families injured in the Quecreek Mine inundation.

²⁴ Of course, issues relating to negligence under tort law do come into play in considering monetary penalties under section 110(i) of the Mine Act., 30 U.S.C. § 820(i). As discussed *infra*, Chairman Jordan and Commissioner Cohen hold that the concepts applicable to the law of negligence generally are applicable to consideration of an operator’s negligence under section 110(i). We also look to the law of negligence in determining whether a violation is attributable to an operator’s unwarrantable failure, which is defined as “aggravated conduct constituting more than ordinary negligence.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987).

Army Corps of Engineers for the discharge of dredged or fill material into navigable waters of the United States, except in certain specified situations. Civil liability under the statute is predicated on either (1) performance, or (2) responsibility for or control over the performance of the work. See *United States v. Bd. of Trustees of Florida Keys Community College*, 531 F. Supp. 267, 274 (S.D. Fla. 1981). Thus, an engineering firm can face liability under the Clean Water Act if it has responsibility for, or control over, the performance of work which violates the Clean Water Act, even if it performs none of the work itself. Accordingly, an engineering firm's liability under the Clean Water Act predicated on "control" is similar to the concepts of control and liability under the Mine Act, as discussed previously in reference to *Joy Technologies* and *National Cement*.

In *United States v. Weisman*, 489 F. Supp. 1331 (M.D. Fla. 1980), an engineering firm was held liable for the violation of 33 U.S.C. § 1344 when it designed a new roadway, submitted permit applications to the Corps of Engineers, and wrote the Corps again in response to denial of the permit. The engineering firm became liable under the Clean Water Act when the owner of the property constructed the roadway despite not having a permit. In contrast, in *United States v. Sargent County Water Resource District*, 876 F. Supp. 1081 (D. N.D. 1992), an engineering firm was found not liable under 33 U.S.C. § 1344 in connection with a project to clean silt out of a ditch through wetlands. The engineering company provided drawings to Sargent County showing the pre-existing depth of the ditch, placed depth stakes in some areas of the ditch, and placed centerline stakes in the ditch, but did not apply for any permits. The Court found the engineering firm not liable under the Clean Water Act because the firm's work was too attenuated from potential violations arising from the construction work performed on the ditch. *Id.* at 1088-89. In the present case, Musser's actions are more akin to those of the engineering firm in *Sargent County* than to the engineering firm in *Weisman*, particularly in that Musser did not prepare the section 75.1200 mine map.

In sum, we conclude that Musser's role in preparing a "base" map that PBS used in preparing the section 75.1200 mine map was insufficient to bring it within the parameters of the specific standard involved in this case. Thus, we conclude that Musser did not violate section 75.1200.

C. S&S²⁵

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*,

²⁵ Chairman Jordan and Commissioner Duffy join Commissioner Cohen in Part II.C. of this opinion.

3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary 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.

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The judge addressed the S&S designation of the citations in his second decision. 30 FMSHRC at 1094-95. He found that, with regard to the first two elements of *Mathies*, the standard had been violated when an inaccurate mine map was produced, and that the violations directly contributed to the very dangerous inundation at Quecreek when the breakthrough occurred. *Id.* at 1095. With regard to the third and fourth *Mathies* criteria, the judge found that, as a consequence of the inaccurate mine map, 18 miners were placed in peril of their lives and nine miners were trapped for three days and four nights before being dramatically rescued. *Id.* We conclude that substantial evidence fully supports the judge's S&S determination; indeed, most of the evidence concerning the *Mathies* elements is undisputed.

PBS alleges that the judge did not address the third *Mathies* criterion. PBS also contends that to demonstrate that the event was “reasonably likely,” the Secretary was required to produce evidence of other mines that relied on abandoned mine maps that were not final and the number of times this resulted in a breakthrough and injuries, and that the Secretary failed to produce such evidence. PBS. Br. at 32. In making these arguments, PBS fails to distinguish between the words “violation” and “hazard” in the *Mathies* test.

The second element in *Mathies* requires consideration of whether a discrete safety hazard — that is, a measure of danger to safety — is contributed to by the violation. There is no requirement of “reasonable likelihood.” The third element is whether there is a reasonable likelihood that the hazard contributed to will result in an injury.

As applied to this case, the “violation” is the failure to have an accurate map. The “hazard” is the danger of breakthrough to an adjacent mine and resulting inundation. PBS concedes that the judge properly found that the hazard — the danger of breakthrough — was contributed to by the mapping failure. But in turning to the third element, PBS conflates “violation” with “hazard.” PBS argues that there must be a reasonable likelihood that the

violation will cause injury. However, that is not the test. The test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., the danger of breakthrough and resulting inundation, will cause injury. The Secretary need not prove a reasonable likelihood that the violation itself will cause injury, as PBS argues.

The Secretary presented evidence regarding the likelihood of injury as a result of the hazard through the testimony of her expert witness, Stanley Michalek. He testified that miners who broke through into a flooded adjacent mine would face numerous dangers of injury: drowning, blocked escapeways, disrupted ventilation, entrapment, hypothermia, air with low oxygen or high noxious gas levels, and roof falls. Tr. 389-91. The testimony constitutes substantial evidence supporting the judge's conclusion that the Secretary proved the third *Mathies* element.

In addition to confusing the concept of a "violation" versus a "hazard" in the *Mathies* test, PBS's challenge to the judge's finding of S&S contains another significant flaw. In asserting that the Secretary was required to produce "an analysis . . . of situations where mining was conducted without a final map . . . and the number of times that resulted in a breakthrough and the number of times that resulted in injuries," PBS Br. at 32, PBS misstates the Secretary's evidentiary burden. Indeed, in arguing that testimony regarding the likelihood of fatal injuries was "a theoretical possibility, not actual reality, which is insufficient for an S&S finding," PBS ignores our previous caselaw in this area. We have held that the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S. See *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) (judge erred in concluding that Secretary failed to carry her evidence burden by not presenting evidence of roof falls or stress on the roof in defending her S&S designation of a roof control plan violation); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996) (operator's assertions that it had no history of accidents and that equipment had been driven for many months in cited condition is not dispositive of S&S determination).

Hence, the judge's treatment of the S&S designation was legally correct and supported by substantial evidence.

D. Negligence²⁶

In setting the penalty, the judge concluded that PBS acted in "a grossly negligent manner." 30 FMSHRC at 1094. His finding was based on PBS's use of a map of the Harrison Mine that was neither dated, final, nor certified, despite the obvious risk of catastrophe presented by the flooded Harrison No. 2 Mine up dip from the Quecreek No. 1 Mine. *Id.* at 1093-94.²⁷ The

²⁶ Chairman Jordan joins Commissioner Cohen in Part II.D. of this opinion.

²⁷ The judge also relied on the absence of a disclaimer on the map. 30 FMSHRC at 1094. We conclude that the judge's finding of gross negligence can be upheld on the evidence relating to the use of the non-final, undated, uncertified property map.

Commission must decide whether substantial evidence in the record supports this determination. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2163.

The issue of PBS's negligence turns on the question of whether, in fulfilling its legal duty to maintain an accurate mine map, it was reasonable for PBS to reproduce the second Consol map on the section 75.1200 map as an accurate depiction of the extent of mining in the Harrison No. 2 Mine. We agree that PBS conducted a diligent search for a final map of the abandoned Harrison No. 2 Mine, and that it used the best map available to it. 28 FMSHRC at 709; Stip. 55. However, the fact that the second Consol map was the best map it could locate does not mean it was reasonable for PBS to conclude that this map was a reliable indicator of the boundaries of the Harrison No. 2 Mine.

PBS assumed that the second Consol map of the Harrison No. 2 Mine was accurate. As stated by Gallo, who was then the PBS vice-president for engineering, the second Consol map contained the most extensive mine workings, and PBS "equate[d] extensive with correct and accurate." Tr. 186, 237. Similarly, Yonkoske, the PBS chief mining engineer, testified: "If you've done everything possible to locate what you have, you plot that on your map, and that goes as your mine line . . ." Tr. 366. Thus, PBS equated "best map available" with "accurate map."

The false assumption that the second Consol map was accurate lay at the heart of PBS's negligence. This map was not only undated, but uncertified and not marked as final. It was, as MSHA expert witness Stanley Michalek testified, "simply a line drawing of some workings on a property map." Tr. 417, referring to Gov't Ex. 4. By assuming that the second Consol map was accurate, PBS assumed that no further mining had occurred at the Harrison Mine which could impact the Quecreek Mine. PBS concluded that no further mining had occurred beyond the area shown despite the fact that it did not know the date of the second Consol map.

Although PBS did not know the date of the map upon which it was relying, it did have information in its possession which indicated the direction in which the mining had been advancing prior to the preparation of the second Consol map. Michalek testified that if PBS had compared the second Consol map with the Greentree map previously located, it would have detected that the mining was progressing in a certain direction. By extrapolating from the most recently known mining, PBS would have seen that additional mining occurring after the time that the second Consol map was prepared likely would have been in the direction of the Quecreek Mine it was planning. Tr. 417-429. Thus, "if mining had continued in the direction . . . shown, it would have been pretty clear that . . . the possible additional workings, if they were present, would have intersected the Quecreek Mine." Tr. 428.²⁸ Witness Richard T. Stoltz, the MSHA Acting

²⁸ Government Exhibit 4 is a reproduction of a portion of the second Consol map prepared by MSHA, showing the outline of the Harrison No. 2 Mine. On this map, Michalek circled the area of the Harrison No. 2 Mine representing the mined-out area which was not shown as being mined-out on the Greentree map, Gov't Ex. 9. Tr. 417-418, 421-23. Michalek indicated the direction of this mining on the map with an arrow. Tr. 426-27. Later at trial, Gallo placed an

Ventilation Division Chief, confirmed that comparison of the two maps showed the additional mining on the second Consol map compared with the Greentree map. Tr. 830, 844-46, 862-66.

Because the second Consol map was undated, Michalek testified that PBS's engineers had a duty to assume that additional mining may have occurred, and that it would have been in the direction of the planned Quecreek Mine. Tr. 428-29. As Michalek stated, prudent engineers "could have conducted additional exploration to try to delineate the workings of the [Harrison] Mine by vertical holes." Tr. 429. They could have also set their "drill-in-advance barrier" further back based on an extrapolation from previous mining at the Harrison Mine. *Id.* They could also have "done long-hole drilling in advance of where their Mains were advancing." *Id.*²⁹

However, there is no evidence that PBS performed the extrapolation of the direction of possible additional mining based on maps in its possession as Michalek outlined. Tr. 483-85. Nor, as Judge Lesnick noted, did PBS take any additional precautions. 30 FMSHRC at 1093.³⁰ PBS simply assumed that the second Consol map represented the final extent of the Harrison Mine workings.

"X" on the map indicating where the Quecreek breakthrough occurred. Tr. 710-11. The arrow points directly toward the location of the breakthrough.

²⁹ Regarding Michalek's testimony, Commissioner Duffy states, "[n]evertheless, when asked what he would have done under the circumstances, he replied that he would have done the same thing that Musser and PBS did. Tr. 490." Slip op. at 42. Michalek's testimony that he "would have done what Musser and PBS did" refers to the overall approach followed by Musser and PBS ("Go out to the likely sources for that information, find out what they have, bring it back, study it, use some engineering judgment, and decide what to do with it from that point." Tr. 490). Michalek clearly stated that he disagreed with the engineering judgment used by PBS and Musser upon finding, at best, an undated, uncertified, non-final line drawing of some workings of the Harrison No. 2 Mine on a property map. Tr. 412-13, 429-30.

³⁰ PBS argues that more pre-mining drilling would have been akin to "finding a needle in a 3,000-acre haystack" (quoting its expert witness Sean Charles Isgan, Tr. 794) because it would have had to encompass the entire perimeter of the mine – a distance of several miles – with drill holes every 10 feet. PBS Reply Br. at 9-10. This argument ignores the fact that if its engineers had performed the extrapolation described by Michalek from the maps already in their possession, they would have narrowed their "haystack" to the relatively small area in which the direction of mining at the Harrison No. 2 Mine was proceeding. A limited number of boreholes across the potential additional entries in the Harrison Mine would have disclosed whether additional mining had occurred after the preparation of the second Consol map. See Government Exhibits 4 and 9, as marked by Michalek and described by him. Tr. 416-28. The entire perimeter of the mine would not have required the drilling of additional boreholes, because PBS would have only had to check abandoned mines that were updip of the proposed Quecreek Mine.

In making his negligence determination, the judge relied in part on the testimony of David Lucas, the Musser engineer³¹ who did the actual mapping of the Harrison Mine in consultation with PBS engineers. 30 FMSHRC at 1093. Lucas testified that although the Consol map was the best map PBS and Musser had, he did not consider it an accurate rendition of the Harrison No. 2 Mine, and was unsatisfied with it. Tr. 57-58. In fact, when asked if he had any reservations about placing that boundary on the permit map, Lucas replied “always.” Tr. 56-57.³²

The judge also justifiably relied on the fact that before receiving from Consol the map they relied on, PBS and Musser had received a different map from Consol in response to their request for a map of the Harrison No. 2 Mine. Quoting the testimony of Michalek, the judge concluded: “Having received two contradictory maps from Consol ought to have put the Respondents on notice that all was not right, that ‘these guys [Consol] didn’t have their system down like they used to.’ Tr. 458.” 30 FMSHRC at 1093 (alteration in original). The judge noted that Musser’s expert witness, Hiram C. Riblett, “agreed that getting an unreliable map would raise doubts about other maps received from the same source. Tr. 651-52.” *Id.*³³

³¹ The testimony of Musser officials is relevant to the analysis of PBS’s negligence because the two entities both searched for maps and both agreed to use the second Consol map. See Tr. 43-44, 58-60, 106-07, 192-93. Lucas acknowledged that “[PBS] knew what [Musser] knew.” Tr. 62.

³² PBS challenges the judge’s reliance on this testimony by citing the testimony of Musser mining engineer Secor that after receiving the second Consol map, Lucas talked again with Carlton Barron. Barron had worked at the Harrison No. 2 Mine, and later came to own the assets of Saxman Coal and Coke after mining ceased (Tr. 19, 38, 43). As PBS notes, Secor testified that he understood that Barron had told Lucas that the mining had not progressed beyond the point shown on the Consol map. PBS Br. at 29. However, as acknowledged by PBS counsel at oral argument before the Commission (Oral Arg. Tr. 26), this testimony was disputed by Lucas, the person who actually talked with Barron. Lucas himself testified that he had gone back to Barron and shown him the Consol map, and Barron said that he did not know about it. Tr. 58. As Lucas testified, this contact with Barron after the receipt of the second Consol map engendered concern rather than confirmation of the accuracy of the Consol map. Tr. 58.

³³ PBS contends that the judge erred in finding significance in the fact that the first map obtained from Consol was found by Musser and PBS to inaccurately depict the boundaries of the Harrison No. 2 Mine. PBS Br. at 28. PBS argues that multiple searches of possible map sources were made, and “the ALJ fundamentally misunderstands the search process: it is an ongoing process that may involve multiple visits or contacts with each source.” *Id.* It would logically follow from this argument that a search for maps is never complete because the source visited may always have more maps than those located. And if, as PBS argues, it is important that “when Mr. Secor at Musser initiated a second visit to Consol, he asked for the latest most up-to-date map,” *id.*,” this would imply that Musser did not clearly indicate to Consol in its first request that it was seeking the “latest most up-to-date map.” At most PBS’s argument raises the

However, PBS asserts that it was reasonable to rely on the second Consol map because it had asked Consol for its best map, because Consol is a large and reputable mine operator with an extensive collection of maps, because PBS had good experiences with Consol maps,³⁴ and because Consol, as the lessor of the coal and collector of royalties from the mining, would have a self-interest in having an accurate map of the Harrison No. 2 Mine workings. PBS Br. at 27-28; Tr. 217-219. We agree that Consol, as lessor of the coal, certainly had a strong self-interest in having, and indeed did have, accurate maps of the Harrison mine workings. But this strong self-interest became greatly reduced after Consol was no longer receiving royalties, which occurred after the mine ceased operations in 1963. As witness Stoltz agreed, the fact that Consol had an interest in keeping its maps accurate while it was receiving royalties does not mean that Consol has a continuing interest in filing them well, storing them well, or organizing them well. Tr. 857.

The question is not whether Consol had an accurate map in the 1960's, but whether it still had such a map, catalogued for availability to Musser and PBS or some other entity, in the mid-1990's, 30 years later. As it turned out, Consol did have an accurate map of the Harrison No. 2 Mine workings, but, as mentioned *supra*, this map (together with other mine-related documents including correspondence) had been sent to one of its attorneys, who, many years earlier, had been handling a request from the Environmental Protection Agency about mines that may have caused discharges into the Casselman River. Stips. 99-107. The attorney had requested maps from the Consol repository about such mines, which included the Harrison No. 2 Mine. Thus, the accurate map was in one of six boxes in a storage room of the Consol Legal Department. *Id.*

This was exactly the type of problem that should have been anticipated in relying on Consol not only to have a map, but to keep it catalogued for availability for 30 years. As Judge Lesnick noted, PBS should have been aware that the Consol map cataloguing system was not reliable in terms of a 30-year-old map when it received, in response to its first request for the map of the Harrison No. 2 Mine workings, a map which proved to be incomplete, and Musser had to go back to Consol a second time. 30 FMSHRC at 1093. Clearly, as Michalek testified, the receipt of an incomplete map in response to the first request should have raised a "red flag" regarding the reliability of Consol's cataloguing system. Tr. 458.

possibility that there is more than one inference which the judge could have drawn from the fact that the first map obtained from Consol proved to be inaccurate. However, the judge has discretion to draw inferences from the facts as long as such inferences are reasonable. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Judge Lesnick's inference here was certainly reasonable, and consistent with the testimony of two expert witnesses, Michalek and Riblett, discussed above.

³⁴ Gallo was the PBS official who testified about his good experiences with Consol maps. Tr. 221-23. Gallo acknowledged that he had no actual knowledge of whether Consol had a system for keeping tracks of mine maps but "[could] only assume that a company of that size and reputation, that they would accumulate data." Tr. 219.

In sum, for the reasons stated above, it was not reasonable for PBS to conclude that the second Consol map, on which it based its section 75.1200 map, was an accurate indicator of the boundaries of the Harrison No. 2 Mine.

In considering PBS's degree of negligence, the judge correctly took into account the significant risk posed by the abandoned Harrison Mine, as PBS knew that this mine was full of water and updip from the proposed Quecreek mine. 30 FMSHRC at 1093. The judge properly noted that "[t]he amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater the actor is required to exercise caution commensurate with it." *Id.*, quoting *Prosser* § 34, at 208; see also *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (holding that "[a]n operator must address a situation presenting a potential source of explosion, as here, with a degree of care commensurate with that danger").

The judge noted testimony indicating that PBS had placed its production agenda ahead of concerns for safety. 30 FMSHRC at 1093. In this regard, Lucas³⁵ testified that he used the Consol map because he "had no choice" after years of searching for an accurate map of the Harrison No. 2 Mine. Tr. 58. He agreed that at the time, getting a permit "was the most important thing." *Id.* This is evidence from which the judge could properly find that PBS placed its desire to open a mine ahead of concerns for the safety of the miners who would be working in the mine. This evidence, together with the evidence showing the unreasonable basis for assuming that the second Consol map – an undated, uncertified map which was nothing more than "a line drawing of some workings on a property map," Tr. 417 – truly represented the extent of mining at the Harrison No. 2 Mine, especially after the first map provided by Consol had proven to be inaccurate, and the failure to take any additional precautions, justifies the judge's conclusion that PBS chose "to play Russian Roulette with the lives of miners." 30 FMSHRC at 1093-94.

PBS offered testimony that it was common in Somerset County, Pennsylvania for boundaries of abandoned mines to be depicted on the basis of maps that were not final or certified maps. Tr. 77, 218. It suggests that the standard of care it exercised conformed to the standard in existence in the MSHA District 2 area or the Somerset County area. While the standard behavior in that geographic area is a factor that may be considered in determining negligence, it does not mean that the "reasonable person" standard is limited to that area. See *Bell v. Jones*, 523 A.2d 982, 987-88 (D.C. 1987) (holding that "the standard of care by which the professional acts of surveyors are measured is a national standard, not a local or regional one"); *Prosser*, § 32, at 187-88.

Furthermore, even if PBS was correct in suggesting that the proper standard of care was a local one, and that local practice did not require final certified maps, this would not insulate it

³⁵ Although Lucas worked for Musser, the judge found that Musser and PBS, "in consultation with each other," agreed to use the second Consol map as the basis for the boundary of the Harrison No. 2 Mine. 30 FMSHRC at 1093.

from a negligence finding. As one commenter has explained:

[C]ustoms and usages themselves are many and various; some are the result of careful thought and decision, while others arise from the kind of inadvertence, carelessness, indifference, cost-paring and corner-cutting that normally is associated with negligence. . . .

Even an entire industry, by adopting such careless methods to save time, effort or money, cannot be permitted to set its own uncontrolled standard. . . . And if the only test is to be what has been done before, no industry or group will ever have any great incentive to make progress in the direction of safety.

Prosser, § 33, at 194-95 (footnotes omitted).

In arguing that substantial evidence does not support the judge's negligence finding, PBS asserts that the judge did not consider all of the relevant evidence. In addition to the arguments already discussed, PBS contends that the judge "ignore[d] the fact that mining was over 200 feet from the start of the [section 75.388(a)(3)] barrier and that Black Wolf was going to cease mining in that direction well before the barrier." PBS Br. at 27. This claim has no validity. Mining stopped over 200 feet from the barrier because it intersected the old workings of the Harrison No. 2 Mine, which were 450 feet from where PBS believed them to be. Tr. 293-94; Stip. 97. Thus, PBS stopped mining 250 feet from the barrier only because of the near-tragedy which gave rise to this case. Moreover, the assertion that "Black Wolf was going to cease mining in that direction well before the barrier" is not only unsupported by any reference to the record, but devoid of any support in the record. Black Wolf President David Rebuck testified that the company "kept the boundary, permit boundary line further than 200 feet from the position of the abandoned mines." Tr. 293. However, neither Rebuck nor any other witness testified that Black Wolf was going to "cease mining in that direction well before the barrier."

PBS also contends that the judge "failed to discuss the extent and nature of PBS's search for maps in his finding of negligence." PBS Br. at 30. However, the judge clearly was aware of the extensive search for maps by PBS and Musser. The judge distinguished between the search for maps, and how PBS used the maps it found. In its use of the maps, the judge "[fou]nd the record in this matter replete with instances of PBS . . . failing to act conservatively and to err on the side of safety." 30 FMSHRC at 1093. The fact that the judge drew different conclusions from those articulated by PBS in his review of the entire record does not mean that he failed to consider the evidence.

PBS also argues that "[t]here is always some uncertainty about the location of inaccessible workings of all abandoned mines," and this uncertainty is accounted for by the requirement of "a 200 foot barrier rather than a 50 foot one" in section 75.388. PBS Br. at 30-31. This argument does not undermine the judge's negligence finding. The 200-foot-barrier requirement would have

applied, rather than a 50-foot barrier, unless the adjacent Harrison mine workings could have been preshifted. 30 C.F.R. § 75.388(a)(3). In other words, this margin of safety is required even when there is not the uncertainty that was present here. Moreover, the argument ignores the reality that compliance with section 75.388 does not ensure that an operator which has an unreliable mine map will avoid a catastrophic breakthrough into adjacent abandoned workings. That reality is demonstrated by this case.

Hence, the record leads us to conclude that substantial evidence supports the judge's determination that PBS acted in a grossly negligent manner.

E. Civil Penalties³⁶

At the time of trial, the Secretary had proposed penalties of \$5,000 against PBS and Musser. In her main brief before the judge, the Secretary specifically referred to the proposed \$5,000 penalty, which she considered a "minimum penalty," and the stipulations and trial exhibits, noted *infra*, in support of the proposed penalty. S. Tr. Br. at 31-32. It was not until the Secretary filed her post-trial reply brief that she requested the judge "to assess a penalty of \$55,000 for each of these mine operators," S. Tr. Reply Br. at 22, which he did.³⁷

On review, PBS argues that the judge failed to explain why his \$55,000 penalty determination substantially diverged from the amount originally proposed by the Secretary. PBS Br. at 33-34. PBS also contends that the stipulations on which the judge relied applied to the proposed penalty, not to the maximum penalty he imposed. *Id.* at 33.

In her brief, the Secretary asserts that the judge sufficiently explained why he assessed penalties higher than the Secretary initially proposed. She relies on his statements that the violations "were of the utmost gravity," S. Br. at 41, quoting 30 FMSHRC at 1092. She also relies on his finding that PBS acted in "a grossly negligent manner." S. Br. at 41, citing 30 FMSHRC at 1094. However, the Secretary acknowledges that the judge's penalty criteria analysis was inadequate with regard to whether the \$55,000 penalty was appropriate to the size of the operator's businesses and whether the proposed penalties would affect the operator's ability to continue in business. S. Br. at 41-42. She notes that the stipulations agreed to by PBS on these penalty criteria were entered into assuming that the penalties would be \$5,000. *Id.* at 41-42.

It is well-established that the Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In determining the amount of the penalty, neither the judge nor the Commission is restricted by a penalty recommended by the Secretary. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983),

³⁶ Chairman Jordan joins Commissioner Cohen in Part II.E. of this opinion.

³⁷ Because Commissioners Cohen and Duffy find that Musser was not liable for the violation, the Commission vacates the \$55,000 penalty the judge imposed against Musser.

aff'd, 736 F.2d 1147 (7th Cir. 1984). However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act. *Cantera Green*, 22 FMSHRC at 620.

The Commission in *Sellersburg*, 5 FMSHRC at 293, explained that “[w]hen . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission.” *See also Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994) (“adequate findings are critical when a judge assesses a penalty that significantly departs from that proposed by the Secretary”). In *Cantera Green*, the Commission clarified that “[w]hile the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria.”³⁸ 22 FMSHRC at 621.

We reject PBS’s contention that the judge failed to adequately explain the significant departure from the Secretary’s initial proposed penalty. The judge relied primarily on the gravity of the violation and PBS’s gross negligence to increase the proposed penalties from \$5,000, which was proposed by the Secretary, to \$55,000, the maximum penalty allowed under the Secretary’s regulations at the time of the violations. 30 FMSHRC at 1088, 1091-92, 1095. The Commission held in *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001), that a judge did not abuse his discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria. Also, the Commission has recently held that it is appropriate for a judge to raise a penalty “significantly” based on his findings of extreme gravity and unwarrantable failure. *Spartan Mining*, 30 FMSHRC at 725. Similarly, the judge was justified in emphasizing the factors of gravity and negligence in this case.

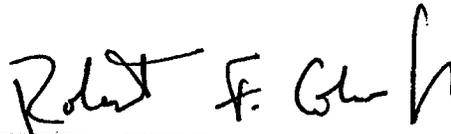
However, we agree that a remand for further consideration of two penalty criteria is necessary. In the judge’s initial discussion of the penalty criteria, he relied on a set of stipulations that were admitted at trial, Gov’t Trial Stip. No. 1, and two exhibits that showed Musser’s and

³⁸ Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

- [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.

PBS's history of violations and production, Gov't Ex. 1 and 2. The stipulations stated that the proposed penalties "will not affect the ability . . . to remain in business;" that each of the violations was abated in good faith; that the government exhibits referred to above accurately set forth the operators' production and history of violations;³⁹ and that those exhibits could be used in determining the penalty assessments. Gov't Trial Stip. No. 1, at 1. In finding that the \$55,000 penalty was appropriate considering the size of PBS's business and its ability to stay in business, the judge erroneously based his conclusion on the stipulations, which were entered into on the basis that the penalty would be \$5,000. It is apparent that, given the judge's substantial increase in penalties for PBS, he did not give PBS an adequate opportunity to address the two criteria once the proposed penalty was increased.

Accordingly, we vacate the judge's penalty determination with regard to PBS. We remand the case to the judge for the purpose of making findings concerning these two statutory criteria based on the assumption that the penalty is \$55,000, and for the purpose of assessing a penalty based on the statutory criteria of section 110(i) of the Act.



Robert F. Cohen, Jr., Commissioner

³⁹ PBS incorrectly asserts that the judge failed to discuss and properly consider the absence of any previous violation history. PBS Br. at 33. The judge explicitly referenced the parties' stipulation that PBS had "no significant history of previous violations." 30 FMSHRC at 1091, which we deem sufficient. *See Spartan Mining*, 30 FMSHRC at 724; *see also Lopke Quarries*, 23 FMSHRC at 713.

Chairman Jordan, concurring in part and dissenting in part:

I join Commissioners Duffy and Cohen in affirming the judge's determination that PBS Coals, Inc. ("PBS") violated 30 C.F.R. § 75.1200, and that the violation was significant and substantial. I also join Commissioner Cohen's opinion affirming the judge's finding that PBS acted in a "grossly negligent manner," and in the section of his opinion vacating the judge's penalty determination with regard to PBS and remanding it to the judge.

Regarding the liability of Musser, I join Commissioner Cohen's opinion holding that in this case Musser was properly cited as an operator based on its status as an independent contractor at the mine.¹ However, I dissent from my colleagues' conclusion that substantial evidence does not support the judge's determination that Musser can be held liable for the violation of section 75.1200. I would find Musser liable and uphold the judge's negligence finding.

Commissioner Cohen and I have determined that Musser can reasonably be considered an operator by virtue of the services it performed as an independent contractor, in connection with the issuance of the permit allowing mining at the Quecreek mine. Moreover, all three Commissioners hearing the appeal of this case agree with the judge's determination that the mine map retained at the Quecreek mine did not accurately depict "[a]djacent mine workings within 1,000 feet," as required by section 75.1200. Section 110(a) of the Mine Act states: "The operator of a coal or other mine in which a violation occurs . . . shall be assessed a civil penalty" 30 U.S.C. § 820(a)(1). This provision has been construed as imposing strict liability, regardless of fault, against the operator of a mine in which a violation occurs. A literal application of the statute, therefore, would appear to support the imposition of a penalty against Musser. Musser is an operator of the Quecreek mine; a violation occurred in that mine; the Act imposes strict liability against an operator of a mine in which a violation occurs. Accordingly, Musser can be held liable for the violation of section 75.1200.

Musser's status as an operator, however, is that of "an independent contractor performing services at the mine." The fact that an independent contractor is considered an operator of a mine does not necessarily mean that the contractor can exert control over the entire mine, or even over the activities or area involved in the violation. A contractor is sometimes hired to perform a particular skilled activity that is limited to a certain area of the mine. A contractor hired solely to sink a shaft, for instance, would presumably have no control over how another contractor constructed the preparation plant. Although the Mine Act imposes strict liability, Commissioner Cohen is rightly mindful of the D.C. Circuit's observation that "strict liability means liability without fault. It does not mean liability for things that occur outside one's control or supervision." *Sec'y of Labor v. Nat'l Cement Co. of California*, 573 F.3d 788, 795 (D.C. Cir. 2009) (citations omitted). Commissioner Duffy also properly notes Commission precedent invoking limitations in holding an independent contractor liable for matters over which it has no

¹ Commissioner Duffy did not reach this issue.

control. Slip op. at 40. I agree with my colleagues that it is pertinent to consider the issue of control in determining Musser's liability for the violation of section 75.1200.

My colleagues have concluded that Musser should not be liable for the violation of section 75.1200 because, in their view, Musser had no direct control over the preparation of the map required to be maintained at the mine. Slip op. at 20-21, 39-40. It is true that PBS, not Musser, prepared the map that was required under section 75.1200 to depict the adjacent mine workings within 1,000 feet. 30 FMSHRC 1087, 1089-90 (Nov. 2008) (ALJ). Musser, however, prepared the environmental permit map for the Quecreek mine and that map had to show, among other things, an outline of abandoned mines adjacent to the proposed mine being permitted. 28 FMSHRC 699, 715 (July 2006) (ALJ). After plotting the outline of the Harrison No. 2 Mine on the permit map, Musser drew a line between the outline of the Harrison No. 2 Mine and the planned workings for the Quecreek No. 1 Mine. Stip. 71. This line represented a 200-foot-wide hydraulic barrier between the Harrison No. 2 Mine and the Quecreek No. 1 Mine. Stip. 71, Jt. Ex. 11. It indicated the limit of planned mining for the Quecreek No. 1 Mine. Edwin Secor, a Musser employee, certified the permit map with the presumed outline of the Harrison No. 2 Mine and the established 200-foot-wide hydraulic barrier. Stip. 66. Mining would be limited by the requirement that a 200-foot barrier remain between the furthest development in the Quecreek mine and the furthest extent of the Harrison No. 2 mine.

Musser's map was used as the base map for complying with section 75.1200's requirement that the operator keep an up to date and accurate mine map showing, among other things, the "adjacent mine workings within 1,000 feet." The adjacent mine workings placed on the section 75.1200 map coincided with the boundaries depicted by Musser in the map submitted as part of the permitting process. Indeed, the judge found that it was "standard practice for an environmental permit map, such as the one Musser prepared and submitted on behalf of Quecreek, to be used as the base map from which the mine map required by MSHA would be drawn" and that "[t]he location of adjacent mines does not change once they are plotted on a permit map, but are simply transferred over to the mine map required by MSHA." 30 FMSHRC at 1089 (citing Tr. 33, 196, 336). In this case "PBS prepared all of the maps of the Quecreek No. 1 Mine by transferring the boundary of the Harrison No. 2 Mine as delineated on the permit map prepared by Musser." *Id.* (citing Tr. 198, 203-04).

The PBS engineers involved in drafting the mine map required under section 75.1200 never thought about making any changes to the boundaries of the Harrison No. 2 mine that were delineated by Musser on the environmental permit map. Tr. 238-39. As one PBS witness explained, the engineer generally takes the previous map and positions it correctly with reference to the map being created. Tr. 335-36. Indeed the PBS expert witness testified that when engineers certify a map created to comply with section 75.1200, they are certifying "that to the best of their ability, they . . . positioned that abandoned mine map on their mapping as accurately as possible." Tr. 745.

The record provides substantial evidence for the judge's conclusion that "Musser was in a position to prevent the errors on the section 75.1200 map because Musser created, certified, and sealed the permit map on which the section 75.1200 map was based." 28 FMSHRC at 716. Furthermore, as the judge pointed out:

Musser knew that even though its map would not specifically be submitted to MSHA for the requirements of section 75.1200, the research and plotting of the Harrison No. 2 Mine and the hydraulic barrier line would be used in creating future maps of the Quecreek No. 1 Mine. By sealing the permit map, Musser verified the map's accuracy.

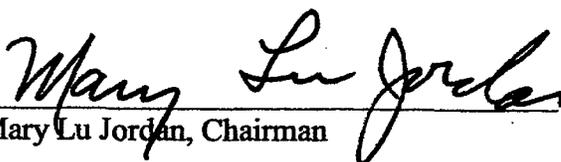
Id.

Whether the section 75.1200 map would accurately reflect "the adjacent mine workings within 1,000 feet" depended on whether the permit map accurately depicted those workings. Musser prepared and certified the permit map. Admittedly, the section 75.1200 mine map requires more information than "the adjacent workings" and Musser was not the entity that actually prepared the section 75.1200 map. Nevertheless, this record offers substantial evidence for the conclusion that Musser had sufficient control over the ultimate contents of the section 75.1200 map, at least at it pertained to the adjacent workings. Thus, it is not unreasonable to hold Musser strictly liable as an operator, for the violation of section 75.1200 that occurred at the Quecreek mine.

I also conclude that substantial evidence supports the judge's finding that Musser acted in a grossly negligent manner.² Musser's reliance on the second Consol map to determine the location of the abandoned Harrison Mine for the environmental permit map was unreasonable. Musser knew that the Consol map was not dated, not marked final, and not certified by a professional engineer or professional surveyor. Stips. 65, 66. Moreover, as mentioned above, Musser's Vice President at the time, David Lucas, testified that he was not satisfied with the Consol map and did not consider it an accurate rendition of the Harrison No. 2 Mine. Tr. 57-58. In fact, Lucas admitted that he always had reservations about placing the Harrison Saxman Mine boundary on the permit map. Tr. 56-57. This uncertainty was compounded by the fact that the receipt of the first incomplete Consol map should have put Musser on notice regarding the reliability of Consol's cataloguing system. Tr. 458. Nonetheless, Musser used the boundary from the Consol map on its permit map which it knew would form the basis of the mine map required under section 75.1200. Tr. 32-33; 59-60.

² I incorporate by reference the opinion of Commissioner Cohen and myself in which we uphold the judge's finding that PBS acted in a grossly negligent manner, *supra* at 25-32. It is appropriate to rely on this analysis, as Musser concurred with the decision of PBS to use the second Consol map to plot the boundary of the Harrison No. 2 Mine on the permit maps. Stip. 66; Tr. 58-60, 106-07, 192-93.

As the judge correctly noted, Musser's negligence was also heightened due to the major risk posed by the abandoned Harrison Mine. 30 FMSHRC at 1093-94. Given Musser's reliance on a map it did not consider accurate, its knowledge that the map it was preparing would be used to prepare the section 75.1200 map, and its elevated duty of care, I would affirm the judge's determination that Musser acted in a grossly negligent manner.


Mary Lu Jordan, Chairman

Commissioner Duffy, concurring in part and dissenting in part:

I concur with Commissioner Cohen in reversing the judge's finding that Musser Engineering, Inc., was liable for a violation 30.C.F.R. § 75.1200, but I would do so on additional grounds, discussed below. I also join Commissioner Cohen and Chairman Jordan in affirming the judge's finding that PBS Coals, Inc., violated the standard and that the violation was significant and substantial in nature. I dissent, however, from my colleagues' affirmance of the judges's determination that the violation was owing to PBS Coals' gross negligence. Accordingly, I would also vacate the judge's penalty determination and remand that issue for further analysis, based on a moderate level of negligence as originally charged by the Secretary and, only then if it becomes necessary, for the purpose of taking into consideration all the appropriate penalty criteria set forth in section 110(i) of the Act, as explained in the opinion of Commissioner Cohen.

My colleagues set forth an extensive summary of the facts in this case which I will not iterate here, except to the extent that they are pertinent to the conclusions I have reached contrary to those of the majority.

I. Musser's Liability.

Under the Pennsylvania Mine Act, which regulates coal mining in that state, mine operators must secure permits from the Pennsylvania Department of Environmental Protection ("DEP"). 28 FMSHRC at 701. When PBS acquired the land that would ultimately contain the Quecreek Mine No. 1 Mine, it contracted with Musser Engineering to prepare a permit application for submission to DEP. *Id.* Musser's duties included the preparation of a mine map that would, among other things, delineate "*known workings of . . . abandoned, underground or surface mines.*" 25 Pa. Code. § 89.154(a)(4) (emphasis added); *see* P. Reply Br. at 5. That required Musser to secure maps for the four abandoned underground mines adjacent to the Quecreek permit area, including the Harrison No. 2 Mine. 28 FMSHRC at 701-702; Stip.12.

Musser's responsibility to PBS was limited to helping secure the DEP permit. The engineering company had no involvement and no control over the PBS's submissions to MSHA when the mine opened in 2001 – three years after the initial permit application had been submitted to DEP. Musser did not submit any maps to MSHA, and would not have been in a position to place a disclaimer or notation on the section 75.1200 map that would have warned about any uncertainties regarding the Harrison No. 2 Mine boundaries, assuming that such a disclaimer was required under the circumstances. Musser's role, even in preparing the state permit maps, was limited in that it only prepared an initial map with proposed boundaries of the Quecreek No. 1 Mine that would not have intersected the Harrison No. 2 Mine at the point where the breakthrough and inundation occurred. M. Reply Br. at 11 (citing Tr. 34, 153).

The citations issued to both Musser and PBS, respectively, state that the information supplied by Musser was "used by PBS to show the Harrison No. 2 boundary on the map required by 30 CFR 75.1200 for the Quecreek # 1 mine." Citation No. 7322487, at 2 (Aug. 12, 2003), and

Citation No. 732488, at 2 (Aug. 12, 2003). However, the Secretary's position in this case – that Musser violated the standard because it was involved in preparing a map that later served as the basis for PBS's preparation of the map that Black Wolf maintained pursuant to section 75.1200 – ignores the language of the standard. Moreover, the Secretary's theory of liability regarding Musser ignores the record evidence that indicates Musser's limited role and PBS's expansive role in preparing the mine maps submitted to MSHA.

Section 75.1200, by its plain language, applies to “[t]he operator of a coal mine” and requires that particular operator to maintain an accurate mine map “in a fireproof repository in an area on the surface of the mine.” 30 C.F.R. § 75.1200. Thus, even if the judge were correct that Musser “knew or had reason to believe” that its state mine map would later be used in preparing maps that were required by MSHA (30 FMSHRC at 1092), Musser is not “the operator of a coal mine” within the intended scope of section 75.1200.¹ *See also* Comm. on Education and Labor, H.R. Rep. No. 91-563, at 54 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1084 (1975) (section “requires the *operator* of an active mine to have in a safe location on the surface an accurate map of the mine”) (emphasis added).

The Commission's decision in *Martin County Coal Corp.*, 28 FMSHRC 247 (May 2006), is instructive in this area. There, the Commission dismissed a citation issued against an independent contractor for allegedly violating a reporting requirement that was applicable to “the person owning, operating, or controlling” a waste impoundment. *Id.* at 270. The Commission contrasted the specific reporting requirement with a general safety standard where the responsibility for complying with the standard can rest with the production operator, an independent contractor, or both. *Id.* Similarly, in *Joy Technologies Inc.*, 17 FMSHRC 1303, 1309 (Aug. 1995), the Commission noted the limitations in holding an independent contractor liable for matters over which it and its employees have no control.

The record in this proceeding fully reflects that PBS and Black Wolf had ultimate control over the preparation, submission, and storage of the section 75.1200 mine map. Significantly, even in the preparatory planning and submission of the state DEP maps, PBS worked closely with Musser. Indeed, PBS vice-president Joseph Gallo testified that he “approved” the boundary lines for the Harrison No. 2 Mine that were on the state permit map. Tr. 247. Finally, PBS's research did not end with Musser's preparation of the state DEP application; PBS continued its efforts to search for maps of the Harrison No. 2 Mine to establish its boundaries in anticipation of submitting the map to MSHA for purposes of complying with section 75.1200. Tr. 321-22; Stip. 60.

In contrast, Musser had no involvement and no control over the section 75.1200 map and did not certify any maps for submission to MSHA. Musser did fully comply with Pennsylvania

¹ By its terms, section 104(a) of the Mine Act limits citations to an operator that has *violated* the Act or any mandatory standard. 30 U.S.C. § 814(a).

law in submitting to the DEP the map that it did prepare, that is, a “general mine map” that showed “[t]he location and extent of *known workings* of active, inactive or abandoned, underground or surface mines.” 25 Pa. Code. § 89.154(a)(4) (emphasis added).

Thus, Musser’s limited role in preparing a “base” map that PBS used in preparing the section 75.1200 mine map is insufficient to bring it within the parameters of the specific standard involved in this case. Accordingly, I join Commissioner Cohen in reversing the judge’s holding that Musser violated the standard.²

II. The Degree of Negligence Attributable to PBS.

As noted above, I find that the judge correctly found that PBS violated the standard and that the violation was significant and substantial in nature. As for the level of negligence chargeable to PBS, I conclude that substantial evidence does not support the judge’s conclusion that the operator demonstrated “gross negligence” in its efforts to provide an accurate map of the Harrison No. 2 Mine.

Because the Mine Act is a strict liability statute, an operator will be held liable if a violation of a mandatory safety standard occurs regardless of the level of fault. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff’d*, 868 F.2d 1195 (10th Cir. 1989). In *Asarco*, the Commission concluded that “the operator’s fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty.” *Id.* at 1636.

Thus, the Mine Act’s principle of strict liability dictates that if an operator maintains a mine map that is not accurate with regard to the features listed in section 75.1200, including adjacent mine workings within 1000 feet, that operator is in violation of the standard. Once that is established, it remains to determine the appropriate level of negligence attributable to the violation.

² I am also persuaded by Musser’s argument that it was not liable because at the time it performed the work for PBS, there was no “mine” in existence that would bring Musser’s activities under Mine Act jurisdiction. M. Br. at 8. In my view, the facts of this case fall squarely within the parameters set forth by the D.C. Circuit Court of Appeals in *Paul v. FMSHRC*, 812 F.2d 717 (D.C. Cir. 1987). Although the Secretary argues that Musser’s activities involved “property . . . to be used” in the work of mineral extraction (S. Br. at 14-15), the D.C. Circuit made it clear that the phrase “to be used” had its limits: “[W]e think the more reasonable interpretation is that § 3(h)(1) is not applicable prior to the commencement of any mineral extraction or construction activities. The phrase “to be used in” merely refers to property that has not yet, but will be, committed to the work of extraction at a *preexisting* site or structure.” *Id.* at 720 (emphasis in original). Nevertheless, it is sufficient for the purpose of deciding this case that section 75.1200, by its clear terms, did not apply to Musser.

The judge concluded that, in violating section 75.1200, PBS acted in a “grossly negligent manner.” 30 FMSHRC at 1094. He based his conclusion in part on the fact that PBS had received two contradictory maps from Consol, which should have put PBS on notice “that all was not right.” *Id.* at 1093. The judge further noted that final, certified mine maps “were a rare commodity,” but found that PBS should have taken additional precautions. *Id.* The judge summarized the basis for his negligence conclusion, stating that he found it “incomprehensible” that PBS failed to place any type of warning on the section 75.1200 map. *Id.* at 1094.

The judge relied principally on the testimony of David Lucas, a technical assistant employed by Musser, to conclude that both Musser and PBS did not find the Consolidation Coal map to be reliable. *Id.* at 1093. Mr. Lucas did testify that he was not satisfied with the map, as the judge states, but that statement needs to be placed in context. Twice in his testimony, on cross examination by counsel for PBS and on redirect by counsel for the Secretary, Mr. Lucas stated that he agreed with his earlier statement, taken during an MSHA interview, that he, in fact, was satisfied with the Consolidation Coal map. Tr. 69-70, 80-81.

This seeming contradiction is easily explained by other testimony by Mr. Lucas that the judge ignored. In the course of discussing the procedure for verifying old maps, Mr. Lucas stated that the only sure way to verify past mining development is to actually survey the underground area in question. In the absence of such definitive plotting of prior mining activity, according to Mr. Lucas, maps are not going to be completely reliable. Tr. 67-68, 79. Moreover, whatever personal doubts Mr. Lucas might have had, his testimony does not indicate that these concerns were shared with PBS.

The judge also relies on the testimony of MSHA witness Stanley Michalek to establish that Consolidation Coal’s map repository was unreliable, inasmuch as PBS had to go back for a second, more up-to-date map. 30 FMSHRC at 1093. According to the judge, PBS was put on notice that, as Michalek put it, Consol no longer had its “system down. They [were] slipping.” *Id.* (citing Tr. 458). It should be noted that Mr. Michalek admitted that he had never prepared a map for purposes of obtaining a permit from the state of Pennsylvania, and that he had never conducted a map search such as that undertaken by Musser and PBS in this case. Tr. 488-89. Nevertheless, when asked what he would have done under the circumstances, he replied that he would have done the same thing that Musser and PBS did. Tr. 490.

So the level of negligence assignable to PBS comes down to what steps the operator took to ensure that the map ultimately submitted to MSHA was “accurate.” PBS asserts (PBS Br. at 26-31), and I agree, that it performed appropriate and accepted due diligence in researching all available sources for evidence of past mining development adjacent to the Quecreek mine. The record is replete with statements by MSHA witnesses that Musser and PBS exercised such due diligence in securing what they believed to be the most up-to-date maps. Tr. 348, 432, 501, 570.³

³ The judge accuses PBS of playing “Russian roulette with the lives of miners.” 30 FMSHRC at 1093-94. If so, there were other players at the table. None of the governmental

The judge's principal basis for determining that PBS was guilty of gross negligence was the operator's failure to include on the mine map a disclaimer or a dotted line to indicate uncertainty regarding the boundary of the Harrison No. 2 Mine. 30 FMSHRC at 1094. The judge had concluded as a threshold matter that had PBS included such a disclaimer on the map it submitted to MSHA it would have been in compliance with section 75.1200. 28 FMSHRC at 707. I find, and my colleagues apparently agree, that the standard by its terms does not require the placing of a disclaimer on a map based on undated, uncertified prior maps, and I share Chairman Jordan's skepticism as to the efficacy of such a disclaimer in the circumstances presented here. *See slip op.* at 18 n.20. I would add that PBS believed the map it did submit to MSHA was, in fact, reliable, thus obviating the need to include a disclaimer in the first place. Finally, it seems to me that if the standard does not require a disclaimer, it is not logical to conclude that failure to provide one in these circumstances would support a finding of any negligence, much less gross negligence.

PBS argued below that it was impossible to comply with the standard, because no final certified map of the Harrison No. 2 Mine was available. 28 FMSHRC at 706. The Secretary countered, and the judge agreed, that PBS could have prepared an "accurate" mine map "by indicating *in some way* on the map that the exact location of the adjacent workings in the Harrison No. 2 Mine was unknown." S. Br. at 21 (emphasis added); *see* 28 FMSHRC at 707; S. Br. at 22 n.18.⁴ Because the Secretary has maintained that the language of the standard is clear, the Secretary's placing of this additional gloss on the standard is neither necessary nor legally correct under *Chevron*, 467 U.S. at 842-43. And while 30 C.F.R. § 75.1200 is a reiteration of section 312 of the Mine Act and section 312 of the Coal Act, there is nothing in the Mine Act, the Coal Act, nor in the legislative history of either that would support such a reading of the standard.

I therefore conclude that the Mine Act and the Secretary's regulations do not provide for such a practice, and none can be read into the regulation when its language is so abundantly clear.

entities charged with assuring the reliability of maps of abandoned mines met its responsibilities in this case. MSHA did not question PBS as to the existence of certified maps of adjacent areas, even though since 1969 the agency or its predecessor had been responsible for maintaining such documents (*see* 30 U.S.C. § 872(c); 30 C.F.R. § 75.1204); the Office of Surface Mining, the designated archival agency under federal law, had only a partial 1957 map of the areas in question (Stip. 78); and Pennsylvania DEP allowed its inspectors to retain official final maps among their own private papers. Stips. 84, 86. These derelictions of official duty played no small role in the near tragedy.

⁴ The Secretary further states, "Section 75.1200's requirement of an 'accurate' map did not require PBS and Musser to prepare a map showing something they could not know; it required them to prepare a map indicating what they did not know." S. Br. at 21. This statement is both difficult to understand and unhelpful in resolving this case.

Any requirement that the operator indicate in some way that the exact location of an adjacent mine is unknown could only be imposed after notice-and-comment rulemaking.⁵

Notwithstanding the lack of any statutory or regulatory basis for requiring a disclaimer on a section 75.1200 map, the judge seized on the lack of a disclaimer to focus on PBS's actions from a general negligence perspective. 30 FMSHRC at 1093-94 ("As the danger becomes greater the actor is required to exercise caution commensurate with it") (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 34, at 208 (5th ed. 1984)).⁶ The judge stated that he considered it "incomprehensible" that PBS did not place any type of warning on the section 75.1200 map. *Id.* at 1094.

While the judge's sentiments are understandable, they are not grounded in the plain language of the standard. In *A. H. Smith Stone Co.*, 5 FMSHRC 13 (Jan. 1983), the Commission explained the nature of a negligence finding under section 110(i): "Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *Id.* at 15. Under the Commission's holding, it is clear that the negligence finding must be grounded in the violation of the standard itself, not by general principles of tort

⁵ In further support of her position, the Secretary switches gears somewhat to assert that a "reasonably prudent operator" would read the standard to require that it provide some indication on a mine map when the exact location of adjacent mine workings is unknown. S. Br. at 24-25. That argument must be rejected as well. The Commission has long held that the "reasonably prudent person" test is invoked to determine whether an operator "would have ascertained the specific prohibition" of a broadly worded standard and "concluded that a hazard existed." *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 656 (Aug. 2008) (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). That test is clearly inapplicable here, where no broadly worded safety standard is involved and the Secretary essentially seeks to add a new requirement to a specific standard. Rather, the Commission has addressed the issue of notice of a plain language provision in the following manner: "when the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements." *Austin Powder Co.*, 29 FMSHRC 909, 919 (Nov. 2007) (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998)).

⁶ The Commission has generally considered "the high degree of danger posed by a violation" in regard to an *unwarrantable failure* finding, rather than a negligence determination. See *Rock of Ages Corp.*, 20 FMSHRC 106, 115 (Feb. 1998) (supervisor should have appreciated extreme danger posed by unexploded pyrodex). It is noteworthy here that the Secretary did not designate the citations as being the result of the operators' *unwarrantable failure*, which the Commission has generally characterized as "aggravated conduct constituting more than ordinary negligence," and in so doing has "recognized that a finding of high negligence suggests *unwarrantable failure*." *Eagle Energy Inc.*, 23 FMSHRC 829, 839 (Aug. 2001) (quoting *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987)).

law and general notions of what would be desirable. In other words, the operator's duty of care is prescribed by the standard. In *Smith Stone*, the Commission rejected the judge's reasoning that the operator failed to engage in a "safe practice," because the Commission concluded that its examination was limited to what the standard required. *Id.* at 16.

As the Commission's decision in *Smith Stone* indicates, the "duty of care" that PBS was required to meet was to maintain an accurate mine map. Obviously, PBS failed to do this, and the judge's examination of the operator's conduct should be focused on the strength of its efforts to locate an accurate mine map of the Harrison No. 2 Mine and its preparation of the section 75.1200 map. The judge instead relied upon a practice, apparently only beginning to emerge prior to the Quecreek inundation, that an operator indicate in some way unknown areas on a mine map.⁷ However beneficial or exemplary this practice might be, the standard at issue was silent on this. Significantly, there was an absence of guidance from MSHA to even suggest that operators should follow this practice.

Moreover, adopting the judge's theory of negligence in this case would have the effect of imposing a general duty clause on mine operators similar to that imposed on general industry by section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1). By its terms, section 104(a) of the Mine Act limits citations to an operator that has violated the Act or any mandatory standard. 30 U.S.C. § 814(a); *see also* Conf. Rep. No 95-461, at 38-39 (1977), *reprinted in* Senate Subcomm. on Labor Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1316-17 (1978) (Mine Act as enacted rejected "general duty" clause that would have permitted citing operators for failing to furnish safe and healthful working conditions and to comply with rule and regulations under the Act).

Here, the judge's reliance on an arguably desirable but unpromulgated practice to require a disclaimer on a mine map stands on a similar footing to the "safe practice" rationale which the Commission rejected in *Smith Stone*. Thus, from the judge's decisions, it is evident that his negligence findings were not limited to PBS's actions in failing to provide an accurate map under section 75.1200. In addressing negligence in his first decision, the judge responded to PBS's

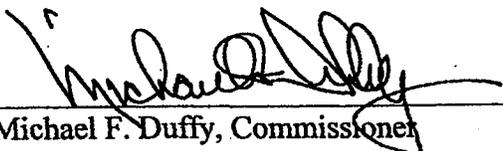
⁷ Most of the evidence concerning the practice of noting uncertainty regarding the boundaries of adjacent mines involved maps dated after the initial map was submitted to the Pennsylvania DEP. *See* Gov't Ex. 10 (final MSHA mine map dated Feb., 23, 1999 (punch line used to indicate unknown areas)); Gov't Ex. 11 (MSHA mine map dated Aug. 26, 2002 (notations used to indicate unsurveyed areas)); Gov't Ex. 12 (MSHA mine map appears to be dated Jan. 4, 2001 (notations used to indicate that extent of prior mining was unknown)); Gov't Ex. 13 (MSHA mine map dated July 15, 2002 (notation used to indicate extent of survey areas unknown)). All the maps came from MSHA districts other than the district in which the Quecreek No. 1 Mine is located, and testimony indicated that there may have been informal guidance as to the practice in those other districts. Tr. 548-49. There is no evidence that MSHA had issued any such guidance regarding mine maps in the district where the Quecreek No. 1 Mine is located.

argument that there was nothing in the standard or other guidance from the Secretary that required PBS to do more than depict the workings of an adjacent inaccessible mine, noting that “[t]here are many prophylactic actions taken by *reasonably prudent people* that are not set forth in the statutes.” 28 FMSHRC at 710 (emphasis added). In further response to PBS’s argument that it had met or exceeded “the standards of the mining community,” the judge stated that, aside from those standards, “given the gravity of the accident, I cannot dismiss basic common sense.” *Id.* at 711. Again, while these sentiments may well be of some moment in a case brought in tort, they are inapposite to the determination of culpability under the Mine Act. Umbrageous hindsight must not be substituted for legal analysis consistent with Commission precedent.

Consequently, I conclude, contrary to the judge’s reasoning, that Commission case law establishes that PBS is not guilty of “gross” or high negligence. *See also Utah Power & Light Co.*, 12 FMSHRC 965, 972 (May 1990) (operator that followed a clean-up plan believing that such conduct was consistent with applicable regulations not guilty of aggravated conduct constituting more than ordinary negligence). In any event, even if the Secretary’s regulations left room for interpretative guidance that indicated the need for map notations in light of uncertain boundaries, she has issued no guidance here that has been ignored. *See also Midwest Minerals, Inc.*, 12 FMSHRC 1375, 1379 (Jul. 1990) (operator not guilty of high negligence where seemingly conflicting MSHA policies left operator in doubt as to what was required for compliance).

Finally, in its recent decision in *Spartan Mining Co.*, 30 FMSHRC 699 (Aug. 2008), the Commission held that negligence findings cannot be based on an operator’s actions after a violation has occurred; rather the judge’s examination must focus on the operator’s actions before the violation occurred. *Id.* at 708. Here, PBS’s failure to provide a notation or warning on a map to indicate uncertainty as to boundaries is, at best, inaction that followed its failure to provide an accurate map with boundaries under section 75.1200.⁸

In summary, I would reverse the judge’s finding of gross negligence. To my mind, nothing presented before the judge below warranted a finding in excess of the moderate negligence originally charged by MSHA after an extraordinarily thorough investigation of the circumstances leading up to the Quecreek inundation.


Michael F. Duffy, Commissioner

⁸ In order to abate the citations issued to it and Musser, PBS was ordered to correct the state mine map in light of the uncertified map found at the Windber Coal Heritage Museum, and to perform test bores when mining with 200 feet of the Harrison No. 2 mine. Citation No. 7322487, at 2-3; Citation No. 732488, at 2-3.

Distribution

**R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center
401 Liberty Avenue, Suite 1340
Pittsburgh, PA 15222**

**Melanie J. Kilpatrick, Esq.
Rajkovich, Williams, Kilpatrick & True, PLLC
3151 Beaumont Centre Circle, Suite 375
Lexington, KY 40513**

**Cheryl C. Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247**

**Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021**

ADMINISTRATIVE LAW JUDGE DECISIONS

15 FMSHRC 2099 (Oct. 1993) the Commission, looking to the U.S. Supreme Court's decision in *Cuyahoga Valley Ry. Co. v. United Transportation Union*, 474 U.S. 3 (1985), held that the Secretary has the authority to vacate citations and that such actions are not reviewable.

In *Cuyahoga* the Supreme Court noted the distinct roles of the Commission and Secretary of Labor as adjudicator and prosecutor, respectively, and that Congress did not intend a commingling of those roles.¹ See, also *Rockville Crushed Stone, Inc.* 1994 WL 700964, December 1994 (Judge Merlin²), noting *RBK's* holding that the "vacation of citations and orders are within the Secretary's unreviewable prosecutorial discretion." cf. *PC Sand & Gravel*, 32 FMSHRC 235, 2010 WL 1145201, February 2010, (Chief Judge Lesnick) in which that judge distinguished the Secretary's effort to vacate citations "in the context of a motion to approve a settlement agreement."

As at least the title, if not the substance, of the Joint Motion is to dismiss the petition for the assessment of the civil penalty in this docket, and as such action does not require Commission approval, the proceeding has become moot and therefore this matter is **DISMISSED, with prejudice.**



William B. Moran
Administrative Law Judge

Distribution:

Leslie Paul Brody, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street SW, Room 7T10, Atlanta, GA 30303

Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 2400 N Street NW, 5th Floor, Washington, DC 20037
Washington, DC 20037

¹While *Cuyahoga* dealt with the authority of the Occupational Safety and Health Review Commission, there is no basis to distinguish the Mine Safety and Health Review Commission's authority and the Commission recognized that fact in *RBK Construction*.

²Judge Merlin was the Chief Administrative Law Judge at that time. He has since retired.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 9, 2010

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. VA 2008-400
 : A.C. No. 44-06804-156224
 :
v. :
 :
KNOX CREEK COAL CORPORATION, : Mine: Tiller No. 1
Respondent :

DECISION GRANTING SUMMARY DISPOSITION
FOR FAILURE TO FILE A TIMELY ANSWER
AND RESPOND TO INITIAL ORDER TO SHOW CAUSE

Statement of the Proceedings

Before: Judge McCarthy

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Knox Creek Coal Corporation, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). The October 29, 2008 Petition seeks civil penalty assessments in the amount of \$25,996 for 11 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The citations and proposed civil penalty assessments are as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Section Assessments</u>
7317861	4/15/08	75.370(a)(1)	\$1,795.00
7317862	4/16/08	75.202(a)	\$2,106.00
7317904	4/16/08	75.370(a)(1)	\$3,689.00
6632093	4/21/08	75.400	\$3,689.00
6632099	4/23/08	75.400	\$ 745.00
6632100	4/23/08	75.202(a)	\$1,412.00
6632101	4/23/08	75.362(b)	\$2,473.00
6632102	4/23/08	75.400	\$3,996.00
6632103	4/23/08	75.400	\$ 745.00
6632105	4/23/08	75.400	\$3,689.00
6632107	4/23/08	75.517	\$1,657.00

I. Initial Order to Show Cause

On November 16, 2009, Chief Administrative Law Judge Robert J. Lesnick issued by certified mail an Order to Respondent to Show Cause why default judgment should not be entered for failure to file an Answer as required by Commission Procedural Rule 29, 29 C.F.R. §2700.29. Chief Judge Lesnick Ordered that an Answer to the Petition be filed within 30 days of said Order, or Respondent will be placed in default and ordered to pay the assessed penalties. The return receipt indicates that said Order was served on Respondent on November 19, 2009. Respondent failed to file its Answer, as ordered, or otherwise respond to the Order to Show Cause. No default Order, however, ever issued.

II. Petitioner's Motion for Summary Disposition

Nearly six months later, on May 17, 2010, the Petitioner filed a Motion for Summary Disposition of Proceedings pursuant to Commission Procedural Rule 66, 29 C.F.R. §2700.66 because Respondent had not filed an Answer to date and had not responded to the Order to Show Cause.

III. Respondent's Appearance, Untimely Answer and Opposition

On May 18, 2010, counsel for Respondent filed a Notice of Appearance. On May 20, 2010, Respondent, by and through counsel, filed its Answer, which admitted, *inter alia*, that Respondent received a proposed assessment from the Secretary for \$25,996.00. On or about May 24, 2010, Respondent, by and through counsel, served its Memorandum in Opposition to Motion for Summary Disposition of Proceeding on the Secretary and Commission.

In its Memorandum in Opposition, Respondent argued that it has bona fide defenses to the underlying 11 citations and that summary disposition would be unfair. Respondent averred that the Petition and Order to Show Cause were served on Respondent. However, Respondent never assigned to outside counsel. Contrarily, the Secretary's Motion for Summary Proceedings was served and immediately assigned to outside counsel, who immediately filed Respondent's Answer. Respondent further averred that it has unspecified bona fide defenses that could result in vacation of the citation, or reduction in the gravity cited and penalty assessed. In such circumstances, Respondent argued that it would be unjust to impose the full remaining \$25,996.00 assessment against it for apparent administrative oversight in failing to assign this matter to outside counsel, particularly since the Secretary has argued no prejudice from any delay in having to defend the citations against reasonable inquiry and cross-examination. On the contrary, Respondent argued that any delay would most likely prejudice Respondent since unspecified persons with relevant knowledge of the citations have left its employ. In sum, Respondent argued that it is ready to proceed with discovery and that this case should be decided on the merits, not inadvertent procedural missteps.

IV. Petitioner's Reply

Petitioner replied that the Respondent admitted its failure to respond to the Petition and Order to Show Cause and has simply stated that this case was not "assigned to outside counsel" until the Secretary filed the instant motion. Thus, Petitioner argued that but for the Secretary's motion, Respondent's inaction would have resulted in default judgment. The Petitioner then analyzed requests for relief from default orders under Commission precedent applying Fed. R. Civ. P. 60(b), which provides that to obtain relief from a final judgment, a party must establish (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) that the judgment is void; (5) that the judgement has satisfied, released, or discharged or should not have prospective application; or (6) any other reason justifying relief. In essence, the Secretary argued that a party requesting reopening from a final judgment or default order under Fed.R.Civ.P. 60(b)(1) must establish more than mere carelessness, i.e., that this case was "never assigned to outside counsel." Finally, the Secretary argued that Respondent must, but has failed to, identify facts that, if proven on reopening, would constitute a meritorious defense. Accordingly, the Secretary argued in its Reply that Respondent has failed to satisfy its burden of establishing an entitlement to extraordinary relief from final order and the Secretary's Motion for Summary Disposition should be granted.

V. My Additional Order to Show Cause

On July 13, 2010, I issued an Additional Order to Show Cause. The Order recognized that the Commission is in the process of issuing a Notice of Proposed Rulemaking for a new Commission default rule, which proposes a rule that includes relief not only from orders that have become final by operation of law under section 105(a) of the Act, but also from defaults resulting from a party's failure to file an answer to a petition for assessment of penalty. I informed the parties in my Additional Order to Show Cause that in an effort to provide as much guidance to the parties as possible, the Commission, in its proposed rule has set forth two principle factors that the Commission would consider in determining whether to reopen a final order of default, as well as other additional factors that it may also consider. I informed the parties that the first factor that the Commission would consider is the nature of the error or omission leading to the default (including whether the operator exercised due diligence in attempting to contest the proposed penalty, whether the untimeliness was within the reasonable control of the operator, and the effectiveness of the operator's internal contest procedures). I informed the parties that the second factor is the period of time between the operator's discovery of its default and the filing of the request to reopen with the Commission. I further informed the parties that additional factors that the Commission might consider include the operator's history of penalty delinquencies, the size of the operator, the operator's experience with Mine Act procedures, whether the operator was represented by counsel at the time of the default, the size of the proposed penalty, prejudice to the Secretary or any affected person, whether the motion is opposed, and any other relevant factor.

I specifically informed the parties that I would consider these factors in arriving at my disposition of this matter. I directed the Respondent, within 14 days from the date of my order, to address these factors and Show Cause Why Summary Disposition for Failure to File a Timely Answer and Response to Notice to Show Cause Should Not Be Granted in this matter. I directed Petitioner to respond, if appropriate, within 8 days after service of Respondent's showing. I informed the parties that no further papers would be permitted and I would then rule on whether the Petitioner's proposed civil penalty assessments should not be made the final order of the Commission, and whether the motion for default judgment should be granted or denied.

