

NOVEMBER AND DECEMBER 2009

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NOVEMBER AND DECEMBER 2009

Review was granted in the following case during the months of November and December 2009:

Jayson Turner v. National Cement Company of California, Docket No. WEST 2006-568-DM. (Judge Jacqueline Bulluck, September 30, 2009)

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Secretary of Labor, MSHA v. Armstrong Coal Company, Docket Nos. KENT 2009-694, et al. (Chief Judge Robert Lesnick, October 30, 2009 - unpublished settlement order)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 13, 2009

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

v.

AMERICAN MOBILE AGGREGATE
CRUSHING

Docket No. CENT 2009-660-M
A.C. No. 13-02377-181753

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 28, 2009, the Commission received from American Mobile Aggregate Crushing ("AMAC") 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).

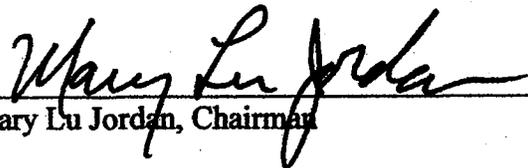
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

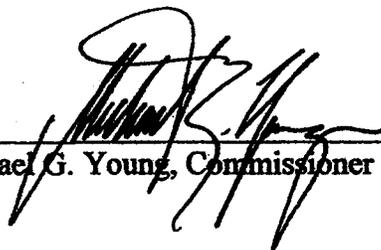
AMAC states that it did not receive the proposed penalty assessment from the Department of Labor's Mine Safety and Health Administration ("MSHA"). AMAC states it was not aware that MSHA had issued the proposed assessment until it received a delinquency notice from MSHA dated July 1, 2009.

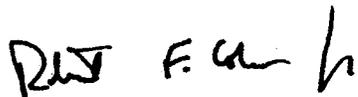
The Secretary does not oppose AMAC's request to reopen the proposed penalty assessment and agrees that the proposed assessment was returned to MSHA undelivered. She states that all proposed assessments are sent to the operator's address of record and that this constitutes service under MSHA's rules. She notes that it is the operator's responsibility to maintain an accurate address of record to ensure future delivery of proposed assessments via Federal Express.

Having reviewed AMAC'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. 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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 13, 2009

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

v.

BAYER CONSTRUCTION
COMPANY, INC.

Docket No. CENT 2009-716-M
A.C. No. 14-01456-183840

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

ORDER

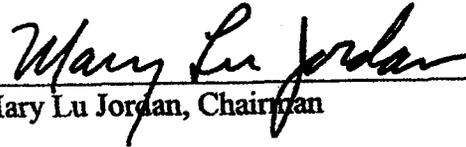
BY THE COMMISSION:

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 11, 2009, the Commission received from Bayer Construction Company ("Bayer") a letter 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).

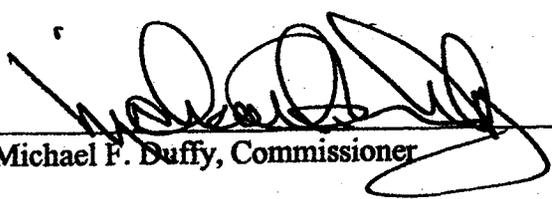
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

The Secretary submits that upon reviewing the records in this proceeding, she has discovered that the proposed penalty was timely contested. The operator made its contest of the penalties at issue in a cover letter that also contained the payment check for some other penalties and did not include the proposed assessment form. The Secretary asserts that she has corrected her records and the agency is treating the matter as having been timely filed.

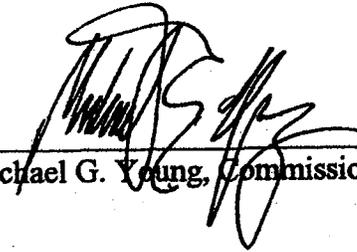
Having reviewed Bayer's request and the Secretary's response, we find the request to reopen to be moot. Bayer has timely contested the proposed penalty assessment, and therefore it did not become a final order of the Commission. The Secretary shall file a penalty petition within 45 days of the date of this order, if she has not done so already. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



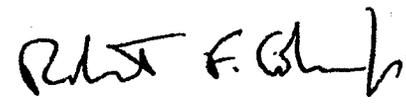
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

Distribution

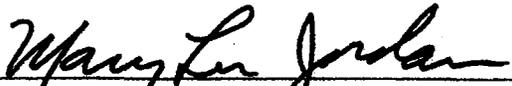
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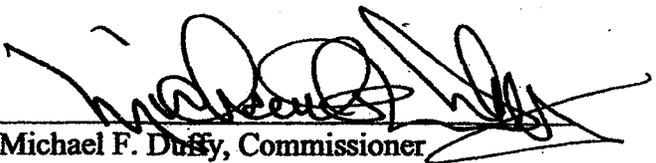
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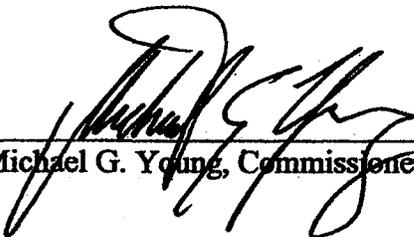
Having reviewed Fisher's request and the Secretary's response, we find the request to reopen to be moot. Fisher has timely contested the proposed penalty assessment, and therefore it did not become a final order of the Commission. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



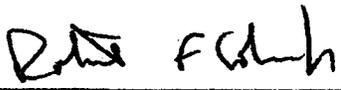
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 13, 2009

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

v.

CARMEUSE LIME INC.

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:
:
Docket No. LAKE 2010-12-M
A.C. No. 33-00013-190312
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:

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

ORDER

BY THE COMMISSION:

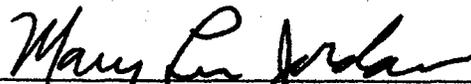
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 6, 2009, the Commission received from Carmeuse Lime Inc. ("Carmeuse") a motion from counsel to reopen a penalty assessment that had become a final order of the Commission pursuant 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).

In a detailed submission, Carmeuse explains that the company official responsible for filing notices of contest to penalty assessments was out of the office on travel during much of the 30-day period following the operator's receipt of the subject assessment and that he had taken on additional duties because of the sudden resignation of the regional manager. Consequently the notice that Carmeuse was contesting two of the penalties was mailed one day late to the Department of Labor's Mine Safety and Health Administration. The Secretary of Labor does not oppose reopening.

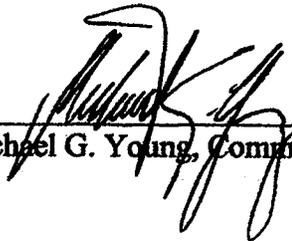
Having reviewed Carmeuse's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent 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.



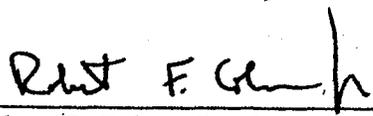
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 16, 2009

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

v.

HANSON AGGREGATES
MIDWEST, LLC

Docket No. LAKE 2010-27-M
A.C. No. 33-00064-181827

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

ORDER

BY THE COMMISSION:

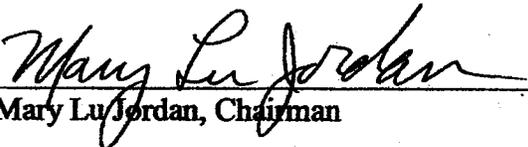
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 8, 2009, the Commission received from Hanson Aggregates Midwest, LLC ("Hanson") a request to reopen a penalty assessment that had become a final order of the Commission pursuant 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).

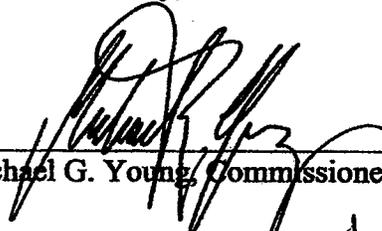
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

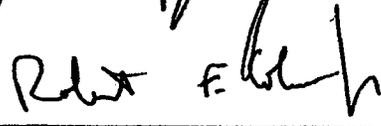
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000181827 to Hanson on April 9, 2009, proposing penalties for three citations and an order that had been issued to Hanson on January 15, 2009. Hanson, which had by letter previously requested a conference with the local MSHA office on two of the citations, promptly paid the other two penalties. Hanson states that it filed its request to reopen after learning from the local MSHA district office that the office had lost Hanson's conference request. It appears from Hanson's request that it mistakenly believed that its conference request also served as a notice of contest for the proposed penalties associated with the two citations in question. The Secretary of Labor does not oppose reopening.

Despite its outstanding conference request on the citations, Hanson was obligated to file a formal contest of the associated penalties in the assessment within 30 days of receipt of the assessment. *See* 29 C.F.R. § 2700.26. Nevertheless, having reviewed Hanson'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. 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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

November 16, 2009

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

v.

MORAN ENVIRONMENTAL RECOVERY

Docket No. SE 2009-687-M
A.C. No. 38-00014-180422

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 7, 2009, the Commission received from Moran Environmental Recovery ("Moran") a letter from its Director of Health & Safety 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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment Case Number 000180422 to Moran on March 26, 2009. Moran states that it mailed its contest of the proposed assessment to the wrong MSHA address and was not informed of its error until after the time to file has passed. Moran enclosed documentation indicating that it mailed its letter of contest timely, but to an incorrect MSHA address.

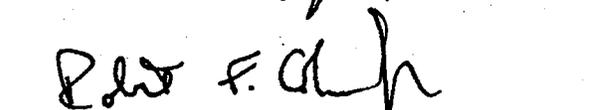
The Secretary does not oppose Moran's motion to reopen.

Having reviewed Moran'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. 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

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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

November 16, 2009

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

v.

ACTIVE MINERALS
INTERNATIONAL, LLC

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: Docket No. SE 2010-38-M
: A.C. No. 09-01192-189515
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:
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BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 October 13, 2009, the Commission received from Active Minerals International, LLC ("Active") a motion from 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).

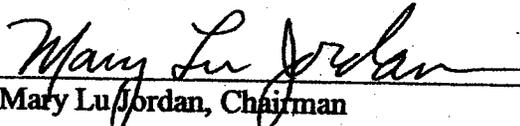
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

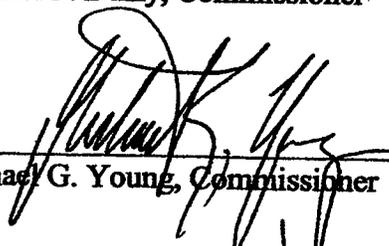
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

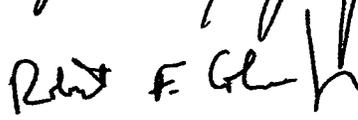
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000189515 to Active on June 30, 2009, proposing penalties for five citations that had been issued to Active in early May 2009. Counsel for Active contends that she timely contested all five penalties on behalf of the operator by letter to the local MSHA district office dated July 13, 2009. The Secretary of Labor does not oppose reopening, but states that the proposed assessment form instructs that notices of contest are to be mailed to MSHA's Civil Penalty Compliance Office in Arlington, Virginia.

The Secretary correctly points out that the proposed assessment form specifies that contests of proposed penalties are to be sent to the Arlington office. Nevertheless, we note that Active did send its letter to the local MSHA district office within the 30-day period for contests, and there is no indication that Active has previously sent contests to the wrong address.¹ Having reviewed Active'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. 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

¹ We caution Active that it must send any future notices of contest regarding proposed penalties to the address specified on the proposed assessment form.

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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 26, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Delta for two citations MSHA had issued to Delta in November 2007. Delta did not pay the assessment until it received a delinquency notice from MSHA. In its first motion, Delta requested reopening on the ground that the assessment was paid in error. According to Delta, the citations underlying the assessment were related to a fatal accident, and Delta had intended to contest the proposed penalties, as it later did in the case of another, much larger, assessment resulting from that accident. Delta stated that its payment of the penalties was due to office personnel not realizing the connection between the assessment and the accident.

While Delta's request for relief addressed the mistake that led to its failure to return the assessment form to MSHA, its motion was silent regarding why the assessment apparently sat unpaid for months, despite having purportedly been routed through Delta's payment process. Consequently, Delta's request to reopen was denied without prejudice. *Delta Sand & Gravel Co.*, 31 FMSHRC 4, 5 (Jan. 2009).¹

In its second request to reopen, Delta states that the assessment was not paid until the delinquency notice was received from MSHA because the individual responsible for reviewing and paying assessments, Mark Slinker, died in the July 2007 fatal accident that led to the citations that are the subject of the assessment. According to Delta, it had yet to put new procedures in place when the assessment at issue was received.

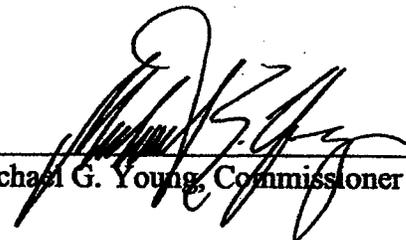
The Secretary of Labor did not oppose Delta's first request to reopen and did not respond to the second request.

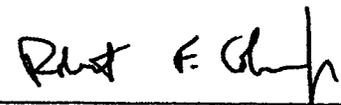
¹ Commissioners Jordan and Cohen voted to deny Delta's original motion without prejudice, while Chairman Duffy and Commissioner Young would have remanded the case to the Chief Administrative Law Judge for a determination of good cause. The effect of the split decision was that the motion was denied without prejudice.

The fact that the proposed assessment was received seven months after the tragic death of Mr. Slinker but Delta had not yet adjusted its procedures to account for his absence suggests that Delta was not paying proper attention to its obligations under the statutory penalty assessment process. Nevertheless, given the circumstances of this case, including the fact that Delta had earlier indicated an intent to contest proposed penalties issued in connection with the fatal accident, 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


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 30, 2009

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

v.

WINGDALE MATERIALS, LLC

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: Docket No. YORK 2009-135-M
: A.C. No. 30-03138-179105
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BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, Commissioners

ORDER

BY: Jordan, Chairman; Young and Cohen, Commissioners

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 16, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Wingdale Materials, LLC ("Wingdale") 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).

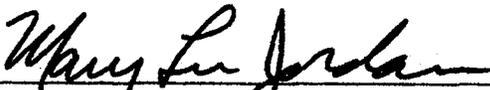
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

Wingdale states that it received Proposed Assessment No. 000179105 from the Department of Labor's Mine Safety and Health Administration ("MSHA") on March 18, 2009. In an affidavit, Wingdale's safety director explains that he was away at the time and did not personally receive the assessment until March 30. He subsequently was also away from the mine on travel the first week of April, and states that he neglected to act upon the assessment immediately after he returned. He mailed the contest form, indicating Wingdale's intent to contest penalties associated with seven citations, six days too late. Soon after, the operator paid the other proposed penalties.

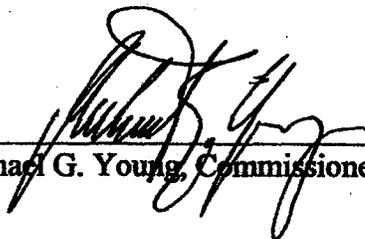
The Secretary of Labor opposes Wingdale's request to reopen the proposed assessment. She characterizes Wingdale's procedures for responding to assessments as inadequate, and argues that inadequate or unreliable internal office procedures do not constitute the exceptional circumstances required for reopening.

Having reviewed Wingdale's request to reopen and the Secretary's response, we conclude that Wingdale has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The safety director's generalized excuse that he did not receive the assessment until March 30, 2009, due to his "travel and work schedule" is not sufficient to warrant relief. Moreover, he admittedly received the assessment on or about March 30, 2009. He thus became personally aware of the assessment well before the April 17 deadline for contesting it, but offers only the excuse that he was traveling on business during the first week of April. This fails to explain why he did not contest the penalty prior to the deadline, during the period in April when he was not traveling.

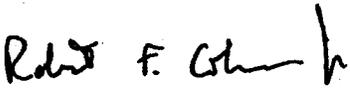
Wingdale's submission does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Wingdale's request.¹ *See e.g., Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008). If Wingdale submits another request to reopen the case, it should explain with specificity why the safety director's work and travel schedule between March 18 and March 30 precluded action on the assessment, and why he did not contest it after the end of the first week in April when he returned from his travel.



Mary Lu Jordan, Chairman



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

¹ Our dissenting colleague lists ten recent cases in which we have granted reopening after MSHA's proposed assessments have become final under section 105(a) because of the failure by operators to timely contest the proposed assessment. Our colleague claims that the information provided by the operators in most, if not all, of these cases was "much less detailed" than the information submitted by Wingdale here. Slip op. at 4. We respectfully disagree, and find the cases to be distinguishable on various grounds. *See, e.g., J & T Servs.*, 31 FMSHRC 118 (Feb.2009) (person responsible for filing contest form was killed in accident shortly after receiving proposed assessment, and contest was filed two days late). As our colleague acknowledges, in none of these ten cases did the Secretary oppose reopening.

By contrast, in the present case, there are periods of time during which Wingdale's failure to act is unexplained. Consequently, we are not denying Wingdale's motion outright, but requiring it to fully explain why the proposed assessment was not contested timely.

Commissioner Duffy, dissenting:

I would not deny the operator's request to reopen but would instead grant reopening. While the majority's denial is without prejudice, and thus leaves the door open for the operator to file another request to reopen, I am not sure what would be gained by requiring its safety director to account for his comings and goings during March and April of this year. The motion in this case presented an honest admission by the safety director that he knew he was under a deadline to file a notice of contest but that travel away from the office on two occasions during the relevant period resulted in his failure to timely file. The contest was filed six days late.

I am mindful that mine safety and health enforcement has stepped up in intensity over the past several years and has resulted in a sharp increase in citations and orders issued. I am further mindful that this intensity has markedly increased the day-to-day responsibilities of all concerned. This Commission, for example, has seen its yearly caseload increase from a level of 2,437 new cases in FY 2005 to 9,240 new cases in FY 2009. MSHA has been authorized to hire hundreds of new inspectors to ensure that all mandated inspections of surface mines (twice annually) and all underground mines (four annually) are conducted. The duties of those charged with complying with the Mine Act and its standards are being stretched as well.

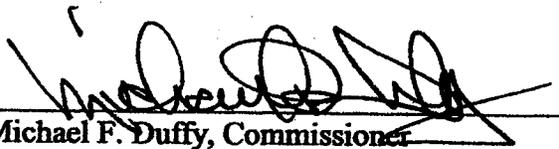
These circumstances do not absolve mine operators from promptly asserting their rights and carrying out their responsibilities in contesting citations and penalties under the Act's procedural requirements, and the Commission has recently been looking at requests to reopen with a more critical eye than in the past. We have gone so far as to institute a rulemaking in an attempt to set criteria and standards for determining when granting a request to reopen a proceeding is appropriate.

In the meantime, and given the circumstances outlined above, I find that a six-day delay in filing a penalty contest that is honestly admitted as having occurred due to press of business falls under excusable neglect. We have of late granted a number of requests to reopen where the notice of contest was submitted to MSHA just a few days late. Compared to the information provided in support of the request to reopen in this case, the information provided by the respective operator in most if not all of each of those other cases was much less detailed regarding what, specifically, prevented the operator from filing a notice of contest at any time during the 30-day period after the penalty assessment was received.¹

¹ See, e.g., *Ruscat Enterprises, Inc.*, 31 FMSHRC 112 (Feb. 2009); *Oak Grove Res., LLC*, 31 FMSHRC 115 (Feb. 2009); *J & T Servs.*, 31 FMSHRC 118 (Feb. 2009); *Clean Energy Mining Co.*, 31 FMSHRC 370 (Apr. 2009); *Lueders Limestone, LP*, 31 FMSHRC 386 (Apr. 2009); *Black Butte Coal Co.*, 31 FMSHRC 400 (Apr. 2009); *Mosaic Phosphates Co.*, 31 FMSHRC 504 (May 2009); *Alex Energy, Inc.*, 31 FMSHRC 540 (May 2009); *Dickenson-Russell Coal Co.*, 31 FMSHRC 587 (June 2009); *West Virginia Mine Power, Inc.*, 31 FMSHRC 600 (June 2009).

While it is true that in those cases the Secretary did not oppose reopening, she, like the majority, provides no explanation for treating this case differently, other than that the safety director appears to have admitted there were times during the 30-day contest period when he could have submitted the form. The Commission has never required a detailed accounting of what prevented an operator from submitting a notice of contest throughout the 30 days in which it had to respond to an assessment, and no reason for the Commission to do so has been advanced in this case.

Consequently, I cannot agree with the majority that relief in this instance should be contingent upon the operator's submission of a greater amount of information than it has already submitted. In addition, I am doubtful that the safety director can say much more than he did when the request to reopen was filed over five months ago.



Michael F. Duffy, Commissioner

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November 30, 2009

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

v.

HIGHLAND MINING COMPANY

: Docket No. WEVA 2009-110
: A.C. No. 46-08693-145240

: Docket No. WEVA 2009-688
: A.C. No. 46-08693-164121

: Docket No. WEVA 2009-689
: A.C. No. 46-08693-167069

: Docket No. WEVA 2009-1037
: A.C. No. 46-06558-169988

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

ORDER

BY: Duffy, Young, and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 14, 2008, the Commission received from Highland Mining Company ("Highland") a motion made 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 21, 2009, the Commission received two more such motions from Highland, and on March 25, 2009, the Commission received a fourth motion.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).

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-110, WEVA 2009-688, WEVA 2009-689, and WEVA 2009-1037, all captioned *Highland Mining Co.*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

With respect to Docket No. WEVA 2009-110, on April 1, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty assessment No. 000145240 to Highland. In its motion to reopen the assessment, Highland acknowledges that a security guard, no longer employed by Highland, signed for the package containing the assessment. Highland states that the security guard left the package in the guard house and that it was never seen again. Highland further explains that it learned of its delinquency with respect to the assessment around July 15, 2008, when it received a letter from MSHA. It did not file a motion to reopen for another three months.

With respect to Docket No. WEVA 2009-688, on September 30, 2008, MSHA issued proposed penalty assessment No. 000164121 to Highland. The record indicates that the proposed penalty assessment was signed for by the company receptionist but was subsequently lost within the operator's internal mail system and never delivered to Highland's safety director for processing. Highland's motion describes the procedures the receptionist was to have followed. After receiving a notice from MSHA dated December 30, 2008, stating that payment on the proposed assessment was delinquent, the safety director promptly investigated the matter and notified counsel, who filed a motion to reopen on January 21, 2009.

With respect to Docket No. WEVA 2009-689, on October 28, 2008, MSHA issued proposed penalty assessment No. 000167069 to Highland. Highland states that the proposed penalty assessment was misplaced on the desk of the operator's safety director, Jason Jude, and that, as a result, Highland inadvertently failed to transmit the proposed penalty assessment to counsel for the filing of a contest. After discovering the mistake, the operator states that it immediately transmitted the matter to counsel, who submitted the contest to MSHA that same day. By letter dated December 23, 2008, MSHA rejected the submission as untimely. The operator filed a motion to reopen on January 21, 2009.

With respect to Docket No. WEVA 2009-1037, on December 2, 2008, MSHA issued proposed penalty assessment No. 000169988 to Highland. Highland states that the proposed penalty assessment was misplaced on the desk of the operator's safety director, Lewis Sheppard, and that, as a result, Highland inadvertently failed to transmit the proposed penalty assessment to counsel for the filing of a contest. After the operator received a delinquency letter from MSHA dated February 26, 2009, operator's counsel filed a motion to reopen on March 25, 2009.

The Secretary only opposes the reopening of the first assessment that Highland seeks to reopen. She opposes reopening on the ground that the operator has conceded that it had no standard practice or procedure for deliveries to the guard house and has failed to explain why it waited three months to file a request for reopening after learning of the delinquency. The Secretary does not oppose reopening the other three assessments.²

² We consider the Secretary's position in the three cases in which she does not oppose reopening in light of the provisions of the Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey

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. 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).

A. Whether Highland Demonstrated Good Cause for Failing to Timely Contest the Penalties

1. Assessment No. 000145240

Having reviewed Highland’s motion and the Secretary’s response, we deny the motion with prejudice. 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 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066 (Dec. 2008); see *Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987) (holding that default caused by failure to establish minimum procedural safeguards for determining that action in response to summons and complaint was taken does not constitute default through excusable neglect). The Secretary correctly points out that Highland concedes that “there was no standard practice or procedure for mail and packages delivered to the guard house.” Mot. at 2. However, Highland’s motion also indicates at another point that guards were responsible for delivering packages that they received to the business office or addressee within the company. *Id.* In light of Highland’s concession and its apparently inconsistent explanation of its procedures, we conclude that it has failed to establish good cause for reopening the proposed penalty assessment.

Energy Company Subsidiaries” dated September 13, 2006. That agreement was in effect when the Secretary filed her responses. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary was not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion was filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary’s position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator’s proffered excuse. The Commission has been informed that, since the time the Secretary filed her responses, she has rescinded the agreement.

2. Assessments Nos. 000164121, 000167069, and 000169988

The three assessments were issued in a period of a little over two months, and Highland has provided a different reason for its failure to timely respond to each. While this could be a series of random mistakes, it could also be an indication of inadequate procedures. We are particularly concerned that in late December 2008 Highland was put on notice by MSHA that it had failed to timely respond to Assessment Nos. 000164121 and 000167069, yet Highland nevertheless failed to timely respond to still another assessment, No. 000169988.

Consequently, we hereby deny the motions to reopen these three assessments, but without prejudice. Should Highland renew its reopening requests, it must do so within 30 days, and fully explain the circumstances in the three failures to timely contest the proposed assessments. It must also address what it has done to ensure that it does not misplace penalty assessments in the future and to ensure that it responds to them in a more timely manner, in order to avoid a repeat of the mistakes it outlined in its four motions.

B. Highland's Promptness in Seeking Reopening

Under Rule 60(c), a motion to reopen, regardless of its merit, is only granted if it is filed within a reasonable time. 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).

Here, with regard to the first assessment, Highland fails to explain why, after it learned of the delinquency, it waited three more months before filing its request to reopen.³ In contrast, with respect to the other three assessments, Highland acted promptly, filing each motion to reopen within 30 days after learning that it had failed to file a timely contest.

In the future, to save time and conserve its resources, the Commission will ordinarily analyze the question of whether the request to reopen was filed in a reasonable time in the following manner. Motions to reopen received within 30 days of an operator's receipt of its first

³ The amount of time is especially relevant, because the Secretary's response raised that issue, and Highland did not file a reply providing an explanation. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008). Accordingly, where the Secretary raises the issue of the delay between receipt of a delinquency letter and the filing of the request to reopen, an operator who does not explain why, after it was informed of a delinquency, it took as long as it did to request reopening, does so at its peril.

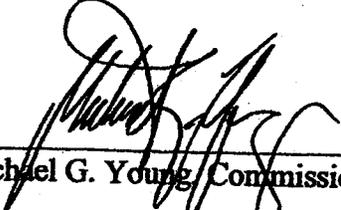
notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time.

Motions to reopen filed more than 30 days after receipt of such information from MSHA should include an explanation for why the operator waited so long to file for reopening. The lack of such an explanation is grounds for the Commission to deny the motion.

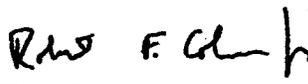
In addition to being prompt in filing a motion to reopen, an operator must also set forth an adequate explanation of the reasons for its delinquency, as we have previously held.



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

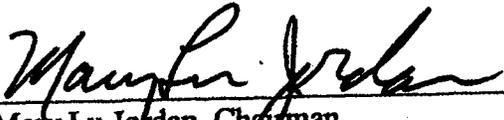
Chairman Jordan, concurring and dissenting:

I agree with the majority that the motion to reopen in Docket No. WEVA 2009-110 should be denied with prejudice. However, unlike my colleagues, I would also deny with prejudice the motions in the remaining three dockets.

A review of the four motions submitted by the operator reveals a system that fails to give appropriate priority to proposed penalty assessments sent by MSHA. The four cases before us involve deliveries of proposed assessments that occurred from April 2008 until December 2008, an eight month time frame. During this period problems occurred at every stage of the operator's internal mail system. For example, in Docket No. WEVA 2009-110, the assessment was delivered to the guard house but apparently never went further. In Docket No. WEVA 2009-688, the safety director states that he never received the proposed assessment and offers only the general speculation that it was lost or misplaced after the receptionist signed for the delivery.

In Docket Nos. WEVA. 2009-689 and 2009-1037, the safety directors did receive the assessments. But even that modest success did not result in timely contests of those proposed penalties. In the first case, the safety director declares that, in completing the contest, he was interrupted by other job duties. Jude Aff. at 2. In the second case, a different safety director states that he was interrupted while completing the contest because he "had to address other important company matters as part of [his] job duties." Sheppard Aff. at 2. These explanations do not rise to the level of "mistake, inadvertence, or excusable neglect"; a safety director will always have a multitude of tasks, and the mere existence of other job duties does not warrant relief.

In sum, indifference, as opposed to inadvertence, would appear to more accurately describe the underlying reason for Highland's pattern of untimely contests, and constitutes grounds for denying its motions to reopen in these cases. *See Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 938-39 (5th Cir. 1999) (finding that the district court did not abuse its discretion in refusing to set aside default judgment when a failure to establish minimum internal procedural safeguards was at least a partial cause of company's failure to respond to complaint).



Mary Lu Jordan, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

December 3, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. VA 2009-3
ADMINISTRATION (MSHA)	:	A.C. No. 44-03317-153866
	:	
v.	:	Docket No. VA 2009-4
	:	A.C. No. 44-06685-153869
BANNER BLUE COAL COMPANY	:	

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

ORDER

BY: Jordan, Chairman; Duffy and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 3, 2008, the Commission received from Banner Blue Coal Company ("Banner Blue") requests to reopen two penalty assessment 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).

On June 17, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two separate proposed penalty assessments to Banner Blue. Banner Blue, however, did not file notices of contest with MSHA until August 22, 2008. Banner states that one reason for the late filing of its contests was the placement, in error, of an internal date stamp of "July 25, 2008," on each of the proposed assessments by Kristy Hurley, a secretary with Banner Blue's parent company, although the assessments were actually received a month earlier. Banner Blue also contends that MSHA's change in delivery methods from the use of certified

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers VA 2009-3 and VA 2009-4, each captioned *Banner Blue Coal Co.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

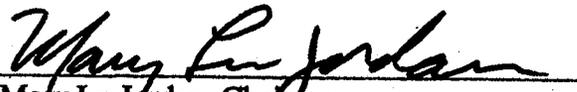
mail to the use of Federal Express delivery had disrupted its internal processing system for proposed assessments.²

The Secretary opposes reopening on the ground that the parent company's safety director – who ultimately reviewed the assessments and directed the company's counsel to contest certain of the penalties in each assessment – should have noticed the June 17, 2008, issuance date on the assessments, investigated the discrepancy with the internal date stamp, and discovered that the assessments had actually been received on June 24. The Secretary also points out that MSHA had changed its delivery methods approximately nine months before Banner Blue received the proposed assessments.

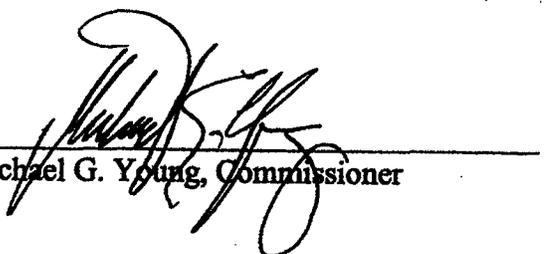
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

² Banner claims that this change resulted in assessments going first to its president's secretary rather than directly to Ms. Hurley in the Engineering Department. However, documents submitted by the Secretary indicate that Ms. Hurley signed for the Federal Express deliveries of the assessments at issue here.

Having reviewed Banner Blue's requests and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether the alleged erroneous date-stamping of the assessments constitutes good cause for Banner Blue's failure to timely contest the penalty proposals and whether relief from the final orders should be granted.³ If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner

³ In our opinion, a judge would be in a better position to consider those facts raised by the Secretary and our dissenting colleague, Commissioner Cohen, that cast doubt whether Banner Blue's failures to timely file notices of contest can be attributed to the erroneous date-stamping.

Commissioner Cohen, dissenting:

This case involves two penalty assessments – 16 enforcement actions with penalties totaling \$44,629.00. My colleagues would remand the case to the Chief Administrative Law Judge for a determination of whether good cause exists for Banner Blue's failure to timely contest the penalty proposals. I respectfully dissent because the facts offered by Banner Blue in its motions fall far short of demonstrating good cause for reopening, especially in light of the criteria of mistake, inadvertence, surprise, or excusable neglect contained in Rule 60(b) of the Federal Rules of Civil Procedure.

Banner Blue is controlled by Wellmore Coal Company ("Wellmore"). Mot. at 2. According to the motions, Wellmore has a central mine management office which handles the operations of 24 mines. *Id.* According to the motions, Wellmore receives "foot high stacks of mail that [come] in each day for all of Wellmore's 24 mining operations." *Id.* According to the motions, Wellmore employs one secretary who is "without ample storage" to handle this volume of mail. Mot. at 5.

The record shows that the two proposed assessments, both dated June 17, 2008, were received by Wellmore on June 24, 2008.¹ However, the assessments bear a "Wellmore Coal Company - Engineering Department" date stamp of July 25, 2008. According to the motions, Banner Blue's counsel "processed" the assessments on August 22, 2008. Mot. at 1. After MSHA notified Banner Blue's counsel that the contests of the assessments were not filed timely, counsel submitted these motions to the Commission on September 30, 2008.

Banner Blue advances three possible explanations for its failure to timely contest the penalty assessments at issue. Its first explanation is that MSHA changed its delivery method from certified mail to Federal Express. According to the motions, "MSHA's change in the mailing procedure of MSHA 1000-179 forms from certified mail to Federal Express foiled a well-laid procedure for processing the forms, and certainly either caused or at least exacerbated other potential mistakes." Mot. at 5-6. MSHA had sent a notice to operators explaining the new mailing procedure, and stating that it would go into effect on September 17, 2007. S. Opp. at 3 n.3. The proposed assessments in this case were received by Wellmore on June 24, 2008, over nine months after this change. A company with the resources and skill to administer 24 separate mining operations presumably has the ability, within nine months, to adjust its internal procedures to accommodate MSHA's change in mailing methods.

The second explanation provided by the operator is that because of the change in MSHA's delivery system, the assessments did not go to Wellmore's Engineering Department secretary, as previously, but instead were sent to the President's secretary, who would forward them to the Engineering Department secretary. Because the President's secretary "did not realize

¹ This fact was not indicated by Banner Blue in its motions. The Commission was furnished evidence of the actual delivery date of the assessments by the Secretary in her response.

the urgency of the mailing,” the operator claims that she did not open them immediately. Mot. at 2. Then, according to Banner Blue, when the Engineering Department secretary received the assessments from the president’s office and date-stamped them, she would have stamped the forms as received on the day they came across her desk. *Id.*

Banner Blue’s essential problem with this explanation is that the record shows that it did not happen. The Secretary provided the Commission with Federal Express delivery records showing that the two assessments issued on June 17, 2008 were signed for by “K. Hurley” on June 24, 2008. The operator’s motions contain affidavits from Kristy Hurley, who identifies herself as the secretary for the Engineering Department. Thus, one must conclude that these assessments never went to the President’s secretary, but instead went to the Engineering Department secretary who normally processed the assessment form.

Banner Blue’s third explanation is that the Engineering Department secretary had recently obtained a new date stamp and may have incorrectly stamped July 25 on the assessments. *Id.* at 3, 5. However, Ms. Hurley’s affidavit states that she obtained the new date stamp “in early June of 2008.” Hurley Aff. at 2. It is unclear whether the operator is asserting that she was date-stamping July instead of June on the “foot-high stacks of mail that came in each day” for approximately two weeks and that no one noticed, or whether she was date-stamping the mail accurately for those two weeks and only these assessments were stamped July 25 instead of June 24.

Another reason why the third explanation is not acceptable is that, as the Secretary points out, it is not an excuse for the Safety Director, Robert Litton, to rely on the date stamp on the assessment forms when the forms themselves clearly indicated the date of issuance as June 17, 2008. A prudent safety director who routinely processed numerous assessments would look at the date of the assessment and – if it was markedly different from the date stamp (i.e., 38 days) – make some inquiries. I note that on all the assessments someone has written instructions within an inch of the printed date of June 17, 2008.

In its motions, the operator acknowledges that it had “a systemic problem in the entire MSHA [penalty assessment form] processing system at the mine office.” Mot. at 1. As noted above, Wellmore was responsible for the operation of 24 mines, with a central mine management office that processed “foot high stacks of mail that came in each day” for all of these operations. Mot. at 2. The single secretary who was charged with processing this mail “without ample storage” was also responsible for managing the “forms, plans, and files for the 24 mines controlled by the Wellmore division.” Hurley Aff. at 1. In other words, this case is not about an operator for whom MSHA’s change in the mailing of the assessment forms to Federal Express nine months earlier “foiled a well-laid procedure.” Mot. at 5-6. It is not about the President’s secretary who “did not realize the urgency of the mailing.” *Id.* at 2. It is not even about the Engineering Department secretary having a wrong date on her stamp. It certainly is not “a series of problems outside of any one person’s control.” *Id.* at 5. What this case involves is a company which has one person processing a foot-high stack of mail, affecting 24 separate operations,

every day, in addition to her other responsibilities. This is not mistake or inadvertence. It is about a large operator (or at least a large controller) which set up a system that, at some point, was bound to fail.

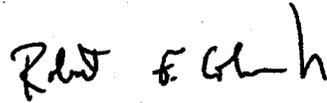
The Commission has previously emphasized that “[r]elief under Rule 60(b) should generally not be accorded to an operator who creates and condones a system which predictably will result in missed deadlines.” *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008). In the *Pinnacle* cases, we denied relief from final orders when the operator “failed to create a mechanism to ensure that it would routinely and effectively receive mail when it was delivered.” 30 FMSHRC at 1062; 30 FMSHRC at 1067.

Moreover, the federal courts have recognized, pursuant to Rule 60(b)(1) that “where internal procedural safeguards are missing, a defendant does not have a ‘good reason’ for failing to respond to a complaint.” *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 935-36 (11th Cir. 2007) (collecting cases); see 11 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2858 n.22 (3d ed.). As the 11th Circuit has noted, “[d]efault that is caused by the movant’s failure to establish minimum procedural safeguards for determining that action in respond to a [complaint] is being taken does not constitute default through excusable neglect.” *Gibbs v. Air Canada*, 810 F.2d 1529, 1537 (11th Cir. 1987); *National Railroad Passenger Corp. v. Patco Transport, Inc.*, 128 Fed. Appx. 93, 95 (11th Cir. 2005) (citation omitted). Similarly, the 7th Circuit has held that where a party’s “internal procedures simply broke down”, the party’s failure to answer a complaint was not excusable under Rule 60(b)(1). *North Cent. Ill. Laborers’ Dist. Council v. S.J. Groves & Sons Co.*, 842 F. 2d 164, 166-67 (7th Cir. 1988) (default not excusable where corporation’s in-house counsel staff of two attorneys was reduced to one because other attorney was disabled, and remaining attorney overlooked the complaint in the resulting pressure, confusion, and increased workload).

An excellent analysis of the issue was set forth by Judge Haynsworth, concurring in *Park Corp. v. Lexington Insurance Co.*, 812 F.2d 894 (4th Cir. 1987). In this case, the court held that the unexplained disappearance of the summons and complaint from the defendant’s mail room did not constitute grounds for relief from the default judgment under Rule 60(b)(1). Judge Haynsworth wrote a separate concurring opinion because he thought that the majority’s standard was too stringent. The Judge focused on the issue of whether a party “maintains adequate internal controls designed to capture and record incoming legal papers and to get them to the responsible official for an appropriate response,” and stated that where such adequate internal controls exist, “a district court should not deny Rule 60(b) relief simply because the party cannot explain how the particular papers were lost.” *Id.* at 898. Nevertheless, Judge Haynsworth concurred with the majority because “Lexington offered no evidence of procedures in the mail room by which the person signing the receipt for the registered or certified mail insures that the papers received in the mail room are recorded on the log and transmitted to the appropriate legal or claims department.” *Id.* He concluded: “The best of systems sometimes suffers an occasional

breakdown. When it does, the neglect should be treated as excusable, but sloppy handling of papers by which legal actions are commenced is inexcusable." *Id.*

This case does not need to be remanded to a judge for a determination as to whether relief should be granted. The operator's submissions reveal, as it admits, a "systemic problem." Mot. at 1. However, it is not, as the operator contends, "a series of problems outside of any one person's control." Mot. at 5. Rather, it is a poorly-constructed, inadequately-staffed and apparently unsupervised system which was, sooner or later, bound to fail. That does not constitute "inadvertence," "mistake," or "excusable neglect," and does not constitute a showing of good cause for the operator's failure to timely respond to the penalty assessments. Consequently, I would deny the motions.



Robert F. Cohen, Jr., Commissioner

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December 10, 2009

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

v.

MORTON SALT DIVISION/MORTON
INTERNATIONAL, INC.

Docket No. CENT 2010-30-M
A.C. No. 16-00970-194172

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 October 15, 2009, the Commission received from Morton Salt Division/Morton International, Inc. ("Morton") 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).

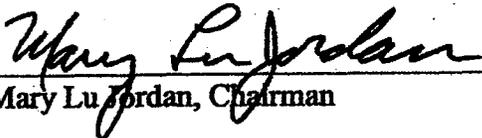
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

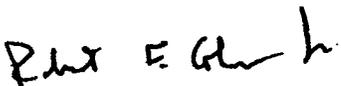
On August 12, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000194172 to Morton, proposing penalties for a number of citations and orders that had been issued to the operator during the previous two months. Morton states that it had earlier indicated its intent to contest one of the orders by requesting and receiving a conference on it and three citations with the local MSHA office. Morton explains that when the assessment was received, it mistakenly did not include the penalty for the order among those penalties it was contesting, and instead paid that penalty amount along with others it was not contesting. The Secretary states that she does not oppose Morton's request to reopen the assessment so that it can contest the penalty associated with the order.

Having reviewed Morton'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. 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

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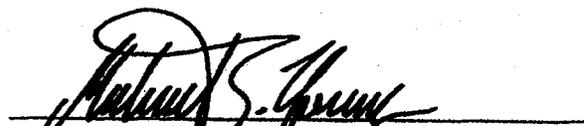
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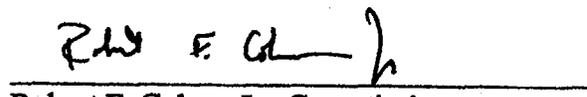
The record indicates that Hurley never received proper notification of the proposed penalty assessment as required under Commission Procedural Rule 25.¹ Under the circumstances of this case, we conclude that Hurley timely notified the Secretary that he wished to contest the proposed penalty once he had such notice.

Because the proposed penalty assessment did not become not a final order of the Commission, we will treat the motion to reopen as moot. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed 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

¹ Commission Procedural Rule 25 states that 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." 29 C.F.R. § 2700.25.

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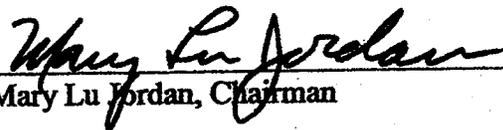
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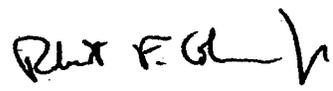
Solvay states that it checked the box on the original assessment form for Citation No. 6420279, but that it was not noted. The Secretary states that a payment dated February 26, 2009, in the amount of \$576, which paid all the proposed penalties except the proposed penalty that the operator seeks to reopen, was timely received at the Department of Labor's Mine Safety and Health Administration ("MSHA") Payment Processing Center in St. Louis, Missouri. However, the Secretary states that MSHA has no record of receiving the penalty contest form at its Civil Penalty Compliance Office in Arlington, Virginia. The Secretary does not oppose Solvay's request to reopen the proposed penalty assessment.

Having reviewed Solvay'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. 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


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December 10, 2009

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

v.

BLUE HAVEN ENERGY, INC.

Docket No. WEVA 2010-144
A.C. No. 46-08581-188168

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 October 27, 2009, the Commission received from Blue Haven Energy, Inc. ("Blue Haven") 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).

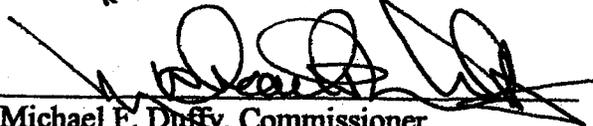
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 June 16, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000188168 to Blue Haven, proposing penalties for eight citations that had been previously issued to the operator. According to its motion, Blue Haven received the assessment, and its representative marked the form to indicate that it was contesting all the proposed penalties. The notice of contest was apparently mailed on June 27, 2009, using certified mail. According to a copy of the on-line record of delivery submitted by Blue Haven with its motion, the envelope that was mailed was received by MSHA two days later. Nevertheless, the penalties were shown as delinquent on a separate, subsequent assessment, which caused Blue Haven to promptly file its motion to reopen.

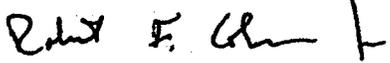
The Secretary of Labor states that, while she has no record of receiving the notice of contest, given the information provided by Blue Haven, she will accept the copy of the notice of contest included with Blue Haven's motion. The Secretary states in her letter dated November 17, 2009, that she will file a penalty petition within 45 days of that date.

Having reviewed Blue Haven's motion and the Secretary's response, we find the request to reopen to be moot. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700, and, per her statements, the Secretary's penalty petition shall be filed no later than January 4, 2010.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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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).

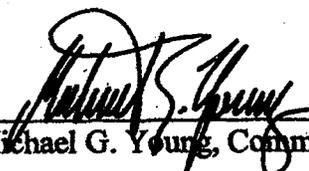
On July 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000192621 to Ray County for three citations MSHA had issued to the operator on June 2, 2009. The request to reopen states that the employee who signed for the assessment when it was delivered never forwarded it for action by the operator. Ray County wishes to reopen the assessment so that it can try to reach a settlement of the penalties. The Secretary of Labor states that she does not oppose reopening in this instance.

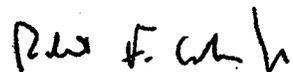
Having reviewed Ray County's request and the Secretary's response, we conclude that Ray County has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Accordingly, we deny without prejudice Ray County's

request. See *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ “Without prejudice” means that Ray County may submit another request to reopen the assessment so that it can contest the citations and penalty assessments. In the event that Ray County chooses to refile its request to reopen, it should provide more specific information regarding why it did not file a notice of contest on a timely basis, and when it learned of the delinquency. Ray County should also specify which of the penalties it wishes to contest upon reopening.

The request to reopen was sent by Earl Wilson, who describes himself as a “Safety Consultant.” Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an “owner, partner, officer or employee” of certain parties, or “[a]ny other person with the permission of the presiding judge or the Commission.” 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Wilson satisfied the requirements of Rule 3 when he filed the operator’s request. We have determined that, despite this, we will consider the merits of the operator’s request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Wilson must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

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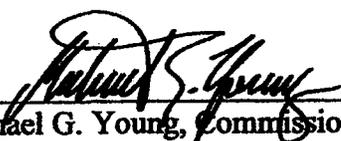
On June 18, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000188689 to M & P, proposing a penalty for a citation that had been previously issued to the operator. According to its motion, M & P received the assessment, and its representative marked the form to indicate that it was contesting the proposed penalty. The notice of contest was apparently mailed on June 27, 2009, using certified mail. According to a copy of the on-line record of delivery submitted by M & P with its motion, the envelope that was mailed was received by MSHA two days later. Nevertheless, M & P later received a notice from MSHA, showing the penalty as delinquent, which caused M & P to promptly file its motion to reopen.

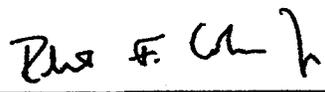
The Secretary of Labor states that, while she has no record of receiving the notice of contest, given the information provided by M & P, she will accept the copy of the notice of contest included with Blue Haven's motion. On November 17, 2009, the Secretary filed a petition for assessment of penalty in this case.

Having reviewed M & P's motion and the Secretary's response, we find the request to reopen to be moot. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 14, 2009

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

v.

IO COAL COMPANY, INC.

Docket No. WEVA 2007-293

DECISION

BY: Duffy, Young, and Cohen, Commissioners

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" or "Act"), Administrative Law Judge David F. Barbour found a significant and substantial ("S&S")¹ violation of 30 C.F.R. § 75.220(a)(1)² but did not find the violation to be a result of the operator's unwarrantable failure.³ 30 FMSHRC 847, 868-69 (Aug. 2008) (ALJ). The Secretary petitioned the Commission to review the unwarrantable failure determination, and the Commission granted the petition. For the reasons that follow, we vacate and remand the judge's unwarrantable failure determination.

¹ 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."

² 30 C.F.R. § 75.220(a)(1) provides: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered."

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

I.

Factual and Procedural Background

A. Events of June 12 and 13, 2006

IO Coal Company ("IO") is the operator of the Europa Mine, an underground coal mine located in West Virginia. 30 FMSHRC at 847-48; Gov't Ex. 11. IO is owned by Magnum Coal Company. Tr. 265. On the morning of June 12, 2006, Inspector Jack Hatfield of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of the mine. 30 FMSHRC at 853. Hatfield examined the 005 Mechanized Mining Unit ("MMU") section, which consists of seven mining entries and encompasses approximately 2100 linear feet. Tr. 147. Hatfield was accompanied at times by General Mine Foreman Fred Thomas and at other times by Section Foreman Michael Jefferson. 30 FMSHRC at 853; Tr. 233-34.

Hatfield first checked the 005 MMU section for imminent dangers. 30 FMSHRC at 853. He testified that as he did, he noticed that the roof on the section contained surface cracks and other kinds of cracks, as well as unsupported kettle bottoms.⁴ *Id.* The men walked up the number 4 entry and then walked to the number 1 entry and across the face, at which point Hatfield traveled back to the number 7 entry. *Id.* (citing Tr. 190). As the inspector was pointing out conditions he considered unsafe, IO personnel installed additional roof support. Tr. 257; 339, 341.

Hatfield believed that IO was not complying with its roof control plan. He issued a section 104(d)(1) order,⁵ closing the section. 30 U.S.C. § 814(d)(1). In the order, the inspector alleged that the 005 MMU section contained adverse roof conditions in the form of "multiple inadequately supported and unsupported surface cracks and kettle bottoms." Gov't Ex. 1.

⁴ Kettle bottoms are "basically . . . petrified tree trunk[s] surrounded by a thin layer of coal." 30 FMSHRC at 851 n.4. The size of the kettle bottom depends on the size of the tree trunk. *Id.* Kettle bottoms are circular, oval or oblong with coal encrusted around the circumference. Tr. 37-38; R. Ex. 2. According to the *Dictionary of Mining, Mineral, and Related Terms*, 297 (2d ed. 1997) (American Geological Institute), a kettle bottom "may drop out of the roof of a mine without warning, sometimes causing serious injuries to miners." *Eagle Energy, Inc.*, 23 FMSHRC 1107, 1108 n.2 (Oct. 2001).

⁵ A Mine Act section 104(d)(1) order is issued during an inspection of a mine when MSHA finds an unwarrantable failure violation within 90 days of a prior issuance of a citation to that mine that was designated as both S&S and a result of unwarrantable failure. Under that order, the operator must "cause all persons in the area affected by such violation . . . 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(d)(1).

In Hatfield's opinion, the conditions violated the mine's roof control plan, Safety Precaution No. 7, which stated:

When adverse roof conditions are encountered[,] such as horsebacks, slicken-sided slip formations, clay veins, kettle bottoms, surface cracks, mud streaks or similar types of conditions in the mine roof, supplemental roof supports shall be installed in addition to primary roof support as appropriate in the affected area.

Gov't Ex. 1, 6.

Mine Foreman Thomas was "very upset." Tr. 205. He called the Mine Superintendent, Tim Beckner, who met Inspector Hatfield as he was leaving. Tr. 363, 371-72. Beckner allegedly asked Hatfield to go back to the section with him, but Hatfield declined. Tr. 372-73. The Mine Superintendent called the Operations Manager and the Vice-President for Magnum Coal. Tr. 373-74. At about 5:00 p.m. on June 12, Beckner, Thomas, Doug Williams (the operations manager), and two mining engineers employed by Magnum Coal entered the 005 section. Tr. 268-70. They examined all the entries and crosscuts on the section without physically walking every one of them. Tr. 269-70, 430.

On the following morning, Inspector Hatfield and MSHA Inspection Supervisor Terry Price returned to the mine. Tr. 77. IO was in the process of putting up additional roof support. Tr. 78. The inspectors determined that the right side of the section could open to allow production but that entries Nos. 1, 2, and 3 needed more support and were to remain closed. Tr. 79-80. The order was terminated later in the day. Tr. 80.

B. Prior Citations

On May 1, 2006, Inspector Hatfield had issued Citation No. 7252337 to IO alleging a section 75.220(a)(1) violation because of adverse roof conditions on the 004 MMU section of the Europa mine. 30 FMSHRC at 850. The conditions consisted of surface cracks, kettle bottoms, and mud streaks at several locations. *Id.*; Gov't Ex. 2. This citation was issued to former Mine Foreman Joe Glenn. Gov't Ex. 2. Fred Thomas was aware of its issuance. Tr. 209-10.

On May 17, Hatfield had issued Citation No. 7252378 for another section 75.220(a)(1) violation for adverse roof conditions to Mine Foreman Thomas. 30 FMSHRC at 852; Gov't Ex. 3. The citation involved unsupported kettle bottoms and surface cracks on the 006 MMU section. 30 FMSHRC at 852. After he issued the citation, Hatfield stated that he had reviewed the roof control plan, particularly Safety Precaution No. 7, with Thomas. *Id.* The company abated the condition by installing supplemental roof support. *Id.*

On June 5, Hatfield had issued Citation No. 7252411 to Thomas pursuant to section 75.220(a)(1) concerning roof conditions on the 006 MMU section when he detected a large kettle bottom that was two feet in diameter and unsupported. *Id.*; Gov't Ex. 4. Hatfield testified that, after issuing the citation, he discussed kettle bottoms with company officials and told them they should pay more attention to the problem. 30 FMSHRC at 852; Tr. 47.

On June 8, Hatfield had issued Citation No. 7252417 alleging a violation of section 75.220(a)(1) to Thomas for another large unsupported kettle bottom in the 006 MMU section. 30 FMSHRC at 852; Gov't Ex. 5. The citation stated: "This MMU has had this condition previously cited." Gov't Ex. 5. As with previous citations, Hatfield testified that he showed management officials a copy of the roof control plan, including Safety Precaution No. 7. 30 FMSHRC at 852; Tr. 48.

C. Judge's Decision

IO contested the June 12 order, and a hearing was held before Judge Barbour. The judge found a violation of section 75.220(a)(1) because he concluded that the Secretary had established the existence of multiple inadequately supported kettle bottoms on the section. 30 FMSHRC at 865-66.⁶ He also determined that the violation was S&S. *Id.* at 867-68. He found that the violation was serious because "if a miner were struck by a falling kettle bottom, serious injury or death would most likely result." *Id.* at 868.

However, the judge found that IO's lack of care was not a result of unwarrantable failure. *Id.* He reasoned that not all kettle bottoms were inadequately supported or unsupported. *Id.* Since some kettle bottoms in the cited area were adequately supported, the judge inferred that "there was not a wide-spread and reckless disregard of the requirements of the roof control plan." *Id.* Additionally, the judge stated that the foreman "simply misjudged some of the kettle bottoms" and that there was a genuine and good faith disagreement between the inspector and IO personnel as to what constituted a kettle bottom. *Id.* He concluded that the violation was due to the company's ordinary negligence. *Id.* at 869. In a footnote, the judge noted that the inspector's finding of unwarrantable failure and high negligence may have been based on "personal pique," citing the inspector's testimony that he found the violation due to high negligence "[b]ecause [the inspector] talked to the operator on several occasions about the roof control plan and it seemed [he] wasn't getting anywhere with just writing a citation." *Id.* at 869 n.18 (citing Tr. 76).

⁶ The judge found that the Secretary failed to meet her burden of proof with respect to surface cracks. 30 FMSHRC at 865. The issue of surface cracks is not before us.

II.