VI. Respondent's Response

On July 27, 2010, Respondent filed its Response to Additional Order to Show Cause and attached the affidavit of Safety Director Jack Snow, which states that he has personal knowledge of the internal administrative process employed by Respondent to respond to proposed penalty assessments. Mr. Snow avers that he reviewed the Proposed Assessment issued by the Office of Assessments for MSHA, which contains the 11 citations at issue; that Respondent clearly indicated on the Proposed Assessment that it intended to challenge these citations; that Respondent returned the contested citation form to the Civil Penalty Compliance Office; and that Respondent's internal assessment payment process was followed because a \$21,263 payment was made on August 12, 2008 for the non-contested citations.

Affiant Snow avers that when the Secretary filed the instant Petition against Respondent [back on October 29, 2008], it would have been routinely handled by corporate in-house counsel or forwarded for assignment to outside counsel for handling of all subsequent aspects of the proceeding. Affiant Snow states that when Chief Judge Lesnick's Order to Show cause was sent to Respondent in mid-November 2009, it was forwarded to corporate headquarters for further disposition. Mr. Snow continued to assume that the matter was being handled by either in-house or outside counsel.

Affiant Snow further states that when the Secretary filed her May 17, 2010 Motion for Summary Disposition for failure to file an Answer, the content of said motion caused him to make inquiries and learn that outside counsel had not been engaged, as intended. That is, in the words of Respondent's counsel, "...given the now obvious nature of the apparent default, Mr. Snow made inquiries and learned that, through an inadvertent mistake, outside counsel had not been engaged, as intended." Mr. Snow immediately contacted outside counsel and had "those documents" forwarded to outside counsel for prompt engagement. Outside counsel then filed Respondent's May 20, 2010 Answer the same day that the Petition was received from the Solicitor's Office by email. Said Answer pleads seven defenses to the Petition's allegations. Further, affiant Snow states that Respondent has bona fide and legal defenses to the citations that should be considered on their merits, and Respondent never intended to waive those defenses. Finally, Mr. Snow avers that all Petitions now received are forwarded immediately to outside counsel for disposition, and counsel confirms that [t]his apparent breakdown in communication had lead Knox Creek to change its procedures relating to the handling of incoming petitions."

Based on this factual background established by affiant Snow, Respondent argues that Commission precedent permits reopening uncontested assessments that have become final under § 105(a) because of inadvertence and mistake, citing *Peabody Coal Co.*, 19 FMSHRC 1613 (Oct. 1997) which cites *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993), and citing *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). Respondent emphasizes the Commission's observation in *Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995) that default is a harsh remedy and if a defaulting party can make a showing of good cause for failure to timely respond, reopening for disposition on the merits is appropriate. Respondent notes that the Commission directed reopening where counsel had misplaced a proposed assessment in a file rather than return it. See *Pederson Brothers, Inc.*, LAKE 2008-60-M (Apr. 4, 2008). Similarly, Respondent notes that mistake and inadvertence under Fed. R. Civ. P. 60(b)(1) were established when the late filing of a hearing request was due to a processing error by accounts payable personnel. See *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999) (granting motion to reopen where mishandling of proposed assessments resulted in mistaken payment during absence of employee regularly responsible for such tasks); *Kaiser Cement Corp.*, 23 FMSHRC 374, 375 (Apr. 2001) (granting motion to reopen where operator's inadvertent payment of the proposed assessment was due to internal processing error and operator attached affidavit supporting its allegations).

In sum, Respondent argues that Commission case law supports the proposition that cases should be decided on their merits where it can be shown that some inadvertent error has prevented a party from strictly complying with the rules of procedure. Respondent reiterates that it timely submitted the contested citation form, which clearly expressed its intent to contest the instant citations; that Respondent promptly paid the net balance of \$21,263 owed for the uncontested citations; that in-house or outside counsel should have filed a [timely] Answer because Knox Creek was not routinely handling communications from the Solicitor or the Court, and that after forwarding this November 2009 Court's Order to Show Cause [to corporate headquarters], Respondent had no reason to believe that this matter was not being handled by counsel. Respondent emphatically contends that it did not realize that its case was in jeopardy until it received the Motion for Summary Proceeding for failure to file an answer, a document whose very title clearly telegraphed that the process of answering petitions had broken down. At that time, Respondent directly contacted outside counsel and cured the pending default by promptly filing an answer. Respondent argues that the Secretary cannot argue prejudice from the regrettable and inadvertent delay, that Respondent is far more likely prejudiced given employee turnover, and that Knox Creek should be permitted to defend on the merits.

Respondent did not address most of the additional factors in the Commission's proposed default rule, as enumerated in my Additional Order to Show Cause.¹

¹Respondent was placed on notice that I intended to consider these factors in my decision and has not challenged the use of these factors. In addition, these factors are similar to those used by other courts in determining whether Fed. R. Civ. P. 60(b)(1) allows for relief. See, e.g. *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1223 (9th Cir 2000); *Pioneer Inv. Services Co. v.*

VII. Petitioner's Reply

On August 3, 2010, Petitioner filed its Reply to Respondent's Response to Additional Order to Show Cause. In said Reply, Petitioner argues that Respondent still fails to show good cause for its late Answer and failed to adequately explain the facts it claims are related to the first factor listed in my Additional Order to Show Cause, i.e., the nature of the error or omission that led to the failure to file a timely answer. Petitioner argues that Respondent attempts to cast the in-house legal department of its parent company, Massey Energy, as an entirely separate and distinct entity over which Respondent has no control, even though Respondent admits that upon receiving the Secretary's motion, it independently contacted outside counsel. According to Petitioner, this action belies Respondent's assertion that it was unable to proceed on its own and rely entirely on the in-house legal department to respond, or refer the matter to outside counsel. Petitioner argues that Respondent's safety director admits receiving and reviewing Chief Judge Lesnick's Order to Show Cause, which he simply forwarded to the in-house legal department without any instruction or question. Petitioner emphasizes that the Order to Show Cause orders Respondent to file an answer within 30 days or show good cause for failure to do so, and plainly stated, in italicized text for emphasis, "you will then be placed in default and ordered to pay the amount of MSHA's penalty \$47,259.00 immediately," and "preserve your right to [a] hearing, you must file an Answer." Respondent, however, made no special efforts to address this issue until the Motion for Summary Disposition was filed.

Petitioner argues that the second factor, i.e., the period of time between the operator's discovery of the default and its action to cure it, also weighs against proceeding now on the merits since the Order to Show Cause was issued a year after the Petition was filed, and the instant motion was not filed until six months later. Thus, 18 months expired before Respondent sought this proceeding on the merits.

Petitioner argues that the additional factors set forth by the Commission in its proposed new default rule likewise weighed against Respondent's argument. In this regard, Petitioner asserts that MSHA's Data Retrieval System, available on its public website, shows that as of July 29, 2010, Respondent had 89 violations with delinquent penalties, originally assessed at \$204,230.00, but currently assessed at \$123,715.00, of which Respondent has paid only \$1,094.00.² Thus, despite the fact that these penalties were reduced by almost half through litigation or negotiation, Respondent has failed to timely remit \$123,715.00 in penalties, according to the Petitioner. Furthermore, Petitioner argues that Respondent is a large mine

Brunswick Associates, Ltd. Partnership, 507 U.S. 380, 395 (1993).

²MSHA's Data Retrieval System contains information on mine citations, orders, and safeguards and is available at MSHA's public website (<http://www.msha.gov/drs/drshome.htm>). On September 8, 2010, the website indicated that the Tiller No.1 mine had 68 outstanding delinquent penalties originally assessed at \$159,906.00, but currently assessed at \$87,246.00, of which Respondent has paid only \$1,049.00.

producing between 700,000 and 1,000,000 tons of coal annually, and it is controlled by a large energy company that produces over 10,000,000 tons of coal annually. Finally, Petitioner argues that Respondent has extensive experience with Mine Act procedures and was represented by in-house counsel at the time of the default.

VIII. Legal Framework

A. Procedural Rules

The applicable Commission Rules in this case provide as follows:

29 C.F.R § 2700.27

§ 2700.27 Proposal for a penalty.

(a) When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

29 C.F.R § 2700.29

§ 2700.29 Answer.

A party against whom a penalty is sought *shall* file and serve an answer within 30 days after service of a copy of the proposal on the party. An answer shall include a short and plain statement of the reasons why each of the violations cited in the proposal is contested, including a statement as to whether a violation occurred and whether a hearing is requested. (Emphasis added).

29 C.F.R § 2700.63

§ 2700.63 Summary disposition of proceedings.

(a) Generally. When a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.

(b) Penalty proceedings. When the judge finds the respondent in default in a civil penalty proceeding, the judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

B. Analogous Precedent

In this penalty proceeding, it is undisputed that the Respondent failed to file a timely Answer and failed to respond to the initial Order to Show Cause. However, a Commission Administrative Law Judge (ALJ) never issued an Order of Default. Accordingly, this is not a

case where Respondent is requesting relief from a default judgment or order, since one never issued. Rather, at this stage of the proceeding, the issue is whether default judgment should issue at this time for failure to timely file an Answer and answer the original Notice to Show Cause.

The facts establish that it was only after the Secretary's Motion for Summary Disposition that Respondent filed its belated Answer because the case was not assigned to outside counsel before then. In essence, therefore, the Petitioner seeks a default judgment on the ground that the Respondent failed to file a timely answer to the Petition and Notice to Show Cause.

I could find no Commission case law or rule governing this issue. Accordingly, I look to analogous case law and the Commission's new proposed default rule to decide this issue.

The concept of granting default judgment in the absence of good cause shown for failure to timely file an answer is consistent with well-established case law under the National Labor Relations Act (NLRA), which provides a model for certain provisions of the Mine Act. The National Labor Relations Board (Board) has consistently rejected counsel inattention as an excuse for the late filing of an answer. See, .e.g., *King Courier*, 344 NLRB 485 (2005) (default judgment granted in absence of good cause shown for late filed answer due to inadvertent inattention of counsel); *South Atlantic Trucking, Inc.*, 327 NLRB 534, 534-35 (1999).³

King Courier is particularly instructive. In that case, the respondent failed to file a timely answer to the General Counsel's complaint under the National Labor Relations Act. The General Counsel filed a Motion for Default Judgment with the Board. The Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The respondent, unlike Knox Creek, actually filed a response to the Board's Notice to Show Cause and included an answer to the complaint. In its response to the Board's Notice to Show Cause the respondent argued that its failure to file a timely answer to the complaint was "the result of inadvertent inattention of counsel in light of the substantial factual issues need to be addressed in this case." The Board found that Respondent's explanation for its failure to file a timely answer did not constitute good cause, noting that "[i]nadvertent inattention of counsel is not sufficient to establish good cause, citing *Electra-Cal Contractors*, 339 NLRB 370, 370 (2003), and *Associated Interior Contractors*, 339 NLRB 18, 18 (2003). Further, the Board found

³I note that the Board's decision *Air Climate Systems, Inc.* 357 NLRB No. 75 (May 30, 2008) *Air Climate Systems, Inc.*, 357 NLRB No. 75 (May 30, 2008) (default judgment granted in absence of good cause shown for answer filed one-day late due to inattention of counsel to ensure timely filing), was decided by a two-member panel consisting of then Chairman Schaumber and then Member Liebman. On June 17, 2010, a divided Supreme Court ruled that the two-member Board was not authorized to issue decisions, specifically holding that Section 3(b) of the Act requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board. See *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010). Accordingly, I need not rely on that analogous authority here.

that respondent's claim that there were substantive and factual issues which needed to be addressed was also not sufficient to establish good cause, and refused to address respondent's assertion that it had a meritorious defense since good cause for the late filed answer was not otherwise demonstrated. See *Dong-A Daily North America*, 332 NLRB 15, 16 (2000), citing *Printing Methods, Inc.*, 289 NLRB 1231, 1232 fn. 4 (1988). Accordingly, the Board granted the General Counsel's Motion for Default Judgment for failure to file a timely answer to the complaint, despite Respondent's answer to the Notice to Show Cause.

Similarly, in *South Atlantic Trucking, Inc.*, the Board found that the respondent failed to establish good cause for the failure to file a timely answer and granted the Acting General Counsel's Motion for Default Summary Judgment, despite respondent's response to the Notice to Show Cause. The Board rejected respondent's arguments that it tried unsuccessfully to fax the answer late on the due date, that hard copies of the answer were misplaced and not mailed until a week later, that summary judgment was unfair since it had a defense on the merits, that counsel was not a regular practitioner, and that the Acting General Counsel was not prejudiced by the delay. The Board found that respondent's late fax transmission would not have been excused, even if facsimile filing of answers were allowed under the Board's rules, and the copies of the answer which were mailed were also untimely. The respondent's bare assertion that the copies were misplaced and not mailed for a week did not establish good cause for failing to file a timely answer. *Father & Sons Lumber*, 297 NLRB 437 (1989), *enfd.* 931 F.2d 1093 (6th Cir. 1991). The respondent received clear notice of its obligation to file a timely answer and its attorney's unfamiliarity with the Board's procedures did not constitute good cause for the late filing. *Duro Pleating*, 317 NLRB 614 (1995). Similarly, the Board rejected the respondent's argument that the government had not been prejudiced by the late-filed answer, concluding that it is not necessary to show prejudice to require compliance with the pleading rule. In sum, respondent's response to the Notice to Show Cause was inadequate because it did not sufficiently explain failure to file a timely answer or provide a cogent reason for further extending the answering period. Finally, the Board noted that respondent's attack on the factual allegations of the complaint, which would have been appropriate in a timely answer, simply came too late. According, in the absence of good cause shown for failure to file a timely answer, the motion for default summary judgment was granted.

C. Legal Analysis

In this case, Respondent both failed to file a timely answer and failed to respond to the Chief Judge Lesnick's Order to Show Cause why no answer was timely filed and why default should not be entered. Thus, contrary to Affiant Snow's suggestion otherwise, it was well before the Secretary filed her Motion for Summary Disposition that the Order to Show Cause "clearly telegraphed that the process of answering petitions had broken down." Respondent's safety director admits receiving that Order to Show Cause, which was simply forwarded to corporate headquarters with no follow-up or direction. Thus, the nature of the error or omission leading to the failure to timely file an answer was the cavalier assumption by Respondent that the Order was being handled by either in-house or outside counsel.

According to Respondent's own affidavit, when the Secretary filed the instant Petition against Respondent in October 2008, it would have been routinely handled by corporate in-house counsel or forwarded for assignment to outside counsel. Respondent is represented by both in-house and outside counsel, as well as a staff responsible for safety compliance issues. Respondent, however, failed to track the progress of this case or follow-up to ensure that the case was being handled, even after an Order to Show Cause was issued.

As explained above in an analogous context, the inadvertent inattention of counsel or corporate headquarters is not sufficient to establish good cause. Respondent failed to exercise due diligence in attempting to perfect its contest to the proposed penalty, cure its failure to timely file an answer, or respond to the initial Order to Show Cause. The untimeliness and apparent breakdown in communication was clearly within the reasonable control of the Respondent and resulted from the ineffectiveness of its internal procedures, as demonstrated by its decision to independently contact outside counsel in response to the Motion for Summary Disposition, and change its procedures relating to the handling of incoming petitions.

In the circumstances of this case, the period of time between when the Respondent discovered, or should have discovered, its failure to file an answer and its effort to cure, is not a mitigating factor. Concededly, Respondent acted quickly by filing an answer after receiving the Motion for Summary Disposition, but that action simply comes too late. As emphasized above, Respondent was on notice that it was in jeopardy of default when it received the Order to Show Cause on November 19, 2009. The Order to Show Cause was filed one year after the initial Petition. Respondent's Safety Director admits that he received and reviewed the Order. The Order plainly stated, in italicized text for emphasis, "*You will then be placed in default and ordered to pay the amount of MSHA's penalty \$47,259.00 immediately.*" The order also stated that "to preserve your right to [a] hearing, you must file an Answer." Thus, the Order to Show Cause was clear and unequivocal notice that the Respondent had not properly answered and was at risk of being placed in default. The Motion for Summary Disposition was not filed until six months after Respondent received the Order to Show Cause. Thus, Respondent had six months to act and failed to do so. In fact, there is no evidence to suggest that Respondent would have ever acted if not prompted by the Motion for Summary Disposition. Therefore, this factor weighs in favor of default judgment against Respondent.

Additional factors that the Secretary highlighted in her papers further weigh in favor of granting her Motion for Summary Disposition. Respondent, Knox Creek Coal Corporation, is a subsidiary of Massey Energy Company and operates the Tiller No. 1 underground coal mine located in Tazewell County, Virginia. Petitioner represents that Respondent has a history of penalty delinquencies and that as of July 29, 2010, MSHA's Data Retrieval System indicated that Respondent had about 89 violations with outstanding delinquent penalties amounting to approximately \$123,715.00.⁴ Respondent is a large mine, which at the time of the violations subject to this docket, was producing between 700,000 and 1,000,000 tons of coal annually.

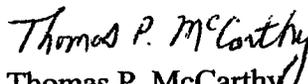
⁴As noted above, on September 8, 2010, MSHA's Data Retrieval System indicated that the Tiller No. 1 mine had 68 outstanding delinquent penalties amounting to a total of \$87,246.00.

Respondent is controlled by a large energy company (Massey Energy), which produces over 10,000,000 tons of coal annually. Finally, Respondent has extensive experience with Mine Act procedures and was represented by in-house counsel, if not outside counsel, at the time of the default. The size of the proposed civil penalty assessments at issue – \$25,996 for 11 alleged violations of mandatory safety standards – is but one-fifth of apparent, delinquent penalties and pales in comparison to revenue generated from annual coal production. The Secretary strongly opposes Respondent's belated efforts to proceed on the merits. Finally, it is not necessary for the Secretary to show prejudice to require compliance with Commission Procedural Rule 29 and an Order to Show Cause, and even if it were, this factor is outweighed by the other factors explained herein.

In sum, I am mindful of the Commission's observation in *Coal Preparation Services, Inc.*, 17 FMSHRC 1530, 1531 (Sept. 1995), relied on by Respondent, that default is a harsh remedy and that if a defaulting party can make a showing of adequate or good cause for the failure to timely respond, the failure may be excused and appropriate proceedings on the merits permitted. In this case, however, I have made a determination based on the totality of the facts and circumstances, following full briefing by the parties on Additional Order to Show Cause, that Respondent has not made a showing of adequate or good cause for the failure to timely file an Answer or respond to Chief Judge Lesnick's initial Order to Show Cause. I decline to reward behavior that has already caused unwarranted expense to the Commission and Secretary because of unexcused failure by a large, experienced and sophisticated operator, represented by counsel, to follow Commission Rule and Order of the Commission's Chief Judge.

ORDER

In light of the foregoing, Petitioner's Motion for Summary Disposition for Failure to File a Timely Answer is **GRANTED**, and it is **ORDERED** that the Respondent pay a penalty of \$25,996.00 within 30 days of this order.


Thomas P. McCarthy
Administrative Law Judge

Distribution:

Jordana L. Greenwald, Esq., Office of the Solicitor, U.S. Department of Labor, 170 S. Independence Mall West, Suite 630, Philadelphia, PA 19106-3306

Alexander Macia, Esq., Spilman, Thomas, & Battel, PLLC, 300 Kanawha Blvd. East, P.O. Box 273, Charleston, WV 25321-0273

/cp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 13, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2007-600
Petitioner	:	A.C. No. 46-08791-120481
v.	:	
	:	Docket No. WEVA 2008-247
	:	A.C. No. 46-08791-130758
	:	
WOLF RUN MINING COMPANY,	:	Sago Mine
Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

These civil penalty proceedings concern Petitions for the Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U.S.C. § 820(a), by the Secretary of Labor against the respondent, Wolf Run Mining Company ("Wolf Run"). The petitions seek to impose a total civil penalty of \$148,400.00 for 15 violations of the Secretary's regulations governing underground coal mines that allegedly occurred at Wolf Run's Sago Mine. The cited violations were identified following a Mine Safety and Health Administration (MSHA) investigation of the January 2, 2006, Sago Mine disaster that resulted in twelve fatalities and one serious injury. The Secretary does not allege that any of the cited violations in these proceedings contributed to the fatal mine explosion.

This Decision concerns the adjudication of 104(d) Order No. 7100920 and 104(a) Citation No. 7100919. Docket No. WEVA 2008-247 contains only 104(d) Order No. 7100920. The civil penalty matter in WEVA 2007-600 initially contained fifteen citations and orders. However, 104(d) Order No. 7100904 was bifurcated from WEVA 2007-600 and assigned to Docket No. 2007-600-A. Order No. 7100904 is the subject of future litigation. Contained among the remaining fourteen citations and orders in Docket No. WEVA 2007-600 is 104(a) Citation No. 7100919, a subject of this litigation.

Prior to the hearing, on July 15, 2009, and January 21, 2010, the parties filed Motions to Approve Partial Settlement with respect to the remaining thirteen citations and orders in WEVA 2007-600. The parties have agreed to a reduction in civil penalty from \$133,900.00 to \$71,800.00 for these thirteen citations and orders.

The settlement terms include modifying 104(d)(1) Order Nos. 7100907, 7100912, 7100916, 7100918, and 7458180 to 104(a) citations to reflect that the violative conditions were not the result of an unwarrantable failure. The parties have agreed to vacate 104(d) Order No. 7100911 because the cited condition has been merged with the conditions contained in 104(d) Order No. 7100909. Similarly, 104(d) Order No. 7100915 shall be vacated because the cited condition has been merged with the conditions contained in 104(d) Order No. 7100914. Finally, the parties have agreed to vacate 104(d) Order Nos. 7458182 and 7458183.

I have considered the representations and documentation submitted in the motions for approval of partial settlement, and I conclude that the proffered partial settlement is appropriate under the criteria set forth in Section 110(i) of the Mine Act. 30 U.S.C. § 820(i). Consequently, the parties' settlement terms shall be approved and incorporated in this Decision.

The hearing with regard to 104(a) Citation No. 7100919 and 104(d)(1) Order No. 7100920 was conducted on February 2 and February 3, 2010, in Clarksburg, West Virginia. The Secretary proposes a total civil penalty of \$14,500.00 for the two cited violations. The citation and order concern a mine operator's responsibility to notify MSHA and mine rescue teams immediately after an accident. The parties filed simultaneous post-hearing briefs and replies that have been considered in the disposition of these matters.

I. Background

The Sago Mine, operated by Wolf Run, is an underground coal mine located in Upshur County, West Virginia. International Coal Group, Inc., (ICG) is the parent company of Wolf Run Mining Company. The contested citation and order concern Wolf Run's alleged violations of the reporting requirements in 30 C.F.R. § 50.10 and 30 C.F.R. § 75.1502(a). The subject citation and order were issued because of Wolf Run's delay in notifying the authorities that an underground mine explosion had occurred. Under applicable regulations and the mine emergency evacuation plan, Wolf Run was required to "immediately" notify MSHA, the West Virginia Office of Miners Health Safety and Training (WVOMHST) and the Barbour County Mine Rescue team that an accident had occurred. Federal and state authorities exercise final authority over the implementation of a rescue plan at an accident scene.

At approximately 6:26 a.m. on Monday, January 2, 2006, a methane explosion occurred in a sealed area of the mine known as the 2nd Left Mains or the 2 North Mains area. The explosion and its aftermath occurred during the national observance of the New Years Day holiday. There were 29 miners underground at the time of the explosion. Most of these miners were members of two continuous miner section crews, each consisting of twelve members.

The crews worked in the 1st Left and 2nd Left face areas. When the explosion occurred, the 1st Left crew had not yet reached the face and managed to evacuate without serious injury. The members of the 2nd Left crew, who were further inby, unsuccessfully attempted to evacuate before barricading themselves in the 2nd Left face area.

Several minutes after the explosion, at approximately 6:36 a.m., Wolf Run management personnel located on the surface received a phone call from an underground foreman of the 1st Left crew who had experienced the force of the explosion. The foreman informed them that his crew had survived a significant underground accident. Approximately 15 minutes thereafter, four members of mine management went underground to assist in the evacuation of miners and to determine the nature and extent of the accident. Sometime between 7:15 a.m. and 7:23 a.m., management personnel communicated from underground to the surface that the 2nd Left crew could not be accounted for. At that time, the Wolf Run officials used an underground mine phone that had been patched into the home telephone of John B. Stemple, Jr., the company's Assistant Director of Safety and Employee Development, to advise Stemple to provide notification to the authorities, and to implement the company's rescue program that relied on the Barbour County Mine Rescue.

Instead of immediately attempting to notify the authorities, between 7:24 and 7:28 a.m. Stemple left messages on the home telephone answering machines of several members of the company's upper management. General Manager Charles Dunbar returned Stemple's call at 7:34 a.m. at which time Stemple informed Dunbar of the explosion. Stemple also managed to have his immediate supervisor, Harrison Tyrone (Ty) Coleman, ICG's Manager of Safety for West Virginia and Maryland, informed of the explosion. Coleman directed Stemple to activate the mine rescue plan shortly after 7:40 a.m.

At 7:46 a.m., Stemple left a message on the home answering machine of an official of WVOMHST. The information provided by Stemple shortly after the accident reflects Stemple's initial attempt to contact MSHA occurred at approximately 7:50 a.m. when he left a phone message at the home of an MSHA supervisor. Stemple initially unsuccessfully attempted to contact a Barbour County Mine Rescue team member at his home at approximately 8:04 a.m. Stemple ultimately successfully contacted an MSHA official at his home at which time a 103(k) order was verbally issued on the telephone at 8:32 a.m. prohibiting anyone from entering the mine. Generally speaking, section 103(k) of the mine act authorizes MSHA representatives to issue such orders deemed appropriate to insure the safety of persons in a coal mine. 30 U.S.C. § 957(k).

MSHA, the Barbour County Mine Rescue Team, and WVOMHST received actual notice of the explosion at approximately 8:30 a.m. Members of these organizations arrived at the Sago Mine between 10:00 a.m. and 10:30 a.m. The mine rescue team was not able to go underground until 5:30 p.m. that evening because of dangerous concentrations of gases. Rescue teams did not reach the 2nd Left face area until the following evening at approximately 11:00 p.m. on January 3, 2006, at which time one survivor was found. There were 12 fatalities.

II. Statement of the Case

This case raises difficult and complex issues concerning the effect of MSHA's exercise of its 103(k) authority on a mine operator's compliance with its reporting responsibilities. As discussed below, a management team went underground after the explosion to assist the evacuation and to assess what had happened. The management team advised Stemple to implement mine rescue at approximately 7:23 a.m. However, Stemple was reticent to contact MSHA without the approval of his immediate supervisor because he believed a 103(k) withdrawal order would be issued immediately. Stemple responded to the request for mine rescue by attempting to contact the company's upper management instead of notifying the authorities. Stemple did not attempt to notify MSHA until 7:50 a.m. He attempted to notify the mine rescue team shortly thereafter. The delay from 7:23 a.m. until 7:50 a.m. constitutes a violation of Wolf Run's obligation to timely report accidents. Consequently, the citation and order concerning Wolf Run's alleged reporting violations shall be affirmed.

The Secretary attributes Wolf Run's delay in implementing its mine rescue plan to an unwarrantable failure. The Secretary has failed to demonstrate the requisite unjustified or aggravated conduct to support an unwarrantable failure due to the significant mitigating circumstances that arose out of the particular circumstances of this case.

III. Findings of Fact

a. Immediate Aftermath of the Explosion

The material facts are essentially undisputed and have been stipulated by the parties. At approximately 6:26 a.m. on January 2, 2006, an explosion occurred in a recently sealed and abandoned area in by the 2 North Mains seals that destroyed all ten of the seals used to separate that area from the active portion of the mine. At that time, the mine was operating two continuous miner sections, 1st Left and 2nd Left. At the time of the explosion, approximately 29 miners were underground. The twelve member 2nd Left crew boarded a mantrip entering the mine through the track entry at approximately 6:00 a.m. and had reached the 2nd Left face working section at the time of the explosion. (Gov. Ex. 5-A). The twelve member 1st Left crew accompanied by a pumper, a belt cleaner and a mine examiner, entered the mine via a mantrip shortly thereafter, at approximately 6:05 a.m., but this crew was still in the mantrip at the 1st Left switch and had not yet arrived at the 1st Left working face. (Gov. Ex. 5-A). A preshift examiner who had entered the mine earlier in the morning remained underground.

At approximately 6:26 a.m., on the surface, dispatcher William Chisolm was speaking on the telephone with Mine Superintendent Jeffrey Toler, who was located in a building next to the dispatcher's office, when a flash of lightning and loud thunder occurred. (Joint Stip. 75). Chisolm told Toler that the mine's Atmospheric Monitoring System (AMS), that monitors carbon monoxide (CO), was lost and that the belts were down. (Joint Stip. 77). CO is a byproduct of fire and explosion. Data from the AMS system reflect that it alarmed

at 6:31:31 a.m. (Joint Stip. 64). The investigation determined the system alarmed at 6:26:35 a.m. because the clock on the AMS was four minutes and 56 seconds fast. (Joint Stip. 65).

Toler initially thought that lightning may have affected the fuses for the AMS system. (Joint Stip. 80). Toler told Chisolm to radio the 1st Left and 2nd Left crew to ask them to check all CO sensors that were alarming to determine the problem. (Joint Stip. 79). Chisolm also spoke to Maintenance Superintendent Denver Wilfong on the phone. Wilfong told Chisolm that communications on the AMS had been lost. Wilfong also thought that fuses had blown. (Joint Stip. 81, 82). Wilfong directed Maintenance Foreman Vernon Hofer, who was in Wilfong's office at that time, to check the AMS and to replace any blown fuses. Hofer proceeded to the dispatcher's office to obtain his cap light. Hofer checked the CO monitor screen to see which belts were affected. He noted the Nos. 1 and 2 Belts were operating, but the Nos. 3 and 4 Belts had lost power. (Joint Stip. 83, 84).

Meanwhile underground, at approximately 6:26 a.m., pumper John Boni, who was in the No. 3 entry at the 22 crosscut, felt a rush of air he attributed to a small pillar fall. (Joint Stip. 56, 67; Gov. Ex. 5-A). At approximately 6:32 a.m., belt cleaner Pat Boni noticed dust moving in an inby rather than an outby direction, the opposite direction air normally flowed. Boni telephoned dispatcher Chisolm from the No. 4 Belt drive to ask what had happened. (Joint Stip. 85, 86).

At approximately 6:36 a.m., Owen Jones, Section Foreman for the 1st Left crew traveled to a telephone after having experienced the force of the explosion and the resultant smoke, dust and debris approximately ten minutes earlier. Jones communicated to Chisolm, Toler and Wilfong, who were still speaking on the telephone on the surface, that "we had a mine explosion or something in here" and "get mine rescue here right now." (Stip. 92, 93; Tr. 89). Jones was concerned about his brother who was a 2nd Left crew member.

After speaking to Jones, Toler learned that the 1st Left crew was accounted for. Toler was concerned that the 2nd Left crew had not responded. (Joint Stip. 96). Toler's uncle was a member of the 2nd Left crew. Wilfong instructed Chisolm to continue trying to establish communications with the 2nd Left crew. (Joint Stip. 98). Toler, Wilfong, Hofer and Safety Director James (Al) Schoonover prepared to go underground to investigate. They boarded a mantrip and proceeded underground. (Joint Stip. 101). Toler estimated that approximately 15 minutes had elapsed from the time of the explosion until they started underground. (Joint Stip. 103).

At approximately 7:01 a.m., Chisolm called Stemple at his home to relate that Jones had reported a big rush of air accompanied by dust and debris. (Tr. 522-23, 525). Sometime between 7:01 and 7:15 a.m., while Chisolm was speaking to Stemple, Wilfong met the 1st Left crew and learned that the 2nd Left crew had not been heard from. Wilfong called Chisolm from underground. (Tr. 527). Wilfong told Chisolm to alert federal and state agencies, and told Chisolm that mine rescue teams were needed immediately. (Joint Stip. 114).

Contemporaneous with hearing that Wilfong had requested notification of mine rescue teams, while continuing to speak to Wilfong, Chisolm patched the land line phone into the mine phone enabling Stemple to speak directly to Toler underground. (Joint Stip. 115). Toler advised Stemple that he was not sure what had happened, that they had found the 1st Left crew, and, that they were helping to bring the crew members to the surface. Toler also told Stemple that there had been no contact with the 2nd Left crew. (Joint Stip. 116-18).

Toler further related to Stemple that the 1st Left crew stated that several intake stoppings were out, and that there was smoke and dust in the air as they traveled along the primary intake escapeway. (Joint Stip. 117). Stemple told Toler that he needed to re-establish ventilation as deep into the mine as possible to prevent a shortage of fresh air at the 2nd Left section. (Joint Stip. 119). Toler testified that his conversation with Stemple began at approximately 7:15 a.m. (Tr. 451). Stemple testified that the telephone conversation ended at 7:23 a.m. (Tr. 572). Sometime between 7:15 and 7:23 a.m. Toler told Stemple to contact mine rescue teams. (Joint Stip. 120). Stemple told Chisolm to continue to try to establish contact with the 2nd Left crew and that he would take care of notifying the parties who needed to be notified. (Tr. 526-27).

Toler instructed Wilfong to assist the 1st Left crew to the surface while he, Schoonover and Jones remained underground. (Joint Stip. 121). One 1st Left crew member had a prosthetic leg. (Tr. 106). Hofer operated a mantrip to transport the 1st Left crew, pumper John Boni, and Wilfong to the surface. The men arrived on the surface at approximately 7:30 a.m. (Joint Stip. 122).

Jones met Toler and Schoonover at the mine phone at the intersection of the No. 25 crosscut at the No. 4 belt entry. (Joint Stip. 123). Jones insisted on remaining underground due to his concern for his brother's safety. Toler instructed Jones to remain at the phone because Jones did not have a hard hat, while he and Schoonover traveled inby to assess the damage. (Joint Stip. 124). Toler and Schoonover observed multiple blown out stoppings from the intake entry towards the track entry. (Joint Stip. 125-27).

Toler and Schoonover decided to withdraw because they did not have CO detectors and atmospheric conditions were uncertain due to multiple damaged stoppings. (Joint Stip. 127). They traveled outby to the intersection of the No. 41 crosscut and No. 4 belt entry where another mine phone was located. Toler called to the surface and instructed Wilfong and Hofer to bring into the mine curtains, nails, boards, saws, all available detectors, and a hard hat for Jones. (Joint Stip. 127-28).

Toler and Schoonover then walked further outby joining Jones who was waiting at the phone location at the No. 25 crosscut and No. 4 belt entry where they waited for Wilfong and Hofer to return with supplies. (Joint Stip. 129). Wilfong and Hofer disconnected the mine power before reentering the mine. (Joint Stip. 130). After gathering supplies, Wilfong and Hofer proceeded inby meeting Toler, Schoonover and Jones. (Joint Stip. 131). After installing check curtains across damaged stoppings at the No. 32 crosscut between the Nos. 6 and 7 entries

on the intake side, the five men boarded a mantrip and rode inby to the No. 42 crosscut. (Joint Stip. 132-33). The CO detectors carried by Toler and Hofer started to alarm between crosscut Nos. 42 and 43. (Joint Stip. 134, 136). Concerned about another explosion, the men disconnected the mantrip batteries and unloaded the supplies at the No. 42 crosscut and the No. 4 belt. (Joint Stip. 137-38). The five men then started to repair stoppings between the No. 6 and 7 entries as they traveled inby. (Joint Stip. 139).

The five men continued to repair stoppings advancing as far as the No. 58 crosscut. (Joint Stip. 142, 149). However, the density of the smoke prevented them from hanging additional curtains. (Joint Stip. 149). Toler, Wilfong and Schoonover exited the mine at approximately 10:35 a.m., unaware that a 103(k) order had been verbally issued by MSHA supervisor James Satterfield at 8:32 a.m. requiring all personnel to evacuate the mine. (Joint Stip. 148, 150). The exact time Jones exited the mine is unclear. All efforts to contact the 2nd Left crew had failed. (Joint Stip. 151).

b. Stemple's Efforts to Reach
Federal, State and Rescue Personnel

After his conversation with Toler that ended at approximately 7:23 a.m., Stemple began attempting to contact the company's upper management. (Joint Stip. 152). Immediately after his conversation with Toler, Stemple phoned purchasing manager Jerry Waters at the company's division office at 7:24 a.m. to obtain the phone numbers of mine manager Raymond Coleman, General Manager Chuck Dunbar, and Stemple's supervisor Harrison Tyrone (Ty) Coleman, ICG's Manager of Safety for West Virginia and Maryland, Raymond Coleman's brother. (Tr. 534). Between 7:24 and 7:28 a.m. Stemple left messages on these three individuals' phones. (Tr. 534-35). Dunbar returned Stemple's call at approximately 7:34 a.m. at which time Stemple informed him about the accident at the mine. (Tr. 537). Dunbar's telephone conversation with Stemple ended at approximately 7:40 a.m. (Tr. 537-38).

Stemple was determined to contact Ty Coleman who was his "boss." (Tr. 534). The company's division office is located approximately one mile from Ty Coleman's house. (Tr. 545). Stemple testified that Waters, who was aware of the explosion since 7:24 a.m., went to Ty Coleman's home and informed him of the accident. Stemple testified that "Jerry [Waters] got back to me" sometime "previous to 8:20" and informed him that he "got Ty out of bed and informed Ty of what was going on." (Tr. 545). Although the record does not reflect when Waters initially advised Ty Coleman of the explosion, the parties have stipulated that sometime after Stemple's conversation with Dunbar ended at 7:40 a.m., Ty Coleman called Stemple and told him to activate the mine rescue teams and to put them on standby. (Joint Stip. 153, 155).

Stemple's initial attempt to notify MSHA is in dispute. Although Ty Coleman did not advise Stemple to notify the authorities until sometime after 7:40 a.m., Stemple testified that he initially attempted to notify MSHA by calling the Bridgeport field office at approximately 7:30 a.m. (Tr. 536-37). There was no answer to his phone call and Stemple did not leave a

message. (Tr. 537). Stemple further testified that he next attempted to contact WVOMHST authorities by calling their Fairmont office at 7:32 a.m. Once again, there was no answer and Stemple did not leave a message. (Tr. 537). Stemple explained that he knew January 2, 2006, was a national holiday and he did not want to leave a message on an office answering machine that he believed would not be heard until the following day. (Tr. 539-40).

Stemple testified that while he was making phone calls to federal and state agencies, Wolf Run's upper management were calling him for status. (Tr. 537). Between 7:34 and 7:40 a.m. Stemple was on the phone with Dunbar. (Tr. 537-38). At 7:40 a.m. Stemple reportedly called both the MSHA Bridgeport field office and the WVOMHST's Fairmont office again to obtain alternative phone numbers from automated recordings. (Tr. 537-38). Again, the phones were not answered, but the recordings provided names and numbers to call.

Stemple also began looking up in his local telephone book the phone numbers of federal and state agency personnel he knew lived in his area. At 7:46 a.m. Stemple left a message on John Collins' answering machine at his home. Collins is a WVOMHST official. Stemple's message informed Collins that there had been a lightning strike at the mine; the mine had lost power; the 1st Left crew felt a gush of air; there was dust, dirt and debris in the air; and that the 1st Left crew was accounted for but the 2nd Left crew was not. (Tr. 539-40).

After two unsuccessful attempts to reach personnel identified in the MSHA office recordings, at 7:50 a.m., Stemple testified he successfully left a message on MSHA supervisor Tenney's answering machine at his home. (Joint Stip. 156; Tr. 538-39; Gov. Ex. 7). Stemple left Tenney the same message he had left Collins. (Tr. 538-39).

At 7:56 a.m., Collins returned Stemple's call at which time Stemple notified him of the incident. (Gov. Ex. 7). After finally providing notification to both federal and state agencies, Stemple called the Sago Mine to obtain the local mine rescue phone numbers. (Tr. 541). At 8:04 a.m., Stemple called Jeff Rice of the Barbour County Mine Rescue Team at Rice's home. (Tr. 541; Gov. Ex. 7). A woman who answered the phone advised Stemple that Rice was not home, but she did not provide his whereabouts. (Tr. 542). Stemple called the local mine rescue station at 8:05 a.m., but there was no answer and there was no answering machine in operation. (Tr. 542, 544; Gov. Ex. 7).

At this point, Stemple testified he had been on the telephone continuously from 7:30 a.m. until 8:05 a.m. calling federal, state and mine rescue agencies and individuals, and he had only managed to speak to Collins and a woman at Rice's home. (Tr. 542, 552; Gov. Ex. 7).

Between 8:05 and 8:25 a.m., Stemple reportedly called the MSHA District 3 office in Morgantown several times to obtain other phone numbers to call from the office's recording system. Stemple left three more messages on the answering machines of MSHA District Manager Kevin Stricklin, and MSHA Assistant District Managers Carol Mosely and William Ponceroff. (Tr. 544-45).

Having not received a response from Tenney, at 8:28 a.m., after attempts to reach two individuals named "James Satterfield" who were listed in Stemple's local telephone book, Stemple reached MSHA supervisor James Satterfield at home. After receiving the information from Stemple, at 8:32 a.m., Satterfield issued a verbal 103(k) order over the phone requiring the withdrawal of all personnel from the mine. (Tr. 545-46). Specifically, Satterfield instructed Stemple that "no one is to enter the mine or do any work at the mine from 8:32 on." (Joint Stip. 147).

Immediately after Stemple spoke to Satterfield, Stemple called the Sago Mine to advise that a 103(k) order had been issued and to request additional phone numbers for other rescue team personnel. (Tr. 546-48). Stemple successfully reached Chris Height, Vice-President of the Barbour County Mine Rescue Association at 8:37 a.m. (Tr. 549; Joint Stip. 167).

Stemple related that he was continuously on the telephone, either making or receiving calls, between 7:01 a.m. and 10:40 a.m. He estimated that he had made or received 48 phone calls during this period. (Tr. 552). At the time of his last phone call, when he called the Sago Mine at 10:40 a.m. for an update, the mine rescue teams had arrived but could not enter the mine without MSHA approval due to the 103(k) order and the atmospheric conditions existing in the mine. (Tr. 559, 568-69).

The Secretary, relying on information Stemple provided shortly after the accident, contends that Stemple's initial attempt to notify MSHA occurred at 7:50 a.m. when Stemple left a message on MSHA supervisor Kenneth Tenney's answering machine. The Secretary's assertion is consistent with Stemple's initial documented 7:46 a.m. telephone message for WVOMHST's John Collins. Both the 7:46 a.m. and 7:50 a.m. telephone messages were left by Stemple after Ty Coleman advised Stemple sometime after 7:40 a.m. to activate mine rescue. Thus, the evidence does not support Stemple's undocumented claim that he attempted to contact MSHA's Bridgeport field office as early as 7:30 a.m.

MSHA personnel first arrived at the Sago Mine shortly before 10:30 a.m. (Joint Stip. 166). Height assembled the Barbour County team members at their Volga, West Virginia station where they prepared their equipment and departed for the mine at approximately 10:30 a.m. (Joint Stip. 169). Several other mine rescue teams were alerted and arrived at the mine after the Barbour County team.

MSHA and WVOMHST exercised final authority over the rescue plan. (Joint Stip. 172). Monitoring of the mine atmosphere was commenced and continued throughout the day. Air quality measurements reflected a downward trend in the levels of dangerous gases. (Joint Stip. 173-74). At 5:25 p.m. on the day of the accident the first mine rescue team entered the mine through the fan house and proceeded in by exploring the mine. (Joint Stip. 175). This was the first time MSHA permitted entry into the mine. (Joint Stip. 169).

The mine rescue teams reached the 2nd Left section the following evening sometime after 11:00 p.m. on January 3, 2006. (Joint Stip. 176). Eleven crew members had died near the face area of the section. There was one survivor. (Joint Stip. 178). Another deceased victim was located outby the 2nd Left section. (Joint Stip. 179).

IV. Further Findings and Conclusions

a. Citation No. 7100919

The thrust of the Secretary's case is that immediately after learning of the underground mine explosion from Owen Jones at 6:36 a.m., Wolf Run management went underground to assist or attempt to establish contact with survivors instead of notifying the authorities of the accident. Consequently, 104(a) Citation No. 7100919 alleges that Wolf Run violated 30 C.F.R. § 50.10 because it failed to notify MSHA immediately following the explosion. The violation was attributed to a high degree of negligence. The Secretary proposes a civil penalty of \$1,500.00 for Citation No. 7100919. The citation states:

An explosion occurred at the Sago mine in the sealed area of the 2 North Mains on January 2, 2006, at 6:26 a.m. MSHA was not immediately notified of the explosion as required. According to testimony during the investigation, the 1st Left section foreman [Owen Jones], who was underground at the track switch at 49½ crosscut at the time of the explosion made a call to the surface approximately 5 minutes after the explosion. He informed mine management, that we've had an explosion in here" and "get mine rescue teams here now." According to testimony the Director of Safety and Employee Development [John B. Stemple, Jr.] initiated the notification to MSHA. His telephone call log, provided to MSHA during the investigation, indicated that the first attempt to notify MSHA of the explosion was made at 7:50 a.m. on January 2, 2006.

The violation is not marked "significant and substantial" only because, at the time of the violation, 30 C.F.R. 50.10 was a regulation and not a standard and because of a Court decision holding that only violations of mandatory standards can be "significant and substantial." Otherwise, this violation is reasonably likely to be (sic) cause a reasonably serious injury since failing to notify MSHA of emergency accident events could delay important health and safety decisions affecting miners at the mine.

(Gov. Ex. 1).

At the time of the accident 30 C.F.R. § 50.10 provided:

If an accident occurs, an operator shall immediately contact the MSHA District Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District Office, it shall immediately contact the MSHA Headquarters Office in Arlington by telephone at (800) 746-1153.

Section 50.2(h)(5) of the regulations, 30 C.F.R. § 50.10, defines “accident” to include “an unplanned ignition or explosion of gas or dust.”

To establish the fact of the cited violation the Secretary must demonstrate: that an accident occurred; the operative time when the mine operator had sufficient knowledge to meaningfully report the material facts and circumstances surrounding the accident; and an unreasonable delay of the mine operator’s responsibility to “immediately” notify MSHA of the accident.

i. Fact of the Violation

Obviously, a tragic explosion constituting a reportable accident occurred at approximately 6:26 a.m. Toler and Wilfong contend Owen Jones did not use the word “explosion” when he called the surface at approximately 6:36 a.m. “right about 10 minutes” after the force of the explosion blew Jones off of the mantrip. (Tr. 85, 448, 468; Joint Stip. 93). Rather, they claim Jones only stated that something bad had occurred. Jones testified, consistent with the information he provided during the investigation, that he told Chisolm and Toler that “we had a mine explosion or something in here” and “get mine rescue here right now.” (Tr. 87, 89).

Owen Jones’ account of what he said during his initial phone call is entitled to great weight because it is consistent with the information he provided to investigators shortly after the explosion. Moreover, the testimony of Toler and Wilfong is self-serving.

However, the fact that Wolf Run’s management knew, or should have known, as early as 6:36 a.m. that an explosion had occurred does not end the analysis. Commission case law, as well as the language of section 103(k) of the Mine Act, recognize that the propriety of actions to be taken immediately following a mine accident is best determined based on personal on-the-scene knowledge of the particular circumstances and conditions at the accident site.

Consequently, in evaluating a mine operator’s reporting obligations under section 50.10, the Commission has acknowledged that mine operators must be accorded a degree of discretion in investigating accidents prior to notifying MSHA. The Commission has stated:

Section 50.10 therefore necessarily accords operators a reasonable opportunity for investigation into an event prior to reporting to MSHA. Such internal investigation, however, must be carried out by operators in good faith without

delay and in light of the regulation's command of prompt, vigorous action. *The immediateness of an operator's notification under section 50.10 must be evaluated on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting.*

Consolidation Coal Company, 11 FMSHRC 1935, 1938 (Oct. 1989) (emphasis added).

Moreover, the language of section 103(k) manifests Congressional recognition that MSHA's oversight of rescue and recovery efforts is best exercised after it has arrived at the mine site and had the opportunity to observe and evaluate the circumstances and conditions that exist at the accident scene. In this regard, the Mine Act provides:

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

30 U.S.C. § 957(k). (Emphasis added).

Subsequent to the Sago Mine disaster, the Secretary has recognized policy issues raised by the issuance of a verbal 103(k) withdrawal order issued before MSHA arrives at the scene of a mine accident. See MSHA Program Policy Letter ("PPL") No. P09-V-01 (August 12, 2009) (the need of a uniform policy for responding to accident notification by issuance of a verbal section 103(j) order until MSHA personnel arrive at the mine site at which time rescue activities can be directed under the authority delegated in section 103(k)).^{1 2} Thus, the exercise of section 103(k) authority prior to MSHA's arrival at an accident site must be balanced with the possible risk to victims caused by a withdrawal order issued without personal knowledge of the nature and variables of the accident. That is why a mine operator's section 103(k) obligation to obtain MSHA's prior approval of any of its efforts to assist and/or recover accident victims is qualified to apply "when feasible."

¹ Although PPL No. P09-V-01 was not admitted in evidence, it is a publically available official record of the Secretary.

² Section 103(j) of the Mine Act, 30 U.S.C. § 957(j), authorizes MSHA to verbally direct operators to take specific actions in response to an accident without the complete control over rescue and recovery operations delegated to MSHA under section 103(k).

Thus, judgment of Wolf Run's actions must be viewed in the context of "all relevant variables" affecting its reaction and reporting, including its preoccupation with assisting victims who were still underground. Toler, Wilfong, Schoonover and Hofer went underground at approximately 6:45 a.m., approximately 15 minutes after the explosion, to determine the nature and extent of the accident and to assist the evacuation. Toler and his associates would have been precluded from entering the mine if, as the Secretary suggests, MSHA was notified at 6:36 a.m. at which time it is likely that a verbal 103(k) withdrawal order would have been issued.³ As it turned out, mine rescue teams were unable to enter the mine until 5:25 p.m. in the evening.

Having not been precluded by MSHA from going underground, sometime between 6:45 and 7:00 a.m. Toler and his associates met the members of the 1st Left crew, including Owen Jones, who had abandoned the mantrip and were traveling outby on foot in an effort to get fresh air. Visibility was very poor. At that time, they learned of the trauma experienced by the crew from the force of the explosion as well as the resultant dust and debris that was created. They also observed some of the missing and damaged stoppings. Toler and Wilfong were concerned for the 1st Left crew's safety. Toler directed Wilfong to assist in the evacuation. Wilfong and the crew reached the surface at approximately 7:30 a.m. While the evacuation efforts continued, Wolf Run made repeated attempts to establish communications with the missing victims of the 2nd Left crew.

After obtaining information from survivors, ensuring the safe evacuation of the 1st Left crew, observing the degree of damage to stoppings, and determining that the 2nd Left crew could not be accounted for, Toler and Wilfong informed Chisolm and Stemple to notify MSHA and mine rescue teams immediately during a telephone conference that ended at 7:23 a.m. Thus, the urgency of Wolf Run's responsibility to notify MSHA and mine rescue started at approximately 7:23 a.m.

Although Stemple now asserts he initially attempted to telephone MSHA's Bridgeport office at 7:30 a.m., on balance, the weight of the evidence reflects that Stemple initially attempted to contact Dunbar and Ty Coleman, his superiors in upper management, to obtain their approval before contacting MSHA despite the requests of Toler and Wilfong for implementation of mine rescue. In this regard, Stemple apparently was reluctant to notify MSHA because, as he told Toler, ". . .if we call MSHA, they're going to issue a (k) order, and they'll expect you to come out of the mines." (Tr. 452). Stemple did not obtain Ty Coleman's directive to activate the mine rescue plans until sometime after 7:40 a.m. Stemple testified:

So I hung up with Jeff (Toler), and I called our division office, at 7:24. I hung up the phone with Jeff (Toler) at 7:23, and in my notes I wrote down that I called the

³ Although the verbal 103(k) order was effective as of 8:32 a.m., after the mine was evacuated with the assistance of Wilfong and Hofer at 7:30 a.m., the Secretary does not allege that MSHA would have permitted Toler and his associates to go underground if MSHA had been contacted at 6:36 a.m.

division office at 7:24. I realized that I didn't have Chuck Dunbar's home phone number or cell phone number.

Chuck Dunbar is the general manger. I didn't have Ty Coleman's home phone number or cell phone. He's my boss, who was the director of safety and employee development. I didn't have Raymond Coleman's phone number or cell phone number. Raymond was the mine manager at the mine.

So I called the division office and spoke to Jerry Waters, who is a purchasing manager. And I believe Jerry was working that day. And I asked Jerry for those three individuals' home phone numbers, cell phone numbers, any contact information that he could give me for those three individuals.

When I hung up the phone from Jerry, my first attempt was with Chuck Dunbar, at 7:25, I wrote down: 7:25 a.m, Chuck Dunbar. And I called up Chuck's home phone number and . . . I left a message that there had been a lightning strike at the mine; we had lost power underground; the 1 Left crew had called out there was a gush of air that went over the top of them, a lot of dust, dirt and debris was in the air; they were all accounted for; they were on their way out of the mine; but we have not been able to get a hold of the 2 Left crew at this time. I hung up the phone.

Then I called Ty Coleman. I called him on his cell phone, he had no home phone number, so I called his cell phone. I left Ty the exact same message.

Then at 7:20 — I want to say 7:28, I called Raymond. I called Check at 7:24; I called Ty, I think, 7:25; Raymond is 7:28. And [I] left the message on Raymond's cell phone.

(Tr. 534-35).

Stemple's telephone call log, provided to investigators shortly after the accident, indicates that his first attempt to notify MSHA of the explosion occurred at 7:50 a.m. on January 2, 2006, when he left a message on Tenney's answering machine. (Gov. Ex. 7). Stemple's contemporaneous telephone log, furnished to MSHA during the investigation, is the best evidence.

The approximate 27 minute delay in notifying MSHA, from 7:23 a.m. until 7:50 a.m., constitutes a serious violation of the requirement in section 50.10 that accidents, including explosions, must be reported immediately. However, the Secretary has not designated this reporting violation as significant and substantial (S&S) because of the Court decision in *Cyprus Emerald Resources Corp.*, 195 F.3d 42 (D.C. Cir 1999), *rev'g Cyprus Emerald Resources Corp.*, 20 FMSHRC 790 (Aug. 1998). *Cyprus Emerald* dealt with whether section 50.11(b) of the

Secretary's regulations, governing the investigation and reporting of accidents, was a "mandatory safety standard" that could be designated as S&S. The Court held that: "[s]ection 104(d) [of the Mine Act] unambiguously authorizes a 'significant and substantial' violation finding for a violation only of a mandatory health or safety standard." *Id.* at 44. Thus, the Court concluded section 50.11(b) was not a mandatory safety standard because it was promulgated by Congress under the "Administration" provisions in Title V, section 508 of the Mine Act, rather than by a section 101 rulemaking.⁴ Although reporting standards may not be designated as S&S, it is clear that the hazard created by the subject violation, that deprives MSHA of timely notice and oversight of mine accidents, is serious in gravity.

The Secretary attributes a high degree of negligence to Wolf Run's notification delay. However, the Secretary's assertion that Wolf Run's obligation to notify authorities began after Owen Jones' initial telephone call approximately ten minutes after the 6:26 a.m. explosion has been rejected because it ignores the nature of this accident that involved the evacuation of survivors. Rather, the termination of Stemple's call with Toler at 7:23 a.m. provides the beginning point for Wolf Run's obligation to notify MSHA. Thus, the actionable delay was approximately 25 minutes rather, than more than one hour as the Secretary argues.

Moreover, there are several other mitigating circumstances. The accident occurred in the early morning hours on Monday, January 2, 2006, when the New Years Day holiday was observed because January 1 was on a Sunday. Consequently, MSHA and WVOMHST offices were closed at the time of the Sago Mine accident. In addition, Wolf Run's management officials were difficult to contact during this holiday period. The Secretary does not dispute that officials were difficult to reach during the New Years Day holiday.

Finally, and most importantly, Wolf Run's delay was not motivated by a desire or reluctance to avoid notification. Rather, the delay is attributable to the fact that Wolf Run was conflicted over its concern for evacuating survivors, its preoccupation with establishing contact with the missing victims, and its responsibility to notify MSHA. In the final analysis, Wolf Run was confronted with either notifying MSHA and subjecting itself to a violation of a 103(k) order, or, violating the reporting provisions of section 50.10. Thus, Wolf Run's actions constitute no more than a moderate degree of negligence. Consequently, the \$1,500.00 proposed by the Secretary for 104(a) Citation No. 7100919 shall be reduced to \$1,000.00.

⁴ Section 508 provides, "[t]he Secretary [of Labor], the Secretary of Health, Education, and Welfare and the Panel are authorized to issue such regulations as each deems appropriate to carry out any provision of this Act." 30 U.S.C. § 957.

b. Order No. 7100920

The mandatory safety standard in section 75.1502(a), 30 C.F.R. §75.1502(a), requires each mine operator to adopt and follow an MSHA approved emergency evacuation and firefighting program. 104(d)(1) Order No. 7100920 alleges that Wolf Run violated 30 C.F.R. § 75.1502(a) because it failed to comply with the mine's emergency evacuation and firefighting program of instruction provision that mine rescue teams be contacted immediately in the event of an emergency. (Gov. Ex. 6 at 12). The violation was designated as S&S in nature. The violation also was attributed to a high degree of negligence that evidenced an unwarrantable failure. The Secretary proposes a civil penalty of \$13,000.00 for Order No. 7100920. The citation states:

A (sic) explosion occurred at the Sago mine, I.D.46.08791 in the sealed area of the No. 2 Mains on January 2, 2006, at 6:26 a.m. The Mine Emergency Evacuation and Firefighting Program of Instruction approved on February 3, 2004 was not complied with. On page 12 of the plan under "Mine Rescue" it states "In the event of a mine fire or explosion the Barbour County Mine Rescue team is to be notified immediately at 457-2745." The Barbour County Mine Rescue team was not immediately notified of the explosion. According to testimony during the investigation, the 1st Left section foreman, who was underground at the track switch a 49½ crosscut at the time of the explosion made a call to the surface approximately 5 minutes after the explosion. He informed the mine dispatcher, and mine management that "we've had a mine explosion in here" and "get mine rescue team here now."

According to testimony, no attempt was made by those people informed by the 1st Left foreman to get a mine rescue team. According to testimony the Director of Safety and Employee Development initiated the first attempt to contact the Barbour County Mine Rescue team. His telephone call log, provided to MSHA during the investigation, indicated that the first attempt to notify the rescue team after the explosion was at 8:04 a.m. on January 2, 2006.

(Gov. Ex. 2).

i. Fact of the Violation

As discussed above, Wolf Run's obligation to immediately notify MSHA and mine rescue teams began at 7:23 a.m., after Stemple's telephone conversation with Chisolm and Toler. At that time, Wolf Run had ascertained the nature and extent of the emergency, and it had taken measures to ensure the safe evacuation of victims. However, Stemple admits he did not make any effort to contact rescue teams until 8:04 a.m. when Stemple phoned Jeffery Rice, a member of the Barbour County Mine Rescue team, at his home. Stemple finally reached Chris Height, Vice-President of the Barbour County Mine Rescue Association at 8:37 a.m. The approximate 40 minute delay from 7:23 until 8:04 a.m, constitutes a section 75.1502(a) violation of

Wolf Run's emergency evacuation and firefighting program that requires immediate notification. Stemple's apparent preoccupation with his attempts to notify federal and state agencies does not absolve Wolf Run's concurrent responsibility to notify mine rescue.⁵

ii. S&S

With respect to the issue of S&S, as a general proposition, a violation is properly designated as S&S, 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 at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 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 Inc., v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The hazard created by a failure to timely notify MSHA and rescue teams in the face of an emergency is self evident. After the explosion, MSHA and WVOMHST exercised final authority over the rescue plan. The fact that rescue teams were prevented from entering the mine until 5:25 p.m. on January 2, 2006, because of dangerous concentrations of gases does not diminish the importance of their prompt arrival. Rescue teams have the experience and equipment to safely attempt to recover victims of mine accidents. The presence of rescue teams also minimizes the exposure of mine personnel who, as in this case, subordinate their personal safety in an effort to save friends, colleagues or family members. In this regard, in their haste to go underground, mine management entered the mine without turning off power and without carrying gas detectors.

⁵ Under the applicable regulations, Wolf Run was required to immediately notify all relevant authorities of the accident. Implementation of mine rescue involves the coordinated efforts of federal, state and mine rescue authorities. Thus, notification of one entity is, in effect, notification of all. Even if Wolf Run is credited with notifying the authorities as of 7:50 a.m. (or 7:46 a.m. when Stemple initially left a telephone message for WVOMHST), such notification was still untimely. Moreover, notification in this case is problematic as the initial contacts were telephone messages rather than direct communications.

Here, Toler's attempt to repair stoppings was well intentioned and there is no evidence that the effort to direct fresh air to the 2nd Left section was harmful. However, Ron Hixon, a member of the rescue team that initially reached the 2nd Left victims, explained how rescue teams proceed into a mine following an explosion. They airlock areas to prevent pushing methane over an ignition source, or to prevent directing CO gases towards trapped victims. (Tr. 238).

Thus, as a general matter, it is reasonably likely that the existing hazards posed by an underground mine emergency will be exacerbated by a delay in the arrival of rescue personnel. It is also reasonably likely that this increased exposure to danger will result in serious or fatal injuries of would be rescuers or the victims of an accident. Consequently, the section 75.1502(a) violation was properly designated as S&S.

iii. Unwarrantable Failure

The remaining question of unwarrantable failure in this case raises difficult issues. Generally speaking, an unwarrantable failure is evidenced by aggravated conduct. *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). I recognize the Secretary's concern for the safety of would be rescuers who may expose themselves to extreme danger because of their desire to save friends and family. I am also cognizant of the Jim Walter Resources mine tragedy noted by the Secretary in which twelve miners who went into a mine to rescue one miner following an explosion were killed by a secondary explosion. (Sec'y br. at 41-42). However, the Jim Walter accident did not involve the evacuation of miners that were known to have survived the explosion. *Jim Walter Resources, Inc.*, 28 FMSHRC 579 (Aug. 2006).

Similar to the delay in notification of MSHA, the Secretary attributes a high degree of negligence to Wolf Run's delay in notifying mine rescue. However, the Secretary's assertion that Wolf Run's obligation to notify rescue teams began after Owen Jones' initial telephone call that occurred at approximately ten minutes after the 6:26 a.m. explosion has been rejected because Wolf Run had not yet determined the nature and extent of the accident. Rather, the termination of Stemple's call with Toler at 7:23 a.m. provides the beginning point for Wolf Run's obligation to notify mine rescue. Thus, the actionable delay from 7:23 until 8:04 a.m is approximately 40 minutes rather than the approximate 1½ hour delay from 6:36 to 8:04 a.m. alleged by the Secretary.

As a threshold matter, it is easy to question the propriety of Wolf Run's conduct by asking why it did not contact MSHA and mine rescue at 7:23 a.m. while Toler and his associates continued their attempts to help victims underground. The simple answer is that they knew they could not legally remain underground once MSHA was notified as exemplified by Satterfield's 8:32 a.m. verbal 103(k) order requiring a total withdrawal from the mine.

In this regard, Gary Marsh, a supply motorman, testified that Stemple told him that morning “[t]hat once we notified MSHA that they would shut us down to where no one would be allowed in the mines and we wouldn’t be able to try to go in there and try to get our people.” (Tr. 142). As previously noted, Toler testified that Stemple told him: “You know if we call MSHA, they’re going to issue a (K) order, and they’ll expect you to come out of the mines.” (Tr. 452). Toler testified he replied: “Don’t let that stop you from calling, because we’re not going to come out.” (Tr. 452). Although Toler testified he told Stemple to call MSHA and mine rescue teams anyway, it is clear that the prospect of the issuance of a 103(k) order in response to Wolf Run’s notification had a chilling effect on Stemple’s reporting responsibilities. (Tr. 454). Toler estimated this conversation occurred at 7:15 a.m. (Tr. 451). Stemple testified the conversation ended at 7:23 a.m. (Tr. 572).

Thus, the Secretary alleges that Wolf Run intentionally delayed notifying MSHA and rescuers immediately because they knew MSHA would immediately issue a 103(k) withdrawal order that would prevent Toler and others from trying to reach the 2nd Left crew. (Sec’y br. at 40). The Secretary argues that such deliberate disregard of the requirements of the law is an aggravating rather than a mitigating factor.

The Secretary’s position is understandable from an enforcement perspective. The failure to timely notify MSHA and rescue teams immediately after an accident is a serious violation. However, notification violations are not *per se* unwarrantable. Wolf Run’s conduct must be analyzed on a case-by-case basis based on what was known at the time without the benefit of hindsight. In this case, unlike the Jim Walters accident, mine management knew that miners had survived the explosion. Thus, management was focused on evacuating the 1st Left crew and determining whether the 2nd Left crew members could be helped.

While the *Nacco* defense may not be used to mitigate an unwarrantable failure, it nevertheless is significant that only mine management personnel, rather than hourly employees, went underground before rescue teams were contacted. *Capitol Cement Corp.*, 21 FMSHRC 883, 893-95 (Aug. 1999), *aff’d*, 2000 WL 1205389 (4th Cir. 2000) (*Nacco* defense unavailable when conduct of supervisory personnel results in unwarrantable section 104(d) violations regardless of whether that conduct exposes other miners to risk). Thus, subordinate hourly employees were not put at risk by management’s actions. Finally, Toler, Jones, Wilfong, Schoonover and Hofer’s presence underground furthered the rescue efforts because they were able to brief the rescue teams about underground conditions while the rescuers remained on the surface until later that evening because of dangerous gases.

As noted, an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining*, 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of

reasonable care.” Id. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); see also *Buck Creek Coal*, 52 F.3d at 135-36 (approving the Commission’s unwarrantable failure test). All relevant factors must be viewed in the context of the factual circumstances, and all material facts and circumstances must be examined to determine if a mine operator’s negligence is mitigated. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

Here, the Secretary fails to distinguish between imprudent or ill-advised conduct, and aggravated or unjustified conduct. Wolf Run’s delay was not motivated by a desire to avoid notifying MSHA of the accident. Nor was it an attempt to alter an accident scene. Rather, Wolf Run’s delay was caused by its preoccupation with determining the condition of its miners who were underground at the time of the explosion.

Toler was concerned about the safety of his uncle who was a 2nd Left crew member. Jones was motivated by a concern for the well being of his brother, also a member of the 2nd Left crew. Toler and his associates were also motivated by a concern for their colleagues. The subordination of their personal safety in an attempt to save others instead of relinquishing their ability to go underground by immediately calling MSHA, given the circumstances in this case, is understandable, if not admirable. Their actions are not attributable to intentional misconduct, or a manifestation of indifference. Their behavior manifested a conscious awareness of an exigent situation rather than a reckless disregard of it. Simply put, it is obvious that the facts surrounding their conduct mitigates their negligence. There was no unwarrantable failure.

Accordingly, 104(d)(1) Order No. 7100920 shall be modified to a 104(a) citation to reflect that the violation was attributable to a moderate degree of negligence. In addition to mine management’s efforts to evacuate or locate colleagues, that included family members, the difficulties of notification of an early morning accident that occurred on a federal holiday are additional mitigating factors. In this regard, the Secretary does not dispute that the authorities were difficult to contact during this holiday period.