Disposition

The Secretary argues that the judge's finding that the violation was not a result of unwarrantable failure should be remanded to the judge for a proper application of the unwarrantable failure analysis. PDR at 11; S. Reply Br. at 3-4. She argues that the judge erred in five ways: (1) by ignoring the operator's history of previous section 75.220(a) violations, the degree of danger posed by the violative condition, and the length of time the violative condition existed; (2) by relying on the fact that "not all" of the kettle bottoms were unsupported or inadequately supported; (3) by relying on a finding that section foreman Jefferson "tried" to meet the standard of care required of him; (4) by relying on a finding that there were "genuine and good faith disagreements" between the inspector and the mine personnel as to what constituted a kettle bottom; and (5) by speculating that the inspector may have acted out of "personal pique" in designating the violation in question an unwarrantable failure. S. Reply Br. at 1.⁷

IO responds that the judge's unwarrantable failure fact-finding should be upheld because record evidence supports the judge's determination that there were genuine and good faith disagreements between the inspector and IO personnel as to what constituted a kettle bottom. IO Br. at 12, 26-29. IO contends that, because of its good faith belief that the roof conditions in question were not kettle bottoms, most of the unwarrantable failure factors are not relevant. *Id.* at 13, 22-24. Additionally, IO maintains that the four previous citations occurred in different parts of the mine with different crews and, as a result, were not germane to the present unwarrantable failure analysis. *Id.* at 19, 26. Finally, IO submits that the judge did not err because the record evidence supports the conclusion that "personal pique" may have improperly played a part in the inspector's unwarrantable determination. *Id.* at 32.

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

⁷ The Secretary designated her petition for discretionary review as her brief in this case. Sec'y letter dated 10/22/08.

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, 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. The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law 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, all of the factors must be taken into consideration and at least noted by the judge.

Because the judge did not address all the elements of the unwarrantable failure analysis, we vacate his finding of no unwarrantable failure and remand for a fuller discussion that identifies and incorporates all the relevant elements and explains how each element affects his unwarrantable failure determination. Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). As the D.C. Circuit has emphasized, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, the Commission cannot perform its review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). Thus, the Commission has held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994).

We discuss each of the aggravating factors of the unwarrantable failure analysis in turn.

A. Extent of the Violative Condition

The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis. See *Peabody*, 14 FMSHRC at 1261 (holding that five accumulations of loose coal and coal dust were extensive). However, the judge here did not expressly address the unwarrantable failure element of extensiveness. Additionally, his findings

relevant to the extensiveness of the kettle bottoms were somewhat conflicting. He found that there were more than 15 unsupported or inadequately supported kettle bottoms (30 FMSHRC at 865-66; Gov't Ex. 9), a number that the Secretary submits is extensive. PDR at 9. Nonetheless, the judge also found that IO performed some work to support kettle bottoms when he concluded that "[n]ot all kettle bottoms in the cited area of the section were inadequately supported or unsupported" and that there was not a "wide-spread" disregard of the requirement to provide supplemental roof support. 30 FMSHRC at 868.

Moreover, the judge does not appear to have considered all of the evidence pertaining to extensiveness. He did not discuss Supervisory MSHA Inspector Terry Price's testimony that, when he returned the following day, three entries of the section still needed more support and only four of the entries could be released back to production. Tr. 167-68. The final three entries were satisfactorily supported by the end of the day. Tr. 80. See *Peabody*, 14 FMSHRC at 1263 (providing that extensiveness can be shown by a condition that requires significant abatement efforts).

We conclude that the judge failed to rule on whether the number and distribution of unsupported kettle bottoms meets the extensiveness factor of the unwarrantable failure analysis. On remand, if the judge relies on the extensiveness factor as a mitigating measure against unwarrantable failure, he should explain how this factor weighs against the other factors in the unwarrantable failure analysis. *San Juan*, 29 FMSHRC at 133 (directing the judge to make findings on the unwarrantable failure elements and to set forth his rationale whether the element supports an unwarrantable failure finding).

B. The Length of Time That the Violative Condition Existed

The Commission has emphasized that duration of the violative condition is a necessary element of the unwarrantable failure analysis. See *Windsor Coal*, 21 FMSHRC at 1001-04 (remanding for consideration of duration evidence of cited conditions). The judge did not make a finding as to the duration of the conditions in which the kettle bottoms remained unsupported. The Secretary asserts that the kettle bottoms remained unsupported for a period of five days, exposing multiple shifts to unsupported roof danger. PDR at 8-9. IO does not dispute that the conditions lasted for five days. IO Br. at 22. The record indicates that the roof conditions on the 005 MMU section were in existence for four or five days. Tr. 66-67, 250-251 (testimony that entries had been in existence for four or five days).⁸

Because the judge did not mention the duration of the roof conditions as a factor in his analysis, we remand this question so that the judge may weigh the record evidence on duration and determine if it qualifies as an aggravating factor in the unwarrantable failure analysis. We

⁸ IO did not preserve the pre-shift and on-shift examination reports completed in the days prior to the issuance of the order in question. Tr. 253-54.

note that analysis of the duration factor may be affected by the judge's analysis, see *infra*, of whether IO Coal's "good faith" belief in the non-existence of kettle bottoms was reasonable.

C. Whether the Operator Was Placed on Notice that Greater Efforts Were Necessary for Compliance

Repeated similar violations may be 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. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (citation omitted); see also *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001) ("a high number of past violations of section 75.400 serve to 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*, 29 FMSHRC at 131 (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." *San Juan*, 29 FMSHRC at 131 (quoting *Consolidation Coal*, 23 FMSHRC at 595).

In making his unwarrantable determination, the judge did not consider the previous four citations for poor roof conditions, especially kettle bottoms, issued to the Europa Mine. Gov't Exs. 2, 3, 4, 5. Additionally, the inspector testified that, following the issuance of three of the citations, he discussed kettle bottoms with company officials and told them they should pay more attention to the problem. 30 FMSHRC at 852; Tr. 47-48. The order at issue states: "This mine has been put on heightened alert by the issuance of similar citations regarding the supporting of surface cracks and kettle bottoms and discussions with mine management regarding the supporting of these roof conditions." Gov't Ex. 1.

Inspector Hatfield testified that, when he spoke with management regarding the roof support problems contained in the earlier citations, "there was no discussion at all" that the condition in question was "not a kettle bottom." Tr. 84 (stating that it "never even became a point, that [the inspector] misidentified [kettle bottoms] at any time"). Foreman Thomas denied that the roof control plan was discussed following the citations. 30 FMSHRC at 852 n.6; Tr. 251. However, the operator's brief appears to accept as a fact that such discussions occurred. IO Br. at 18-19, 26 n.17. The judge did not resolve the conflict in testimony with regard to the extent of the operator's prior notice based on discussions with the inspector.

Nor did the judge's unwarrantable failure analysis factor in the four previous citations for unsupported kettle bottoms in the six week period prior to the issuance of the section 104(d)(1) order on June 12, 2006. These citations are highly relevant to the issue of whether the operator was on notice that greater efforts at compliance were necessary. See *Eagle Energy Inc.*, 23 FMSHRC 829, 838-39 (Aug. 2001) (directing the judge to consider the operator's prior citations as an aggravating factor).

Moreover, the operator's argument that the prior citations for unsupported kettle bottoms do not constitute conclusive evidence of the factual existence of unsupported kettle bottoms in the past is contrary to law. The legal principle of finality holds that an uncontested citation is akin to an unappealed judgment. See *Old Ben Coal Co.*, 7 FMSHRC 205, 209 (Feb. 1985) (an operator cannot deny the fact of violation and at the same time pay a civil penalty; paid penalties that have become final orders conclusively reflect violations of the Act). In this case, IO could have contested the assessments in the prior citations, thereby putting at issue the existence of kettle bottoms on four occasions in the six weeks before June 12, 2006. It chose not to do so, even after the issuance of the section 104(d)(1) order on June 12 implicitly raised the issue of prior violations. Hence, the fact that unsupported kettle bottoms existed as described in the four prior citations can not now be questioned.

Nor are we persuaded by IO's argument that the four prior citations do not serve as adequate prior notice because they involved different crews on "far removed" sections rather than the one at issue here. IO Br. at 18. IO overlooks a critical fact: three of the four citations were issued to the same mine foreman, Fred Thomas, who is involved here, and Thomas was well aware of the other citation issued to the previous mine foreman. Thomas had the responsibility to raise safety awareness on all the mine sections regarding kettle bottoms and other roof conditions. We reject as untenable and contrary to the Mine Act IO's suggestion that until such time as a violation is found on a particular section, the section is immune from knowledge of a safety problem elsewhere in the mine. The Commission has rejected the argument that only past violations involving the same regulation and occurring in the same area within a continuing time frame may be properly considered when determining whether a violation is unwarrantable. *Peabody Coal Co.*, 14 FMSHRC at 1263; *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997). Finally, we note that general mine management retains responsibility for safety and health compliance. *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (actual knowledge not necessary element to establish aggravated conduct for an unwarrantable failure finding). Accordingly, under Commission case law, past violations covering a different area than the one cited may serve to provide an operator with sufficient awareness of a problem. *San Juan*, 29 FMSHRC at 131-32.

We also reject the operator's argument that the four prior citations are an insufficient basis for a finding of unwarrantable failure because all of the previous citations had included a finding of only moderate negligence. IO Br. at 17. Inspector Hatfield engaged in a process of progressive enforcement. The first four times he observed unsupported kettle bottoms, he issued section 104(a) citations and found only moderate negligence. On the fifth occasion, because the operator continued to engage in the same unsafe conduct, Inspector Hatfield made a finding of unwarrantable failure and issued a section 104(d)(1) closure order. This appears to be a measured response to the operator's persistent non-compliance with the terms of its roof control plan. Moreover, the Commission has recognized that under its precedent, prior citations, even if not for unwarrantable failure, put operators on notice that greater compliance is necessary. *Eagle Energy*, 23 FMSHRC at 838.

We note that the judge in a footnote stated: "Hatfield's finding of unwarrantable failure and high negligence may have been based on personal pique more than on an analysis of the standard of care IO and its employees were required to meet. When asked why [Hatfield] found the violation was due to IO's 'high' negligence, he responded, 'Because I talked to the operator on several occasions about the roof control plan and it seemed I wasn't getting anywhere with just writing a citation.'" 30 FMSHRC at 869 n.18 (citing Tr. 76). We question the judge's statement that the Inspector may have acted out of "personal pique." The Mine Act contemplates a progressive enforcement scheme whereby if an operator incurs repeated similar serious violations and fails to remedy the situation, MSHA appropriately is to increase the severity of the enforcement action. See 30 U.S.C. § 814(d) & (e). This scheme is intended to induce meaningful compliance by operators with the safety and health requirements of the law. As stated by the Court of Appeals for the District of Columbia in *Coal Employment Project v. Dole*, quoting the legislative history: "Thus, we understand the [Senate Human Resources] Committee to say that an unwarrantable failure citation is a remedy available to an inspector confronting a non-technical violation that involves unwarrantable behavior, such as the operator's deliberate or *repetitious violation* of a health or safety standard." 889 F.2d 1127, 1133-34 (D.C. Cir. 1989) (emphasis added).

Based on the record, we conclude that IO Coal was on notice that greater efforts at compliance with its roof control plan were needed. *American Mines Servs., Inc.* 15 FMSHRC 1830, 1834 (Sept. 1993) (concluding that the evidence presented on the record supported no other conclusion and remand was unnecessary). Because the operator has maintained that it disagreed in good faith with the inspector's characterization of kettle bottoms, this is a critical factor in the unwarrantable failure determination in this case. On remand, the judge should weigh this factor of notice together with the other factors in his unwarrantable failure analysis.

D. Whether the Violation Posed a High Degree of Danger

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 at 1243-44 (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").

The judge found that the violation was S&S and of serious gravity. 30 FMSHRC at 867-68. The judge held that the "inadequately supported and unsupported kettle bottoms posed discrete safety hazards" because kettle bottoms could slip from the roof without warning, sometimes causing serious injuries to miners. *Id.* at 867 & n.17. The judge emphasized that eight miners worked and traveled under the cited kettle bottoms and that the inadequately supported and

unsupported kettle bottoms could fall at any time, resulting in serious injury or death. *Id.* at 867-68.

Although the judge considered dangerousness in considering whether IO violated section 75.220(a)(1) and whether that violation was S&S, the judge did not relate any of those findings to his unwarrantable failure analysis. In *San Juan*, 29 FMSHRC at 133, the Commission determined that the judge erred by failing to make necessary findings and conclusions as to whether evidence of the danger posed by the violation demonstrated that the operator's conduct was aggravated, and how this factor weighed against other factors in his analysis. We likewise remand the danger factor for further evaluation.

E. The Operator's Effort in Abating the Violative Condition

An 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 on operator on "heightened alert" that more is needed to rectify the problem. *New Warwick Mining Co.*, 18 FMSHRC 1568, 1574 (Sept. 1996). The focus on the operator's abatement efforts is on those efforts made prior to the citation or order. *Id.*

The record evidence appears to demonstrate that prior to the inspection at issue IO did not take any additional steps to remedy its roof conditions in response to the previous four citations. Tr. 252-53. Mine Foreman Thomas testified that, following the issuance of the three prior violations having to do with Safety Precaution No. 7 of the Roof Control Plan, he did not take any special steps, such as a safety meeting with the section foremen relating to roof conditions. Tr. 253.

The judge failed to consider IO's apparent lack of remedial actions to improve its roof safety following the four prior citations. He also made no findings as to the extent of the operator's abatement efforts and how that factor related to his unwarrantable failure analysis. See *San Juan*, 29 FMSHRC at 136 (remanding the question of whether the operator's prior actions in abating the violative condition supports an unwarrantable failure finding). Accordingly, we remand for evaluation of the abatement factor. We note that analysis of the abatement factor will be affected by the judge's analysis, see *infra*, of whether IO Coal's "good faith" belief in the non-existence of kettle bottoms was reasonable.

F. The Operator's Knowledge of the Existence of the Violation and whether the Violation was Obvious; the Reasonableness of the Operator's "Good Faith Disagreement" with MSHA as to What Constitutes a Kettle Bottom

An operator's knowledge of the existence of a violation and whether the violation is obvious are important elements of an unwarrantable failure analysis. Moreover, it is well settled that an operator's knowledge may be established, and a finding of unwarrantable failure

supported, where an operator reasonably should have known of a violative condition. See *Emery*, 9 FMSHRC at 2002-04; *Drummond Co., Inc.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991), quoting *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (“*Emery* makes clear that unwarrantable failure may stem from what an operator ‘had reason to know’ or ‘should have known’”).

In this case, IO contends that it had a good faith disagreement with Inspector Hatfield regarding what was, and what was not, a kettle bottom. IO Br. at 4-14; Tr. 199-201, 309-11, 346, 377. The issue of the operator’s “good faith disagreement” with Inspector Hatfield as to certain roof formations being kettle bottoms is inextricably intertwined with the issues of the operator’s knowledge of the existence of the violation and the obviousness of the violation. It also affects the issues of duration and efforts at abatement.

In weighing the evidence, the judge found that section foreman Jefferson “simply misjudged some of the kettle bottoms” and that there were “genuine and good faith disagreements between the inspector and IO personnel as to what constituted a kettle bottom.” 30 FMSHRC at 868-69. The judge’s finding of “genuine” disagreements is supported by substantial evidence.⁹ Regarding the disagreements being in “good faith,” the judge, after describing the witnesses’ conflicting testimony about the existence of unsupported kettle bottoms, found that “[n]one of the witnesses were, in my opinion, disingenuous.” *Id.* at 866. We find no compelling evidence in the record to take the extraordinary step of overturning the judge’s credibility determination in this regard.¹⁰

However, a finding of a subjective “good faith disagreement” does not end the inquiry. The trier-of-fact must determine whether the operator’s belief was objectively reasonable under the circumstances. In *Kellys Creek Resources, Inc.*, 19 FMSHRC 457 (Mar. 1997), the

⁹ 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)).

¹⁰ 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). Generally, the Commission will uphold a judge’s credibility determination unless compelling evidence supporting reversal is offered. See *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1418 (June 1984) (refusing to take the “exceptional step” of overturning judge’s findings based on credibility resolutions); see also *Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984), *aff’d* 766 F.2d 469 (11th Cir. 1985) (stating that when the judge’s finding rests upon a credibility determination, the Commission will not substitute its judgment for that of the judge absent clear indication of error).

Commission held that “if an operator acted on the good-faith belief that its cited conduct was actually in compliance with applicable law, and that belief was *objectively reasonable under the circumstances*, the operator’s conduct will not be considered to be the result of unwarrantable failure when it is later determined that the operator’s belief was in error.” *Id.* at 463 (citing *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615-16 (Aug. 1994)) (emphasis added). In *Cyprus*, the Commission overturned the judge’s finding that the foreman’s good faith belief precluded an unwarrantable failure determination because the judge failed to consider the “reasonableness” of the foreman’s belief. 16 FMSHRC at 1615. In *Kellys Creek*, 19 FMSHRC at 463-65, the Commission reversed the judge’s determination that a good faith belief precluded unwarrantable failure because the Commission found that the belief was not reasonable. *See also Wyoming Fuel Co.*, 16 FMSHRC 1618, 1628-29 (Aug. 1994) (holding that an operator’s conduct was not aggravated where judge implicitly found that operator’s good faith belief that it was in compliance with regulations was reasonable under the circumstances), *aff’d*, 81 F.3d 173 (10th Cir.1996) (unpublished table decision).

In this case, the judge did not determine whether the operator’s “genuine and good faith disagreements” with the MSHA inspector as to what constituted a kettle bottom were objectively reasonable under the circumstances. For example, the judge did not harmonize his finding of “good faith disagreements” with his earlier finding that “[i]f, in fact, Hatfield misidentified kettle bottoms, it is reasonable to expect IO personnel to have protested long and loud, then and there. They did not. [Tr. 84, 114] A close reading of the testimony reveals that it was after he issued the order that they began to argue he misidentified the formations.” 30 FMSHRC at 866.

Additionally, the judge 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. In *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996), the Commission affirmed the judge’s finding of no reasonable, good faith belief where the operator failed to inquire into MSHA’s enforcement position. Analogously, IO apparently did not seek MSHA’s guidance on its decision not to support the alleged kettle bottom formations even though it had received a number of citations.

Most significantly, the judge’s finding that section foreman Jefferson “was not indifferent to his responsibilities” for roof control on the section and “tried, but failed to meet the standard of care required of him,” 30 FMSHRC at 868, does not dispose of the issue of reasonableness. Jefferson’s supervisor was Thomas, the mine foreman, and Thomas was certainly aware of the four previous citations for unsupported kettle bottoms in the six weeks before this order was issued. Thomas had received the last three of these citations directly from Hatfield, and was aware of the first one being given to his predecessor as mine foreman. Hatfield testified that in issuing each of these previous violations, he had talked with Thomas or his predecessor about what he classified as a kettle bottom, and the need to comply with Safety Precaution No. 7 of the roof control plan. Tr. 37, 39-40, 45, 48, 52. His testimony is corroborated by the fact that the section 104(d)(1) order issued in this case on June 12, 2006 states: “This mine has been put on heightened alert by the issuance of similar citations regarding the supporting of surface cracks and

kettle bottoms and discussions with mine management regarding the supporting of these roof conditions.” Gov. Ex. 1. Although Thomas denied talking with Hatfield about the roof control plan after receiving the previous citations, Tr. 251, it is undisputed that IO Coal neither contested the previous citations for unsupported kettle bottoms nor inquired of MSHA supervisory personnel regarding Hatfield’s understanding of what constituted a kettle bottom.

The conduct of section foreman Jefferson in this case is thus much less significant than the conduct of mine foreman Thomas in determining whether the “good faith disagreement” with MSHA was reasonable under the circumstances. Thomas acknowledged that after receiving the three previous citations, he did not hold a safety meeting with any of the section foremen to discuss roof control. Tr. 253. Indeed, the record does not indicate that Thomas took any action whatever to achieve greater compliance with the roof control plan during the period he was mine foreman prior to the June 12, 2006 order. In this context, we note our statement in *Consolidation Coal Co.*, 14 FMSHRC 956, 970 (June 1992): “Whatever difficulties may be presented by the Secretary’s interpretation of the Act and regulations, no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.”

Finally, a thorough review of all the facts and circumstances bearing on the unwarrantable failure-issue should consider that IO did not preserve the pre-shift and on-shift examination reports completed in the days prior to the issuance of the order in question. These reports would likely have shed some light on how much the operator knew about the kettle bottoms before the order was issued. Tr. 253-54. See *Windsor Coal*, 21 FMSHRC at 1004 (preshift books reflecting coal accumulations along the belt were relevant to determination of whether operator was on notice of need for greater efforts at compliance); *Peabody Coal*, 14 FMSHRC at 1262 (same). The judge did not discuss or draw any conclusions with respect to these missing reports.¹¹ We direct the judge to address the missing examination reports in his evaluation of knowledge and weigh this in his unwarrantable failure analysis.

Hence, on remand, the judge should consider the issues of the operator’s knowledge of the existence of the violation and whether the violation was obvious. The principle question in these determinations is whether the operator’s “good faith disagreements” with Inspector Hatfield as to what constituted a kettle bottom were objectively reasonable under the circumstances. If the operator’s disagreements with the inspector were reasonable, then it may be concluded that the operator did not have knowledge of the existence of the violation and that the violation was not obvious. However, if the disagreements were not reasonable, in light of the judge’s finding that

¹¹ It is well-recognized that if a party has control over a writing or other type of evidence, which is relevant to an issue, and fails to produce the evidence, an inference can be drawn that the evidence would be adverse to the party. *McCormick on Evidence* provides that “[w]hen it would be natural under the circumstances for a party to . . . produce documents or other objects in his or her possession as evidence and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference.” 2 *McCormick on Evid.* § 264 (6th ed. 2006) at 220-21.

the disagreements were not articulated until after the withdrawal order was issued, together with the fact of IO Coal's response (or lack thereof) to the issuance of four previous citations for the same type of violations of the roof control plan, then it may be concluded that the operator did have knowledge of the violation.

Ultimately, the judge should bear in mind the D.C. Circuit's characterization of Congressional intent:

Congress was particularly concerned about curbing repeat offenders among mine operators. Reporting on the bill that became the Mine Act, the Senate Committee on Human Resources stated:

In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed.

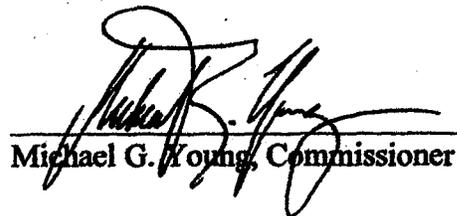
Coal Employment Project v. Dole, 889 F. 2d at 1132.

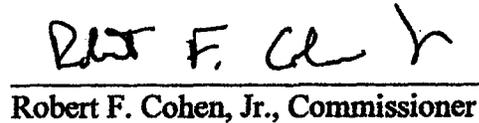
III.

Conclusion

For the reasons discussed above, we vacate the judge's determination that IO's violation of section 75.220(a)(1) was not caused by its unwarrantable failure. We remand for reconsideration of the record consistent with this decision, and for reassessment of the civil penalty, if appropriate.¹²


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹² Our dissenting colleague would have the Commission reverse the judge's determination and hold, as a matter of law, that the evidence compels a finding that the violation was due to the operator's unwarrantable failure. While we agree that the evidence, particularly the four previous violations of section 75.220(a)(1) because of unsupported kettle bottoms, strongly suggests a finding of unwarrantable failure, it is the function of the judge, not the Commission, to weigh all the relevant evidence and make a determination on this issue. *Martin County Coal Corp.*, 28 FMSHRC 247, 257 (May 2006).

Chairman Jordan, dissenting:

Over the course of six weeks, IO Coal received four citations because it failed to install supplemental roof support in the face of adverse conditions. Three of the four citations were issued to the same individual, general mine foreman, Fred Thomas, after MSHA inspector Hatfield observed unsupported kettle bottoms in the mine.¹ Tr. 33-49. According to the inspector, after issuing each citation he discussed the hazards posed by the kettle bottoms with mine officials and urged them to take precautions. Tr. 45-48.² Nevertheless, four days after he issued his fourth citation, Inspector Hatfield returned to the mine and observed at least fifteen unsupported kettle bottoms, a situation which prompted the inspector to issue the section 104(d)(1) unwarrantable failure order under review. Tr. 53, 56-59, 68; Gov't Ex. 1.

The judge below upheld the violation but eliminated the unwarrantable failure designation. My colleagues have concluded that the judge's unwarrantable failure determination must be vacated and that issue remanded for reconsideration. Because I find the operator's ongoing failure to support kettle bottoms in the mine, despite repeated warnings from MSHA, to constitute precisely the type of behavior that Congress intended to address in section 104(d)(1) of the Mine Act, I would reverse the judge and find the subject violation to have been properly designated as resulting from the operator's unwarrantable failure to comply with its roof control plan.

Unwarrantable failure is demonstrated by "aggravated conduct, constituting more than ordinary negligence," characterized by "reckless disregard," "intentional misconduct," "Indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987). These terms aptly describe the operator's conduct in this case. Although the four previous citations clearly put IO on notice it was failing to address the hazardous conditions posed by the kettle bottoms in its mine, the operator took no meaningful steps to rectify the situation until the subject withdrawal order was issued. If this behavior does not constitute unwarrantable failure, I'm not sure what does. As Congress explained when it enacted the Mine Act, "the unwarranted failure order recognizes that the law should not tolerate miners continuing to work in the face of hazards resulting from conditions violative of the Act which the operator knew of or should have known of and had not corrected." S. Rep. No. 95-181, at 31, (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 619 (1978).

The Commission has recognized that whether conduct results from an operator's 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

¹ The material constituting a kettle bottom is not part of the coal bed and can slip from the roof at any time unless adequate support is provided. 30 FMSHRC 847, 867 (Aug. 2008).

² The operator appears to concede that these conversations took place. IO Br. at 18-19.

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, 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.

My colleagues concede that the operator was on notice that greater efforts at compliance with its roof control plan were needed and they acknowledge that "[t]he record evidence appears to demonstrate that prior to the inspection at issue IO did not take any additional steps to remedy its roof conditions in response to the previous four citations." Slip op. at 11, citing Tr. 252-53. In addition, they agree that the judge correctly found the violation to be significant and substantial, and thus of high gravity.³ With regard to the duration of the violation, it is undisputed that the cited condition lasted for at least four or five days. Tr. 66-67, 250-51; IO Br. at 22. In terms of the extensiveness of the condition, the judge found there were more than 15 unsupported or inadequately supported kettle bottoms. 30 FMSHRC at 865-66; Gov't Ex. 9.⁴ Given these circumstances - wherein the operator was on notice of an extensive and dangerous violation of long duration that MSHA had cited it for repeatedly, and which IO did not take any significant steps to address - the record can only support one conclusion: that the violation was caused by the operator's unwarrantable failure to comply.

³ Although the majority acknowledges the judge's finding that "eight miners worked and traveled under the cited kettle bottoms and that the inadequately supported and unsupported kettle bottoms could fall at any time, resulting in serious injury or death," slip op. at 10-11, citing 30 FMSHRC at 867-68, they nonetheless remand the case to the judge for consideration of the "danger factor." Slip op. at 11. In light of his significant and substantial finding, I do not see how the judge could fail to find the dangerous nature of the cited condition to be an aggravating factor. The inspector testified that the cited roof conditions presented the hazard of falling roof material, Tr. 75-76, 158-59, that should a roof fall occur, injuries would reasonably be expected to be permanently disabling, Tr. 47, 75, and that a roof fall was reasonably likely to occur due to the lack of supplemental support for numerous adverse roof conditions. Tr. 75-76.

⁴ The inspector testified that the unsupported kettle bottoms were obvious and extensive. Tr. 52. Moreover, as my colleagues have noted, the extensiveness of the violation can be shown by the significant abatement effort that was necessary before the order was terminated. Slip op. at 7.

My colleagues' would have the judge focus on the reasonableness of the operator's disagreement with MSHA regarding whether or not certain roof conditions at the mine constituted kettle bottoms. Slip op. at 11-15. However, after receiving four prior citations for unsupported kettle bottoms, the operator's position was patently unreasonable. By the fifth time IO was cited, MSHA's view on the question was eminently clear. It was unreasonable for IO to stubbornly adhere to its position, given MSHA's vigorous and consistent enforcement actions. As we emphasized in *Consolidation Coal Co.*, 14 FMSHRC 956, 970 (June 1992), a high degree of negligence is appropriately attributed to an operator who does not comply with MSHA's interpretation after MSHA has made its view evident:

Whatever difficulties may be presented by the Secretary's interpretation of the Act and regulations, no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.