The Secretary proposes a civil penalty of \$13,000.00. I share the Secretary’s concern that mine operators must not be encouraged to delay notification of an accident because of a desire to conduct their own rescue. However, I am troubled by the exercise of MSHA’s authority and control, prior to its arrival at the mine, over the conduct of mine management personnel who have personal knowledge of the conditions at the accident site. The strict exercise of such authority may, as in the current case, discourage prompt notification. Depending on the particular circumstances, mine operators must be permitted to take prudent action in the moments following a mine accident that furthers the evacuation of victims or helps to determine their location in the mine. Accordingly, the provisions of section 103(k) recognize that mine operators must obtain MSHA’s prior approval of any plan to recover accident victims “when feasible.” Although the Secretary emphasizes that Wolf Run has not been charged with violating the verbal 103(k) order, the prospect of its issuance had a chilling effect in this case. Thus, the prospect of the issuance of a 103(k) order in this case is relevant and material.

The determination that Wolf Run's notification delay is not attributable to an unwarrantable failure is based on the totality of the particular circumstances in this case and should not be broadly construed. In the final analysis, the goal is achieving the most effective way to promote the health and safety of both rescuers and victims in the moments immediately following an accident. There are no easy answers to this difficult dilemma.

Nevertheless, the delayed notification of mine rescue teams in violation of an approved mine evacuation plan is a violation that is serious in gravity. Given the serious gravity, a civil penalty of \$10,000.00 shall be assessed for 104(a) Citation No. 7100920. This relatively small reduction of the \$13,000.00 proposed penalty balances the Secretary's concern over the prompt reporting of accidents with the exigent mitigating circumstances that place the propriety of mine management's actions in this case in the proper perspective.

ORDER

Consistent with this Decision, **IT IS ORDERED** that 104(a) Citation No. 7100919 in Docket No. WEVA 2007-600 **IS AFFIRMED**.

IT IS FURTHER ORDERED that Wolf Run Mining Company shall pay a civil penalty of \$1,000.00 in satisfaction of Citation No. 7100919.

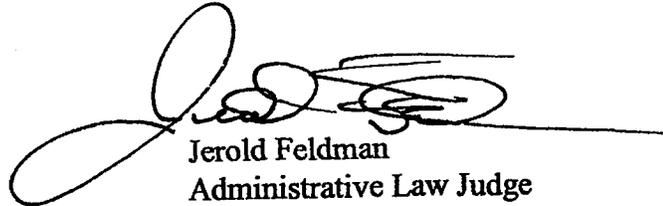
IT IS FURTHER ORDERED that the parties' motions to approve partial settlement **ARE GRANTED**. Consistent with the parties' settlement terms, **IT IS ORDERED** that Wolf Run Mining Company shall pay a total civil penalty of \$71,800.00 in satisfaction of the remaining 13 citations and orders that are in issue in Docket No. WEVA 2007-600.

IT IS FURTHER ORDERED that 104(d)(1) Order No. 7100920 in Docket No. WEVA 2008-247 **IS MODIFIED** to a 104(a) citation to reflect that the cited violation was not attributable to an unwarrantable failure.

IT IS FURTHER ORDERED that Wolf Run Mining Company shall pay a civil penalty of \$10,000.00 in satisfaction of Citation No. 7100920.

Consistent with the total civil penalty assessment of \$11,000.00 for the two citations that were adjudicated in these matters, as well as the parties' settlement terms, **IT IS ORDERED** that Wolf Run Mining Company pay, within 45 days of the date of this Decision, a total civil penalty of \$82,800.00 in satisfaction of the 15 citations and orders that are the subject in these proceedings.

IT IS FURTHER ORDERED that, upon receipt of timely payment, the civil penalty proceedings in Docket Nos. WEVA 2007-600 and WEVA 2008-247 **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

Robert S. Wilson, Esq, Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd.,
22nd Floor West, Arlington, VA 22209

R. Henry Moore, Esq, Jackson Kelly, PLLC, Three Gateway Center, 401 Liberty Avenue,
Suite 1340, Pittsburgh, PA 15222

/rps

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
WASHINGTON, D.C. 20001**

Telephone: (202) 577 6809

Facsimile: (202) 434-9949

September 14, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 2009-444-M
Petitioner	:	A.C. No. 29-02252-184671
v.	:	
	:	
	:	
KHANI COMPANY, INC.,	:	Khani K100/Metso Crusher & Screen
Respondent	:	

Appearances:

Ronald M. Mesa, Mine Safety and Health Administration, Dallas, Texas for Petitioner

Naser Alikhani, pro se, Albuquerque, New Mexico

DECISION

Before: Judge William Moran

This case is before the Court 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 "Mine Act" or "Act"). The Petition cited Respondent for four (4) alleged violations of the Act, with a proposed penalty assessment of \$100.00 for each citation, resulting in a \$400.00 total proposed assessment. At a point several weeks before the hearing, the Secretary offered to vacate Citation No. 6465534. A hearing ensued on August 3, 2010 in Albuquerque, New Mexico and as a preliminary matter, that citation, No. 6465534, was vacated. Tr. 16.

While the Secretary established *prima facie* cases for each of the three remaining citations, the central controversy in this matter involves whether there was jurisdiction under the Mine Act at the time of the inspection which resulted in the issued citations. Therefore, although the citations themselves will be discussed, briefly, the decision will focus upon the jurisdictional question. For the reasons which follow, the Court finds that the violations were established, that jurisdiction existed at the time of the inspection, and that a civil penalty in the sum of \$200.00 (two-hundred dollars) is appropriate.

Findings of Fact

The parties entered into a number of stipulations but, understandably from the Respondent's perspective, the Respondent did not agree with the Petitioner's proposed stipulation that Respondent's Metso Crusher and screen operation constituted mining and selling of materials, nor that such activity affected interstate commerce.

MSHA Inspector Lloyd Ferran testified the Respondent's Metso Crusher and screen is located in Deming, New Mexico and that he performed an inspection there on April 2, 2009. Tr. 28, 30, 48. Ferran described it as a sand and gravel operation. Respondent's witness, Mr. Hubble, the superintendent at the mine, agreed that was the nature of the operation. Tr. 147. Upon arriving, the inspector met Mr. Hubble and there was also a miner's representative present. Ferran stated that when he arrived at the operation, it was operating. He observed "a couple of loaders" and "stockpiles." He also observed dust "coming out of the conveyor belts" and he stated that the conveyor belts were running, that is, they were moving, and he observed materials stockpiled. Tr. 36, 43. Another indication the operation was active, Ferran heard noise and took sound level readings. Tr. 38-39. His inspection included examining a track hoe, a Cat 958, a water tank truck, and the crusher or screen plant. Tr. 41.

Inspector Ferran issued a citation on a front end loader that did not have a ROPS (i.e. "rollover protection structure") label reflecting the make and model number for which it was designed. The citation alleged a violation of Section 56.14130(c)(3). Tr. 50, Citation 6465532. As it turned out, the ROPS was the correct model for the loader, but the wrong ROPS *label* had been affixed, an error attributable to the supplier, not the mine operator. Subsequently, the manufacturer sent a letter to MSHA explaining that the wrong label had been attached to the ROPS. Tr. 55, 130. The violation was abated by affixing the correct label. Tr. 58. MSHA ultimately decided there was no negligence on the Respondent's part for the violation and it was deemed a "paper violation." A \$25.00 (twenty-five dollar) penalty is appropriate for this violation.

Ferran also issued a citation for an alleged parking brake violation. Tr. 61, Citation No. 6465533. That citation involved the same piece of equipment cited for the ROPS issue, as described above. Tr. 66. The parking brake for the front-end loader in issue was not able to hold the vehicle on the grade. Tr. 65. The citation referenced Section 56.14101(a)(2), which provision requires a parking brake capable of stopping and holding the equipment on the maximum grade it travels. The inspector considered an injury unlikely to occur because the service brake did work. Yet, he believed that if such an injury did occur it would be fatal. Tr. 66, 69. Also, regarding the parking brake violation, although the Respondent suggested that the person operating the loader may not have fully engaged the parking brake during the test of its effectiveness, the critical point is that the operator did not ask that the test be repeated after the initial failure. Tr. 103.¹

¹MSHA called, as its second witness, Mr. Benny Lara, a supervisor from its Albuquerque filed office. Mr. Lara issues job assignments to the inspectors who work out of that field office.

The Court agrees that the \$100.00 (one-hundred dollar) penalty proposed by MSHA is appropriate.

Ferran's third citation cited Section 56.18010, for the lack of an individual holding a current first-aid training certificate. The Respondent was unable to provide any documentation to show that it had an employee with such current training. Tr. 73. Ferran accepted the Respondent's assertion that it had an employee with such training but that the certification had expired. Because he accepted that such individual had been so trained, but not re-certified, the inspector concluded that the gravity should be marked as 'unlikely.' Tr. 74. No defense was presented to the certification issue. The Court concludes a \$75.00 (seventy-five dollar) penalty is appropriate.²

Through his questioning of Mr. Ferran, the Respondent tried to establish that while they were planning to re-open the pit, it was not yet open at the time of the inspection. Tr. 85. These questions were designed to show that the operation was in the process of setting up, as opposed to actually producing mined material. Tr. 97, 106, 128.

For its part, the Respondent provided testimony through Mr. Tom Hubble, who, as previously mentioned, is the mine's superintendent. Apart from its recent resumption of mining activities, Mr. Hubble stated that the site had, during various periods of time, prior mining activity, as evidenced by numerous old waste piles that remained there. Tr. 145. Hubble testified that they were getting the site ready to go into production at the time of the inspection. Tr. 146-147. The activity going on at the time of the inspection, as Mr. Hubble described it, was "reclaim work," that is, activity necessary to perform in order to have the site ready to resume production. Tr. 149. Apart from the dispute as to whether there was mined material running on the site's conveyor belts, Hubble agreed that, as part of getting ready to resume mining activity,

Tr. 111-113. Although the Respondent questioned the circumstances leading to Mr. Ferran's presence at the mine on the day of the inspection, the Court explained that the outcome of this case would not depend upon any issue of whether Mr. Ferran had been properly assigned to do the inspection in this matter. Tr. 114. Mr. Lara did identify a March 2, 2009 document identified as a "Notification of Mine Opening or Closing," which document was signed by Mr. Alikhani. Tr. 115. Lara also testified that he attempted to have MSHA's Education Field Service ("EFS") visit the facility to determine if any hazards were present and to see if their paperwork was complete. Tr. 117-118. No citations are issued when there is an EFS visit. Such a visit did occur on March 13, 2009, when MSHA's Mr. Steve Bowroznik came to the facility. Tr. 119-120. The inspection in issue occurred during the first week of April which was subsequent to the EFS visit. Although the Respondent also requested a compliance assistance visit, or "CAV," MSHA advised that it did not have the manpower to provide that and that the EFS visit occurred instead. Tr. 124. Mr. Lara did agree that, at least at the time of the EFS visit, the Respondent was setting up the operation, and not producing mined product. Tr. 128.

² Subsequently, all the citations in this proceeding were abated and terminated. Tr. 132.

he had to run the conveyor belt, in order to ensure that it was operating properly. Tr. 148. Part of that testing process does involve having material on the belt while it is running and he agreed that such activity had occurred at some time prior to the inspector's arrival. Tr. 148. Mr. Hubble could not state an exact date, but he believed that the operation actually resumed production about 12 to 13 days following the inspection in issue here. Tr. 152.

Discussion

As the Mine Act's coverage applies to mine site activities occurring prior to the commencement of removing minerals from the ground, Khani Company is subject to that Act for such pre-mining activities. Further, the Respondent's pre-mining activities come within the United States Constitution's interstate commerce clause.

A. The Mine Act applies to activities prior to mineral removal, such as the set-up of the mine.

The Respondent agreed that the heart of his dispute in this proceeding is that, while the mine was getting ready to commence mining at its mine site, the Khani K100 /Metso Crusher & Screen, it had not actually started mining when the inspection in issue here took place. Tr. 133. Because 'mining' itself, that is the removal of minerals from the earth, had not yet occurred at the time of the inspection on April 2, 2009, Khani contends that there was no jurisdiction under the Mine Act. Mr. Alikhani, President of Khani Company, acting *pro se*, did not testify, but contended that as there was no scale present at the operation, and as the mine had not produced anything that "affected commerce" at the time of the inspection, it could not be cited for mining violations. Tr. 136

The Court agrees that "mining," in the sense of mineral removal, had not commenced at the time of the inspection.³ Instead, the Court finds that the mine was in the process of resuming the removal of minerals from the earth. That is, the operation was preparing to resume operations. However, while the removal of minerals did not actually resume until approximately two weeks after the inspection, the law is quite clear, and it has long been well-established that the Mine Act applies to such pre-mining activities.

³Mr. Alikhani also contended that the inspection in issue stemmed from MSHA's intention to 'get him,' as pay back for its having to vacate some seven citations issued several years ago against the operation. Tr. 140. Mr. Alikhani agreed that his contention was that MSHA sought revenge for the embarrassment of having to withdraw those citations and therefore that the agency had an improper motive in conducting the inspection in issue in this proceeding. Tr. 141. While the Court accepts that Mr. Alikhani *believes* that the inspection here stemmed from such improper purposes, there is no *evidence* to support that belief. Consequently, the claim is rejected.

A few brief examples demonstrate the Mine Act's coverage to such "pre-mining" or "set-up" activities. In *Sec. v. Royal Cement Co.*, WEST 2007-844-M, (Dec. 2009), Judge Manning was faced with the same situation as here; an operation which was preparing to restart operations, but had not resumed the production of mineral removal.⁴ There, the judge noted that the "Mine Act's use of the language 'used in, or to be used in, the milling of . . . minerals' indicates that, for jurisdictional purposes, a 'mine' includes . . . facilities where mineral mining milling will be taking place in the future." The judge further noted that the United States Court of Appeals for the Third Circuit has referred to the 'to be used' language as encompassing "contemplated use." *Id.*, citing *Lancashire Coal Co. v. Sec'y of Labor*, 968 F. 388 (3rd Cir. 1992). So too, in *Sec'y of Labor v. The Pit*, WEST 94-97-M, 16 FMSHRC 2008 (Sept. 1994), which also involved the inspection of a sand and gravel pit, administrative law judge Arthur Amchan also relied upon the "to be used in" language employed in the definition of a mine under the Act, to conclude that coverage applies even if mining has not yet commenced. The judge noted that such a conclusion makes sense as well because the Act is intended to prevent injuries and illnesses and that such protection logically applies whether employees are setting up equipment or engaged in production. *2010.

Here, the Respondent's own witness conceded that the mine was preparing to resume mining activities and that running equipment such as the front-end loader and the operation of conveyor belts was part of that process. Certainly it is undeniable that the hazards associated with those activities are present whether they occur during the mine's set-up for operations to commence or during the actual process of mineral removal for its sale.

B. The Respondent's activities affect interstate commerce.

The second contention raised by Mr. Alikhani is the claim that the activity in question "wasn't affecting commerce." Tr. 131. This issue too is not novel and it has been long resolved that the measure of "interstate commerce" is far broader than the literal words would imply to non-lawyers.

Mr. Alikhani concedes that the equipment at the site "was transported from Arizona to New Mexico," but as he did not *purchase* it in Arizona, he believes that interstate commerce did not occur. Apart from the fact that purchases are not the determinative factor in assessing the scope of interstate commerce, the Respondent does not grasp the breadth of the commerce clause.

A few cases illustrate that Khani's contention is without merit. In *Sec'y of Labor v. Nicholson*, 16 FMSHRC 1967, (September 1994), which case also involved a sand and gravel

⁴In fact, the circumstances in *Royal Cement* were more removed from the resumption of mining activities than those presented in this litigation, as the company only engaged in pre-mining *repairs* but it never resumed mining. In contrast, here, *Khani* did resume mining about two weeks after the inspection.

operation, Judge Weisberger addressed the claim that the activities there did not involve interstate commerce. There, he noted that the Commission addressed the scope of the Commerce Clause in *Harless Towing Inc.*, 16 FMSHRC 683 (April 11, 1994). In *Harless*, the Commission noted the long history of the broad construction of that clause, including the fact that even commercial activity which is purely intrastate in character has been found to be within its ambit. "where the activity, combined with like conduct by others similarly situated, affects commerce among the states." To appreciate the breadth of the coverage of the clause, one need only turn to *Wickard v. Filburn*, 317 U.S. 111 (1942) where the Supreme Court held that wheat grown solely for consumption on the farm where it was grown still affects interstate commerce. As a closer example, in *United States v. Lake*, 985 F.2d 265, 267-69, the Sixth Circuit held that a mine operator who sold all his coal locally and purchased his mining supplies from a local dealer, still engaged in interstate commerce. This decision, like *Filburn*, is based on the realization that such small scale activities when considered with such similar activities by others, has a cumulative impact on interstate commerce. Thus, the activity is analyzed, not from a microscopic view, but rather from a telescopic one.

Accordingly, the Court finds that the activity in issue at Khani Company's operation affects interstate commerce.

CIVIL PENALTY ASSESSMENT

The three citations are affirmed and, as set forth above, civil penalties are imposed for each of three violations.

ORDER

Khani Company, Inc., Respondent, is **ORDERED TO PAY** the Secretary of Labor the sum of \$200.00 (two-hundred dollars) within 30 (thirty) days of the date of this decision.⁵

William B. Moran

William B. Moran
Administrative Law Judge

⁵Payment should be sent to the Mine Safety and Health Administration, P.O. Box 790390, St Louis, MO 63179-0390.

Distribution:

Mr. Naser Alikhani, 102 Highway 66 East, Albuquerque, New Mexico 87123

**Mr. Ronald M. Mesa, CLR, Mine Safety and Health Administration, 1100 Commerce Street,
Room 462, Dallas, TX 75242-0499.**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
WASHINGTON, D.C. 20001
Telephone: (202) 577-6809
Facsimile: 202-434-9949

September 14, 2010

GERMAN ALAVEREZ,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. VA 2010-266-DM
	:	NE MD 2010-02
v.	:	
	:	
LOUDOUN QUARRIES/DIV of	:	
CHANTILLY CRUSHED STONE and	:	Loudoun Quarries Mine ID 44-00071
CHANTILLY CRUSHED STONE,	:	Chantilly Crushed Stone Mine ID 44-00024
Respondents	:	

ORDER OF DISMISSAL

Before: Judge William Moran

This case is before the Court upon a discrimination complaint filed with the Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (the Mine Act). Mr. German Alvarez, the Complainant, filed his complaint on March 9, 2010, alleging that he was terminated from Loudon Quarries-Div/Chantilly Crushed Stone and Loudon Qrs-Div / Chantilly Crushed Stone (“Operators” or “Respondents”) on April 27, 2009 “in retaliation for reporting a broken seat in a dump truck to an inspector from the Mine Safety and Health Administration.” Complaint at 1. The Complainant requested the following relief: “[r]einstatement to his former position; back pay since [Complainant’s] date of termination; [i]nterest on all back pay awarded; . . . costs related to the prosecution of [the] claim; . . . attorney’s fees; . . . [and] [a]ny other relief deemed appropriate by the Commission.”

A hearing in this case commenced on July 29, 2010. The Complainant presented as the first and, as matters turned out, the only witness in the proceeding. After a time, in the course of his testimony about his employment at Respondent’s mine, the Court inquired of Mr. Alvarez:

Judge Moran: “do you want to go back to work for these people, sir? Is that your hope?”

The witness [Mr. Alvarez]: “No.”

Counsel for the Complainant then stated, accurately, that the Complaint set forth, as noted above, that documents and statements indicated that a return to work was part of the relief sought by Mr. Alvarez. Tr. 65.

Perplexed by the Complainant’s response in the negative, the Court posed the following question to his counsel, “[I]f [the Court] were to find that [Mr. Alvarez] was discriminated against, but he doesn’t want to go back to work, wouldn’t the damages end as of the time he determines - - he’s not entitled to damages after he says I don’t want to work for them any more.” Tr.65.

Complainant’s Counsel responded, “Agreed.” Tr. 65.

Shortly thereafter in the proceedings, the Court returned to the issue of the relief Mr. Alvarez was seeking, asking:

“Mr. Alvarez, you don’t want to go back to work for these people, right?”

Mr. Alvarez responded: “I don’t want to go back and work for them.” Tr. 67.

The Court then asked of Mr. Alvarez: “Okay, when you were fired on April 28 of last year [2009], was there a point in time after the day you’re fired when you said I don’t want to go back to work for them any more in your own mind? Do you understand my question?”

Mr. Alvarez responded, “Yes, I do.” Tr. 68.

The Court continued, “Okay, was there a point when you said I don’t want to go back to work for them again?”

Mr. Alvarez: “I say that in my mind. I heard from them they don’t want to see me any more, so - - you know, why I think about going back to work in there. They told me they don’t want to see me in there. I don’t want to step in this quarry.” Tr. 68.

The Court inquired further, trying to ascertain the Complainant’s position.

“Okay, I’m not trying to put words in your mouth, but I’m trying to understand this. On April 28th you’re fired, right?”

Mr. Alvarez: “Yes.” Tr. 68.

The Court: “You’re gone. You’re not working there. The next day, did you still hope to go back to work for them or did you not want to work for them any more after that?”

Mr. Alvarez: “No, I went to look somewhere else. No.” Tr. 68.

The Court inquired further still, asking the Complainant: "If they had said to you that day come back to work, would you say yes, fine; or would you say no, I don't want to work for you [any] more."

Mr. Alvarez responded, "No, I don't want to work with them. No." Tr. 68-69.

Understandably, Complainant's Counsel was surprised by his client's testimony. Counsel explained that in his conversations with the Complainant, Mr. Alvarez *had* expressed that he was seeking to return to work at the Respondents' business.

Because the Complainant's command of English was less than average, as it is not his native language, the Court inquired yet again to be sure of the Complainant's stance.

The Court: "Do you understand, Mr. Alvarez, you've told me that as of the day - - let's be more reasonable - - say the day after you're fired, my understanding is that you never wanted to go back to work for these people after that, even if they had offered you a job back?"

Mr. Alvarez: " No, I don't want to go back to work with them, no." Tr. 70.

The Court then inquired of Complainant's Counsel if Counsel agreed that, even if Mr. Alvarez were to prevail in his discrimination claim, his damages would be zero. Counsel agreed with that assessment by the Court, stating, "Right." Tr. 70.

Counsel for Respondents then moved for dismissal, to which Mr. Alvarez's Counsel responded that he "couldn't expect [the] Court to award Mr. Alvarez a remedy that he is not seeking. . . . If he's not seeking his job back, . . . I have no good response to that. . . . I can't deny what [Mr. Alvarez] just told your Honor in open court. . . . It [had been Counsel's] understanding going forward that there was, in fact, relief sought, which was return to his job and damages up until that date." Tr. 71. Complainant's Counsel also agreed with the Court's characterization that, based on his testimony at the hearing, Mr. Alvarez understood the questions relating to his employment with the Respondents and that he was unequivocal that he did not want to return to work for them, at least as of the day following his firing. Tr. 71.

The Court then afforded the Complainant a final opportunity to speak on this issue upon advising that it had no choice but to dismiss the case. Mr. Alvarez stated: "He know that I told the Inspector investigator in my testimony that I don't want to come back to work with them. He know that. It's in the tape and in the testimony." Tr. 72. The Court then explained to the Complainant that, based upon his testimony, it had no choice but to dismiss the matter and it asked whether he understood that meant he would lose his case. Mr. Alvarez responded, "Yes." Tr. 72. The Court then summed up, again, the situation before it:

"The evidence here, based . . . [on Mr. Alvarez's testimony] is that you don't want to go

back to work for this company ever, and that you did not want to go back to work once you were fired on April 28, 2009. Is that correct, still?" Mr. Alvarez responded, "Yes."¹ Tr. 72-73.

The Court then announced that the proceeding was dismissed, advising that a formal Order would follow.

Findings of Fact

As set forth above, the Complainant, German Alvarez, did file a complaint of discrimination on March 9, 2010, alleging that he was terminated from Loudon Quarries-Div/ Chantilly Crushed Stone and Loudon Qrs-Div / Chantilly Crushed Stone ("Operators" or "Respondents") on April 27, 2009 "in retaliation for reporting a broken seat in a dump truck to an inspector from the Mine Safety and Health Administration." Complaint at 1. At that time the Complainant requested the following relief: "[r]einstatement to his former position; back pay since [Complainant's] date of termination; [i]nterest on all back pay awarded; . . . costs related to the prosecution of [the] claim; . . . attorney's fees; . . . [and] [a]ny other relief deemed appropriate by the Commission.

At the hearing, the Complainant, testifying as the first, (and in light of his testimony, the only witness at the proceeding), stated that from the date of his discharge he would not have returned to the Respondents' employment at any time thereafter. The effect of Complainant's position is to preclude any damages, making his claim moot.

Discussion

Given the foregoing, the Court has no choice but to dismiss this action. In *Sonney v. Alamo Cement Co.*, 29 FMSHRC 310 (April 2007) ("*Alamo*"), Judge Feldman was faced with the same situation, issuing a dismissal, as the Complainant there was "not seeking any tangible relief such as lost pay or reinstatement." The judge noted that, in a section 105(c)(3) action, after one has an opportunity for a hearing, an order is then issued, "based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring **the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.**" 30 U.S.C. § 815(c)(3). (emphasis added).

Judge Feldman noted that a case is moot when "it is impossible for the court to grant any effectual relief whatever to a prevailing party." * 313, citing *In re Kurtzman*, 194 F.3d 54, 58 (2nd Cir. 1999). The judge went on to observe that the Commission has spoken to the subjects of

¹At that point Mr. Alvarez's Counsel did inquire of his client, "[W]hy did you file the complaint with the Mine Safety Act? Why did you file a legal matter and proceedings here? What were you seeking?" Mr. Alvarez responded, "I'm not going to answer that question." Tr. 73.

declaratory relief and mootness in *Mid-Continent Resources, Inc.*, where it stated:

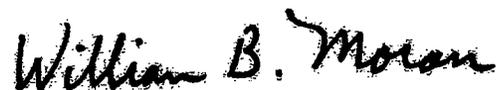
The presence of a controversy must be measured at the time the court acts. It is not enough that there may have been a controversy when the action was commenced if subsequent events have put an end to the controversy or the opposing party disclaims the assertion of the countervailing rights. A case is moot when the issues presented no longer are "live" or the parties no longer have a legally cognizable interest in the outcome.

Alamo at *314, citing *Mid-Continent Resources, Inc.*, 12 FMSHRC 949, 955 (May 1990).

In the present matter, as in *Alamo*, the Complainant is not seeking reinstatement and recovery of monetary damages resulting from the alleged discrimination is not available, as Mr. Alvarez was explicit and clear that he would not have returned to work with the Respondents once he had been discharged.

ORDER

Based on the foregoing, the Court finds that the Complainant's allegations of discrimination, as set forth in his Complaint, have been superceded by his testimony at the hearing that, upon being discharged by the Respondents on April 27, 2009, he would not have returned to the employment of the Respondents, even if offered reinstatement, from that date to the present. Given the Complainant's stance, that no damages are sought by him, the case has become moot. Accordingly, the Complaint of Discrimination is hereby **DISMISSED**.



William B. Moran
Administrative Law Judge

Distribution:

**Jonathan Kopin, Esq., Kenneth J. Coughlan, Esq., 10 East Baltimore Street, Suite 901,
Baltimore, MD 21202 (for German Alveraz)**

**Bradford T. Hammock, Esq., Matthew F. Nieman, Esq., Jackson Lewis, LLP, 10701 Parkridge
Blvd., Suite 300, Reston, VA 20191**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

September 17, 2010

PERFORMANCE COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 2010-1190-R
	:	Order No. 4642503; 04/05/2010
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine: Upper Big Branch Mine-South
Respondent	:	Mine ID: 46-08436

**ORDER GRANTING SECRETARY'S
MOTION FOR SUMMARY DECISION**

This matter was initiated by Performance Coal Company (“Performance”) in an effort to gain modification of, or temporary relief from, a 103(k) order issued by the Secretary of Labor (“Secretary”) at the Upper Big Branch Mine (the “mine”). The order set forth protocols for entry into the mine for the accident investigation conducted by MSHA in cooperation with the West Virginia Office of Miners’ Health, Safety and Training (“OMHST”). Prior to the entry of the order, Performance submitted suggested protocols for the investigation which were rejected by both MSHA and OMHST. Performance subsequently filed an Emergency Application to Modify, or Alternatively for Temporary Relief. The motion for temporary relief was denied on July 7, 2010. Following the filing of additional motions, an order denying a request for an expedited hearing was entered on July 21, 2010. Shortly thereafter, on July 23, 2010, the Secretary filed a motion for summary decision based upon the voluminous material already contained in the file, including pleadings and affidavits from each party. On August 4, 2010, Performance filed an opposition to the motion for summary decision alleging that material facts are in dispute and, even if they are not, the Secretary is not entitled to summary decision as a matter of law. The Secretary subsequently filed a reply brief. For reasons that follow, I **GRANT** the Secretary’s Motion for Summary Decision.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. Statement of Undisputed Facts

1. Between May 3 and May 20, 2010, MSHA and Performance exchanged letters discussing initial accident investigation protocol guidelines regarding destructive testing

and the subdivisions of the underground inspection team. Performance's Memorandum of Points and Authorities in Support of Emergency Application to Modify, or Alternatively for Temporary Relief from MSHA's Section 103(k) Order ("Mem. Supp. of Application"), 3-4, Ex. 4 pp. 1-4.

2. On May 28, 2010, Performance contacted MSHA by letter and highlighted its objections to MSHA's preliminary protocol guidelines, which Performance had gathered from MSHA's various letters and from verbal communications with Chief Accident Investigator Norman G. Page. *Id.* at 4, Ex. 6.
3. On June 8, 2010, MSHA responded to Performance by letter and stated that MSHA's accident investigation team wanted to work with Performance as to what should be included in the protocols. MSHA also stated that the protocols would be completed and distributed to all parties before the start of the underground inspection. *Id.* at 4-5, Ex. 7.
4. Also on June 8, 2010, Performance submitted a draft investigation protocol for MSHA's review and approval. *Id.* at 5, Ex. 8. In its letter accompanying the draft, Performance stated "[w]e request your approval of this plan and, accordingly, the modification of the 103(k) Order at the appropriate time." *Id.* at Ex. 8 p. 1. Performance would have limited the composition of each team underground to two representatives from MSHA, two from OMHST, two from Performance, and one from the miners' representative. Performance's draft stated that "[o]nly Team members may go underground," except for occasional visits by officials from MSHA, OMHST, and Performance. *Id.* at Ex. 8 ¶¶ 1, 9.
5. On June 15, 2010, MSHA rejected Performance's submitted protocol and noted its deficiencies. *Id.* at 5, Ex. 10. That same day, OMHST similarly rejected Performance's submitted protocol. *Id.* at Ex. 11.
6. On June 24, 2010, MSHA provided Performance with a copy of its and OMHST's final joint protocols. *Id.* at 5, Ex. 12 pp. 3-7. The cover letter that MSHA sent with the protocols to Performance noted that MSHA had addressed some of Performance's concerns raised at a June 23, 2010 meeting by modifying the language of the joint protocols. *Id.* at Ex. 12 pp. 1-2. The modified provisions included those relating to photography, destructive testing and dust sampling. *Id.*
7. The joint protocols include provisions covering various investigative scenarios; of these provisions, Performance has objected to particular provisions relating to photography, dust sampling, mapping, and destructive testing. *Id.* at 5-6, Ex. 13.
8. On June 25, 2010, MSHA modified the Section 103(k) order at the Upper Big Branch Mine-South to reference the joint protocols, stating that the reason for the modification was to "insure the safety of any person in the mine, including all accident investigation team members." *Id.* at Ex. 15 p. 1. The joint protocols allow Performance to request that certain photographs be taken; to view them underground and promptly receive

copies of them; to receive copies of maps; and to receive excess material from dust samples whenever it is possible. *Id.* at 6., Ex. 12 pp. 5-6, Ex. 15.

9. From the time of the accident until some time in June, 2010, MSHA often detected potentially hazardous levels of carbon monoxide and other fire gases in the mine; MSHA also detected explosive levels of methane. Secretary's Memorandum of Points and Authorities and Statement of Undisputed Facts in Support of Motion for Summary Decision ("Sec'y Mem. Supp. Summ. Dec."), 4.
10. The Team Leader of MSHA's accident investigation, Norman Page, relied on his understanding that MSHA considered the existing ventilation system to be fragile due to the susceptibility of the temporary controls in place at the time. MSHA also saw issues of potential roof control hazards, poor visibility, water accumulations, and severely obstructed travelways with abundant trip-and-fall hazards. *See* Declaration of Norman G. Page, July 1, 2010 ("Page Decl."), ¶ 14.
11. Mike Lawless, the expert for Performance and a former MSHA employee, was not involved when the protocols were drafted but believes that there is a stable gas environment, with predictable straight line methane liberation, that is safe for an underground accident investigation, including use of digital photography and electronic mapping and surveying equipment. Declaration of Michael J. Lawless, P.E., C.M.S.P., July 13, 2010 ("Lawless Decl."), ¶ 24.
12. The joint protocols that are being used and were put in place through the amendment to the 103(k) order are contained in Exhibit C of the Secretary's Opposition to Emergency Application to Modify, or Alternatively for Temporary Relief from MSHA's Section 103(k) Order and Memorandum of Points and Authority in Support of Motion to Dismiss for Lack of Jurisdiction ("Sec'y Opp'n Application"). Sec'y Opp'n Application, Ex. C.
13. Since the amendment, MSHA has been operating under the auspices of the joint protocols in its underground investigation. Mem. Supp. of Application, Ex. 17 ¶ 41.
14. The Joint Protocols limit the number of individuals underground. There are to be certain types of teams (mapping, dust survey, electrical, photography, flames and forces, geologic mapping, and evidence gathering), and each team will consist of at least one MSHA representative and one OMHST representative. *Id.* at Ex. 14 ¶¶ 1, 2. One representative each from Performance, the West Virginia Governor's Independent Investigation Panel, and the miners' representative may accompany each team. *Id.*
15. MSHA Accident Investigation Leader Page determined that, in issuing the 103(k) order, limiting the number of individuals underground and the length of time individuals spend underground are safety-related concerns, as this minimizes the total number of individuals exposed to the potentially hazardous conditions. Page Decl., ¶ 4.

Performance agrees that quicker and more efficient investigation methods will improve the safety of investigators. *See* Mem. Supp. of Application, 9, Ex. 17 ¶ 12.

16. Limiting ignition sources underground in this mine is a safety-related concern that Page relied on in making his determination regarding the investigation protocols. *See* Page Decl., ¶¶ 18, 27.
17. Permissible cameras are not available. *Id.* at ¶ 27.
18. In rejecting Performance's request to take its own photographs, MSHA determined to limit the use of non-permissible cameras underground on the belief that it affects safety. *Id.* at ¶ 27.
19. If Performance had its own cameraman taking pictures underground, MSHA determined that this would increase personnel underground and the length of time of the investigation, thus raising safety concerns. *Id.* at ¶¶ 25, 30. According to the protocols, Performance may request that MSHA take a photograph where it deems appropriate.
20. The essential component of the company's transit system, needed for its laser mapping, is a non-permissible piece of equipment, which means that it is a potential ignition source. *Id.* at ¶ 18. This is a safety-related concern that MSHA raised in restricting the use of a laser transit system. *Id.* at ¶ 17.
21. MSHA restricted use of the laser transit system on safety grounds because MSHA determined that its use would increase the number of personnel underground or, if the number of personnel were not increased, would increase the length of time of the investigation for the people who were underground. *Id.* at ¶¶ 17, 19, 20. Lawless agrees that the mapping method Performance seeks to use would require additional persons underground. *See* Lawless Decl., ¶34.
22. MSHA restricted Performance from taking additional dust samples based on the belief that it affected safety, as performing a single dust sampling at each sampling point serves to reduce the amount of time spent by investigators underground. *See* Page Decl., ¶ 24.
23. The joint protocols do not prohibit Performance from being present at tests conducted on evidence. *See* Mem. Supp. of Application, Ex. 14 ¶ 39. MSHA inserted language on testing in the joint protocols after a dialogue with Performance, making clear that Performance will be notified of any tests to be conducted and given an opportunity to attend and review testing procedures (except for testing on rock dust samples). *See id.*; *see also* Page Decl., ¶ 7.¹

¹ As for destructive testing, Performance has not made clear what relief it seeks. It states that it wants to "participate meaningfully" in testing, but does not argue how MSHA's testing procedures fail to provide it with meaningful participation.

24. The joint protocols allow photographs to be taken only by MSHA and OMHST. The same is true of mapping. The other three entities involved in the investigation are restricted from doing either. Only MSHA will take dust samples. Sec'y Opp'n Application, Ex. C.
25. Performance, the miners' representative, and the West Virginia Governors' Independent Investigation Panel may ask MSHA to take certain photographs, observe all mapping and receive the results of each at the end of each shift. *Id.*

b. Conclusions of Law

The issues before me on the Secretary's motion for summary decision are both constrained and simple: Are there genuine issues as to any material fact regarding whether the Secretary abused her discretion in issuing the subject modification of the 103(k) order; and, if not, did the Secretary abuse her discretion? For reasons that follow, I find that there are no material facts in dispute, that the Secretary did not abuse her discretion, and, therefore, that the Secretary is entitled to summary decision as a matter of law.

Pursuant to Rule 67 of the Procedural Rules of the Federal Mine Safety and Health Review Commission ("Commission"), a motion for summary decision shall be granted if the entire record shows: "(1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also Meek v. Essroc Corp.*, 15 FMSHRC 606, 615 (Apr. 1993); *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). Summary judgment should not be granted unless it is clearly shown that a trial is unnecessary. *See Wimsatt v. Green Coal Co., Inc.*, 16 FMSRHC 487 (Feb. 1994) (ALJ). If a material fact is in dispute, then the ALJ must conduct an appropriate hearing. *Energy West Mining, Co.*, 16 FMSHRC 1414. (July 1994).

In order to determine what facts may be material, it is necessary to understand how section 103(k) orders, and their respective modifications, operate. Section 103(k) of the Act states:

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

30 U.S.C. § 813(k). I agree with Commission Judge Hodgdon that "section 103(k) provides that it is MSHA, not the operator, who is in charge of the investigation." *Rockhouse Energy Mining Co.*, 26 FMSHRC 599, 602 (July 2004) (ALJ). The Act gives MSHA plenary power to make

post-accident orders for the purpose of protection and safety of all persons. *Miller Mining Company, Inc. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983). MSHA has broad authority to issue 103(k) orders to effectuate this purpose. *Buck Mountain Coal Co.*, 15 FMSHRC 539 (Mar. 1993) (ALJ); *West Ridge Resources, Inc.*, 31 FMSHRC 287 (Feb. 2009) (ALJ). This broad grant of authority is recognized in the legislative history, which states that:

[t]he unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise *broad discretion* in order to protect the life or to insure the safety of any person. The grant of authority under section [103(k)] to take appropriate actions and . . . to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 95-181, at 29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978) (emphasis added).

Given the broad discretion afforded the Secretary, her issuance of a 103(k) order, or subsequent modification, is reviewable for an abuse of discretion. The case law addressing this standard, while generally applied in the context of roof and ventilation plan contests, is equally applicable here. Pursuant to such, and according to the abuse of discretion standard, the Secretary must show that Norman Page, the MSHA investigation team leader, did not act in an arbitrary and capricious manner in deciding to issue the 103(k) order and subject modification. *See Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd* 111 F.3d 963 (D.C. Cir. 1997). The Commission in *Twentymile Coal* applied the following guidance in determining if the actions of a district manager were arbitrary and capricious:

The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” In reviewing the explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

30 FMSHRC 736, 754-755, quoting *Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The material facts in this matter are those that “materially” address whether the Secretary examined the relevant data and articulated a rational connection between the facts and the issuance and modification of the 103(k) to “insure the safety of any person in the . . . mine.” I find that the undisputed facts, as outlined above and discussed below, sufficiently address all pertinent matters in this case such that there are no genuine issues as to any material fact.

Performance seeks to have Modification 66 to Order No. 4642503 immediately modified to permit Performance:

- (i) to conduct its investigation using its own photography;
- (ii) to conduct its investigation using its own electronic mine mapping;
- (iii) to conduct its own dust sampling or parallel dust sampling with MSHA; and
- (iv) to participate meaningfully in any destructive testing of evidence.

Performance’s Supplemental Response in Supp. of Application, 2. However, the issue is whether the Secretary abused her discretion, and is not whether Performance’s suggested protocols are better, or whether Performance would conduct the investigation differently. Performance does not dispute that it spent a great deal of time supplying information and input into the protocols prior to the issuance of the modification of the (k) order by MSHA.

MSHA Investigation Leader Page explained that, while MSHA was conducting the investigation jointly with OMHST, the agencies did consider suggestions from other parties, including Performance. However, Page explained, MSHA’s primary concern is safety, and too many persons underground increases the risk of exposure to potentially hazardous conditions, further delays the investigation, and increases the amount of time it takes for those persons underground to exit the mine in the event of an emergency. MSHA considered input from Performance and modified its protocols to accommodate a number of Performance’s requests. As Page explained, MSHA “must maintain the highest level of safety possible during the underground inspection so that no inspection team member is placed in unnecessary danger.” Page Decl., ¶ 15. He goes on to state that, while MSHA has determined that the underground investigation may proceed in a safe manner, “the mine still presents a potentially hazardous environment in which no individual should stay unnecessarily.” *Id.* Page explained that, in determining that a limited number of cameras should be underground, he took into consideration the fact that cameras are not permissible, that gas checks must be made before they are used and that the inspection will proceed more quickly with only one photographer. In addressing the issue of mapping, again he considered the issue of permissibility and the number of persons underground for purposes of safety. The same is true of the dust sampling. Page considered input from all entities who have an interest in the investigation and made adjustments to the protocols where appropriate. The joint protocols were agreed to by four of the five entities

represented underground, and were only disputed by Performance.

It is the Secretary's duty to systematically evaluate the conditions and practices at the mine and keep the section 103(k) order in effect until it can be determined that the hazards that caused the explosion have been corrected and will not recur. In doing so, the Secretary must conduct a thorough investigation into the cause of the accident. In light of the conditions at the Upper Big Branch Mine as described in the declaration of Norman Page, I conclude that the Secretary may insist on protocols that she believes are necessary to insure the safety of the investigation. While those protocols may not be what Performance wants or expects, they are nonetheless reasonable and intended to insure the safety of all persons in the mine.

The mine asserts that the protocols, specifically limiting the use of cameras, mapping and dust samples, are not related to safety. Performance further alleges that the refusal to allow it to take its own photographs, conduct its own mapping and dust sampling, deprives the mine of its congressional mandate to conduct its own investigation into the cause of the accident. First, as noted above, I find that the protocols are related to safety and are reasonable given the information before Page. Lawless, who was not involved in the creation of the protocols, has a differing view of what should be included. However, a differing view does not take away from the reasonableness of the decision made by Page. Second, Performance is not deprived of the opportunity to fulfill its duty to investigate the cause of the explosion at its mine, as the mine argues. Not only can the mine gather information while accompanying the MSHA investigation team, it can conduct an independent investigation when MSHA has completed its investigation and released the (k) order on the mine. It appears that no discussion of this right took place with Page, but even so, it does not diminish the reasonableness of his decision in putting the protocols in place.

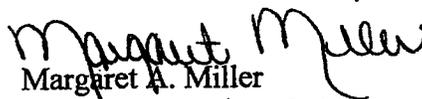
Finally, Performance questions Page's credibility by submitting the affidavit of Andrew J. Neuhalfen. Neuhalfen Decl. Neuhalfen's declaration addresses an incident that occurred during a mantrip inspection. Page was present for a short time during the inspection and observed problems with photographers from various parties all attempting to take photographs at the same time. Neuhalfen, who was one of the individuals taking photographs, disputes that there was any problem and seeks to blame Page for any disruption that may have occurred. While the facts surrounding the event described by Neuhalfen may be in dispute, they are not material to the matter at hand, and the statement of Neuhalfen is not enough to put Page's credibility at issue.

Addressing every argument raised and each document submitted by Performance is not necessary in this case. The largest portion of the information submitted by Performance is irrelevant to the heart of this matter, i.e. whether Page abused his discretion in issuing the modification of the (k) order to include the investigation protocols. For example, the opinion of Lawless that this investigation is being conducted differently than other MSHA accident investigations is meaningless, as each accident investigation has its own special circumstances that must be addressed when determining how to best proceed. In addition, the many affidavits identifying impermissible equipment used by MSHA in the investigation have no bearing on the decision regarding Page's discretion, as he described a "limit" on impermissible equipment as opposed to a "ban" on such. Further, the opinions of Performance's experts who take issue with

the way the investigation is being conducted do not show that Page was any less reasonable in making his decisions. I find that Page considered the relevant evidence, offered a logical explanation for his decisions, and did not abuse his discretion with regard to the 103(k) order.

ORDER

I conclude that the Secretary has met her burden of proving that Page did not abuse his discretion and that the joint protocols are rationally connected to safely conducting the accident investigation. Accordingly, the notice of contest filed by Performance is **DISMISSED** and the Secretary's motion for summary decision is **GRANTED**.


Margaret A. Miller
Administrative Law Judge

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Robert Luskin, Esq., Patrick Slevin, Esq., Benjamin Wood, Esq., Peter Gould, Esq.,
Patton Boggs, LLP, 2550 M St., NW, Washington D.C. 20037

Derek Baxter, Esq., Robert Wilson, Esq., Keith Bell, Esq., Office of the Solicitor, U.S.
Department of Labor, 1100 Wilson Blvd., Room 2226, Arlington, VA 22209-2296

/svp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 21, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-1059
Petitioner	:	A.C. No. 15-12428-149534
v.	:	
	:	
SEQUOIA ENERGY, LLC,	:	Prep Plant
Respondent	:	

DECISION

Appearances: Matthew Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
James Bowman, Midway, West Virginia, for the Respondent.

Before: Judge Feldman

This civil penalty proceeding concerns a Petition for Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), as amended, 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Sequoia Energy, LLC, (Sequoia). The petition sought to impose a civil penalty of \$40,029.00 for eleven alleged violations contained in 30 C.F.R. Part 77 of the Secretary's mandatory safety standards governing mining operations at surface coal mines.

Prior to the hearing, the Secretary moved to amend her civil penalty petition by vacating Citation Nos. 7496254, 7496257 and 7496261. The Secretary also moved to amend Citation No. 7496260 to include the cited condition in Citation No. 7496257, and to amend Citation No. 7496262 to include the cited condition in Citation No. 7496261. The Secretary's motion to amend was granted during an April 5, 2010, telephone conference with the parties.

This matter was heard in Richmond, Kentucky on May 4, 2010, at which time the parties stipulated that Sequoia is a mine operator subject to the provisions of the Mine Act. At the hearing, the parties proffered a joint motion to approve the settlement of four additional citations. Namely, Sequoia agreed to pay the \$1,111.00 proposed civil penalty for Citation No. 7496253; the parties agreed to delete the significant and substantial (S&S)¹ designation from Citation No. 7496256 and Sequoia agreed to pay a \$947.00 civil penalty instead of the \$4,689.00

¹ Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

civil penalty initially proposed; Sequoia agreed to pay the \$540.00 proposed civil penalty for Citation No. 7496259; and Sequoia agreed to pay the \$745.00 proposed civil penalty for Citation No. 7496265. Thus, pursuant to the terms of their settlement, Sequoia has agreed to pay a total civil penalty of \$3,343.00 for these four citations.

The remaining citations that are the subject of this proceeding are Citation Nos. 7496260, 7496262, 7496263 and 7496266 for which the Secretary proposes a total civil penalty of \$18,877.00. All four of the cited conditions have been designated as S&S. The parties' post-hearing briefs have been considered in the disposition of this case.

I. Background

On February 8, 2008, Mine Safety and Health Administration (MSHA) Inspector Argus Brock inspected a coal preparation plant operated by Sequoia. The preparation plant is in Harlan, Kentucky. (Tr. 42). The inspection was in response to a complaint that had been filed with MSHA concerning reported defects on a D9N dozer. However this dozer is not a subject of the four citations in litigation in this proceeding. (Tr. 44, 96). The preparation plant is a large facility employing approximately thirty miners who work during two shifts. The first shift is from 6:00 a.m. until 5:00 p.m. The second shift begins at 5:00 p.m. and ends at 3:00 a.m. (Tr. 327).

Six refuse trucks are used during the day shift, and four refuse trucks are operated during the evening shift. Rock material that is separated from coal is loaded into haul trucks from refuse bins. Refuse haul trucks transport the rocks from the refuse bins at the plant to a refuse pile that is situated on a hill approximately one quarter of a mile from the preparation plant. (Tr. 37-38, 58-59).

There are lighting systems at the refuse bins and refuse pile sites. The refuse bins are illuminated with 250 watt white halogen bulbs that are located on each of the four corners of the refuse bins. The halogen bulbs are aimed towards the ground where the truck beds are positioned for loading from the bins located above. (Tr. 139-40). The refuse pile is illuminated by two sources of light each energized by two diesel-powered generators. Each light source consists of four halogen lights. One light source illuminates the refuse pile at the top of the hill. The other light source shines down from the top of the hollow to illuminate the access road to and from the refuse pile. (Tr. 140-41).

Brock testified that he had previously met with Sequoia's safety director concerning Sequoia's failure to correct defects noted in Sequoia's pre-shift examination book. (Tr. 91). However, Brock conceded that these warning were never documented and Sequoia has denied that they were previously warned. (Tr. 100).

On February 8, 2008, Brock inspected several forty-ton refuse trucks that were in operation at the plant. Based on his observations, Brock issued the four citations that remain at issue for defects he observed on three of the refuse trucks. The truck defects noted by Brock concern inoperable front lights, a defective exhaust pipe, a cracked upper side view mirror, a missing lower side view mirror, an inoperable back-up alarm, and an accumulation of oil on a refuse truck hood. Although Brock reviewed the pre-shift examination reports for these three trucks, Brock did not make copies of the pre-shift reports and he did “[not] recall exactly what [they] said.” (Tr. 104). Brock did not take photographs of any of the cited conditions and he did not record any information from the pre-shift reports in his contemporaneous notes. (Tr. 107; Gov. Ex 2). The pre-shift examination reports are not in evidence.

II. Significant and Substantial Framework

As a general proposition, 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 at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 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 Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC at 1129, 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., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 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 Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any S&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Co.*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

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

III. Civil Penalty Framework

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty 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 of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 citing 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294, *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

It has neither been contended nor shown that imposition of the civil penalties proposed in this case will adversely affect Sequoia's ability to continue in business, or, that the penalties proposed are disproportionate to the size of Sequoia's business. The cited conditions were abated in a good faith and timely manner. The Secretary has not specifically asserted that Sequoia's history of violations is an aggravating factor.

IV. Findings and Conclusions

i. Citation No. 7496260²

Brock inspected Sequoia's Volvo A40D No. T9 Refuse Truck. The Volvo A40D has a vertical exhaust pipe that is located behind the platform used to access the operator's compartment. The exhaust pipe is connected to the muffler at the approximate height of the operator's seat in the cab of the truck. (Tr. 143). The exhaust pipe is attached to the muffler with a clamp. Brock noted that the bottom portion of the exhaust pipe, in the area where the exhaust pipe was connected to the muffler, had a leak which allowed carbon monoxide to escape. (Tr. 50, 55). Although the source of the leak was not visible, as it was in between the cab and the bed, Brock opined the seepage of fumes was apparent because it created a layer of soot on the side frame of the truck bed behind the exhaust. (Tr. 57, 143). The leak was in close proximity to the operator's door. As a result, fumes entered the operator's compartment when the truck was idling. (Tr. 50). Brock testified that he recalled that the truck operator told him that he was exposed to fumes when he was sitting in the operator's cab while the truck was idling. However, Brock did not refer to this reported conversation in his contemporaneous notes. (Tr. 54).

The Volvo A40D Refuse Truck has a pair of high and low-beam lights located above the front bumper on each side of the front grille. (Resp. Ex 4). Each pair of high and low-beams is secured to the truck in a harness. Sequoia contends the truck had two large additional headlights attached to the frame of the truck at the top corners of the windshield. (See Resp. Ex. 4). Brock does not recall whether he observed additional headlights at the top of the windshield. (Tr. 61-62). However, based on his review of photographs of a refuse haul truck proffered by Sequoia at the hearing, Brock conceded that these upper lights are more powerful than the headlights as "they just light up the - - [kind of] the whole area in front of you." (Tr. 106; Resp. Exs. 4-6).

Brock noted that the right (passenger side) high and low-beams were not operational. (Tr. 64-65). Brock recalled that there was a reference to "lights" in the pre-shift examination records. However, Brock could not recall exactly what the pre-shift report said. Although the defective lights are noted in Brock's contemporaneous notes, the notes are devoid of any references to pre-shift examination reports. (Tr. 104-05; Ex. 2 at 14).

² As noted, a defective leaking exhaust pipe was initially the sole subject of Citation No. 7496260. (Gov. Ex. 4). This citation has been modified to include the defective front lights on the No. T9 refuse truck that was the subject of Citation No. 7496257 that now has been vacated. (Gov. Ex. 5).

As a result of his observations of the defective exhaust and the inoperable headlights, Brock issued Citation No. 7496260 alleging a violation of the mandatory safety standard in 30 C.F.R. § 77.404(a). This safety standard requires that “mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery in unsafe condition shall be removed from service immediately.” Brock designated the defects as S&S in nature and he attributed the violative conditions to a moderate degree of negligence. The Secretary proposes a civil penalty of \$4,689.00 for Citation No. 7496260.

Willie Fee, Sequoia’s service mechanic, testified that he was not aware of any complaints from the operator of the Volvo A40D Refuse Truck. (Tr. 135-36). Fee examined the truck after it was cited by Brock. Fee determined the exhaust leak was caused by a broken muffler clamp. (Tr. 132). Fee confirmed that the leak caused soot to accumulate on the frame of the truck. (Tr. 145-46). Fee admitted that the leak could be heard when the engine was started. (Tr. 146). However, Fee claimed the operator was not exposed to fumes because, if the windows were closed, the operator’s cab was a sealed air conditioned compartment. (Tr. 135).

Fee testified that all of the haul trucks are equipped with high and low-beams located above the front bumper and supplemental upper headlights that are factory installed. (Tr. 138, 153-54). Fee admitted that the right front high and low-beams were inoperable. Fee determined the defect was attributable to a wiring harness that was grounded against the frame causing blown fuses.

Fact of the Violation

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. The cited mandatory safety standard in 30 C.F.R. § 77.404(a) requires mobile equipment to be maintained in safe operating condition. The Commission has concluded that equipment is unsafe if a reasonably prudent person, familiar with industry standards and the factual circumstances surrounding the condition and use of the equipment, would recognize that the cited hazard required corrective action. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). Here, Fee has admitted that there was a defect in muffler clamp causing a leak of carbon monoxide (CO) fumes from the exhaust pipe. The leak was in proximity to the operator cab compartment. The exposure of the operator to CO fumes constitutes a hazardous condition.

In addition, Sequoia concedes the right front high and low-beams were inoperable due to a short caused by contact of the wiring harness with the truck frame. Although there apparently were additional headlights mounted at the upper corners of the windshield, defective high and low-beam lights result in a diminution of nighttime visibility rendering the vehicle unsafe under 30 C.F.R. § 77.404(a). Consequently, the evidence supports the cited violation of this mandatory standard.

S&S

As noted, a violation is properly designated as S&S if it is reasonably likely that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. The degree of likelihood of serious injury or illness must be evaluated in the context of continued exposure to the hazardous condition during both the period prior to issuance of the citation as well as the time the violative condition would have existed if normal mining operations had continued. Obviously, continued exposure to CO fumes is dangerous, particularly in view of its odorless nature. It is reasonably likely that such continued exposure will result in CO poisoning causing serious physical injury or death. Consequently, the defective muffler clamp, alone, provides an adequate basis for designating the cited violation as S&S.

Degree of Negligence

Brock attributed the cited conditions to a moderate degree of negligence. I agree. However, there are several mitigating factors. Brock could not recall whether driving lights were installed at the top of the truck. (Tr. 67). Thus, Brock did not refute Fee's testimony that all of the haul trucks had upper lights installed. Significantly, Brock conceded that if he had realized that the upper lights were installed he might not have cited the inoperable right lower headlights. (Tr. 67). Although Brock recalled that the left headlights were working, he did not recall which, if any, additional lights on the truck were operational. (Tr. 61-62).

Although Brock testified that the pre-shift examination referred to "lights," as previously noted, the pre-shift report has not been proffered in evidence by the Secretary. Moreover, there is no reference to relevant pre-shift examination reports in Brock's contemporaneous notes. While the defective lights apparently existed for at least several shifts, there is no evidence that Sequoia ignored defects reported as a result of pre-shift examinations. Moreover, the lighted conditions at the refuse bins and refuse pile, along with the supplemental headlights mounted at the upper corners of the windshield, mitigate the hazard caused by the inoperative right headlights.

With respect to the condition of the exhaust pipe, Brock does not contend that the defective exhaust pipe was noted by pre-shift examiners. Although the defect was apparent when the truck engine was started, there was no visible hole in the exhaust system that made the condition readily apparent.

With respect to notice, although Brock asserts that Sequoia had been previously warned, the Secretary does not contend that Sequoia's history of violations reflects an inadequate emphasis on the importance of maintaining equipment in safe operating condition. Consequently, although the attribution of moderate negligence is affirmed, there are significant mitigating circumstances related to the degree of gravity of the cited violation that warrant a reduction in the civil penalty proposed by the Secretary. **Accordingly a civil penalty of \$1,400.00 shall be assessed for Citation No. 7496260.**

ii. Citation No. 7496262³

Brock inspected Sequoia's Volvo A40D No. T7 Refuse Truck. The truck normally is equipped with two pairs of side view mirrors. The upper mirror is a traditional side view mirror that enables the truck operator to view side areas of the truck. It is approximately four inches wide and six inches long. It is capable of lateral adjustment. The bottom mirror is adjusted downward to enable the operator to view the rear wheels of the truck. This mirror is used by the operator to ensure that a truck does not breach a berm when backing into an elevated area. Although Brock stated there were berms on elevated roadways in the preparation plant and different levels at the refuse dump site, Brock did not describe discrete elevated areas at the refuse bins or the refuse pile where the refuse trucks maneuver to load and unload their contents. (Tr. 185-86).

Brock observed a crack in the upper left (driver side) side view mirror. Despite the crack, Brock testified that the upper mirror was still functional. (Tr. 188, 207). The lower left front mirror was missing. Similar to the No. T9 refuse truck, the right high and low-beam headlights were not functioning on the No. T7 truck.

As a result of his observations, Brock issued Citation No. 7496262 that now concerns the defective and missing mirrors and the inoperable right headlights. The citation alleges a violation of 30 C.F.R. § 77.404(a) for failure to maintain the truck in safe operating condition. (Gov. Exs. 7, 8). Brock designated the cited conditions as S&S in nature, and he attributed the violative conditions to a moderate degree of negligence. The Secretary proposes a civil penalty of \$4,689.00.

Fee, an experienced refuse truck operator, testified that the upper rather than lower side view mirror normally is used to dump at the refuse site. (Tr. 209, 216). In this regard, Brock testified the rock material dumped at the refuse site is crushed and flattened by a dozer. (Tr. 165). The level nature of the refuse pile area negates a truck operator's reliance on the lower side view mirror. (See Gov. Ex. 13). Moreover, Brock conceded that the side view mirrors were not needed at the refuse bins where the trucks are driven directly under and through the bins. (Tr. 192).

³ As noted , the defective and missing left side mirrors were the sole subject of Citation No. 7496262. (Gov. Ex. 7). This citation has been modified to include the defective right front lights on the No. T7 refuse truck that was the subject of Citation No. 7496261 that now has been vacated. (Gov. Ex. 8).

Fact of the Violation

As previously discussed, mobile equipment is properly characterized as unsafe if a reasonably prudent person familiar with the operation and maintenance of the equipment would recognize that the condition of the equipment creates a hazard. *Alabama By-Products, supra*. Properly maintained side view mirrors are essential for safe operation of mobile equipment. The factory installation of both upper and lower side view mirrors is a recognition of their contribution to the safe operation of this heavy duty haulage vehicle.

At the hearing it was noted that the testimony and evidence with respect to the inoperable high and low-beam headlights on the No. T9 truck are incorporated by reference to the No. T7 truck. As discussed above, the absence of operable right side headlights, despite the presence of supplemental lights mounted on the top of the truck, constitutes an unsafe condition. Consequently, the evidence supports the fact of the violation of the mandatory standard in 30 C.F.R. § 77.404(a).

S&S

Analysis of the S&S issue in this instance requires a recognition of the unanticipated variable circumstances during the course of continued mining operations under which this forty-ton haulage truck will be driven. Side view mirrors protect both the truck operator and miners who may be exposed to the risk of being struck while working in proximity to this moving vehicle. It is reasonably likely that the diminution of visibility resulting from the cracked and missing mirrors will result in an event, i.e., a truck accident, that results in serious or fatal injuries. In addition, while not currently contemplated, it is likely that this haulage truck will be operated under circumstances that require a lower side view mirror to ensure that the vehicle does not back through a berm installed in an elevated area. Consequently, the cracked and missing side view mirrors, alone, provide an adequate basis for designating the violation as S&S in nature.

Degree of Negligence

Brock attributed the cited conditions to a moderate degree of negligence. Again, I agree. However, there are also mitigating factors. Although the upper mirror was cracked, Brock conceded that it was still functional. Although the missing lower side view mirror is not trivial, it is true that these haulage trucks are not dumping in the vicinity of elevated areas. Thus, the lower mirror, adjusted to view the position of the rear tires, is not normally relied on. The same mitigating circumstances concerning the inoperable headlights on the No. T9 truck discussed above apply to the defective headlights cited on the No. T7 truck.

Consequently, although the attribution of moderate negligence is affirmed there are significant mitigating circumstances related to the degree of gravity of the cited violation that warrant a reduction in the civil penalty proposed by the Secretary. **Accordingly a civil penalty of \$1,200.00 shall be assessed for Citation No. 7496260.**

iii. Citation No. 7496263

In addition to the cracked and missing left side view mirrors and the inoperable right side headlights, Brock observed an accumulation of hydraulic oil in an area located on the right side of the hood of the Volvo A40D No. T7 Refuse Truck. Brock testified that hydraulic oil is combustible at temperatures in excess of 700 or 800 degrees. (Tr. 227, 250-51).

Brock noted that a turbocharger, approximately eight to ten inches in diameter, was located on the right upper side of the engine of the T7 truck. A turbocharger supplies fuel to the engine in a method that increases engine performance. Brock stated the operational temperature of a turbocharger can be in excess of 1,400 degrees. (Tr. 227, 251). Brock conceded the temperature on the surface of the hood was not adequate enough to ignite the hydraulic oil. (Tr. 246). Brock also admitted that he did not know if the source of the hydraulic oil was spraying the oil under the hood in the direction of the turbocharger. (Tr. 244). However, Brock was concerned that a fire or explosion could result if the oil leak came into contact with the hot turbocharger that constituted a source of ignition.

As a result of his observations, Brock issued Citation No. 7496263 alleging a violation of 30 C.F.R. § 77.1104 for allowing combustible material in the form of hydraulic oil to accumulate on the hood of the truck. (Gov. Ex. 10). Brock noted that this condition had been entered in the pre-shift examination book. (Tr. 233-36). The mandatory safety standard in 30 C.F.R. § 77.1104 prohibits the accumulation of combustible materials in areas where they can create a fire hazard. Brock designated the oil accumulation as S&S in nature, and he attributed the violative condition to a moderate degree of negligence. The Secretary proposes a civil penalty of \$5,503.00.

Fact of the Violation

Fee testified that the source of the hydraulic oil was a broken O-ring on the hose that supplied hydraulic oil to the radiator fan. (Tr. 269-71). At the trial, Sequoia's representative stipulated to the fact of the violation although the S&S designation remains in dispute. (Tr. 252-53; *Resp. Br.* at 7).

S&S

The thrust of the Secretary's S&S assertion is that it is reasonably likely that the unpredictable nature and extent of a spraying oil leak caused by a deteriorating O-ring under a hood in proximity to a turbocharger will result, given continued operation of the truck, in a fire or explosion resulting in serious injury to the operator. (Tr. 252). Fee on the other hand asserted that the radiator was positioned between the oil leak and the turbocharger. Consequently, Fee opined that the "oil would have to come through the radiator into the engine compartment . . . to get to the turbo." (Tr. 267).

Fee's speculation concerning the path of the leaking oil spray misses the point. The fact remains that leaking combustible hydraulic oil in proximity to very hot engine components constitutes a hazardous condition. The unpredictability of the directional flow of this leaking oil accentuates the degree of hazard. This condition creates the circumstances for the proverbial "accident waiting to happen." Consequently, it is reasonably likely that the ignition hazard created by the presence of this hydraulic oil as a source of fuel will result in an event, *i.e.*, fire or explosion, causing serious or fatal injury to the operator of the refuse truck. Accordingly, the cited violation is properly characterized as S&S in nature.

Degree of Negligence

The Secretary alleges that this condition existed for several shifts as the condition was noted in the pre-shift examination book. Moreover, this condition was obvious in that it was readily observable on the hood of the truck. Consequently, the evidence reflects at least a moderately high degree of negligence. **Given the serious gravity associated with the cited condition, a civil penalty of \$3,500.00 shall be assessed for Citation No. 7496263.**

iv. Citation No. 7496266

Brock inspected Sequoia's Volvo A40D No. T10 Refuse Truck. Brock tested the back-up alarm and determined that it was inoperable. (Tr. 287). The back-up alarm is a device that sounds when the refuse truck is operated in reverse. (Tr. 288). The back-up alarm is intended to alert miners who are in the path of a truck traveling in reverse. (Tr. 288). The No. T10 truck is operated throughout the preparation plant in proximity to people and equipment. (Tr. 289). Brock was concerned that the absence of an audible back-up alarm will result in a miner sustaining serious or fatal crushing injuries as a result of being struck by the truck. (Tr. 293).

Brock testified that the inoperable back-up alarm was noted in the pre-shift examination and that Rodney Collett, Sequoia's foreman, told him that he was aware of the defect. Although Brock's notes reflect a variety of mobile equipment defects "that existed for several months," the duration of the back-up alarm malfunction is unclear. (Tr. 291; Gov. Ex 2 at 28-30).

As a result of his inspection, Brock issued Citation No. 7496266 citing a violation of the mandatory safety standard in 30 C.F.R. § 77.410(c) that requires warning devices on mobile equipment. Brock designated the violation as S&S in nature and he attributed the violation to a high degree of negligence. The Secretary proposes a civil penalty of \$3,996.00.

Fact of the Violation

Sequoia has stipulated to the fact of the cited violation although the S&S designation remains in dispute. (*Resp. Br.* at 8). Fee testified that the back-up alarm was muted because it was covered with mud. Fee opined that the alarm could be heard from ground level although it was very low. (Tr. 317-18). The condition was abated by cleaning the mud that had accumulated around the alarm and washing the alarm with water. (Tr. 318-19).