(citation and internal quotation marks omitted).

Although IO now contends that the inspector misidentified formations which were not, in fact, kettle bottoms, it is apparent that the operator was simply conducting "business as usual," as it made no meaningful inquiries to MSHA at the relevant time about its alleged disagreement over what constituted a kettle bottom. Its argument that the cited condition was simply the result of a "good faith disagreement" or "difference in judgment" would have more credence if mine officials had bothered to speak with MSHA about this question before the mine closure. Instead, they failed to challenge any of the previous citations and did not bring up the dispute when accompanying the MSHA inspector. Tr. 114.

Although my colleagues correctly fault the judge for failing to address all of the elements of the unwarrantable failure analysis, slip op. at 6, their remedy - remanding the case "for a fuller discussion that identifies and incorporates all the relevant elements and explains how each element affects his unwarrantable failure determination," - *id.*, is unnecessary. Given the findings by the judge, findings with which the majority does not disagree, and the overwhelming "evidence [of] a callous disregard for the hazards," *Rock of Ages Corp.*, 20 FMSHRC 106, 115 (Feb. 1998) (citation omitted), demonstrated by IO's persistent failure to properly support the roof even after it was repeatedly cited by MSHA, any additional analysis would be superfluous. Although the factors articulated by the Commission in prior unwarrantable failure cases have created invaluable guideposts, *see, e.g., Mullins & Sons Coal*, 16 FMSHRC at 195-96, at this point in the litigation the judge should not be obliged to produce a mechanistic litany on every factor.

The Commission has not hesitated to reverse a finding of no unwarrantable failure when faced with compelling evidence to the contrary. For example, in *Jim Walter Resources, Inc.*, 19 FMSHRC 480 (Mar. 1997), we reversed the judge's conclusion that three coal accumulation violations were not the result of unwarrantable failure, explaining that:

[o]ur review of this record as a whole - particularly the undisputed evidence regarding the prior warnings and the extensive and obvious nature of the violation - leads us to conclude that there is not substantial evidence to support the judge's finding that no aggravated conduct occurred. In such a case, the proper course of action is reversal, not remand.

Id. at 489 n.8. See also *Consolidation Coal Co.*, 22 FMSHRC 328, 333 (Mar. 2000) (reversing judge's finding of no unwarrantable failure when operator failed to respond effectively to rectify a violative condition of which it was aware). As in those cases, we have here a record in which there is not substantial evidence to support a finding that aggravated conduct did not occur.

Congress created the unwarrantable failure designation in section 104(d)(1) as an enforcement mechanism to be used in exactly the type of circumstance presented in this case: an operator whom MSHA repeatedly cited but who nonetheless failed to remedy a safety problem. Although the trial judge is, of course, the initial finder of fact, it is axiomatic that when the evidence supports only one conclusion, a remand to the judge serves no purpose. See *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (affirming judge's finding of no unwarrantable failure, despite judge's error in not addressing some of the Secretary's evidence). Here, the record compels the conclusion that the violation was due to the operator's unwarrantable failure. Accordingly, I would reverse:


Mary Lu Jordan, Chairman

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December 14, 2009

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

v.

WEBSTER COUNTY COAL, LLC

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Docket No. KENT 2008-167

A.C. No. 15-02132-129470

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 2, 2009, the Commission received from Webster County Coal, LLC ("Webster") a motion seeking to reopen a proposed penalty assessment that had allegedly become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On April 13, 2009, Chief Administrative Law Judge Robert J. Lesnick issued a show cause order to Webster because Webster had failed to file an answer to a petition for penalty assessment sent to it by the Secretary of Labor on December 28, 2007. In the show cause order, the judge stated that Webster would be found in default if it did not file an answer or show good cause for not doing so within 30 days of the order. The record shows that Webster received the Order to Show Cause on April 16, 2009. On November 3, 2009, Chief Judge Lesnick issued an order finding that Webster had failed to respond to the show cause order and entering a judgment by default for the Secretary.

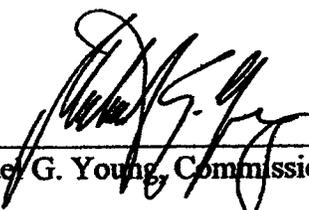
On December 2, 2009, the Commission received the motion to reopen from Webster. The motion did not provide reasons regarding why the company had not answered the petition for penalty assessment nor responded to the show cause order. It instead asserted that the operator had no record of receiving the proposed assessment. In her response to the motion, the Secretary opposed the granting of Webster's request because it does not address any basis for vacating the Chief Judge's default order.

The Chief Judge's jurisdiction in this matter terminated when his default order was issued on November 3, 2009. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A); 29 C.F.R. § 2700.70(a). We construe the motion from Webster to be a timely filed petition for discretionary review.

The petition for discretionary review filed by Webster does not address the validity of the Chief Judge's default order nor provide any reasons why the default order should be vacated. The operator also does not address why it failed to address the show cause order when the record specifically indicates its receipt. In addition, Webster does not indicate how the Secretary had issued a petition for the assessment of civil penalty if Webster had not first contested the initial proposed assessment, which it now claims not to have received. On these grounds, we hereby deny the petition.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ Commissioners Duffy and Young would entertain an amended motion to reopen that directly addresses Webster's failures to answer the petition for assessment of penalty and to respond to the show cause order. Such a motion should include supporting documentation, including affidavits from the individuals involved fully explaining those failures. See *Prairie Materials Sales Inc.*, 26 FMSHRC 800, 801 n.1 (Oct. 2004).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 15, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-1871
v.	:	A.C. No. 46-01436-180675
	:	
CONSOLIDATION COAL	:	Docket No. WEVA 2009-1872
COMPANY	:	A.C. No. 46-01436-186516

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 26, 2009, the Commission received from Consolidation Coal Company ("Consol") motions made 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).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

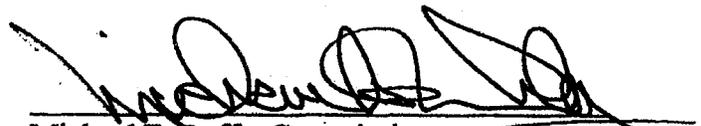
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-1871 and WEVA 2009-1872, both captioned *Consolidation Coal Co.* and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

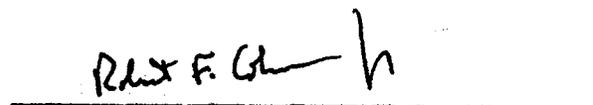
The record indicates that the operator misplaced the proposed assessments during a lengthy process of changing portals at the mine. The proposed assessments were inadvertently placed in a box of assessments that had already been processed, and this box had been left at the portal which had been vacated. When the proposed assessments were discovered, the operator promptly filed motions to reopen. The Secretary states that she does not oppose the reopening of the proposed penalty assessments.

Having reviewed Consol's requests and the Secretary's responses, 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


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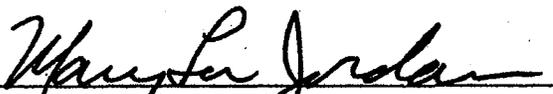
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On December 16, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000171630 to Consol, proposing civil penalties for 70 citations issued to the operator at its Bailey Mine during the preceding two months. Consol states that its then superintendent at the mine, who normally received assessments and forwarded them to the safety department for further action, was on vacation around the holidays when the assessment at issue arrived. Consol further explains that the mine was idle for the holiday week, and that the safety director did not receive the assessment until January 22, 2009. According to Consol, at that point the safety director affixed a cover sheet indicating his mistaken belief that the assessment had been received just that day. After Consol sent its notice to MSHA that it was contesting 11 of the penalties on January 29, 2009, MSHA rejected the contest as untimely.

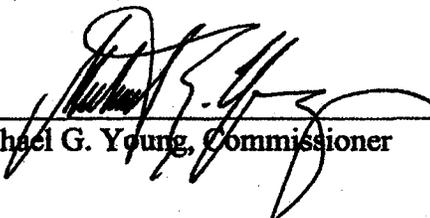
The Secretary of Labor does not oppose the motion to reopen.

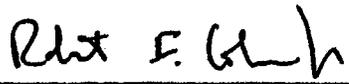
Certain factors weigh in favor of granting the motion to reopen, i.e., the Secretary does not oppose it and the contest was eventually filed only four days late. However, Consol, after learning of MSHA's February 23, 2009, rejection of its notice of contest, waited more than three months to file its motion to reopen. Under Rule 60(c), a motion to reopen, regardless of its merit, is only granted if it is filed within a reasonable time. 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 from MSHA or other notice of default and the operator's filing of its motion to reopen, as well as the reason for any delay. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009).

Having reviewed Consol's request and the Secretary's response, we conclude that Consol has failed to explain the delay in responding to MSHA's rejection of its notice of contest and therefore has not provided the Commission with an adequate basis to reopen. *See, e.g., Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). Accordingly, we deny without prejudice Consol's request to reopen.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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November 4, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-497
Petitioner	:	A.C. No. 15-18241-136323
v.	:	
	:	
CLOVERLICK COAL CO., LLC,	:	Mine # 1
Respondent	:	

DECISION

Appearances: Jennifer Booth, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Richard Darrell Cohelia, Cloverlick Coal Company, LLC, Benham, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Cloverlick Coal Company, LLC, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The petition alleges four violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$16,587.00. A hearing was held in Kingsport, Tennessee. For the reasons set forth below, I affirm the citations, after modifying three of them, and assess a penalty of \$2,834.00.

Background

Cloverlick Coal Company operates Mine No.1, an underground coal mine, in Harlan County, Kentucky. During a July 2, 2007, inspection of the mine, MSHA Inspector Samuel Ray Creasey observed an oxygen tank and an acetylene tank which he believed were not being properly stored. In addition, the acetylene tank was not being maintained in safe operating condition. While inspecting on July 23, 2007, Inspector Creasey determined that an adequate on-shift inspection had not been conducted on the No. 3 belt flight for the 002 MMU (mechanized mining unit). Finally, on August 30, 2007, he concluded that the approved ventilation plan in effect at the mine was not being followed. The resulting four citations were contested by the company and scheduled for trial.

At the beginning of the trial, the parties announced that they had settled Citation No. 6665561, concerning the inadequate on-shift inspection, and that the operator had agreed to pay

the proposed penalty in full. (Tr. 11.) Evidence was taken on the three remaining citations and they will be discussed in the order issued.

Findings of Facts and Conclusions of Law

Citation No. 6665550

During the course of his July 2 inspection, Inspector Creasey observed an oxygen tank and an acetylene tank lying, in an inverted manner, on the trailer of a mantrip. (Tr. 16-17.) As a result of this observation, Inspector Creasey issued Citation No. 6665550 alleging a violation of section 75.1106-3(a)(2) of the Secretary's regulations, 30 C.F.R. § 75.1106-3(a)(2). The citation stated that the "Condition or Practice" resulting in the violation was that:

The oxygen and acetylene tanks for the 001 MMU are not being stored in a safe manner. They are both tilted in an upside down direction and the oxygen cylinder has its top extending 6" off the back of the trailer that is being used to haul them. They are also not adequately secured to the trailer.

(Govt. Ex. 1.) Section 75.1106-3(a)(2) requires compressed gas cylinders stored in an underground coal mine to be "[p]laced securely in storage areas designated by the operator for such purposes, and where the height of the coalbed permits, in an upright position, preferably in specially designated racks, or otherwise secured against being accidentally tipped over."

The inspector testified that the oxygen tank extended approximately six inches off the back of the trailer. (Tr. 17.) He further testified that the tanks could be stored upright in this mine. (Tr. 17.) These tanks are used in repair work, such as oxygen cutting and torch work. (Tr. 20.) Inspector Creasey admitted that he did not check to determine whether the tanks were empty or full. (Tr. 29.) Cloverlick did not present any evidence on this citation.

The oxygen and acetylene tanks were apparently not in use. An oxygen tank and an acetylene tank that are both lying upside down on a mantrip trailer cannot be considered to be in an upright position or otherwise secured against being accidentally tipped over. As a result, I find that the operator violated section 75-1106-3(a)(2) as alleged.

Significant and Substantial

Inspector Creasey determined that this violation was "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a

reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission enumerated four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F. 2d 99, 103-104 (5th Cir. 1988), *aff-g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co., Inc.* 6 FMSHRC 1573, 1574 (July 1984). Whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

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

Inspector Creasey testified that the position of the acetylene tank created an explosion hazard because the inverted position would cause the acetone to run to the valve where it would not separate from the acetylene, making the acetylene more volatile. (Tr. 17-18, 22.) He opined that such an explosion would result in loss of limbs, broken bones, burns or lacerations. (Tr. 22.)

With regard to the oxygen tank, the inspector testified that the position of the tank hanging off of the rear of the trailer created the potential for the top of the tank to be knocked off, exposing the valve. (Tr. 18.) He speculated that if the valve was broken off, the pressure would be released from the top of the tank, projecting it “like a missile” in the opposite direction. (Tr. 18-19.) Inspector Creasey testified that the tank likely weighed about 70 pounds. (Tr. 19.) He said that the tank was used and transported on a daily basis throughout the mine. (Tr. 21.) He stated that if the tank did become a missile and hit someone, it would cause “fractures, contusions, bruises.” (Tr. 22-23.) As previously noted, the company presented no evidence on this citation.

The evidence clearly establishes the first two criteria, the violation of a safety standard and distinct safety hazards, explosions and propulsion, resulting from the violation. It also establishes a reasonable likelihood that injuries of a reasonably serious nature, loss of limb, broken bones, burns, lacerations or contusions would result from the violation. As is frequently the case, however, it is the third criterion where the Secretary’s proof fails.

When evaluating the reasonable likelihood of a fire, ignition, explosion or “blast-off” there must be a “confluence of factors” present based on the particular facts surrounding the violation. *Texasgulf*, 10 FMSHRC at 501. This includes proof of a fuel source. *Id.* at 503. Here the inspector admitted that he did not know whether the tanks were empty or full. The Secretary presented no other evidence on this issue. Thus, the Secretary has not shown that the tanks contained gas. In a remarkably similar case involving an alleged violation of section 75.1106-

3(a)(2) for an oxygen tank and an acetylene tank leaning against the rib of a coal pillar in an active roadway, the Commission held that the failure of the Secretary to prove that the tanks contained fuel supported “only the conclusion that the Secretary failed to carry her burden of proof as to the critical element of a fuel source” and that, therefore, the violation was not S&S. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1284 (Dec. 1998).

Accordingly, I conclude that the Secretary has failed to prove that this violation was “significant and substantial.” The citation will be modified appropriately.

Citation No. 6665551

Inspector Creasey issued Citation No. 6665551 alleging a violation of section 75.1106-5(a) of the Secretary’s regulations, 30 C.F.R. § 75.1106-5(a). The “Condition or Practice” alleged to have resulted in this violation was that: “The gauge for the acetylene cylinder on the 001 MMU is not being maintained in a safe operating condition. The gauge is broken off where the pressure is read and this could possibly cause a leak when used.” (Govt. Ex. 3.) Section 75.1106-5(a) requires that “[h]ose lines, gauges, and other cylinder accessories shall be maintained in a safe operating condition.”

At the same time that he found the tanks inverted in the trailer, Inspector Creasey also observed that the high-pressure gauge on the acetylene tank was missing and determined that it had broken off. (Tr. 33.) He testified that hazard caused by the gauge being broken off was that:

You wouldn’t be able to tell what pressure you’re letting the gas through the gauges at. And acetylene by manufacturer specification is not to ever be released over 15 psi, and without that gauge you wouldn’t know what it’s coming out at because above 15 psi that acetylene can be spontaneous combustion. And also, you have the danger of a leak through that gauge right there.

(Tr. 33.)

The company did not present evidence on this citation.¹ I find that the Secretary has

¹ On cross examination of the inspector, however, the operator did raise the issue of whether this citation and the previous one were duplicative, that is, attempting to punish the company twice for the same action. (Tr. 38.) The Commission has long held that “citations are not duplicative as long as the standards involved impose separate and distinct duties on an operator.” *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 716 (Aug. 2008); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-04 (June 1997); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981). Here the standards clearly impose separate and distinct duties on the operator: (1) the storage of gas cylinders; and (2) maintaining gauges in safe operating condition.

established that the gauge on the acetylene cylinder was not maintained in accordance with the mandatory safety standard in Section 75.1106-5(a).

Significant and Substantial

Inspector Creasey designated this citation as “significant and substantial.” In support of this, he testified, as set out above, that without the gauge it was not possible to determine the pressure of the gas being released. This is important, because if the pressure were over 15 psi, it could result in spontaneous combustion. He also said that gas could leak from the area where the gauge had broken off. He submitted that a fire from the ignition of gas leaking from the gauge or an explosion if the pressure exceeded 15 psi could result in amputations, broken bones or serious burns. (Tr. 34-35.)

All of this, however, depends on there being gas in the tank. As was determined previously, the Secretary has failed to establish that there was gas in the tank. Thus, the third *Mathies* criterion has also not been proven for this citation. Consequently, I conclude that the violation was not “significant and substantial” and will modify the citation accordingly.

Citation No. 6665589

During Inspector Creasey’s August 30, 2007, inspection, he observed a miner cutting coal and rock in the No. 2 heading and visible rock dust throughout the No. 2 entry. (Tr. 41-43.) Mining operations were stopped and Inspector Creasey went up to the end of the line curtain. (Tr. 41-42.) He attempted to take an air reading with his anemometer, but the turbine in the anemometer would not turn. (Tr. 42.) From that point he walked to the first line curtain outby the last open crosscut and discovered that there was not a check curtain at that point. (Tr. 42.) As a result, the air was short circuiting through the area rather than going up to the face area where the miner was cutting. (Tr. 42.)

Based on these observations, Inspector Creasey issued Citation No. 6665589 to Cloverlick alleging a violation of section 75.370(a)(1) of the Secretary’s regulations, 30 C.F.R. § 75.370(a)(1).² The “Condition or Practice” alleged to result in this violation was stated as:

The operator is not following the approved ventilation plan in effect at this mine. The Joy Miner, S/N JM5984, was observed cutting and loading coal in the No. 2 Heading on the active 002 MMU. When an anemometer was held up behind the exhausting line curtain, it would not turn. The ventilation plan requires 6,000

² Inspector Creasey issued the citation as a 104(a) citation, 30 U.S.C. § 814(a), alleging that the violation was S&S and resulted from “high” negligence. (Govt. Ex. 4 at 1.) On September 18, 2007, he modified it to a 104(d)(1) citation. (Govt. Ex. 4 at 2.) On October 29, 2008, the day before trial, he modified it back to a 104(a) citation. (Govt. Ex. 4 at 3, Tr. 41.)

cfm of air and 60 FPM Mean Air at the face where coal is being mined, cut, or loaded. The first open crosscut inby the return brattice line did not have a block curtain in it and the section intake air was short circuiting into the return at this location. There was visible dust in the area of the miner and outby in the #2 entry. The miner was cutting approximately 30" of rock in this area.

(Govt. Ex. 4.) Section 75.370(a)(1) provides that: "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." The ventilation plan at Cloverlick's Mine No. 1 requires 6,000 cfm of air at the "inby end of the line curtain used a[t] the working face" where MMU 002-0 is being operated. (Gov't Ex. 6 at 12.)

Charles Dewayne Baker was the second shift section foreman at Cloverlick when the citation was issued. (Tr. 67.) He testified that all the curtains were hung in the No. 2 section when he completed his pre-shift examination, somewhere between 9:00 and 11:00 p.m. (Tr. 71.) When Baker took an air sample, at that time, it was "well above" 6,000 cfm. (Tr. 72.)

Baker related that he was not present in the No. 2 heading when the inspector made his air reading and found the missing block curtain at around 11:30 p.m., but responded to Inspector Creasey's summons to go there. (Tr. 74.) He asserted that on his arrival, after the inspector told him that he did not have any air, he started to take his own air reading, but did not complete it because "Mr. Creasey, he seemed to have a problem and I wanted to find out what it was." (Tr. 74.) He claimed, however, that his "blades were turning." (Tr. 74.)

Baker said that he then sent two "car drivers" down one side of the entry to check for downed curtains and he "walked down #2 entry all the way to the feeder - right across from the feeder to check curtains myself on that side." (Tr. 74-75.) Neither the drivers nor he found any curtains down. (Tr. 75.) He testified that then: "I went back up to Mr. Creasey and to the best of my knowledge he said, 'You've got it now. You can - you can go ahead and move your miner' because he had my miner stopped." (Tr. 75.)

Baker speculated that a possible reason the curtain could have been missing was that a scoop operator had knocked it down while going through the area. (Tr. 73.) Baker testified that the scoop operator had torn down curtains in the past, and he would need reminding to hang them back up. (Tr. 73.) He said that the operator could have torn down the curtain in question and put it back up without his knowledge, although at the time, the operator had denied tearing one down. (Tr. 88.) Nevertheless, Baker also contended that the scoop operator was not a good worker and had been subsequently fired. (Tr. 88.)

On the other hand, Inspector Creasey testified that he was in the area approximately 25 minutes before the curtain was replaced. (Tr. 45.) He said that the curtain was still missing when Baker arrived. (Tr. 63-64.)

Neither side presented any other evidence to support their position. Indeed, it is difficult to discern exactly what is the company's position. Except for denying that he ever saw a missing curtain, Baker's testimony relies on implications, rather than direct contradictions, to attempt to refute the inspector's testimony. In fact, when asked by counsel for the Secretary if it was his testimony that the condition never existed, Baker responded: "No, ma'am. No, I'm just -- I'm just telling you everything was up when I checked it. It was there." (Tr. 82.) In addition, when discussing whether the parties wanted to submit briefs in the case, the company's representative said that the only thing they were contesting was high negligence, that they had no problem with the citation or the S&S part of it. (Tr. 89-90.)

Nonetheless, it is necessary to address the credibility of the witnesses to decide whether there was a violation. In this regard, the inspector's testimony was coherent, straight forward and not weakened by cross examination. Further, it is essentially corroborated by his notes made at the time of the violation. (Govt. Ex. 5 at 2.) Finally, there is no apparent reason for Inspector Creasey not to tell the truth.

Contrarily, Baker's testimony was hesitant, equivocal on significant points and undermined by cross examination. Thus, his testimony that his "blades were turning" and his implication that there was never a curtain down are questionable. Furthermore, by relating that another Cloverlick foreman had been suspended without pay for three days for a similar citation, albeit a 104(d)(1) citation, he provided a good reason for not admitting the violation.³ (Tr. 84-87.)

Accordingly, I credit the testimony of Inspector Creasey and find that the operator violated section 75.370(a)(1) as alleged.

Significant and Substantial

Inspector Creasey designated this violation as being "significant and substantial." He said that both silicosis and pneumoconiosis were likely because the miners working in the area were "breathing rock dust because of the high quartz content in the rock. And you also have the coal dust in that area too because it's just suspended in the air and no air is coming to move it out." (Tr. 46.) He testified that the amount of dust was extensive throughout the No. 2 entry. (Tr. 50.) From the evidence, he believed that the violation "[p]ossibly existed for the entire cut. Approximately 30 minutes." (Tr. 64.)

The Commission has held that the overexposure to coal and quartz dust resulting from a violation of the respirable dust standards, sections 70.100 or 70.101, 30 C.F.R. §§ 70.100 or 70.101, is presumed to be S&S. *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274, 1281 (Sept. 1986); *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986). The Commissioners reached

³ Until the day before the trial, the company believed it was facing a 104(d)(1) citation. See n.2, *supra*.

this conclusion based on "the nature of the health hazards at issue, the potentially devastating consequences to affected miners, and the strong concern expressed by Congress for the elimination of occupation-related respiratory illnesses to miners" *U.S. Steel*, 8 FMSHRC at 1281. While there can be no such presumption in this case, since a respirable dust standard is not involved, the same concerns still apply. This particularly true here, where the exposure was extensive and could have lasted as long as 30 minutes.

Applying the *Mathies* criteria, I have already found (1) a violation of a safety standard. I further find: (2) that the violation contributed to a discrete safety hazard, overexposure to quartz and coal dust; (3) that, because of the extensiveness of the dust and the length of time the violation probably lasted, it was reasonably likely that an injury would result; and (4) that the injury would be serious, resulting in silicosis and/or pneumoconiosis. Therefore, I conclude that the violation was "significant and substantial."

Civil Penalty Assessment

The Secretary has proposed penalties of \$15,953.00 for the three violations contested at the hearing. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-484 (Apr. 1996).

In this connection, the parties have stipulated that the proposed penalties will not affect the company's ability to remain in business and that Cloverlick demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. (Tr. 12-13.) I find from the allied papers that Mine No. 1 is a large mine and its controlling entity is a large company. I further find that the operator has a better than average history of previous violations. (Govt. Ex. 8.)

Turning to gravity, I find that the two gas cylinder violations, Citation Nos. 6665550 and 6665551, were not very serious. However, I find that Citation No. 6665589, the ventilation plan violation, was a serious violation of the secretary's standards.

With regard to negligence, Inspector Creasey found that the operator was moderately negligent concerning the cylinder violations because they were "in an area where the pre-shifters and on-shift examiners travel through the area and they should have seen where they were" (Tr. 24, 35.) I concur with his assessment.

I do not agree, however, with his conclusion that the ventilation plan violation resulted from "high" negligence. He based this conclusion on the extensiveness of the dust and the fact that more than one person knew that the condition existed at the time. (Tr. 50.) Inspector Creasey testified that when the miner operator came out of the area he was covered with white dust. (Tr. 50.) He further testified that "anyone with . . . reasonable mining experience would know that air wasn't moving in that area." (Tr. 50.)

However, there is no evidence that Baker, the section foreman, knew of the condition. In fact, the evidence is that he was not present. What evidence there is suggests that the curtain was torn down by a scoop operator. At least, that is what the inspector was told after the curtain was re-hung and mining began again. (Tr. 54.)

The Commission has long held that the negligence of a "rank-and-file" miner cannot be imputed to the operator for civil penalty purposes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) (*SOCCO*). In this connection, the Commission has stated that: "[W]here a rank-and-file employee has violated the act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct." *SOCCO* at 1464.

To try to show "high" negligence, the Secretary introduced a citation that the company had received for the same violation during the previous May. (Govt. Ex. 7, Tr. 51-53.) By itself, that one citation does not demonstrate a lack of supervision, training or disciplining of its employees on the part of the operator. Furthermore, unlike this citation, the foreman (not Baker) was present while the violation was occurring when the May citation was issued. (Tr. 53.) Finally, the foreman involved in the May citation was suspended for three days without pay and the scoop operator suspected of tearing down the curtain in this case was subsequently fired. (Tr. 87-88.) This shows that the operator was taking reasonable steps to prevent rank-and-file miner's violative conduct. Accordingly, I will modify the level of negligence for Citation No. 6665589 from "high" to "low."

Taking all of these factors into consideration, I conclude that the following penalties are appropriate: (1) Citation No. 6665550—\$100.00; (2) Citation No. 6665551—\$100.00; (3) Citation No. 6665561, in accordance with the parties agreement,—\$634.00; and (4) Citation No. 6665589—\$2,000.00.⁴ Therefore, the total penalty in this matter is \$2,834.00.

Order

In view of the above, Citation No. 6665561, in accordance with the agreement of the parties, is **AFFIRMED**; Citation Nos. 6665550 and 6665551 are **MODIFIED**, by deleting the "significant and substantial" designations, and are **AFFIRMED** as modified; and Citation No. 6665589 is **MODIFIED**, by reducing the level of negligence from "high" to "low," and is

⁴ It is apparent that Citation No. 6665589 was originally assessed as a 104(d)(1) citation and that the penalty was not modified when the citation was modified. I took this into consideration in addition to the penalty criteria discussed above.

AFFIRMED as modified. Cloverlick Coal Company, LLC, is **ORDERED TO PAY** a civil penalty of **\$2,834.00** within 30 days of the date of this decision.