S&S

Similar to the previous S&S analysis regarding the broken side view mirrors, the hazard of exposure of unwitting victims to a truck without an adequate back-up alarm requires a recognition of the unanticipated variable circumstances under which this forty ton haulage truck will be driven during the course of continued mining operations. The obvious purpose of a back-up alarm is to warn persons positioned behind the truck who cannot be seen by the truck operator. Given the vagaries of human conduct with respect to inattention and carelessness, it is reasonably likely that the hazard created by a non-functioning back-up alarm will result in serious or fatal injuries to someone positioned behind the truck. Consequently, the inaudible condition of the back-up alarm is properly designated as an S&S violation.

Degree of Negligence

The Secretary alleges that this condition existed for a significant period as the condition was noted in the pre-shift examination book. Fee testified that he did not report the back-up alarm as being repaired, although it was periodically cleaned, because it was a recurring problem. (Tr. 319-20). Fee reported that he ultimately moved the alarm so that the horn was not facing outward and exposed to piles of mud when the truck was backed up to dump its load. Specifically, the horn was positioned in a downward direction to avoid mud from muting the horn. (Tr. 323-23). Brock conceded that it was not uncommon for the truck to back into previously dumped material that was muddy and wet thereby preventing the back-up horn from working. (Tr. 307-18).

The admitted muddy conditions are a mitigating factor, however Sequoia is responsible for maintaining the alarm in functioning condition. Accordingly, the violation is attributable to a moderate degree of negligence. **Given the serious gravity associated with the cited condition, a civil penalty of \$2,200.00 shall be assessed for Citation No. 7496266.**

I note parenthetically, that the previous penalties proposed by the Secretary for violations concerning Sequoia's failure to correct defects on mobile equipment ranged from \$60.00 to \$400.00 compared to the \$3,996.00 to \$5,503.00 range currently proposed by the Secretary for the four adjudicated citations. I recognize the Secretary's concern that Sequoia needs to display greater efforts to maintain its heavy duty refuse trucks regardless of their operation under adverse conditions. The imposition of civil penalties from \$1,200.00 to \$3,500.00 in this case, that are significantly greater than previous assessments imposed by the Secretary for similar violations, adequately address the Secretary's concern.

As a final note, this decision formalizes the tentative bench decision that was issued at the culmination of the hearing. (Tr. 336- 60). At that time, I urged the parties to settle these four citations by incorporating the terms of the tentative decision in their settlement agreement. (Tr. 337- 40). This approach would have avoided the expenditure of the limited resources of the Commission and the Secretary in the light of an unprecedented backlog of mine safety cases by obviating the need for filing briefs and issuing a formal written decision.

Specifically, at the completion of the hearing, the parties were advised:

. . . We have four citations that we heard today and I will issue a preliminary decision. . . . I will leave it to the parties to either file briefs agreeing or disagreeing with the preliminary decision, or, the parties, in the alternative, could agree to settle the case based on what my recommendations are in the preliminary decision. . . . By settling the case, neither party has to file a brief and, therefore, they can spend their energies with regard to other cases that are pending. . . . [If] the briefs are filed, if [the parties] decide not to accept my recommendation, I can be convinced that maybe my preliminary decision is wrong . . . [and] I'll change my decision accordingly.

(Tr. 337-39).

At the hearing, Sequoia agreed to settle by adopting the terms of the tentative decision. (See Resp. Br. at 1). Subsequent to the hearing, the Secretary, however, declined to settle by adopting these terms. Although advised to do so, the Secretary's brief did not even address the preliminary decision. While I recognize the Secretary's right to a written decision, particularly if there is a desire to raise significant issues on appeal, the tentative decision affirmed the four citations in issue in virtually every respect with the exception of a reduction in the total civil penalty, from to \$18,877.00 to \$8,300.00.⁴ (See Tr. 338). Resolution of the appropriate civil penalty to be assessed is committed to the Commission's discretion. 30 U.S.C. § 820(i). In this regard, the Secretary's brief acknowledged "[the] Administrative Law Judge is accorded broad discretion in assessing civil penalties under the Mine Act." (Sec'y Br. at 15 citing *Cantera Green*, 22 FMSHRC at 620). Yet the Secretary insisted on briefing this matter. I urge the Secretary to reconsider whether the pursuit of this matter was a judicious use of government resources.

⁴ As a matter of perspective, the Secretary agreed to settle four other citations in this docket proceeding for a total civil penalty of \$3,343.00 rather than the \$7,085.00 civil penalty initially proposed.

ORDER

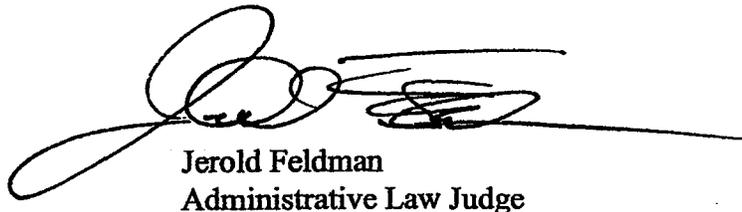
Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 7496260, 7496262, 7496263 and 7496266 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Sequoia Energy, LLC, shall pay a total civil penalty of \$8,300.00 in satisfaction of Citation Nos. 7496260, 7496262, 7496263 and 7496266.

IT IS FURTHER ORDERED that the parties' motions to approve partial settlement **ARE GRANTED**. Consistent with the parties' settlement terms, **IT IS ORDERED** that Sequoia Energy, LLC, shall pay a total civil penalty of \$3,343.00 in satisfaction of the remaining citations that are in issue in this proceeding.

Consistent with the total civil penalty assessment of \$8,300.00 for the four citations that were adjudicated in this matter, as well as the parties' settlement terms, **IT IS ORDERED** that Sequoia Energy, LLC, pay, within 30 days of the date of this decision, a total civil penalty of \$11,643.00 in satisfaction of the eleven citations that are the subject of this proceeding.

IT IS FURTHER ORDERED that, upon receipt of timely payment, the civil penalty proceeding in Docket No. KENT 2008-1059 **IS DISMISSED**.


Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

Matt S. Shepard, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street,
Suite 230, Nashville, TN 37219

Jim Bowman, Sequoia Energy, P.O. Box 99, Midway, WV 25878

/rps

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9964 / FAX: 202-434-9949

September 27, 2010

MACH MINING, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 2009-324-R
v.	:	Citation No. 8414214; 02/12/2009
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY & HEALTH	:	Mach #1 Mine
ADMINISTRATION, (MSHA)	:	Mine ID 11-03141
Respondent	:	

DECISION

Appearances: Christopher D. Pence, Esq., and David J. Hardy, Esq., Allen, Guthrie, McHugh & Thomas, PLLC, Charleston, West Virginia, for the Contestant.
Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Respondent.

Before: Judge Weisberger

I
Introduction

This case is before me based on a Notice of Contest filed by Mach Mining, LLC, (“Mach”) challenging the issuance of Citation No. 8414214, which alleges a violation of 30 C.F.R. § 75.364¹.

¹This matter was initially consolidated with a contest of Citation No. 8414211 (Docket No. LAKE 2009-323-R), which alleged a violation of 30 C.F.R. § 75.380(d)(1), requiring that escapeways be maintained in a safe condition. Citation No. 8414214, the citation contested in the present matter, originally alleged a violation of 30 C.F.R. § 75.363(a), and was subsequently modified to a violation of 30 C.F.R. § 75.364(b)(5), which requires an examination of an escapeway for hazardous conditions. At the conclusion of the hearing held on May 14, 2009, the Secretary made a motion to amend Citation No. 8414214 again by changing the alleged violated standard to 30 C.F.R. § 75.364(h), which requires that a record be made of hazardous conditions found during weekly examinations. After the parties argued the merits of the motion, it was granted.

Pursuant to notice, a hearing was initially held in St. Louis, Missouri, on May 14, 2009.² The parties were directed to file briefs addressing the limited issue of whether the cited area was a “working section”, and thus triggering the requirements of escapeways.³ Each party subsequently filed a brief, and a reply. On July 15, 2009, the undersigned issued a partial decision determining that the cited area was a “working section.”

A conference call was held on November 9, 2009; the parties indicated that they did not seek an opportunity to present additional evidence relating to the remaining issues regarding Citation No. 8414211 (Docket No. LAKE 2009-323-R). Subsequently, the parties each filed a brief and a reply addressing these issues. The parties agreed that if it was found that the Contestant violated Section 75.380(d)(1), *supra*, then a hearing should be scheduled regarding the remaining citation (No. 8414214).

The undersigned issued a decision on February 24, 2010, *Mach Mining LLC*, 32 FMSHRC 213 (“Mach I”) (2010) finding that the Contestant violated Section 75.380(d),⁴ and dismissing the contest. On May 13, 2010, pursuant to the agreement of the parties, a hearing was held on the issues presented in Mach’s Notice of Contest (Citation No. 8414214). Each party submitted a post-hearing brief, and Contestant filed a response in opposition to the Respondent’s brief.

II. Stipulations

At the May 14, 2009 hearing, the parties filed 44 Joint Stipulations, which were initially included, in part, in the undersigned’s July 14, 2009 Partial Decision. The stipulations, as pertinent to the issue at bar, are set forth as follows:

9. On February 12, 2009, MSHA Inspector Bobby F. Jones conducted a

²The record was kept open to allow for the possibility of an additional evidentiary hearing.

³Pursuant to 30 C.F.R. § 75.380(b)(1), an operator is required to provide an escapeway “for each working section.” Thus, the existence of a working section is a predicate for the imposition of all regulatory mandates relating to escapeways, including those set forth in Sections 75.380(d)(1), and 75.364(h).

⁴Specifically, I found that the combination of items present in the escapeway would thwart the clear purpose of Section 75.380(d) *supra* (i.e., to allow persons to escape quickly in the event of an emergency). I also found that the violation was significant and substantial.

regular quarterly inspection of Mach #1 Mine, operated by Mach Mining, LLC. ["Mach"]

10. While conducting his inspection, Mr. Jones inspected the primary escapeway to the Headgate (hereinafter "HG") #4.

35. Contestant began weekly examination of the primary escapeway at HG #4 five weeks prior to the issuance of the subject citations.
36. Contestant assigned Mine Examiner Dave Adams the task of conducting the weekly examinations at HG #4 from January 8, 2009, through February 12, 2009.
37. The concrete blocks existed in the escapeway outby the regulator since on or about January 6, 2009, when the regulator was created, through February 12, 2009, when the subject citations were issued.
38. The pile of gob existed in the escapeway since on or about January 6, 2009, when the regulator was created through February 12, 2009, when the subject citations were issued.
39. The take-up track existed in the escapeway since on or about January 6, 2009, when the regulator was created through February 12, 2009, when the subject citations were issued.
40. The pallet of crib ties existed in the escapeway since on or about January 6, 2009, when the regulator was created through February 12, 2009, when the subject citations were issued.
41. Mine Examiner Adams last conducted a weekly exam of the primary escapeway prior to the issuance of Cit. No. 8414211 on or about February 9, 2009.
42. The concrete blocks outby, pile of gob, take-up track, and pallet of crib ties were present in the primary escapeway at HG #4 since January 6, 2009, when the regulator was created through February 12, 2009, when the subject citations were issued.
43. Mine Examiner Dave Adams did, in fact, conduct weekly examinations for hazardous conditions at the primary escapeway at HG #4 from January 8, 2009, through February 12, 2009.

44. Mine Examiner Dave Adams did not note any hazardous conditions in the weekly examination records for the primary escapeway at HG #4 during the period from January 8, 2009, through February 12, 2009.

III.

Testimony of the Witnesses and the Parties' Positions

On February 12, 2009 MSHA Inspector Bobby Jones inspected the primary escapeway to the headgate ("HG") #4 at the Mach #1 mine, an underground coal mine. In testimony adduced at the initial hearing on May 14, 2009,⁵ he described various hazardous items in the escapeway. Jones testified at the May 13, 2010 hearing that these items were not noted in the weekly examination book although they were obvious, extensive, and had existed since HG #4 went into production. Jones issued a citation alleging a violation of Section 75.364(h),⁶ that was significant and substantial and resulted from Mach's unwarrantable failure.

Essentially, it is Mach's position that it was not in violation of Section 75.364(h), *supra*, because it had a "good faith" belief that the cited accumulated materials were not "hazardous conditions", and therefore were not required to be recorded under the terms of Section 75.364(h), *supra*.

Mach relies on the testimony of David L. Adams, the examiner who conducted the weekly examinations at issue. Adams was asked whether he believed that the cited material constituted a hazard. He answered as follows: "[n]o, because there was a clear walkway, there was a lifeline through there that was accessible to the miners. All the materials that's stated in the citation is nothing that's abnormal for a mine, including the piece of belt structure." [sic] (Tr. 82).⁷

⁵ At the hearing held on May 13, 2010, the transcript and record of the initial proceeding (docket No. LAKE 2009-323-R) were incorporated into the record of the instant proceeding.

⁶ Section 75.364(h), as pertinent, provides as follows:

At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made...The record shall be made by the person making the examination or a person designated by the operator...

⁷ Unless otherwise noted, all transcript page citations refer to the May 13, 2010 hearing.

In further explanation, Adams testified that:

[t]he area that was in question here, the overcast work, the construction work had just recently been completed. The people that worked this section that would be escaping through that area, if need be, were familiar with the area. They built it, so they - - you know, if they had to come through the regulator to escape to the stairway, they knew the walkway, they knew it was clear. Their biggest obstacle would be the stairs on the overcast, not the materials that were to the side. (Tr. 82-83).

Also, he indicated that there was a clear path “from the opening in the regulator along the rib line, for the distance from the regulator to the stairs to the first overcast.” *Id.* At 83. Last, Adams opined that in the event of smoke and poor visibility miners could pull down a lifeline and “...[t]hey would follow the rib line, because if you’re lights go out in your house, instead stumbling through the dark, you’re going to find a wall. You’re going to find something familiar. They would follow the same path as what the lifeline would carry them to the staircase.” [sic] (Tr. 84).

Anthony Webb, Mach’s Mine Manager testified that no one at the mine felt the conditions present in the escapeway constituted a hazard. He stated that prior to February 12, 2009, no MSHA official had advised him that the mine’s escapeways were not maintained safely, or that they believed Mach’s examiners failed to note hazardous conditions in their reports, or that its examinations were inadequate.

Webb added that he had inferred that the type of materials found in the escapeway did not present a hazardous condition because the “same condition existed at the regulator at Headgate #3 in two previous quarters,” which did not result in a citation from two other inspectors. (Tr. 62-63). Upon further questioning, Webb admitted that he was specifically referring to several blocks on both sides of the base of the regulator, but he was not aware of any of additional materials present at Headgate #3 in those previous inspections. Webb asserted that no one from MSHA had previously advised him that such items were a hazard.

IV.

Discussion

A. Violation of Section 75.365(d), *supra*

The parties stipulated that the escapeway included a number of items, including a gob pile, loose concrete blocks, a take-up track, and a pallet of crib ties that had been present in the escapeway since January 6, 2009. Moreover, the parties previously stipulated that Adams conducted weekly examinations of HG #4 from January 8, 2009, through February 12, 2009.

I previously found a violation of Section 75.380(d) due to the combination of the pallet of crib ties, take-up track, pile of gob, loosely strewn concrete blocks on either side of the regulator, and the presence of water on the floor, which would hinder and delay the emergency evacuation of miners, especially any who were injured.⁸ This finding becomes the law of the case. Despite the presence of these items in the escapeway for approximately five weeks, the mine examiner failed to note any of these conditions in his weekly reports. I have taken into account the opinions of Adams and Webb, that they did not believe the accumulated items constituted hazardous conditions. However, it is well established that the standards set forth in Title 30, Code of Federal Regulations (“CFR”) impose strict liability upon an operator. *Western Fuels - Utah Inc.*, 11FMSHRC 278 (Mar. 1989); *ASARCO Inc.*, 8 FMSHRC 1632 (Nov. 1989).

Based on all the above, I find that Mach did violate Section 75.364(h), *supra*.⁹

B. Significant and Substantial

The violation in the present case was designated “significant and substantial”. As set forth in *Elk Run Coal Co., Inc.* 27 FMSHRC 899, 904-905 (2005), a violation is “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.” See *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Elk Run, supra*, at 905 the Commission quoted the following further explanation it previously provided in *Mathies Coal Co.*, 6 FMSHRC 1-3 (1984):

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable

⁸ Mach I, *supra*.

⁹ I take cognizance of Mach’s argument that a proper examination was conducted under Section 75.364(h) *supra*, if an examiner reasonably believed that the conditions he observed were not hazardous. In support of this proposition, Mach cites the following cases: *Secretary v. Arch of Wyoming, LLC*, 32 FMSHRC 568 (May 2010) (ALJ); *Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1134-36 (Oct. 1999) (ALJ); *Lopke Quarries, Inc.*, 22 FMSHRC 899. 911-12 (July 2000) (ALJ).

All these cases were decided by Commission Judges. These do not have precedential value, and I am not bound by them. To the extent that they are not consistent with my decision, I choose not to follow them.

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.

I previously found a violation of a mandatory safety standard due to the hazardous conditions that existed in the escapeway.¹⁰ Also, I found that the conditions of the escapeway constituted a discrete safety hazard. Similarly, I found that based on the combination of accumulated items in the escapeway, the hazard of stumbling and tripping, and the resultant impediment to a prompt evacuation in an emergency, especially in the presence of smoke and low visibility, that it was reasonably likely that a reasonably serious injury to a miner was reasonably likely to have occurred. I concluded that the materials in the escapeway constituted a significant and substantial violation of Section 75.380(d)(1), *supra*.

Accordingly, I conclude that if the condition of the escapeway was itself a significant and substantial violation, then for the same reasons the failure to document and report such conditions constitutes a significant and substantial violation.

C. Unwarrantable Failure

The citation at issue identified the violation to be an unwarrantable failure due to the “extensiveness of these hazardous conditions [which] were obvious to the most casual observer.” Further, according to Jones, the hazardous conditions were not reported in five weekly examination reports preceding the inspection.

In essence, it is Mach’s position that the Secretary was not able to establish that the violation herein was as a result of it’s unwarrantable failure. Mach argues that it acted under a “good faith” belief by Adams that the cited conditions were not hazardous, and thus were not required to be recorded. Also, that the citation at bar was the first instance that MSHA had raised any issue with regard to material in Mach’s escapeways.

In *I.O. Coal Company, Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009) the Commission set forth the following analysis with regard to unwarrantable failure:

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 and operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC (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,” or a “serious lack of reasonable care.” *Id.* at 2003-2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

¹⁰ Mach I, *supra*

The Commission has recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstance exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation. See *Consolidated Coal Co.*, 22 FMSHRC 340, 353 (March 2000) (“*Consol*”); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. Corp., 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEngery Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988).

1. Extent of the violative condition.

Mach argues that any alleged violation was not extensive. Mach relies on the fact that Jones had inspected all of Mach’s escapeways which totaled approximately 16 miles without issuing any citations for obstructions, whereas the cited area constituted only 60 feet. However, according to Jones’ testimony that was not impeached, the entire area that he cited was 100 or 120 feet in length. I find that due to the combination of the various accumulated materials that extended 100 to 120 feet in an escapeway to have been extensive.

2. The length of time that the violative condition existed.

In essence, it appears to be Mach’s position that the fact that the cited conditions have existed for five weeks should not cause the unwarrantable finding to be applied because Mach had not been given any notice¹¹ that the materials constituted a violation. There is not any dispute that the cited conditions had existed for five weeks prior to their having been cited by Jones. I thus find that the violative conditions had existed and had not been reported for five weeks prior to Mach’s inspection that resulted in the citation at issue.

3. Whether the operator was placed on notice that greater efforts were necessary for compliance.

The record does not contain any evidence that MSHA had placed Mach on notice that greater efforts were necessary for compliance. There is not any evidence of any discussions that MSHA officials had with Mach concerning greater efforts in this regard, prior to the issuance of

¹¹The issue of notice is discussed below, IV(C)(3) *infra*.

the citation at issue. Nor is there any evidence in the record that Mach had previously been cited for existence of materials in the escapeway that would impede a speedy evacuation. I therefore find that it has not been established that Mach was placed on notice that greater efforts were necessary for compliance.

4. Whether the violation posed a high degree of danger.

Mach argues that it did not perceive the conditions as hazardous. In this connection, Webb, who opined there was not a high degree of danger to miners, presented his reasons as follows:

...[I]f a guy went through that area and he would be feeling along the rib, he would be going slow anyway. And something like that, if the guy bumps up against the block with his foot he's going to know to pick his foot and step over it. That's just the nature of coal mining. The guys are prepared for that. (Tr. 68).

He opined further as follows:

The people that worked this section that would be escaping through that area, if need be, were familiar with the area. They built it, so they - - you know, if they had to come through the regulator to escape to the stairway, they know the walkway, they knew it was clear. Their biggest obstacle would be the stairs on the overcast, not the materials that were to the side. (Tr. 82-83)

Lastly, Adams testified that in the event of low visibility and smoke "...[t]he lifeline is overhead. They would bring the lifeline - - pull it down to them. They would follow the rib line, because if you're lights go out in your house, instead stumbling through the dark, you're going to find a wall. You're going to find something familiar. They would follow the same path as what the lifeline would carry them to the staircase." [sic] (Tr. 84)

On the other hand, I found that the record establishes that the violation was significant and substantial due to the failure to report the existence of a combination of accumulated items in the escapeway creating tripping and stumbling hazards that would impede a prompt evacuation in an emergency. (IV(B), *infra.*) For essentially the same reasons, I find that the violation posed a high degree of danger.

5. The operator's efforts in abating the violative conditions.

As set forth in *I.O. Coal, supra*, at 1356, the focus on the operator's abatement efforts is on those efforts made prior to the citation or order. In this connection, the record does not contain any evidence of any abatement efforts made by Mach prior to the issuance of the citation therein by Jones.

However, it is significant to note that, as set forth in *I.O. Coal, supra* at 1356, “[a]n operator’s effort in abating the violative condition is one of the factors established by the Commission as determinative of whether a violation is unwarrantable. Where an operator has been placed on notice of a problem, the level of priority that the operator places on the abatement of the problem is relevant. *Enlow Fork*, 19 FMSHRC at 17. Previous repeated violations and warnings from MSHA should place an operator on ‘heightened alert’ that more is needed to rectify the problem. *New Warwick Mining Co*, 18 FMSHRC 1568, 1574 (Sept. 1996). As set forth above, (IV(C) (3) *supra*)), the record does not establish that Mach had been placed on notice that it had a problem with hazardous items in escapeways.

Moreover, as set forth in *I.O. Coal, supra*, abatement efforts relate to Mach’s good faith belief that the accumulated items were not hazardous. For the reasons discussed below, (IV(C)(6)), the record establishes that the “good faith” belief was reasonable. Accordingly, I conclude that the record establishes the existence of significant mitigating factors lowering the level of Mach’s negligence relating to non-abatement of the violative condition.

6. Mach’s knowledge of the existence of the violation, whether the violative conditions were obvious, and the reasonableness of the “good faith” belief that the cited items in the escapeway were not hazardous.

a. good faith

The Secretary argues, based on the uncontradicted testimony of Jones, that the items he cited were immediately obvious. Next, the Secretary argues that Mach’s “good faith” belief that these materials were not hazardous, was not objectively reasonable considering the combination of obstructions in the escapeway. Therefore, it is maintained, that Adams should have recognized the hazard presented.

As set forth above, (III *infra*), Adams explained, based on his experience, the basis for his belief that the materials cited were not hazardous. He referred to the presence of a lifeline that was “accessible” to miners and a clear walkway or path. “...from the opening in the regulator along the rib line, for the distance from the regulator to the stairs to the first overcast” (Tr. 83). He also described the materials in the escape as “not normal” and testified as follows: “There was nothing in the area that wasn’t present throughout the mine. Many places in escapeways you’re going to find block, you’re going to find crib ties. In your secondary escapeways, belt lines are present, belt structures are present.” (Tr. 86) It is significant to note his testimony that, prior to February 12, no one from MSHA had told him that the accumulated items in the escapeway constituted hazardous conditions.

In further support of his belief that there were not hazardous conditions in the escapery that needed to be reported, he indicated that at the time the conditions were cited he had a son working on the sections whose “safety depends on me.” (Tr. 87). I observed his demeanor, and

find his testimony credible in all these regards. Thus an inference might be drawn that he would not have been motivated to disregard hazardous conditions in the area.

Therefore, I find that Adams, in “good faith,” was of the opinion that the cited materials did not constitute a hazardous condition that had to be reported

b. objectively reasonable under the circumstances.

In evaluating an operator’s “good faith” belief, a determination must be made whether it was “objectively reasonable under the circumstances” *I.O. Coal, supra*, at 1357. In *I.O. Coal, supra*, at 1359 in remanding the judge’s determination that the condition was not as a result of the operator’s unwarrantable failure, the Commission directed the judge to consider “... the issues of the operator’s knowledge of the existence of the violation and whether the violation was obvious.” While it is clear that the existence of the cited material was patently obvious, the issue for resolution is whether the hazard was obvious, and whether Mach should reasonably have known of the hazard. In *I.O. Coal, supra*, one of the errors cited by the Commission as having been made by the Judge was that “...[he] did not pose the question of whether IO’s conduct was ‘reasonable’ under the circumstances after it had received four MSHA citations on this very issue.” Thus it is most significant to note that in the case at bar, as set forth above IV(C), *infra*, Mach had not been placed on notice by MSHA that there was a problem with the materials in escapeways.

I find, considering the lack of notice from MSHA, that the level of MSHA’s negligence is mitigated regarding what it reasonably should have known concerning the existence of a hazard.

For all the above reason, I find that it has not been established that the level of Respondent’s negligence relating to the violation at bar reached the level of aggravated conduct. Accordingly, I find that it has not been established that the violation was a result of Mach’s unwarrantable failure.

Conclusion

For all the above reasons, I conclude that the Respondent established that Mach violated Section 75.364(h), *supra*, and that the violation was significant and substantial. I also conclude that it has not been established that the violation was a result of Mach’s unwarrantable failure.

ORDER

It is **Ordered** that Citation No. 8414214 be amended to reflect the fact that the operator's violation of Section 75.364(h), *supra*, was not the result of its unwarrantable failure. It is further **Ordered** that Docket No. LAKE 2009-324-R be **Dismissed**.



Avram Weisberger
Administrative Law Judge

DISTRIBUTION: (Certified Mail)

Christopher D. Pence, Esq., and David J. Hardy, Esq., Allen, Guthrie, McHugh & Thomas, PLLC, 500 Lee Street, East, Suite 800, P.O. Box 3394, Charleston, WV 25333

Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn Street, 8th Floor, Chicago, IL 60604

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9964 / FAX: 202-434-9949

September 28, 2010

AMERICAN COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 2010-408-R
v.	:	Order No. 8418503; 01/19/2010
	:	
SECRETARY OF LABOR,	:	Galatia Mine
MINE SAFETY AND HEALTH	:	Mine ID 11-02752
ADMINISTRATION, MSHA,	:	
Respondent	:	

DECISION

Appearances: Robert H. Beatty, Jr., Esq., Dinsmore & Shohl, LLP, Morgantown, WV 26501,
for the Contestant
Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor,
Chicago, IL 60604, for the Respondent

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest filed by American Coal Company challenging the issuance by the Secretary of Labor, Mine Safety and Health Administration (“MSHA”) of an Order issued under Section 103(k)¹ of the Federal Mine Safety and Health Act of 1977 (“The Act”). An expedited hearing was held in St. Louis, Missouri. At the conclusion of the hearing the parties presented oral arguments, and a bench decision was made. The decision is set forth below, with the exception of the correction of non-substantive matters.

Introduction

American Coal operates the Galatia Mine, an underground coal operation. Coal is brought to the surface by conveyors and dumped on the New Future Stockpile.

¹ Section 103(k), *supra* provides, as pertinent, as follows:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, ...

The Parties' Witnesses

Michael Rennie, an MSHA supervisor, was at the site on January 19, 2010. He observed smoldering areas in the lower portion of the pile.

The Secretary also adduced the testimony of Wendell Ray Crick, who has been an MSHA inspector since 2000, and was previously a miner for approximately 20 years. Prior to his work as an MSHA inspector he made annual refresher training presentations in various areas including stockpile safety. In addition, he has eight years experience as a firefighter.

Rennie testified that he arrived at the New Future Stockpile somewhere between 8:00 and 8:30 a.m. on January 19.

At the time that he arrived he picked up a sulphur-like odor which he described as a burning coal smell. According to him, the odor got stronger as he got closer to the smoking areas. He indicated that at approximately five different locations, he observed some areas that were smoking. Accordingly to Rennie, the smoke was about three to five feet in diameter and rose about eight to ten feet high. He described the smoke as whitish-brownish.

He opined that the hazard was due to the fact that at any time the conditions that he observed could burst into flame due to the action of oxygen or wind. He also indicated that this can cause burning in a void area in the stockpile. In general, it was his opinion that, essentially based on his experience as a firefighter, if there is smoke, there is fire.

He also indicated that at the five areas where he saw smoke, there was a perimeter around the three to five foot diameter of the smoke that he observed. The perimeter was between eight inches and two feet and was composed of white ash. He did not see any flames at the smoking areas that he observed.

Crick issued an order under Section 103(k), *supra*. The order alleges, *inter alia*, as follows:

“Upon inspection of the New Future raw coal stockpile located at the New Future portal, the stockpile is observed with 5 separate locations smoking with white colored ash surrounding these areas ...”

Michael Smith, a safety inspector, testified for the company. He indicated that he traveled with the inspector and he also did not observe any fire.

Discussion

The parties stipulated that the issue of the existence of a fire on the New Future Stockpile on January 19, 2010, is dispositive of this proceeding; i.e., it will result in either

dismissal of the citation or dismissal of the Notice of Contest.

In essence, the Secretary argues that flames are not necessary to support a finding of fire. The Secretary relies on the testimony of the inspector regarding the presence of smoke, white ash, and “smoldering” (Tr. 25, 27, 28, 29, 54). He also testified that if oxygen or air “hits” hot coal or “smoldering ... it can burst into flame at any time.” (Tr. 59).

The Secretary argues, in essence that her interpretation that a fire does not require the presence of flames, should be accorded deference, as it is consistent with the purpose of the Act to provide for safety of miners and mine safety, and to enable the quick evacuation of miners in the event of a fire.

The Secretary also relies on two treatises that set forth a discussion of two types of combustion; one is a fire that requires a flame, and the other is a type of fire or combustion that does not require a flame. And the Secretary also relies on Phelps Dodge Tyrone Inc., 29 FMSHRC 669 (Aug. 2007) (ALJ Manning)(holding *inter alia*, the flames must be present for there to be a “fire”, that it was “unplanned” and that it was not extinguished within the time requirements of 30 CFR) *aff’d* in part, 30 FMSHRC 646 (2008) (the Commission affirmed the Judge’s findings that a fire was “unplanned” under Section 502(h)(b), but did not make a majority decision as to whether a “fire” requires the presence of flames).

It is critical to focus in on exactly what is at issue here and what is the framework upon which a decision must be made. At heart here is the challenge to an order issued by the Secretary under the authority of Section 103(k) of the Act which states, pertinent, as follows: “In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to ensure the safety of any person in the coal or other mine” (emphasis added).

The plain words of Section, 103(k), *supra* authorize the Secretary to take action “when [the secretary’s representative is present] in the event of an accident occurring in the mine.” The key question for resolution, as posed by counsel, is what is an accident within the meaning of Section 103(k), *supra*. The next step is to look at the Act for a definition of “accident”. Section 3(k) of the Act defines “accident” as including “a mine explosion, mine ignition, mine fire ...” The Act does not define the term “mine fire.” The Secretary has made reference to §30 CFR 75.1103-4(a)(2)² and 30 CFR §50.2(h)(6).³ The Secretary’s regulations are promulgated subject

² Section 75.1103-4(a)(2) provides, as pertinent, as follows: “...Where used, sensors responding to radiation, smoke, gases, or other indications of fire, shall be spaced at regular intervals to provide protection...”.

³ Subsequent to the hearing, the parties stipulated that the transcript should be amended to reflect the fact that the Secretary cited Section 50.2(h)(6) and not Section 50.10(h)(6) as was set forth in the hearing transcript. Section 50.2(h)(6) provides that “accident” means, as pertinent, as follows:

to notice but under the authority of the Act.

The sections referred to by the Secretary do not relate to the issuance of a Section 103(k) order no. Mainly they relate to the definition “of fire” as it pertains to regulatory responsibilities of a mine operator such as reporting an accident, a fire, or having various sensory equipment. However, once we’re dealing with the authority of the Secretary under a section of the Act, the only controlling definitions are those set forth in the Act, rather than some regulatory definition or provision that doesn’t pertain to a section of the Act.

The Commission has held that in interpreting a statute, the plain meaning of its terms is controlling. *Phelps Dodge, supra*, at 651-652. Further, as set forth in numerous commission cases, in determining the meaning of a term reference is made to its ordinary meaning. *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *see also* cases cited therein.

In ascertaining the common meaning of a statutory term resort is made to a dictionary.⁴ I note that in *Webster’s Third New International Dictionary* (2002), “fire” is defined as “the phenomenon of combustion manifested in light, flame, and in heating, destroying and altering effects.” (emphasis added). *Random House Dictionary of the English Language*, (2nd ed.) (unabridged) (1996) defines “fire,” as is pertinent as “a state, process, or instance of combustion in which fuel or other material is lighted and combined with oxygen giving off heat, light and flame” (emphasis added). What is in common in both of these unabridged dictionary definitions is the fact that the ordinary meaning of “fire” means the production of a flame.

In the case at bar, there was not a flame present in the cited areas, when observed by the inspector. Applying the common meaning, I don’t find any ambiguity with regard to the language of Sections 103(k), *supra*, and 3(k), *supra*.

I have also take into cognizance the Secretary’s argument with regard to deference. However, when it comes to deference, the starting point is the plain meaning of the statute and, whether there’s any ambiguity. *Phelps Dodge, supra*, I find that, based on the common meaning of “fire” that there is not ambiguity in Section 3(k), *supra*.

As set forth in *Akzo Noble Salt v. FMSHRC* 212 F 3rd 1301 (D.C. Cir. 2000). The Secretary’s interpretation of a Regulation to be deferred to when it is the fair and

“In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery.”

⁴ The Secretary made some reference to treatises and treatise at various discussions, but they are not authoritative when it comes to the issue of what is the ordinary meaning of a statutory term. The only authoritative source for the common meaning of the word set forth in a statute is a dictionary.

“considered judgment.” *Akzo, supra*, at 1304. I can not find any cases that require or hold that an authoritative interpretation is, as in the case at bar, an argument by counsel and/or position of a Secretary’s witness at trial.⁵

Conclusion

Based on the parties’ stipulations and for all the above reasons, I find that since the evidence fails to establish that there was a mine fire, it follows that there was not an “accident” as defined in Section 3(k), *supra*. Therefore, I find that there was not any basis to allow for the issuance of an Order under Section 103(k) of the Act. Thus, as was stipulated to by the parties, the order at issue is **Dismissed**.

ORDER

The **Order** issued by the inspector is dismissed, and the Notice of Contest filed by the operator is sustained. If further Ordered that this case be Dismissed.



Avram Weisberger
Administrative Law Judge

Distribution: (CERTIFIED MAIL)

Robert H. Beatty, Jr., Esq., Dinsmore & Shohl, LLP, 215 Don Knotts Blvd., Morgantown, WV 26501

Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Chicago, IL 60604

/lp

⁵ Moreover, I take cognizance of the Secretary’s Inspector who opined that a fire could start up at any time. He does have extensive experience as firefighter. However, the record does not contain evidence of any extensive experience with regard to coal fires, or that the chemical factors, or physical factors relating to coal fires, are the same as fires that a fireman would normally encounter. Also, it has not been established that the inspector is an expert relating to coal combustion. Therefore, I do not accord much weight to his above opinion.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001

September 28, 2010

MICHAEL R. LEE,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	
	:	Docket No. WEST 2009-1063-DM
v.	:	Case No. RM-MD 2008-13
	:	
	:	
GENESIS, INC.,	:	Mine ID: 24-01-01467
Respondent.	:	Troy Mine

DECISION

Appearances: Michael R. Lee, *pro se*, Troy, Montana, Complainant;
Karen L. Johnston, Esq., Jackson Kelly, PLLC, Denver, Colorado, on behalf of
Respondent.

Before: Judge Paez

This case is before me upon a complaint of discrimination filed by Michael R. Lee (“Lee”) against Genesis, Inc. (“Genesis”), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the “Act” or “Mine Act”), 30 U.S.C. § 815(c).

I. Procedural Background

Lee filed a complaint on August 20, 2008, with the Mine Safety and Health Administration (“MSHA”), pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).¹ By letter dated June 4, 2009, MSHA informed Lee that, based on the information

¹ Section 105(c)(2) of the Mine Act states, in relevant part:
Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as [s]he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, [s]he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, . . . alleging such discrimination or interference and propose an order granting appropriate relief.

30 U.S.C. § 815(c)(2).

gathered during its investigation of his complaint of discrimination, it had determined that a violation of section 105(c) of the Mine Act did not occur. Lee, without the assistance of counsel, initiated this case on June 23, 2009, under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).² Lee alleges he was terminated from employment at Genesis for complaints he made regarding health and safety at the Troy Mine. Lee also alleges that Genesis denied him his safety bonus and that Genesis attempted to have Lee's unemployment benefits denied.³ A hearing was held in Coeur d'Alene, Idaho, pursuant to section 105 of the Act, 30 U.S.C. § 815. At the conclusion of the hearing, the parties were permitted to submit written post-hearing briefs.⁴

Genesis acknowledges that Lee engaged in a protected activity and suffered adverse action. However, Genesis asserts there is no causal connection between the two and that Lee was terminated based on poor performance. Therefore, the general issue before me is whether Lee's termination was motivated in part by the protected activity, or whether Genesis would have taken action based on Lee's unprotected activity alone.

For the reasons stated below, Complainant's discrimination claim is dismissed.

II. Findings of Fact

² Section 105(c)(3) of the Mine Act states, in relevant part:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

30 U.S.C. § 815(c)(3).

³ During the hearing, Lee did not present any evidence regarding his alleged safety bonus. However, in a letter dated September 28, 2008, to the Montana Department of Industry, Lee states he was paid a safety incentive after his termination. (Compl. Ex. C-95.) Regardless, the safety incentive is discretionary. (Compl. Ex. B-101.) Further, Lee admitted that Genesis unsuccessfully contested Lee's receipt of unemployment benefits, as Lee in fact received unemployment benefits from the State of Montana. (Tr. 16, 217; Compl. Ex. D.)

⁴ After the hearing, Lee submitted a Post-Hearing Statement on January 27, 2010. Genesis submitted a Post-Hearing Brief on January 26, 2010, and a Response to Complainant's Post-Hearing Statement on February 3, 2010. Lee submitted a Reply Statement on April 2, 2010.

Genesis operates the Troy Mine in Montana where Lee worked. The Troy Mine is an underground mine that produces copper and silver concentrate. (Tr. 28.) This mine does not use the sophisticated technology that more modern mining operations have adopted. Rather, the Troy Mine employs an older system of crushers and float circuits that filter out the valuable ore from the rock and debris using mechanical and chemical processes.

The process begins with the extraction of copper and silver ore that is embedded in rock. Once this ore is extracted from the ground, it is crushed, travels on a conveyor belt to a secondary crusher, and then travels to the fine ore bin. (Tr. 28, 248.) From the fine ore bin, the rock is conveyed to the concentrator, which contains the grinding circuit and the flotation circuit. (Tr. 248.) The particles exit the grinding circuit through cyclones, which separate out the heavier debris using centrifugal force, and then enter the float circuit as slurry, which is a mixture of water and finer particles. (Tr. 115, 249-50.) The flotation circuit is located in the “ball mill” area of the mine and consists of two circuits – the rougher circuit and the cleaner circuit, which are used to separate out the copper and silver ore from the slurry. (Tr. 251-52.) The flotation operator is required to adjust the amount of chemicals added to the slurry in response to the changes in “feed grade” – i.e., the percentage of valuable ore flowing into the circuits. (Tr. 256.) The flotation operator also has the responsibility to continually evaluate slurry moving through the rougher circuit and determine through visual inspection whether the “reagent” levels—i.e., chemical substance levels—need to be adjusted. (Tr. 176, 258-59.) This whole process is aimed at extracting as high a percentage of copper and silver ore from the mined rock as possible.

Not long after Lee was hired, Genesis installed an on-stream analyzer to assist in real-time analysis of the feed grade traveling through the flotation circuit. (Tr. 256.) As the slurry leaves the mill, it goes to the refuse or “tailings area” for thickening and then goes through a system of pipes over the length of several miles to the tailings pond. (Tr. 30, 253-54.) If the copper and silver ore is not recovered from the slurry before it reaches the tailings, then it is forever lost. (Tr. 254-55.) Thus, the ore recovery rates from the flotation circuit achieved by a flotation operator are critical to the profitability of the mining operation. Indeed, during the entire milling process, a number of samples are taken at various points on each shift for analysis at the mill assay lab to determine whether a proper rate of ore recovery is taking place. (Tr. 255-56.) The Genesis mill installed an on-stream analyzer in the fall of 2006, and it became operational in June 2007. (Tr. 256-57.) A flotation operator’s performance is based upon recovery rate measurements. (Tr. 86-87.) The flotation operator is part of a four-person team that also includes a tailings operator, a grinding operator, and a grinding helper. (Tr. 254.) The Troy Mine had a day shift and a night shift. (Tr. 119.)

Michael Lee worked as a miner over a period of approximately twenty-five years before he was hired by Genesis. (Tr. 24.) Genesis first hired him on January 23, 2007, as a temporary employee at the Tech 1 level. (Tr. 26.) Lee’s brother, who worked for Genesis, recommended Lee for the job, and Lee was at times on the same four-person team with his brother during his employment with Genesis. (Tr. 265-66, 457-58.) In March 2007, Genesis offered Lee a permanent job working in the secondary crusher and, occasionally, in the ball mill. (*Id.*) Lee was promoted to Tech 2 shortly after he was offered permanent employment. (Tr. 26; Ex. R-2.) A few months later, Lee was moved to the concentrator and promoted to Tech 3. (Tr. 27, 268;

Ex. R-2.) Mill Manager Steve Lloyd testified that he “expected a lot” out of Lee because of his prior experience (Tr. 280.) Lee was employed in a similar mining operation in Alaska for several years just prior to his employment with Genesis, though that mining operation was heavily computerized unlike the Troy Mine (Tr. 146-47, 279-80.) Lee had been terminated from the position at the Alaska mine because he failed a drug test. (Tr. 148.)

The record establishes that Lee engaged in protected activity. In the spring of 2007, Lee complained about dim lighting in the secondary crusher, and he provided maintenance supervisor Clint Jensen with a list of light fixtures needing repair. (Tr. 36-37.) Lee testified they were not fixed for several months. (Tr. 37.) Steve Lloyd addressed the repair himself. (Tr. 310.) Later, in July 2007, Lee observed an ignition switch problem on a tailings pickup truck. (Tr. 164.) Lee called a mechanic to fix the problem and marked the issue on a vehicle preshift safety card. (Tr. 164.) However, he did not have any verbal communications with anyone in management regarding the condition. (Tr. 164-65.) Lloyd testified that he did not learn of this issue until he read Lee’s prehearing documents in this matter. (Tr. 311.) In October 2007, Lee left a note for Lloyd pointing out the failure of an emergency stop button. (Tr. 45; Ex. R-6.) Lloyd corrected the condition, responded to the note, and thanked Lee for bringing the issue to his attention. (Tr. 165; Ex. R-6.) During the fall of 2007, Lee marked “no safe access” on his pre-shift cards for several days because he observed an open flame from a heater in a reagent storage area within 15 feet of the chemical storage area. (Tr. 50.) This issue was abated by red-tagging and shutting off the heater. (Tr. 320.) In a November 21, 2007, meeting, Lloyd informed Lee that he was not getting promoted to Tech 4 because he needed more experience. (Tr. 337; Ex. R-7.) However, Lee received his promotion approximately one month after this meeting. (Tr. 339; Ex. R-2.)

Lee testified that, over time, he became more aware of safety issues in his workplace. (Tr. 225.) For example, on a preshift card, Lee wrote down that he felt there should be a horn on the regrind mill. (Tr. 358.) However, because it is not required by MSHA and did not appear to provide any greater measure of safety, Steve Lloyd denied this request. (Tr. 359.) Additionally, Lee provided Lloyd with a handwritten note regarding the sumps’ identification tags and switches. (Tr. 359-60.) Lloyd told Lee that only one sump was not identified properly, but he also acknowledged Lee’s concern over the switch problem and replaced it. (Tr. 360.)

In January 2008, Lee was assigned to shovel snow off of a roof. (Tr. 55.) While doing so, he pointed out that the ladder used to climb up to the roof was “rickety” and that there was no fall protection. (Tr. 57; Compl. Ex. B-14.) About ten minutes later, Lee was instructed to come down off the roof. (Tr. 58.) In February 2008, Lee found a note in the garbage can in Clint Jensen’s office identifying an unsafe spot in the mine due to a fallen rock. (Tr. 64, 67; Compl. Ex. F-135.) Lee contacted the district manager of MSHA and gave a statement regarding this note, but did not tell anyone at Genesis that he was doing so. (Tr. 69-70, 173; Compl. Ex. F.) During this time, Lee was working as a float operator and had been assigned to that position for approximately five months. (Tr. 283.) Lee was the primary float operator beginning in January 2008. (Tr. 282.)

Steve Lloyd testified that in March 2008 he removed Lee from flotation operator as a “wake-up call” to show he was concerned about Lee’s performance. (Tr. 283.) Lloyd stated that

in a performance meeting he made it clear to Lee that his current results were unacceptable, as Lee had the lowest recovery numbers of all four crews. (Tr. 280, 284.) Lee testified that he did not view this change as a punishment or demotion. (Tr. 97; Compl. Ex. B-13.)

In April 2008, Lee was moved to the ball mill in order to get additional training on the float circuit. (Tr. 463.) Also in April 2008, Mike Roby and Steve Lloyd addressed Lee's phone usage. (Tr. 81-82.) Lee was given a written warning to limit his personal phone calls on company time. (Tr. 81-83.) On May 30, 2008, Lloyd held a meeting with Lee to discuss performance expectations. (Tr. 293.) Clint Jensen and team leader and tailings operator Mike Roby were also present. (*Id.*) Lloyd communicated to Lee that he wanted Lee to do his best and to do as well as his peers, but Lloyd testified he did not give Lee specific recovery percentages because these numbers tend to fluctuate. (Tr. 293-94; Compl. Ex. B-35.) Lee went back on the flotation operator circuit in June 2008 and had the highest recovery of the month. (Tr. 295; Compl. Ex. A-d-1, 2.) In June 2008, another team leader, Kelly Cannon, had recovery numbers three points lower than other crews. (Tr. 294.) However, Cannon had only one week of flotation experience at that time. (*Id.*)

In July 2008, Lee's recovery numbers on two shifts were fifteen points below that of other crews. (Tr. 76, 103, 300; Ex. R-4.) As Mike Roby testified, low recoveries mean monetary loss, because more copper and silver ore are lost as refuse in the tailings. (Tr. 462.) Lloyd believed Lee's performance problem was due, in part, to the fact that he did not rely on the analyzer and did not "pan his circuit" – i.e., did not place slurry from a float circuit in a pan and swirl it around to separate out the copper or silver ore to see how much is being recovered and use this information to adjust the amount of chemicals added to the float circuit. (Tr. 444.) Lloyd and Lee both testified that Lloyd spent time teaching Lee how to properly pan a circuit; however, Lee admitted he still had difficulty perfecting this technique. (Tr. 439-40, 442.) Also, Mike Roby believed Lee's performance was impacting the rest of the crew because Lee's crew members were becoming very negative. (Tr. 486.) For example, Lee was involved in a "heated argument" with his brother when they were on the same four-person team. (Tr. 494.) Lee also had shouting matches with Clint Jensen and Jeff Franke, another Genesis employee. (Tr. 303.) Additionally, Lee admitted to a disagreement with Mary Jo Moore that brought her to tears. (Tr. 128-31.) Lee even stated, "[t]hat is the only incident that I remember where I had intimidated somebody to tears." (Tr. 130-31.)

Lee was the day shift float operator on July 18, 2008, when a power bump (or loss of electricity) occurred that caused the mill water pumps to stop running. (Tr. 206-07.) Lee testified that if the mill water pumps go down, the float operator has to "start running" to limit the loss of copper and silver ore to the tailings. (Tr. 208.) Steve Lloyd testified that Lee did not respond to the bump "like the rest of the crew." (Tr. 370; Compl. Ex. B-36.) Lee did not jump up and run to drain his flotation cells, and he did not turn off his reagents. (Tr. 369.) After this incident, around July 24, 2008, Lloyd decided to terminate Lee. (Tr. 415.) Lloyd testified that he did not consider giving Lee a few days off rather than firing him, because he stated he was "actively counseling" Lee beginning in April 2008. (Tr. 419.) During the "counseling sessions," Lloyd did not give Lee any documentation and did not keep any documentation in a personnel file. (Tr. 419, 421.) Lee testified that Genesis's apparent policy, as conveyed to the state

unemployment division, was that mill employees who could not demonstrate competency at the Tech 4 level would be demoted to Tech 3. (Tr. 131-32; Ex. B-19, 20.) On August 4, 2008, Lloyd, along with Jensen, Roby, and Vic White, the human resources manager, held a meeting with Lee where he was informed that his employment at Genesis was being terminated for poor performance and spending too much time in the break room. (Tr. 75-76.)

III. Principles of Law

Section 105(c)(1) of the Mine Act provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation.

30 U.S.C. § 815(c)(1).

Under established Commission law, a complainant in a section 105(c) proceeding establishes a prima facie case of a violation if a preponderance of the evidence proves (1) that he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-800 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Id.* If the mine operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activities and would have taken the adverse action in any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328-29; *Pasula*, 2 FMSHRC at 2800; *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

In evaluating whether a complainant has proven a causal connection between protected activities and adverse action, the following factors are to be considered: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between protected activity and the adverse action; and (4) disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F. 2d 86 (D.C. Cir. 1983).

In analyzing a business justification as an affirmative defense for an adverse action, the Commission has held that:

[t]he proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities [T]he narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. *Cf. R-W Service System, Inc.*, 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

Chacon, 3 FMSHRC at 2516-17.

IV. Further Findings of Fact and Conclusions of Law

Because Genesis neither contests that Lee engaged in a protected activity when he made several safety complaints nor contests that Lee suffered adverse action when his employment was terminated, the only issue to be decided is whether the adverse action was motivated, at least in part, by Lee's protected activity, or whether Genesis would have taken the adverse action for unprotected activity alone.

A. CAUSAL CONNECTION

1. Knowledge of Protected Activities

Steve Lloyd, who ultimately made the decision to terminate Lee, did not dispute that he was aware of Lee's safety complaints. In fact, Lee frequently went to Lloyd with his safety concerns. However, Lloyd was not aware of two of Lee's complaints: Lee's statement to MSHA regarding the note found in Jensen's garbage can and the pickup truck ignition switch problem. Lee admitted he did not inform anyone in management of these two complaints, and Lloyd testified he did not know about these complaints until after Lee initiated this discrimination proceeding. Moreover, Lloyd testified, in response to numerous questions, that none of Lee's safety concerns were in any way part of his decision to terminate Lee's employment. Lloyd stated that the reason he terminated Lee was due to Lee's poor performance. (Tr. 308.) Moreover, Lee testified that he had great respect for Lloyd and believed Lloyd was a good manager and truly concerned about safety, as evidenced by his actions in response to Lee's safety complaints. (Tr. 223.) I find Lloyd to be a very credible witness and credit his testimony about his being unaware of Lee's safety concerns reported to MSHA. Nevertheless, I determine that Genesis had knowledge of Lee's other protected activities, given Lee's history of reporting safety issues to Lloyd.

2. Hostility

Lee continued to receive promotions during his tenure at Genesis, even after making safety complaints. There is no evidence that Lee received any written warnings or demotions. Lloyd stated he "actively counseled" Lee to help Lee perform his job to the best of his ability. Additionally, Lee was personally thanked by Lloyd for bringing safety violations to his attention. While Lee testified that Clint Jensen seemed to be upset with him at times, there is no evidence that Jensen, or any other member of management, treated Lee with any hostility after making the

complaints or solely because of Lee's concerns. Moreover, Lee was permitted to take vacation even though he did not follow proper procedure for requesting time off. (Tr. 341.) Even though Lee did not receive his Tech 4 promotion when originally scheduled, after gaining more hands-on experience, he was promoted. Also, Lee did not consider being taken off the flotation circuit in March 2008 to be an adverse action.

Lee further alleges that Genesis informed, and continues to inform, potential employers that Lee is not eligible for rehire, which is preventing Lee from obtaining employment. Specifically, Lee stated that he believes Genesis was "blacklisting" him. (Tr. 239.) On cross-examination during the hearing, Lee addressed the allegation:

Q: Other than the comment from this woman [at the trucking company where Lee applied for a job] that Genesis stated you were not eligible for rehire, [are there] any other facts that cause you to conclude that you're being, as you said, blacklisted by Genesis?

A: No other facts, no.

(Tr. 241.) On redirect, Lee admitted he made assumptions and had "no way of knowing what Genesis is telling potential employers." (Tr. 242.) Other than this unsupported testimony, Lee offered no other evidence of Genesis's alleged blacklisting. I credit Lloyd's testimony as to his lack of knowledge about Lee's discussions with MSHA, as well as his reasons for terminating Lee due to performance. Because Lee was let go by Genesis due to its stated issues with his performance, I believe that informing potential employers that Lee is ineligible for rehire at Genesis is a reasonably accurate statement based on the actions Genesis took regarding terminating Lee's employment. Considering all the evidence adduced at hearing as a whole, I determine that neither Lloyd nor Genesis's management exhibited hostility or animus towards Lee due to his protected activities.

3. Coincidence in Time

For the first thirteen months of Lee's employment, Genesis did not issue him any reprimands or take any disciplinary action against him. During those thirteen months, Lee made his safety complaints to management. Lee first brought a safety concern to Genesis's attention only a few months after he began employment at Genesis. The last "protected activity" that anyone at Genesis knew about prior to Lee's termination was in January 2008 when Lee was shoveling snow on a roof. Lee was not terminated until seven months later in August 2008. In other cases where adverse action was found to be motivated, in part, by a protected activity, the employees experienced adverse actions less than two months – usually within a few days – after engaging in a protected activity. See *Pasula*, 2 FMSHRC 2786; *Robinette*, 3 FMSHRC 803; *Chacon*, 3 FMSHRC 2508; *Driessen*, 20 FMSHRC 324; *Sec'y of Labor on behalf of Gatlin v. Kenamerican Res., Inc.*, 31 FMSHRC 1050 (Oct. 2009). Here, no such coincidence exists. I, therefore, determine that there is no coincidence in time between Lee's protected activity and the adverse action taken against him.

4. Disparate Treatment

In examining the disparate treatment factor, the Commission has stated that, “[t]ypical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter.” *Chacon*, 3 FMSHRC at 2512. Here, little evidence was offered as to whether other employees were disciplined or demoted based on performance. Both parties admitted that Lee was taken off of his flotation circuit to get more hands-on experience. And even Lee admitted that he did not perceive this event as a disciplinary action or demotion. While the evidence may tend to show that no other Genesis employee had been fired recently (*see* Tr. 509), Lloyd credibly testified that there were high performance expectations of Lee because of his prior experience. Even though the other crews’ recovery numbers all varied, Lee’s numbers were more contrasting than his experienced-operator peers. Lloyd testified that Kelly Cannon was not disciplined for his low numbers because he had little experience, whereas Lee had significant flotation circuit experience. Lloyd’s testimony on these facts was not undermined by cross-examination. Cannon was not guilty of the same, or more serious, offense as Lee. Lee had more experience and his recovery numbers were significantly lower.

Moreover, Lloyd testified that members of Lee’s team, including Lee’s own brother as well as the team leader, had complained about Lee’s lackadaisical approach to his work, such as remaining in the ball mill for long periods of time instead of actively checking the floatation circuits. Lloyd testified that he believed this affected the morale of the team, as testimony already reflected that Lee had interpersonal problems with some of his coworkers, some of which resulted in crying and in shouting matches. Lloyd also was aware that Lee had been using the company telephone to call his girlfriend in Alaska, and she also had been calling Lee at work on the company phone line. Although Lloyd did not discipline Lee for this, he did reiterate to Lee that these actions needed to stop. It is reasonable for Lloyd to have considered these other incidents in combination with the fluctuation in Lee’s performance to decide to terminate Lee. Notwithstanding the scant evidence on the discipline Genesis meted out to other employees for performance issues, I determine that the evidence presented does not establish that Lee suffered disparate treatment.

Consequently, in considering the above four factors, I determine that Lee has failed to prove a causal connection between his protected activities and the adverse action of his termination by Genesis.

B. AFFIRMATIVE DEFENSE

Genesis asserts as an affirmative defense a business justification for terminating Lee. The Commission has stated that, “[i]f a proffered [business] justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate.” *Chacon*, 3 FMSHRC at 2516. Here, I credit the testimony of Steve Lloyd who testified he had high performance expectations for Lee because of his many years experience – specifically, his experience at a more technologically advanced mine with a more difficult flotation circuit. (Tr. 280.) Lloyd expected Lee to “set the standard” on recovery and to help define how to make the flotation

circuit better, rather than “create the average.” (*Id.*) With regard to the July 18, 2008, power bump incident, Lloyd credibly testified that Lee did not respond to the bump “like the rest of the crew,” in that he did not jump up and run to drain his flotation cells or turn off his reagents. (Tr. 369-70; Compl. Ex. B-36.) According to Mike Roby, instead of responding to the power bump Lee continued to sit and eat, and Roby relayed that information to Lloyd. (Tr. 370.) Lee did not contradict Lloyd’s testimony regarding this incident.

Moreover, the record revealed other problems Lee experienced. Employees were allowed one five-minute phone call per shift. (Tr. 83.) Lee asserts that all of his calls were made on his breaks but that he did make long distance calls to his girlfriend in Alaska. (Tr. 84, Compl. Ex. B-16.) Lee asserts that he stopped making phone calls after Mike Roby held a meeting with the whole crew and admits that he received a written warning. (Tr. 82, 84, Compl. Ex. A.) Also, Lee made plans to go to Alaska in December 2007 and marked his vacation in the flotation operator’s log book to try to find a replacement. (Tr. 194.) However, Lee did not talk to Clint Jensen or Steve Lloyd about taking vacation. (Tr. 341, Compl. Ex. B-34.) Even though his vacation was not authorized under the normal policy, Lee was permitted to take vacation because he had already purchased plane tickets. (Tr. 341-42.) At the hearing, Lee testified that he could not remember if he purchased plane tickets before noting his vacation request. (Tr. 195.)

Additionally, Lee testified that, on average, he would spend a maximum of 2.5 hours over the course of a 12-hour shift in the control room and/or break room. (Tr. 197.) However, Steve Lloyd testified that several people, including Lee’s brother, Joe, and Patty Regh, informed him that Lee would actually spend five to six hours in the break room. (Tr. 299.) Joe Lee and Patty Regh did not testify at the hearing even though Lee acknowledged that he could have subpoenaed them to either corroborate his testimony or cross-examine them. (Tr. 512.) The excessive time in the break room was a major concern for Lloyd because, in order to do well at the Genesis Mill, an operator needs to keep after the circuit and watch it carefully. (Tr. 299.) Lloyd also testified that Lee’s attitude was affecting other crew members in that they felt it unfair that Lee was spending so much time in the break room. (Tr. 302.) Lloyd felt that if he reassigned Lee, Lee’s attitude would continue to be a problem. (Tr. 302.) Indeed, Lloyd had already reassigned Lee in a previous month and though Lee showed he could do the job well in June, by July his numbers had slipped below average and there was no evidence of a change in Lee’s attitude. Mike Roby’s testimony regarding Lee’s attitude supported Lloyd’s assertions.

As stated above, low recovery numbers create a negative financial impact on the company. A recovery percentage just three points lower than the other average numbers over the course of one month can mean almost \$100,000 in lost revenue. (Tr. 296.) The alleged justification of poor performance would have motivated Genesis for terminating Lee. The potential monetary loss for Genesis in July 2008 could have been up to \$500,000. Based on this calculation and the fact that Lee did not impeach or contradict this evidence, I find that Genesis’s disciplinary action was not “so out of line with normal practice that it was a mere pretext” to a “discriminatory motive.” *Id.* While being mindful as to not substitute for the operator’s business judgment, surely such a large monetary loss in such a short amount of time is enough to discipline an experienced employee. Accordingly, Lee’s unprotected activity of spending multiple hours in the break room, which led to his low recovery numbers, motivated Genesis to

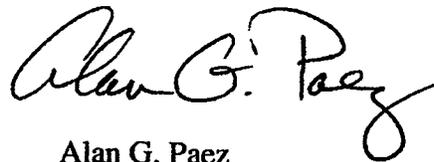
terminate Lee's employment. Genesis has established it would have taken adverse action for an unprotected activity alone.

Moreover, I find Lee to be less credible because, throughout his testimony, he frequently forgot dates of events and could not remember pertinent facts relating to incidents. (*See* Tr. 26, 34, 43-44, 46, 52-53, 82-85, 160, 179-80, 200, 206.) Lee's credibility is further diminished by the fact that he would not directly answer questions posed by Genesis's counsel, and his testimony was weakened significantly by cross-examination. (*See* Tr. 197, 204, 207, 225, 234-35.)

For all of the reasons discussed above, I conclude that Lee did not prove, by a preponderance of the evidence, a prima facie case with regard to the adverse action being motivated, in any part, by the protected activity. Additionally, I conclude that Genesis prevailed in its affirmative defense. Therefore, Lee has failed to establish that Genesis discriminated against him in violation of section 105(c) of the Mine Act.

V. Order

In light of the foregoing, it is hereby **ORDERED** that Complainant's discrimination claim be **DISMISSED**.



Alan G. Paez
Administrative Law Judge

Distribution: (Certified Mail)

Michael R. Lee, 140 Little Lane, Troy, Montana 59935

Karen L. Johnston, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

/ac

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001-2021

Telephone: (202) 233-3880

Fax: (202) 434-9949

September 28, 2010

R S & W COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	
v.	:	Docket No. PENN 2010-523-R
	:	Citation No. 7006738, 05/05/2010
	:	
SECRETARY OF LABOR	:	Docket No. PENN 2010-524-R
MINE SAFETY AND HEALTH	:	Order No. 7004057, 05/25/2010
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
	:	Mine: R S & W Drift Mine
	:	Mine ID: 36-01818

ORDER OF DISMISSAL

Before: Judge McCarthy

The cases before me involve a § 104(a) Citation No. 7006738 and related § 104(b) Order No. 7004057 issued as a result of R S & W's failure to provide the Mine Safety and Health Administration (MSHA) with a certified mine map after having temporarily closed the R S & W Drift Mine. R S & W filed a notice of contest of the Citation and Order by letter dated June 4, 2010, and filed a Motion for an Expedited Hearing. On June 9, 2010, I issued an Order Denying Contestant's Motion for Expedited Hearing and set this matter for hearing on July 13, 2010.

In the interim, on June 10, 2010, Contestant was served with the Secretary's proposed penalty assessment for Citation No. 7006738.¹ Thereafter, on June 21, 2010, the Secretary filed a Motion to Stay and Continue Hearing Date pending the filing of a Petition for Assessment of Civil Penalty, provided that Contestant filed a notice of contest to the proposed penalty assessment. R S & W objected to the relief requested in the Secretary's Motion. On July 2, 2010, I issued an Order granting the Secretary's Motion to Stay and Continue the Hearing Date, pending the filing of a Petition for Assessment of Civil Penalty.

Contestant R S & W, however, did not contest the Secretary's proposed penalty assessment. Therefore, by letter dated September 16, 2010, the Secretary moved to dismiss this contest proceeding because R S & W did not contest the Secretary's proposed assessment of penalty as required by the statute and applicable regulations.

¹Sec. 104(b) orders are not assessed civil money penalties. Accordingly, no penalty was assessed for Order No. 7004057.

The relevant provisions of section 105(a) and (b)(1)(A) of the Mine Act provide as follows:

SEC. 105. (a) If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

(b)(1)(A) If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty. A copy of such notification of the proposed assessment of penalty shall at the same time be sent by mail to the representative of the mine employees. If, within 30 days from the receipt of notification of proposed assessment of penalty issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the notification of proposed assessment of penalty, such notification shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a notification of proposed assessment of penalty issued under this subsection shall constitute receipt thereof within the meaning of this subsection.

Similarly, the applicable procedural rules of the Commission provide as follows:

§ 2700.25 Proposed penalty assessment.

The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment.

§ 2700.26 Notice of contest of proposed penalty assessment.

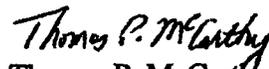
A person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty assessment. A person who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the underlying citation or order pursuant to § 2700.20. The Secretary shall immediately transmit to the Commission any notice of contest of a proposed penalty assessment.

§ 2700.27 Effect of failure to contest proposed penalty assessment.

If, within 30 days from the receipt of the Secretary's proposed penalty assessment, the operator or other person fails to notify the Secretary that he contests the proposed penalty, the Secretary's proposed penalty assessment shall be deemed to be a final order of the Commission not subject to review by any court or agency.

Applying the foregoing statutory provisions and procedural rules to the facts at issue, I find that R S & W did not file the requisite notice of contest to the Secretary's proposed penalty assessment. Accordingly, that proposed penalty assessment became a final order of the Commission that is no longer subject to review.

Accordingly, the contests of Citation No. 7006738 and Order No. 7004057 are **DISMISSED**, and the civil penalty proposed is due and owing.


Thomas P. McCarthy
Administrative Law Judge

Distribution:

Jennifer K. Welsh, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630 East, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

Randy Rothermel, Owner, R S & W Coal Co., Inc., 207 Creek Road, Klingerstown, PA 17941

/cp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

September 29, 2010

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2007-273-M
Petitioner	:	A.C. No. 03-01875-62140
	:	
v.	:	
	:	
	:	
PARKSTONE,	:	
Respondent	:	Mine: Park Stone

**ORDER DENYING RESPONDENT’S REQUEST
TO REOPEN PENALTY ASSESSMENT
ORDER TO PAY**

This case is before me pursuant to an order of the Commission dated, September 7, 2007, remanding these matters for further consideration and determination as to whether the operator, Parkstone, is entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure.¹ In particular, Rule 60(b)(1) provides relief from a final judgment in cases where there has been a “mistake, inadvertence, surprise, or excusable neglect.” Fed. R. Civ. P. 60(b)(1).

This matter arose because Parkstone failed to notify the Secretary of Labor (“Secretary”) that it wished to contest the proposed penalties within 30 days of receipt of the proposed penalty assessments. Parkstone alleges that it failed to respond to the penalty assessment because it mistakenly believed the citations were dismissed as part of other litigation. However, Parkstone’s request to reopen was filed almost two years after the assessment became a final Commission order, and thus, would be untimely.² Nevertheless, Parkstone’s additional claim of MSHA’s lack of jurisdiction is not time-barred. *Sea-Land Serv., Inc. v. Ceramica Europa II*,

¹ While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied “so far as practicable” Rule 60(b). 29 C.F.R. § 2700.1(b).

² Under Fed. R. Civ. P. 60(b)(1), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered.

Inc., 160 F.3d 849, 852 (1st Cir. 1998); *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994). Parkstone asserts that the activities involved are not subject to Mine Act jurisdiction and the citations should be vacated. The Secretary opposes reopening the proposed penalty assessment and states that Parkstone's jurisdictional claim is not meritorious.

In prior litigation, specifically, Docket No. CENT 2005-96-M, in which the citations in that case were dismissed, Parkstone agreed and stipulated that MSHA has jurisdiction in the "pit" area of Parkstone's operation.³ (See Stipulations and Motion to Approve Settlement Agreement, signed and dated August 16, 2006). Parkstone further agreed that the products of its mine, 03-01875, enter commerce or affect commerce within the meaning of sections 3(d), 3(h), and 4 of the Mine Act. *Id.*

Section 3(h)(1) of the Mine Act defines "coal or other mine" as "an area of land from which minerals are extracted . . . and lands . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals . . . or used in, or to be used in, the milling of such minerals." 30 U.S.C. § 802. Section 4 of the Mine Act states that each mine, "the products of which enter commerce, or the operations of products of which affect commerce . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803.

First, Parkstone's jurisdictional claim is based on the assertion that the "mine site [sic] is located on private property and operated by family members owning the property with no employees." (Motion at 1). Parkstone states that the Secretary sent Commission Judge Jacqueline Bulluck a document stating that "[t]he following factors, among others, shall be considered in making determinations of what constitutes mineral *mining* under 3(h)(1) and whether a physical establishment is subject to either authority by MSHA or OSHA: . . . the number of individuals employed in each process." (emphasis added) (Motion at 2). However, that document, a prehearing report, actually stated, in relevant part, "what constitutes mineral *milling* under 3(h)(1). . . ." (emphasis added).

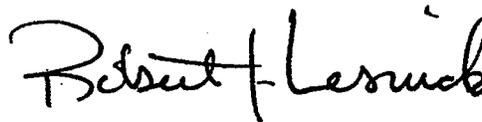
The twelve citations in the case at hand all involve the mining areas, the "pit" or equipment used in the pit and mining operations, or record-keeping and reporting. None of the citations mention the "garden" area that Parkstone asserts is not subject to MSHA jurisdiction. The pit area is undisputedly a mineral extraction area, and the products of the pit area enter commerce and affect commerce within the meaning of the Mine Act. Additionally, the pit water pump is equipment used in the work of extracting minerals. Therefore, the number of individuals employed is not a jurisdictional consideration and MSHA properly issued the citations and Parkstone is subject to the Mine Act jurisdiction. Accordingly, Parkstone's request to reopen based on mistake is time-barred as discussed above.

³ Parkstone states that when the citations were dismissed in Docket No. CENT 2005-96-M, it mistakenly believed the citations in the case at hand (Docket No. CENT 2007-273-M) were also dismissed.

Even if the request to reopen was not time-barred, Parkstone has not made a showing of extraordinary circumstances. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). Parkstone's conclusory statement that it believed the underlying citations in this case were part of another case lacks sufficient detail. The statement does not demonstrate extraordinary circumstances, and does not provide an adequate basis to reopen.

Also, Parkstone has not identified any facts that, if proven on reopening, would constitute a meritorious defense. *See FG Hemispheres Associates, LLC v. Democratic Republic Of Congo*, 447 F.3d 835 (D.C. Cir. 2006). The only defense suggested by Parkstone is lack of jurisdiction, which, as discussed above, is not meritorious

Based on the foregoing, Parkstone's request to reopen the penalty assessment is **DENIED**. Parkstone is **ORDERED TO PAY** the proposed penalty assessment of \$1,081.00 within 30 days of this order.⁴ Upon receipt of payment, this matter is **DISMISSED**.



Robert J. Lesnick
Chief Administrative Law Judge

Distribution: (Certified)

Carl E. Parks, President, Parkstone, 196 Saint Elizabeth Road, Morrilton, AR 72110

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor, Arlington, VA 22209-2296

Myra James, Chief, Office of Civil Penalty Compliance, MSHA, U. S. Department of Labor, 1100 Wilson Blvd., 25th Floor, Arlington, VA 22209-3939

/amc

⁴Payment should be sent to: U.S. Department of Labor, Payment Office/MSHA, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001

202-434-9981/Tele 202-434-9949/Fax

September 29, 2010

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : Docket No. SE 2008-356
Petitioner : A.C. No. 40-03217-139758 -02
: :
v. :
MOUNTAINSIDE COAL COMPANY, : Harris Branch/Tackett Creek Surface Mine
Respondent :

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Tommy D. Frizzell, Jacksboro, Tennessee, on behalf of Mountainside Coal Company.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of a Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Petition alleges that Mountainside Coal Company is liable for one violation of the Secretary's Mandatory Safety Standards for Surface Coal Mines and Surface Work Areas of Underground Coal Mines,¹ and proposes the imposition of a civil penalty in the amount of \$35,500.00. Mountainside challenges an order, issued pursuant to section 104(b) of the Act, for its failure to timely abate the violation. A hearing was held in Knoxville, Tennessee, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Mountainside committed the violation, but that it was not significant and substantial ("S&S") or the result of an unwarrantable failure, and impose a civil penalty in the amount of \$1,500.00. I also vacate the section 104(b) Order.

Findings of Fact - Conclusions of Law

Mountainside Coal Company operates a surface coal mine in Claiborne County, Tennessee. The mine is very large and includes several different job sites, some up to four miles apart. On August 21, 2007, Stanley Sampsel, an inspector employed by the Secretary's Mine Safety and Health Administration, conducted an inspection of the mine's Jellico Seam job site. Around noon, he observed very dry and dusty conditions on the haul road, and measured the thickness of the dust layer at from two to three and one-half inches. Haul trucks traveling the

¹ 30 C.F.R. Part 77.

road were stirring up a considerable amount of dust. Ex. G-3, G-4. There was virtually no wind, and the dust clouds raised by the trucks extended for a considerable distance. Sampsel believed that the dust clouds significantly impaired the visibility of the truck drivers and any vehicle or equipment operators that might use the haul road. At 1:00 p.m., he issued Citation No. 7469449, alleging that Mountainside failed to control the haul road dust. Ex. G-2. The penalty subsequently assessed for that violation was paid by the operator.

Sampsel left the mine about 2:00 p.m., in order to complete paperwork associated with the inspection. He then visited a nearby marketplace where he encountered several miners who informed him that dust was a problem at the mine, especially during the second shift, and that the haul roads were watered only when an inspector was there. Sampsel decided to return to the mine that evening. He arrived at the Tackett Creek site about 7:00 p.m. Overburden was being removed at the Tackett Creek site. A loader was operating in a pit area, removing material and dumping it into haul trucks, which transported it to a dump site. Two trucks alternated loading/dumping, traveling a haul road to the dump site and returning to the pit, partially on a different road. A dozer, located at the dump site, pushed the dumped material and occasionally maintained the haul road by clearing it of rocks that had fallen off the trucks.

Sampsel drove to a position just off the haul road, where he observed trucks generating large clouds of dust. He testified that the dust remained suspended from five to ten minutes, depending upon wind conditions, and he measured the dust on the roadway to be one to three inches thick. Tr. 28. He concluded that the dust significantly reduced the visibility of equipment operators in the area and, at 7:30 p.m., issued Citation No. 7469453 for failure to control dust. The time he had fixed for abatement of the violation, 30 minutes, passed, and he did not perceive any effort on the part of the operator to address the problem. Sampsel then issued Order No. 7469454, pursuant to section 104(b) of the Act, withdrawing the miners from the site until the condition was abated.

Mountainside timely contested the order and the civil penalty assessed for the citation.

Citation No. 7469453

Citation No. 7469453 alleges a violation of 30 C.F.R. § 77.1607(i), which requires that “Dust control measures shall be taken where dust significantly reduces visibility of equipment operators.” The violation was described in the “Condition and Practice” section of the Citation as follows:

The haulage roads dump area and pit were not being properly maintained. Dust control measures were not being taken where road dust significantly reduced visibility for the equipment being operated on the roadways, dump and pit areas of

the Tackett #1 job. The road dust ranged from one to three inches deep on the active roadway (at times visibility was near zero).

Ex. G-5.

Sampsel determined that it was highly likely that the violation would result in a permanently disabling injury, that the violation was S&S, that two persons were affected, and that the operator's negligence was high. The citation was issued pursuant to section 104(d)(1) of the Act, and alleged that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard.² A specially assessed civil penalty in the amount of \$35,500.00 was proposed for this violation.

The Violation

The weather in the area of the mine had been very hot and dry for an extended period, and mobile equipment traveling on the roadways created dusty conditions that required considerable attention. Typically, water trucks were used to treat the roadways at the beginning of the day shift and following the noon break. Tr. 36-37. Once treated, dust was controlled for a period of two-to-four hours. Tr. 34, 36-37. There was a dedicated water truck driver on the day shift. On the evening shift, 5:30 p.m. to 3:30 a.m., a water truck was operated by the foreman or a utility man, as time permitted. Alan King, the second shift foreman, conducted his preshift examination of the Tackett Creek site around 3:00 p.m. He then followed his standard routine. He met with his utility man, Lewis Gaylor, and they proceeded to conduct preshift examinations at other job sites and erect light plants for the night's work. By about 8:00 p.m., they had finished erecting light plants at the King Mountain site, and Gaylor was dispatched to fill the water truck and begin watering the roads.

As noted above, Sampsel had arrived at the Tackett Creek site around 7:00 p.m., and at 7:30 p.m., he observed a layer of dry powdery dust from one to three inches deep on the haul road. The large haul trucks traveling the road raised dust clouds that trailed out behind them for some distance. The dust clouds raised by the trucks are depicted in photographs taken shortly before the citation was issued. Ex. G-6, G-7. Sampsel had been sitting in his parked vehicle, a Jeep, on the side of the haul road when dust raised by a passing haul truck reduced his visibility to near zero. Tr. 39, 54.

Respondent makes much of the fact that Sampsel did not ride with the haul truck drivers, or inquire whether their visibility was reduced by the dust. Tr. 66, 160. However, it is not necessary that Sampsel have actually ridden in the truck to determine whether the operator's visibility was significantly reduced. Sampsel had ridden in such trucks, and was capable of

² The parties stipulated that the predicate section 104(d)(1) order, Order No. 7550843, issued on June 3, 2005, was in paid status and that there had not been an intervening "clean" inspection of the mine. Tr. 8-9.

making that assessment by observing the dust cloud. Tr. 60. Andy Michael, one of the haul truck drivers, agreed that the trucks were raising dust clouds, but testified that his visibility was not significantly impaired. Tr. 169-71. However, that broad conclusory statement was made in response to a leading question, and I accord it little weight. Obviously, a dust cloud behind a truck would not impair the driver of that truck's visibility. However, on occasions when the trucks passed each other, both drivers' visibility would have been significantly impaired for a brief time. In addition, there were other equipment operators traveling the roads, some operating smaller vehicles like the Jeep that Sampsel was driving. The foreman and utility man traveled to the various job sites, and it is possible that other individuals, e.g., a mechanic would be at the site.

I find that Mountainside failed to employ measures to control dusty conditions that significantly limited the visibility of equipment operators at the Tackett Creek site. Accordingly, I find that the standard was violated.

Significant and Substantial

An S&S violation is described in section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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., Inc.*, 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 Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. A measure of danger to safety was contributed to by the dusty conditions, which limited visibility of equipment operators. The Secretary contends that the dusty conditions could have resulted in a collision involving a large haul truck, and there is little question that such a collision would have resulted in a reasonably serious injury. As is often the case, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event, i.e., a collision.

While Sampsel determined that the violation was "highly likely" to result in an injury, his testimony regarding abatement reflects that he must have regarded the probability of serious injury as considerably lower. As noted in the discussion of the 104(b) Order, *infra*, he allowed 30 minutes for the violation to be abated, and would readily have extended the time if he had been informed that efforts were being undertaken to address the condition, e.g., that the water truck was on the way or was being filled. Tr. 45. Consequently, he would have allowed mining operations to continue for an hour or longer.

Sampsel was concerned about a possible collision between a haul truck and a slower moving loader or dozer. Tr. 40-41. In fact, he specified that two persons were affected by the violation because a collision between two large vehicles would likely result in injuries to both drivers. *Id.* However, the truck drivers' visibility was not impaired by dust trailing their vehicles and, as a picture taken by Sampsel demonstrates, the trucks raised considerably less dust as they slowed when they entered the pit or dump area, where the loader and dozer were located. One of the pictures that Sampsel took of a haul truck that had slowed to enter the pit shows that it raised some dust, but it is questionable whether it was of sufficient quantity to constitute a hazard.³ Tr. 27-28; Ex G-6.

It also appears that Sampsel's estimate that the dust clouds remained suspended for five-to-ten minutes was vastly overstated. The haul trucks traveled at a speed of approximately 20 miles-per-hour ("mph") while moving between the pit and dump areas, and Sampsel estimated

³ Sampsel testified that dust was prevalent in all areas, including the pit, but that he did not recall to what extent the loader operator's visibility may have been limited. Tr. 99.

that the dust clouds extended 200 feet behind the trucks. Tr. 27-29; Ex. G-3, G-4, G-7. He estimated that the dust cloud raised by the truck depicted in a photograph as slowing at the pit area extended for 100 feet. Tr. 27-28. A truck traveling at 20 mph is moving at a rate of 1,760 feet-per-minute ("fpm"); at 10 mph it travels 880 fpm; and, at 5 mph it travels 440 fpm. A dust cloud extending 100 feet behind a truck moving at 5 mph, would indicate that the dust remained suspended for approximately 15 seconds. The result would be the same for a dust cloud extending 200 feet behind a truck moving at 10 mph. While Sampsel's time and distance estimates were, no doubt, rough, they do indicate that dust clouds raised by the trucks remained suspended for considerably less than a minute, and most likely ceased to be hazardous prior to that. Moreover, because of lower speeds, less dust was raised in the pit and dump areas where other vehicles were more likely to be encountered. In addition, as noted previously, a truck driver's vision was not impaired by the dust cloud raised by his own truck. Consequently, it was highly unlikely that a haul truck would strike another vehicle. Although the trucks did pass each other occasionally, those instances were rare because trucks returning to the pit traveled on a different part of the haul road for a portion of the trip. Tr.164-67; Ex. R-5. When the trucks passed, both drivers' visibility would have been impaired for a brief period of time, e.g., 5-10 seconds, but it is highly unlikely that any other vehicle would have been in the vicinity.

Given all of these factors, I find that while it is possible that a collision and serious injury could have occurred as a result of the violation, the Secretary failed to carry her burden of establishing that it was reasonably likely that a serious injury would occur in the normal course of continued normal mining operations. I find that the violation was unlikely to result in a permanently disabling injury and that it was not S&S.

Unwarrantable Failure - Negligence

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

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) ("*R&P*"); *see also Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has

existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Citation was issued pursuant to section 104(d)(1) of the Act, which requires that the violation be both S&S and the result of an unwarrantable failure. 30 U.S.C. § 814(d)(1). Having found that the violation was not S&S, it is technically unnecessary to decide whether it resulted from an unwarrantable failure. However, it is necessary to address the issue of negligence, which is alleged to have been high. Because the S&S findings herein may, or may not, become final, the issue of unwarrantable failure will be addressed for the sake of judicial economy.

The Secretary contends that Mountainside's negligence rose to the level of unwarrantable failure because it had been put on notice of the need for enhanced compliance efforts by the earlier issued citation, that the condition was obvious, and that it presented a high degree of danger to miners. Sec'y. Br. at 18-21. The argument has appeal, but none of the points are without qualification.

As to notice, Sampsel knew that King typically conducted his preshift examination with a day shift foreman, and believed that he had consulted with Roger Kidd, the day shift foreman to whom the earlier dust citation had been issued at the Jellico Seam job site. Tr. 35-36. However, King testified that he conducted his preshift examination with a different day shift foreman, and had no knowledge of the issuance of the earlier dust citation until the following day. Tr. 129, 132. The Secretary argues that the operator, Mountainside, was aware of the earlier issued citation through Kidd, and should have assured that King was aware of it. While the Secretary may be technically correct, the argument fails to address the practical problems with the notice argument. Given the short period of time that elapsed following issuance of the first citation, and the lack of actual communication between Kidd and King, I place little weight on the notice factor.

As noted above, I have found that the violation was not S&S, based partially on Sampsel's testimony that he would have readily extended the time for abatement if he had been advised that

some effort was being made to address the condition. That appears to be inconsistent with his determination that the condition was highly likely to result in a serious injury. For the reasons stated in the S&S analysis, I find that the condition did not pose a high degree of danger to miners.

The Secretary contends that large dust clouds generated by the haul trucks were obvious to anyone at the site. However, King was not at the Tackett Creek site when the cited condition developed. When King conducted his preshift examination of the site, the roads were in good condition. Tr. 106, 121-22. Sampsel had been at the Tackett Creek site during the day shift, and did not observe any problems with the roads. Tr. 33. After conducting his preshift examination, King met with Gaylor, and proceeded to other job sites to erect light plants. They had finished erecting light plants at the King Mountain site, and Gaylor was dispatched to fill the water truck and water the roads. Tr. 107, 125. King was about to travel to the Tackett Creek site when he was advised of Sampsel's actions.

The Secretary argues that King was familiar with the general conditions, the long-standing drought, and knew, or should have known that hazardous dusty conditions would develop at the site if watering was not done shortly after the second shift commenced. That is a fair argument, and justifies a finding of moderate negligence on the part of Mountainside. However, in my opinion, given King's earlier observations, it does not satisfy the Secretary's burden to establish that Mountainside's negligence was high or the result of an unwarrantable failure.

Order No. 7469454

Order No. 7469454 was issued pursuant to section 104(b) of the Act, which provides that an inspector may require all persons not involved in abatement activities to be withdrawn when an operator has failed to timely abate a violation and it has been determined that the time for abatement should not be extended.⁴ The Order effectively prohibited all work at the site, except

⁴ Section 104(b) of the Act provides:

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

30 U.S.C. § 814(b).

use of the water truck to correct the cited condition. Sampsel issued the Order because he believed that no effort had been made to address the dusty conditions in the 30 minutes that had been allowed for abatement.

In order to present a prima facie case that a section 104(b) withdrawal order was properly issued, the Secretary must prove that the originally cited condition continued to exist after the period allowed for abatement expired. *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509 (Apr. 1989). The operator may rebut the Secretary's prima facie case by showing that the conditions in the citation had been abated within the period allowed, but that they recurred. The operator may also challenge the reasonableness of the time period set for abatement, or the Secretary's refusal to extend the period. *Energy West Mining Co.*, 18 FMSHRC 565, 568 (Apr. 1996). The burden is on the operator "to bring to MSHA's attention any specific abatement measures justifying extension of the abatement period." *Energy West Mining Co. v. FMSHRC*, 111 F.3d 900, 904 (D.C. Cir. 1997). In evaluating whether an inspector has abused his discretion in issuing a section 104(b) withdrawal order, in lieu of extending the abatement period, the following factors should be considered: 1) the degree of danger that extension would have caused to miners; 2) the diligence of the operator in attempting to meet the time originally set for abatement; and, 3) the disruptive effect that an extension of time, or a failure to extend the time, would have had upon operating shifts. *Youghiogeny and Ohio Coal Co.*, 8 FMSHRC 330, 339 (Mar. 1986).

There is little question that the cited condition continued to exist when the 30-minute period set for abatement had expired. The water truck had not yet arrived at the site. However, it is also apparent that Mountainside had acted diligently in addressing the condition. Gaylor had arrived at the water truck's location before he was aware that a citation had been issued. From that point, it should have taken approximately two hours to abate the condition, 60-75 minutes to conduct a preshift examination of the truck, fill it with 12,000 gallons of water and drive it to the Tackett Creek site, and 40-45 minutes to water the roads. Tr. 148-50. The haul road had been watered, and the Order was terminated at 9:10 p.m., one hour and forty minutes after the citation had been issued. Tr. 44; Ex. G-10. Consequently, the condition was abated about as expeditiously as it could have been, given the circumstances that existed when the citation was written. It does not appear that the degree of danger to miners was such that a longer period of abatement would have been inappropriate. While approaching darkness would have rendered the situation more dangerous, Sampsel readily acknowledged that he would have extended the time for abatement if he had simply been informed that the water truck was being filled or was on the way.

This is a close case. However, two considerations convince me that the Order should not be sustained. First, the original time set for abatement was somewhat arbitrary. Sampsel's testimony on the reasonableness of the time he set for abatement was inconsistent. He believed that 30 minutes would have been a reasonable time to abate the condition, if a truck loaded with water had been at the site. Tr. 42, 91. However, he acknowledged that he did not know where Mountainside's water trucks were located, and did not ask. Tr. 88. Nor did he discuss with the

operator the amount of time that would be required to abate the condition. Tr. 87-88. Sampsel conducted a safety run when he arrived at the site, and should have been aware that there was no water truck present, and that more than 30 minutes would be required to abate the condition. Ex. R-1 at 5.

Second, I do not accept Sampsel's testimony that he was not aware of any effort on the part of Mountainside to address the condition. There was an effective communications system at the mine site, and Sampsel had access to it. All of the miners had CB radios, and could readily communicate with each other. Sampsel also had a CB radio, and generally knew which frequencies the miners used when he was on the site. Tr. 90. The evidence regarding communications between Sampsel and the miners is conflicting. Sampsel described communications with King prior to issuance of the order, but King denied communicating with Sampsel until after the order had been issued. Tr. 43-44, 125, 139. Haul truck driver, Michael, testified that he advised Sampsel, by CB radio, that the water truck was on the way before the job was shut down.⁵ Tr. 159, 170, 174. There also were radio communications regarding Gaylor's location and the status of his efforts to get the water truck loaded and driven to the site. Tr. 110-11, 146-47. Sampsel acknowledged that he did not recall all of the conversations on the radio that night. Tr. 90.

While Sampsel may not have been advised directly by King about the status of the water truck, he was, or should have been, aware that the truck was being filled and brought to the site. With the ready availability of radio contact between and among Sampsel and all of the miners on the site, if Sampsel was unaware that the water truck was being filled and brought to the site, his lack of knowledge would have to have been, at least in part, self-imposed. Sampsel readily acknowledged that he would have extended the time for abatement. Under the circumstances, I find that the operator met its burden of bringing to MSHA's attention information that would have justified an extension of the abatement period, and that the violation was promptly abated.

Upon consideration of the above, Order No. 7469454 will be vacated.

The Appropriate Civil Penalty

Mountainside is a medium-sized operator, with a medium to large-sized controlling entity. The assessment data reflects that it averaged 0.5 violations per inspection day during the relevant period, a relatively low incidence of violations. Mountainside does not contend that payment of the proposed penalty will affect its ability to continue in business. The violation was promptly abated.

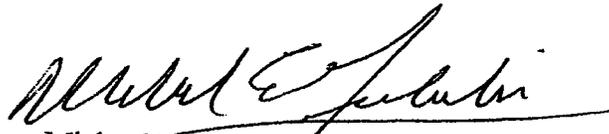
Citation No. 7469453 is modified to a citation issued pursuant to section 104(a) of the Act and is affirmed. The gravity of the violation was found to be less serious than alleged, including

⁵ Much of Sampsel's testimony is couched in terms that he was not informed *by King* about the status of the water truck. See, e.g., Tr. 44,

that it was not S&S. In addition, the operator's negligence was found to be moderate. A specially assessed civil penalty of \$35,500.00 was proposed by the Secretary. The lowering of the levels of negligence and gravity justify a significant reduction in the proposed penalty. I impose a penalty in the amount of \$1,500.00 upon consideration of the above and the factors enumerated in section 110(i) of the Act.

ORDER

Order No. 7469454 is **VACATED**. Citation No. 7469453 is modified to a citation issued pursuant to section 104(a) of the Act and is **AFFIRMED, as modified**, and Respondent is **ORDERED** to pay a civil penalty in the amount of \$1,500.00, within 30 days.



Michael E. Zielinski
Senior Administrative Law Judge

Distribution (Certified Mail):

Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street,
Suite 230, Nashville, TN 37219-2456

Tommy Frizzell, 280 Tionesta Drive, Jacksboro, TN 37757

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

October 6, 2010

SUMITOMO METAL MINING	:	CONTEST PROCEEDING
POGO, LLC,	:	
Contestant	:	Docket No. WEST 2010-429-RM
	:	Citation No. 6478675; 12/04/2009
v.	:	
	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Pogo Mine
ADMINISTRATION (MSHA)	:	Mine ID 50-01642
Respondent	:	

ORDER

This case is before me on a motion to reverse the dismissal of the above captioned case. This case was dismissed by Order dated August 19, 2010. The Commission was informed that the operator, Sumitomo Metal Mining Pogo, LLC (“Sumitomo”), had paid the penalty relating to the contest case. However, Sumitomo filed a motion to reopen the penalty assessment with the Commission on April 2, 2010, and the Secretary of Labor (“Secretary”) informed the Commission that she did not oppose the request to reopen. By Order dated September 30, 2010, the Commission granted Sumitomo’s request to reopen and directed the Secretary to file a petition for assessment of penalty. That penalty proceeding, which includes Citation No. 6478675, is assigned as Docket No. WEST 2010-940-M.

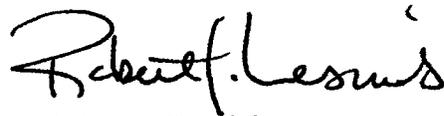
An operator may initiate a contest proceeding by filing of a Notice of Contest pursuant to section 105(d) of the Mine Safety and Health Act of 1977 (“Act”) and Commission Procedural Rule 20. 30 U.S.C. § 815(d); 29 C.F.R. § 2700.20. This proceeding challenges the issuance or modification of a citation or order. The notice of contest of a citation or order “does not constitute a challenge to a proposed penalty assessment that may subsequently be issued by the Secretary under section 105(a) of the Act, 30 U.S.C. § 815(a), which is based on that citation or order.” 29 C.F.R. § 2700.21(a).

An operator may also contest a proposed penalty assessment for a citation or order pursuant to section 105(a) of the Act and Commission Procedural Rule 26. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.26. “A contest of the proposed penalty assessment prompts the filing of a civil penalty proceeding and places into issue not only the proposed penalty, but the fact of violation and any special findings contained in the citation or order.” *Chestnut Coal*, 29 FMSHRC 107, 108 (Feb 2007) *citing* *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620-23 (Sept. 1987); 29 C.F.R.

§ 2700.21(b). This can result in two separate proceedings before the Commission involving the same parties and the same demand for relief.

Because there is an open penalty proceeding, “[t]he contest proceeding no longer serves any useful purpose, practically or legally. As a general principle, duplicative litigation is to be avoided in the federal courts, as it undoubtedly is in other courts and adjudicative bodies. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).” *Chestnut Coal*, 29 FMSHRC at 108 (Feb 2007).

In light of the foregoing, Sumitomo’s Motion to Reverse the Dismissal is **DENIED**. The operator may contest any penalty assessment for this citation and is not precluded from raising all factual and legal questions in the penalty proceeding. 29 C.F.R. § 2700.21.



Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Dana M. Svendsen, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2220, Arlington, VA 22209-2296

Keith E. Bell, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

Thomas Paige, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor East, Room 2226, Arlington, VA 22209-3939

Myra James, Chief, Office of Civil Penalty Compliance, MSHA, U.S. Dept. Of Labor, 1100 Wilson Blvd., 25th Floor, Arlington, VA 22209-3939

/amc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021
Telephone: (202) 434-9958
Fax: (202) 434-9949

October 7, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2009-663-M
Petitioner	:	A.C. No. 14-01477-191032
	:	
v.	:	Docket No. CENT 2009-664-M
	:	A.C. No. 14-01635-191033
NELSON QUARRIES INC.,	:	
Respondent	:	Mine: Plant 1 & 5

DECISION
ORDER TO PAY

This case is before me on two petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Nelson Quarries, Inc., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 and 820 (the “Mine Act” or “Act”). The two violations were issued by MSHA under section 104(a) of the Mine Act, one at Plant #1, and the second one at Plant #5. The Secretary proposed assessed penalties of \$460.00 and \$100.00, respectively.

The parties waived their right to 20 days notice in order to be heard on September 16, 2010 in Springfield, Missouri. The parties presented testimony and documentary evidence at the hearing and entered into certain stipulations that were accepted by the Court and entered into evidence as Ct. Ex. A.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Nelson Quarries, Inc. (“Nelson”) operates the five limestone quarries known as Plant numbers 1 through 5 in various counties in Kansas. They employ three crews of miners. Nelson blasts, drills, extracts and crushes limestone at each of these sites. They bid on contracts and use whichever quarry is closer to the customer to supply the product. Because there are five plants and three crews, there are at least two plants not in operation at any one time. Nelson operates its plants intermittently and seasonally. The parties stipulate that Nelson is an operator of the two plants in question here and that the mine known as Plant #1 meets the definition of a mine under the Act subject to the

jurisdiction of the Federal Mine Safety and Health Review Commission (“the Commission”). (Ct. Ex. A).

Inspector Bellfi is a journeyman MSHA mine inspector with previous experience as a member of a mine safety committee at two mines subsequent to serving as highway patrolmen for the State of Nevada for 12 years. On May 18, 2009, he conducted inspections of Plant #1 and Plant #5, and as a result issued citations nos. 6447701 and 6447705, respectively.

A. Plant #1

1. Citation No. 6447701

On May 18, 2009, Inspector Bellfi issued citation no. 6447701, Ex. S-1, to Nelson for a violation of section 56.14132(a) of the Secretary’s regulations. The citation alleges that:

The backup alarm for the Ford F350 welding truck, KS plate PJF841, was not maintained in a functional condition in that the backup alarm did not operate when inspected. The vision from the drivers seat is obstructed by the location of the Miller welding unit attached the (sic.) bed of the truck. The welder is usually by himself performing maintenance and there is little foot traffic at the mine. A fatal injury could occur from this type of hazard.

The inspector found that it was unlikely that an injury would occur but if it did, it would affect one person and could reasonably be expected to cause a fatality. The operator’s negligence was assessed as moderate. The Secretary has proposed a penalty of \$460.00.

2. The Violation:

The standard, 30 U.S.C. § 56.14132, states, in pertinent part:

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

When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have- an automatic reverse-activated signal alarm; a wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement; a discriminating backup alarm that covers the area of obstructed view; or, an observer to signal when it is safe to back up.

The parties stipulated that the alarm did not function when it was inspected and that the rearview mirror and the rear window of the truck were obstructed by a Miller welder mounted behind the cab. (Ct. Ex. A).

Inspector Bellfi testified that he was met by Forman Clift and Mr. Perez of Nelson Quarries when he arrived to conduct his inspection. Mr. Bellfi testified that he observed that Nelson had a welder mounted on an F350 pickup truck directly behind the cab obstructing the rearview mirror. (See photo Ex. S-4). He testified that the driver of the truck would have a blind spot directly behind the truck and would be unable to see a pedestrian in that area even when using the side view mirrors. (Tr. 34-36). Bellfi spoke with the operator of the welding truck and was informed by him that he usually worked alone when operating the welder. Although there were several people on foot in the mine, Bellfi could not place someone working for any period of time directly behind the truck. Based upon this information, Bellfi assessed the number of persons affected by the violation as one and the gravity as unlikely. (Tr. 28-29 and 36-37). The degree of negligence was assessed as moderate because there was no indication on the pre-shift examination that the backup alarm was not functioning and the operator stated that he did not advise management of that fact. Bellfi found these to be mitigating factors justifying a reduction in negligence from high to moderate. (Tr. 38-39).

With the regard to the nature of an ensuing injury, the inspector testified that based upon his 12 years as a highway patrolman and his review of a MSHA fatalgram involving a similar truck lacking a backup alarm, he felt an accident would result in a fatal crush-type injury. (Ex. S-2). He explained how a vehicle of any size traveling at a slow rate of speed would knock a pedestrian down rather than throw him up and over the vehicle; it would then take the pedestrian's feet out from under him and roll over him, causing a fatality. (Tr. 30-34).

Forman Clift testified that he was present when the welding truck was inspected and he had no knowledge that the backup alarm was not functioning. He further testified that the welder worked either by himself or with one helper and the plant is shutdown when he performs his work. (Tr. 94-95). The welder is located across the bed of the truck directly behind the cab. Mr. Clift acknowledged that despite the truck being equipped with side view mirrors, there is still a blind spot behind the truck. Although, he felt the truck had a "pretty good panoramic view." (Tr. 97). He pointed out that the typical mining truck is significantly larger than a Ford pickup truck and would have a larger blind spot. (Tr. 97-99).

Jason Schmidt, Nelson's mechanic, testified that he was contacted by Clift on the day of the inspection and asked to investigate the cause of the alarm failure. The wires for the alarm system are located in the back of the truck bed. When Schmidt touched them together they worked intermittently but the connector had corroded. He stated that corrosion causing loose wires is an "everyday common problem" and can be caused by hitting a bump in the road, wind, weather and the like. (Tr. 119-120). However, inspections for corrosion of wires were conducted only when the vehicle needed an oil change every six to seven thousand miles. (Tr. 120-121). The operator told Schmidt that the alarm had worked earlier that morning. He made the necessary repairs in a timely manner. (Tr. 114-117). Mr. Schmidt estimated the weight of the truck at 7,000 pounds and the weight of the welder at 2,000 pounds. (Tr. 122).

Nelson argues that the negligence should be assessed as low and the resulting injury as less than fatal, the rationale being that a Ford F350 pickup truck is substantially smaller than the usual mine vehicle and that Nelson was not aware of the malfunctioning alarm prior to the inspection.

I find neither of these arguments persuasive. The standard requires that the alarm shall be maintained in a functional condition. Although the backup alarm may have worked when the pre-shift examination was performed, (although the examination report was not submitted into evidence), knowing that corrosion of wires is an everyday common occurrence causing the alarm to work intermittently at best, I find moderate negligence on Nelson's part in its failure to inspect the wiring more frequently than every six or seven thousand miles. The argument that the severity of an injury should be assessed at something less than fatal because a truck/welder combo weighing just barely less than two tons is lighter than the usual mining vehicle is beyond absurd. I find the testimony of Inspector Bellfi, as a MSHA investigator and 12 year veteran of the highway patrol, credible and controlling on this issue. Although, common sense alone would lead to the conclusion that the human body could not survive being rolled over by a vehicle of 9,000 pounds.

B. Plant #5

1. Citation No. 6447705

Nelson Quarries, as stated above, operates five plants on an intermittent basis depending upon the location of their customer and the season. On January 25, 2009, Nelson filled out a Notification of Commencement of Operations, Closing or Moving form indicating that they were closing Plant #5 at Cherryvale from February 2, 2009 until February 28, 2009. (Ex. S- 9, at 5). Inspector Bellfi traveled to the plant on May 18, 2009, and found what he believed to be a closed mine and issued the citation, (Ex. S-5), which states:

The operator failed to notify the nearest MSHA office of the correct start date of mining operations. A notification form was filed at the Topeka field office indicating that the mine would commence mining operations on 2/28/2009. The crushing plant was moved to the location but not constructed. The mine was not operating as of the attempted inspection date 5/18/2009. No notification was given to MSHA to indicate mining would not commence by the original date submitted.

The inspector believed that the property at the time of the inspection was under the jurisdiction of the Occupational Safety and Health Administration ("OSHA") because it was temporarily closed, and issued the citation based upon his lost time and effort traveling to the property for an inspection. Because the mine was not operating, the violation was a paper one. Inspector Bellfi assessed moderate negligence because the

weather had been extremely wet preventing Nelson from bringing the plant on line as anticipated. The Secretary proposes a penalty of \$100.00.

2. The Violation

Section 56.1000 of 30 U.S.C. provides:

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

When a mine is closed, the person in charge shall notify the nearest district office as provided above and indicate whether the closure is temporary or permanent.

The parties stipulated that when Inspector Bellfi arrived at Plant #5, the crusher was present but not set up and had not been, between February 28, 2009 and May 18, 2009. It was further agreed that there had been no drilling, blasting or extracting of limestone during this time period and that Nelson was the operator this mine with Mine ID No. 14-01635. (Ct. Ex. A).

Inspector Bellfi testified that the Nelson had operated Plant #5 for some time as a limestone quarry. As stated above, Nelson operates mobile and intermittent plants depending upon the weather and orders placed by customers. Plant #5 was due to be closed for 26 days according to the Mine Notification form submitted by Nelson. (Ex. S-6). Plant #5 is approximately three hours away from the Topeka field office. (Tr. 44). When the inspector arrived on the property on May 18 and found the crusher in pieces and only a loader and stockpile present, he concluded that the mine was closed and that he lacked jurisdiction to conduct an inspection. (Tr. 46-48). At one point, he testified that he saw customers pulling up and loading their trucks with product from the stockpile but later he testified that he did not see any customers purchasing limestone. (Tr. 46 and 85). As support for his belief that OSHA rather than MSHA had jurisdiction over the property, he cited the *Interagency Agreement Between the Mine Safety and Health Administration, U.S. Department of Labor, and the Occupational Safety and Health Administration, U.S. Department of Labor* (the "Agreement").¹ (Ex. S-7). Inspector Bellfi stated that somewhere in the Agreement, it states that a loader and a stockpile do not qualify as a mine and are under OSHA's jurisdiction. (Tr. 48, 52-53). Further, the workers present at that time would not fall under the protection of the Mine Act (Tr. 59). Only when there is mining activity does MSHA have jurisdiction over the facility; a plant

¹ *Interagency Agreement Between the Mine Safety and Health Administration, U.S. Dept. of Labor, and the Occupational Safety and Health Administration, U.S. Department of Labor*, U.S. Dept. of Labor (March 29, 1979), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=222 ("Interagency Agreement").

being setup would be mining activity. (Tr. 78-80). When only a stockpile and loader remain on the property, jurisdiction reverts back to OSHA according to the Agreement. (Tr. 82).

When Inspector Bellfi informed personnel of the citation, the response was that it had been very wet. Forman Clift also testified that it rained continuously that spring delaying the setting up of the crusher. (Tr. 100). He also stated that plants may be inoperable from a few days to as long as six months, but that they have never been asked by MSHA for notification on a weekly basis when a plant is temporarily idle. (Tr. 101-103). Mr. Schmidt testified that during the period of February to May, he was called out to Plant #5 of several occasions to repair different pieces of equipment including water pumps set up to remove the rain water in the quarry. (Tr. 114).

Numerous Mine Notification forms were submitted by the Secretary for Plant #5 and other Nelson mines as evidence of Nelson's being well aware of the requirement to file such notices and amended notices of movements of plants, temporary closures and openings of the quarries, changes of address or other changes in identification or nature of mining. (Ex. S-9). In fact, page 4 of Ex. S-9 is the form filled out on June 25, 2009, following the issuance of this citation which indicates a closing date of February 28, 2009, and an opening date of August 3, 2009. Page 3 of Ex. S-9 is a revised form prepared the same day indicating an unknown opening date and page 2 is the final form dated July 31, 2009, informing MSHA of the opening date of August 10, 2009.

The Agreement between OSHA and MSHA does not delineate jurisdiction between the two agencies by the presence of a loader or stockpile nor does it state that jurisdiction bounces back and forth between the two agencies depending upon whether a mine is temporarily closed for seasonal or other reasons. The Agreement is, in fact, inclusive, rather than exclusive, in defining MSHA's jurisdiction. It states that the general principle is that the Secretary will apply the Mine Act and the standards promulgated there under to protect miners from unsafe or unhealthful conditions. MSHA has jurisdiction over mines and mills except when "the provisions of the Mine Act either do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites (e.g. hospitals on mine sites) or where there is statutory coverage under the Mine Act but there exists no MSHA standards applicable to particular working conditions on such sites, then the OSHA Act will be applied to those working conditions." (Emphasis added) *See* Interagency Agreement, *citing* 30 U.S.C. § 815. The Agreement cites Mine Act section 3(h) which defines a mine over which MSHA has jurisdiction as "lands, structures, facilities, equipment and other property used in, or to be used in, or resulting from mineral extraction." *Id.* There is also a provision under the Act directing the Secretary of Labor, in determining what constitutes mineral milling, to give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical site. When doubts result as to whether jurisdiction lies with OSHA or MSHA, those doubts will be resolved in favor of the Congressional intent that the facility will be included within the coverage of the Mine Act. OSHA's jurisdiction is

carved out as an exception to MSHA's jurisdiction and applies to brick, clay pipe, refractory plants, ceramic plants, fertilizer product operations, concrete batch, asphalt batch, not mixed plants; smelters and refineries whether or not on mine property and salt, cement and gypsum board plants not on mine property.

The evidence shows that Plant #5 has been in operation under Mine ID No 1401635 since December 2004 as an intermittent/mobile limestone mine. (Ex. S-9). Plant #5 has been under the jurisdiction of the Mine Act and has been subject to regular inspections continually since that time. The property still had a workable quarry on it, the pumps were in operation draining the water in preparation of extracting minerals, there was a loader and cranes, and there was a stockpile resulting from prior mineral extraction present on May 18, 2009. There had not been a reversion of jurisdiction to OSHA at any time. That having been said, the fact that the property was under MSHA's jurisdiction does not address the issue of whether Nelson complied with the standard of notifying MSHA of an accurate expected opening date of its operation. This standard was promulgated to ensure inspections are conducted during times at which it can be verified that the operator is adequately protecting the safety and health of the miners. It also serves to conserve MSHA's expenditure of resources by avoiding travel to mines located far from the field offices when not in operation. *See* MSHA, Comment and Recommendations; Notification of Legal Identity, and Notification of Commencement of Operations and Closing of Mines, 72 Fed. Reg. 35730 (proposed June 29, 2007). The process by which an amended notification could have been provided to MSHA was extremely simple. Nelson could have called or faxed in a revision to the initial notification. The fact that they had done numerous such notifications in the past confirms that they were well aware of the necessity for doing so and the means by which it could have been accomplished.

Nelson argued that the mine was not closed when Inspector Billfi came on May 18, 2009. In support of this position, they offered the self-serving testimony of Mr. Schmidt, the mechanic, to say that he was called to the site multiple times to service equipment located there between February and May. However, Nelson did not produce any work orders, inspection reports indicating equipment needing repair, invoices for parts purchased or any specific dates, times and/or repairs done to lend credence to this very vague testimony. Furthermore, the MSHA notification forms they submitted on June 25, 2009, amending the cited notification, indicate that the mine was closed from February 28, 2009, the originally proposed opening date, until August 10, 2009. (Ex. S-9, at 2-3). Finally, Forman Clift simply stated to the inspector on May 19 that the mine was not yet open because of inclement weather all winter and spring.

From these facts, I conclude Plant #5 was still closed on May 18, 2009, when Inspector Billfi issued the citation. I further find that having given an estimated opening date of February 28, 2009, Nelson violated the standard by not providing a revised notice of opening shortly thereafter with a more accurate estimated opening date.

II. PENALTY

The Mine Act section 110(i) delegates to the Commission and its judges "authority to assess all civil penalties provided in the Act." 30 U.S.C. § 820(1). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 830(a). Therefore, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The administrative law judge then has the authority to assess *de novo* the appropriate penalties taking into consideration the six statutory penalty 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.

30 U.S.C. § 820(1).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *affd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s]... [of] the Act." *Id.* at 294; *Camera Green*, 22 FMSHRC 616, 620 (May 2000).

The parties' stipulation provides that the proposed assessment will not affect the operator's ability to continue in business. (Ct. Ex. A.). I accept this stipulation based upon the evidence presented.

I also find that the operator abated the citations in good faith in a timely manner. The history shows a number of citations, none of which have been significant or substantial, and I find that the following penalties are appropriate in the case given the statutory criteria:

Citation No. 6447701: I assess a penalty of \$460.00 as proposed by the Secretary based upon the negligence and gravity as discussed above.

Citation No. 6447705: I assess a penalty of \$100.00 as proposed by the Secretary based upon the negligence involved as discussed above.

III. ORDER

Based on the criteria in section 110(1) of the Mine Act, 30 U.S.C. § 820(1), I assess a penalty of \$560.00 for the two violations in this docket. Nelson Quarries, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$560.00 within 30 days of the date of this decision.²



Priscilla M. Rae
Administrative Law Judge

Distribution:

Paul M. Nelson, Representative for Respondent, P. O. Box 334, Jasper, MI 64755

Hillary Smith, Conference & Litigation Representative, US Department of Labor,
MSHA, P.O. Box 25367 M/NM, Denver, CO 80225-0367

² Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-3577/FAX 303-844-5268

October 18, 2010

TWENTYMILE COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. WEST 2008-788-R
	:	Order No. 7622426; 03/12/2008
	:	
v.	:	Docket No. WEST 2008-1093-R
	:	Order No. 6686312; 05/06/2008
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 2008-1094-R
	:	Order No. 6685313; 05/06/2008
	:	
	:	Foidel Creek Mine
	:	Mine ID No. 05-03836
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. WEST 2009-333
	:	A.C. No. 05-03836-169779-01
	:	
v.	:	Docket No. WEST 2009-579
	:	A.C. No. 05-03836-175445-01
	:	
	:	
TWENTYMILE COAL COMPANY, Respondent	:	Docket No. WEST 2009-1174
	:	A.C. No. 05-03836-189502-01
	:	
	:	
	:	Foidel Creek Mine

DECISION

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania,
for Twentymile Coal Company;
Jennifer A. Casey, Esq., and Kim R. Rogers, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, and Larry R. Ramey,
Conference & Litigation Representative, Mine Safety and Health
Administration, Denver, Colorado, for the Secretary of Labor.

Before: Judge Manning

These cases are before me on notices of contest filed by Twentymile Coal Company (“Twentymile”) and petitions for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Steamboat Springs, Colorado, and filed post-hearing briefs.

Twentymile operates the Foidel Creek Mine, a large underground coal mine in Routt County, Colorado. The mine extracts coal in panels using a longwall system. As discussed below, the parties settled many of the citations at issue in these cases. Order Nos. 7622381, 6686312, 6686313, 7622426, 8456774, and 8456778, issued under section 104(d)(2) of the Mine Act, were adjudicated at the hearing.

I. ORDER NO. 7622381; WEST 2009-579

A. Background.

On December 12, 2008, Inspector James Preece issued Order No. 7622381 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.360(a)(1) as follows, in part:

A certified person designated by the operator did not make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which a miner was scheduled to work underground between the No. 2 to 3 entry crosscut, 7 Main North (60+56). The following conditions existed: (1) the last preshift examination (rock belt) was certified by date, time, and initials 12-10-2008; (2) a miner was working in the area taking down equipment doors between the entries and installing Kennedy stopping; (3) hazardous conditions existed in the crosscut

(Ex. G-1). The inspector determined that an injury was reasonably likely and that any injury would reasonably be expected to be permanently disabling. He determined that the violation was significant and substantial (“S&S”) and that the company’s negligence was high. Section 75.360(a)(1) provides, in part, that “a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground.” The Secretary proposes a penalty of \$5,645.00 for this order.

Inspector Preece testified that he began his inspection in the area of the rock belt. Dianna Scott Ponikvar, a senior safety representative for Twentymile, accompanied the inspector. Ponikvar informed the inspector that the belt was not in operation. After his examination, they traveled to the 7 Main North between the Nos. 2 and 3 crosscut entries, where they encountered Tim Torres in a crosscut. Inspector Preece testified that Torres told him that he was in the area to

remove a set of equipment doors and install a Kennedy stopping. (Tr. 21; Ex. G-3, p. 3). The inspector noticed materials, including aluminum panels, a foam pack, and a hydraulic jack used to build a Kennedy stoppings were in the area. (Tr. 22-23).

Inspector Preece testified that he observed hazardous loose material, broken ribs, and the improper storage of the foam pack at this location. (Tr. 22-25; Ex. G-2). He stated that the ribs were broken in the area above the location of the stored building materials. The most recent preshift examination had taken place on December 10, 2008. (Tr. 30). Based on what he observed, the inspector immediately issued several citations for the hazardous conditions but he did not issue the subject order until he discussed the matter with Matt Wade, the mine foreman. Preece testified that Wade advised him that the building materials were placed in the crosscut by miners on the midnight shift. (Tr. 23). Because moving the materials into the area took some time and the construction of a ventilation device affects mine safety, Inspector Preece concluded that the delivery of materials in the crosscut was a scheduled activity and that mine management directed the work. (Tr. 55). Inspector Preece testified that Torres told him that he had been assigned by Wade to build the stopping doors. (Tr. 29; Ex. G-3, p. 2). Wade told the inspector that he had not examined the area and he did not check the books to see when the last preshift was performed. *Id.*

Ms. Ponikvar testified that the rock belt has not been used since November 29, 2008. (Tr. 70-71). In the course of the inspection, she entered the subject crosscut with the inspector. In the crosscut they observed the supplies that were being staged for the removal of an equipment door and the installation of a Kennedy stopping. (Tr. 72-74). While they were in the crosscut, Torres entered the area from the opposite side, *i.e.*, the 7 Main North travelway. (Tr. 77-78; Ex. TCC-1). Ponikvar testified that Torres entered the crosscut to confirm that the necessary supplies were present for the planned work. (Tr. 81).

Mr. Wade testified that he sent Torres to the crosscut to make sure that all equipment and supplies needed for the work to be performed were present. (Tr. 95-98, 101). He stated that Torres was not going to be working in the area and that the equipment doors were going to be removed and the Kennedy stopping was going to be installed the following day. *Id.* According to Wade, it takes an entire crew to perform this work; a solitary miner would be unable to do it. (Tr. 98).

B. Summary of the Parties' Arguments Concerning the Violation.

The Secretary argues that preshift examinations are critically important because it is the primary means of detecting developing hazards in a mine, such as a bad roof. The goal of preshift examinations is to protect miners from easily preventable accidents. Twentymile failed to comply with the safety standard because the last examination occurred two days earlier. Twentymile violated the safety standard on two separate occasions. First, Twentymile exposed miners to hazards when it assigned them to deliver supplies to the crosscut. It is highly unlikely that miners performed this work on their own without being ordered to do so by management.

Consequently, it was a scheduled activity that required a preshift examination. Second, Torres entered the area to begin the process of removing the equipment doors and installing the Kennedy stoppings. Management scheduled this activity as well.

At the hearing, the Secretary moved to plead in the alternative that Twentymile violated section 75.361(a). (Tr. 101). That provision, entitled “supplemental examination,” states, in part, “before anyone enters an area in which a preshift examination has not been made for that shift, a certified person shall examine the area for hazardous conditions” The Secretary contends that in the event the court finds that no work had been scheduled in the subject crosscut that required a preshift examination, Twentymile was nevertheless required to perform a supplemental examination for hazardous conditions before anyone entered the crosscut. It is clear that mine management directed miners to enter the area to deliver the supplies and directed Torres to enter the area to check on the supplies. As a consequence, a supplemental examination was required.

Twentymile argues that no violation of section 75.360(a)(1) occurred. Preshift examinations are required three hours prior to an eight-hour cycle in areas of the mine (1) where miners are normally required to work or travel; or (2) where work or travel is scheduled prior to the beginning of the examination. A preshift was not required because no work or travel was scheduled to occur in the crosscut prior to the start of the examination period. No work was being performed in the crosscut at the time of the inspection. Torres was not actively working to remove the equipment door or to install the stopping at that time, nor was he scheduled to do so. Wade testified that he instructed Torres to drop off a scoop in the 7 Main North travelway Entry No. 2, adjacent to the crosscut, in anticipation of the performance of work the next day. (Tr. 95-96). Torres simply walked into the crosscut to make sure the supplies were present. It would take more than one miner to remove the equipment door and install the stoppings.

Twentymile maintains that the Secretary also did not establish a violation of the standard with respect to the dropping off of supplies in the crosscut. Wade testified that the persons who dropped off the supplies may have performed an examination and the Secretary did not prove otherwise. (Tr. 104). In any event, dropping off supplies is not work that requires a preshift examination.

Twentymile argues that the Secretary’s attempt to plead in the alternative at the hearing after the testimony had been completed should be denied. No explanation was given for the unreasonable delay in seeking an alternative ground for recovery. The request was untimely. This attempt to change her theory of the case amounts to legally recognizable prejudice that merits denial of the motion to amend.

C. Discussion.

I find that the Secretary established a violation of section 75.360(a)(1). The evidence establishes that on the previous midnight shift, miners gathered supplies to be used in

constructing the stopping and delivered them to the subject crosscut. A preshift examination was not performed prior to the delivery of this material. The safety standard requires the operator to make a preshift examination within three hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. Although other areas of the mine were preshifted, the crosscut was not. Clearly, miners had to work or travel in the crosscut to perform this work. The miners would have delivered the materials upon the direction of management. Consequently, the work was scheduled by the mine operator. These miners would have been exposed to any hazards in the crosscut, as discussed below. Twentymile argues that a certified person may have performed a supplemental examination of the area. There is no proof that such an examination was performed, however.

In addition, Mr. Torres traveled through the crosscut in the presence of the inspector and Ms. Ponikvar. He went into the crosscut to make sure supplies were present to install the stopping. I credit the testimony of the company's witnesses that Torres did not intend to start the work of removing the equipment door or installing the stopping. Although his exposure to any hazards was not very great, he traveled to the area at the direction of his supervisor.¹

D. Significant and Substantial.

Inspector Preece determined that a number of hazards were present in the crosscut, as listed in the order of withdrawal. He issued section 104(a) citations for these alleged hazards. The inspector alleged that the rib in one area of the subject crosscut was not being supported or controlled. He stated that the outby side of the crosscut had a loose hanging rib measuring 13 inches in thickness, 10 feet in height, and 8 feet in length. (Tr. 23; Ex. G-9). He also alleged that the presence of the foam pack violated the mine's ventilation plan because it was not in a designated storage area.

Inspector Preece was concerned that Torres would start removing the equipment door in the crosscut. Removing the door would create a significant hazard because the doors were secured by stoppings which were helping to support the loose rib. (Tr. 25). If the loose rib were to fall on a miner it could reasonably be expected to cause debilitating injuries. (Tr. 32-33). By not conducting a preshift exam, the operator and its miners would not know what hazards were present in the crosscut before work began.

Twentymile maintains that the evidence establishes that the rib was supported by wire mesh. (Tr. 74; Ex. G-2). Ponikvar testified that the rib did not create a hazard to miners working in the area. *Id.* The presence of the foam pack, while it might have been a technical violation, did not create a hazard. Twentymile also contends that the Secretary failed to establish that there was a reasonable likelihood that any hazard present would result in an injury. Mr. Torres was

¹ Because I find that the Secretary established a violation of section 75.360(a)(1), I do not resolve the issue whether it was appropriate for the Secretary to plead a violation of section 75.361(a) in the alternative after all evidence on this order had been presented.

going to be in the crosscut for a very short time and he was not scheduled to remove the doors or build the stopping. (Tr. 95-98). Due to the nature of the work, it would require a crew of men to remove the equipment door.

A S&S violation is described in section 104(d)(1) of the 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 S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

[i]n 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The Commission provided additional guidance with respect to the third element of the S&S test:

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., Inc.*, 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 Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984) (emphasis added); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

U.S. Steel Mining Co., Inc., 7 FMSHRC 1125, 1129 (Aug. 1985) This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the

time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Looking only at the activities of Mr. Torres on December 12, I find that the Secretary did not establish that the violation was S&S. Torres was simply walking into the crosscut to see if materials were present for the crew to perform the scheduled work the following day. But for the presence of the inspector, he would have been in the crosscut for an extremely short time. It is highly unlikely that he would have sustained any sort of injury. The inspector based the S&S determination, in part, on his belief that Torres was going to start removing the equipment door. As stated above, I find that the evidence establishes that Torres was in the area only because he was directed to park a scoop near the crosscut and then enter the crosscut to check if the necessary supplies were present. I cannot assume that Twentymile would not have conducted a preshift examination before a crew commenced the work of removing the equipment door the following day.

Nevertheless, the inspector also cited Twentymile because the materials to be used to construct the Kennedy stopping were delivered the previous shift. It is clear that a preshift examination was not performed. In addition, there is absolutely no evidence that a supplemental examination was conducted. Whenever a supplemental examination is conducted, the examiner must certify by initials, date, and time that the examination was made. 30 C.F.R. § 75.361(b). No such certification was found in the area. Preshift examinations had been performed in the 7 Mine North, but there is no evidence that the subject crosscut was examined.

I find that the Secretary established that the violation was S&S. There was a violation that created a discrete safety hazard. I find that it was likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. I base this finding on the fact that significant work had been performed on the previous midnight shift when supplies and materials were delivered to the crosscut. The miners would have been in the crosscut for some time dumping rather heavy material in the area. (Ex. G-2, p. 3). Such activities exposed the miners to any hazards that were present. The rib that was of concern to the inspector was partially supported by wire mesh. (Tr. 74-75; Ex. G-2, p. 2). Nevertheless, based on the testimony of the inspector, I find that much of the rib was not adequately supported.² “The preshift examination requirement is unambiguous and is of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 15 (Jan. 1995).

² Preece testified that the supplies for constructing the stopping had been placed directly under the loose rib he was concerned about. Ponikvar testified that the alleged loose rib was on the opposite side of the crosscut. The photographs do not resolve this conflict. My S&S finding is not dependent on a resolution of this conflict in the testimony.

E. Unwarrantable Failure.

The term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

The Secretary argues that the violation was properly designated as an unwarrantable failure because Twentymile could have easily determined whether a preshift examination was conducted by reviewing the record books. When the shift foreman failed to determine whether the crosscut had been preshifted, he placed any miners who entered the crosscut into a potentially hazardous position. The Secretary also notes that Twentymile has been cited for violating the safety standard 13 times in the previous two years. (Tr. 37-38).

Twentymile contends that the violation should not have been designated as an unwarrantable failure. The extent and duration of the violation was very limited. Torres traveled to the crosscut by way of the 7 Main North No. 2 entry, which had been preshifted. The only area that he traveled through that had not been examined was the crosscut and he went there only to make sure that the supplies were present. In addition, no hazards were present in the crosscut. When Torres entered the crosscut, Ponikvar and Inspector Preece were already present. Under these circumstances, there was no aggravated conduct.

I find that the violation was not the result of Twentymile’s aggravated conduct but was the result of its ordinary negligence. The violation existed for a short period of time and miners were only in an area that had not been preshifted for a short time. Although Twentymile has received previous citations for violations of section 75.360(a)(1), the circumstances here were unusual and I find that it had not been placed on notice that further efforts were necessary to ensure compliance. The violation was not particularly obvious. I agree with the Secretary that compliance with 75.360(a)(1) is critically important and that performing preshift examinations is a fundamental safety practice in the mining industry. I find that, in this instance, the failure of the company to perform the examination was a result of simple, ordinary negligence rather than reckless, intentional, or indifferent conduct. This order is **MODIFIED** to a section 104(a) citation with moderate negligence. A penalty of \$2,000.00 is appropriate for this violation.

II. ORDER NO. 6686312; WEST 2009-333

A. Background.

On May 6, 2008, Inspector Barry Grosely issued Order No. 6686312 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.400. The order alleges that:

In the belt entry (#3-entry) of the Main North #1 and #2 main conveyor belt line, from the Portal to crosscut 34 and including the #2 tripper drive area of the #2 Main north belt, the operator allowed combustible material to accumulate. The affected area from the portal to crosscut 34 is about 3400 feet in length.

(Ex. G-10). The order goes on to state that the adjoining crosscuts also contained combustible material. The order states that in this delineated area, accumulations of float coal dust were on the ribs, roof, floor, belt hardware, pipes and hoses, drive motors, belt structures, and electrical control boxes. The order states that the float coal dust ranged in thickness from a couple of sheets of paper to as much as 1/16 of an inch thick or more. The float coal dust was described as being dry and dark grey to black in color. The inspector determined that an injury was reasonably likely and that any injury would reasonably be expected to be permanently disabling. He determined that the violation was S&S and that the company's negligence was high. Section 75.400 provides, in part, that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces . . . shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." The Secretary proposes a penalty of \$50,700.00 for this order.

Inspector Grosely testified that coal was being produced when he arrived at the mine on May 6 but that there had been minimal production on the previous shift. (Tr. 115, 140-41). He reviewed the preshift examination books and noted that there were entries in the books regarding accumulations. Inspector Grosely started his inspection in the transfer building and drive building on the surface. He issued three citations for accumulations of float coal dust and coal fines in those areas. (Tr. 121-22). He then traveled into the mine through the portal for the No. 3 Entry. This entry was the main conveyor belt entry and it was on intake air. (Tr. 124). He testified that he immediately noticed accumulations of float coal dust and, as he traveled further inby, the accumulations became "more pronounced." (Tr. 123, 125-26). The accumulations existed from the portal to Crosscut 34, a distance of 3,400 feet. (Tr. 126).

Inspector Grosely stated that the accumulations were heavier in the crosscuts along the entry. (Tr. 123, 127). Air moves through the belt entry at a rate of 350 feet per minute and the inspector believes that this high velocity caused most of the rock dust that is injected into the entry to travel down the belt line. (Tr. 127-30). As a consequence, there was less rock dust in these crosscuts.

Inspector Grosely estimated that the float coal dust had accumulated to a depth of 1/16th of an inch in some locations. (Tr. 134-36). Inspector Grosely testified that when he rubbed his hand across the top of electrical installations, the float coal dust “flowed like water” and appeared to be very fine. (Tr. 127). He testified that he believes that these accumulations were more than what are typically generated during a normal production cycle at the mine. (Tr. 137). The inspector believes that the extensiveness of the accumulations, combined with the fact that minimal production had occurred on the immediately preceding shift, demonstrated that the conditions he observed had existed for more than one shift and that the accumulations in the crosscuts had existed for a very long period of time. (Tr. 140-41).

Grosely further testified that the accumulations were obvious and extensive. (Tr. 126, 151). He stated that a person without experience in the mining industry could have identified the seriousness of the condition. (Tr. 151, 156). On that basis, he determined that the violation was the result of Twentymile’s unwarrantable failure to comply with the requirements of the safety standard. Inspector Grosely testified that the violation was S&S, because, if mining operations had been permitted to continue, it would have been reasonably likely that a fire or explosion would have occurred, resulting in at least permanently disabling injuries to miners. (Tr. 142, 150-51).

Allan Meckley, a mine foreman for Twentymile, testified that the company had established a rock dusting protocol that included a permanent pressurized bulk rock dusting line in the belt entry. (Tr. 233). Hoses connected to the dust line were used by rock dusting teams to rock dust the entry and the associated crosscuts. (Tr. 235). The belt is rock dusted two to three times a week. (Tr. 238). The company’s preshift examination books reveal that the examiners did not note any hazards or violations from May 4 to May 6, 2008, in the cited entry. (Ex. G-13). Some of the examiners did insert comments indicating conditions which, while not rising to a violation or a hazard, would benefit from additional rock dust. *Id.* The company took action to address the conditions observed by the examiners. For example, in response to these comments in the preshift books, rock dusting was performed on May 5 from Crosscut 78 to the tail of the No. 2 belt, and was progressing toward Crosscut 55. (Tr. 237; Ex. G-13). Rock dusting continued on the morning of May 6. At the same time that Inspector Grosely was inspecting the mine on May 6, Fireboss Tim Bertram examined the No. 1 and No. 2 belts and indicated that the area from the portal to Crosscut 20 could use dust. (Ex. G-13). Mr. Bertram testified that he did not believe that the condition constituted a hazard or a violation of the safety standard. (Tr. 270). Six different mine examiners inspected the entry and, although they all suggested that more rock dust be applied, none of them believed that a hazard existed. (Ex. G-13).

Michael DeZeeuw, a respirable dust sampler in the company’s safety department, testified that the mine has a concrete floor the first 400 feet into the mine and at the belt drives. (Tr. 209-10). Concrete is used in these areas to make it easier to keep the area clean of coal dust. He testified that the rock dust at the Foidel Creek Mine is often grey in color. He accompanied Inspector Grosely during the inspection. He observed the same conditions as the inspector. DeZeeuw testified that the dust in the area was light to dark grey in color. He believes that the

darker material was a mixture of rock dust and float coal dust. (Tr. 214). He did not consider these accumulations to present a hazard and he would not have described it as a hazard in the examination book. *Id.* There was no methane along the belt line.

DeZeeuw further testified that, in his opinion, an explosion or fire was highly unlikely along the belt. (Tr. 215). There were not any significant ignition sources. There was some dust inside electrical boxes, but not enough to propagate a fire or an explosion. The electrical boxes were not required to be permissible. The equipment that needed to be greased was in an area where the floor was concrete and the walls were covered with shotcrete. (Tr. 218). He admitted that there was a belt fire at the mine some time prior to 1999. (Tr. 233). The mine's carbon monoxide monitoring system will detect the presence of smoke and shut down the system. (Tr. 226). The mine contains about eight and a half miles of conveyor belts.

B. Discussion.

1. Significant and Substantial.

Twentymile is not contesting the violation in this instance, but it contends that the Secretary did not establish that the violation was S&S. The Secretary maintains that the conditions observed by Inspector Grosely met all four elements of the Commission's S&S test. Twentymile allowed float coal dust to accumulate over a large area of the No. 3 belt entry. A discrete safety hazard existed. The Secretary argues that Inspector Grosely reasonably determined, based on the particular conditions he observed, that there was a reasonable likelihood that miners working in the area would be injured and that such an injury would be of a reasonably serious nature.

The Secretary contends that ignition sources likely to propagate a mine fire or explosion were present in the belt entry. Rollers are spaced every six to ten feet along the top of the belt line and every ten feet along the bottom. (Tr. 132-33). About 65 rollers fail at the mine every working day. (Tr. 133, 144). Bearings on rollers can fail without any notice. (Tr. 133, 145, 224). When such a failure occurs, there is a potential for sparking and heating of the metal components. Sparking and heat can cause a fire or ignition. Indeed, the Secretary notes that Inspector Grosely observed a failed belt roller during his inspection and he shut down the subject belt line until the accumulations could be removed. (Tr. 133-34; Ex. G-12, pp. 4-5). He also testified that he observed areas where the belt was rubbing against belt hangers. (Tr. 142-43). The belt operates at a speed of 800 to 900 feet per minute. The Secretary argues that the speed of the belt, combined with defective belt rollers and the rubbing of belts against metal parts, has a potential to generate heat. The presence of float coal dust in this environment not only creates a fire hazard, but also enhances the probability of a mine explosion. (Tr. 142-43, 147-48).

Twentymile argues that the Secretary did not establish the third element of the Commission's *Mathies* test because the necessary preconditions for an explosion or fire did not exist. The presence of numerous monitoring and prevention systems further served to safeguard

the belt entry from fire or explosion. To propagate an explosion, float coal dust must be suspended in the air. This occurs as a result of a methane explosion. It is uncontested that there was no methane in the belt entry. The inspector admitted that, in the absence of detectable levels of methane, a methane explosion in the belt entry was unlikely. (Tr. 200-01). The belt entry was very humid, making it less likely that the float coal dust would go into suspension. Also, the inspector did not sample the dust to see what percentage was rock dust.