T. Todd Hodgdon
Senior Administrative Law Judge

Distribution:

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/rps

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-3577/FAX 303-844-5268

November 5, 2009

PETER J. PHILLIPS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2009-286-DM
	:	RM MD 2008-05
v.	:	
	:	Mine ID 05-04
	:	Portable Crusher #4
A & S CONSTRUCTION COMPANY,	:	
Respondent	:	

DECISION

Appearances: Peter J. Phillips., Florence, Colorado, *pro se*;
Richard P. Ranson, Esq., and Jason P. Kane, Esq., Ranson &
Kane, P.C., Colorado Springs, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Peter J. Phillips against A & S Construction Company ("A & S"), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Phillips contends that he was terminated from his employment because he complained about safety issues at the Evans Pit. An evidentiary hearing was held in Cañon City, Colorado. For the reasons set forth below, the discrimination complaint is dismissed.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

At all pertinent times, A & S operated the Evans Pit near Pueblo, Colorado. The pit included a crusher and ancillary equipment used to make aggregate for asphalt and concrete products. In June 2007, the crusher was operating 24 hours a day, seven days a week. On or about February 12, 2008, Mr. Phillips filed a discrimination complaint with the local office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). On November 3, 2008, the Secretary determined that the facts disclosed during her investigation into the complaint filed by Phillips do not constitute a violation of section 105(c) of the Mine Act.¹

¹ The parties were previously engaged in litigation concerning these matters. Before the Secretary determined that section 105(c) of the Mine Act had not been violated, she brought a temporary reinstatement case under section 105(c)(2). A & S agreed to an economic reinstatement.

On or about December 12, 2008, Phillips filed this proceeding on his own behalf under section 105(c)(3) of the Mine Act. The complaint of discrimination alleges that he was a wash plant foreman for A & S and that on June 26, 2007, he observed the scraper lying on its side. When he went to see what had happened, he saw Kenny McMullen, the scraper operator, shaking his head saying that he could not believe that he did this. When Phillips talked to McMullen, he could smell alcohol on his breath. Harvey Barnhard approached and Phillips told him that McMullen was drunk. Phillips told Barnhard that he wanted McMullen off the property. Barnhard told him to mind his own business. Phillips then called John Paul Ary and was told that McMullen was the only scraper operator and that he would have to stay. Phillips replied that he does not "put up with anyone drinking or doing drugs on the job." (Discrim. Complaint). On or about September 8, 2007, when McMullen came to work drunk, Phillips told him that he was fired. McMullen called Ary who told him that he was not fired. Phillips subsequently told Ary that McMullen could kill someone, to which Ary responded by telling Phillips to mind his own business. On September 13, 2007, A & S fired Phillips for allegedly failing to show up at work without prior approval. In its answer to the complaint, A & S denied these allegations and asserted several affirmative defenses.

A. Phillips' Request for a Second Continuance.

This case was assigned to me on February 20, 2009, and I issued a prehearing order on February 23. I issued a notice of hearing on March 23, 2009, following a conference call with the parties, setting the hearing for May 18. Shortly thereafter, six subpoenas were sent to Phillips at his request. Counsel for A & S took Phillips' deposition on April 8, 2009. As required by my notice of hearing, A & S submitted its witness and exhibit list to me on May 6. On or about May 14, another conference call was held during which Phillips asked that the hearing be canceled because he felt he needed to find counsel to represent him. I orally granted Phillips' request and then issued an order on May 14 canceling the hearing so that he could find an attorney to represent him in the case.

On July 17, 2009, I held another conference call with the parties. During this call, Phillips advised me that he was unable to find an attorney to represent him and that I should set a hearing date. After discussing several possible dates, the parties agreed that the hearing would be held on September 9, 2009. On this basis, I issued a notice of hearing on July 20 setting the case for hearing on September 9.

The parties convened on September 9 in Cañon City and Phillips was ready to proceed with the hearing. Phillips did not raise any objections to the hearing when I asked if there were

On November 26, 2008, Judge David Barbour dissolved his order of temporary economic reinstatement and dismissed the temporary reinstatement proceeding. 30 FMSHRC 1119 (Nov. 2008). The Commission granted Phillips' petition for review of the judge's dissolution of the order of temporary economic reinstatement. By decision dated September 9, 2009, the Commission, by a two to two vote, affirmed the judge's order. 31 FMSHRC _____ (Sept. 2009).

any preliminary matters. (Tr. 5). After counsel for A & S finished with his opening statement, Phillips said "I am going to need a lawyer." (Tr. 14). He characterized the company's opening statement as "nothing but lies." *Id.* I advised him that an opening statement is not evidence and that I would not consider it when rendering my decision. (Tr. 15). I reminded Phillips that I postponed the hearing from May until September so that he could find an attorney and that during our July conference call he advised me that he was ready to proceed to hearing. (Tr. 14-15). He replied "[t]hen you will have to decide it and rule for them." (Tr. 15). When Phillips was asked why he did not get a lawyer after the hearing was postponed in May, he replied "I don't have no money [and] I still don't have no money." (Tr. 16). Phillips said that he called four attorneys including Tony Oppgard. The three Denver attorneys wanted a retainer of \$2,500 and he said "I don't have that kind of money." *Id.* He indicated that he needed a lawyer after listening to the company's opening statement because it was "all fabricated." *Id.* I did not grant his request for second continuance of the hearing and called Phillips to the stand so that he could present his case.

The Commission has not directly addressed the right to counsel issue. In *Sewell Coal Co.*, the Commission reversed a judge because he set a hearing date that conflicted with a previously scheduled commitment of the company's counsel and then refused to continue the hearing upon the request of the attorney. 2 FMSHRC 2479 (Sept. 1980). The Commission balanced the public interest in the prompt adjudication of cases against the convenience of the judge and the party's right to be represented by counsel, and concluded that the judge abused his discretion in denying the request for a continuance. The Commission stated that "due process has been given . . . when a party has been afforded the opportunity to obtain competent counsel . . ." *Id.* at 2480. In *Jaxsun v. Asarco, LLC.*, the Commission recognized that, when assessing matters of party representation at a hearing, judges should be guided by the Mine Act, the Commission's Procedural Rules, and the Administrative Procedure Act ("APA"). 29 FMSHRC 616, 620-621 (Aug. 2007). The APA provides that a party may appear at a hearing without representation, although the party is entitled to obtain representation. 5 U.S.C. § 555(b). The Commission's procedural rules allow a party to represent himself or obtain counsel. 29 C.F.R. §§ 2700.3(b)(1), 2700.4(a).

At least one federal court has held that a judge does not abuse his discretion when, in a civil case, he denies a motion to continue a case a second time after the moving party failed to obtain counsel during the first continuance. *Charles v. Rice*, 999 F.2d 1580; 1993 WL 307892 (5th Cir. 1993) (unpublished). The court held that an abuse of discretion will be found only when the denial of continuance " 'severely prejudiced' the party requesting it and where, 'on balance, the interests in favor of a fair trial heavily outweighed the interests in favor of an immediate trial.' " *Id.* at WL p. 3, citing *Smith-Weik Machinery Corp. v. Murdock Machine & Engineering Co.*, 423 F.2d 842, 844 (5th Cir. 1970).

In this case, I granted Phillips a continuance of the hearing, over the objection of A & S, so that he could obtain counsel. I set the case for hearing a second time only after Phillips advised me that he was unable to obtain counsel and he was ready to proceed to hearing. I chose

September 9, 2009, for the hearing date after making sure, during a conference call, that Phillips had no objection to that date. The hearing commenced as scheduled and Phillips asked for a continuance only after counsel for the company completed his opening statement.² When asked why he had not engaged an attorney during the summer, he replied that he did not have sufficient funds to pay a retainer and that he still did not have such funds. It would have been unfair to A & S to grant a second continuance at the start of the hearing because A & S was prepared for the hearing and the company had four witnesses ready to testify. The Commission had expended resources in preparation of the hearing and had retained a court reporter. The only basis Phillips gave was that the company's opening statement was "nothing but lies." I explained to Phillips that the opening statement was not evidence and that he would be given the opportunity to cross-examine the company's witnesses after they testified. He also knew, well before the hearing, that the company would offer evidence that differed from his own. He had a copy of the company's witness and exhibit lists since May 6, 2009. Phillips had a copy of the company's six page answer which set forth many of the defenses that counsel summarized in his opening statement. Indeed, Phillips sent A & S a response to the answer so it is clear that he had studied it. (Ex. B). Congress provided that discrimination cases shall "be expedited" by the Commission. (§ 105(c)(3) Mine Act). I weighed all of the factors set forth above and determined that Phillip's request for a second continuance should be denied, especially since the request came after the hearing had started and it was unlikely that he would have been more successful in retaining an attorney than he had been during the summer.

B. Summary of the testimony.

Phillips testified that he was hired by A & S in August 2006, after he was fired from another job. (Tr. 18). He was hired to operate a loader at the Evans Pit near Pueblo, Colorado. In November of that year he started working as a mechanic at the pit. He had prior experience working as a mechanic on heavy equipment. Phillips testified that Darrell Fisher was his supervisor at the pit and that they got along very well. Fisher was the crusher foreman at the pit and he supervised the pit when Harvey Barnhart was not there. Fisher became the crusher superintendent after Barnhart was reassigned to other pits in July 2007. (Tr. 102, 106-07, 111). John Paul Ary functioned as the chief operating officer of A & S. (Tr. 79-80, 140-42). Phillips was responsible for keeping the wash plant operating. He did not supervise anyone and he could not set his own hours even after he was given the title "foreman" in August 2007. (Tr. 101).

Harvey Barnhart was the crusher superintendent for A & S and, as such, was the supervisor of the Evans Pit. (Tr. 80). He was also the supervisor of three other pits for A & S. He has worked for A & S since 1987 and has operated virtually every piece of equipment that the company owns. In the summer of 2007, the wash plant at the pit was operating seven days a week and 24 hours a day. A & S employed about 100 people in 2007.

² If I had not granted the company's request to make an opening statement, the trial would have proceeded and Phillips would not have asked for the continuance at all or he would have requested a continuance after one or more of the company's witnesses had testified.

Denise Gonzales was the office manager and safety manager for A & S. As safety manager, she monitored safety training to make sure that all employees received required MSHA/OSHA training. (Tr. 121). She also supervised enforcement of the company's alcohol and drug policies. She gave each new employee an employee manual, safety manual, and drug/alcohol policy statement. (Ex. D). She testified that the company conducts drug/alcohol testing when hiring employees, after serious accidents, upon reasonable suspicion, and on a random basis. (Tr. 123).

1. Events of June 26 and 28, 2007

On June 26, 2007, McMullen partially tipped over the scraper he was operating while he was dumping overburden. Phillips testified that he was in the control shack running the wash plant and he could see the scraper from that vantage point. (Tr. 21). Phillips said that he was the first person to arrive at the scene of the accident. Phillips testified that he could smell alcohol on McMullen's breath when he talked to him. Phillips also testified that Fisher arrived at the scene soon thereafter and he told Fisher about the alcohol on McMullen's breath. (Tr. 27). According to Phillips, when he told Fisher that McMullen should be fired, he agreed with him "100 percent." (Tr. 25, 51-52). Phillips also testified that he called Ary to discuss the incident with him using Fisher's cell phone. Phillips testified that Ary replied that because McMullen was the company's only scraper operator, he would not be terminated.

Barnhart testified that when he arrived at the pit on June 26, he noticed that someone was moving the trackhoe toward the area where the overburden was being stacked in berms. (Tr. 93). Phillips was operating the trackhoe. He told Phillips to take the trackhoe back to the pit and to return to the wash plant. Barnhart testified that he did not have any other discussion with Phillips at that time. (Tr. 95). As the scraper dumps more overburden on a berm, a slope will develop. Barnhart testified that McMullen should have used the bulldozer, that was parked in the area, to flatten out the berm when it became too steep. (Tr. 91-95). If he had done that, he would not have tipped the scraper. Barnhart testified that it only took about five minutes to get the scraper going again.

In his complaint of discrimination, Phillips stated that, when Barnhart arrived at the pit that day, Phillips told Barnhart that he wanted McMullen "off the pit today" and that Barnhart told him "to mind my own 'f---ing business'" (Ex. A). Phillips testified about these events at the hearing. (Tr. 49-50). Barnhart testified that Phillips did not mention anything about McMullen having alcohol on his breath that day. (Tr. 96, 106). He also testified that Fisher was not at the pit on June 26, 2007, but was out of town on personal business. (Tr. 97). Fisher testified that he was in Silver City, New Mexico, on June 26 visiting his in-laws. (Tr. 109; Ex. N). He did not return to work at the pit until July 2. He could not recall any time when Phillips complained about employees operating equipment with alcohol on their breath. (Tr. 114-15).

Barnhart testified that he has known and worked with McMullen for many years. Barnhart worked close to McMullen on June 26 and he did not smell any alcohol on McMullen's

breath that day or on any other day. (Tr. 103-04). He also stated that he would terminate anyone using drugs or alcohol "in a heartbeat." (Tr. 104). The company has a zero tolerance policy in that regard. Ary also testified that the company has zero tolerance for alcohol and drug abuse. (Tr. 142-3). If there is an accident caused by an employee who is impaired by alcohol, the financial impact would be "devastating" to the company. Ary testified that "[i]nsurance companies are driving our industry" because the risk of liability is so great. (Tr. 144). Based on his experience with Barnhart, Ary said that there is no doubt in his mind that, if Barnhart was made aware that an employee had the smell of alcohol on his breath, he would have called for an immediate test of that employee. Ary testified that he never heard that Phillips had complained about McMullen. Barnhart also testified that, if a scraper operator quit or was terminated, he could find a replacement that same day by moving another employee into that position. (Tr. 85).

On June 28, 2009, Barnhart terminated Phillips from his employment. (Tr. 31). Phillips said that he was let go after he had an argument with Barnhart. Phillips testified that this termination had nothing to do with the events of June 26 involving McMullen. (Tr. 52-53). Barnhart testified that he was eating lunch that day when Phillips approached him and said, "I don't like my job anymore." (Tr. 98). When Barnhart said that not everyone likes their job all the time, Phillips said he was not going to repair the wash plant when it breaks down anymore. Barnhart asked Phillips to return to the wash plant. Phillips said that he was taking the rest of the week off and that he would return on Monday. (Tr. 98). At that point, Barnhart terminated his employment with the company.

On June 29, Ary called Phillips and offered him his job back. Ary told Barnhart that he rehired him because the company needed to keep a mechanic/welder on staff and the company was "under the gun" to keep the wash plant operating. (Tr. 99). Ary testified that he wanted to give Phillips a second chance. (Tr. 147, 150). Fisher testified that when he returned from his vacation in New Mexico, after Phillips had been rehired, he noticed a change in Phillips' attitude toward his work. According to Fisher, after he was hired back, "he figured nobody could tell him nothing." (Tr. 112-13). For example, according to Fisher, Phillips took a longer time when changing a screen at the wash plant.

2. Events of September 8, 2007

Phillips also testified that when he came to work on September 8, 2007, he again smelled alcohol on McMullen's breath. (Tr. 43). Phillips testified that he told McMullen that he was fired, but he admitted at the hearing that he did not have the authority to fire anyone. (Tr. 44). Phillips testified that he complained to Fisher about this. (Tr. 23-25, 43-33). Phillips said that he smelled alcohol on McMullen's breath on at least one other occasion while at work. In his complaint of discrimination, Phillips stated that he talked to Ary that day and asked him "what if [McMullen] kills someone or himself?" and John Paul Ary told me to mind my own business." (Ex. A). At the hearing, Phillips testified that he did not talk to Ary about this incident. (Tr. 56-57). Fisher testified that Phillips never told him that he smelled alcohol on McMullen's breath.

(Tr. 115). Gonzales testified that, according to the company's payroll records, McMullen was not at work on September 8, 2007. (Tr. 134-36).

3. Events of September 11 - 13, 2007

Phillips testified that during the afternoon of September 11, 2007, he talked to Fisher about going to the company's facility in Cañon City to get a stretcher and other safety supplies to take to the Evans Pit. He also said that he called Fisher on the phone that evening to let Fisher know that he would be definitely getting these supplies the next day rather than going to work at the pit. (Tr. 33-34, 70-71). He also told him that he was going to Ace Hardware to get other supplies for the pit. Phillips said that he put on his work clothes on September 12 and went to the Fremont Paving³ yard in Cañon City. He talked to a man in the parts area about getting a number of items including a stretcher. He got a purchase order from the parts man and went to Ace Hardware to get additional parts including plywood, a T-Square, and a socket wrench. (Tr. 36-38). He then went home for the day at about 2:00 p.m. (Tr. 39). He normally works a 12 hour shift at the pit, from 6:00 a.m. to 6:00 p.m. Phillips testified that he called Fisher at the pit and Fisher told him that everything was running well. (Tr. 68-69). In his deposition, Phillips testified that he talked to Denise Gonzales at the Fremont Paving office about getting a company truck. (Tr. 63-64; Ex. I). He could not remember this conversation at the hearing. (Tr. 62). In his deposition, he said that he did not talk to Fisher on September 12. (Tr. 69).

Fisher testified that Phillips failed to report to work on September 12. Fisher further testified that Phillips never notified him that he would not be working at the Evans Pit on September 12. (Tr. 117, 119). At about 10:00 a.m. on September 12, Denise Gonzales called Fisher to ask why Phillips was at her office at Fremont Paving in Cañon City instead of at the pit. *Id.* He told her that he had no idea why Phillips was there.

Gonzales testified that Phillips spoke to her on the morning of September 12 at the Fremont Paving office. She testified that he was not wearing work clothes and that he told her that he was "running personal errands." (Tr. 132). When he asked for a company truck and cell phone, she replied that only Ary could authorize that. She said that after this conversation she called Fisher to ask why Phillips was at the Cañon City office.

When Phillips went to work on September 13, he started doing some repairs on the jaw crusher. Phillips testified that Fisher then drove up, told him he was fired, and then drove away. (Tr. 40). Fisher testified that he asked Phillips where he had been the day before. Phillips responded that he was in Delta, Colorado, working with Ary and Barnhart at a pit there. (Tr. 117). Fisher testified that he knew Phillips was lying because Gonzales had called and told him he was at her office in Cañon City on September 12. Fisher called Ary to tell him that Phillips is no longer a dependable employee and that he "just can't use him" anymore. (Tr. 117). He also

³ Fremont Paving & Ready Mix and A & S are affiliated companies. Both A & S and Fremont Paving have offices and other facilities at the same location in Cañon City.

called Gonzales. Phillips left the pit and went to the office at Fremont Paving. On the way there, he talked to Ary and Ary confirmed that he was terminated. (Tr. 149-50).

Phillips testified at the hearing that he does not know why he was fired. (Tr. 72). Phillips believes that the stated reason that the company gave for terminating him was a pretext, but he is not sure why he was actually terminated. (Tr. 77). He said that the "main" reason he filed the complaint is because other people were passing him by and getting various benefits, including a company truck. (Tr. 75-76). He alleged at the hearing that people who have been caught driving under the influence of alcohol ("DUI") have been given access to company trucks. He said that he complained about this to Fisher on a number of occasions. (Tr. 78). Fisher testified that Phillips never complained to him about employees with DUIs in their driving records. (Tr. 114-15).

Fisher testified that he terminated Phillips because he was no longer a dependable employee. (Tr. 118). Phillips did not show up at work on September 12 and he did not call in advance to tell Fisher that he would not be there. Fisher also testified that he never would have authorized Phillips to buy supplies at an Ace Hardware in Cañon City because the company employs a "parts guy" who would have bought the supplies in Pueblo. It is about a two hour round trip drive from the Evans Pit in Pueblo to Cañon City. (Tr. 119).

Phillips admitted that the company performs random drug and alcohol testing and that the night crew was tested for alcohol on June 26, 2007. (Tr. 64). Phillips testified that one individual tested positive as a result of this testing, but he was not fired. (Tr. 64-65). Gonzales, who supervised this test, testified that nobody tested positive for alcohol as a result of this test. (Tr. 129-30). Gonzales also testified that the company obtains a driving record report on every employee when they are hired and annually thereafter. (Tr. 136-38). The company's insurance carrier notifies her if an employee's drivers license has been suspended. This insurance carrier is "very stringent" with respect to DUIs and will exclude from coverage an employee with a recent DUI. (Tr. 137). When an employee receives a DUI, he is usually terminated from employment.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

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

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Protected Activity

I have previously held that complaining about alcohol use is protected under section 105(c) of the Mine Act because it directly relates to employee safety. *Fletcher v. Morrill Asphalt Paving*, 24 FMSHRC 232, 239 (Feb. 2002). In the present case, however, I find that it was not established that Phillips engaged in protected activity or that the company terminated him from his employment as a result of any protected activity.

Much of the testimony of Phillips was internally inconsistent and was contrary to the objective facts established at the hearing. For example, in his complaint of discrimination, Phillips said that while he was at the scene of the accident, Fisher "approached" him. (Ex. A). At the hearing, he testified that he had an extended conversation with Fisher about McMullen's alcohol abuse that day and that Fisher agreed with him that McMullen had been drinking and that he should be fired. (Tr. 23-26, 51-52). He also testified that he used Fisher's cell phone to call Ary that day. (Tr. 42-43). Yet, the objective evidence establishes that Fisher was in New Mexico when these events occurred. A & S presented Fisher's credit card statement to show that he charged meals and other items in New Mexico with his Visa card during this period. (Ex. N). Phillips testimony on this issue is not credible.

Phillips also testified that he complained about the smell of alcohol on McMullen's breath on or about September 8, 2007. He said that when he complained about this to Fischer, Fisher responded by saying "I don't know what we are going to do with this guy." (Tr. 43-44). Fisher testified that Phillips never said anything to him about McMullen's breath or alcohol use. In his discrimination complaint, Phillips stated that he had a discussion about McMullen with Ary that day and Ary told Phillips to mind his own business. (Ex. A). At the hearing, he admitted that he did not discuss McMullen with Ary. Gonzales testified that she reviewed McMullen's payroll records for September 2007 and that a time card for McMullen could not be located for September 8, 2007. To make sure that his time card for that day had not been misplaced, she checked the payroll records to see how many hours McMullen worked that week.

She discovered that he worked 48.5 hours the week that included September 8 and that this time was fully accounted for by the hours he worked on the other days that week. (Tr. 133-36). Consequently, she testified that McMullen was not paid for any work on September 8. I note that September 8, 2007, was a Saturday and it would appear that McMullen was not at work that day. It is possible that Phillips was mistaken about the exact date, but his account of the events is otherwise inconsistent.

At the hearing, Phillips alleged that A & S allowed employees with suspended drivers licenses to operate company trucks and other mobile equipment. (Tr. 76-78). He said that these licenses were suspended by the State of Colorado due to DUI infractions. This allegation was not contained in his complaint of discrimination. I find that this allegation is not credible and I credit the evidence presented by A & S to rebut this allegation. Gonzales testified that employees who are given DUI tickets are usually terminated because all employees are expected to be able to operate trucks or other mobile equipment. A company the size of A & S would not take such a risk because it is unlikely that its insurance carrier would cover any liability for accidents caused by these employees.

Based on the above, I find that it was not established that Phillips engaged in protected activity. There was no credible proof that McMullen was under the influence of alcohol at the pit. I credit Barnhart's testimony in this regard. I credit the testimony of Ary and Gonzales concerning the company's substance abuse policies. I also credit the testimony of Fisher and Barnhart that Phillips did not communicate any concerns about the use of alcohol to company management. Phillips' testimony with respect to these issues was not credible.

B. Adverse Action

Even if I assume that Phillips engaged in protected activity, I find that it was not established that his termination from employment was motivated in any part by complaints about alcohol use. In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.

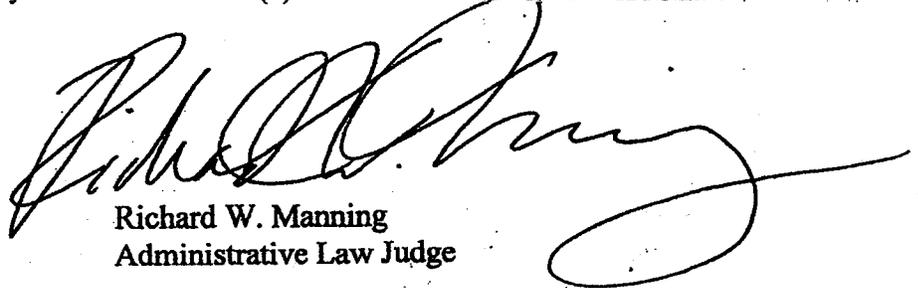
All of the company's witnesses denied that Phillips communicated any concern that he could smell alcohol on the breath of McMullen. I credit that testimony as well as the testimony of Barnhart that he would have had McMullen tested if he suspected that McMullen had been drinking. There is no credible evidence that company managers displayed hostility or animus

toward the protected activity. I credit the evidence presented by A & S that its managers do not tolerate the use of alcohol or drugs and that, if anyone is caught under the influence of these substances while working at the pit, they will be subjected to testing and termination if the test results are positive. There is coincidence in time between the alleged protected activity and his termination. Disparate treatment is not an issue in this case.

I find that the reason A & S gave for Phillips' termination was not a pretext for an unlawful dismissal. A & S terminated Phillips earlier in the summer of 2007. Phillips testified that this termination was not the result of his alleged protected activity. Ary rehired Phillips because he wanted to give him a second chance and the company needed a mechanic for the wash plant. Phillips' description of the events of September 11 through 13 is not very credible. Fisher testified that he never gave Phillips permission to buy supplies for the pit in Cañon City on September 12 rather than work at the wash plant that day. I credit this testimony. The pit and crusher facilities were operating full bore at that time. Because it vibrates, the wash plant is prone to mechanical breakdowns and Phillips was needed to make repairs to keep the plant in operation. (Tr. 87). It is highly unlikely that Fisher would have wanted Phillips to take the day off so he could get a stretcher and miscellaneous supplies in Cañon City. Gonzales testified that Phillips told her he was running personal errands that day. Fisher testified that when he asked Phillips why he was not at work on September 12, Phillips replied that he was working at another pit with Barnhart. I find that the decision of A & S to terminate Phillips was not at all related to complaints about alcohol use.

III. ORDER

For the reasons set forth above the discrimination complaint filed by Peter J. Phillips against A & S Construction Company under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

November 18, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2007-712
-Petitioner	:	A.C. No. 46-01433-121119
	:	
v.	:	Docket No. WEVA 2008-308
	:	A.C. No. 46-01433-132560
	:	
	:	Docket No. WEVA 2008-1536
	:	A. C. No. 46-01433-155218
	:	
CONSOLIDATION COAL COMPANY,	:	Loveridge No. 22 Mine
Respondent	:	

DECISION

Appearances: John Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Petitioner;
Rebecca Oblak, Esq., Bowles, Rice, McDavid Graff & Love, LLP, Morgantown, West Virginia, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Respondent Consolidation Coal Company (Consol) with multiple violations of mandatory standards and proposing civil penalties for those violations. The general issue before me is whether Consol violated the cited standards as charged and, if so, what is the appropriate civil penalty for those violations. Additional specific issues are addressed as noted. Decisions approving partial settlements of a number of charging documents have been issued in these proceedings so that only the four charging documents discussed herein remain for decision.

Order Number 7100826

This order, issued pursuant to Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:^{1 2}

¹ Section 104(d) of the Act provides, in relevant part, as follows:

(1) 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,

Combustible material in the form of damp loose coal and coal fines is being allowed to accumulate under the 10-D Section, 065-0 MMU, coal conveyor belt from 14 ½ block to 15 ½ block for a distance of 140 feet. The accumulation is up to 10 inches in depth under the bottom belt and is rubbing the bottom of the belt and accumulating to the extent at which it is pushing the bottom belt up into the belt structure. Several bottom rollers in the cited area are completely covered in coal fines. There is one stuck roller located at 15 block within the area. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The cited standard provides that “[c]oal, dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.”

Jeremy Ross, an inspector for the Department of Labor’s Mine Safety and Health Administration (MSHA), has a degree in mechanical engineering from the West Virginia University and several years of industry experience. On May 29, 2007, Ross was conducting an inspection at the Loveridge No. 22 mine as part of a regular quarterly inspection and a five day spot inspection for methane. Inspector Ross was accompanied by MSHA trainee Chad Currance, Respondent’s safety representative Jeff Taylor, and by United Mine Workers of America (UMWA) Safety

and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine disclosed no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

² There is no dispute that the precedential orders required by Section 104(d)(2) existed.

Committee representative Richard Harrison.³ The inspection party traveled to the 10-D Section, 065-0 MMU. The purpose of the section was to develop a longwall panel and Respondent was behind schedule at the time of the inspection.

The inspection party traveled to the face of the 10-D section and then proceeded outby through the belt entry. Respondent was utilizing a continuous haulage system in the section consisting of a mobile belt called a flexible conveyor train (FCT) and a stationary belt called a "dynamic move up" (DMU). The FCT was 570 feet long and operated immediately behind the continuous miner. The FCT transferred coal from the continuous miner to the stationary DMU belt. The DMU belt was 760 feet long and transferred the coal in turn onto the permanent section belt. The outby end of the FCT was connected to the DMU and rode back and forth on rails on top of the DMU belt. As the miner trammed forward or backward, the FCT rode forward and backward in unison. When the section belt was advanced, the FCT would be secured on top of the DMU. The DMU would then propel the tandem forward and pull the section belt along behind.

According to Inspector Ross, there was an accumulation of combustible material stretching over 140 feet from 14 ½ block to the 15 ½ block under the DMU conveyor. He testified that loose coal and coal fines extended the width of the belt (approximately 60 inches), and varied from two to ten inches in depth. He found that the coal was deepest at the outby end near the DMU drive unit but that it was also up 10 inches deep inby at several other locations. The coal was black in color and most of it was dry.

The belt was running when the inspectors first observed it some time between 10:22 a.m. and 11:15 a.m. but no coal was loaded on the belt. After the belt was shut down Inspector Ross examined the accumulation with his walking stick and discovered at least three buried rollers. The inspectors testified that after the violation had been abated and the accumulation had been removed, they discovered additional rollers which had been buried and hidden from view. In the deepest part of the accumulation they found that the coal had pushed the lower belt up so that it was no longer in contact with the rollers. The belt was riding in the coal and rubbing against the belt structure at that location.

Inspector Ross opined, based on his observations and discussion with Respondent's Project Engineer/Foreman, Brooks Barker, that the accumulation had been created by carry-back spillage. The scrapers on the belt were not removing all the particles of coal from the DMU belt where it dumped onto the permanent section belt. As a result, some of the coal was sticking to the underside of the lower belt and it was carried back inby until it fell off the belt onto the mine floor.

The credible observations of Inspector Ross were also corroborated, in significant respects, by Inspector Currance and by UMWA safety representative Harrison and their testimony clearly supports a violation as charged. In reaching this conclusion I have not disregarded Respondent's

³ At the time of hearings Trainee Currance had become a qualified MSHA inspector (Tr. 505).

arguments that the accumulation did not consist of coal but rather of incombustible rock from the mine floor. However, I find the Secretary's evidence to the contrary to be more credible. The Secretary's witnesses found that the accumulation was black while the bottom rock on the mine floor was gray.

They squeezed the material and it crumbled like coal. It did not "ball-up" like other material or mud would have. They also found that the coal also reflected light differently than rock would have and concluded from its weight and texture that it was coal rather than rock. Even Respondent's witness, Brooks Barker, admitted that the bottom rock was easily distinguishable from coal. Under the circumstances and considering the credible testimony of Inspector Ross, corroborated in all significant respects by Inspector Currance and UMW representative Harrison, I have no difficulty finding that, indeed, the cited accumulation consisted of coal.

Respondent argued alternatively that, even if the accumulation was coal, it was created by rib sloughage rather than created over time by carry-back spillage. The credible testimony is, however, that there were not large pieces of coal in the accumulation, thus indicating that the coal had been mined by the continuous miner and had not fallen in larger pieces from the rib.

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

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

I have found that the first element has been established i.e. that there was an extensive accumulation of combustible material in violation of 30 C.F.R. § 75.400. Based on the credible testimony I also find that the accumulation contributed to a discrete safety hazard by creating a fire danger to miners working or traveling in the belt entry. The second element is therefore also established. I also find that the credible testimony establishes a reasonable likelihood of a belt fire occurring because the loose coal accumulation was extensive and ignition sources were present. A number of rollers and the belt were running in the coal and had begun heating and drying the coal. The belt was also rubbing the belt structure itself. The inspectors observed the coal crusting over where the rollers and belt had been running in the accumulation evidencing that the resulting friction had already begun heating the coal. The credible evidence also shows that, in addition to being black and dry, the coal was also made of small particles which are easier to ignite and make a fire that much more likely.

The existence of these factors clearly establishes the third element under the *Mathies* criteria. See *Mid-Continent Resources*, 16 FMSHRC 1218, 1222 (June 1994) and *Amax Coal Company*, 19 FMSHRC 846, 849 (May 1997). The fourth element of the *Mathies* test requires the Secretary to establish that the injury will be of a reasonably serious nature. The credible evidence establishes that the injuries to the miners would include smoke inhalation, carbon monoxide poisoning, and burns. These are of a serious nature and accordingly I find that the Secretary has met her burden of proving that the violation was “significant and substantial” and of high gravity.

I also find that the violation was the result of high negligence and “unwarrantable failure” to comply with the cited standard. Unwarrantable failure is “aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). 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, 193-94 (February 1991); see also *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals. See *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987), *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).

This Commission, in determining unwarrantable failure, has considered whether an operator’s conduct was aggravated by looking at all the facts and circumstances to see if any aggravating factors exist, such as the length of time that the violation existed, the extent of the violative condition, whether the operator was 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. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001). The credible testimony establishes in this case that the coal accumulation was obvious and extensive. The loose coal and coal fines extended over 140 feet and even lifted the belt off some rollers. Moreover it took ten

miners working for over six hours to remove the coal. The accumulation also exposed the miners who worked and traveled in the belt entry to a belt fire in a gassy mine with ignition sources. This evidence, alone, is sufficient to establish high negligence and unwarrantable failure.

I also find, however, from the credible testimony of the inspectors and UMWA safety representative Harrison, that the accumulation had existed over multiple shifts. The frictional heating by the belt and rollers had dried out and crusted over the accumulation. The credible testimony shows that this would have taken more than one shift, since the coal spillage from the belt is initially wet due to belt sprays designed to keep the dust down. In addition, the accumulation was formed by carry-back spillage and would have taken several shifts to cover the 140 foot area. Respondent's records also show that the accumulation had existed for several days without attention. Respondent's production records indicate that only 155 tons of coal were produced and carried on the DMU belt on the midnight shift prior to the inspection on Tuesday, May 29, 2007. The credible record shows that this would have been insufficient to create the 140 foot accumulation observed by the inspectors. The belt had been idle for three days prior to the inspection because of Memorial Day weekend May 26, 27, and 28, 2007. On Friday, May 25, 2009, Respondent produced more than ten times the amount it did on the midnight shift May 29, 2007 (Govt. Exh. 5 at pp. 5, 6 of 13). Over 1,600 tons of coal had been produced which could have created sufficient carry-back spillage to result in the condition observed by Inspector Ross. This evidence, alone, is sufficient to establish high negligence and unwarrantable failure.

I further find that Respondent was on notice that greater efforts were required to comply with the cited standard. Inspector Ross cited the same DMU belt twice within the prior two months for other serious accumulations. He issued Order No. 7100729 on March 30, 2007 and Citation No. 7100732 on April 9, 2007 (Gov't Exhs. 6 and 7). Mr. Barker was in charge of the DMU through this period. Ross held a meeting with mine management, including the superintendent, mine foreman, and safety director, on April 3, 2007, prior to the subject quarterly inspection and emphasized the need to keep the DMU conveyor unit clean and to prevent accumulation of coal. In addition, Respondent received 104 citations and orders for violations of 30 C.F.R. § 75.400 in the fifteen months prior to the subject order (Gov't Exh 15). This evidence, alone, is sufficient to establish high negligence and unwarrantable failure.

Finally, it is apparent that Respondent's Project Engineer/Foreman, Brooks Barker, had actual knowledge of the cited accumulation under the DMU belt. Barker told the inspectors that the DMU conveyor belt was having ongoing spillage problems because the belt scrapers were not removing the smaller particles of coal from the belt. He stated that he had therefore removed the belt scraper (10 days earlier, on May 19, 2007) and sent it to an outside contractor for modification. When the inspectors asked where the scraper had been positioned before it had been removed, Barker stated that it was located where the accumulation was. Significantly, Barker had just arrived on the section and had not yet arrived at the cited area. Despite his awareness of the spillage problem, Barker allowed production to continue while waiting for the scraper to return from the contractor. Indeed, Barker stated that the spillage problem pre-dated the first two citations Respondent received on the DMU on May 30, 2007, and April 9, 2007. This evidence is sufficient

to independently establish high negligence and unwarrantable failure. Under the circumstances it is clear that the Secretary has sustained her burden of proving that the violation at bar was the result of high negligence and unwarrantable failure.

Citation Number 7100823

This citation, issued by Inspector Ross on May 29, 2007, under Section 104(a) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1722(a) and charges as follows:

The return wire rope pulley for the miner cable tensioner on the 10-D Section DMU coal conveyor unit is not provided with a guard to prevent persons from coming in contact with the pulley. The pulley is 14 inches in diameter, 24 inches off of the mine floor, and directly along the side the 10-D Section belt travelway. The travelway is 36 inches wide at this location. Miners are required to walk the belt each shift to conduct an examination.

The cited standard provides that "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

During his inspection on May 29, 2007, Inspector Ross observed that the return wire rope pulley on the DMU coal conveyor unit was unguarded. There is no dispute that the pulley had never been guarded and that it was provided by the manufacturer without guarding. The pulley was located alongside the walkway where miners travel and the walkway was about thirty-six inches wide at this point. This walkway was also muddy and slippery thereby, according to inspector Ross, increasing the risk that miners could slip and fall into the pulley (Govt. Exh. 4 p.3 of 8 and Gov't Exh. 8).

Within this framework of credible evidence it is readily apparent that the cited pulley "may be contacted by persons and which may cause injury to persons" thereby requiring guarding. I do not find, however, that the violation was "significant and substantial" or was the result of high negligence. I find that the Secretary has failed to sustain her burden of proving that there was a reasonable likelihood that the hazard contributed to would result in an injury and a reasonable likelihood that the injury in question would be of a reasonably serious nature. In this regard, it is undisputed that the cited pulley is generally stationary and when it moves it travels very slowly i.e. .85 miles per hour. There is also credible evidence that some protection was provided by the design and location of the troughs. Finally, there is evidence that MSHA inspectors including Inspector Ross had examined the section at issue on five occasions between March 30, 2007, and May 29, 2007, and failed to find any violation regarding the subject pulley. If, indeed, there had been such a serious hazard at this location it is unlikely that it would have repeatedly been overlooked by experienced MSHA inspection teams. Indeed, another violation was cited at the very same location on April 26, 2007, (Citation number 6604312) which required guarding along the DMU and past the location of the pulley in question.

As previously noted, I also find that the violation was the result of low to moderate negligence. Respondent relied in part on the fact that the manufacturer did not provide any guarding at the cited pulley, and the fact that some guarding had been provided by the design and location of the troughs located in front of the pulley. In addition, MSHA inspectors themselves during five recent prior inspections, including one at the very same location of the DMU conveyor unit, had not seen fit to have cited or even warned the Respondent of what has now been deemed by the Secretary to have been a "significant and substantial" violation. The violation alleged in Citation Number 7100823 and the penalty proposed by the Secretary for that citation must accordingly be modified.

Order Number 7100827

This order, issued on May 29, 2007, under Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.360(a)(1) based on the findings of Inspector Ross that the preshift examination for the day shift on May 29, 2000, was inadequate because there was a failure to record two hazardous conditions, namely, the unguarded return wire rope pulley on the DMU coal conveyor unit (Citation Number 7100823) and the accumulation of combustible material existing over 140 feet from the 14 ½ block to the 15 ½ block under the DMU conveyor (Order No. 7100826).

The cited standard provides in part as follows:

Except as provided in paragraph (a)(2) of this section, 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. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

As previously discussed in connection with the underlying order (No. 7100826), the coal accumulation was extensive and Consol had been cited twice before within a two month period for serious accumulations at the same locations (Govt. Exh. 6 and 7). In addition, Inspector Ross had met with Consol management on April 3, 2007, prior to the subject inspection and emphasized the need to keep the DMU conveyor unit clean to prevent the accumulation of coal. Finally, as previously discussed, Respondent's own project engineer/foreman, Brooks Barker, had actual knowledge of the accumulation but did not ensure that it was recorded and/or addressed. Under the circumstances, it is clear that the Secretary has met her burden of proving the violation herein.

For this same reasons that the underlying violation was found to be "significant and substantial" the instant violation was also "significant and substantial". The failure to report and correct such significant and hazardous violations is likewise a "significant and substantial" violation. The violation herein was also the result of high operator negligence and "unwarrantable failure" to comply with the cited standard. The Respondent's mine examiners are agents of the operator and their failure to report the extensive coal accumulation is properly imputed to the Respondent.

Rochester and Pittsburgh Coal Company 13 FMSHRC189, 195-196 (February 1991). For the reasons previously stated with respect to the underlying violation, failure to report that violation was also the result of high operator negligence and "unwarrantable failure".

Order Number 7100548

This order, issued on February 27, 2007, under Section 104(d)(2) of the Act, alleges another "significant and substantial" violation of the standard at 30 C.F.R. § 75.360(a)(1) and charges as follows:

The pre-shift examination for methane and hazardous conditions that was conducted on 02/27/2007 for the day shift crew on the 8-D longwall, 062-0 MMU section is inadequate in that the hazardous conditions described in violation #7100547 were not reported in the operators records of examinations and had not been corrected at the time of this inspection. The following conditions were obvious to this inspector as soon as he entered the effected [sic] areas. The record book indicates that only condition that exist [sic] is the area from #53 block to #50 block needs dusted, this condition has been entered in the record book for the past 9 shifts. The listed conditions would be obvious to any prudent person especially examiner's charged with the responsibility of conducting an examination of the mine. The mine operator was previously put on notice for the same type of conditions. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

MSHA inspector Ronald Postalwait testified that on February 27, 2007, he inspected the 8-D longwall belt, 062-0 MMU section at the mine as a part of a regular quarterly inspection and five day spot inspection for methane. Postalwait was accompanied on his inspection by UMWA safety representative Samuel Woody and Respondent's safety representative John Larry. The longwall belt transfers large amounts of coal from the longwall to the surface.

Postalwait observed what he considered to be large accumulations of loose coal and coal dust along the belt stretching over 3,500 feet. On the basis of these accumulation, he issued Order No. 7100547 for a violation of 30 C.F.R. § 75.400. This order was settled prior to trial and is now a final order of the Commission. The facts underlying Order No. 7100547 are therefore established for purposes of these proceedings and cannot now be challenged. *Peabody Coal Co.*, 11 FMSHRC 2068, 2092 (October 1989); *Ranger Fuel Corp.*, 10 FMSHRC 612, 617-619 (May 1988). In any event, an independent review of the facts supports the violation herein as charged.

Inspector Postalwait issued Order No. 7100547 for a Section 104(d)(2) violation of 30 C.F.R. § 75.360(a)(1) because the hazardous belt accumulations were not recorded in the day shift preshift examination report. The preshift was performed between 5:00 a.m. and 7:00 a.m. that morning by Michael Fleece. Postalwait discovered the accumulations at approximately 11:15 a.m. According to the credible testimony of Postalwait, the accumulations he observed were extensive. Loose coal and coal fines extended from the 64 block to the 62 block and from the 53 block to the 48 block.

The accumulations were on both sides of the belt and measured from two inches to five inches deep. The combined width of the accumulations varied from one foot to three feet. Coal dust accumulations stretched from the 64 1/4 block to the 57 block, from the 53 block to the 48 block, and from the 42 block to the 39 block. Both the loose coal and coal dust accumulations were black in color and powder dry. UMWA representative Woody agreed with his description of the accumulations. Woody's contemporaneous notes further corroborate the testimony.

Based on the credible and corroborated testimony, I find that the accumulations cited were obvious. The coal dust accumulations stood out because they completely blackened the previously rock-dusted surfaces in the entry including the mine floor, ribs, belt structure, water line, and roof supports straps. There were also footprints in the coal dust in the walkway which were in plain view. Woody agreed with the inspector and testified that the conditions were very obvious.

Postalwait opined that the accumulations had existed for more than a shift and should have been observed and reported by the preshift examiner. He concluded that the loose coal accumulations had been formed by belt spillage. He noted that coal from the belt is wet because of the water sprayed at points along its length used to keep dust down. However, when he examined the accumulations by hand he found that they were dry throughout. According to the credible testimony by Postalwait it would have taken more than one shift for the loose coal to have dried out to the extent he observed. Furthermore, he observed that the air flow in the belt entry was low (approximately 70 feet per minute) and he concluded therefore that it would have taken more than one shift for this air flow to dry the accumulations. He opined moreover that it would have taken more than one shift for this air flow to have spread the coal dust over the 3,500 foot area. Woody agreed that the accumulations had existed prior to the preshift examination and that the examiner should have observed and reported them.

The credible evidence also shows that the accumulations has been created some time before and had been left uncorrected. According to Postalwait, when he observed the accumulations, no spillage was being created by the belt. Mr. Woody agreed and testified that the belt was running true during the inspection. According to the credible evidence there were no defects that were creating coal dust at the time either. In addition, the bearings that had fallen out of five defective rollers cited by Postalwait had been completely covered by coal dust. The loose coal accumulations had also been covered with coal dust. Therefore the accumulations and defective rollers had not been created simultaneously. The loose coal accumulation and defective rollers had occurred even earlier than the coal dust accumulation. Within this framework of credible evidence, it is clear that the accumulation had existed well before the day shift preshift examination of February 27, 2007, that the conditions were obvious and accordingly, that the violation is proven as charged. Indeed, Respondent's safety representative, Mr. Larry, acknowledged during the inspection that the conditions cited by the inspector were a violation and should have been reported by the examiner. For the reasons cited in the Secretary's post hearing brief I can give Mr. Larry's exculpatory testimony at hearings but little weight.

I also find that the violation was "significant and substantial" and of high gravity. Respondent's failure to report the accumulations in the longwall belt entry clearly exposed miners to serious hazards. Five belt rollers from the 60 block to the 57 block were missing bearings in the midst of one of the cited coal dust accumulations. The bearings had failed and fallen out of the rollers. The rollers were turning metal-on-metal on the inner shaft and both the shaft and the rollers had turned a bluish color from the frictional heating. Indeed, Respondent's examiner, Mike Fleece, agreed at trial that a blue color indicated that the metal had been heated. Inspector Postalwait has seen rollers in this condition produce sparks and ignite coal. Sparks from the rollers would likely also have ignited the coal dust on the mine floor below and on the belt structure. Furthermore the rollers would likely also heat up the belt and ignite the coal dust on the belt structure. UMWA representative Woody also agreed that the rollers presented an ignition source to the coal dust around them.

The conditions in the mine made the likelihood of a fire great. This is a gassy mine and the presence of methane could exacerbate any belt fire. Postalwait measured 0.45% methane at the 63 block in the longwall belt entry. The coal dust accumulations below and around the defective rollers presented an enhanced risk of fire. The evidence confirms that these smaller particles of coal are easier to ignite and, once started, can ignite larger pieces of coal.

The credible evidence also establishes that a number of miners would have been exposed to serious injury from a belt fire. Examiners, belt cleaners, maintenance crew and other miners travel and work on the belt. The stage loader operator was also just in by the accumulations and would also have been affected by a fire. Finally, if a fire affected a ventilation control, the smoke from the fire could travel to the face and endanger the face crew and miners fighting a fire would also have been exposed to injury. Miners would likely sustain burns, smoke inhalation, and carbon monoxide poisoning. While I have not disregarded the exculpatory testimony of Mr. Larry, again, for the reasons stated in the Secretary's brief, I can give that testimony but little weight.

I also find that the violation was the result of high negligence and "unwarrantable failure". The credible evidence is that the accumulations were extensive and obvious. The loose coal and coal dust accumulations extended from block to block over the 3,500 foot total length of the area. The loose coal was up to three feet wide including both sides of the belt and were up to five inches deep. Furthermore, the cleanup required eight miners working for almost four hours.

The credible evidence also establishes that the accumulations had existed for more than a shift, had not been addressed and that they posed a high degree of danger to miners. Moreover, Respondent had previously been placed on notice concerning problems with accumulations and with inadequate preshifts. Inspector Postalwait credibly testified that he specifically discussed the issues with the mine management including the superintendent during the previous two quarterly inspections. In addition, the Respondent had received 16 citations/orders for violations of 30 C.F.R. 75.360(a)(1) and 114 for violations of 30 C.F.R. 75.400 in the fifteen months prior to the issuance of the subject order.

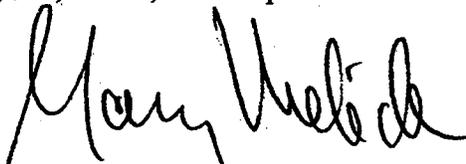
Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business.

The parties have stipulated to four of the six penalty criteria i.e. the size of the business, the history of previous violations, the good faith of the operator in obtaining compliance after the issuance of the charging documents at issue, and the effect of the penalties on Respondent's ability to continue in business. Respondent produced 67,404,718 coal in 2006 including 6,383,219 tons at the subject mine. Respondent is accordingly a large mine. Respondent has been assessed for a total of 851 charging documents based upon 689 inspection days in the 15 months immediately preceding the issuance of charging documents Nos. 7100823, 7100826 and 7100827. Respondent received a total of 973 charging documents based on 762 inspection days in the 24 months immediately preceding the issuance of Order No. 7100548. There is no dispute that Respondent demonstrated good faith in obtaining compliance after the issuance of the charging documents at issue herein. Respondent does not contend that even the proposed penalties would affect its ability to continue in business. The negligence and gravity of the violations at issue have been discussed herein.

ORDER

Order Numbers 7100826, 7100827 and 7100548 are affirmed as written with civil penalties of \$60,000.00, \$20,300.00, and \$7,000.00 respectively. Citation Number 7100823 is hereby modified to delete the "significant and substantial" findings but is otherwise affirmed with a civil penalty of \$300.00. The noted penalties, totaling \$87,600.00, shall be paid within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
202-434-9977

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 23, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2008-721-M
Petitioner	:	A.C. No. 32-00837-159178-01
	:	
v.	:	Docket No. CENT 2008-722-M
	:	A.C. No. 32-00837-159178-02
BEYLUND CONSTRUCTION, INC.,	:	
Respondent	:	Mine: Crusher

DECISION

Appearances: Ronald Goldade, Conference and Litigation Representative, U.S. Dept. of Labor, Denver, Colorado on behalf of Petitioner.
Steve Beylund, President, Beylund Construction Inc., Bowman, North Dakota on behalf of Respondent.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), Mine Safety and Health Administration ("MSHA") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), charging Beylund Construction, Inc. ("Beylund") with a total of 18 violations of mandatory standards and proposing penalties totaling \$4,059 for those violations. The general issue before me is whether Beylund violated the cited standards, and if so, what is the appropriate civil penalty to assess in accordance with section 110(i) of the Act.

Beylund operates a scoria pit and crusher at its location in Ward County, North Dakota. The parties submitted signed joint stipulations in which they agreed that, among other things, the operation is a "mine" as defined by the Act, that the mine affects interstate commerce, that all persons working at the crusher are "miners" within the meaning of the Act, and that the Commission has jurisdiction to hear this case.

Prior to the hearing, the parties initiated a conference call with the Court. Mr. Steve Beylund represented Beylund Construction, and the Secretary was represented by a Conference and Litigation Representative ("CLR"). Mr. Beylund explained during the call that he preferred for the Secretary to put on her case without him present, and suggested that he show up later for

an hour to explain his side. He further explained that he didn't have a quarrel with the citations that were issued, but wanted his day in court to protest the fact that MSHA was able to come onto his property over his objection. I explained the purpose of the hearing to Mr. Beylund and instructed him to bring any documents or photographs that he believed would help explain his position, including any financial documents if he thought that his ability to pay the civil penalties was an issue.

At the outset of the hearing, Mr. Beylund again expressed his position that he had no real issue with the violations as issued by the MSHA inspector. The parties signed and submitted a stipulation that included provisions admitting that each violation occurred as set forth in the citation. (Tr. 8, Ex. 27). When questioned, Mr. Beylund was unclear about what he had signed and about what he intended to explain to the Court. Therefore, it was determined that the Secretary's witness, MSHA inspector Shane Julien, would testify as to each violation and Mr. Beylund would then have the opportunity to ask questions and respond. During the course of the hearing, Mr. Beylund once again stated that he admitted the violations and did not want to proceed through each of the 18 citations that were issued, and instead preferred to use his time to voice his dissatisfaction with MSHA. (Tr. 76-77).

Findings of Fact

Beylund Construction, Inc. operates a scoria pit and crusher in remote North Dakota. In 2007 an MSHA inspector discovered the Beylund pit and crusher operation after noticing a number of Beylund trucks hauling material near Bowman, North Dakota. Because no one was present at the mine, the inspector left his business card on the fence. (Tr. 19). In January 2008, Mr. Beylund called the MSHA office in Rapid City, South Dakota. The office supervisor, Inspector James Weisbeck, testified that he spoke with Mr. Beylund on the phone and explained the MSHA requirements at that time. (Tr. 19-21).

Inspector Weisbeck informed Mr. Beylund of, among other things, what MSHA had to offer to small operators, the purpose of MSHA, how inspections worked, and who was subject to the Mine Act. Further, Weisbeck offered to conduct a courtesy inspection at the mine and help Beylund come into compliance with MSHA regulations. Mr. Beylund refused the offer and replied that he wanted nothing to do with MSHA or its inspectors. (Tr. 22-24, 82).

Several months after the conversation between Weisbeck and Beylund, MSHA Inspector Shane Julien returned to the Beylund scoria pit. The Beylund operation, as observed by the inspector, consists of a surface scoria pit, crusher plant, dozer, back hoe, excavator, haul trucks and other heavy equipment. (Tr. 42). On the day of Julien's visit, there were three employees working at the operation, including Mr. Beylund and his son. Julien testified that he "observed that the mine was loading trucks, doing maintenance, [and] cleaning up around the operation." (Tr. 32-33).

As inspector Julien and an MSHA inspector trainee were entering the mine site, they encountered a pickup truck carrying Mr. Beylund, his son, and another Beylund employee. (Tr. 35, 43). The inspectors explained the MSHA inspection scheme and the right of the inspectors to enter the mine to conduct an inspection. Mr. Beylund was not welcoming. He raised his voice and told the inspectors that the mine had been sold and they could not conduct an inspection. Again, the inspector explained the Mine Act and the inspector's right to be on the property, but Mr. Beylund denied them entry. (Tr. 36, 39). The inspectors left, traveled a short distance down the road, and stopped to call the MSHA field office about the denial of entry. Shortly thereafter, Mr. Beylund approached the inspectors, acknowledged that his lawyer had informed him that MSHA could enter without a warrant, and told the inspectors they could return to the mine and inspect. (Tr. 36-37).

The inspectors returned to the mine and conducted a regular inspection of the pit and the crusher operation. They took notes and photographs of each violation and explained them to Mr. Beylund during the close out conference. The inspectors observed the scoria pit, the crusher, an excavator, dozers, back hoe, and several trucks. It appeared that the mine crushed the scoria for several days at a time, and then loaded it on the haul trucks to be delivered. The inspectors discovered that Mr. Beylund, his son, and one other employee did the bulk of the work at the pit and the crusher. As a result of the inspection, sixteen citations and two orders were issued, including citations for failing to properly guard equipment, failure to file a mine identification, and failure to train any person who worked at the mine. (Tr. 42). Subsequently MSHA issued eight 104(b) orders for failure to abate a number of the violations in a timely manner. At the time of the hearing, one citation, number 6327959 citing a violation of 30 C.F.R. § 46.5(a) was not abated. The citation was issued because "[t]wo miners, Steve Beylund and Michael Beylund, had not received the MSHA required 24 hour new miner training within 90 days after beginning work at the mine." (Ex. 10).

As indicated above, Mr. Beylund had no quarrel with the violations as issued but used the opportunity to tell the Court about his experience with MSHA and his difficulty with the inspection. At one point during his testimony Mr. Beylund acknowledged that he had operated the pit and the crusher for at least three years. At another point, he attributed a longer operational time frame for the pit and crusher. Mr. Beylund was not consistent in his testimony and I question his credibility. Since Mr. Beylund agreed that the violations as issued are correct, I will not address each citation. Instead, I will briefly address Mr. Beylund's arguments regarding jurisdiction and the amount of penalty to be assessed for each violation.