Twentymile contends that the absence of necessary preconditions for a fire also made any ignition of float coal dust very unlikely. The belt rollers are regularly inspected for damage and the air is regularly tested for the presence of oxygen, carbon monoxide and methane. The belt was equipped with belt slip monitoring devices that automatically shut down the drive belt if the belt malfunctions. Moreover, the belt line was equipped with a fire suppression system and water sprays to reduce the presence of float control dust in the event excessive heat is detected.

For the reasons set forth below, I find that the Secretary established that the violation was S&S. There is no doubt that float coal dust had settled over a large area. The float coal dust had settled throughout the entry for a distance of 3,400 feet. It covered every surface and had also settled into the crosscuts. I credit the inspector's testimony that the float coal dust accumulation was more than would be typically generated in one production cycle. The key issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury.

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990).

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997).

The float coal dust was disbursed over a wide area and was about as thick as a couple of sheets of paper. The accumulations were heavier in the crosscuts. Along the floor of the mine, the float coal dust was on top of rock dust. The rock dust used at the mine is often grey in color rather than white. It is not entirely clear when the float coal dust was deposited, but it was deposited over a number of shifts. The dust was very fine. Some of the accumulations were dry, but the environment in the entry was very humid.

It is important to understand that the area cited by the inspector was at the portal of the mine and was not near the longwall face. There was no methane detected in the area and, assuming continued mining operations, it was unlikely that methane would accumulate in this

area of the mine. The entries were on intake air and velocity of the air was quite high as it passed through this area.

When asked about ignition sources, the inspector testified that he saw several potential ignition sources. He saw evidence that the belt had been rubbing against the belt hangers for an extended period of time. A number of belt rollers had "belt string" wrapped around them. This string is produced as the edge of the belt becomes frayed from rubbing against the metal structure. He stated that float coal dust can saturate the string and burn if it gets caught in a defective belt roller. A belt roller can fail without much warning. Inspector Grosely also believed that the electrical components along the entry could become an ignition source. Finally, some of the bearings in the belt system had been over-greased and this grease could burn if it came in contact with defective rollers.

I find that it was unlikely that the electrical equipment would cause the float coal dust to burn. The cables, boxes, and other electrical components were in good operating order. There is no evidence that they were overheating or were likely to overheat. The fact that some dust was found inside electrical boxes does not help establish that it was likely to ignite.

Although there was a chance that a defective roller could ignite float coal dust, I find that it was unlikely it would start a fire that could create a hazard to miners. The belts used to convey coal and rock at mines today are fire retardant and will not burn under normal circumstances. There is no evidence that piles of loose coal and coal fines had accumulated under the belt, or under or near rollers such that a localized ignition of float coal dust could start a fire that would spread. The same is true where the belt was rubbing against metal components. If such a hot spot ignited a small amount of float coal dust at that location, it was unlikely that this event would start a mine fire. The rollers are checked during preshift examinations and are replaced on a frequent basis. A carbon monoxide monitoring system continuously monitors the belt entry. It is designed to detect any combustion or heat along the belt at an early stage. The belt is also equipped with a belt slip monitoring system that automatically shuts down the drive in the event of belt slippage.

The Secretary relies, in large part, on the belt fire at the Aracoma Coal Company's Alma No. 1 Mine. (Tr. 147). That fire presented a different situation from the present case, however. The water sprays at the belt drive, where the fire started, had been turned off and stoppings separating the escapeways from the belt entry were missing. (Tr. 185). These conditions did not exist in the present case. There have been no fatalities and no reportable injuries resulting from any reportable belt fire since at least 1979 other than the Aracoma fire. *See Cumberland Coal Resources, LP*, 31 FMSHRC 137, 149 (Jan. 2009) (ALJ) (*reversed on other grounds*, 32 FMSHRC 442 (May 2010)).

The key issue when evaluating a citation or order involving float coal dust is the possibility that the dust will be put into suspension in the mine atmosphere. By far the most common way for float coal dust to be put into suspension is from a methane explosion. The

methane explosion need not occur in the immediate area of the float coal dust. The explosion can occur at the working face, for example, and the force of the blast can travel a long distance along the entries of the mine. This force can then cause the float coal dust to fill the mine atmosphere. The force of a methane explosion can also severely disrupt the mine's ventilation system and cause the air to stop flowing through entries. If the air stops flowing, the float coal dust will not be disbursed or diluted, but will stay suspended in the air. When float coal dust is suspended in the air, the exposed surface area of the dust particles increases exponentially, thereby making the dust extremely volatile. The suspended float coal dust can then provide fuel for a methane explosion occurring at the face to continue down the entries for a considerable distance beyond the presence of the methane. In addition, other ignition sources in the immediate area of the coal dust can ignite the suspended float coal dust.

Because float coal dust is highly explosive when it is suspended in the air, applying the Commission's S&S test to such accumulations presents a challenge. The third element of the test requires a showing that there is a reasonable likelihood that the hazard contributed to will result in an injury. At any given time in any given underground coal mine it is unlikely that there will be a serious methane ignition or explosion that will put an accumulation of float coal dust into suspension. It is reasonably likely, however, that there will be at least one serious methane ignition or explosion over the life of a gassy coal mine. If such an event occurs, the consequences are catastrophic and the presence of an accumulation of float coal dust can significantly increase the hazard to miners. The Secretary is not required to establish that it is more probable than not that an injury will result from a violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

It is undisputed that there was no methane present in the cited entries of the mine and there is no evidence that methane had ever been detected in these entries. It is also undisputed that the mine liberates significant quantities of methane. The mine typically liberates between 500,000 and 1,000,000 cubic feet of methane per day. As a consequence, the mine is usually on a 10-day spot inspection cycle.³ Thus, there is always a potential for rapid buildup of methane in the mine, notwithstanding the mine's ventilation system and other controls, which could lead to an explosion.

The Commission has held that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 175, 178-79 (Dec. 1998); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). I credit the testimony of Inspector Grosely in this regard. I also credit Inspector Grosely's testimony that there was insufficient rock dust in the cited area to mitigate this hazard.

It is important to note that, under the logic of Twentymile's argument, an accumulation of float coal dust would not be considered to be S&S so long as methane or other combustible

³ At the time of this inspection, the mine was on a 15-day spot inspection cycle because it was not liberating as much methane in the months preceding the inspection.

materials, such as loose coal and coal fines, were not present along with an ignition source. This argument fails to recognize that the presence of such conditions would likely create an imminent danger. If, upon entering a mine, an MSHA inspector discovered extensive accumulations of float coal dust, detected the presence of more than a trace amount of methane, and found one or more ignition sources, he would be justified in issuing an imminent danger order. A condition does not need to rise to the level of an imminent danger or anything close to an imminent danger to be considered S&S.

Considering the factors set forth in *Enlow Fork*, I find that the violation was S&S. The accumulations were extensive and obvious. Insufficient rock dust was present to render the float coal dust inert. Although there was no methane in the subject entries, the mine is a gassy mine subject to spot inspections. As a consequence, methane could build up rapidly and unexpectedly in an area of the mine closer to or at the longwall face. Such a rapid buildup of methane could reasonably be expected to be exposed to ignition sources that would detonate the methane. In addition, there were ignition sources in the area that could independently ignite float coal dust if it were suspended in the mine atmosphere by a methane explosion further inby. I find that the Secretary established the third and fourth elements of the *Mathies* S&S test. It is the *contribution* of a violation to the cause and effect of a hazard that must be S&S. It was reasonably likely that the hazard contributed to by the violation would result in an event in which there was a serious injury.

2. Unwarrantable Failure.

The Secretary maintains that the violation was caused by the operator's unwarrantable failure to comply with the safety standard. The conditions observed by the inspector were obvious and extensive. She argues that the deteriorating conditions along the entry would have been noticeable to a layperson. Twentymile applied more than nine tons of rock dust to abate the condition. In addition, the condition had existed for a considerable length of time. The operator also had ample notice regarding the need for greater efforts to comply with section 75.400. Twentymile was cited about 45 times for alleged violations of this standard during the 15 months preceding the issuance of the subject order. In addition, Inspector Grosely issued a citation for a similar violation along the No. 7 belt line in October 2006.

Twentymile contends that the violation was not the result of its unwarrantable failure to comply with the standard. Management was unaware of the extensive nature of the accumulation. The preshift examiners did not find any violations or hazards in advance of the May 6 inspection. Because the examiners did not mark the accumulation as a hazard, management was not aware of any hazard present. Some of the examiners noted in the remarks section of the preshift book that the area "could use" rock dust, but there were no hazards noted. The general mine foreman and a representative from the safety department visited the area and did not believe that a hazard existed. Actions were taken to address the dust in the entry. For example, rock dusting was performed from the 78 crosscut to the tail of the No. 2 belt on May 5. Rock dusting was continuing on the morning of the inspection. Thus, Twentymile diligently

followed up on any reports in the examination book that additional dusting was recommended. Twentymile had installed a permanent pressurized rock dusting system in the belt entry, which demonstrates the importance it places on keeping the belt entries safe.

The preshift examination reports contain the following information in the “remarks” section with respect to float coal dust in the cited belt entry. In all cases, the report states “Safe at time of exam” at the beginning of the remarks section.

May 4 - 6:18 p.m. to 7:25 p.m., “Accumulations at Tripper #1, appears to need dust.” On the same line it says, “Dusted XC 78 to tail 5-5-08 MSB”

May 5 - 2:00 a.m. to 3:05 a.m., there were no entries noting the presence of float coal dust or recommending that rock dust be applied.

May 5 - 10:00 a.m. to 10:55 a.m., “Need rock dust from portal to XC 23” and “XC 55 to tail could use dust.” There is another notation stating, “5-5-08 in progress MSB.” It is not entirely clear what area the “in progress” notation was referring to because there were other items needing correction noted in the remarks section of the examination book.

May 5 - 6:10 p.m. to 7:02 p.m., there were no entries noting the presence of float coal dust or recommending that rock dust be applied.

May 6 - 2:00 a.m. to 3:08 a.m., there were no entries noting the presence of float coal dust or recommending that rock dust be applied.

May 6 - 10:00 a.m. to 10:43 a.m., “Could use dust portal to XC 20.”

(Ex. G-13).

Inspector Grosely believes that the conditions he observed at about 10:10 a.m. on the morning of May 6 would have been present at the time of the 2:00 a.m. examination conducted by Charles Craig, yet nothing was noted in the preshift examiner’s book.⁴ (Tr. 169). Grosely also took into consideration that there had been little production during the graveyard shift that ended on May 6. As a consequence, he believes that the cited conditions had existed for more than one shift. (Tr. 140-41, 173).

⁴ Timothy Bertram started his examination some time before 10:00 a.m. on May 6, behind the inspector. That is, Bertram entered the portal after Inspector Grosely with the result that he had not yet examined those areas inspected by Grosely. (Tr. 270-71). He did not believe that the conditions he saw created a hazard to miners. (Tr. 270). He did note that rock dust should be applied from the portal to crosscut 20. He saw that as a condition that needed to be addressed rather than as a hazard to miners.

Allen Meckley, a mine foreman with Twentymile, testified that the “in progress” notation in the May 5 morning shift examination book means that the crew was in the process of applying rock dust in the areas noted in the examination book. (Tr. 237). He stated that the area cited by the inspector is dusted, on average, about two to three times per week.

Dennis Bouwens, an outby coordinator for Twentymile, testified that the order of withdrawal was inappropriate. (Tr. 249). He does not believe that the cited condition created a hazard. (Tr. 249-50). He testified that Twentymile was being “proactive” by applying rock dust along the belt further inby the area cited by the inspector. (Tr. 252). Once the order was issued, he had the crew that was rock dusting along the belt entry redirect their efforts further outby to address the area cited by the inspector. (Tr. 253).

I find that the Secretary established that the violation was the result of a serious lack of reasonable care by Twentymile. In the shifts prior to Inspector Grosely’s inspection, none of the preshift examiners considered the accumulation of float coal dust to be hazardous and did not even note the condition in the examination book. Mr. Bertram noted that the belt entry “could use dust,” but the person who examined the entry at 2:00 a.m. on May 6 before Inspector Grosely conducted his inspection did not enter anything in the preshift book. In addition, nothing was entered for the examination that took place at 6:10 p.m. on May 5. As stated above, I credit the testimony of Inspector Grosely that the float coal dust accumulated over several shifts. I find that the accumulation of float coal dust should have been noted by these examiners. Their failure to do so demonstrated a serious lack of reasonable care. A preshift examiner acts as the agent of a mine operator when he is performing his examinations and his conduct is imputable to a mine operator for unwarrantable failure purposes. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 197 (Feb. 1991).

As stated above, the accumulations were quite obvious and extensive. The conditions were hazardous and were S&S. The operator had been put on notice that greater efforts were necessary for compliance. Inspector Grosely issued Twentymile an unwarrantable failure citation in October 2006 for float coal dust along the No. 7 belt entry. (Tr. 154; Ex. G-10). He warned the operator that they must “remain vigilant to remedy this volatile condition.” (Tr. 155). Twentymile was cited about 45 times for violations of section 75.400 in the 15 months prior to the issuance of the subject order.⁵ *Id.* In addition, MSHA instituted a belt initiative in October 2006. MSHA notified Twentymile at that time that the agency intended to focus on belt lines during upcoming inspections. (Tr. 151-53). In examining an unwarrantable failure finding related to section 75.400, the Commission has recognized that:

past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. *Enlow Fork Mining Co.*, 19

⁵ About 13 of the citations and orders are final Commission orders. (Ex. G-23). It is not clear how many of these involve float coal dust accumulations.

FMSHRC 5, 11-12 (Jan. 1997). Likewise, a high number of past violations of section 75.400 serve to put an operator on notice that it has recurring safety problem in need of correction and the violation history may be relevant in determining the operator's degrees of negligence. *Peabody*, 14 FMSHRC at 1263-64.

Consolidation Coal Co., 23 FMSHRC 588, 595 (June 2001).

I find that Twentymile's failure to apply rock dust in the cited area constituted aggravated conduct but it did not demonstrate reckless, intentional, or indifferent conduct. As the Secretary noted in her brief, Twentymile applies rock dust from the furthest inby position, with crews working outby against the flow of the air. (S. Br. 17; Tr. 235). Twentymile was applying rock dust further inby when Inspector Grosely entered the mine. Although it is not clear when or on what shift additional rock dust would have been applied in the area cited by the inspector, it is likely that the entries would have been rock dusted at some point after Mr. Bertram's entry in the examination book was noted by a foreman.⁶ The violation was the result of Twentymile's serious lack of reasonable care. The negligence was high. A penalty of \$50,000.00 is appropriate.

III. CITATION NO. 6686313; WEST 2009-333

A. Background.

On May 6, 2008, Inspector Barry Grosely issued Order No. 6686313 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.360(a)(1). The order alleges that:

In regards to the pre-shift examination conducted on May 6, 2008, on the graveyard shift for the day shift during the hours of 02:00 hrs and 3:08 hrs along the Main North #1 and #2 main line conveyor belt from the head roller at the main transfer building to crosscut - 46 in the #3 belt entry, the operator failed to conduct an adequate preshift examination.

(Ex. G-11). The order goes on to state that hazardous conditions were present but that the examination book was "absent of any postings of hazardous conditions." The order further stated that allowing the condition to "go uncorrected would reasonably likely result in an accident causing serious injury or illness." The Secretary proposes a penalty of \$50,700.00 for this order.

⁶ The Secretary criticized Twentymile's practice of noting the need for rock dust in the "remarks" section of the examiner's report rather than in the "hazardous conditions" section. I need not weigh in on this issue because it is clear that the most recent examiners' reports did not note the accumulations in either section of the record book.

At the hearing, the Secretary modified this order to a section 104(a) citation with high negligence. (Tr. 160).

Inspector Grosely testified that the failure of Twentymile's preshift examiner to recognize an obvious, hazardous condition during a preshift examination and to properly record this hazard violated the safety standard. (Tr. 163-65, 169). The hazardous condition the inspector was concerned about was the accumulation of float coal dust discussed above. He stated that the examiner who performed the examination at about 2:00 a.m. on May 6 did not perform an adequate preshift examination because the float coal dust was not noted in the book. (Tr. 169; Ex. G-13 p. 1). The float coal dust had been noted in the examination book for the examination that took place between 10:00 a.m. and 10:55 a.m. on May 5, however. (G-13 p. 4). It was obvious to the inspector in examining the conditions along the belt line that rock dust had not been applied to the cited area in response to the May 5 notation in the examiner's book. The inspector believed that the conditions would have been worse by 2:00 a.m. on May 6. (Ex. G-10).

The Secretary argues that the examination made by Charles Craig at 2:00 a.m. on May 6 was inadequate. Mr. Craig testified that the cited area did not need to be rock dusted. (Tr. 263). The Secretary points to his testimony that he would "possibly" report float coal dust as a hazard in the preshift book if the accumulations were "an eighth of an inch or greater" and "appeared black." *Id.* He admitted that the eighth of an inch guideline was one of his own making that other examiners might not use. (Tr. 266-67). Mr. Bertram, the examiner who conducted an examination soon after Inspector Grosely entered the mine on May 6, concluded that rock dust was needed from the portal to crosscut 20. (Tr. 270; Ex. G-13 p. 2). The Secretary contends that it was Twentymile's inability to recognize the hazardous condition and take steps to record the hazard that caused the inspector to issue the order of withdrawal.

Twentymile argues that the proper test is whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous conditions that the regulation seeks to prevent. *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990) *aff'd* 951 F.2d 292 (10th Cir 1991). Several experienced mine examiners, as well as Meckley, DeZeeuw, and Bouwens, all determined that the accumulation of float coal dust did not present a hazard to miners. These individuals all have extensive experience and they all walked through the cited area. In addition, the Secretary has not provided the mining community with any guidance to indicate how much float coal dust must be present in order to violate section 75.400 and how much rock dust is sufficient to eliminate the hazard. As a consequence, examiner Craig used an eighth of an inch as a guideline. Given Craig's experience and reasoned judgment and the subjectivity of the standard, it is Twentymile's position that no violation occurred.

B. Discussion.

1. Violation.

The Commission has determined that preshift examinations are fundamental in assuring a safe work environment for the miners. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). “The preshift examination is intended to prevent hazardous conditions from developing.” *Id.* The preshift examiner must look for all conditions that present a hazard and this responsibility is not restricted to S&S conditions. *Id.* at 14. It is not violations that the examiner is required to find, but rather conditions that present a potential hazard to miners.

As stated above with respect to Order No. 6686312, I determined that the presence of the accumulations of float coal dust in the cited belt entry presented a hazard to miners. Rock dust had not been applied to the float coal dust to render it safe. The mine liberates extensive quantities of methane. For these same reasons, I find that the Secretary established a violation of section 75.360(a)(1). Given the obvious nature of the violation, I find that a reasonably prudent person, familiar with the mining industry and the protective purpose of the safety standard, would have recognized that this hazard needed to be recorded in the preshift examination book. The examiner who performed the preshift examination at 2:00 a.m. on May 6 did not note that there was float coal dust present or that rock dust was needed in the area. It is clear that the mine examiners at Twentymile had not all been sufficiently rigorous when inspecting areas of the mine for accumulations of float coal dust.

2. Significant and Substantial.

Twentymile contends that the S&S designation is unfounded because an injury causing event was unlikely. The Secretary bears the burden of proving the four elements of the *Mathies* S&S test and the Secretary failed to establish the fourth element. The Secretary maintains that the violation was S&S. Inspector Grosely was concerned that Twentymile’s preshift examiners failed to conduct adequate examinations because of their inability to recognize the hazards presented by accumulations of float coal dust. She maintains that it is crucial for the preshift examiner to record hazardous accumulations in the log book because mine foremen use these records when scheduling work.

For the reasons set forth with respect to Order No. 6686312, I find that the Secretary established that the violation was S&S. By failing to perform an adequate examination and recording the hazard presented by the float coal dust, the subject preshift examiner contributed to a serious safety hazard. A foreman looking at the examiner’s report for 2:00 a.m. on May 6 would not know rock dust was needed in the No. 3 belt entry because there was no such notation. I find that it was reasonably likely that the hazard contributed to by the violation would result in an accident in which there would be a serious injury.

3. Negligence

As stated above, the Secretary modified this order to a section 104(a) citation with high negligence. (Tr. 160). In support of the high negligence determination, the Secretary relies on Inspector Grosely's testimony that Twentymile has a history of citations for inadequate preshift examinations. In October 2006, Grosely issued a section 104(d)(1) order charging Twentymile with a failure to conduct a proper preshift examination after he discovered excessive coal accumulations along the No. 7 beltline. (Tr. 176-77). He testified that he advised mine management that the examiners needed to be more vigilant about identifying and correcting coal accumulations. (Tr. 155). Potentially hazardous conditions were either not identified at all or were listed in the "remarks" section of the report rather than in the "hazardous conditions observed" section. He was also concerned that it is often difficult to discern from the subsequent notations in the log book whether accumulation hazards had been corrected. The Secretary also relies on the five section 75.360 violations Twentymile received between February 2007 and May 2008. (Ex. G-7). Finally, the Secretary relies on the fact that Grosely testified that the conditions he observed on May 6, 2008, were obvious and extensive.

I find that the Secretary did not establish that the violation was the result of more than ordinary negligence. It is true that MSHA provided Twentymile with some notice that greater efforts were necessary to keep belt entries clear of accumulations. This action was taken as part of MSHA's belt initiative. As a result, Twentymile removed tons of material from the floor of its belt entries long before the present inspection. This belt initiative was not specifically directed to accumulations of float coal dust. I find that Twentymile's employees who were in the No. 3 entry in the days and hours preceding Grosely's inspection genuinely believed, in good faith, that the accumulation of float coal dust that they observed did not present a hazard to miners. As a consequence, the preshift examiners, including Mr. Craig, did not believe that they needed to report it in the hazardous conditions section of the preshift record book. I find that Twentymile was negligent with respect to this violation but its negligence did not rise to the level of high negligence. A penalty of \$5,000.00 is appropriate.

IV. ORDER NO. 7622426; WEST 2009-333

A. Background.

On March 12, 2008, Inspector Art Gore issued Order No. 7622426 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.400. The order alleges that:

Float coal dust was deposited on rock dusted surfaces in the longwall return (20 Right No. 1 Entry) from survey point 42+50 to 25+50, a distance of 1700 feet. The float coal dust was deposited on the floor, ribs, and supplemental supports. This entry was examined by a foreman on 3/08/2008 and documented in the weekly

examination book under hazards as the location could use rock dust and no corrective action was documented.

(Ex. G-15). The order goes on to state that the entry was also examined on 3/11/2008 and 3/12/2008 and mining continued on the section. The Secretary proposes a penalty of \$70,000.00 for this order.

Inspector Gore, who was accompanied by Inspector Carol Miller, began his inspection by traveling to the No. 1 Entry tailgate longwall return. He was at the mine for a methane spot inspection. He tested for methane during his inspection, but he did not detect any problems with methane. (Tr. 283). The inspection party traveled to the longwall face and entered the tailgate entry. He testified that he immediately noticed that the tailgate was black. (Tr. 284). The inspection party walked into the tailgate a few hundred feet and it was still black. He advised Dianna Ponikvar that he was probably going to issue a withdrawal order because of these conditions. (Tr. 284). Inspector Gore testified that there was dark coal dust everywhere. It was on the floor, on the ribs, and on the cans, which are used for supplemental roof support. Coal dust had also accumulated in the crosscuts. The inspector also observed that the trickle duster was not working at that time. This duster blows rock dust into the air current so that rock dust will mix with any coal dust that has accumulated. Gore testified that the float coal dust that he observed was "heavy." (Tr. 286). He said that it was "triple" the amount necessary to establish a violation. (Tr. 287). Inspector Gore walked up the tailgate in the direction of the air current for a distance of about 1,700 feet. Beyond that point he said that the conditions looked "pretty good." (Tr. 288).

Inspector Gore reviewed weekly examination records, preshift examination records, and the dates, times and initials ("DT & P") he found in the entry. The weekly examination book contained an entry dated March 8, 2008, that stated that the entire tailgate area for the No. 1 Entry needed rock dusting. (Tr. 291-93, 328-29; Ex. G-21). The examination book noted that corrective action was taken on March 11, but the area dusted did not include the area cited by the inspector. (Tr. 292-93, Ex. G-21). Inspector Gore concluded that Twentymile continued to mine for at least eight shifts between the time the need for rock dusting was noted in the examination book and the time of his inspection on March 12. The fact that the electric trickle duster was not operating at the time of the inspection also led the inspector to determine that the violation was the result of Twentymile's unwarrantable failure to comply with the safety standard. (Tr. 285-86).

Dennis Bouwens, outby coordinator, testified that he performed the weekly examination on March 8. He noted that he thought that more rock dust was needed but he did not believe that the conditions he observed created a hazard. (Tr. 327-29). The highest methane level he detected was less than one percent during his examination. (Tr. 328). Although he wrote "could use rock dust" in the examination book, the coal dust he found did not present a hazard. (Tr. 329). The area was very humid. He also testified that arrangements to rock dust the area had been made. (Ex. TCC-31). On March 6, a pallet of rock dust, which is about a ton, had been delivered to the tailgate. (Tr. 342; Ex. TCC-31). The night shift crew installed 40 supplemental support structures, known as "cans," from the location of the rock dust pallets in an outby direction. On

March 7, beginning where the night crew left off, the day shift installed 39 additional support cans. He further testified that the cans were installed in preparation for rock dusting. On March 10, additional rock dust was delivered to the tailgate and a slinger duster was filled. *Id.* He also said that the slinger duster was used during the day shift of March 11 and an additional load of rock dust was delivered to the area. Rock dusting continued during the night shift from survey station 27+00 outby. As a consequence, the tailgate was rock dusted from point 27+00 to the mouth of the section.

B. Discussion.

1. Significant and Substantial.

Twentymile is not contesting the violation, but it contends that the Secretary did not establish that the violation was S&S. The Secretary maintains that the testimony of Inspector Gore establishes that float coal dust had been in suspension in the tailgate and in sufficient amounts to propagate an explosion or fire. (Tr. 298-99). It is clear that the float coal dust did not accumulate during a single shift. Indeed, the Secretary argues that the conditions observed by Inspector Gore on March 12 were more hazardous than those noted in the March 8 weekly examination. Assuming continued normal mining operations, the hazard presented a risk of an ignition, fire, or explosion.

The Secretary contends that, although the longwall was not in operation at the time of the subject inspection, the longwall had operated for at least eight shifts between the reporting of the float coal dust hazard in the March 8 weekly examination book and Inspector Gore's inspection. As soon as Inspector Gore entered the tailgate entry from the longwall face, he noticed that the tailgate was black with float coal dust. (Tr. 284). Potential ignition sources existed in the longwall face, both during production shifts and at times when the longwall was down for repair. Moreover, the mine liberates a significant amount of methane during the normal production cycle. The roof strata at the Foidel Creek mine contains significant amounts of quartz, which can create a spark as the longwall shearer passes through it. (Tr. 317-18).

Twentymile contends that the Secretary merely established that an accident "could occur" and failed to establish that a serious accident was reasonably likely to occur. The Commission has explicitly rejected a finding of an S&S violation based on the "potential" that an injury could occur. *Texas Gulf, Inc.*, 10 FMSHRC 498, 500-01 (April 1988); *Zeigler Coal Co.*, 15 FMSHRC 949, 953-54 (June 1993). Twentymile argues that the Secretary has failed to establish that an explosion or fire was more than a remote possibility. A necessary precondition to a float coal dust explosion is a methane gas ignition that puts the dust into suspension. The evidence establishes that there was very little methane in the area. Bill Bennett, the longwall coordinator, measured 0.1 percent methane in the tailgate. (Tr. 337). There was a methane monitor in the tailgate and a carbon monoxide monitor on the longwall.

Both Bouwens and Bennett testified that the float coal dust was grey because rock dust was mixed in with the coal dust. (Tr. 329, 348). Much of the rock dust was applied from the trickle duster located in the tailgate. Although Inspector Gore believed that the longwall shearer was a potential ignition source, Bennett testified that since he started working at the mine in 1991, there has not been a single methane ignition caused by the longwall shearer or by a rock fall. As a consequence, there was little if any chance of a float coal dust explosion borne of a methane ignition. Twentymile also discounts the other ignition sources cited by Inspector Gore. These included cutting torches, pumps, and failing roof bolts. The area was extremely humid, which acts to prevent suspension by making the coal dust particles adhere to each other. (Tr. 330).

For the same reasons as discussed above with respect to Order No. 6686312, I find that the Secretary established that the violation was S&S. Float coal dust is highly explosive when it is suspended in the mine atmosphere. I credit the inspector's testimony that the accumulations were heavy. The accumulations were in that part of the tailgate that is adjacent to the longwall face. As discussed above, the mine is on a spot-inspection schedule because of the amount of methane liberated.

The float coal dust had obviously been accumulating for some time because the report of the weekly examination made on March 8 notes that the tailgate "could use rock dust." (Ex. G-21). Bouwens, who performed the weekly examination, testified that he did not believe that the float coal dust he observed created a hazard to miners. (Tr. 328). He testified that the accumulations were not black in color at that time. The weekly examination book indicates that, while rock dust was applied to other areas in the tailgate, rock dust was not applied to the area cited by Inspector Gore until after he issued his order of withdrawal.⁷ (Tr. 333; Ex. G-21).

There was clearly a discrete safety hazard contributed to by the violation and I find that there was a reasonable likelihood that the hazard contributed to by the violation would have resulted in a serious injury or fatality. The Secretary is not required to establish that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC at 865. The accumulation had existed in some form for several days. I believe that it was unlikely that the cited accumulations would have ignited on their own because there were no ignition sources in the tailgate. Nevertheless, it was reasonably likely that a significant methane ignition in the longwall face would cause the float coal dust in the tailgate to go into suspension thereby intensifying the explosion. I have taken into consideration the high humidity in the tailgate entry. The float coal dust was in the area of the tailgate closest to the longwall face. I credit the testimony of Inspector Gore that there are a number of ignition sources at the face. The fact that the mine has not experienced a significant methane ignition at the face is not dispositive. A sudden release of methane can occur at the face without warning. Such an event is reasonably

⁷ The electrically operated trickle duster in the tailgate is designed to spray rock dust into the air during production shifts and maintenance shifts. It is not clear from the record how well this device was operating during the time between March 8 and March 12. (Tr. 300). The trickle duster was not required by the mine's ventilation plan.

likely at some point over the life of a mine. It is also reasonably likely that the mine's ventilation system will not be capable of rapidly diluting such a large buildup of methane and that the methane will be ignited by an ignition source along the longwall face.

2. Unwarrantable Failure.

The Secretary argues that her unwarrantable failure determination should be affirmed because float coal dust was distributed over a "vast area" and the dust had been present for a significant period of time without any abatement efforts. Mine management had knowledge of these conditions and ordered that rock dust be applied in other locations in the tailgate further away from the longwall face. The accumulations were present for a distance of ten crosscuts from the entrance of the tailgate at the longwall face. The operator had applied rock dust from that point to the outby end of the tailgate. Inspector Gore did not observe any evidence that rock dusting was in progress at the cited location. There were no pallets of rock dust present. (Tr. 316-17). The sling duster that the operator contends was being used to dust the area was not in the entry at the time of the inspection but was moved into the area after the order was issued. (Tr. 359). The Secretary also contends that the sling duster would not have been an effective means to apply rock dust in the affected area because the cans used as supplemental roof support were stacked in the center of the entry. (Tr. 358).

Twentymile contests the unwarrantable designation because it acted reasonably under the circumstances to ensure the safety of miners. The float coal dust observed by the inspector did not present a hazard. The area was grey in color, which reflected the presence of rock dust. The trickle duster was in operation most of the time and hand dusting typically occurs when center cans are installed. (Tr. 344-46, 350-52). Bouwens credibly testified that he would have taken immediate steps to have the cited area rock dusted if he believed that the accumulations were hazardous when he conducted his weekly examination on March 8. Twentymile also contends that most of the tailgate had been rock dusted by the time Inspector Gore conducted his inspection. The area cited by Inspector Gore had to be hand dusted because of the presence of the center cans. Rock dust had been brought into the area for this purpose. (Tr. 337, 342).

Whether this violation was the result of the operator's unwarrantable failure is a close issue. On one hand, the float coal dust was relatively heavy and was present over a large area in the tailgate near the longwall face. Float coal dust had been accumulating in this area since at least March 8 without being abated. On the other hand, Twentymile had applied rock dust to the vast majority of the tailgate. It had to install supplemental support along the center of the entry and then apply rock dust by hand in the cited area. I credit Twentymile's witnesses with respect to the preparations that had been made.

As stated earlier in this decision, factors to be considered include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been put on notice that greater efforts for compliance are necessary, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the

operator's knowledge of the existence of the violation. Based on these factors, I find that the violation was the result of a serious lack of reasonable care by Twentymile and was therefore unwarrantable. I base this conclusion on the fact that the violation was serious, it existed in a large area of the tailgate, it had been in existence for several shifts, management was aware of the condition, and management had been put on notice that greater efforts to comply with the standard were necessary. Twentymile's failure to apply rock dust in the cited area constituted aggravated conduct but it did not demonstrate reckless, intentional, or indifferent conduct. The negligence was high. A penalty of \$50,000.00 is appropriate.

V. ORDER NO. 8456778; WEST 2009-1174

A. Background.

On May 7, 2009, Inspector Art Gore issued Order No. 8456778 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.1507(a)(11)(ii) as follows:

The 23 Right Section MMU 009-0 refuge alternative is placed just outby Crosscut No. 7+80, in the No. 1 entry, close to the right side rib looking inby. In the crosscut is approximately 8.19 tons of loose coal and debris that have been pushed against the stopping. This condition would place the deployed chamber directly against these combustible materials.

(Ex. G-17). The inspector determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was high. Section 75.1507(a)(11)(ii) provides, in part, that a mine's "Emergency Response Plan (ERP) shall include the following for each refuge alternative and component: (11) suitable locations for the refuge alternatives and an affirmative statement that the locations are – (ii) where feasible, not placed in areas directly across from, nor closer than 500 feet radially from, . . . fuel, oil, or other flammable or combustible materials storage." The Secretary proposes a penalty of \$4,000.00 for this order.

Inspector Gore testified that he examined the refuge alternative (the "chamber") for the 23 Right Section MMU 009-0 during his quarterly inspection. (Tr. 363, 400). The longwall section was close to being completed and the chamber was located in the No. 1 entry just outby crosscut 7+80, which was not far from the Six Main North Shaft, an escape shaft. (Tr. 363, 392, 397). Gore testified that the chamber was a Strata refuge chamber. In order to deploy this type of chamber, a miner must break the seal on the door, loosen the latches, open the door about 180 degrees, unroll the deflated tent inside so that it is extended to its full length of 45 feet, and inflate the tent. (Tr. 366-368, 399). The optimal way to deploy the tent is straight out from the door. (Tr. 368). Gore testified that the chamber, when not deployed, is about 25 feet long, 5 to 6 feet wide, and 4 feet tall. (Tr. 387). The chamber weighs at least a couple of tons and must be moved

with heavy equipment. (Tr. 375, 387). The chamber is frequently moved as the longwall retreats out of the section. (Tr. 387-88).

Inspector Gore indicated that the chamber at issue was located on the right side of the entry, about three feet from the rib, as one looked inby. He testified that the proximity of the chamber to the rib would have prevented a miner from opening the chamber door the last 10 to 20 degrees necessary to open the door to its full extent. (Tr. 367). As a result, Gore believed that the tent, when deployed, would come in contact with the chamber door and have to be deployed at an angle rather than straight out from the door. (Tr. 367-69). He acknowledged on cross-examination, however, that the tent could be rolled out of the chamber while the door was only open 90 degrees. (Tr. 393). The door to the chamber was facing inby and the lifeline, which should normally go to the door, went from the back of the chamber, over the top, and was connected to the door. (Tr. 364-65). According to the inspector, if a miner were using the lifeline, he would run into the back of the chamber before finding the door. *Id.*

Gore testified that refuge chambers are normally put in crosscuts rather than in entries, but he acknowledged that this is not a regulatory requirement. (Tr. 365, 393-94). The inspector estimated that about 8.9 tons of loose coal were piled against a stopping and that this pile would have been adjacent to the refuge tent if it were deployed at an angle. (Tr. 365-66, 369, 371). He did not know whether the coal was wet. (Tr. 388-89, 393).

Gore testified that he issued the subject order based on the conditions he observed. He said that the chamber was not in a suitable location because the door could not be opened all the way, the chamber was in a roadway rather than in a crosscut, and the tent would be immediately adjacent to combustible materials. (369-70, 373-75, 395). He agreed that, no matter where the chamber was placed, it would be immediately adjacent to coal. Gore testified that he issued an unwarrantable failure order because of the numerous refuge chamber citations he had previously issued, the public meetings that were held to discuss the critical nature of refuge chambers, and what he termed as a "total lack of reasonable care" demonstrated by the operator. (Tr. 370-71).

Inspector Gore testified that the chamber should have been placed in a crosscut that was otherwise empty and that the location should have been selected based on the condition of the ribs and roof, the likelihood of damage caused by other equipment, and the presence of accumulations or fire hazards. (Tr. 373). He determined that the violation was not S&S because the mine had two fresh air escapeways and it was unlikely that both of these escapeways would become unusable during an emergency. (Tr. 376). Gore determined that the operator's negligence was high because he had discussed refuge chambers with mine management and he does not believe that they take these chambers seriously. (Tr. 377). Based on conversations he had with miners, he did not believe that the chamber had been in the cited location for a long period of time. (Tr. 375).

Jack Reed, a longwall utility foreman, testified for Twentymile. He testified that in May 2009, the subject longwall panel was just about completed and preparations had begun to move

the longwall to a new section. (Tr. 405). Due to the lack of room in the Nos. 2 entry, a scoop was used to move the chamber from the No. 2 entry to the No. 1 entry. (Tr. 405-06). This move occurred between 6:00 and 8:00 a.m. on May 6. Once moved, the chamber was about 700 feet from the Seven Main North entries. (Tr. 406). Prior to the move, a loader was used to clean up the area where the chamber was going to be placed. This cleanup was necessary because the area was very wet and muddy. (Tr. 409-10). As a result of this cleanup, material was piled up inby the new location of the chamber. Reed testified that the piles were not coal or any other combustible material but were chunks of mud and debris. (Tr. 409, 415). A scoop was used for this work because the area was too small to use a loader to transport the material to a belt. (Tr. 410). Reed also testified that the door on the chamber only needs to be opened 90 degrees to pull the tent out, but he was not sure if the door needed to be opened wider to inflate the tent. (Tr. 410-11).

Chad Day, a longwall utility manager, testified for Twentymile. He testified that he worked at the mine on the preceding shift. He noted that a large amount of water had collected in front of the chamber. (Tr. 419). He was concerned that the presence of the water could prevent miners from deploying the tent in the event of an emergency. (Tr. 410). As a consequence, he instructed the scoop operator to move the chamber outby 50 feet from its location. (Tr. 419-20). Moving the chamber took about an hour. The chamber was moved to the side of the entry so that the entry could still be used for passage. After the move, the muddy muck in the crosscut was just inby the new location for the chamber. (Tr. 420). He did not believe that the muddy material would interfere with the chamber being deployed and the tent inflated. (Tr. 421). He did not know whether the piled material was roadway muck or coal. (Tr. 425-26).

Dianna Ponikvar testified that the refuge chamber cited by Inspector Gore could have easily been deployed and inflated in the location it was found at the time of the inspection. (Tr. 428-29). She accompanied the inspector and she testified that the chamber was situated in a position that, when deployed, the door to the tent would have been on the inby end of the tent on the corner and not close to the rib. *Id.* She testified that, although refuge chambers are to be used as a last resort, Twentymile takes these chambers very seriously. Mine examiners and face bosses examine the chambers five to six times a day; mine personnel receive rescue chamber training annually; and the chambers in the Three North Main are protected with cribbing and barricades. (Tr. 429-30). She admitted that miners commonly refer to refuge chambers as “coffins” and she said that, in the event of an emergency, she would exit the mine using a designated escapeway. (Tr. 432-33).

The Secretary argues that Twentymile violated the cited regulation by placing the chamber in a position that would have prevented proper deployment of the tent in the event of an emergency. The order should be affirmed because the chamber was in a roadway rather than in a crosscut, loose coal was piled in an area adjacent to the chamber that would interfere with the deployment of the tent, and the door to the chamber could not be fully opened due to the chamber’s proximity to the rib.

Twentymile argues that the order should be vacated. First, section 75.1507(a) merely establishes what must be included in a mine's ERP. The cited subsection contains a requirement for a plan provision that, as applicable here, chambers not be placed in areas directly across from, no closer than 500 feet radially from "fuel, oil, or other flammable or combustible materials storage." This regulation does not provide an independent basis for liability. Second, the accumulated material referred to by the inspector was actually mud and other roadway material that had been piled up. It was not coal or any other combustible material. Third, in the alternative, if the material is found to be coal, it is clear that the regulation's reference to "combustible material" does not include coal or coal storage, but rather contemplates other more volatile materials for which there are specialized underground storage procedures. Finally, contrary to the Secretary's position, the cited regulation does not contemplate that, in determining suitable locations, the mine should address the potential for interference with deployment of the chamber. The chamber could be properly deployed given the position of the chamber in the entry.

I find that the Secretary failed to establish a violation of the cited regulation. First, the regulation, entitled "Emergency Response Plan; refuge alternative," is simply a list of what must be included in a mine's ERP. There has been no showing that the ERP adopted and approved by MSHA for the Foidel Creek Mine violated section 75.1507 in any way.⁸ In addition, assuming that the regulation can be directly applied as a mandatory safety standard, it has not been established that the chamber was near "fuel, oil, or other flammable or combustible storage." Whether the material near the chamber contained coal or not, it cannot be construed as "flammable or combustible *storage*." It was a pile of material that was scooped up from the bottom of the roadway to provide a flat place to place the chamber. More importantly, I find that it was not established that the material was flammable or combustible. Although it is likely that some coal was in the material, I credit the testimony of Twentymile's witnesses that the pile of material was mostly mud and debris scooped up from the mine floor. I credit the testimony of Twentymile's witnesses that the chamber could be deployed at the location cited by the inspector. Consequently, this order is vacated.

VI. ORDER NO. 8456774; WEST 2009-1174

A. Background.

On May 7, 2009, Inspector Art Gore issued Order No. 8456774 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.360(d) as follows:

There is no initials, date and time to certify that the required examination was conducted for the refuge alternative for 23 Right Section MMU 009-0 for the day shift. The last DT & I entry in the

⁸ The cited section states that an ERP shall prohibit refuge chambers from being placed in the vicinity of "belt drives, take-ups, transfer points, air compressors, explosive magazines, seals, entrances to abandoned areas, and fuel, oil, or other flammable or combustible storage."

book provided at the refuge chamber is 05-06-2009 by JR, however there is no time notation. The next entry is 05-06-2009 at 2:25 PM by LM.

(Ex. G-16). The inspector determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was high. Section 75.360(d) states that the "person conducting the preshift examination shall check the refuge alternative for damage, the integrity of the tamper-evident seal and the mechanisms required to deploy the refuge alternative, and the ready availability of compressed oxygen and air." The Secretary proposes a penalty of \$4,000.00 for this order.

Inspector Gore testified there was a logbook at the chamber where examiners recorded the results of their examinations. As amended, the logbook showed that an examination had been made at 10:00 p.m. on May 6, 2009, but that no examination had been made during the day shift on May 7. (Tr. 377, 381-82; Ex. G-19 p. 2). These examinations are required to be made on the same time intervals as regular preshift examinations. Gore testified that the person conducting the examinations should check to make sure that nothing would interfere with the deployment of the chamber and should also make sure that the chamber is in a suitable location. (Tr. 383-84). Gore also stated that he checked the examination books for the mine and could not find any notation that indicated that this examination had been made. (Tr. 400-02; Ex. TCC 44).

Mr. Reed testified that he conducted an examination of the chamber on May 6 and placed the date and his initials in the logbook, but that he forgot to put the time of his examination, which was 10:00 p.m. (Tr. 411-12; Ex. G-19 p. 2). He did put the date, time, and his initials at other areas that he examined along the entry. (Tr. 412-13). Mr. Day testified that he conducted an examination of the chamber on May 7, but he did not put an entry in the logbook for the chamber because he got distracted by moving the chamber away from the water hazard. (Tr. 423, 425-26; Ex. G-19, p. 2). He testified that he also forgot to enter his examination into the preshift examination book. (Tr. 424, 427; Ex. TCC 44). He admitted that he "just spaced it." (Tr. 426). Day testified that he did put the date, time and his initials at other locations in the area, such as at the support cans, the longwall recovery chute, and the crib storage area. (Tr. 424). Ms. Ponikvar testified that mine examiners and face bosses examine the chambers five to six times a day. She agreed that on this occasion no examination of the chamber was recorded in either the chamber log book or the preshift book. (Tr. 431-32).

The Secretary contends that the lack of an entry in the logbook at the refuge chamber demonstrates that Twentymile did not conduct the required preshift examination of the chamber prior to the beginning of the day shift. Based on the surveyor's manual, the last preshift was conducted on May 6, 2009, at 2:25 p.m., almost 18 hours prior to Inspector Gore's inspection. Section 75.360 requires that a preshift examination be conducted within three hours preceding the beginning of the shift. She argues the preshift examinations are critical to ensure that the chamber is in safe operating condition.

Twentymile argues that it did not violate section 75.360(d). Although the examinations were not certified in the record book, it is undisputed that Jack Reed performed an examination of the refuge chamber at 10:00 p.m. on the night of May 6, 2009. His testimony should be credited in this regard. His testimony is corroborated by his entry in the log maintained on the surface that he conducted the examination between 9:35 p.m. and 10:03 p.m. in 23 Right. He wrote that he preshifted the “barricade chamber,” remarking that “area safe at time of exam.” (Ex. TCC-44). Mr. Day testified that he performed an examination on May 7 and had the chamber moved because it was in a wet area. He admitted that he did not record his examination at the refuge chamber or in the preshift examiner’s report on the surface.

The Secretary relies on the log books to establish that no examinations were conducted. Inspector Gore’s order of withdrawal states that the last DT & I entry in the book provided at the refuge chamber is “05-06-2009 by JR;” however, there is no time notation. A time “10:00 p.m.” was subsequently placed by this entry without an objection from the inspector. (Tr. 382; Ex. G-19 p. 2). “JR” refers to Jack Reed. The order goes on to state that the next entry is “05-06-2009 at 2:25 PM by LM.” At the hearing, the inspector indicated that this “next entry” was actually the previous entry. (Tr. 378). He stated that he was at the mine at 8:05 a.m. on May 7, so more than 12 hours had passed since the refuge chamber had been examined. The refuge chamber should have been preshifted at 3:00 a.m. on the morning of May 7. (Tr. 379). The inspector testified that he did not see dates or initials at any other location near the chamber. Chad Day testified that he did conduct an examination early in the morning of May 7, but he failed to enter the DT & I in the logbook. (Tr. 423, 425-26).

I credit the evidence that shows that Mr. Reed conducted an examination at 10:00 p.m. on May 6. Thus, the only issue is whether an examination was made prior to the day shift on May 7. There are no written records showing that such an examination was made. Mr. Day testified that he, in fact, made the examination but that he forgot to record it because he got involved in moving the refuge chamber to a location that was not so wet. (Tr. 423). He testified that “during my preshift exam, I walked up to the refuge chamber and saw water in front and sloughage off to the side, that would inhibit the refuge chamber from being extracted due to the water hole.” (Tr. 419). He stated that he did conduct an examination of the chamber. (Tr. 421-22, 423). I found his testimony to be entirely credible.

The cited safety standard requires that the person conducting the preshift examination check the refuge alternative for damage, the integrity of the tamper-evident seal and the mechanisms required to deploy the refuge alternative, and the ready availability of compressed oxygen and air. There is no question that he conducted a preshift examination of the area in the early morning hours of May 7, 2009, and I credit his testimony that his examination included the refuge chamber. I also find that his examination included the items set forth in the safety standard. The standard requires that an examination be performed and does not require that the results of the examination be recorded. Consequently, I vacate this order of withdrawal.

VII. SETTLED CITATIONS

At the hearing, the parties proposed to settle the remaining citations in these cases. In WEST 2009-333, the parties propose to settle five section 104(a) citations. The parties propose to reduce the negligence in Citation Nos. 7622564 and 7622565 to "moderate." The remaining citations remain unchanged. In WEST 2009-1174, the parties proposed to settle Order No. 8460288, which remains unchanged. I have considered the representations and documentation presented and I conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

VIII. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Reports. (Ex. G-23). Twentymile had about 281 paid violations at the Foidel Creek Mine during the 15 months preceding March 11, 2008, about 196 paid violations in the 15 months preceding May 5, 2008, about 355 paid violations during the 15 months preceding December 11, 2008, and about 514 paid violations in the 15 months preceding May 6, 2009. Twentymile is a large mine operator as is Twentymile's parent company, Peabody Energy. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Twentymile's ability to continue in business. The gravity and negligence findings are discussed above.

IX. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

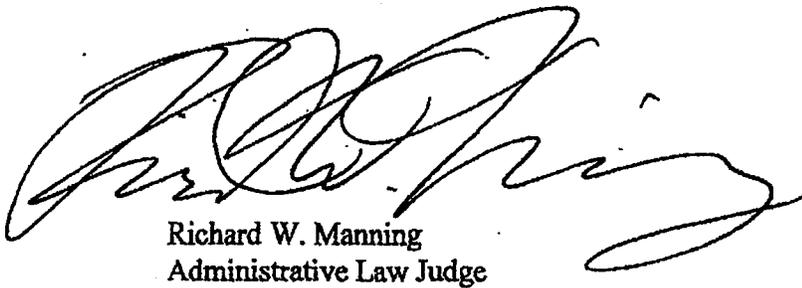
<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2009-0333		
6686312	75.400	\$50,000.00
6686313	75.360(a)(1)	5,000.00
7622426	75.400	50,000.00
7291922	77.1605(k)	1,657.00
7284349	70.101	3,143.00
7284351	70.101	2,473.00
7622564	75.403	705.00
7622565	75.403	601.00
WEST 2009-0579		
7622381	75.360(a)(1)	2,000.00

WEST 2009-1174

8456778	75.1507(a)(11)(ii)	Vacated
8456774	75.360(d)	Vacated
8460288	75.1725(a)	27,959.00

TOTAL PENALTY \$143,538.00

For the reasons set forth above, I enter the following: Order No. 7622381 is **MODIFIED** to a section 104(a) citation with moderate negligence; Order No. 6686312 is **AFFIRMED**; Citation No. 6686313 is **MODIFIED** to a moderate negligence citation; Order No. 7622426 is **AFFIRMED**; Order No. 8456774 is **VACATED**; and Order No. 8456778 is **VACATED**. Twentymile Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$143,538.00 within 40 days of the date of this decision.⁹ Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202 (Certified Mail)

Larry R. Ramey, Conference & Litigation Representative, Mine Safety and Health Administration, P.O. Box 25367, Denver, CO 80225-0367 (First Class Mail)

R. Henry Moore, Esq., Jackson Kelly, 3 Gateway Center, Suite 1340, 401 Liberty Ave., Pittsburgh, PA 15222 (Certified mail)

RWM

⁹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5266/FAX 303-844-5268

October 18, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY & HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2009-68-M
Petitioner	:	A.C. No. 22-00582-163187-01
	:	
v.	:	Docket No. SE 2009-69-M
	:	A.C. No. 22-00582-163187-02
BLUE MOUNTAIN PRODUCTION CO.,	:	
Respondent	:	Mine: Jasper Creek

DECISION

Appearances: Melanie L. Paul, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Larry Evans, Oil-Dri Corporation, Ochlocknee, Georgia, for Respondent.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Blue Mountain Production Co., pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The case involves two violations in Docket No. SE 2009-68-M with a penalty of \$2,176.00, and six violations in Docket No. SE 2009-69-M with a \$600.00 penalty. The citations were issued by MSHA under section 104(a) and (d) of the Mine Act at the Jasper Creek mine. The parties presented testimony and documentary evidence at the hearing held on August 26, 2010 in Memphis, Tennessee. At the conclusion of the hearing, a decision on the record was entered and is set forth in part below. Necessary edits have been made to the transcript language.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Blue Mountain Production Company (“Blue Mountain” or the “mine”), is the owner and operator of the Jasper Creek Mine located in Blue Mountain, Mississippi. Stip. 1-9; (Tr.11-13). The mine agrees that it is subject to the jurisdiction of the Mine Safety and Health

Administration and that the Administrative Law Judge has jurisdiction to issue this decision. In August, 2008, Billy Randolph, Michael Evans and Michael Smallwood, all MSHA inspectors, conducted regular inspections of the Jasper Creek Mine. As a result of the inspections, the eight citations contested herein were issued. At hearing, one citation was modified and the mine operator agreed to pay the citation as modified.

Transcript pages 209- 211:

I make the following findings of fact and conclusions of law. I accept the parties' stipulations regarding the jurisdiction of the commission and the jurisdiction of the Mine Safety and Health Administration, and the other stipulations that are entered into the record as evidence.

. . . The mine agrees that it is subject to the jurisdiction of the Mine Act and that this Court has jurisdiction to issue this decision. Two inspectors, actually three, Inspector Randolph and Inspector Mike Evans both went to the mine on Sunday, August 10th, and . . . Inspector Smallwood who went to the mine the next day on August 11, 2008. All three of these inspectors were involved in issuing the citations that are before me.

I have two docket numbers. . . . [First,] I'm going to address SE 09[-]68. . . . [I]n this case[,] . . . because of the defenses raised by Blue Mountain[,] I [will] remind the parties that this is a strict liability statute.

The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health hazards. When a violation of the mandatory safety standard occurs in a mine, the operators automatically are assessed a civil penalty.

In addition, the Secretary is not required to prove that a violation creates a safety hazard unless it is included as part of the standard that is cited [or it has been designated as S&S]. . . . The Mine Safety and Health Act imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a violation -- for a valid citation to be issued.

A. Docket No. SE 2009-68-M

This docket includes two citations, both issued by Billy Randolph on August 10, 2008.

i. Citation No. 7751837

This citation was issued for a violation of 30 C.F.R. § 56.14107(a), which requires that “[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.” The citation described the violation as follows:

A obvious and serious hazard existed to three employees working at ground level where an approximate 14 inch drive belt pulley was operating located waist high and easily accessed. Amputating and crushing injuries would likely result if one contacted the moving machine part. There was no guard at all on the east side of the hopper car unloading belt discharge. Foot prints were visible immediately at the unguarded discharge roller, no barricades or warning signs were posted. The belt line had operated approximately 15 minutes Friday and had operated approximately 20 minutes today and was planned to operate another two hours. The mine operator permanently removed the belt line from service. This is the forth (sic) time this standard has been cited in the past two years at this mine site. The Plant Manage[r] (Danny Yancey) engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that the head pulley guard was missing and the employees worked in the area when the machinery was in motion. This violation is an unwarrantable failure to comply with a mandatory standard.

Randolph determined that the violation was reasonably likely to result in a permanently disabling injury, that the violation was significant and substantial, that one employee was affected, and that the negligence was high. A civil penalty in the amount of \$2,000.00 has been proposed for this violation.

a. The Violation

Transcript pages 212-214:

[T]he primary thrust of most of the testimony today was regarding this particular violation. Inspector Randolph, who is an experienced mine inspector and a field office supervisor, along with Inspector Trainee Michael Evans, arrived at the mine on a Sunday.

And together as they entered into the mine, they immediately saw four persons from the mine standing in the area of a belt conveyor. . . . Three were standing. One was on the

Bobcat.

[The inspectors] immediately saw that part of the belt was unguarded, that material was coming off the belt, that the Bobcat was operating and they could see the guards were not on the belt where they were intended to be. The belt was about 25 feet long.

Two men were standing on the side where . . . Mr. Randolph and Mr. Evans took pictures, and both [inspectors] questioned the supervisor Mr. Yancey about the missing guard. . . . Inspector Randolph and Inspector Evans testified that the workers were [near the conveyor.] Mr. Evans said six feet from the conveyor, and Mr. Randolph said anywhere from 10 to 15 feet.

Mr. Yancey . . . said a little bit farther away. [The unguarded portion was] . . . near the discharge roller, and I reference[] Exhibit 9A, which shows the unguarded portion of the conveyor.

[I]t is obvious from the photograph and from the inspector's testimony that the guard at one time was in that location guarding that tail pulley but for some reason was not [installed in place on the day of the inspection].

This particular conveyor had been borrowed from another mine and put together on Friday and operated [for] several hours [on that day] and then again on Sunday at both times without . . . any guard near the discharge portion, the discharge roller of the conveyor.

There were other unguarded parts of the conveyor as well, but the inspector testified that he -- it was his policy to cite the conveyor belt and not each individual [unguarded area]. The belt was about waist high. The inspectors could see over the guards that were already [in place and had a clear view of the area where the guards were missing].

[The inspectors] could also see tripping and slipping hazards including the soft sandy material on the ground and the pieces of wood and track that were sticking out from below the conveyor.

[Randolph and Evans observed] . . . tracks or marks on the ground near the unguarded area. There is no -- no one really knows who was standing . . . next to the unguarded area, but

nevertheless, the important part is that it was accessible to anyone who wanted to walk up to it.

Based on his vantage point, Randolph believes that Yancey could see the guard, and was aware that the belt had been dumping. Yancey testified that he did not see the area that had the missing guard and that the inspector misinterpreted the conversation regarding the guard.

Transcript Page 211:

[T]he commission interprets safety standards to take into consideration ordinary human carelessness. In the case of Thompson Brothers Coal, the commission held that the [guarding] standard must be interpreted to consider whether there is a reasonable possibility of contact and injury including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. [*Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984).]

Human behavior can be erratic and unpredictable. So, for example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down.

In such an instance, the employee's clothing could become entangled in a moving part and a serious injury would result. Guards are designed to prevent just such an accident. The fact that no employee was in the immediate area does not take away from the violation.

Government Exhibit 9C shows the rotating shaft, which was not guarded on left side. That area, particularly the bearing, which is required to be greased, and the bolt heads, will easily catch a sleeve and pull a miner into the unguarded portion of the shaft located on the discharge pulley.

Inspector Evans testified that he observed footprints very close to the conveyor and surmised that someone had been working in the area. (Tr. 139). Mine witnesses testified that no one was in the immediate area of the unguarded pulley on the day of the inspection. Either way, the area was easily accessible and, based on the history of such injuries at plants throughout the United States, it is not a defense that no person was next to the unguarded area at the time it was observed by the inspector. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

Mr. Yancey and the company witnesses testified that the belt was being tested on

Sunday; however, the evidence does not support that the conveyor was in place for such a test run, nor were there barricades or signs warning individuals to stay away from the unguarded area during any test. Further, the company witnesses testified that no one had conducted an inspection of the conveyor prior to starting it up.

For the above reasons, I find that the Secretary has proven a violation of the cited mandatory standard.

b. Significant and Substantial

A significant and substantial (“S&S”) violation is described in section 104(d)(1) of the 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 S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. I find, further, that the violation contributed to the hazard of a miner getting caught in the unguarded areas of the belt or pulley and being pulled in or entangled. Third, the hazard contributed to will result in an injury as a result of being pulled into the belt, pulley, or the drive. As the inspectors explained, the unguarded areas were out in the open and available for anyone to approach and work around. Further, there were a number of tripping hazards adjacent to the unguarded belt. Randolph explained why the pinch point and the area missing the guard would be accessed in the normal course of mining by persons at the mine. He explained that if the bearing freezes it is necessary to get close to examine and grease the bearing, or to run water on the bearing to cool it. Further, if material is spilling off of the belt then a miner would enter the area to adjust the hopper. In his view, a number of people would be

in the area that was not guarded. Finally, entanglement in the pinch point would result in an injury that is serious and potentially fatal.

Transcript pages 215-217:

[I]n order to establish that a violation of the mandatory safety standard is significant and substantial, the Secretary of Labor must prove first that there is a violation, which I have already indicated that there is . . . a [clear] violation of the [guarding] standard in this case, that there is -- second, a discrete safety hazard that is a major danger to safety contributed to by this violation.

And the safety hazard here is unguarded moving parts that could pull someone in or otherwise injure them should they fall or become entangled in the belt. The next part of the test, part three, a reasonable likelihood that the hazard contributed to will result in injury is the most difficult part of the significant substantial [elements] for the Secretary to prove.

But in this case, . . . the Secretary has met her burden. . . . [T]here was a major pinch point on top of the discharge pulley. If anyone got entangled into it, it would mean amputation or serious injury. The location of the belt was right at waist high. It was easy to access.

There was nothing guarding, barricading, or blocking anyone from going toward the pinch point or the unguarded pulley. There was no -- there were three miners on foot in the area, a fourth on a piece of equipment. There had been no meeting or warnings [to] stay away from that particular part of the [belt].

And it is reasonably likely that someone would walk into that area and be -- and be injured. Anyone would walk in the area to look at it to make sure it is discharging properly, to clean it up.

Other[] reasons explained by Inspector Randolph [include that a miner] . . . might be in the area to run water on the area or to cool it down or to grease it, clean up the spill, adjust the hopper. So there were a number of reasons. It was easily accessible, and there were a number of reasons why someone might go in the area.

[I]f they did get caught in that belt, the injury would be serious. Therefore, I find that this is a significant and substantial violation as cited by the inspector. . . . [T]he mine argues it was

not S and S because it was not accessible [in] that no one had reason to go over [to that area], but I . . . [have] already articulated my reasons for agreeing with [the inspectors]-- I credit Inspector Randolph and Inspector Evans . . . in that regard.

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek coal Inc. v. MSHA*, 52 F.3d. 133, 135-136 (7th Cr. 1995). Inspector Randolph qualifies, without question, as an experienced MSHA inspector. He described the violation as significant and substantial and explained that unguarded portions of the belt are reasonably likely to lead to an event that causes serious injury.

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). I find that the facts of this violation clearly lead to a finding that it was significant and substantial.

c. Unwarrantable Failure

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,194 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

The day the subject citation was issued, Randolph and Evans described the condition as obvious and as having existed for an extended period of time. Nothing had been done to abate the violation, no warnings or barricades had been posted and the violation posed a high degree of danger to the miners. In addition, two of the three men who were on foot observing the conveyor were supervisors.

Evans observed three men standing at the conveyor as it was operating and another man on a bobcat, all approximately 5-6 feet from conveyor. Evans learned that two of the men standing near the conveyor (i.e., Yancey, the plant manger, and Jones, a team leader) were supervisors. Further, Evans learned that the person who set up the conveyor on the previous

Friday was also a supervisor. Evans explained that he immediately noticed the missing guards, particularly the missing guard in the head area where the shaft was turning and creating an entanglement hazard. In addition Evans saw that a guard was missing on other side of the conveyor at the drive head, leaving the drive roller exposed for about five feet.

Evans asked the plant manager, Yancey, if he knew the guards were missing. Evans remembers that Yancey indicated that he was aware that the area needed to have the guards that were missing. Evans also learned that the belt had been running about 30 minutes on Sunday before the inspectors arrived, and had run several hours on Friday. Evans later took statements from both Palmer and Jones, both supervisors. He learned that neither of the two of them had performed a safety inspection nor had they directed any miner to conduct a safety inspection prior to starting up the belt.

Evans determined that the violation was the result of high negligence based on the circumstances at the time, with no mitigating factors. Yancey was in charge and another supervisor was present, yet no warnings were given to other employees to stay back from the unguarded areas, no meeting was held prior to starting up the conveyor, and no barricades were erected. When the inspectors arrived, the employees and supervisors present were facing the conveyor and looking in the direction of the head drive where the guard was missing, and should have noted the missing guard and taken some action.

Yancey testified that he was not aware that the head pulley guard was missing. He said that he didn't tell Randolph that he knew that it was a violation, or that he knew the head guard was off, nor did he tell Evans that he knew it was off. He recalls that Evans questioned him about the missing guard and whether he knew that the head pulleys on conveyors needed to be guarded. He responded that he did know that they needed to be guarded. Yancey testified that he did not inspect the conveyor prior to putting it in operation and, from his vantage point, he was not able to see the area where the guard was missing. Although Yancey testified that he did not see that the guard was missing, the inspectors saw it immediately upon leaving the office and moving into the work area. Therefore, I credit the testimony of Randolph and Evans that the missing guard was obvious to anyone who was working in the area. I find that the violation is an unwarrantable failure as designated by the inspectors and assess the proposed penalty of \$2,000.00.

ii. Citation No. 7751841

This citation was issued for a violation of 30 C.F.R. § 56.12018, which requires that “[p]rincipal power switches shall be labeled to show which units they control, unless identification can be made readily by location.” The citation described the violation as follows:

A hazard exists to miners performing work on electric powered equipment and electrical circuits in that the principle power switches were not labeled to show which units they control. This is the third time that this standard has been cited in the past two years at this mine site.

Randolph determined that the violation was not significant and substantial, that one employee was affected, and that the negligence was high. A civil penalty in the amount of \$176.00 has been proposed for this violation.

a. The Violation

Randolph credibly testified that the power switch box on the wall at the kit kat conveyor could be easily accessed by workers, maintenance persons, and contract electricians. The power switch was occasionally used to cut power to equipment in this area so that work could be performed on the equipment or as the need may arise to de-energize the belt. In failing to identify the breaker, the mine ran the risk that the wrong breaker would be thrown, thereby energizing and starting the belt or equipment without notice which would, in turn, result in a fatal accident. Randolph reviewed the records and discovered that this particular power switch box had been cited three times in the past for not having all of the switches labeled.

The operator defends this violation by asserting that the unlabeled switches were circuit breakers, not principal power switches. However, I credit Randolph's testimony that this is a central power switch by virtue of the fact that the various switches turn off power to different parts of the conveyor area. He explained that a circuit breaker also turns off the power and is a power switch.

Transcript pages 219-220:

There's no question [the power switch] could not be identified by location based on Inspector Randolph's [unrefuted] testimony. Randolph determined that the power switch box on the wall at the kit kat conveyor did not have all of the power -- all of the switches labeled.

And he testified that it was in clear violation of this mandatory standard. . . . [T]he mine's defense to this violation is that it was not a switch, not a principal power switch. [The mine] also argues that the three that were labeled . . . [to abate the violation after the citation was issued] -- at least one of them was not a principal power . . . [switch].

I don't find that argument persuasive. . . . [Instead], I credit the testimony of Inspector Randolph, who is also a certified electrician that these were principal power switches [in that they could de-energize large portions of the area by throwing the switch] and that they were not labeled.

. . . Inspector Randolph did not designate this as significant and substantial. One employee was affected, but he did indicate

that the negligence was high. I agree with Inspector Randolph, that the negligence was high. He indicated that the mine had been cited for this before. It is a simple thing.

The box is right there. It should have had all of the labels on it that are . . . [required]. . . . I affirm the violation, including the negligence finding of the inspector and assess a 200-dollar penalty for the violation.