Conclusions of Law

Mr. Beylund first argues that he didn't understand the law and therefore cannot be found "guilty" of these violations. He declared a number of times that he's not a criminal, and did nothing wrong. (Tr. 84). At the same time, Mr. Beylund argued that if the mine doesn't size the material "then he is home free." In other words, on one hand, he said he didn't understand the

law, while on the other, he argues that if the crusher is not in operation, he does not have to comply with the law. (Tr. 85, 91). I find that while Mr. Beylund may not have been familiar with all MSHA standards, he was certainly aware that he could be subject to MSHA regulation. His view is, if MSHA does not catch him, then he is not subject to the law. Mr. Beylund cannot plead ignorance of the law while at the same time trying to avoid it, or develop his own theory about when he does and does not have to comply. Further, MSHA supervisor James Weisbeck had told Mr. Beylund at least six months prior to the inspection that Beylund was subject to MSHA regulation. If he was not aware of the law for the three or more years while he was operating, he certainly became aware six months before the inspection when he was offered assistance to come into compliance. Beylund's response to the offer of assistance by Supervisor Weisbeck was that he didn't want anything to do with MSHA and that MSHA could "catch [him] if [it] can." (Tr. 19).

Mr. Beylund made no effort to learn the law, but instead did everything he could to avoid it. His lack of specific knowledge and his actions to avoid MSHA do not excuse the violations. First, as a general matter, the Mine Act is a strict liability statute. As such, the Mine Act assesses liability without regard to the individual operator's fault. *International Union, UMWA v. FMSHRC*, 840 F.2d 77, 83 (D.C. Cir. 1988). However, fault may be considered in setting the level of the civil penalties by considering whether the operator was negligent. 30 C.F.R. § 100.3. When a person operates a mine, it is his duty, at a minimum, to make an inquiry regarding his status and the safety standards he is expected to meet.

Beylund's next argument, that MSHA should not have the right to enter the property without a warrant, also fails. (Tr. 88). It is well established that MSHA can and must enter any mine to conduct the inspections required by the Act. The Act provides for such entry. 30 U.S.C. § 813. Safety concerns and enforcement needs justify warrantless inspections of mines. *Marshall v. Texoline Company*, 612 F.2d 935 (5th Cir. 1980). While Mr. Beylund did not like the fact that MSHA had the right to enter his property without a warrant, he agreed, after speaking to his attorney, that the law gives that right to the MSHA inspectors. He presented no legal reason for his argument regarding the warrantless search except to say that the government should not have such a right.

The primary thrust of Beylund's defense is that MSHA has no jurisdiction over the pit and crusher operations, unless the plant is in operation at the time the inspectors arrive. (Tr. 88). Mr. Beylund maintains that if he operates the crusher, and MSHA does not catch him operating, then he cannot be issued any citations. Consequently, he was operating on Saturdays and Sundays in order to avoid an MSHA inspection. (Tr. 83). The Secretary argues that the extraction of scoria and operation of the crusher brings the facility within the Act's definition of a mine, and therefore the equipment, facilities, and employees are all subject to MSHA's jurisdiction.

Beylund commenced crushing operations at this site at least three years ago. (Tr. 27). Beylund did not request a mine identification or seek to come into compliance with MSHA regulations at start up. The scoria pit operated for a number of years without MSHA notice and Mr. Beylund admits that he often operated on Saturdays and Sundays because he knew that

MSHA inspectors did not work on those days. Mr. Beylund urges the Court to vacate the citations that were issued because the mine was not sizing rock, and therefore was not operating at the time the inspectors arrived. He averred that MSHA would have to catch him operating and believed that until it did, it could not inspect the premises. He did not argue that his operation was outside of MSHA jurisdiction, but simply that jurisdiction only applied if the pit and crusher were in operation.

The legislative history of the Act makes clear that Congress intended that the Act's coverage provisions be interpreted broadly. The Senate Committee report emphasized that "what is considered to be a mine and to be regulated under this Act [should] be given the broadest possible interpretation, and . . . doubts [should] be resolved in favor of inclusion of a facility within the coverage of the Act." 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 and Health Act of 1977* at 602 (1978). The Commission and the courts have recognized this broad Congressional intent and have applied the Act's provisions to a wide variety of mining operations, including mining and crushing facilities similar to those at Beylund's site. *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979) (facilities for processing of material dredged from a river bed were within the Act's definition of the term "coal or other mine"); *W.J. Bokus Ind.*, 16 FMSHRC 704 (Apr. 1994) (equipment in garage used by both the operator's sand and gravel mine and asphalt plant is subject to the Mine Act's jurisdiction); *Marshall v. Cedar Lake Sand and Gravel Co., Inc.*, 480 F.Supp. 171 (E.D. Wisc. 1979) (pit from which sand and gravel are removed falls squarely within the Act's definition of a mine); *Marshall v. Gilliam*, 462 F.Supp. 133 (E.D. Mo. 1978). A small, family-run gravel business was held to be a mine and MSHA's jurisdiction to inspect and enforce the Act was upheld as to a gravel pit, screening plant and equipment used, or that had been used, in the operation. *Jeppesen Gravel*, 30 FMSHRC 324 (Apr. 2008) (ALJ).

Several aspects of Beylund's operation clearly fall within the Act's definition of a mine. The removal of scoria from its natural deposits in the pit, crushing and sizing the rock, and transporting the rock, all constitute mining. (Tr. 42, 90). Mr. Beylund, his son, and another employee extracted minerals from the pit, crushed the rock, and then loaded the rock onto the haul trucks. Beylund maintained and repaired mining equipment, including a dozer, back hoe and crusher. Whether specific items that were cited, such as gas cans or oxygen cylinders, were actually used in mining activities, the presence of those items in the area where miners worked mandated that Beylund comply with MSHA's regulations. *W.J. Bokus Ind.*, 16 FMSHRC at 708-709; *Marshall v. Gilliam*, 462 F.Supp. at 135.

While the crusher is only operated on an "as needed" basis, it was evident that it had recently been operated and that the pile of scoria recently crushed was being loaded onto the trucks and transported. The site was being cleaned up from the most recent crushing operation. (Tr. 42). Equipment and facilities that are available for use by miners must be maintained in compliance with applicable safety standards, and are subject to inspections whether or not they are actually being used at the time. See, e.g., *Ideal Basic Ind., Cement Div.*, 3 FMSHRC 843 (Apr. 1981) (equipment located in a normal work area and capable of being used must be in compliance with safety standards).

I further find that additional factors buttress MSHA's assertion of jurisdiction. First, when resolving jurisdictional questions of this sort, the benefit of the doubt goes to the Secretary. As the Commission stated in *Watkins Eng'rs & Constructors*, "Congress clearly intended that . . . jurisdictional doubts be resolved in favor of coverage by the Mine Act. 24 FMSHRC at 675-676 (citing 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 and Health Act of 1977*, at 602 (1978)).

A second related factor is that the courts and, by implication, the Commission and its judges, have been reluctant to second guess the Secretary when she makes choices involving MSHA and OSHA coverage. She is the one whose duty it is to administer the acts, and when, in the course of her administration, she makes informed and reasoned jurisdictional determinations, judicial decision makers have been wary of overruling her. See *Watkins Eng'rs & Constructors*, 24 FMSHRC at 672-673, 676.

For all of these reasons, Beylund's challenge to MSHA jurisdiction must fail. Finding no merit to any of the defenses raised by Beylund, the citations are affirmed as issued.

Penalty

I conclude that the penalties initially proposed by the Secretary would not adequately effectuate "the deterrent" purpose underlying the Act's penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). I reach this decision based upon my conclusion that Beylund did everything it could to avoid MSHA inspection, and for years operated on days Mr. Beylund felt MSHA would not find the crusher in operation. In addition, Mr. Beylund suffered life-threatening injuries when he fell from the crusher and the same could have easily been the fate of other employees. Yet, he failed to abate the citations as required, and, as of the date of hearing, he and his son had not received the training necessary to operate the crusher and equipment safely.

The principles governing the authority of 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) 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. 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 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).

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*, 5 FMSHRC at 292. 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; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

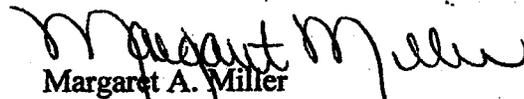
While I find no reason to question the degree of negligence and gravity assessed by the inspector and used by the Secretary in proposing the penalties in these two cases, I do, however, question Mr. Beylund's good faith abatement. Eight of the original eighteen violations were not abated within the time required by the citations. The most troublesome failure to abate concerns the training of employees at the mine. Training is so important to the safe operation of the mine and the serious injuries sustained by Beylund might have been avoided if he had been properly trained. The fact that a large number of citations were not abated in a timely manner, that most of the violations could have easily been abated within the time set, and that the training citation remains unabated, all weigh heavily on the determination of the increased penalties for those violations.

Beylund is a small operator and agreed that the penalties as assessed would not interfere with its ability to continue in business. Since Beylund had not been inspected prior to June, 2008, it has no history of violations. I find the following penalties appropriate in this circumstance.

Citation/ Order#	Standard	Reason for Change	S&S	Assessed Penalty	Final Penalty
6327943	41.11(a)	None	N	\$100	\$100
6327948	56.14107(a)	None	Y	\$270	\$270
6327949	56.12030	Failure to abate	Y	\$270	\$300
6327956	56.12028	None	Y	\$270	\$270
6327959	46.5(a)	Failure to abate	Y	\$971	\$1,000
6327960	46.6(a)	None	Y	\$897	\$897
6327944	56.12008	Failure to abate	N	\$112	\$120
6327945	56.11003	Failure to abate	N	\$112	\$120

6327946	56.14107A	Failure to abate	Y	\$121	\$140
6327947	56.12008	Failure to abate	N	\$112	\$120
6327950	56.14107A	None	N	\$100	\$100
6327951	56.16006	Failure to abate	N	\$112	\$120
6327952	56.4203	None	N	\$100	\$100
6327953	56.14132A	Failure to abate	N	\$112	\$120
6327954	56.18010	None	N	\$100	\$100
6327955	47.31A	None	N	\$100	\$100
6327957	50.30	None	N	\$100	\$100
6327958	46.3	None	N	\$100	\$100
Total				\$4,059	4,177

Consistent with this decision, it is **ORDERED** that Beylund Construction Inc., pay a total civil penalty of \$4,177 for the 18 violations contained in these dockets. Such payment shall be made within 30 days of the date of this decision.¹


Margaret A. Miller
Administrative Law Judge

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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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 30, 2009

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA),	:	
on behalf of LIGE WILLIAMSON	:	Docket No. KENT 2009-1428-D
Complainant	:	PIKE CD 2009-06
v.	:	
	:	
CAM MINING, LLC,	:	Mine ID 15-18911
Respondent	:	Number 28 Mine

AMENDMENT OF ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Feldman

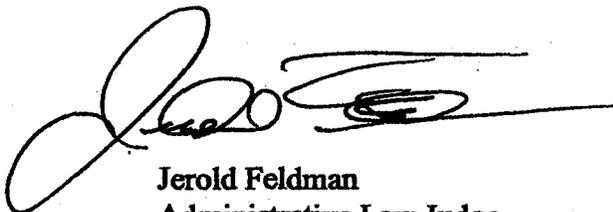
An Order of Temporary Reinstatement was issued on October 26, 2009, granting an application for temporary reinstatement filed by the Secretary, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2), against CAM Mining, LLC (CAM Mining) on behalf of Lige Williamson. The initial decision on the Secretary's application, following a September 2, 2009, evidentiary hearing, determined that the Secretary failed to satisfy her burden of demonstrating that the application for temporary reinstatement was not frivolously brought. 31 FMSHRC __ (Sept. 30, 2009) (ALJ). The Secretary appealed the initial decision. The Commission then reversed and ordered the retroactive reinstatement of Williamson effective as of September 30, 2009, the date of the initial decision. 31 FMSHRC __, slip op. at 8 (Oct. 22, 2009). Consistent with the Commission's remand, the October 26, 2009, Order of Temporary Reinstatement granted Williamson's reinstatement relief effective September 30, 2009.

The parties have now filed a joint motion to amend the Order of Temporary Reinstatement. The Secretary and CAM Mining have agreed to the method of computation that will determine Williamson's economic reinstatement relief as of September 30, 2009.

In view of the above, consistent with the terms of the parties' agreement, **IT IS ORDERED THAT** CAM Mining shall pay Lige Williamson his regular weekly rate of pay of \$24.00 per hour for 40 hours in addition to payment for 10 hours of overtime pay per week computed at the normal overtime compensation rate. The agreed total gross wages per week that Williamson shall be paid is \$1,320.00 retroactive to September 30, 2009, minus deductions for taxes and other items, if any, that were deducted during Williamson's

employment. The parties have agreed to the terms of the deductions for Williamson's health insurance premiums and the effective date of his health insurance coverage. In addition, all other benefits that Williamson was entitled to prior to his termination shall be restored effective September 30, 2009, including but not limited to his participation in CAM Mining's 401(k) employee benefit program.

Williamson's economic reinstatement shall not prejudice CAM Mining's right to contest Williamson's discrimination complaint that currently is being investigated by the Secretary. The Secretary should endeavor to complete, as soon as practicable, her investigation so that this matter may proceed to an evidentiary hearing on the merits. If the Secretary, upon investigation, finds that the provisions of section 105(c) have not been violated, she shall file a motion to vacate this Order of Temporary Reinstatement. Alternatively, CAM Mining may move to vacate this temporary reinstatement order if the Secretary declines to prosecute Williamson's complaint pursuant to section 105(c)(2) of the Mine Act. *Peter J. Phillips v. A&S Construction Co.*, 31 FMSHRC __, Docket No. West 1057-DM (Sept. 9, 2009). If the Secretary elects to file a discrimination complaint on behalf of Williamson pursuant to section 105(c)(2) of the Mine Act, **IT IS ORDERED** that Williamson's economic reinstatement shall remain in effect until the merits of the Secretary's 105(c)(2) complaint becomes final.



Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

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/rps

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021

December 2, 2009

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA),	:	
on behalf of MARK GRAY,	:	Docket No. KENT 2009-1429-D
Complainant	:	BARB CD 2009-13
	:	
v.	:	
	:	
NORTH FORK COAL CORPORATION,	:	Mine ID 15-18340
Respondent	:	No. 4 Mine

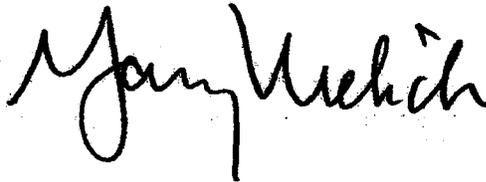
ORDER DISSOLVING ORDER OF ECONOMIC TEMPORARY REINSTATEMENT /
ORDER OF DISMISSAL

On September 8, 2009, the undersigned judge found that the Secretary's application for the temporary reinstatement of Mark Gray, under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (c)(2), was not frivolously brought and ordered his temporary reinstatement. Thereafter, on September 17, 2009, upon agreement of the parties, this judge ordered the economic temporary reinstatement of Mr. Gray. Respondent North Fork Coal Corporation subsequently requested that the economic temporary reinstatement order be terminated.

The Secretary stated in her response, filed Nov. 23, 2009, that on Nov. 20, 2009, she sent written notification to Mr. Gray that, as a result of her investigation of his "Section 105(c)" complaint, she had decided not to file a "Section 105(c)(2)" complaint on his behalf. Under the circumstances, the Order of Economic Temporary Reinstatement must be dissolved and this temporary reinstatement proceeding must be dismissed. *Secretary of Labor on Behalf of Peter J. Phillips v. A&S Construction Co.*, 30 FMSHRC 1119 (Nov. 2008)(ALJ Barbour), *aff'd* *Peter S. Phillips v. A&S Construction Co.*, WEST 2009-1057-DM, 2009 WL 2971140 (FMSHRC Sept. 9, 2009).

ORDER

The Order of Temporary Economic Reinstatement, issued on September 17, 2009, is hereby dissolved, and this proceeding is dismissed.



Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (By Certified Mail and Facsimile or E-Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 3, 2009

KNOX CREEK COAL CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. VA 2007-15-R
	:	Citation No. 7317341; 11/07/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. VA 2007-16-R
	:	Order No. 7317342; 11/07/2006
	:	Tiller No. 1
	:	Mine ID 44-06804
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. VA 2007-55
	:	A.C. No. 44-06804-119560
KNOX CREEK COAL CORPORATION, Respondent	:	Tiller No. 1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. VA 2008-215
	:	A.C. No. 44-06804-141359A
ERNEST B. MATNEY, Employed by KNOX CREEK COAL CORP., Respondent	:	Tiller No. 1

DECISION

Appearances: Lucy C. Chiu, Esq., Office of the Solicitor, U.S. Department of Labor,
Arlington, Virginia, for the Petitioner;
Timothy W. Gresham, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia,
for the Respondents.

Before: Judge Feldman

These consolidated civil penalty and contest proceedings concern a Petition for the Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, as amended ("the Act"), 30 U.S.C. § 820(a), by the Secretary of Labor ("the Secretary") against the respondent, Knox Creek Coal Company ("Knox Creek"). The petition seeks to impose a total civil penalty against Knox Creek of \$8,300.00 for two violations of Part 75, 30 C.F.R. Part 75, of the Secretary's mandatory safety regulations governing underground coal mines that the Secretary asserts are attributable to an unwarrantable failure.¹ The violations were cited as a result of a November 7, 2006, mine inspection.

The proceedings also concern a personal liability action brought by the Secretary under section 110(c) of the Act, 30 U.S.C. § 820(c), against Ernest B. Matney. The Secretary seeks to hold Matney personally liable for payment of a total civil penalty of \$2,700.00 for the two violations in issue. Section 110(c) of the Act provides that a corporate agent "who knowingly authorized, ordered or carried out . . . [a] violation" committed by a corporate operator may be subject to individual liability.

These matters were heard on June 2 through June 3, 2009, in Abingdon, Virginia. The parties' post-hearing briefs and replies are of record.

I. Statement of the Case

These consolidated matters concern two citations issued as a consequence of Mine Safety and Health Administration ("MSHA") Inspector Donald K. Phillips' November 7, 2006, inspection of Knox Creek's Tiller No. 1 underground mine facility. The citations are 104(d)(1) Citation No. 7317341 for failure to conduct an adequate preshift examination in violation of 30 C.F.R. § 75.360(a)(1), and, 104(d)(1) Order No. 7317342 for failure to protect personnel from roof and/or rib falls in contravention of 30 C.F.R. § 75.202(a). The violations were designated as significant and substantial (S&S)² and, as previously noted, the Secretary alleges the violations were the result of Knox Creek's unwarrantable failure. At the hearing, Knox Creek stipulated to the fact of the occurrence of the violations and to the fact that the violations are properly characterized as S&S in nature. (Tr. 81-82, 86-87, 284-85).

¹As a general matter, an unwarrantable failure occurs when a violation is caused by aggravated conduct rather than ordinary negligence. *Emery Mining*, 9 FMSHRC 1997, 2001 (Dec. 1987).

²Generally 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).

Thus, the only remaining issue concerning Knox Creek is whether the subject violations are attributable to an unwarrantable failure. As discussed below, the Secretary has demonstrated, by a preponderance of the evidence, that the violations are unwarrantable because: the cited roof conditions posed a significant hazard as they included a sheared roof bolt located in an intersection in close proximity to an area of bad roof; the adverse roof conditions existed for at least several shifts; the cited dangerous roof sloughage was extensive and obvious in nature; Knox Creek had made no efforts to address the dangerous roof conditions; and Knox Creek was on notice that more thorough preshift examinations were required by its examiners by virtue of a previous citation that had been recently issued for an inadequate preshift examination.

With respect to the 110(c) personal liability action brought against Ernest B. Matney, to prevail, the Secretary must show that Matney, as a foreman in a position to protect employee safety, failed to act on the basis of information that gave him knowledge or reason to know of the existence of a hazardous violation. *Sec'y of Labor v. Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982). Although Matney's preshift examination was inadequate, in essence, the Secretary's 110(c) case against Matney is circumstantial in nature. Although denied by Knox Creek, the Secretary alleges that a crib had been installed to support the sheared roof bolt that was located in an intersection in close proximity to an area of bad roof. The Secretary asserts that the crib was either intentionally removed, or, accidentally knocked down. In any event, the Secretary maintains that the crib was not replaced intentionally because it interfered with the paths of scoops as they traveled through the subject intersection from their battery recharging stations to and from the face. Consequently, the Secretary believes that Matney knew, or should have known, that a crib was required, and, that his failure to note the missing crib during his preshift examination is an aggravating factor that gives rise to Matney's personal 110(c) liability.

As noted below, the inferences sought to be drawn by the Secretary do not demonstrate that it is more probable than not that a crib had been installed under the subject sheared roof bolt. Thus, the Secretary's evidence is inadequate to establish that Matney deliberately failed to note a hazardous roof condition that was known to him, or, that should have been known to him, during his preshift examination.³ As discussed herein, while Matney's preshift examination was inadequate, and a contributing factor in establishing Knox Creek's unwarrantable failure, the level of Matney's negligence does not give rise to 110(c) liability. Consequently, the Secretary has failed to show that Matney is liable because he "knowingly authorized, ordered or carried out" the subject violations. Accordingly, the case brought by the Secretary against Matney shall be dismissed.

³ Personal liability under section 110(c) requires more than the typical "knew or should have known" standard that evidences ordinary negligence. As discussed *infra*, the "should have known standard" for personal liability is analogous to ignoring available facts that disclose the existence of a hazardous condition. *See Roy Glen*, 6 FMSHRC 1583, 1586 (July 1984). Here, the evidence is inadequate to demonstrate that Matney knew that a crib had been installed.

II. Findings of Fact

Knox Creek, a subsidiary of Massey Energy Company, operates the Tiller No. 1 underground coal mine located in Tazewell County, Virginia. Coal is extracted during two production shifts, and there is one maintenance shift. (Joint Stip. 6; Tr. 265-267).⁴ The area of the mine that is the subject of these proceedings is the 005 MMU as it existed on November 7, 2006. The 005 MMU is also referred to as the No. 3 section. The area consists of the No. 3 and the No. 4 entries, and the crosscut between these entries in the general vicinity of the area located in an inby direction from survey stations 8050 to 8045. (App. I).⁵ In this area, Knox Creek utilized the room and pillar method. The relevant provisions of the roof control plan limited the entry widths to 20 feet. Roof bolts were required, four across between the ribs, on four foot centers. Each roof bolt is driven into the roof through a six inch washer-like bearing plate that compresses a larger 10 to 12 inch "pizza pan" plate that supports the draw rock in the surrounding area of the bolt. The pillar dimensions were 40 to 45 feet square, mined on 60 to 65 feet centers. Thus, consistent with the approved roof control plan, the widths of the entries and crosscuts in the 005 MMU were 18 to 20 feet. The height of the crosscuts and entries was approximately six feet.

a. Initial Development in the Vicinity of Survey Stations 8045 and 8050

Knox Creek originally mined the area in the vicinity of survey stations 8045 and 8050 approximately three to four months prior to the November 7, 2006, inspection in issue. (Gov. Ex. 7; Tr. 235, 279-280, 397). When this area was initially mined, there was a rock fall in the No. 3 entry that required the area to be dangered-off with two rows of cribs. (See App. I). In addition, there was a sheared roof bolt at the inby edge of the intersection of the crosscut inby survey station 8045 and the No. 3 entry. (See App. I). The sheared bolt was the second bolt from the left rib.⁶ Consequently, the sheared bolt was 8 feet from the left rib and 12 feet from the right rib. The damaged bolt was missing both the bearing plate and the "pizza pan" plate. Thus, the stripped bolt was not a source of any roof support. The area around the damaged roof bolt was rock dusted. Thus, the roof bolt apparently was damaged during the initial development of the area inby survey station 8045. After this area was mined and rock dusted, it remained idle for several months until November 2006, when battery chargers for scoops were moved into the area in preparation for further development inby.

⁴ The parties' agreed upon stipulations include general joint stipulations and stipulations of fact. The joint stipulations are cited by number. The factual stipulations are cited by page number. (Joint Ex. 1).

⁵ Government Exhibit 7 has been appended to this Decision as "Appendix I."

⁶ The crosscut ribs are identified herein as "left" and "right" from the perspective of viewing the crosscut in an inby direction. (See App. I).

b. Prior Notice Regarding Inadequate Preshift Exams

The parties have stipulated that a citation was issued to Knox Creek on October 31, 2006, for an alleged inadequate preshift examination at the 002 MMU. (Joint Stip. p. 6; Tr. 428). To terminate this citation, all of Knox Creek's examiners, including Ernest Matney, Christopher Stiltner, and Charles Riordan, the three 005 MMU section foreman who testified in these proceedings, were retrained on preshift examinations. The retraining occurred shortly after October 31, 2006, less than one week prior to the issuance of the November 7, 2006, citations in issue. (Tr. 428).

c. Planning and Placement of Battery Chargers

Approximately four days after the issuance of the October 31, 2006, citation for an alleged inadequate preshift examination in the 002 MMU, the three 005 MMU section foremen began inspecting the intersection at the 8045 survey station in preparation for advancement inby. Night shift foreman Riordan testified that on Saturday, November 4, 2006, he, day shift foreman Stiltner, and maintenance shift foreman Matney, determined that the best locations to place two scoop battery chargers were in the crosscut between the No. 3 entry and the No. 4 track entry, and, in the No. 3 entry to the right of the intersection at survey station 8045. (App. I; Tr. 222-23, 226). Riordan stated the three foreman traveled the area several times before deciding on the placement of the chargers because placement of the chargers was limited by the lost space in the vicinity of the rock fall in the No. 3 entry that had occurred when the area was initially mined. (App. I; Tr. 224, 227-28). All three foreman testified that they did not notice the sheared bolt in the intersection although they traversed the area several times before selecting the battery charger locations. (Tr. 252, 269, 321, 387). The two battery chargers were situated in the No. 3 entry and in the crosscut outby the 8050 survey station on Sunday evening, November 5, 2006, and/or Monday morning, November 6, 2006. (Joint Stip. p. 7; Tr. 223). The scoops operating from these battery chargers are approximately 10 feet wide and 25 feet long. For the purposes of this decision the scoop and charging station in the No. 3 entry has been designated as No. 1, and the scoop and charging station in the crosscut has been designated as No. 2. (See App. I).

d. Preshift and Onshift Examinations

Prior to November 7, 2006

After the battery chargers were placed in the No. 3 entry and crosscut, at least four preshift and onshift examinations of the 005 MMU were conducted. Matney conducted an onshift and preshift examination at 4:13 a.m. on Monday, November 6, 2006. Stiltner conducted an onshift and preshift examination during the November 6th day shift following Matney's maintenance shift. Riordan conducted an onshift and preshift examination on the evening of November 6, 2006. Finally, in the early morning hours of November 7, 2006, at 4:15 a.m., approximately five hours before Phillips issued the subject citations, Matney conducted his November 7, 2006, combined onshift and preshift examination that was completed 36 minutes

later at 4:51 a.m. None of the preshift or onshift examinations noted any of the hazardous roof conditions cited by Phillips in 104(d)(1) Order No. 7317342.

e. Matney's Preshift Examination

Matney testified that during the early morning hours of November 7, 2006, his crew was performing maintenance on a continuous miner at the intersection at survey station 8630, which was approximately seven crosscuts in by the No. 1 entry. Matney stated that approximately 38 loose crib blocks were used to prop up the mining machine. Specifically, approximately 20 blocks were placed under the miner, and approximately 18 blocks were used to support the head of the miner. Matney testified he instructed his crew to place the loose crib blocks between the cribs in the rock fall area in the No. 3 entry after they finished repairing the continuous miner. However, Matney testified that he did not know where the loose crib blocks were ultimately placed. (Tr. 338-39).

Matney began his preshift examination at 4:15 a.m. Matney checked approximately eight headers. After returning to his crew at the continuous miner, Matney traveled down to the power center, then to the belt drive, and ultimately to the No. 1 charger in the No. 3 entry where he initialed the date board at 4:39 a.m. Matney stated that he observed the intersection in the vicinity of survey station 8045 from the back of the No. 1 scoop that was parked next to the No. 1 charger. However, he did not walk through the intersection in the vicinity of survey station 8045, or to the rock fall area. The date board at the No. 1 charger was approximately 45 feet away from the survey station at 8045. Matney did not note sloughage and compacted material in the intersection of the crosscut and No. 3 entry observed by Phillips during his inspection several hours later. Day shift foreman Stiltner testified that his crew did not take scoop No. 1 off the charger in the No. 3 entry before Phillips inspected the area during the morning of November 7, 2006. Consequently, there is reason to believe that the compacted material on the mine floor immediately underneath the corner of the right rib existed prior to Matney's November 7, 2006, preshift examination because it apparently was caused by contact with the No. 1 scoop.