B. Guarding Violations in Each Docket

Four of the six citations at issue in the docket addressed below, and one of the two citations in the docket addressed above, allege that Blue Mountain failed to adequately guard moving machine parts. Blue Mountain argues that it did not receive fair notice of MSHA's determination that its guarding was inadequate. The Jasper Creek Mine has been inspected at least annually for the past ten years. Blue Mountain contends that many of the missing guards cited by Inspector Randolph and Inspector Smallwood have been missing since MSHA began inspecting the mine. The lack of guards in the three separate areas discussed below had not been cited by any inspector until Inspector Randolph and Inspector Smallwood did so in this case.

Section 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving machine parts that can cause injury." The standard makes clear that guarding is required but leaves unanswered what is required to protect persons from coming into contact with moving machine parts. The standard was written broadly to effectuate its protective purpose and cover a wide range of moving machine parts. Blue Mountain is not arguing that the cited areas did not come within the purview of the standard.

The Secretary must provide fair notice of the requirements of a broadly written safety standard. The language of section 56.14107(a) is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (Dec. 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (Sept. 1991).

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission recently summarized this

test as “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.”

Id. (citations omitted). In other words, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. “The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated.” *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

The mine operator argues that, with regard to the three guarding violations discussed below, the machines have not had guards for many years and have not been cited, leaving the operator to believe that it was in compliance with the applicable guarding standard. Blue Mountain argues that it is entitled to reasonable notice from MSHA of its intention to require additional guarding before civil penalties may be assessed. The Secretary contends that the citations should be affirmed because Blue Mountain did not meet the burden of proof for its fair notice defense.

Transcript page 223-224:

The remaining violations are guarding violations. And as to those guarding violations, the mine has raised the issue of fair notice, which deserves a little discussion before we go forward with those. But let me first note on the record that Citation Number 7751843 has been modified to allege a violation of 56.1411 -- 112B. And the operator accepts it as modified, and a 100-dollar penalty is assessed as suggested by the Secretary.

. . . I want to address briefly the fair notice issue that came up in the remaining guard[ing] violations. Blue Mountain argues that it did not receive fair notice of MSHA’s determination that several areas, particularly three areas were not guarded that should have been guarded.

And then raising the . . . fair notice issue, Blue Mountain contends that many of the guards . . . -- that these guards were seen or inspected by previous inspectors in the past 12 to 15 years, and no one has . . . [deemed them] a violation.

Essentially, when a mine operator raises the issue of fair notice, it is raising the issue of whether or not the standard is specific, that it gives them notice as to what is required.

The fact that other inspectors walk by it can lead them to believe that no guarding is necessary. However, the fact other

inspectors walk by . . . [a violation without citing it] is not enough to allege a fair notice argument. Just because a mine inspector [may] walk[] by a violation [without issuing a citation] does not relieve the mine operator of its duty to follow the standard.

C. Docket No. SE 2009-69M

i. Citation No. 6133232

This citation was issued for a violation of 30 C.F.R. § 56.14107(a), which requires that “[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.” The citation described the violation as follows:

A hazard exist to miners working in Rotex shaker screen area. A guard was not provided to prevent crushing injuries from pinch points between the shaker screens and the hanger brackets adjacent to the travel way.

Smallwood determined that the violation was not significant and substantial and the negligence was moderate. The Secretary proposes a penalty of \$100.00

a. The Violation

Inspector Smallwood arrived at the mine on Monday, August 11th. Smallwood has been an inspector for two and one-half years and has a total of 23 years of mining experience. When he first arrived at the mine, he conducted interviews regarding the unwarrantable violation issued the previous day by Inspector Randolph. He then began his inspection and observed the Rotex screening system. Smallwood testified that the machine moves rapidly and that there is a walkway next to the system which is traveled each day. In his opinion, a miner can trip or fall into the pinch point, which is easily accessible from the walkway. He opined that the violation is only obvious when the machine is on and moving. Exhibit 15(a) is photograph of the area that shows the shaker screen and support bracket. People travel in the area to do maintenance and checks.

Transcript pages 227-228:

The guard was not provided to prevent crushing injuries from [the] pinch point between the shaker and the hanging bracket adjacent to the travel way. . . . [T]he mine said only two of the [four] -- only two were required to be guarded and that is[, according to Inspector Smallwood,] . . . because two were near a travel way . . .

Inspector Smallwood indicated that the screening system

moves rapidly, and . . . it is next to a walkway. Trip and fall hazards would put someone right into the pinch point. And he indicated that is the reason he designated this as a violation.

He did say that because there was good visibility and it may not be likely that someone would fall into this particular area, he designated it as non-S and S. And the -- the injury indicated would be primarily cuts and bruises from falling into it.

He [indicated] . . . moderate negligence because it had not been brought to the attention of the mine in the past. I find that Inspector Smallwood did, based on his credible testimony, establish a violation as set forth. And in this case, his testimony was -- the important part of his testimony [for purposes of fair notice is] . . . that the hazard . . . is obvious when the machine is operating.

It is not so obvious when it is not moving. In that case, a mine inspector may well walk by it if it is not moving, but the mine operator is there each and every day to see it and should be -- a reasonable person would know that these areas next to the walkway should be guarded [given the nature of the pinch points].

At this point the fair notice defense does not apply, and I find that there is a violation. The inspector has credibly testified that there are moving machine parts that may be contacted and cause injury. Hence, a violation is established. There is no evidence that an inspector has observed this screening section in operation but there is evidence that a reasonably prudent person who watches the machine operate would understand that a guard is necessary. Therefore, I find that the operator has not met his burden in asserting the defense of fair notice and assess the proposed penalty of \$100.00.

ii. Citation No. 6133235

This citation was issued for a violation of 30 C.F.R. § 56.12016, which requires that:

[e]lectrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The citation described the violation as follows:

The electrically powered Kat Kit conveyor was not locked and tagged out of service while repairs to the tail pulley were in process. Employees working on this equipment were exposed to the possibility of injury, if the conveyor was started without workers knowledge. The employee had a emergency stop button depressed, making the chance of an accident unlikely.

Smallwood determined that it was not significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$100.00 has been proposed for this violation.

a. The Violation

Smallwood testified that depressing the emergency stop button is not a replacement for turning off the power at the source and locking it and tagging it out of service so that it is not accidentally started while work is being performed. In this case, guards were being installed on the conveyor when Smallwood observed the violation. Smallwood is aware of an accident that occurred in the weeks prior to the citation in which the emergency stop malfunctioned and equipment started inadvertently causing injuries to a miner.

The mine argues, and Yancey testified, that the emergency stop button is a way to comply with the standard based upon the fact that the emergency stop is a switch that is used to turn off/on the power. According to Yancey, the emergency stop button was depressed and the worker had the button in his sight at all times and, therefore, the chances of it starting without his knowledge were non-existent and the intent of the standard was met.

Transcript pages 221-222:

[Citation] 6133235.

. . . [This] citation was [issued] for a violation of [section] 56[-]12016, which requires electrical power equipment to be de-energized before mechanical work is done. This is essentially lock-out, tag-out standard.

. . . I don't think there is any question about the facts. There was an employee working on the kit kat conveyor, which is pictured on Exhibit 11A and B. An employee was placing guards to . . . [abate another] citation, and he had stopped the belt -- the conveyor with the emergency stop button.

Instead of going to the main power source locking . . . [it] and tagging out, . . . [he used the emergency stop button]. . . [I find this to be a very serious violation.] Lock-out, tag-out is

something that should be known by everyone at this point in the Mine Act.

Inspector Smallwood indicated that the negligence was moderate and that this was not an S and S violation. There is no question that there was a violation. It was not locked-out and tagged-out. . . . [T]he mine believes that the E -- the emergency stop button was depressed [,] [s]o the belt could not possibly start, and that was an alternative to the lock-out, tag-out. I don't find that argument persuasive, and I agree with Inspector Smallwood that, in fact, it was not locked and tagged out according to the requirements and the standard, and the violations existed. And I find the gravity to be a little higher than the inspector assessed, and I assess a 300-hundred dollar penalty for this violation.

iii. Citation No. 7751838

This citation was issued for a violation of 30 C.F.R. § 56.12004, which requires “[e]lectrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected.” The citation described the violation as follows:

A potential shock and burn hazard existed to miners that would use the Bob Cat (250 NT) welding machine located under the Bentnoite (sic) Silo. The portable welding machine was ready to be used if needed and was not locked and tagged out of service. The electrode cable had one inch of exposed bare copper conductor that could be contacted.

Randolph determined that it was not significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$100.00 has been proposed for this violation.

a. The Violation

Randolph explained that he cited the portable welding machine due to the exposure of the copper wire conductor inside the insulating jacket of the electrode cable. The machine was ready for use. If the cable had been picked up by the exposed areas, then a short circuit would have occurred and shock and burn hazards would have existed. Randolph observed the condition shown in Government Exhibits 10(a) and 10(b). The mine operator argues that since the welder is portable, it is not subject to the standard.

Transcript pages 222-223:

[Randolph] issued this citation and this violation because there was a nick or a cut in the [cable of the] welding machine located -- a portable welding machine located in the Bentonite silo.

There is no question the photographs shows that there was a nick or a cut in the cable and that . . . the nick or cut exposed the bare copper and conductor that could be contacted by anyone picking up [the cable] to the machine.

If the welding leads were energize[d] or if that cable were energized, it could result in an electrical - in an electrocution or short circuit causing injury to the person using the equipment. One inch of it was exposed. It was ready to be used, although it was not in use at the time.

It could short circuit, causing shock hazard, and the injury would be very serious. But it was not -- it was the opinion of Inspector Randolph that it was not likely to happen because it was a small exposed part. He designated moderate negligence. . . .

[Randolph] doesn't know when [the cut in the cable] . . . occurred, but . . . [it was easily visible]. He designated the negligence as moderate[.] . . . So I -- I credit Inspector Randolph's testimony and find that there was a violation of the standard as he cited and assess a 200-dollar penalty for the violation.

iv. Citation No. 7751840

This citation was issued for a violation of 30 C.F.R. § 56.14107(a), which requires that “[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.” The citation described the violation as follows:

A hazard exists to miners working on the tray conveyor located in the Kit Kat Filling area in that the drive pulley shaft was not guarded. Miners in the area are exposed to broken hand and broken arm injuries.

Randolph determined that it was not significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$100.00 has been proposed for this violation.

a. **The Violation**

Randolph observed the kit kat conveyor belt on the date of the inspection when it was not operating. He could see that the trays placed on the conveyor were sitting on top of moving parts. He determined that the location of the trays presented a hazard where miners' fingers could be caught as they lifted the tray to move it from the belt. The miners are told to wait until the belt stops to pick up the tray but it is possible that, when in a hurry, they will lift the tray without waiting for the belt to stop. In that case, they could easily catch their fingers or sleeves and become entangled in the belt. It is Randolph's view that it is difficult to see the pinch points unless the belt is stopped and the trays are removed, such as they were on August 11.

The mine argues that the conveyor moves slowly and the chances of getting caught in the moving parts is negligible. It also argues that the pinch points that are not covered by the trays are guarded and the other moving parts are guarded by the trays themselves. The operator's arguments do not change the fact of the violation, since the pinch points exist and workers have their hands near those points when removing trays. If the miners contact the moving belt parts under the tray, the miners would suffer an injury, possibly the loss of a finger. The arguments of the operator go to the gravity of the violation which has been marked as moderate. Finally, the mine argues that the conveyor has been without a guard for many years and has not been cited by MSHA.

Transcript pages 228-229:

Inspector Randolph determined that the violation was not significant and substantial but that [the area under the trays] . . . needed to be guarded I don't think there is any dispute that there were guards around the tray area, but the issue was the area under the tray.

When workers lift the trays off the belt, they could catch their hands or fingers in[] the pinch point below. And that is the area that he required to be guarded. Again, because this area is covered by trays and the inspector would have to be there in order to see someone lifting the tray off to know that, in fact, that there was a pinch point that could cause a problem, I do not find that fair notice applies . . . [in this instance].

The mine operator is in a far better position to look at this and know, and a reasonable person should know that this area should contain a guard to protect the hands and fingers of persons lifting the trays off the conveyor.

I credit the testimony of Inspector Randolph and find that there is a violation of the guarding standard and agree and assess the penalty of 100-dollars as proposed by the Secretary.

v. Citation No. 7751842

This citation was issued for a violation of 30 C.F.R. § 56.14107(a), which requires that “[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.” The citation described the violation as follows:

A hazard exists to miners working near the Kit Kat Feed conveyor in that a guard was not provided for a exposed rotating shaft between the speedreducer and the drive pulley. Entanglement hazards resulting in broken bones and lost work days.

Randolph determined that the violation was not significant and substantial, that one employee was affected and that the negligence was moderate. A civil penalty in the amount of \$100.00 has been proposed for this violation.

a. The Violation

Randolph described this area, which is elevated, as being above the feed conveyor and accessible only by ladder. The unguarded area is shown in Government Exhibit 13(a). The location has one bearing that must be greased but it has an extended grease line that makes it possible for work to be done without getting too close to the moving part. A worker may be required to access the point to grease the machine once each month, and a worker conducting a safety inspection of the area would be required to climb the ladder and walk past the area several times each week. Due to the speed of the rotating shaft, it would quickly pull a worker who comes in contact with it into the moving parts, thereby causing severe injuries.

This case is a close call for the use of the “fair notice” defense. Yancey argues on behalf of the company that he traveled the area with mine inspectors, that the area is accessed by ladder, is hardly traveled, and that the mine has a safety device for greasing the equipment which keeps the worker away from any moving part. Two inspectors observed this violation and agreed that it was obvious and that a reasonable person should have seen the violation and provided a guard over the moving area.

Transcript pages 229-230:

[Randolph testified] that a guard is not provided for a[n] exposed rotating shaft between the speed reducer and the drive pulley. Entanglement hazards resulting in broken bones and lost work days [would result in the event a miner came into contact with the moving machine part].

The photograph of this particular violation shows that the violation -- that the unguarded place is very clear. . . . Exhibit 13A, shows that the unguarded moving portion of this machine is obvious.

I don't know why an inspector would go by and not cite this. [However,] Mr. Yancey did testify that he personally was in this area[, which is accessed by a ladder,] with an MSHA inspector and no one mentioned to him that this particular area should be guarded.

[I agree with Randolph that] . . . it should be guarded. And it does present a hazard[, . . . [i]t has pinch points, moving parts that [could cause injury and therefore] should be guarded. This is -- this is the citation that I believe the fair notice defense would come into play.

This is one of those cases where it does look obvious from the photographs . . . [yet inspectors failed to cite it for many years].

Since the area is elevated, set back from the walkway, and not traveled often, a reasonable person may not know that the area should be guarded. Given Yancey's clear and convincing testimony that he passed the position many times with an inspector and a guard was not mentioned, he understood that one was not needed. Therefore, in this case, the operator has shown the fair notice defense applies and, for that reason, I vacate the citation.

vi. Citation No. 7751843

This citation was issued for a violation of 30 C.F.R. § 56.14107(a). At hearing, I granted the Secretary's motion to amend the citation to an alternative section of the regulations. The operator agreed to the amendment and agreed to pay the violation as amended. Randolph determined that it was not significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of \$100.00 has been proposed for this violation. The violation has been admitted and the \$100.00 penalty is assessed.

II. PENALTY

The principles governing the authority of the Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty 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.

30 U.S.C. § 820(i).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history shows few violations in the past, thus justifying the low penalties in this matter. The size of the operator is large and I accept the Secretary's finding of negligence for each citation discussed above. Further, I find that the Secretary has established the gravity as described in the citations and assess the following penalties:

<i>Citation No. 7751837:</i>	\$	2,000.00
<i>Citation No. 7751841:</i>	\$	200.00
<i>Citation No. 6133232:</i>	\$	100.00
<i>Citation No. 6133235:</i>	\$	300.00
<i>Citation No. 7751838:</i>	\$	200.00
<i>Citation No. 7751840:</i>	\$	100.00
<i>Citation No. 7751842:</i>	- Vacated -	
<i>Citation No. 7751843:</i>	\$	100.00

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed above for a total penalty of \$3,000.00. Blue Mountain Production Co. is hereby **ORDERED** to pay the Secretary of Labor the sum of \$3,000.00 within 30 days of the date of this decision.¹


Margaret A. Miller
Administrative Law Judge

¹Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

Larry R. Evans, Oil-Dri Corporation of America, P.O. Box 380, Highway 3 North, Ochlocknee, GA 31773

Melanie L. Paul, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth St., S.W., Atlanta, GA 30303

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500

Washington, DC 20001-2021

Telephone No.: 202-434-9980

Telecopier No.: 202-434-9949

October 25, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-1138-M
Petitioner,	:	A.C. No. 35-03298-149593
	:	
v.	:	
	:	
THREE WAY PORTABLE CRUSHING,	:	
INC.,	:	
Respondent.	:	Mine: Portable

DECISION

Appearances: John D. Perez, Certified Mine Safety Professional, U.S. Department of Labor, Vacaville, CA, on behalf of the Secretary
Wendell H. Lux, Three Way Portable Crushing, 6330 Harmony Road, Sheridan, OR, on behalf of Three Way Portable Crushing

Before: Judge Barbour

This is a civil penalty proceeding brought pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §§ 815, 820. The Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA"), petitions for the assessment of a civil penalty of \$946.00 for one alleged violation of Section 56.3131, a mandatory safety standard applicable to surface metal and nonmetal, including open pit, mine operators. The alleged violation is set forth in a citation issued pursuant to Section 104(a) of the Mine Act. 30 U.S.C. § 814(a).¹

¹ The citation was originally issued pursuant to Section 104(d)(1), but was subsequently modified to a 104(a) citation.

Three Way Portable Crushing, Inc. ("Three Way Portable") is a six or seven-man crushed stone operation that removes and crushes basalt stone once it has been shot from the high wall. (Tr. 54; 156) Three Way Portable began working at the quarry on January 07, 2008 and planned to operate there for approximately fifteen days. (Gov. Ex. 7) Weyerhaeuser owns the quarry where Three Way Portable was working and Weyerhaeuser developed the high wall.(Tr. 160-161) MSHA Inspector Anderson conducted a regular inspection of the quarry on January 15, 2008 and January 16, 2008. (Tr. 169)² Inspector Anderson issued Citation No. 6430303 based on an alleged violation of Section 56.3131, which requires that loose materials be stripped back from the top of the quarry wall in places where persons work and that fall-of-material hazards be corrected.³ The company contested the penalty assessed for the alleged violation. The matter was assigned to me by the Chief Judge and was heard in Salem, Oregon.

STIPULATIONS

The parties have agreed to the following stipulations:

1. Three Way Portable ...is engaged in the mining of washed rock in the United States, and its mining operations affect interstate commerce, and is subject to the Federal Mine Safety and Health

Section 104(a) states in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a . . . mine subject to this Act has violated . . . any mandatory health or safety standard . . . or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator.

² Anderson is an MSHA mine inspector with six years of prior experience inspecting mines and 23 years of prior experience working in open pit mines with high walls. (Tr. 23) He has experience with both high wall failures and rock falls. (Tr. 41)

³ 30 C.F.R. § 56.3131 states:

In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create fall-of-material hazard to persons shall be corrected.

Act of 1977, 30 U.S.C. § 801, et seq.

2. The history of violations as shown in Exhibit A of the Petition for Assessment accurately reflects that of Three Way Portable....
3. The area referred to in citation 6430303 is a pit or quarry.
4. The pit or quarry wall was about two-hundred (200) feet high.
5. There was loose, unconsolidated material on the pit or quarry wall.
6. The pit [or] quarry wall was not sloped to the angle of repose.
7. Th top pit or quarry wall had not been stripped back for at least ten (10) feet.
8. Richard Holub, foreman, was on site the day of the inspection which resulted in the subject citation.
9. The mine is located about five (5) miles past the locked gate on the access road to the quarry.
10. The citation was abated in a timely manner.
11. The mine size is small.

(Joint Ex. 1.)

CONTENTIONS RELATING TO CITATION NO. 6430303

Inspector Anderson, testifying on behalf of the Secretary, stated that he issued Citation No. 6430303 after observing a violation of the mandatory safety standard in Section 56.3131, which requires that loose material on quarry walls be stripped back in work areas and that fall-of-material hazards be corrected. 30 C.F.R. § 56.3131. Anderson was accompanied during the inspection by the pit foreman, Rick Holub; Rodric B. Breland, an MSHA Supervisor-Inspector conducting a routine review of Inspector Anderson; and an MSHA trainee. (Tr.25; Tr. 70-71; Tr. 169.) During his inspection, Inspector Anderson noticed that the high wall, measuring approximately 200 feet, had loose material on it. (Tr. 23; Gov. Ex. 4.) Rocks, dead trees and other unconsolidated material had not been stripped back and were hanging on the face of the high wall. (*See* Tr. 26.)

Inspector Anderson testified that he observed a load operator on the left side of the pit repairing a 2.5 or 3.0 foot berm approximately 20 to 25 feet from the high wall. (Tr. 24; Tr. 57.)

These estimates were agreed to by Holub during the inspection. (Tr. 24; Tr. 130; Gov. Ex. 4.) Inspector Anderson did not see the load operator go behind the berm area or see the operator exit the loader while working on the berm. (Tr. 36.) He determined that only one person was affected by the violation based on the fact that he observed only the load operator working under the high wall. (Tr. 43.) Inspector Anderson testified that he saw the load operator digging for material for the berm to the right of the high wall and marked the location on Exhibit 5. (Tr. 48; Gov. Ex. 5.)

Inspector Anderson considered the high wall hazardous because the loose material on top of the high wall presented a fall-of-material hazard to loaders driving down the travel way. (Gov. Ex. 4.) Anderson stated that loose material was likely to fall off the high wall, bounce off the full bench-like structures on the wall and get projected out from the base of the wall at speeds fast enough to cause a fatality. (Tr. 42.) Supervisor-Inspector Breland affirmed Inspector Anderson's assessment of the likelihood of injury. (Tr. 78.) Breland testified that he had done an inspection in Colorado involving a fatality caused by the fall of materials from a high wall. (Tr. 77-78.) A small boulder had rolled down the high wall to the road. (Tr. 78.) It hit a loader below and broke through the front windshield with so much force that the seat and the operator were hurled out of the back of the loader. (*Id.*) Anderson determined that the approximately 2.5 or 3.0 foot berm being erected was inadequate protection against this hazard. (Tr. 24-26.) Supervisor-Inspector Breland testified that he also found the berm inadequate. (Tr. 73.) Anderson recommended that the height of the berm be increased and that the berm be moved farther away from the high wall. (Tr. 48-49.) The operator abated the violation by erecting an approximately 6 foot berm about 50 to 75 feet from the high wall and by moving workers out of the area near the high wall. (Tr. 49-50.)

Inspector Anderson concluded that the violation of Section 56.3131 was significant and substantial based on his determination that a mandatory standard had been violated, there was a discrete danger to persons, injury was reasonably likely to occur and any injury that occurred was likely to be serious. (Tr. 43.)

Inspector Anderson determined that injury from a fall of material was reasonably likely to occur due to weather conditions such as wind and the freezing and thawing of materials on the high wall, the close proximity of the berm being constructed to the high wall and the close proximity of the high wall to the areas where he was digging materials for the berm. (Tr. 37; 43.) Inspector Anderson found high negligence because the berm was placed too close to the high wall and was incomplete at the time of inspection. (Tr. 44.)

Rod Klenski, a load operator for Three Way Portable, testified on behalf of the company. Klenski stated that he and Holub were using a 966F loader and a 966G loader to both repair the berm in question and dig out rock to feed into the crusher plant. (Tr. 110; 114-115; 120.) He stated that approximately 100 feet of the berm was missing. (Tr. 114.) Klenski, who constructed the original 2.5 to 3.0 foot berm located 20 to 25 feet from the high wall, believed that the berm provided adequate protection against a

fall-of-material hazard (Tr. 111.) Holub testified that he told workers to dig on either end of the high wall and not go anywhere near the high wall. (Tr. 131.)

Wendell H. Lux, Secretary for Three Way Portable, disputed the estimates, originally agreed to by Rick Holub during the inspection, and argued that the original berm was actually at least 4.0 feet tall and 50 feet away from the high wall. (Tr. 150) Lux theorized that part of the berm was missing when the inspection began because a road construction contractor working in the pit removed it over the weekend for use as fill material for pipes. (Tr. 159 -160) He testified that this had happened in the past. (*Id.*) The company operated at a reduced level on Monday, January 14, 2008 and did not replace the berm that Monday. (Tr. 172.)

RESOLUTION OF THE ISSUES

CITATION NO. 6430303

Citation No. 6430303 states:

The material at the top of the high wall at the cross over road quarry was not strip[p]ed back 10 ft from the top of the quarry and there was loose and unconsolidated materials including, rocks, and dead trees hanging on the face of the wall. The high wall was estimated to be about 200 ft. in height and was not benched in the area of concern. At the time of inspection a front end loader was observed installing a berm within about 20 ft. from the toe of the high wall. Dave Hansen/President, and Wendell Lux/ Secretary stated that they were aware of the hazardous condition of the high wall and directed employees to install the berm. The loader was directed to dig materials from the shot muck from each end of the pit. Due to the close proximity of the loaders travel way, if materials were to fall from the wall it could result in a fatal injury. Owners Dave Hansen and Wendell Lux engaged in aggravated conduct constituting more than ordinary negligence in that they were aware of the hazardous condition of the high wall and allowed the front end loader operator to travel within approximately 20 ft. of the hazardous high wall area. This violation is an unwarrantable failure to comply with a mandatory standard.

Note: A 6 ft. barrier was erected to eliminate access to the hazardous area. Termination due time will be set to allow operator reasonable time to correct the hazard.

Note: All measurements were agreed upon by the foreman.
(Gov. Ex. 4.)⁴

⁴ As previously noted, the citation was modified from a 104(d)(1) citation to a 104(a) citation.

THE VIOLATION

I conclude that the Secretary has established a violation of the first part of 30 C.F.R. § 56.3131, which requires that loose material be sloped to the angle of repose or stripped back at least 10 feet from the top of the quarry wall. The parties stipulated that there was loose material on the approximately 200 foot high wall and that the material had not been sloped to the angle of repose or stripped back at least 10 feet. Inspector Anderson's testimony that he observed a load operator repairing a berm near the toe of the high wall during his inspection is sufficient evidence to establish that persons travel in the area while performing their assigned tasks. (Tr. 24.)

I conclude that the Secretary has also established that Three Way Portable violated the second sentence of Section 56.3131, which requires that fall-of-material hazards at the base of a quarry wall be corrected. 30 C.F.R. § 56.3131. The parties contest whether there was a berm under the high wall prior to the day of inspection. However, even if the 2.5 to 3.0 foot berm had been in place under the high wall prior to the inspection it would have been inadequate. Given Inspector Anderson's 23 years of experience working in open pit mines with high walls and his personal experience with both high wall failures and minor rock falls, I credit his testimony that a 2.5 to 3.0 foot berm placed 20 to 25 feet from the high wall was inadequate protection against a fall-of-material hazard and that a berm of approximately 6 feet placed 50 to 75 feet from the wall was necessary.

During the inspection Anderson estimated that the berm was 2.5 to 3.0 feet and located 20 to 25 feet from the high wall. These estimates were recorded on the citation he issued and confirmed by Rick Holub, foreman for the company, during the inspection. At the hearing Wendell Lux then claimed that the berm was actually at least 4 feet tall and 50 feet away from the high wall. I find Wendell Lux's argument that the Secretary incorrectly estimated the size and placement of the berm unpersuasive. The Secretary's estimates were made contemporaneously with the inspection and confirmed by Three Way Portable's foreman, Rick Holub. Wendell Lux is the only witness for the respondent who disputed the estimates.

NEGLIGENCE

Though Inspector Anderson modified the citation from a 104(d)(1) citation to a 104(a) citation his negligence finding remained high. Anderson determined the degree of negligence was high based on the fact that the berm being erected was too close to the high wall, part of it was not in place when the inspectors arrived and Holub was aware that miners were erecting the berm. I conclude that the company was moderately negligent. As Holub admitted, Three Way Portable operated on Monday, January 14, 2008 without completing the berm and had not completed the berm by the time the inspection occurred. I credit Holub's testimony that miners

were instructed not to work under the high wall because as foreman he is in a position to know where workers were performing their duties. The only two persons working under the high wall were erecting a safety berm. Further, the company had a partial berm erected which provided some notice and protection to Three Way Portable miners. These facts support a finding of moderate, not high negligence.

S&S GRAVITY

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the 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 that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co.*, 52 F.3d 133, 135(7th Cir. 1995); *Austin Power Co. v. Sec’y of Labor*, 861 F.2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996).

The Secretary has proven that a violation of Section 56.3131 occurred. It has been established that the violation contributed to a fall-of-material hazard for miners using the loader travel way. Specifically, the danger was that loose material could fall off the high wall, bounce off the full bench-like structures and get projected out from the base of the wall at speeds fast enough to cause a fatality.

The Secretary has also established that the safety hazard identified was reasonably likely to cause injury. Inspector Anderson determined that the loose materials and inadequate berm

contributed to a fall-of-material hazard for loaders traveling near the high wall. I credit the testimony of Inspector Anderson and Supervisor-Inspector Breeland that this hazard was reasonably likely to cause injury. Inspector Anderson has over 23 years of experience with open pit mines and Supervisor-Inspector Breeland offered persuasive testimony regarding a fatality at another mine caused by material falling from a high wall. Government Exhibit 1 clearly shows at least one uprooted tree dangling down the face of the high wall. This photographic evidence lends further support to Inspector Anderson's assessment of the likelihood of injury. In light of this evidence, I credit Inspector Anderson's finding that injury was reasonably likely, even though Three Way Portable operated at the site for only about 15 days and is a very small six or seven-man operation.

The Secretary has proven that the hazard would cause reasonably serious injury. Given Inspector Anderson and Supervisor-Inspector Breeland's experience, I credit their testimony that loose material falling from the top of the high wall could cause serious injury or even a fatality. For the reasons above, I find that the violation was both significant and substantial and serious.

REMAINING CIVIL PENALTY CRITERIA

The Act requires that I assess a civil penalty for the violation. It also requires that in doing so, I consider the statutory civil penalty criteria. 30 U.S.C. § 820(i).

HISTORY OF PREVIOUS VIOLATIONS

Three Way Portable's history of previous violations reflects very few prior violations. I find, based on the record in this case, the applicable history of previous violations is a mitigating factor. Therefore, I will reduce the penalty based in part on Three Way Portable's prior history.

SIZE

The parties have stipulated that Portable is a small mine. (Joint Ex. 1) Accordingly, I will assess a lesser amount than I would for medium or large operations.

ABILITY TO CONTINUE IN BUSINESS

There is no evidence the size of any penalty assessed will adversely affect Three Way Portable's ability to continue in business, and I find it will not. Therefore, when assessing a penalty, I will neither increase nor decrease it on account of this criterion.

GOOD FAITH ABATEMENT

Finally, the parties agreed that the alleged violation was abated in good faith by Three Way Portable and in a timely manner.(Joint Ex. 1.) The company's prompt good faith abatement supports a reduction in penalty.

CIVIL PENALTY ASSESSMENT

Given the civil penalty criteria discussed above, I assess a civil penalty of \$600.00.

ORDER

Consistent with this Decision, it is **ORDERED** that Citation No. 6430303 is **AFFIRMED** except that the inspector's negligence finding is **MODIFIED** from "high" to "moderate."

Within 40 days of the date of this decision, Respondent is **ORDERED** to pay civil penalties totaling \$600.00 for the violation found above. Upon payment of the penalty and modification of the citation, this proceeding is **DISMISSED**.


David F. Barbour
Administrative Law Judge

Distribution:

John D. Pereza, Conference & Litigation Representative, U.S. Department of Labor, MSHA,
2060 Peabody Road, Suite 610, Vacaville, CA 95687

Wendell H. Lux, Three Way Portable Crushing, 6330 Harmony Road, Sheridan, OR 97378

/ca

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

September 1, 2010

FREEDOM ENERGY MINING	:	CONTEST PROCEEDING
COMPANY,	:	
Contestant	:	Docket No. KENT 2010-1352-R
	:	Citation No. 8241282; 07/26/2010
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine: #1
ADMINISTRATION (MSHA),	:	Mine ID: 15-07082
Respondent	:	

ORDER GRANTING SECRETARY’S MOTION FOR SUMMARY DECISION
ORDER DENYING CONTESTANT’S CROSS MOTION FOR SUMMARY DECISION
ORDER DENYING CONTESTANT’S MOTION FOR EXPEDITED HEARING
ORDER TO PRODUCE REQUESTED RECORDS

Statement of the Proceedings

This Notice of Contest proceeding concerns Citation No. 8241282 filed by the Respondent against the Contestant pursuant to section 103(h) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(h). The July 26, 2010 Citation, as written, alleges as follows:

The operator failed to produce/provide records requested by MSHA special investigators during the performance of the investigators (sic) official duties under Section 110 of the Federal Mine Act. On June 23, 2010, written request for specific documents were given to the operators (sic) legal counsel, (Jonathan Ellis, Esquire of Steptoe and Johnson). Again these records were requested on July 1, 2010, by the District Manager. On July 9, 2010, a letter received from Jeffrey K. Phillips Steptoe and Johnson, Attorneys of Law states that Freedom Energy is not willing to produce the coal production reports requested. Section 103 (a) and (h) of the Federal Mine Safety Act requires the operator to furnish information requested by the Secretary of Labor that she has determined necessary in carrying out provisions of the Federal Mine Act.

The violation was not cited as significant and substantial, but alleged to result from the operators’s high negligence.

I. Procedural Background

A. The 104(d)(2) Orders

In the two months preceding issuance of the July 26, 2010 Citation at issue, MSHA issued three section 104(d)(2) orders against Contestant.

Specifically, on May 17, 2010, MSHA issued 104(d)(2) Order No. 8241080 alleging that combustible materials consisting of loose coal, coal fines, and coal dust have been allowed to accumulate on the No. 20 conveyor belt. The violation was cited as significant and substantial resulting from the operator's high negligence and constituting an unwarrantable failure to comply with a mandatory safety standard.

Also on May 17, 2010, MSHA issued 104(d)(2) Order No. 3515431 alleging failure to comply with the approved ventilation plan for the 001 MMU, despite the section 103(i) spot inspections every five days. The Order, which was to remain in effect until ventilation plan changes had been approved by the District Manager, found that the totality of violations existing during this and previous inspections demonstrated a routine practice of mining without sufficient ventilation at the working faces. The violation was cited as significant and substantial resulting from the operator's high negligence and constituting an unwarrantable failure to comply with a mandatory safety standard.

On June 10, 2010, MSHA issued 104(d)(2) Order No. 8241268 alleging a violation of 30 C.F.R. 75.400 for accumulations of loose coal in various locations along the entire length of the #17-B belt conveyor, and debris in the neutral entries from the end of the track up to the section power center. The Order found that the totality of violations found during this and previous inspections demonstrated a routine practice of allowing accumulations of loose coal, coal dust, and debris to exist in the active workings of this mine, noting that this was the 277th occurrence in the last two years. The violation was cited as significant and substantial resulting from the operator's high negligence and constituting an unwarrantable failure to comply with a mandatory safety standard.

B. MSHA's Section 110 Investigation, Request for Records, and Subsequent Correspondence With Contestant

As a result of foregoing 104(d)(2) orders, MSHA Special Investigator Alan Howell began a section 110 investigation, consisting of interviews and document review.¹ On June 23, 2010, pursuant to this investigation, Special Investigator Howell wrote Jonathan Ellis, counsel for Sidney Energy Company d/b/a Freedom Energy Mining Company for Mine #1, and specifically

¹Section 110(c) of the Mine Act imposes personal liability on individual corporate agents if they knowingly authorized, ordered, or carried out a violation of a mandatory health or safety standard or an order issued under the Act.

requested the following information:

Massey Energy Production Reports, dates ranging from May 10, 2010 to May 20, 2010 from the Freedom Energy Mining Company, #1, 001 Section Name, Address, Phone numbers and hours worked (time sheets) of all employees working on the 001 Section during this time frame, and the Massey Energy Production Reports for the 010 Section for the dates on June 8, 2010 to June 11, 2010.

Special Investigator Howell's letter further stated that MSHA's authority to seek records under section 103(a) of the Act mandates that "[a]uthorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing and disseminating information relating to health and safety conditions, the cause of accidents and the causes of diseases and physical impairments originating in such mines." Special Investigator Howell requested that Respondent provide the requested records by close of business June 25, 2010, otherwise the matter would be considered for legal action under section 108 of the Act.²

By letter dated July 9, 2010, counsel for Contestant sent an e-mail and attached a reply letter to James Poynter, the Acting District Manager at MSHA in Pikesville, Kentucky regarding the investigation of ventilation and accumulations issues at Freedom Energy #1 mine, and more specifically Special Investigator Howell's demand for time sheets and coal production reports. Contestant's July 9 letter unequivocally asserted that "Freedom Energy is not willing to produce coal production reports."³ Contestant's July 9 letter further stated that "[p]roduction reports are not required to be created or maintained" and that section 103(h), referenced in other recent MSHA correspondence, directs that a coal operator "shall establish and maintain such records, make such reports, and provide such information, as the Secretary . . . may **reasonably require** from time to time to **enable him to perform his functions under [the Mine] Act.**" (emphasis in original). In addition, Contestant indicated that MSHA had not demonstrated to Freedom Energy that the requested coal production reports are necessary for MSHA to perform any functions relating to an investigation of ventilation and accumulations in the 001 Section or how the production reports are relevant to MSHA's investigation. Accordingly, Contestant advised

² Section 108 of the Act deals with injunctions and authorizes the Secretary to institute a civil action for permanent or temporary injunctive relief in federal district court whenever a mine operator or agent, inter alia, violates or refuses to comply with any order or decision issued under the Act, including a civil penalty assessment order; interferes with, hinders or delays that Secretary in carrying out the provisions of the Act; or refuses to furnish any information or report requested by the Secretary in furtherance of the provisions of the Act.

³That letter erroneously cited section 103(d) of the Act, instead of 103(b), as authorizing the Secretary to sign and issue subpoenas for production of relevant documents. Section 103(b) deals with public hearings.

MSHA that the production reports would not be supplied.

C. The Citation at Issue, Contestant's Motion for Expedited Hearing, and Additional Correspondence

The Secretary responded to Contestant's July 9 letter by issuing the July 26, 2010 Citation No. 8241282, which gave Contestant 15 minutes to terminate the Citation. Contestant alleges that MSHA failed to give counsel notice of the Citation until well after the termination time expired.

By letter dated July 26, 2010, MSHA's Acting District Manager Poynter wrote Sidney Coal Company, Inc. President Charles I. Bearnse, III, concerning Contestant's refusal to comply with the request for coal production reports in the section 110 investigation. Poynter's July 26 letter referenced a prior July 1 letter from him advising Contestant that MSHA was seeking certain documents pursuant to its right to investigate matters occurring under the Mine Act.⁴ Poynter's July 26, 2010 letter specifically advised that section 103 gives MSHA the right to demand that operators produce records reports and information the Secretary deems to be reasonably required to enable her to perform her functions under the Act. Poynter's July 26 letter also advised that one of the required functions under the Act is the investigation of allegations of willful violations by agents of an operator; that the response from Contestant's counsel refused to produce the coal production reports; that a summary of time and attendance records had been provided; and that the Act requires that an operator produce original documents for examination and copying by MSHA when requested, not a partial or selective summary, which is non-responsive and unacceptable. Poynter's July 26 letter further advised that continued noncompliance has led MSHA to consider these violations for the civil penalty provisions of section 110(b) of the Mine Act, which authorizes a daily civil penalty of up to \$7500 for every day you fail to comply with our citation. Poynter's July 26 letter closed by stating that if Contestant has not produced the requested documents by close of business on July 22, 2010, MSHA will implement section 110(b) of the Act to propose civil penalties for each day that Contestant fails to comply with the request for document production.

Poynter's July 26, 2010 letter, like the instant Citation, was not served on counsel, even though the letter itself acknowledges that counsel represented Contestant in the instant matter.⁵

On July 29, 2010, Contestant filed with the Commission a Motion for Expedited Hearing "because of MSHA's unreasonable attempt to impose a monetary penalty." Contestant argued,

⁴That July 1, 2010 letter was not included in the record submitted by either party in this proceeding.

⁵I am troubled by the fact that it appears that MSHA knowingly skipped counsel in this matter, and MSHA is admonished that it should not skip counsel in any matter that it knows a Contestant or Respondent is represented by counsel.

inter alia, that whether or not Contestant was obligated to produce the requested documents under the Mine Act is a legal question, that no safety issues are implicated by the non-production, and that the threatened daily penalty is unnecessary, arbitrary and punitive. Contestant further argued that if MSHA is permitted to impose a daily penalty of \$7,500, Contestant is exposed to more than \$200,000 in fines by August 27, 2010. Consequently, Contestant argued that an expedited hearing is proper because unique or extraordinary circumstances are present that result in continuing harm or hardship.

By email dated July 30, 2010, counsel for the Solicitor wrote counsel for Contestant, with copy to MSHA Special Investigator Howell and the MSHA District Office. Counsel for the Solicitor indicated that since MSHA had not received an answer from Contestant concerning resolution of this matter, MSHA was starting the process for daily penalties for non-production. Counsel for Contestant's email reply to all that same day, confirmed confidence in the legal position taken in Contestant's July 9 letter to Poynter, and confirmed that Contestant was not inclined to disseminate the coal production reports that MSHA demanded.

D. The August 4, 2010 Conference Call with the Undersigned

On August 4, 2010, I convened a conference call with counsel for the Solicitor and counsel for Contestant. In response to my questioning, counsel for the Solicitor explained why in her view, the coal production reports were relevant, necessary and reasonably requested in order for Special Investigator Howell to complete his section 110 investigation. She indicated that the documents were contemporaneous and kept in the ordinary course of business and would show who was responsible for what goes on in the working sections of the mine on the dates in question. Counsel for the Solicitor stated that she was filing forthwith a Motion for Summary Decision Concerning Notice of Contest and Memorandum in Support, with attached declarations and other supporting documents, which mooted Contestant's Motion for Expedited Hearing, particularly since no daily penalty had yet been assessed. Counsel for the Solicitor further indicated that she had offered to keep the documents that had been requested confidential for purposes of the Freedom of Information Act, but such offer was rejected by Respondent. Counsel for Contestant argued that the company-created coal production reports were not required under the Act, that the Secretary cannot independently determine what documents need to be turned over, and that perhaps the documents could be turned over in redacted form. When the Secretary objected to Contestant's unilateral determination of redaction issues, I indicated that any redaction or privilege issues would be subject to my in camera inspection.

II. The Secretary's Motion for Summary Decision

On August 5, 2010, the Secretary filed with the Commission her Motion for Summary Decision Concerning Notice of Contest and Memorandum in Support, with attached Declarations from Special Investigator Howell and MSHA Ventilation Specialist Brian Dotson.

Special Investigator Howell declares, among other things, the following:

- that his section 110 investigation of the three 104(d)(2) orders against Contestant requires an inquiry into what information was available to certain agents of the operator at the time of the violations;
- that he has past mining experience working in various counties around Eastern Kentucky as superintendent, electrician, section foreman and equipment operator;
- that he is aware of the contents of records kept by Freedom Energy, including production and time and attendance records, because of his prior coal mine employment, his work in prior investigations concerning Freedom Energy, his work on other investigations relating to mines owned or controlled by AT Massey, and his work with prior managers who worked for Massey operations in this area, including Freedom Energy;
- that as part of his section 110 investigation, he determined that the production reports for the period of May 10-20, 2010 were contemporaneous documents produced by managers and agents of the operator, which provided information relevant to the operation of the working sections and the belts carrying coal out of the mine while active mining was occurring;
- that he requested production records that were kept in the usual course of business and were made contemporaneously by agents of the operator at the time of the violations, and that such records are regularly produced by operators during investigations under the Act;
- that although the timing and attendance records were produced, the production records were not produced, despite several reasonable requests for these documents, and that reason given for non-production was that such records were not required to be maintained under the Act and the Secretary had not established that the request was reasonable;
- that MSHA and counsel for the Secretary continue to explain to counsel for the contestant that the Act requires production of records, whether required to be maintained or not, when requested by the Secretary;
- that the delay in producing the requested records has hindered his investigation under section 110 and caused lost time and resources for himself and counsel;
- that the continued refusal to produce the coal production reports establishing actions taken during production shifts around the time of the May 17, 2010 violations, causes harm to the Secretary, who must determine, which director(s), officer(s) or agents(s) of the operator, if any, authorized, ordered or carried out such violations, and causes potential harm to agents of the operator, who may be incorrectly cited for personal responsibility for said violations, but exculpated by production of such reports;
- that based on the nature of the violations, which are of the type that could

- cause serious accidents and death, it is critical that MSHA discover if particular management officials knew of the conditions or had information tending to give them knowledge; and
- that an accurate evaluation of the actions of management during the relevant time period cannot be completed without the contemporaneous, coal production reports.

Declarant Dotson avers that prior to his employment with MSHA, he worked for Massey Energy in a variety of positions, including mine superintendent; that he is aware of the production records used at mines owned and operated by Massey Energy; and that the Freedom #1 mine is under the control of Massey Energy's Sidney division. He further declares that as mine superintendent, he would review coal production records containing information relevant to operation of the section and coal belts on a daily basis, and he would make daily resource allocation decisions, based in part, on coal production records. On information and belief, he avers that the requested records may be relevant to the negligence of mine management for the cited violations at issue.

Based on the foregoing declarations and her understanding of applicable Commission law, the Secretary argues that her Motion for Summary Decision should be granted in this Contest proceeding because there are no genuine issues as to any material fact and she is entitled to judgment as a matter of law. The Secretary argues that sections 103(a) and (h) of the Mine Act require the operator to furnish information requested by the Secretary that she has determined necessary in carrying out the provisions of the Mine Act. The Secretary emphasizes that under section 103(h) of the Act, the operator must produce records related to investigations when requested by the Secretary, whether or not those records are required to be maintained by the operator. The Secretary points out that the production records in question were kept in the usual course of business and were made by agents of the operator at a time well-nigh contemporaneous with the violations. The Secretary argues that the requested records document actions that were taken or conditions that existed during working shifts at the time of the violations, and will assist in identifying managers and agents, if any, who knew or should have known of the violations and failed to act based on circumstances that could amount to aggravated conduct constituting more than ordinary negligence, which is necessary to establish section 110(c) liability. The Secretary argues that many directors, agents, and/or officers of Contestant are potentially liable for the violations under section 110 of the Act; that MSHA has an affirmative obligation to investigate such potential liability; and that the requested production records are relevant to issues presented concerning production and agent responsibility under the Act, including the actual mining cycles that occurred, the length of time the conditions were present, and the persons present at the time the violations occurred, who knew or should have known of their existence. Accordingly, the Secretary requests that Citation No. 8241282 be upheld.

III. The Contestant's Response and Cross Motion for Summary Decision

On August 18, 2010, Contestant filed its Response in Opposition the Secretary's Motion for Summary Decision Concerning Notice of Contest, with attached Affidavit of James F. Pinson, Jr.

Affiant Pinson avers as follows:

- that he has been superintendent for Contestant since July 2008, and employed by a Massey Energy subsidiary since 1994;
- that he is familiar with and reviewed the coal production reports for Contestant dated May 10-20 and June 8-11, 2010;
- that he had reviewed the three section 104(d)(2) orders set forth above;
- that Contestants's May and June 2010 coal production reports contain some information that has no relevance to said orders;
- that said coal production reports contain some information that is redundant and the same as information contained in pre-shift inspection reports, on-shift inspection reports, and/or belt examination reports;
- that said coal production reports contain some information that should not be disclosed to individuals who are not employed by Contestant, including information pertaining to the mine's cut sequence;
- that based upon his investigation, he does not believe that Contestant has previously turned over coal production reports to MSHA;
- that he was a supervisor of Brian Dotson for some of the time that Dotson was employed by a Massey Energy subsidiary, that during such time, Dotson did not work for Freedom Energy Mine Company, and that Dotson ceased employment with any Massey subsidiary in 2005;
- that the coal production reports at issue are different from, and contain additional information than, those used when Dotson was employed with a Massey subsidiary through 2005;
- that he does not recall meeting MSHA Special Investigator Howell until the summer of 2010, that he has never seen Howell underground at Freedom Energy Mine Company; and that he has no knowledge that Howell has ever been given access to, or looked at, the coal production reports at issue.

Based on the foregoing affidavit, Contestant essentially cross moves for summary decision, conceding that there is no genuine issue as to any material fact. Contestant does point out, however, that it is unclear whether that Secretary seeks summary decision on the "high" negligence designation or simply on the dissemination of the coal production reports. In this regard, Contestant argues that there is no basis for finding that it knew or should have known of the violative practice by refusing to provide a production report, and, since there are mitigating circumstances for the non-production, the high negligence designation is baseless.

Contestant advances two principal arguments on cross motions for summary decision. First, it asserts that the Secretary's demand the coal production reports is *ultra vires* because it exceeds an express statutory limitation on the Secretary's power to demand information from coal operators. Second, Contestant argues that the Secretary's demand for coal production reports violates the Fourth Amendment.

With regard to the first argument, Contestant notes that the Secretary relies almost entirely upon section 103(h), with passing reference to section 103(a) of the Act, neither of which, in Contestant's view, require a coal operator to furnish all information "requested by the Secretary of Labor that she has determined necessary in carrying out the provisions of the Federal Mine Safety Act." Nowhere has Congress bestowed on MSHA such unfettered discretion to dictate what a coal operator must turn over during an MSHA investigation. Rather, the information must be necessary to enable the Secretary to perform her functions under the Act, Contestant argues. Contestant further contends that "[t]he Secretary has, to date, steadfastly refused to explain how the requested records are necessary to her discharge of her statutory duty, saying instead only that she has a secret reason that she cannot reveal." Contestant notes that it was not until the Secretary filed her Motion for Summary Decision that Contestant learned that the three section 104(d)(2) orders gave rise to the special investigation, and Contestant argues that the time sheets, pre-shift inspection reports, on-shift inspection reports, and belt books, which were already turned over, contain all the relevant information that it is obligated to disclose to MSHA.⁶

With regard to its second argument, Contestant argues that the Supreme Court in *Donovan v. Dewey*, 452 U.S. 594, 599 (1981), held that searches under the Mine Act do not violate the Fourth Amendment as long as they are authorized by law or necessary for the furtherance of federal interests. Contestant argues that the Secretary's production demand 1) is not authorized by law because it exceeds her statutory authority to require production of information, and 2) does not further federal interests because she has refused to identify specifically why she seeks the information instead of stating only that she has a secret reason for requesting it. In addition, Contestant argues that since the "heavy regulation" of the Mine Act does not require Contestant to maintain the sought-after records, the operator maintains a reasonable expectation of privacy in those records, akin to the third prong of *Dewey*, where random, infrequent, or unpredictable inspections may trigger a warrant requirement to protect against unbridled discretion of executive or administrative officers. Response at 8-10. In conclusion, Contestant argues that the Mine Act does not give the Secretary the power to demand that Contestant produce the sought-after records. Rather, to gain access to Contestant's "proprietary" coal production reports, the Fourth Amendment and applicable case law require a warrant, Contestant argues.

⁶Contestant challenges the evidentiary basis for the Secretary's claim (Motion at 6) that the operator has produced similar production records during regular inspections of the mine has a pattern of disclosing production reports.

IV. Analysis With Findings and Conclusions

A. Applicable Legal Principles

Under Commission Rule 67(b), 29 C.F.R. § 2700.67(b), a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, show 1) that there is no genuine issue as to any material fact, and 2) that the moving party is entitled to summary decision as a matter of law.

Section 103(h) of the Act states in pertinent part that “[i]n addition to such records as are specifically required by the Mine Act, every operator of a coal or other mine shall establish and maintain such records, make such records, and provide such information, as the Secretary . . . may reasonably require from time to time enable him to perform his functions under this Act 30 U.S.C. § 803(h).⁷

Section 110(c) of the Mine Act provides that whenever a corporate operator violates the mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

As set forth in the Secretary’s Motion, to establish Section 110(c) liability, the Secretary must prove that an individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992), citing *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 559, 563 (1971)). 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 (Jan. 1981). Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). That is, as a predicate to individual liability, a corporate operator’s agent must be privy to knowledge or information that gives him reason to know of the existence of a violative condition under circumstances wherein his failure to act amounts to aggravated conduct constituting more than ordinary negligence. *Johnson Paving Company, Inc., and William T. Pinson*, 31 FMSHRC 1246, 1255 (Oct. 2009) (ALJ Barbour).

⁷The legislative history of the Mine Act states that the Secretary’s determinations concerning requests for records should be final and the request should minimize the burden on operators consistent with her need to efficiently and effectively perform her enforcement responsibilities. Senate Report, No. 95-181, page 28, 95th Congress 1st Session, as reported in U.S. Code Cong. & Admin. News 1977, page 3428.

B. Application of Legal Principles to the Facts

Contrary to Contestant's arguments that the Secretary's production demand exceeds her statutory authority and does not further federal interests, I find that under Section 103(h) of the Act, the Secretary's demand for coal production reports is a request that is reasonably required by the Secretary from time to time to enable her to perform her functions under the Act. Section 103(h) of the Act specifically states "[i]n addition to such records as are specifically required by the Mine Act, every operator of a coal or other mine shall establish and maintain such records, make such records, and provide such information, as the Secretary ...may reasonably require from time to time enable him to perform his functions under this Act"⁸

The coal production reports, although not specifically required by the Act, have been created and maintained by Freedom Energy in the ordinary course of business, and are reasonably necessary for the Secretary to perform her functions under the Act. One such function, clearly communicated to the Contestant in the Secretary's July 26, 2010 letter, is the investigation of allegations of willful [or knowing] violations by agents of the operator. Similarly, Citation No. 8241282 essentially informs Contestant that the requested records were required to be produced under section 103(h) so that the Special Investigator could perform official investigative duties under section 110.

Furthermore, I find that the Secretary clearly advised Contestant during the August 4, 2010 conference call with the undersigned, and again in the instant Motion for Summary Decision, that the contemporaneous production records taken during working shifts on the dates surrounding the 104(d)(2) orders, are relevant to identify managers and agents who knew or had information that would lead them to know of the violations occurring on May 17 and June 10, 2000. I further find that the Secretary has established that the requested coal production records are relevant to the special investigation. The Secretary's affidavits establish that the records are relevant to conducting an investigation under section 110 and that the Secretary is required to perform such an investigation. Specifically, Special Investigator Howell's declaration establishes that production reports produced by managers and agents of the operator provide information relevant to the operation of the working sections of the mine and the belts carrying coal out of the mine while active mining transpired. Declarant Dotson, a former mine superintendent at mines owned and operated by Massey Energy, states that he reviewed coal production records containing information relevant to operation of the section and coal belts to make daily resource

⁸Contestant argues that it not required to turn over business records that are not required to be kept by the Act. Contestant does not point to any authority that allows for such an exemption to the requirements of section 103(h). In fact, section 103(h) explicitly states that, "*in addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the [Secretary] may reasonably require*" (emphasis added). In these circumstances, I reject Contestant's argument *under Chevron USA Inc. v. Nat'l Res. Defense Council*, 467 U.S. 837 (1984), that its contrary interpretation is clear and unambiguous.

allocation decisions, and therefore, the requested records may be relevant to the negligence of mine management for the cited violations in the section 104(d)(2) orders.

Although Contestant attempts to counter the import of such declarations with a rather vague and nonspecific affidavit from Mr. Pinson to the effect that the coal production reports are different from those used since 2005 and contain some irrelevant, redundant, or proprietary information, I find the declarations of Special Investigator Howell and Mr. Dotson sufficiently probative to establish the relevancy of the requested information to the section 110 investigation at issue. Furthermore, I find that Contestant has not raised any specific, legitimate and substantial confidentiality interest, and even had it done so, it has sought no accommodation from the Secretary.⁹ In fact, the Solicitor stated during the conference call that the Secretary offered to keep the coal production reports confidential for Freedom of Information Act (FOIA) purposes, but Contestant rejected any such accommodation. Nor has Contestant submitted the coal production reports for in camera inspection, which I indicated that I would order should counsel raise privilege or redaction issues. In sum, I conclude that the Secretary's request for coal production reports satisfies the "reasonably required" standard of section 103(h) of the Act.

I also reject the Contestant's argument that the Secretary's request for coal production records is an unreasonable search and seizure under the Fourth Amendment and must be predicated on a warrant. In *Donovan v. Dewey*, 452 U.S. 594, 599 (1981), the Supreme Court established that inspections of commercial property may be unreasonable "[1] if they are not authorized by law or [2] are unnecessary for the furtherance of federal interests . . . [or] [3] if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." As explained above, the Secretary's production demand does not violate the Fourth Amendment since it is authorized by law under section 103(h) of the Act and necessary to further a federal interest, the attribution of appropriate individual liability during a section 110 investigation predicated on 104(d)(2) orders. In addition, given the heavy regulation under the Mine Act, and the specific language of section 103(h) and section 110(c) of the Act, the Contestant lacks a reasonable expectancy of privacy, under the third prong of *Dewey*, in contemporaneous business records that may show who had knowledge of violations for Section 110 investigation purposes, which investigations are required by statute from time to time, particularly in the context of extant 104(d)(2) orders. Because the operator of a mine in such a pervasively regulated industry cannot have a reasonable expectation of privacy in business records to which Congress has allowed the agency access, a warrantless demand for such records does not violate the Fourth Amendment. Cf. *Peabody Coal Co.*, 7 FMSHRC 183 (Feb. 14, 1984) (no search warrant necessary for special investigator to require mine operator to produce certain accident and illness reports required to be kept under the Act, in response to section 103(g) investigative request that was not a regular inspection and could not be predicted). As noted above, the fact that the instant production records were not required, but have been created and

⁹Cf. *Pennsylvania Power and Light*, 301 NLRB 1104, 1105-1106 (1991).

maintained by the operator, makes no difference under the express language of section 103(h) because they have been shown to be reasonably necessary for the Secretary to perform her investigative functions under section 110 of the Act.

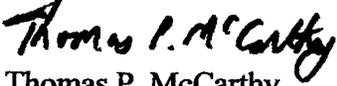
Finally, I note that Contestant has challenged the “high” negligence designation set forth in the July 26, 2010 Citation at issue. I find that the operator’s level of negligence was cited appropriately. In reaching this conclusion, I have considered the fact that MSHA is alleged to have skipped counsel when issuing Citation No. 8241282 and its July 26, 2010 letter to Contestant. Nevertheless, by July 26, 2010, through both said Citation and letter, Contestant was apprised that the coal production reports were requested pursuant to section 103(h) so that the MSHA special investigator could perform investigative functions under section 110. In the August 4, 2010 conference call, counsel for the Solicitor again made clear that the requested coal production reports were relevant, necessary and reasonably requested in order for Special Investigator Howell to complete his Section 110 investigation and establish who was responsible for working sections of the mine on the dates in question and attribute appropriate individual agent liability, if any, under section 110(c) of the Act. Counsel for the Solicitor further made this purpose clear in her instant Motion for Summary Decision. Thus, counsel for Contestant’s representations in Contestant’s August 18 Response at 5 that “[t]he Secretary has, to date, steadfastly refused to explain how the requested records are necessary to her discharge of a statutory duty,” is a factual contention that lacks evidentiary support under Fed. R. Civ. P. 11(b)(3), applicable in this forum by § 2700.1(b) of the Commission’s Procedural Rules. Rather, to date, the Contestant has refused to abate the cited violation and has hindered the Secretary’s time-sensitive investigation under section 110 of the Act. See Howell Declaration at 3.

Having considered the entire record, I conclude that Respondent’s adamant and continued refusal to provide the requested records and work towards an accommodation with the Secretary is designed to frustrate the imposition of potential individual liability for the section 104(d)(2) violations being investigated and warrants a finding of high negligence. Accordingly, I find a reduction in the challenged negligence designation is not warranted.

ORDER

In light of the foregoing, the Secretary’s Motion for Summary Decision is **GRANTED**, the Contestant’s Cross Motion for Summary Decision is **DENIED**, the Contestant’s Motion for Expedited Hearing is **DENIED** given my disposition of the Cross Motions for Summary Decision and the fact that no daily penalty under section 110(b) has yet been imposed, and the Contestant is **ORDERED** to produce the contemporaneous coal production reports for the dates

requested immediately to prevent any potential daily penalties under section 110(b) of the Act from continuing to accrue should the Secretary seek to impose penalties under that section of the Act for Contestant's continued intransigence.


Thomas P. McCarthy
Administrative Law Judge

Distribution: (Certified Mail)

Jeffrey K. Phillips, Esq. Steptoe & Johnson, PLLC, Bank One Center, 8th Floor, P.O. Box 1588, Charleston, WV 25326-1588

Mary Sue Taylor, Esq., Office of the Solicitor, US Department of Labor, 618 Church St., Suite 230, Nashville, TN 37219-2456

/cp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 13, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2009-949-M
Petitioner	:	A.C. No. 15-07101-179364
v.	:	
	:	
	:	
	:	
	:	
	:	
	:	
CARMEUSE LIME & STONE,	:	Maysville Mine
Respondent	:	

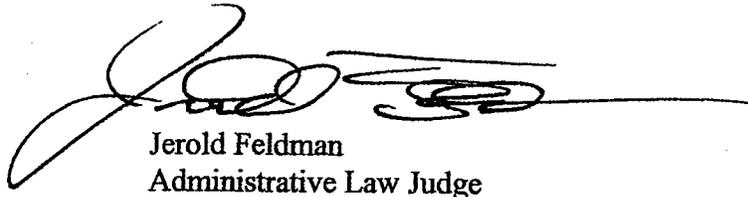
**ORDER GRANTING THE SECRETARY’S MOTION
FOR WITHDRAWAL OF THE MOTION TO DISMISS**

This captioned proceeding is before me upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act) filed against Carmeuse Lime & Stone (Carmeuse). 30 U.S.C. § 815(d). The petition seeks to impose a civil penalty of \$138.00 in satisfaction of Citation No. 6510263. This citation alleges a violation of mandatory safety standard in 30 C.F.R. § 57.15005 that requires safety belts to be worn where there is a danger of falling. Specifically, the citation states, in pertinent part, “[a] vendor/subcontractor employee from Excel Air & Oil Equipment, Inc., [Excel] was observed standing atop the Mobiltrans HD 30 bulk oil tank while not using suitable fall protection. He was installing a flow meter in one of the delivery lines”

On May 7, 2010, the Secretary filed a motion to dismiss this case, based on the erroneous belief that the case should be dismissed because Excel was a contractor. On May 13, 2010, the Secretary filed a motion to withdraw her original motion to dismiss because she now believes that Excel is a vendor. On May 25, 2010, Carmeuse filed a motion in opposition to the Secretary’s motion to withdraw her motion to dismiss admitting that Excel is a contractor. Section 3(d) of the Mine Act provides that a mine operator includes any independent contractor performing services at a mine. 30 U.S.C. § 802(d).

Whether Excel is a vendor or a contract is a distinction without a difference. Excel is an independent contractor (mine operator) as contemplated by section 3(d) by virtue of the performance of its services at the mine.

The Court of Appeals for the D.C. Circuit held that the Secretary's decision to cite the owner-operator of a mine and/or its independent contractor, is an exercise of her prosecutorial discretion that is unreviewable. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006). Consequently, the Secretary may cite Carneuse for alleged safety violations of its independent contractor Excel. Accordingly, **IT IS ORDERED** that the Secretary's motion to withdraw its motion to dismiss **IS GRANTED**.



Jerold Feldman
Administrative Law Judge

Distribution:

Melody S. Wesson, Conference & Litigation Representative, U.S. Department of Labor, MSHA,
135 Gemini Circle, Suite 212, Birmingham, AL 35209

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty
Avenue, Pittsburgh, PA 15222

/tps

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001

September 17, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-592
Petitioner,	:	A.C. No. 15-09636-139419
	:	
v.	:	Docket No. KENT 2008-784
	:	A.C. No. 15-09636-144081
BLUE DIAMOND COAL COMPANY,	:	
Respondent,	:	
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2009-6
MINE SAFETY AND HEALTH	:	A.C. No. 15-09636-161762 A
ADMINISTRATION (MSHA),	:	
Petitioner,	:	
	:	
GARY L. JENT, Employed by BLUE	:	
DIAMOND COAL COMPANY,	:	
Respondent.	:	Mine: #77

**ORDER DENYING RESPONDENT'S DISPOSITIVE MOTION ON FINDINGS OF
FACT AND CONCLUSIONS OF LAW PREVIOUSLY DECIDED**

**ORDER DENYING RESPONDENT'S MOTION TO EXCLUDE
WITNESS MICHAEL GAUNA**

This proceeding is brought by the Secretary of Labor against Respondent, Blue Diamond Coal Company, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d), and 29 C.F.R. §§ 2700.25–31. On July 23, 2010, Respondent filed its Dispositive Motion on Findings of Fact and Conclusions of Law Previously Decided ("Motion for Collateral Estoppel"). Respondent filed its prehearing report on August 3. Pursuant to a request by the Secretary, her prehearing report deadline was extended to August 11 due to counsel for the Secretary being out of town for several hearings. Due to a death in my family, I held a teleconference with counsel for all of the parties on August 9, 2010, to reschedule this matter's hearing date for October 26–29, 2010. Given counsel for the Secretary's hearing schedule coupled with the new October hearing date, I also permitted the Secretary to file both her prehearing report and response to Respondent's motion by August 17, 2010. The Secretary filed her response on August 11 and her prehearing report on August 17. Respondent filed the Motion to Exclude Witness Michael Gauna ("Motion to Exclude Witness") on August 23, 2010. The Secretary responded to the Motion to Exclude Witness on September 2, 2010.

I. MOTION FOR COLLATERAL ESTOPPEL

Respondent argues that collateral estoppel bars relitigation of whether it failed to maintain 9,000 cubic feet per minute (“CFM”) at the last open crosscut (“LOCC”). (Resp’t Mot. for Collateral Estoppel 3–4.) That issue underlies Order No. 4220150, which is in dispute in this case. In making its argument, Respondent relies on Administrative Law Judge Michael E. Zielinski’s opinion in *Blue Diamond Coal Co. (Blue Diamond I)*, 32 FMSHRC 581 (May 2010) (ALJ). Respondent stresses that *Blue Diamond I* considered whether the violation underlying Order No. 7521769 was highly likely to result in a fatal injury because the absence of the permanent stopping resulted in the failure to maintain 9,000 CFM at the LOCC. (Resp’t Mot. for Collateral Estoppel 2.) Respondent observed that Judge Zielinski made findings of fact and conclusions of law regarding the amount of air at the LOCC.¹ (*Id.* at 2–3.) Because Order No. 4220150 in this case alleges the failure to maintain 9,000 CFM at the LOCC, Respondent argues it should not have to relitigate this issue.² (*Id.* at 3–4.) Respondent further asserts that the remaining elements of collateral estoppel are satisfied. (*Id.* at 3.)

The Secretary responds that the issues presented in *Blue Diamond I* and in the present matter are not the same, as they involve different legal standards. (Sec’y Resp. to Mot. for Collateral Estoppel 4–5.) The Secretary emphasizes that *Blue Diamond I* evaluated Respondent’s missing and improperly constructed stoppings at several locations in the mine, whereas the underlying violation in this case concerns the ventilation at the face of the mine. (*Id.* at 5.) The Secretary also argues that Judge Zielinski purposefully chose not to resolve the facts at issue in Order No. 4220150. (*Id.* at 5–6.)

In assessing an assertion of collateral estoppel, the Commission has stated that the “[i]dentity of issue is a fundamental element that must be satisfied before collateral estoppel may be applied.” *Bethenergy Mines, Inc.*, 14 FMSHRC 17, 26 (Jan. 1992) (citing *Continental Can Co., U.S.A. v. Marshall*, 603 F.2d 590, 594 (7th Cir. 1979)). In the context of issue preclusion, “[i]ssues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits be the same.” 18 Charles Alan Wright et al.,

¹ In support of this contention, Respondent attached to its motion a copy of *Blue Diamond I* indicating the findings it believed were pertinent to resolving this issue. I have considered this information and do not agree that the issues involved in these two orders are the same for the purposes of collateral estoppel.

² Respondent also quoted Order No. 7521769, stating ““Order #4220150 is issued for failure to comply with the approved ventilation plan on the 011/MMU (failure to maintain 9,000 cfm at the last open crosscut).” (Resp’t Mot. for Collateral Estoppel at 2.) Order No. 7521769’s mere reference to Order No. 4220150 for failure to maintain 9,000 CFM at the LOCC does not dispose of this issue. As discussed below, the issues involved in Order No. 4220150 and Order No. 7521769 are not the same.

Federal Practice and Procedure § 4417, at 449 (2d ed. 2002) (quoting *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9th Cir. 1971)).

To apply collateral estoppel, the issues in the previous and the present actions must be identical beyond reasonable doubt. In 2001, the Commission assessed whether collateral estoppel may apply to an order specifically alleging a failure to identify kettle bottoms by location based on a nearly contemporaneous citation for roof defects involving multiple conditions, such as kettle bottoms. *Eagle Energy, Inc.*, 23 FMSHRC 1107, 1110–11, 1115 (Oct. 2001). The Commission reasoned that “it is apparent from comparing the uncontested citation and the contested orders . . . that there is a lack of identity of issues.” *Id.* at 1115.

Citing only general points of law regarding collateral estoppel, Respondent has not demonstrated the required identity of issues. Here, the previous order charged Respondent with failing to maintain permanent stoppings under 30 C.F.R. § 75.333(b)(2). The present order alleges that Respondent breached its ventilation plan under § 75.370(a)(1). Judge Zielinski discussed the air flow at the LOCC only insofar as it related to whether No. 7521760 constituted an S&S violation resulting from an unwarrantable failure to comply with § 75.333(b)(2). *Blue Diamond I*, 32 FMSHRC at 583–91. Judge Zielinski did not evaluate the breach of the ventilation plan alleged in the order at issue in this case. *Id.* at 584. He stated that “[Order No. 4220150] is not at issue in this proceeding.” *Id.* Instead, he discussed the airflow at the LOCC “in terms of the missing stopping” at issue in Order No. 7521760. *Id.* at 5. Because these two orders involve incongruent factual allegations and different legal standards, Respondent’s motion must be denied in accordance with *Eagle Energy*. Indeed, taken to its logical conclusion, to rule to the contrary would suggest that the Secretary has the broad power to invoke collateral estoppel against operators based on past related citations and orders.

II. MOTION TO EXCLUDE WITNESS

Respondent argues that one of the Secretary’s witnesses, Michael Gauna, should be excluded from the hearing. (Resp’t Mot. to Exclude Witness 1.) Respondent contends that the introduction of Mr. Gauna as a witness constitutes an unjustified, last-minute delay because the Secretary had not disclosed him as a possible witness until her August 17 prehearing report. (*Id.* at 1.) Moreover, the Secretary’s prehearing report is Respondent’s only source of information concerning Mr. Gauna. (*Id.* at 1–2.) According to Respondent, scheduling the witness depositions took great effort, and given the timing of Mr. Gauna’s disclosure, it would be prejudiced if I allowed Mr. Gauna’s testimony. (*Id.* at 2.)

The Secretary responds that she must rely on Mr. Gauna’s testimony to counter the testimony of Respondent’s expert witness, Dr. David Newman. (Sec’y Resp. to Mot. to Exclude Witness 2.) The Secretary had not even heard of Respondent’s intent to call Dr. Newman until July 2010 after Respondent had deposed all of the Secretary’s witnesses. (*Id.* at 1.) Within two weeks of receiving Respondent’s prehearing report identifying Dr. Newman as a witness, the Secretary concluded she would need Mr. Gauna to address Dr. Newman’s assertions. (*Id.* at 2.)

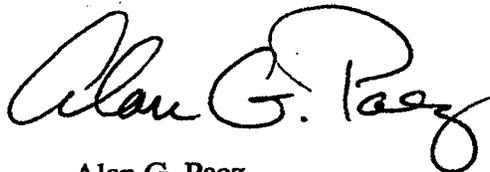
The Secretary argues that because I rescheduled this case's hearing for a later date, Respondent will not be prejudiced. (*Id.*) The Secretary further asserts that denying Mr. Gauna's testimony will hurt her response to Dr. Newman and preclude my consideration of relevant evidence. (*Id.* at 3.)

Under 29 C.F.R. § 2700.55, the administrative law judge has broad power to rule on evidentiary issues. Although the Secretary did not alert Respondent about calling Mr. Gauna until August 17, Respondent has more than a month before the hearing date to depose him. Moreover, the Secretary will call Mr. Gauna in response to Dr. Newman, of whom the Secretary did not receive formal notice until August 3. Barring the testimony of Mr. Gauna would limit the availability of relevant evidence that would be helpful to my understanding of the case. Based on these facts, I deny Respondent's motion.

I am, nevertheless, sensitive to the demands of scheduling depositions. I am also aware that Congress's recent supplemental appropriations bill has given the Secretary extra resources. Therefore, the Secretary shall make Mr. Gauna available for deposition as early as possible before the hearing date.

III. ORDER

Respondent's Motion for Collateral Estoppel is **DENIED**. Respondent's Motion to Exclude Witness is **DENIED**. In addition, the Secretary shall make Mr. Gauna available for deposition by Respondent at the earliest date possible.



Alan G. Paez
Administrative Law Judge

Distribution List: (Via Facsimile and U.S. Mail)

Tom Grooms, Esq., U.S. Department of Labor, Office of the Regional Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219-2440

Melanie Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, 2333 Alumni Park Plaza, Suite 310, Lexington, KY 40517

Randall S. May, Esq., Barret, Haynes, May & Carter, P.S.C., 113 Lovern Street, P.O. Box 1017, Hazard, KY 41701-1017

/jts

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 2010

SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of HARRY LEE BECKMAN,	:	
Complainant	:	Docket No. WEVA 2009-1526-D
	:	Case No. MORG-CD-2008-10
v.	:	
	:	
METTIKI COAL (WV), LLC,	:	Mountain View Mine
Respondent	:	Mine ID: 46-09028

ORDER GRANTING METTIKI’S MOTION
TO FILE REPLY BRIEF
AND
ORDER DENYING SECRETARY’S
MOTION TO STRIKE

The hearing in this discrimination matter, brought by the Secretary of Labor (“Secretary”) on behalf of Harry Lee Beckman against Mettiki Coal, LLC (“Mettiki”), was conducted on July 21 through July 23, 2010. Simultaneous post-hearing briefs were filed on October 14, 2010. On October 20, 2010, Mettiki filed a Motion for Leave to File Reply Brief. The Secretary opposes Mettiki’s motion.

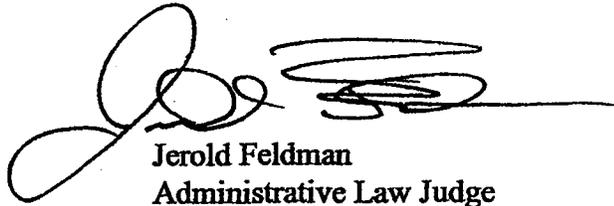
While not a matter of right, motions for leave to file reply briefs are liberally granted. Accordingly, **IT IS ORDERED** that Mettiki’s Motion for Leave to File Reply Brief **IS GRANTED. IT IS FURTHER ORDERED** that reply briefs shall be filed simultaneously **on November 15, 2010**. If the Secretary declines to file a reply brief, the Secretary’s counsel should so advise my office at jlevine@fmshrc.gov **on or before November 15, 2010**.

Also for consideration is the Secretary’s October 20, 2010, Motion to Strike Appendix A of Mettiki’s Post-Hearing Brief concerning MSHA’s investigation report of a February 17, 2006, fatal diesel-powered locomotive accident that occurred at a different Mettiki mine. The accident occurred when the operator of the locomotive was struck by a longwall shield that protruded from a parked lowboy railcar that was located adjacent to the path of the locomotive. Mettiki seeks to include this accident report to demonstrate its heightened awareness of the hazard posed by locomotive accidents. (Mettiki Br. at 44, fn. 35).

The Secretary seeks to strike this accident investigation report because it was not admitted into evidence at the hearing. Mettiki opposes the Secretary’s Motion to Strike because the accident report is a public document available on MSHA’s website.

The accident report is distinguishable from the locomotive accident in this case that concerned a rear-end collision with a lowboy. However, it is relevant since the accident was described in testimony at the hearing. (Hrg. Tr. 938-39). It is also relevant as an illustration that the unsafe operation of a diesel-powered multi-ton locomotive is hazardous.

As noted by Mettiki, the accident report is a public document, the contents of which were referenced in testimony. Moreover, the Secretary does not assert that it is prejudiced by the inclusion of this document in Mettiki's brief. Finally, it is surprising that the Secretary would seek to strike the accident report because it merely states the obvious, *i.e.*, the hazardous nature of locomotive accidents. Moreover, it is troubling that the Secretary would take a restrictive, rather than an inclusive, approach to the evidence that should be considered in this matter. Accordingly, **IT IS ORDERED** that the Secretary's Motion to Strike **IS DENIED**.



Jerold Feldman
Administrative Law Judge

Distribution: (Electronic and Certified Mail)

Samuel Lord, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd.,
22nd Floor West, Arlington, VA 22209

Willa B. Perlmutter, Esq., Crowell & Moring, LLP, 1001 Pennsylvania Ave, NW,
Washington, DC 20004

/jel

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

October 15, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA),
on behalf of Jose A. Chaparro,
Complainant,

v.

COMUNIDAD AGRICOLA
BIANCHI, INC.,
Respondent,

Reynat Jimenez,
Respondent,

Manuel Menéndez
Respondent,

Eduardo Martínez
Respondent

DISCRIMINATION PROCEEDING

Docket No. SE 2010-434-DM
SE MD 2010-02

Mine: CAB Aggregates

ORDER

Before: Judge Barbour

Order Denying Respondents' Motion to Dismiss,

On October 07, 2010 Respondents filed a Motion to Dismiss. The Secretary filed a responsive motion on October 13, 2010. Respondents make two arguments in their Motion to Dismiss. First, the Respondents argue that the claims against Reynat Jimenez, Supervisor of the Mine; Manuel Menéndez, President of Comunidad Agricola Bianchi, Inc. ("CAB"); and Eduardo Martínez, Chairman of the Board of Directors for CAB as individuals; should be dismissed because these individuals are neither "operators" nor "persons" under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §§ 815, 820. Respt. Mt. to Dismiss 6. The Secretary contends that the individual respondents are "operators" or "persons" under the

Mine Act. *See* Sec. Opp'n To Respt. Mt. to Dismiss 5. The Secretary also argues that Respondents' Motion to Dismiss should be denied because it is actually a motion for summary decision and does not meet the summary decision standard set forth in Commission Rule 67. *Id.*

The Federal Rules of Civil Procedure provide guidance on the standard for motions to dismiss since the Commission's procedural rules do not supply a standard. *See* 29 C.F.R. § 2700.1(b)(2008). A 12(b)(6) motion to dismiss for failure to state a claim raised in a motion rather than in a pleading, as was the case here, is treated as a motion for summary judgment. Fed. R. Civ. P. 12(c). In order to prevail on summary decision under Commission Rule 67 Respondents must demonstrate that there is no genuine issue of material fact and that Respondents are entitled to judgment as a matter of law. I find that the Respondents' motion is actually a Motion for Summary Decision and that the motion does not meet the summary decision standard because there is a genuine issue of material fact regarding whether Mr. Jimenez, Mr. Menéndez, and Mr. Martínez are "operators" or "persons" under the Act. For the reasons stated above, I deny Respondents' Motion to Dismiss. However, this order does not foreclose litigation of this issue at the hearing. The Secretary is still required to demonstrate that Mr. Jimenez, Mr. Menéndez, and Mr. Martínez are "operators" or "persons" within the meaning of the Act.

Second, Respondents argue that the Secretary's July 26, 2010 Motion for Leave to Supplement and Amend the First Amended Complaint was untimely filed. Respt. Motion to Dismiss 5. However, I already found the Secretary's motion to be both timely and non-prejudicial when I granted the motion in my July 14, 2010 Order and Respondents have not given me cause to revisit that ruling.

Secretary's Motion in Limine to Admit into Evidence the Deposition Transcripts of Reynat Jimenez, Eduardo Martínez, and Manuel Menéndez and Respondents' Request to Admit into Evidence the Deposition Transcript of Jose A. Chaparro

On October 04, 2010 the Secretary filed a Motion in Limine to Admit the Deposition Transcripts of Reynat Jimenez, Eduardo Martínez, and Manuel Menéndez. In the motion the Secretary requests that their deposition testimony be admitted both against them as individual respondents and against CAB. Sec. Mot. in Limine 2. She argues that Rule 32 of the Federal Rules of Civil Procedure permits the use of depositions against a party or its agents for any purpose and that use of the depositions would make the hearing more efficient by eliminating the need for certain testimony. Respondents contend in their responsive motion that admitting the deposition testimony would be inefficient, but request that if the deposition testimony of Jimenez, Martínez, and Menéndez is admitted the deposition testimony of Jose A. Chaparro also be admitted. Respt. Resp. Mot. 3. On October 14, 2010 the Secretary orally advised the Court that she opposes the Respondents' request to admit the deposition testimony of Chaparro.

It is not unusual in a proceeding such as this for a party to use deposition testimony for impeachment purposes, and, of course, the parties may avail themselves of the opportunity throughout the course of the forthcoming hearing. What is unusual is to enter a deposition into evidence. In fact, the Federal Rules of Evidence, which frequently guide Commission proceedings, in general allow the admission of such testimony into evidence only if the moving party can show the declarant is unavailable as a witness. Fed. R. Evid. 804(b). Here, each of the deponents apparently is available to testify in person, and it is well established that in person testimony, if available, is preferred to deposition testimony. Being guided by these principles, I conclude that the parties' motions to admit the deposition transcripts as evidence should be denied, and that the case should proceed in the normal manner with both sides presenting their cases through the direct testimony of witnesses before the presiding judge. For this reason, I deny the Complainant's motion and the Respondents' request.

**Respondents' Motion in Limine and [sic] to Take
Administrative Notice of Puerto Rico Statute**

On October 14, 2010 Respondents filed a Motion in Limine and [sic] to Take Administrative Notice of Puerto Rico Statute. In the motion Respondents requested that I take judicial notice of the three Puerto Rican statutes cited in his motion. The Secretary orally advised the Commission that she opposes the Respondents' Motion in Limine. The Secretary's objection is noted, but I have determined that the court will take judicial notice of these laws as requested by the Respondents. The relevancy, if any, of these laws to the issues at hand and their effect, if any, on the applicability of Mine Act, remains an open question.


David F. Barbour
Administrative Law Judge

Distribution:

Allison Bowles, Esq., Marc G. Sheris, Esq., U.S. Department of Labor, Office of the Solicitor,
201 Varick Street, Room 983, New York, NY 10014

Rafael Sanchez Hernandez, Esq., First Bank Building, Suite 320, 1519 Ponce de Leon Ave.,
San Juan, Puerto Rico 00909

/ca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021

October 27, 2010

JUSTIN NAGEL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. WEST 2010-464-DM
	:	WE MD 09-11
	:	
NEWMONT USA LIMITED,	:	
Respondent	:	Mine ID: 26-02512
	:	Leeville Mine
	:	

**ORDER CERTIFYING INTERLOCUTORY DISCOVERY RULING
TO THE COMMISSION**

**ORDER GRANTING RESPONDENT’S MOTION TO DISMISS
FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS
AND REPEATED LACK OF CANDOR WITH TRIBUNAL**

**ORDER STAYING DISMISSAL PENDING COMMISSION RULING
ON CERTIFIED INTERLOCUTORY DISCOVERY ORDER**

This matter is before me upon a discrimination complaint filed by Justin Nagel (“Complainant”) pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended. Section 105(c)(1) of the Act prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety-related, protected activity. A discrimination complaint under section 105(c)(3) of the Act may be filed by the complaining miner if the Secretary, after investigation conducted pursuant to section 105(c)(2) of the Act, has determined that the provisions of section 105(c)(1) of the Act have not been violated. Complainant Justin Nagel appears *pro se* in this matter, as the Secretary of Labor decided not to pursue Nagel’s discrimination allegations under section 105(c)(2).

To facilitate the Commission’s review of this matter, a detailed outline of the salient procedural motions and Administrative Law Judge (ALJ) orders leading up to my dismissal of this proceeding is set forth below.

I. Procedural Background

A. The Complaint and Order to Answer

On January 5, 2010, Complainant Nagel filed a complaint of discrimination under section

105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended. On January 6 and February 16, 2010, the Commission sent a letter requesting certain material from Complainant before the case could be processed. More specifically, Complainant was requested to provide proof that he had served Respondent with a copy of his Complaint. On March 16, 2010, Chief Judge Lesnick issued an Order to Respondent to Answer the Complaint.

B. Order Denying Respondent's Motion to Dismiss

On March 26, 2010, Respondent filed a Motion To Dismiss for failure to state a claim upon which relief could be granted. On April 30, 2010, the Complainant filed a letter with the Commission explaining his service of the Complaint and attaching as Exhibit A, a copy of an audio recording of a meeting that Complainant had with Respondent's management representatives Thayne Church, Monty Holland, and Mike Woodland concerning certain events surrounding his termination on or about August 20, 2009. On May 28, 2010, Chief Judge Lesnick issued an Order Denying Respondent's Motion to Dismiss.

On June 2, 2010, this discrimination proceeding was assigned to me. On July 2, 2010, I issued a Pre-Hearing Order in this proceeding. Also on July 2, 2010, I issued an Order Consolidating Cases and Denying Complainant Motion for Temporary Reinstatement.

On June 10, 2010, Respondent served its Answer on Complainant.¹

C. Initial Conference Calls, Extension for Time to Procure Counsel, and Order Confirming Discovery Schedule and Trial Dates

On August 3, 2010, I participated in a conference call with Mr. Nagel and Respondent's counsel to discuss issues related to this matter, particularly Mr. Nagel's request for an extension of time to obtain an attorney and file a pre-conference statement. His request for an extension of time was granted during the conference call. At that time, Mr. Nagel indicated that he was "very close" to obtaining an attorney based on several referrals. Respondent's counsel indicated that discovery from Mr. Nagel was due on August 16, 2010. Mr. Nagel indicated that he thought he would have an attorney by that time. Accordingly, I scheduled another conference call for August 17, 2010.

On August 17, 2010, I participated in another conference call between Mr. Nagel and counsel for Respondent. Mr. Nagel indicated that he had been unsuccessful in obtaining an attorney to represent him in this matter despite contact with the referrals and with two state bar associations. Nevertheless, he expressed confidence that he could obtain an attorney by August 31, 2010. Otherwise, he assured the Court that he was prepared to proceed *pro se* and represent himself at trial, which was scheduled for October 25 and 26, 2010 in Elko, Nevada.

¹Upon inquiry from my office this date that the Answer had apparently not been filed with the Commission, Respondent filed its Answer with the Commission on October 27, 2010.

Respondent's counsel argued to the Court that Mr. Nagel's responses to discovery were inadequate and non-responsive. Counsel further indicated that Respondent had been served with discovery requests from Mr. Nagel. Based on the discussion at the conference call concerning the issues of legal representation, outstanding discovery, and trial dates, I informed the parties that I would issue an order codifying the parties' agreements and my instructions.

On August 19, 2010, I issued an Order Confirming Conference Call Agreements and Discovery Schedule. That order set this matter for trial, as follows:

A conference call will be held on August 31, 2010 at 4:00 pm E.S.T. (2:00 pm M.S.T., 1:00 pm P.S.T.) to discuss Mr. Nagel's continuing efforts at obtaining counsel, the status of discovery, and any remaining pre-hearing issues related to this matter.

Mr. Nagel has agreed to acquire legal representation by August 31, 2010, or to continue to represent himself in this matter.

Mr. Nagel shall provide full and complete responses to Newmont's discovery requests no later than September 14, 2010. Privileged information, and the names of other miner witnesses, need not be disclosed at this time.

Newmont shall provide responses to Mr. Nagel's discovery requests no later than September 21, 2010.

Newmont will take Mr. Nagel's deposition on September 28, 2010 in Spokane, Washington [later changed to Elko, Nevada].

A hearing on the merits will take place in Elko, Nevada, on October 25-26, 2010. A Notice of Hearing containing further details will be issued to the parties after the August 31, 2010 conference call.

The parties are hereby ORDERED to comply with the above schedule and agreements.

**D. Complainant's Inability to Procure Counsel
and Agreement to Proceed Pro Se**

On August 31, 2010, I held a conference call with the parties. Complainant Nagel indicated that despite his best efforts, he had been unable to obtain counsel in this matter and he would represent himself.

E. The Onslaught of Procedural Motions and ALJ Orders

On September 9, 2010, Respondent filed a Motion For Partial Summary Decision or to Strike or Limit Certain Claims. On September 22, 2010, Complainant Nagel filed a response. On September 27, 2010, I issued an Order Conditionally Limiting Certain Claims and Granting Partial Summary Judgment on certain claims. My Order set forth the claims of interference and discrimination at issue in this case.

On September 20, 2010, Complainant filed a Motion to Dismiss [Counsel] for Ethics Violations. On September 23, 2010, Complainant filed a Motion to [Amend] and Correct Motion to Dismiss [Counsel] for Ethics Violations. On September 24, 2010, Counsel for Respondent filed a Statement in Opposition to Complainant's Motion to Dismiss Patton Boggs for Ethics Violation[s]. On September 30, 2010, Complainant filed a Disciplinary Referral with the Commission. On October 5, 2010, counsel for Respondent filed a Statement in Opposition to Complainant's Disciplinary Referral.

During a conference call between the parties on September 24, 2010, Respondent requested that they be allowed to hire private security for the scheduled September 28, 2010 deposition of Complainant, and that all participants in said deposition submit to a reasonable search upon entry. I orally granted that request, as reasonable, to be followed up by written Order, which Order Granting Respondent's Request For Security issued on October 13, 2010. On October 20, 2010, I issued an Order Denying [Complainant's] Motion to Require Respondent to Reduce its Oral Motion for Security to Writing.

In the interim, on September 24, 2010, Respondent filed a Motion to Compel Production of Recorded Conversations that Complainant had made with representatives of Newmont management concerning discussions or meetings related to allegations of interference and discrimination, as alleged in his Complaint.

On September 28, 2010, Complainant was deposed by Counsel for Respondent. During the deposition, counsel for Respondent asked Complainant how many tape recordings of conversations Complainant had with Respondent's management about issues in this case. Complainant answered that he thought that he had five tapes in his possession.

On October 5, 2010, Complainant filed a notarized Affidavit pursuant to Commission Rule 80, requesting that I withdraw and recuse myself from hearing this matter on the grounds of bias and impossibility for a fair trial.

On October 13, 2010, Complainant Nagel filed his Response to Newmont's Motion To Compel Production of Recorded Conversations.

On October 14, 2010, Complainant Nagel filed a Motion for Partial Summary Judgment. On October 14, 2010, Respondent filed its Opposition. On October 14, 2010, Complainant filed a Response to the Opposition. On October 15 and 21, 2010, respectively, Complainant Nagel filed Amendment to Partial Summary Judgment and [Second] Amendment to Partial Summary

Judgment, with 2008 employee handbook attached. As further set forth below, on October 21, 2010, I issued an Order Denying Complainant's Motion for Partial Summary Judgment.

In the interim, on October 15, 2010, Complainant served Respondent with a motion entitled "Motion to Review Decision of Releasing the Number of Tapes and Strike from Deposition Record." In his motion, Complainant states that he incorrectly stated the number of tapes in his possession during his deposition in order to "protect the integrity of criminal investigation and any informants that may or may not be on audio recordings." This motion eventually was filed with the Commission on October 21, 2010, although the motion had been brought to my attention as Exhibit B to Respondent's Response to Complainant's Motion for Continuance and Motion to Dismiss, discussed below. I denied Complainant's Motion in my October 22, 2010 Order Denying Motion to Strike Testimony From Deposition Record.

Also on Friday, October 15, 2010, I convened a conference call with the parties to discuss settlement prospects and any outstanding discovery matters. Respondent's counsel indicated that Mr. Nagel had not provided Respondent with a copy of his affidavit motion that I recuse myself. I informed the parties that my clerk would send Respondent a copy. My clerk did so.

Because I was concerned this *pro se* Complainant had made one-party consent recordings that may be illegal under Nevada law and implicated Fifth Amendment self-incrimination issues, I further informed the parties that I had researched Nevada law and concluded that the act of producing in-person recordings, which are legal in Nevada, raised no Fifth Amendment privilege against self-incrimination. Accordingly, I ordered Nagel to produce all in-person recordings, but not any telephone recordings, as the later appeared to be illegal under Nevada law (see *Lane v. Allstate Insurance Co.*, 969 P.2d 938 (Nev. 1998)), and the act of production itself implicated self-incrimination concerns. I also ordered Nagel to provide answers to interrogatories 13 and 15. I informed the parties that my written Order compelling discovery would issue on Monday, October 18, 2010.

During the conference call on October 15, 2010, Mr. Nagel agreed to overnight copies of the five audio recordings to Respondent's counsel for delivery on Monday, October 18, 2010. Complainant Nagel assured the Court and Respondent that he would do so. Mr. Nagel further agreed to provide answers to interrogatories 13 and 15 by said date. To preclude premature disclosure of any potential miner witnesses under Commission Rule 62, the parties agreed to a redaction procedure, which was incorporated into the terms of my Order compelling discovery.

On October 18, 2010, I issued my Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations and Order Granting [Respondent's] Motion To Compel Answers to Interrogatories 13 and 15. On October 18, 2010, I also issued an Order Denying Complainant's Motion for Recusal.

On October 18, 2010, Complainant Nagel did not provide Respondent's counsel with answers to Interrogatories 13 and 15 or provide Respondent's counsel with the in-person audio recordings, as he had agreed to do during the conference call with the undersigned on October

15, 2010.

On October 19, 2010, Complainant Nagel filed a Motion for New Hearing Date. In his motion, Complainant Nagel requested that the upcoming hearing in this matter, scheduled for October 25-26, 2010 in Elko, Nevada, be postponed.

F. Respondent's Instant Motion to Dismiss

On October 19, 2010, Respondent filed a Response to Complainant's Motion for Continuance and the instant Motion to Dismiss. Respondent opposed Complainant's request that the hearing be postponed and moved to dismiss this proceeding due to Mr. Nagel's repeated failure to comply with my Orders pursuant to Commission Rule 59. Respondent argues that Complainant has demonstrated a pattern of unwillingness to comply with direct orders from the undersigned and is not likely to abide by my orders or Commission procedural rules in any future proceeding, including the impending hearing, no matter when it may be scheduled. Because the Complainant has demonstrated clear contempt of my direct orders and Commission rules, Respondent argues that this discrimination proceeding should be dismissed.

More specifically, the Respondent argues that when a party refuses to comply with an order directing the production of discoverable information, the Judge has the authority under Commission Rule 59 to "make such orders with regard to the failure as are just and appropriate, including . . . dismissing the proceedings in favor of the party seeking discovery." Respondent argues that Complainant has continually abused the discovery process and refused to abide by my orders and Commission procedural rules. While the Respondent acknowledges that dismissal is considered a harsh sanction, Respondent argues that Complainant has demonstrated that he considers himself to be above the authority of this tribunal, and therefore un-sanctionable. As a result, Respondent contends that any sanction short of dismissal is insufficient to remedy the continual contempt that the Complainant has demonstrated for the authority of this tribunal and Commission rules and procedures.

In its Motion to Dismiss, Respondent enumerates how the Complainant's alleged contempt for ALJ authority is evidenced by the following instances of refusal to comply with ALJ orders. I set forth Respondent's specific arguments below:

1. Refusal to Respond to Interrogatories Despite [Judge] Orders

Respondent contends that the Complainant has refused to respond to Respondent's interrogatories, despite four separate orders to do so. Respondent notes that Newmont issued its interrogatories to Mr. Nagel on July 15, 2010. Respondent states that after Mr. Nagel neglected to respond to two interrogatories, Nos. 13 and 15, the ALJ required him to do so. The Respondent states that during a conference call held on September 24, 2010, the ALJ issued his third order to Mr. Nagel to respond to Respondent's interrogatories Nos. 13 and 15. (See Ex. A, attached to

Respondent's Motion). Respondent further notes that on September 29, 2010, the Respondent e-mailed the Complainant, alerting him to the fact that his ordered responses were still outstanding. *Id.* Respondent further notes that during the conference call on October 15, 2010, the ALJ issued, for the fourth time, an order requiring the Complainant to provide the outstanding interrogatory responses. (See Ex. B, attached to Respondent's Motion). Respondent asserts that as of October 19, 2010, six days prior to trial, the Complainant has yet to respond to the ALJ's orders.

2.. Refusal to Comply with [ALJ] Order by
Untruthfully Responding to Deposition Questions

The Respondent argues that the Complainant refused to truthfully answer deposition questions under oath because he disagreed with the ALJ's order to respond to the questions posed. Specifically, Respondent notes that during his deposition, Mr. Nagel was asked about the tape recordings that he made of conversations with Newmont supervisors and management while he was employed at Newmont. Respondent states that Mr. Nagel refused to answer questions pertaining to those tapes. Respondent notes that pursuant to prior agreement, the parties contacted the ALJ, who ordered that Mr. Nagel respond to the questions, and Mr. Nagel provided answers during the deposition. (See Tr. 214:5-15, 217:1-10, attached as Ex. C to Respondent's Motion). Respondent points out that subsequent to the deposition, on October 15, 2010, Mr. Nagel moved to strike his deposition testimony responsive to the questions at issue because he had not truthfully answered the questions regarding the number of tape recordings that he has in his possession. (See Ex. D, attached to Respondent's Motion). Respondent argues that Mr. Nagel has taken the position that he was not required to give a truthful answer at deposition because he disagreed with the ALJ order. *Id.*

Respondent argues that Mr. Nagel has likewise demonstrated contempt for the discovery process and procedures by refusing to truthfully answer deposition questions. Respondent argues that in his deposition testimony, Mr. Nagel specifically stated, under oath, that he intended to call six miner-witnesses at trial. (See Ex. C at Tr. 239:21-25, attached to Respondent's Motion). Respondent notes, however, that in his recently filed pre-hearing statement,² Mr. Nagel identifies nine separate unnamed individuals as confidential miner witnesses. (See Ex. E, attached to Respondent's Motion). Respondent states that in order for Newmont to successfully prepare its case for trial, it has the right to depose Mr. Nagel's miner witnesses within the 48 hours prior to trial. Since Mr. Nagel cannot truthfully provide the number of witnesses that Newmont is required to depose, Respondent argues that it has been disadvantaged in its deposition scheduling and trial

²Complainant Nagel did not file his pre-hearing statement with my office at the Commission, he just served Respondent.

preparation.

3. Refusal to Comply with [ALJ] Order to Produce Tape Recordings

Despite expressly agreeing to comply, Respondent argues that Complainant has also refused to abide by my Order to produce the tape recordings that he made of conversations with Newmont management representatives. Respondent notes that during the [October 15, 2010] conference call with the Court, the ALJ informed Mr. Nagel that he was requiring Mr. Nagel to produce the tape recordings at issue. (See Ex. F, attached to Respondent's Motion). Respondent states that during this call, Mr. Nagel expressly agreed to have the tapes delivered overnight to Newmont's counsel by Monday, October 18, 2010, which was exactly one week before trial. Respondent further states that after the conference call, Mr. Nagel further indicated his compliance with my order in e-mail correspondence with Newmont's counsel regarding the manner of transcription of the tapes. (See Ex. G, attached to Respondent's Motion).

Respondent confirms that on Monday, October 18, 2010, after the tapes did not arrive in the morning delivery, Newmont's counsel contacted Mr. Nagel to request the relevant delivery information and tracking numbers. (See Ex. H, attached to Respondent's Motion). According to Respondent, after several hours, Mr. Nagel responded, indicating that the tapes had not been sent because he is "Appealing the Judges (sic) Decision to the Commission." *Id.* Respondent states that Newmont is not aware that any appeal has been filed.³

Respondent argues that this alleged instance of contempt is particularly troubling given the short amount of time that Newmont was given to transcribe and redact relevant information on the tapes prior to trial, which is scheduled for October 25 and 26, 2010. Respondent further argues that it is clear from Mr. Nagel's pre-hearing statement, filed on October 19, 2010, that he intends to use the tape recordings, or evidence derived from the tape recordings, at trial. (See Ex. E, attached to Respondent's Motion). By way of example, Respondent notes that the first paragraph of Mr. Nagel's statement appears to have quotations derived from tape recordings, upon which Mr. Nagel intends to rely. (*Id.* "I don't care if you're recording this.").

Respondent argues that although the above illustrations by no means represent an exhaustive list of the myriad examples of Mr. Nagel's contempt and frustration of judicial authority, such instances demonstrate that Mr. Nagel has little

³As explained below, on October 25, 2010, Complainant Nagel filed "Petitions of Discretionary Review, Order to produce recordings."

respect for, or intention of abiding by, the Judge's orders in this matter. Respondent reiterates that Mr. Nagel has been issued repeated orders to comply with discovery, and continually has agreed to comply with such orders in word, and then has flat-out refused to comply. Respondent argues that Mr. Nagel has demonstrated that if he does not agree with this tribunal, he is not bound by its authority, nor, apparently, is he bound by the oath he took prior to the deposition. Consequently, Respondent argues that Mr. Nagel has demonstrated that any sanctions issued to him for failure to comply with the Judge's Order will be disregarded, ignored or overlooked. Accordingly, Respondent argues that the only appropriate response to Mr. Nagel's constant refusal to fairly participate in this proceeding is to dismiss the matter for repeated failures to comply with the Judge's orders.

Finally, Respondent states that despite Mr. Nagle's actions, Newmont is prepared to go forward with the scheduled trial date. However, should the Judge determine that a postponement is appropriate, Newmont asks that it be conditioned as follows: First, that no further postponements be allowed, and second, that Mr. Nagel be advised that any further failure to comply with Judge's Orders will result in the dismissal of the case. In conclusion, Respondent argues that the ALJ should deny Complainant's Request to Postpone the Hearing and grant the Respondent's Motion to Dismiss.

**G. Pre-Hearing Statements, Additional Conference Calls,
and Additional Orders**

On October 19, 2010, the parties filed their respective Pre-Hearing Statements.

On October 20, 2010, I convened a 90-minute conference call with the parties. I indicated that I would issue an Order on October 21, 2010, Denying Complainant's Motion for Continuance. I again ordered Mr. Nagel to comply with my discovery orders. I indicated that my office had not received any Motion to Compel Discovery from Complainant Nagel. He indicated that perhaps he did not send my office a copy, just Respondent.⁴ Nevertheless, on the conference call, I went through each of the discovery requests that Mr. Nagel indicated that Respondent had not complied with, and resolved them, reserving the right to draw adverse inferences against Respondent at trial for any non-production or failure to preserve evidence.

I also asked Mr. Nagel to explain what the five tapes involved. Mr. Nagel explained that the tapes involved the following: a conversation that he had with management representative Monty Holland and Shane Eisenbarth concerning his reported safety concern regarding alleged improper disposal of pressurized paint cans; the grievance meeting concerning his disciplinary

⁴On October 20, 2010, Respondent filed its Responses to Complainant's Motion to Compel Discovery. To date, my office has received no Motion to Compel Discovery from Complainant Nagel.

warning for alleged failure to guard an open hole at the waste breaker; the grievance meeting concerning his alleged failure to receive proper training; a conversation he had with supervisor Gilbert Liguizmo, concerning Respondent's alleged failure to give Nagel a pay upgrade; and a conversation he had with management representatives Mike Woodland, Thayne Church and Monty Holland concerning his alleged failure to water roads (the missing water truck incident), which Respondent claims led in part to his termination on August 20, 2010. Accordingly, these tapes concern events surrounding critical allegations of interference and discrimination as alleged in Nagel's section 105(c)(3) complaint. See also my September 27, 2010 Order Conditionally Limiting Certain Claims and Granting Partial Summary Judgment, which described the allegations of interference and discrimination at issue in this matter.

During the October 20, 2010 conference call, I informed the parties that Complainant's Motion for Partial Summary Judgment, as amended, would be denied and that an Order to that effect would issue the next day. As noted above, that Order issued on October 21, 2010.

During that same conference call on October 20, 2010, Complainant Nagel again agreed to turn over the tapes and overnight them to Respondent. As explained below, he again renegeed on this agreement the next day.

On October 21, 2010, I issued an Order Denying Complainant's Motion for Continuance. I noted that the critical events at issue in this discrimination proceeding were at least 14 months old and in some cases more than two years old. I further noted that back on August 19, 2010, I issued an Order Confirming Conference Call Agreements and Discovery Schedule. I found that the parties have had sufficient time to complete discovery and prepare for trial. I then explained in detail, why I was denying each reason advanced by Complainant for a continuance. After denying each one of Complainant's reasons for a continuance, I concluded that further delay in this matter was contrary to the public interest and the interests of all parties in a timely resolution of their dispute.

On October 21, 2010, I also issued an Order Denying [Complainant's] Motion to Strike Testimony from Deposition Record.

On October 21, 2010, Complainant Nagel finally provided Respondent with answers to Interrogatories 13 and 15. He also provided Respondent with a list of minor witnesses, since the parties were two business days before trial.

On October 21, 2010, I convened another conference call with the parties. Respondent explained that Mr. Nagel again had refused to overnight the tapes as he had agreed to do. Mr. Nagel explained that he was refusing to turn over the tapes because was appealing my decision to the Commission. I explained to Complainant Nagel, as set forth in my October 21, 2010 Order Denying Complainant's Motion for Continuance, that interlocutory review is governed by Commission Rule 76, and that any interlocutory review by the Commission, assuming that it is granted, shall not operate to suspend the hearing, unless otherwise ordered by the Commission.

Nevertheless, Mr. Nagel refused to comply with my Order to turn over the audio tapes to Respondent because he was appealing my Order to the Commission.

H. The Orders to Show Cause Why Dismissal Is Not Appropriate for Failure to Comply with Discovery Orders, Complainant's Submission of Cause Not To Dismiss, and Respondent's Response To Complainant's Reasons Not To Dismiss

Accordingly, during the conference call on October 21, 2010, Complainant was **ORDERED TO SHOW CAUSE** by email to the Court and Respondent by noon E.S.T. on October 22, 2010, why this proceeding should not be dismissed for failure to comply with my discovery order to produce the audio tapes. A final conference call was scheduled for noon E.S.T. on October 22, 2010. My conference call Order to Show Cause was followed up by written **ORDER TO SHOW CAUSE WHY DISCRIMINATION PROCEEDING SHOULD NOT BE DISMISSED FOR FAILURE TO PRODUCE AUDIO TAPES CONCERNING ALLEGED ACTS OF INTERFERENCE AND DISCRIMINATION AS ORDERED BY THE COURT.**

By attachment to e-mail sent to the Court and Respondent at 6:39 E.S.T. on Thursday, October 21, 2010, Complainant Nagel submitted his explanation for Cause Not to Dismiss. He argued as follows:

Under 29 C.F.R. 2700.56(e) states that discover must be completed 20 days prior to the scheduled hearing date. For good cause shown the Judge may extend or shorten the time of discovery. Both Newmont and I are still in discovery. On or about October, 15 2010 Judge McCarthy ruled of Newmont's Motion to compel recordings. Under Commission Rule 2700.70 Any person adversely affected by a Judge's decision or order may file with the Commission a petition for discretionary review within 30 days of the decision or order. I have stated I'm pursuing this option and I'm within 30 days. I have 30 days to appeal Judge McCarthy's decision. Judge McCarthy stated something about rule 76 criminal procedure, this is civil court. There is no 30 C.F.R 2700 as stated in the order for security. I know who the U.S. Marshals and the Elko County Sheriff are. I have 30 days to ask the commission to review the order. There is a thin line between coercion and corruption. To the extent that I wasted time with a Disciplinary referral, If the court would up hold it's laws I wouldn't have to do their job for them.

Respectfully,
Justin Nagel 10-21-2010

Complainant Nagel failed to appear or participate in the final conference call with the undersigned and Respondent at noon E.S.T. or 9 a.m. Pacific time, on October 22, 2010. The undersigned and Respondent's outside and in-house counsel waited for Mr. Nagel to call in for twenty minutes and my office tried to reach him by phone leaving voice messages, but received

no response, until Monday, October 25, as set forth below. Accordingly, at 1:45 p.m. E.S.T. on October 21, 2010, I sent the following email to the parties:

Good afternoon gentlemen,

Complainant Justin Nagel did not appear for the conference call scheduled for 12 noon E.S.T. today. I have received Mr. Nagel's response to my Order to Show Cause why this matter should not be dismissed. Given Mr. Nagel's refusal to turn over the audio tapes concerning critical allegations of interference and discrimination alleged in his complaint, I have concluded that Respondent cannot receive a fair hearing in this matter. Accordingly, the hearing scheduled for October 25 and 26, 2010 in Elko, Nevada is cancelled. My Order concerning Respondent's Motion to Dismiss will issue by close of business on Monday, October 25, 2010.⁵

On Saturday, October 23, 2010, counsel for Respondent sent the following email to the my office and Complainant Nagel concerning the events of Friday, October 22, 2010.

Dear Judge McCarthy

I am writing to relay to the Court the following information, which I believe may be material to its ruling on Respondent's Motion to Dismiss. We have copied Mr. Nagel on this email so that the parties and the Court do not engage in any ex parte communications regarding potentially substantive information.

On Tuesday, October 19, my associate, Caroline Davidson-Hood, emailed Mr. Nagel, and copied the Court, informing him that we intended to hold depositions of his miner witnesses on Friday October 21, and that he may attend the depositions, if he so chose. On Wednesday October 20, Mr. Nagel responded to that email, noting that the day and date didn't match, and asked on what day we would hold depositions. My colleague noted the mistake and responded that depositions would be held on Friday the 22nd of October. Aside from noting the mismatched day and date, Mr. Nagel did not give any indication that he planned on attending the deposition. The relevant email string is displayed below.

On Thursday October, 21, after Mr. Nagel had issued his list of miner witnesses, after the Court had issued its Order to Show Cause Why not to Dismiss the Case, and after the Court scheduled a conference call for all parties at 9:00am Pacific Time [noon E.S.T.] October 22, Respondent determined that formal

⁵Given the subsequent events and filings in this case discussed below, I notified the parties by email on October 25 and 26, that my Order concerning Respondent's Motion to Dismiss would not issue until Wednesday, October 27, 2010.

depositions on Friday morning would be impractical, because the employees listed as witnesses were members of a crew that would not be coming to work until Friday evening, and therefore we could not serve any of the Newmont employees for depositions until after the time had passed for the previously scheduled depositions. Moreover, it appeared impractical to conduct depositions during a conference call with the Court which would determine the status of the hearing and the necessity to conduct any depositions at all. Therefore, I decided that it was more efficient to cancel the depositions and attempt to speak to the employees once they had arrived at the mine on Friday night, if we needed to speak to them at all.

Because of the number of issues that had arisen, it was not until the afternoon on Friday October 22, 2010, that my paralegal contacted the courthouse to cancel the room reservation that we had made for depositions. At that time, the woman at the courthouse stated that "the dark haired guy" that we deposed last time, had showed up at the courthouse at 8:00 am for depositions and waited around until 9:00 am before he left.

Newmont and its counsel would like to state for the record, that although we did not inform Mr. Nagel that we would not be holding depositions on Friday morning, we had no indication from him that he intended to attend them. Moreover, we had expected him to be a party on the conference call on Friday, at which time each party would be fully aware of whether the hearing, and therefore the depositions, would go forward. As of this writing, the undersigned has not received any oral or written communication from Mr. Nagel regarding the events described above.

If it is a fact that Mr. Nagel did go to the courthouse on Friday morning for depositions, we regret if any miscommunications caused him any inconvenience. However, we had no way of knowing that he would be there, not only because he didn't inform us of his intention, but also because we expected that he would be aware that depositions would not be held during a conference call scheduled with the court, in which he was required to participate. Regardless of any possible miscommunication regarding the depositions, Mr. Nagel was aware of the conference call and simply failed to participate or notify the Court of the reasons for his failure.

In its last filing with the Court, Respondent noted that Mr. Nagel's failure to appear at the October 22 conference call could, without more, constitute a ground for dismissal of this matter. However, as we also pointed out in that filing, there are numerous additional bases on which dismissal can, and should, be based in this matter.

Should the Court desire additional information regarding this matter, Ms. Davidson-Hood and I will be available for a conference all at the Court's convenience.

Respectfully,
Mark N. Savit
Patton Boggs LLP
Counsel for Respondent

On Monday, October 25, 2010, during the preparation of this Order, the undersigned received the following email from Complainant, with copy to Respondent's counsel.

I apologize [sic] for missing the confrence [sic] call. I was at the court house [sic] with the witnesses to be disposed [sic]. I left my call in information and was hoping to obtain it from Mr. Savit at 8:00 am when the deposition was scheduled. Only myself and the witnesses show up.

Respectfully, Justin Nagel

Shortly, thereafter, I received the following email from Respondent's counsel, with copy to Complainant Nagel.

Judge McCarthy,

Just to make sure the record contains all pertinent information, we did not notice any witnesses for deposition, so no witnesses would have been there unless Mr. Nagel brought them with him. The court employee who gave us the information has told us that he appeared to be there by himself. We can check further if the court wishes.

Respectfully,
Mark N. Savit
Patton Boggs LLP

Also on Monday afternoon E.S.T., the undersigned received Newmont's Response to Complainant's Reasons Not to Dismiss. In essence, Respondent again moves to dismiss this matter under the Court's broad authority to manage the course of the proceedings under Commission Rules. See e.g., Rules 55, 56, 59, 66, and 80. Respondent's arguments re-emphasize Complainant Nagel's continual lack of candor to the Court and repeated refusal to comply with direct orders to turn over the tapes. Respondent further argues that Complainant's asserted justification in response to the Order to Show Cause, i.e., that he is unwilling to comply with my orders to produce the tapes because he has filed an appeal of said orders with the Commission, is procedurally improper under Commission Procedural Rule 76 governing interlocutory review. Respondent points out that Complainant Nagel has neither submitted a

motion to the Judge seeking certification of his interlocutory appeal on the discovery order to produce the tapes, nor has the judge certified that appeal upon his own motion. Thus, Respondent argues that Complainant Nagel's direct appeal to the Commission has not met any of the requirements laid out in Rule 76, and is procedurally improper in direct violation of Commission rules of procedure.

Respondent further argues that even if Complainant Nagel had properly applied to the Commission for interlocutory review, he was still obligated to comply with the direct order of the court to turn over the tapes. Respondent notes, as the Judge previously advised Complainant, that Rule 76(a)(2) expressly states that, "[i]nterlocutory review by the Commission shall not operate to suspend the hearing unless otherwise ordered by the Commission." Since the Commission has issued no order suspending proceedings, Respondent argues that Nagel had a duty to release the tapes so that Respondent could prepare for the scheduled hearing date. Respondent argues that as result of Complainant Nagel's failure to do so, the Respondent has been prejudiced and proceeding with the hearing has been rendered impractical.

Further, Respondent argues that even if Complainant Nagel properly sought certification of this matter for interlocutory review, said certification would have been properly denied by the Judge and the Commission because it presented a routine issue of discovery as to whether tapes should be produced before trial, and therefore was not of sufficient weight and importance to interrupt the normal course of the proceeding in order to appeal for a decision of the Commission. Respondent relies on Commission precedent holding that interlocutory review is not appropriate where the issue has been determined in a prior Commission decision or the issue is not a controlling question of law. See *United States Steel Mining Co.*, 16 FMSHRC 1043 (May 1994); *Northwestern Resources Co.*, 22 FMSHRC 255 (Feb. 2000). Respondent notes that the tapes have been deemed non-privileged and relevant by the Judge, and Commission rules state that all relevant, non-privileged evidence is admissible. See Rule 63; cf. Rule 56(b) governing scope of discovery. Respondent further notes that Nagel has refused to produce the tapes because he believes that they may be relevant for some potential, future, criminal proceeding against Respondent in support of charges that have not yet been filed. Respondent argues that such tangential and irrelevant justifications do not trump the well-established Commission rule that non-privileged relevant evidence is admissible. Thus, Respondent argues that the question of law governing the admissibility of the relevant evidence is well-established and it is neither a controlling question in this matter, nor will it immediately materially advance this proceeding.

In sum, Respondent argues that this case should be dismissed for Complainant Nagel's continuing lack of honesty and candor, his failure to participate in relevant proceedings, and his gamesmanship in causing delay and waste in order to garner more time to prepare for trial. Respondent emphasizes that Nagel has not only refused to follow procedural rules and the direct order of the ALJ, but his continuing and constant misrepresentations demonstrate that no amount of delay or relief short of dismissal is appropriate. Accordingly, Respondent requests dismissal for Complainant's continual misconduct.

I. Complainant's Petitions For Discretionary Review

On October 25, 2010, Complainant Nagel filed Petitions for Discretionary Review, Order to produce recordings, with attached exhibits. It is confusing, rambling, and at times incomprehensible. Despite Respondent's arguments to the contrary, consistent with my practice of liberally construing the pleadings of this *pro se* Complainant, I treat it as a motion for certification of my interlocutory discovery ruling to the Commission under Rule 76.⁶ I hereby

⁶Commission Procedural Rule 76 provides as follows:

§ 2700.76 Interlocutory review.

(a) Procedure. Interlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission. Procedures governing petitions for review of temporary reinstatement orders are found at § 2700.45(f).

(1) Review cannot be granted unless:

(i) The Judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding; or

(ii) The Judge has denied a party's motion for certification of the interlocutory ruling to the Commission, and the party files with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification.

(2) In the case of either paragraph (a)(1)(i) or (ii) of this section, the Commission, by a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission, may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding. Interlocutory review by the Commission shall not operate to suspend the hearing unless otherwise ordered by the Commission. Any grant or denial of interlocutory review shall be by written order of the Commission.

(b) Petitions for interlocutory review. Where the Judge denies a party's motion for certification of an interlocutory ruling and the party seeks interlocutory review, a petition for interlocutory review shall be in writing and shall not exceed 15 pages. A copy of the Judge's interlocutory ruling sought to be reviewed and of the Judge's order denying the petitioner's motion for certification shall be attached to the petition.

(c) Briefs. When the Commission grants interlocutory review, it shall also issue an order which addresses page limits on briefs and the sequence and schedule for filing of initial briefs, and, if permitted by the order, reply briefs.

certify that my discovery orders to turn over the tapes involve a controlling question of law that will materially advance final disposition of this proceeding. Indeed, as explained below, Complainant's repeated refusal to turn over the tapes, which concern the heart of this case, has resulted in my dismissal of this matter. Certainly, in light of this dismissal, there can be no doubt that my interlocutory ruling has materially advanced the final disposition of this matter.

On October 26, 2010, Complainant Nagel filed another Petition for Discretionary Review concerning my October 13, 2010 Order Granting Respondent's Request for Security. I decline to certify that interlocutory ruling for interlocutory review as my Order does not materially advance the final disposition of this proceeding, and has been rendered moot because the deposition has already occurred.

II. Order Granting Respondent's Motion to Dismiss

Commission Procedural Rule 59 provides that if a party fails to comply with an order compelling discovery, the Judge may make such orders as are just and appropriate, including dismissing the proceeding in favor of the party seeking discovery. For good cause shown, the Judge may excuse an objecting party from complying with the discovery request.⁷

Commission Procedural Rule 66(a) requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

(d) Scope of review. Unless otherwise specified in the Commission's order granting interlocutory review, review shall be confined to the issues raised in the Judge's certification or to the issues raised in the petition for interlocutory review.

⁷Specifically, Commission Rule 59 provides, as follows:

§ 2700.59 Failure to cooperate in discovery; sanctions.

Upon the failure of any person, including a party, to respond to a discovery request or upon an objection to such a request, the party seeking discovery may file a motion with the Judge requesting an order compelling discovery. If any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate, including deeming as established the matters sought to be discovered or dismissing the proceeding in favor of the party seeking discovery. For good cause shown the Judge may excuse an objecting party from complying with the request.

As detailed above, on October 18, 2010, I issued my Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations and Order Granting [Respondent's] Motion To Compel Answers to Interrogatories 13 and 15. I cited Commission Rule 59, thereby warning Complainant that failure to comply with my order compelling discovery of the audio tapes may result in dismissal of his case. As further outlined above, I then issued Orders to Show Cause why this proceeding should not be dismissed. Accordingly, the procedural requirements for dismissal of this proceeding as a discovery sanction have been met.

Given the severity of the sanction, the issue remains whether dismissal is just and appropriate, i.e., related to the particular claim at issue and not an abuse of discretion. *See Keefer v. Provident Life and Accident Insurance Co.*, 238 F.3d 937 (8th Cir. 2001)(dismissal of action as discovery sanction under Fed. R. Civ. P. 37(b)(2)(A) was not abuse of discretion given order compelling discovery, willful violation of that order, and prejudice to other party); *see also Ladien v. Astrachan*, 128 F.3d 1051 (7th Cir. 1997) (dismissal of case as sanction under Fed. R. Civ. P. 37(b)(2)(A) for repeated discovery violations not abuse of discretion). Based on the totality of circumstances, I find that dismissal is just and appropriate here as a sanction for Complainant's repeated failure to comply with discovery Orders and lack of candor with the tribunal, which has interfered substantially with a fair hearing in this matter, unduly burdened the record, and caused additional work, delay, and expense through refusal to comply with discovery Orders and Commission rules.

In determining whether dismissal is a just sanction for a party's failure to obey a discovery order under Fed. R. Civ. P. 37(b)(2)(A), district courts generally consider the following factors: the culpability of the non-complying party; the degree of actual prejudice to the party seeking discovery; the amount of interference with the judicial process; whether the non-complying party was warned in advance that dismissal would be a likely sanction for noncompliance; and the efficacy of lesser sanctions. *See e.g., EBI Securities Corporation, Inc. v. Hamouth*, 219 F.R.D. 642, 647 (D. Colo.) citing *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920-21 (10th Cir. 1992).

Applying these factors, I find that Complainant's noncompliance with my discovery orders was repeated and deliberate. Complainant repeatedly failed to respond to two of Respondent's interrogatories until two business days before trial, despite being ordered on several occasions to do so. Complainant admitted in his motion to strike deposition testimony that he incorrectly stated the number of tapes in his possession during his deposition. Most importantly, however, Complainant refused to comply with multiple discovery orders to produce the tape recordings, despite promising to do so, thereby demonstrating forthright lack of candor with this tribunal.

Specifically, during the October 15, 2010 conference call, I explained the basis for my impending October 18 Order compelling discovery of the tapes. I ordered Complainant to provide copies of the tapes to Respondent by overnight mail for morning delivery on October 18,

2010. Complainant agreed to do so and the parties agreed to a redaction procedure for the names of miner witnesses. Complainant then broke his promise to this tribunal and Respondent.

Complainant was served with my written Order to compel production of the recorded conversations on October 18, 2010. Complainant did not produce the tapes. During a subsequent conference call on October 20, 2010, I again ordered Complainant to provide copies of the tapes to Respondent by overnight mail. Complainant again promised this tribunal and Respondent that he would do so. Complainant again breached his promise.

On the October 21, 2010 conference call, Complainant Nagel stated that he was refusing to comply with my Order to turn over the audio tapes to Respondent because he was appealing my Order to the Commission. In doing so, Complainant Nagel failed to comply with Commission Rule 79 governing interlocutory review of my discovery orders, even though he was informed of this rule and further informed that the Commission's grant of such review shall not operate to suspend the hearing, unless otherwise ordered by the Commission. Nevertheless, Mr. Nagel persisted in his refusal to turn over the tapes. Moreover, he failed to participate in the final conference call before trial.

There is no doubt on this record, that the tapes withheld from discovery relate to events that comprise the gravamen of Complainant's allegations of interference and unlawful discipline, suspension and termination. In fact, during the October 20, 2010 conference call, Mr. Nagel acknowledged that the tapes involved the following critical events relative to his protected activity and allegations of interference and discrimination: a conversation that he had with management representatives Monty Holland and Shane Eisenbarth concerning his reported safety concern regarding alleged improper disposal of pressurized paint cans; the grievance meeting concerning his disciplinary warning for alleged failure to guard an open hole at the waste breaker; the grievance meeting concerning his alleged failure to receive proper training; a conversation he had with supervisor Gilbert Liguizmo concerning Respondent's alleged failure to give Nagel a pay upgrade; and a conversation he had with management representatives Mike Woodland, Thayne Church and Monty Holland concerning his alleged failure to water roads (the missing water truck incident), which Respondent claims led, in part, to his suspension and termination.

Since the tapes concern events surrounding critical allegations of interference and discrimination as alleged in Nagel's section 105(c)(3) complaint, I find that Respondent would be prejudiced significantly by not having an opportunity to review the tapes before trial and adjust its defense strategy or settlement posture accordingly. As set forth in my October 18, 2010 Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations and Order Granting [Respondent's] Motion To Compel Answers to Interrogatories 13 and 15, the Commission's discovery rules are construed liberally to permit wide-ranging discovery of all information reasonably calculated to lead to the discovery of admissible evidence, but discoverable information need not be admissible at trial. Thus, a request for discovery should be considered relevant if there is any possibility that information sought may be

relevant to the subject matter of the action and discovery should ordinarily be allowed unless it is clear that information sought can have no possible bearing upon subject matter of action, or it is protected by privilege. See e.g., *Billy Brannon v. Panther Mining, LLC*, 31 FMSHRC 717 (May 2009) (ALJ Barbour) (granting motion to compel audiotapes of mine conversations involving the complainant and other miners made during the time frame of the alleged discrimination).

That standard is clearly met here. Respondent was prejudiced in the preparation of its defense and evaluation of settlement, particularly given the number of tapes at issue and their nexus to critical allegations of interference and discrimination alleged in the Complaint. Furthermore, Complainant's repeated disregard of my discovery orders to turn over the tapes interfered with the judicial process, necessitating cancellation of the hearing to ensure a fair trial for Respondent.

It also cannot be overlooked, that the Court has bent over backwards to ensure that this *pro se* Complainant could receive a fair trial, and has acted consistent with Supreme Court and Commission precedent generally holding the pleadings of *pro se* litigants to less stringent standards than pleadings drafted by attorneys. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*pro se* litigant's complaint held to less stringent standards than complaint drafted by attorneys); *Tony M. Stanley, emp. by Mgt. Consultants, Inc.*, 24 FMSHRC 144, 145 n.1 (Feb. 2001) (same); *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (Commission recognized that courts generally consider the special circumstances of litigants untutored in the law).

Consistent with this precedent, the undersigned granted Complainant an extension of time to procure counsel after the Secretary decided that his Complaints (09-06 and 09-11) lacked merit. When Complainant was unable to retain counsel, the Court, consistent with Commission precedent, permitted Complainant to proceed *pro se*, which is his right under section 105(c)(3), even though his case would have been best served by legal counsel or non-legal representative, who could clearly articulate his position in timely and responsive pleadings that were properly served, and engage in meaningful discovery and settlement negotiations. Cf. *Jaxun v. Asarco*, 29 FMSHRC 616, 621 (Aug. 2007). The undersigned then broadly construed Complainant's allegations in my September 27, 2010 Order Conditionally Limiting Certain Claims and Granting Partial Summary Judgment on certain claims. The undersigned then examined Complainant's acts of recording under Nevada law with an eye toward protecting any privilege against self-incrimination that may be implicated. See my October 18, 2010 Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations and Order Granting [Respondent's] Motion To Compel Answers to Interrogatories 13 and 15. Furthermore, as outlined above, Complainant has on several occasions failed to properly file his motions with this tribunal, however, I have treated his motions as properly filed. See e.g., my Order Denying Motion to Strike Testimony from Deposition Record. Finally, over the objection of Respondent, and consistent with my practice of liberally construing the pleadings of this *pro se* Complainant, I have treated Complainant's "Petitions for Discretionary Review, Order to produce recordings,"

with attached exhibits, as a motion for certification of my interlocutory discovery ruling to the Commission under Rule 76.

But there is a limit to how far this tribunal can go, and Complainant exceeded that limit here, even though acting *pro se*. The Complainant's repeated refusals to comply with my discovery orders to turn over the tapes, despite promising on numerous occasions that he would do so, placed Respondent at a significant disadvantage from unfair surprise and unnecessary expense during trial preparation, and took away the possibility of a fair trial because the discoverable matter concerned the crux of Complainant's case. Given the subject matter of the tapes, their number, and their nexus to the critical allegations of unlawful interference, discipline, suspension, and termination, a lesser sanction under Rule 59, i.e., deeming as established the matters sought to be discovered, would strike at the heart of Complaint allegations in any event, thereby precluding both meaningful relief sought by Complainant and a practical, fair trial for Respondent.

In these circumstances, in the exercise of my discretion, I find that a lesser sanction would have neither cured the prejudice to Respondent, deterred additional misconduct by Complainant, nor provided an effective or practical sanction. After all, courts are not constrained to impose the least onerous sanction available, but exercise discretion to choose the most appropriate sanction under the totality of circumstances. *Keefe*, 238 F.3d at 941. Given Complainant Nagel's repeated lack of candor and refusal to turn over the audio tapes concerning critical allegations of interference and discrimination alleged in his Complaint, I concluded that Respondent could not receive a fair hearing in this matter and I was compelled to cancel the hearing.

Finally, Complainant was warned in advance that dismissal would be a likely sanction for continued noncompliance with my discovery orders to provide copies of the tapes, absent good cause shown. As emphasized above, my October 18, 2010 written discovery Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations, specifically cited Commission Rule 59, thereby warning Complainant that failure to comply with my order compelling discovery may result in dismissal of his case. Thereafter, during conference calls on October 18 and 20, 2010, when Complainant Nagel promised to overnight the tapes and then reneged on his agreement, Nagel was made aware that dismissal would be a likely sanction for continued non-compliance. Thereafter, during the conference call on October 21, 2010, I issued an oral Order to Show Cause why this proceeding should not be dismissed. On October 22, 2010, I issued my written Order to Show Cause why this proceeding should not be dismissed for failure to produce audio tapes concerning alleged acts of interference and discrimination as ordered by the Court. Accordingly, the procedural requirements for dismissal of this proceeding as a discovery sanction were satisfied.

Thereafter, Complainant submitted his explanation for cause arguing that the parties were still in discovery, that he had 30 days to appeal my Order compelling production of the tapes, and

that if the Court would uphold its laws, Complainant Nagel would not have to do the Court's job for it. Complainant Nagel then failed to participate in the final conference call with the Court.

Having carefully reviewed Complainant Nagel's submission, I find that his explanation does not constitute good cause under Rule 59, which provides that for good cause shown, the Judge may excuse an objecting party from complying with the discovery request. I find no good cause to excuse Complainant Nagel from complying with the discovery request for the audio tapes. First, contrary to his contentions, discovery has ended. Complainant has simply failed to comply with my repeated rulings to turn over the tapes because he seeks review before the Commission. Second, as Respondent correctly points out, Complainant inappropriately relies on Rule 70 concerning petitions for discretionary review of final case disposition from the judge, as opposed to petitioning under Rule 76 for interlocutory review of my discovery orders.

Nevertheless, consistent with my practice of liberally construing the pleadings of this *pro se* Complainant, I have treated Complainant's "Petitions for Discretionary Review, Order to produce recordings," with attached exhibits, as a motion for certification of my interlocutory discovery ruling to the Commission under Rule 76. In light of my Order granting Respondent's Motion to Dismiss this proceeding, there can be no doubt that my interlocutory ruling will, and in fact has, materially advanced the final disposition of this matter. However, I stay the effect of my dismissal pending Commission ruling on the certified interlocutory discovery Order.

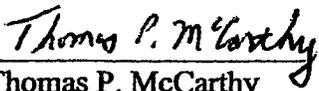
In sum, based on the totality of circumstances, dismissal is a just and appropriate sanction for Complainant's repeated failure to comply with my discovery Orders and for his repeated lack of candor with this tribunal, which has interfered with the judicial process and precluded Respondent from obtaining a fair trial. Complainant's noncompliance with my discovery orders was repeated and deliberate. Furthermore, Complainant repeatedly failed to respond to two of Respondent's interrogatories until two business days before trial, despite being ordered on several occasions to do so. In addition, Complainant admitted in his motion to strike deposition testimony that he incorrectly stated the number of tapes in his possession. Most importantly, Complainant refused to comply with multiple discovery orders to produce the tape recordings, despite repeatedly promising to do so. His lack of candor with this tribunal was willful and deliberate. Since the tapes concern events surrounding critical allegations of interference and discrimination alleged in Complainant's section 105(c)(3) complaint, Respondent was prejudiced significantly by not having an opportunity to review the tapes before trial and adjust its defense strategy or settlement posture. Complainant's conduct interfered with the judicial process and forced cancellation of the hearing. Complainant was warned times in advance that dismissal would be a likely sanction for his repeated noncompliance with my discovery orders and failure to honor his agreements with this tribunal and Respondent. Given the subject matter of the tapes, which strike at the core of this case, lesser sanctions are inappropriate.

In light of the foregoing, **IT IS ORDERED** that Complainant's October 26, 2010 "Petitions of Discretionary Review, Order to produce recordings," with attached exhibits, is treated as a motion for certification of my interlocutory discovery ruling to the Commission

under Rule 76. **I HEREBY CERTIFY** that my discovery orders to turn over the tapes involve a controlling question of law that will materially advance final disposition of this proceeding. Indeed, as explained herein, Complainant's repeated refusal to turn over the tapes, which concern the heart of his case, has resulted in my dismissal of this matter.

IT IS FURTHER ORDERED that Respondent's Motion to Dismiss is hereby **GRANTED** and the case is **DISMISSED**.

IT IS FURTHER ORDERED that the dismissal is **STAYED** pending the Commission's ruling on the certified interlocutory discovery ruling.


Thomas P. McCarthy
Administrative Law Judge

Distribution:

Justin Nagel, P.O. Box 182, Rathdrum, ID 83858

Richard Tucker, Newmont Mining, 1655 Mountain City Hwy., Elko, NV 89801

Donna Vetrano Pryor, Esq., Mark Savit, Esq., Patton Boggs LLP, 1801 California Street, Suite 4900, Denver, CO 80202

Commissioners

/cp