After signing the date board in the No. 3 entry Matney traveled down a crosscut parallel to the crosscut where the No. 2 scoop was located. Matney traveled to the belt drive, walked the track entry, and used a mantrip to travel down to the crosscut to the vicinity of the No. 2 battery charger. Matney signed the date board located in the crosscut in by survey station 8050 at 4:40 a.m., reflecting that the date board was signed one minute after the date board in the No. 3 entry was signed.⁷ Matney testified that he observed the intersection at survey station 8045

⁷ The accuracy of the times noted by Matney is suspect because it is difficult to imagine how Matney could traverse the area from the date board in the No. 3 entry to the date board in the crosscut in one minute. (App. I). In any event, Matney's preshift examination took 36 minutes, from 4:15 a.m. until 4:51 a.m., to complete.

from the date board at the No. 2 battery charger. The No. 2 scoop was not parked next to the charger during Matney's preshift examination. Rather, it was located near the disabled continuous miner in the intersection at survey station 8630.

Similar to his inspection of the roof conditions with cap light from the first date board in the No. 3 entry, Matney testified that he relied on cap light to view the 8045 intersection from the second date board located in the crosscut. The only reference to roof conditions in Matney's written November 7, 2006, preshift examination report was the remark "top shaggy." (Gov. Ex. 10 -10). Matney testified that he did not observe any of the adverse roof conditions that were subsequently observed by Phillips five hours later at 10:00 a.m.

f. Phillip's November 7, 2006, Inspection

i. Conditions at Track Entry Near
Survey Station 8050

On the morning of November 7, 2006, at approximately 10:00 a.m., Phillips traveled the track entry where he noted an area of approximately 6 to 12 inches that had sloughed off of the inby rib at the intersection of the crosscut and track entry. (App. I, "Area F"). Phillips determined that the distances from the rib of the first two roof bolts adjacent to this sloughed off area were 60 inches and 54 inches, respectively. The approved roof control plan required the first row of roof bolts to be no more than 48 inches from the rib. Phillips also observed roof cracks and loose roof material in this area. Phillips' concern was heightened because this was an area where personnel exited from the mantrip.

ii. Conditions at the No. 3 Entry Near
Survey Station 8045

After inspecting the sloughed rib near survey station No. 8050, Phillips traveled the crosscut inby to survey station No. 8045 where he observed roof cracks containing rock dust. Phillips checked a test hole in the vicinity of 8045 and found separation of approximately 49 inches. (App. I, "Area D"). In addition to separations in the roof, Phillips observed an old rock fall area in the No. 3 entry outby its intersection with the crosscut that was dangered-off and supported by two rows of cribs. Phillips observed that, in the first row of cribs, the three lowest timbers in the crib nearest the inby rib were dislodged, apparently as a result of having been struck by the No. 1 scoop as it turned right inby into the crosscut from the No. 3 entry. (App. I, "Area A"). The dislodged corner crib was particularly hazardous in view of its location, in a dangered-off area, near the intersection of the crosscut and the No. 3 entry.

iii. Sheared Roof Bolt in Inby Intersection
of Crosscut and No. 3 Entry

At the inby end of the intersection of the crosscut and No. 3 entry Phillips observed that the second roof bolt, located 8 feet from the left rib and 12 feet from the right rib, had been sheared off. (App. I, "Area B"). The severed bolt was covered with rock dust. The bearing plate and "pizza pan" used to support the draw rock were missing. Phillips testified that he observed marks that were brownish in color near the sheared bolt. (Tr. 119). Phillips believed the brown marks were beyond the area where the "pizza pan" would have been located. (Tr. 166). Phillips surmised the marks were made by a wooden wedge that was used to tighten a crib to the roof that had been installed as a substitute for the damaged roof bolt. Throughout these proceedings, Knox Creek has maintained that a crib had never been installed under this damaged roof bolt. (Tr. 293-96).

Phillips also noted approximately 30 loose crib blocks lying on the mine floor along the crosscut's left rib inby its intersection with the No. 3 entry. (App. I, "Area B"). The dimensions of a crib block are 6 inches in depth and 3 feet in width. (Tr. 120). The stacking of four crib blocks creates approximately one foot of crib height crib. (Tr. 121). Consequently, it would require approximately 24 crib blocks to construct a crib that was six feet high. Because of the brown roof marks he had observed, Phillips concluded that the loose crib blocks lying along the crosscut rib were the dismantled remains of a crib that had been installed to support the roof area surrounding the sheared bolt. (Tr. 122, 167).

As previously noted, the sheared bolt was located 8 feet from the left rib of the crosscut. If a crib that was 3 feet wide had been installed, it would result in approximately 10½ feet of clearance between the right rib and the end of the crib. The presence of the crib would preclude the scoops, that are 10 feet wide, from traveling through the intersection of the crosscut and the No. 3 entry to the face. Moreover, the scoops' access to the charging stations from the face could only be accomplished through the crosscut between the No. 2 and No. 3 entries. Access through the No. 4 entry was blocked because of the track. Access to the face through the No. 3 entry was blocked. Specifically, the inby portion of the No. 3 entry was blocked by No. 1 charger, and the outby portion of the No. 3 entry was dangered-off and blocked by cribs. Consequently, Phillips recognized Knox Creek had a motive to dismantle the crib, if it had been installed, to allow the scoops to travel from the face to and from their battery chargers. (Tr. 122, 127).

As noted, throughout these proceedings, Knox Creek has maintained that a crib had never been installed under this damaged roof bolt. (Tr. 293-96). In this regard, Matney testified that there was no crib installed under the damaged bolt at the time of his preshift examination during the early morning hours of November 7th. (Tr. 467). Consistent with Matney's testimony, night shift foreman Riordan, day shift foreman Stiltner, and maintenance superintendent Steve Addison testified they had never seen a crib supporting the roof in the area of the

damaged bolt. (Tr. 252, 306-307, 321, 520). Moreover, as previously noted, the existence of the damaged roof bolt was repeatedly overlooked during at least four preshift and onshift examinations conducted by Matney, Riordan and Stiltner that preceded Phillips' November 7, 2006, inspection.

To contradict Phillips' speculation that the loose crib blocks were the remnants of a dismantled crib, as previously discussed, Matney testified that the crib blocks located along the left rib were used to prop-up and repair a continuous mining machine that was located near survey station 8630 during the November 7, 2006, maintenance shift. (Tr. 339). After maintenance of the continuous miner was preformed, Matney stated he directed miners Dave Bullion and Aaron Pennington to place the crib blocks in the dangered-off area of the No. 3 entry so that they would not be run over by the scoops as they traveled to and from the battery chargers. Matney testified that despite his instructions, the crib blocks apparently were placed along the left rib of the crosscut inby the No. 3 entry. With respect to roof marks, although Addison did not recall seeing any marks, he speculated that the missing "pizza pan" could have caused the roof marks described by Phillips. (Tr. 504).

iv. Sloughed-Off and Compacted Material at the Right Rib of the Crosscut

Phillips observed the inby corner of the right rib of the crosscut in the intersection of the No. 3 entry had sloughed off causing the first row of roof bolts to be 61, 58, and 64 inches from the rib in violation of the approved roof control plan that required the distance from rib to bolts to be no more than 48 inches. (App. 1, "Area C"). Phillips also observed that the sloughed material had been compacted on the floor reflecting that the material had been run over by the No. 1 scoop as it turned the corner from the No. 3 entry into the crosscut. Since there were four by four pallets of cinder blocks on the floor adjacent to the outby rib in the No. 3 entry, Phillips concluded that the No. 1 scoop would have had to hug the inby rib as the scoop approached the battery charger. (App. 1, "Area D"). This would expose the operator compartment of the scoop, which is located on the right hand side, to the corner of the rib that was compromised. As noted, day shift foreman Stiltner testified that his crew did not remove the No. 1 scoop from its charger prior to Phillips' inspection. Consequently, as previously discussed, the damaged rib and compacted material on the mine floor apparently existed at the time of Matney's preshift examination that occurred before Stiltner's day shift operations. (Tr. 480-483).

v. Sheared Bolt Near the No. 2 Battery Charger

Standing at the date board in the crosscut inby survey station 8050, Phillips observed a sheared roof bolt that was located over an outby corner of the No. 2 battery charger. The sheared bolt was four feet from the right rib. (App. 1, "Area E"). The charger receptacle was lying on the charger and had not yet been plugged into the No. 2 battery. Phillips was concerned that a miner would be exposed to the sheared bolt area when he attempted to attach the No. 2 battery to the scoop.

vi. Sloughed Right Rib Area Adjacent to
No. 2 Charger

Phillips also observed sloughage of the right rib in the area that was adjacent to the No. 2 charger. He determined the distance from the sheared bolt to the deteriorated rib was seven feet, indicating that three feet had fallen off of the rib. Riordan and Stiltner testified that they never observed this deteriorated rib condition during their preshift and onshift examinations. (Tr. 232-34, 319).

g. Citations Issued to Knox Creek

As a result of Phillips' observations of the roof conditions noted above, and the fact that these conditions were not disclosed during the preshift examination as hazardous conditions requiring remedial action, Phillips issued 104(d)(1) Citation No. 7317341 for failure to conduct an adequate preshift examination in violation of 30 C.F.R. § 75.360(a)(1), and, 104(d)(1) Order No. 7317342 for failure to protect personnel from roof and/or rib falls in contravention of 30 C.F.R. § 75.202(a). The violations were designated as S&S and they were attributable to Knox Creek's unwarrantable failure. The Secretary seeks to impose a total civil penalty of \$8,300.00 for these alleged violations.

h. Personal 110(c) Liability of Matney

The Secretary also seeks to impose personal liability of \$2,700.00 against Ernest B. Matney under section 110(c) of the Act for the two violations in issue. Section 110(c) provides that a corporate agent "who knowingly authorized, ordered or carried out . . . [a] violation" committed by a mine operator may be subject to individual liability.

III. Further Findings and Conclusions

a. Knox Creek

The mandatory safety standards in issue are 30 C.F.R. §§ 75.202(a) and 75.360(a)(1). 104(d)(1) Order No. 7317342 cites a violation of Section 75.202(a). This mandatory safety regulation provides:

The 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.

104(d)(1) Citation No. 7317341 cites a violation of Section 75.360(a)(1). This mandatory safety regulation provides, in pertinent part:

... 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. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

As noted, at the hearing, Knox Creek stipulated to the fact of the occurrence of the violations, and, to the fact that the violations are properly characterized as S&S in nature. (Tr. 81-82, 86-87, 284-85). Thus, the remaining issue with respect to Knox Creek is whether the violations are attributable to an unwarrantable failure.

The elements of unwarrantable conduct are well settled. The Commission has determined that 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).

The Commission examines various factors in determining whether a violation is unwarrantable, including the magnitude of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC at 11-12, 17; *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984).

It is clear that virtually all of the elements of an unwarrantable failure are manifest in this case. With respect to the magnitude of the violations, the hazardous roof conditions, which were repeatedly overlooked by preshift and onshift examiners, included: two sheared roof bolts, one of which was located in an intersection near a dangered-off area; several areas of rib sloughage that resulted in exceeding the maximum 48 inch distance allowed between ribs and roof bolts; and a dislodged crib located near an intersection in an area of bad roof. There is no evidence that these hazardous roof conditions did not exist during Matney's November 7, 2006, preshift examination as these conditions were observed by Phillips shortly thereafter.

Regarding the length of time the subject violations existed, the area in the vicinity of survey stations 8050 and 8045 was initially mined during the summer of 2006. The sheared roof bolt in the intersection of the crosscut and the No. 3 entry apparently occurred during the initial mining cycle by virtue of the fact that the severed shaft of the roof bolt was covered with rock dust. Knox Creek has admitted that a crib had not been installed to supplement this damaged roof bolt between the time it was initially damaged and the time it was observed by Phillips in November 2006, a period of approximately four months. (Tr. 293-96). In addition, there was another unsupported sheared roof bolt located almost directly over the No. 2 battery charger in by survey station 8050. This damaged roof bolt apparently also existed since the area was initially mined.

The evidence also reflects that the sloughed material located along the corner of the right rib at the inby intersection of the crosscut in the No. 3 entry, compacted by the No. 1 scoop, existed for more than one shift because the No. 1 scoop remained on the battery charger during the shift preceding Matney's maintenance shift. Consequently, it is apparent that the hazardous roof conditions went unattended for a considerable period of time, and they were repeatedly overlooked during the course of numerous preshift and onshift examinations.

Moreover, the cited roof conditions, repeatedly overlooked by Knox Creek examiners, were readily apparent. The roof sloughage lengthened the permissible distance between the first row of roof bolts and the rib. The sheared roof bolt in the intersection of the crosscut in the No. 3 entry was in a heavily traveled area. In addition, it was in the vicinity of a dangered-off area that required supplemental crib support. Finally, the No. 2 battery charger was positioned almost directly under another sheared roof bolt exposing miners to a hazardous roof condition.

The degree of danger is the most damaging aspect of this unwarrantable failure analysis. The location of the unremedied severed bolt, in the intersection in the No. 3 entry and crosscut, in proximity to a roof fall area, alone, warrants an unwarrantable failure finding. The sheared bolt was located in the crosscut at the inby edge of the intersection, eight feet from the corner of the left rib. This roof bolt served no purpose given the missing retention plate and "pizza pan" plate. Consequently, there was only one functioning roof bolt between the left rib and the third roof bolt located 12 feet from the left rib, in an intersection that was adjacent to a dangered-off area where a roof fall had already occurred. In addition, miners using the No. 2 battery charger were also exposed to another damaged roof bolt that was located above.

With respect to whether Knox Creek was on notice that greater compliance efforts were necessary, it is significant that Knox Creek was cited for inadequate preshift examinations in its 002 MMU on October 31, 2006, only one week before Phillips issued the citations in issue. Moreover, to abate the October 31st citations, Knox Creek examiners Matney, Stiltner and Riordan, the examiners that were responsible for examining the 005 MMU area in issue, were retrained in the proper methods of conducting preshift examinations. In this regard, 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 safety standard. *Peabody*, 14 FMSHRC at 1263-64.

Finally, there is no evidence that Knox Creek took any action to remedy the hazardous roof conditions prior to Phillips' November 7, 2006, inspection. The long standing nature of these readily apparent hazardous roof conditions, that were repeatedly overlooked during the numerous onshift and preshift examinations preceding Phillips' inspection provide an adequate basis for concluding that the roof condition and preshift examination violations of sections 75.202(a) and 75.360(a)(1), respectively, are attributable to Knox Creek's unwarrantable failure.⁸ Accordingly, 104(d)(1) Order No. 7317342 and 104(d)(1) Citation No. 7317341 shall be affirmed.

b. Knox Creek's Civil Liability

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

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

As noted, the Secretary seeks to impose a total civil penalty of \$8,300.00 consisting of \$4,600.00 for Order No. 7317342 and \$3,700.00 for Citation No. 7317341. The parties have stipulated that the continuing mining operations of Knox Creek Coal Company, a subsidiary of Massey Energy Company, will not be affected by the civil penalty proposed by the Secretary. As charged by the Secretary, the violations are attributable to at least a high degree of negligence. The violations were abated in a timely manner, and, there are no other aggravating or mitigating circumstances that warrant disturbing the total \$8,300.00 civil penalty proposed by the Secretary for the two violations in issue. Consequently, the civil penalty initially proposed by the Secretary shall be assessed.

⁸ It is unclear whether 104(d)(1) Citation No. 7317341 that states that "an adequate pre-shift examination has not been conducted for the active 005 MMU" refers to a single pre-shift examination, or, a series of pre-shift examinations. I construe this citation to be applicable to a series of inadequate pre-shift examinations because all foreman/examiners were required to complete training on proper examination procedures to terminate the citation. (Gov. Ex 3).

c. Personal Liability of Matney

The Secretary seeks to assign personal liability to Matney for the two violations in issue. Section 110(c) of the Mine Act provides:

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

The preshift examination "is of fundamental importance in assuring a safe working environment underground." *Enlow Fork*, 19 FMSHRC 5, 15 (Jan. 1997) (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)). Thus, a mine operator is required to perform preshift examinations to identify hazardous conditions. *Id.* at 14. (citing 30 C.F.R. § 75.360(b)). However, not every inadequate preshift examination that is attributable to a mine operator's unwarrantable failure provides a basis for personal liability of the preshift examiner under section 110(c). In other words, a mine operator's culpability for an unwarrantable failure based on an inadequate preshift examination evidencing more than ordinary negligence may be insufficient to demonstrate that its agent "knowingly" violated the cited regulation requiring adequate preshift exams.

The indicia necessary to support a finding that a corporate agent acted "knowingly" under section 110(c) is difficult to articulate. As a general proposition, a "knowing" violation under section 110(c) involves aggravated conduct rather than ordinary negligence. *Bethenergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). However, the analysis does not stop there. While it is true that an unwarrantable failure also involves more than ordinary negligence, there are significant conceptual differences between unwarrantable conduct and "knowingly" violating a mandatory safety standard. Individuals charged with 110(c) liability should be judged based on their individual knowledge and actions not on the collective actions or inferred knowledge of the mine operator. Thus, an agent of a corporate mine operator is subject to 110(c) liability if he has knowledge of a hazardous condition but he *deliberately* fails to act. *Id.*

The operative term "knowingly" has been extensively discussed by the Commission and the Court. The Commission discussed the criteria for determining if there is personal liability under section 110(c) of the Mine Act in *Lefarge Construction Materials*, 20 FMSHRC 1140 (Oct. 1998). The Commission stated:

The proper inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358,362-64 (D.C. Cir. 1997). To establish

section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the 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. 558 (1971)). An individual acts knowingly where he is "in a position to protect employee safety and health [and] 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*, FMSHRC at 16

20 FMSHRC at 1148 (emphasis added). Similarly, in *Roy Glen*, the Commission stated:

Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted "knowingly" in violation of section 110(c) when, *based upon facts available to him*, he either knew or had reason to know that a violative condition or conduct would occur, but failed to take appropriate preventative steps.

6 FMSHRC at 1586 (emphasis added).

In *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d (D.C. Cir. 1997), the Court addressed the issue of individual knowledge:

... the meaning of "knowledge" depends upon context and that a continuum of meaning that stretches from "constructive knowledge" to "actual knowledge" with various gradations between under the Commodity Exchange Act, [an] individual "knowingly" induced a violation if he had "*actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue.*"

108 F.3d at 363 (emphasis added) *citing JCC v. CFTC*, 63 F.3d 1557, 1567-68 (11th Cir. 1995).

As noted, preshift examiners Matney, Stiltner and Riordan repeatedly failed to note the cited hazardous roof conditions during at least four shifts preceding Phillips' November 7, 2006, inspection. While these failures to perform adequate examinations, collectively, provide the basis for an unwarrantable failure, Matney must be judged on his individual conduct. Thus, the Secretary must prove Matney knew or should have known of a hazardous condition and failed to act. In other words, the Secretary must show that Matney knowingly ignored the hazard. *Roy Glen*, 6 FMSHRC at 1586 (ignoring a known hazard is a see-no-evil approach to mine safety that violates section 110(c)). In this regard, the Secretary seeks to prove, through circumstantial evidence, that Matney knew, or should have known, that Knox Creek had installed, and intentionally removed, a crib that was supporting the sheared bolt in the intersection of the crosscut and the No. 3 entry.

The Secretary has established that Knox Creek had a motive to remove the crib if it had been installed because there would only have been approximately ten feet and six inches clearance between the crib and the right rib of the crosscut. Such a crib would have impeded the passage of the No. 1 and No. 2 scoops, that are ten feet wide, as they traveled to and from the battery chargers to the face. However, the Secretary's assertion that a crib had, in fact, been installed is not based on direct evidence. Rather, it is based on several inferences the Secretary seeks to draw from several collateral facts.

The Secretary relies on approximately 30 six inch deep by three feet wide crib blocks that Phillips observed lying on the mine floor along left rib of the crosscut in by its intersection with the No. 3 entry to infer that a crib recently had been disassembled. Matney testified that the crib blocks had been used as a ramp to repair a continuous miner.

The Secretary also relies on marks that were brownish in color that Phillips reportedly observed in close proximity to the sheared bolt to infer that a crib had been installed. Phillips has speculated that the marks are wedge marks that had been left by a crib. Although not conceding that marks existed, Knox Creek speculates that the roof marks could have been made when the "pizza pan" was secured to the roof by the bearing plate. The Secretary has not proffered any photographs in support of her belief that the marks were made by a crib.

In determining the sufficiency of evidence, the Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Inferences based on indirect evidence are "inherently reasonable" if there is a "logical and rational connection between the evidentiary facts and the ultimate fact to be inferred." *Id.* However, in the instant case the alternative explanations offered by Knox Creek for the collateral facts concerning the roof marks and the presence of loose crib blocks are as reasonable as the Secretary's speculation.

Significantly, the Secretary, in the citation and order in issue, attributes the exposure to hazardous roof conditions, and the inadequate preshift examination, to high negligence rather than to a reckless or a conscious disregard of the need to reinstall a dismantled crib. Consistent with the Secretary's high negligence designation, although Matney's preshift examination, like the examinations of his colleagues, was inadequate and evidenced a high degree of negligence by virtue of the hazardous conditions that were overlooked, it does not constitute a "knowing" violation of the cited mandatory safety standards.

While a crib may have been removed for the sake of expediency, in the final analysis, the Secretary bears the burden of proving, by a preponderance of the evidence, that a crib had, in fact, been installed. The Commission has noted that the preponderance of the evidence standard requires the trier of fact to believe the existence of a fact "is more probable than its nonexistence." *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted). On balance, the Secretary has failed to satisfy her burden of demonstrating that it was more probable than not that a crib had been installed. Consequently, the Secretary has

failed in her attempt to establish that Matney acted "knowingly" because he failed to act on the basis of information that gave him knowledge, or reason to know, of the existence of hazardous roof conditions. Although Matney's 36 minute preshift examination was inadequate, in that hazardous roof conditions were overlooked, the evidence does not reflect that it was illusory, or otherwise so precursory, to support the conclusion that Matney "knowingly" violated the subject mandatory safety standards. Accordingly, the citation and order issued against Matney shall be vacated.

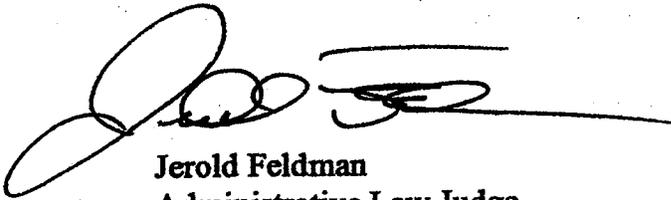
ORDER

In view of the above, **IT IS ORDERED** that Knox Creek Coal Corporation's contests in Docket Nos. VA 2007-15-R and VA 2007-16-R **ARE DISMISSED**.

IT IS FURTHER ORDERED that 104(d)(1) Citation No. 7317341 and 104(d)(1) Order No. 7317342 in Docket No. VA 2007-55 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Knox Creek Coal Corporation shall pay, within 45 days of the date of this Decision, a total civil penalty of \$8,300.00 in satisfaction of 104(d)(1) Citation No. 7317341 and 104(d)(1) Order No. 7317342.

Consistent with this Decision, the Secretary has failed to demonstrate that Ernest B. Matney knowingly authorized, ordered or carried out violations of sections 75.360(a)(1) and 75.202(a) of the mandatory safety standards. Consequently, **IT IS ORDERED** that the personal liability case in Docket No. VA 2008-215 **IS DISMISSED**.



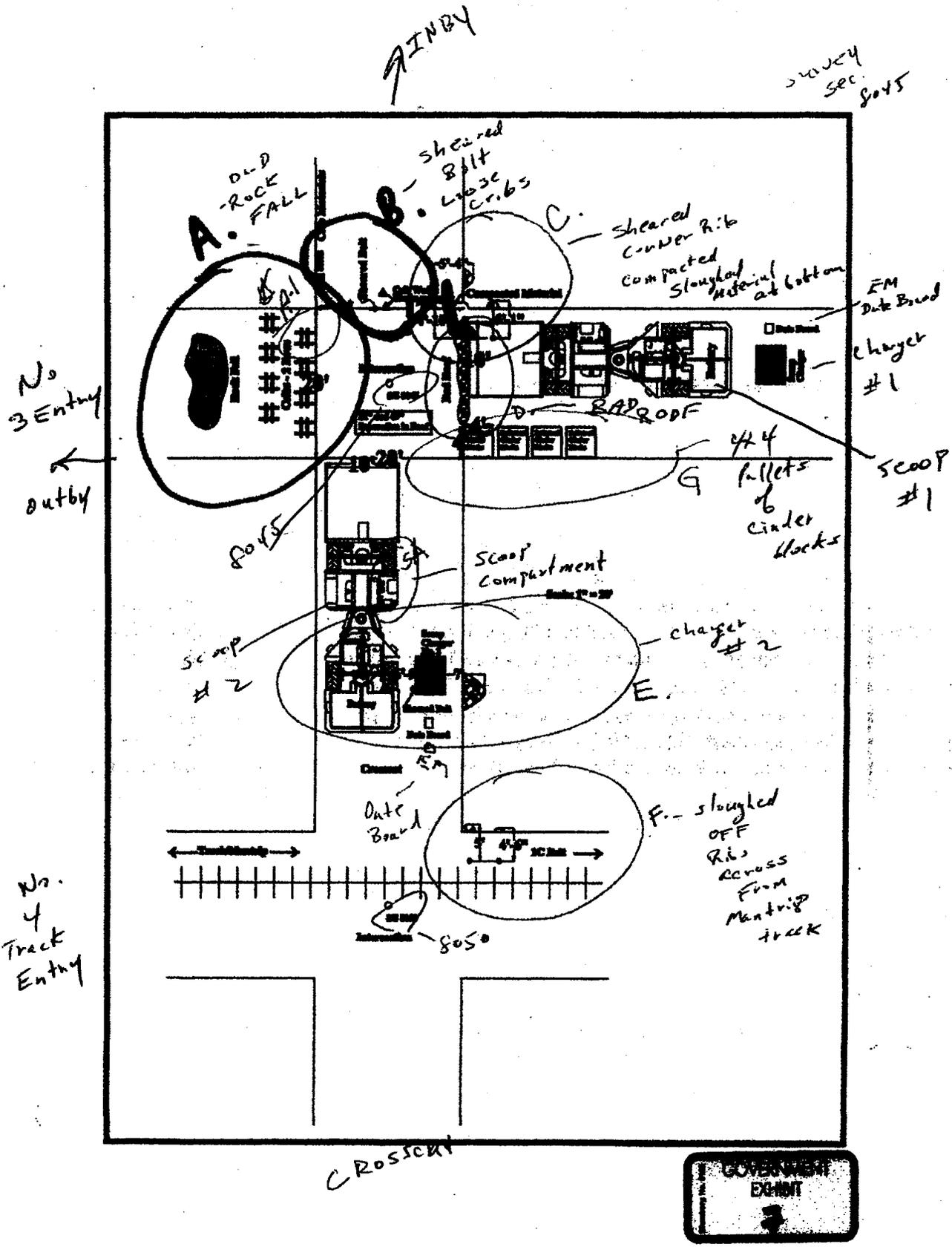
Jerold Feldman
Administrative Law Judge

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/rps



APPENDIX 1

Respondent, RS&W Coal Company, Inc., with a violation of the Act for failing to update its Emergency Response Plan (ERP) to provide for the installation of wireless communications and electronic tracking (C&T) systems at its mine, and failing to state sufficient reasons for not adopting such systems. A hearing was held in Pottsville, Pennsylvania on November 24, 2009, wherein the parties submitted all relevant material regarding the dispute.² For the reasons set forth below, the citation is affirmed.

Findings of Fact – Conclusions of Law

The Statutory and Regulatory Backdrop

In response to a series of tragic accidents in which underground coal miners lost their lives, Congress enacted the Mine Improvement and New Emergency Response Act of 2006 (MINER Act).³ The MINER Act amended section 316 of the Mine Safety and Health Act of 1977, to require, *inter alia*, that each underground coal mine operator develop and adopt a response and preparedness plan, or ERP, and submit it to the Secretary for approval and periodic review. The MINER Act became effective on June 15, 2006, and the initial ERPs were to be adopted and submitted by August 14, 2006. The Act requires that ERPs include several provisions intended to enhance the ability of trapped miners to survive an accident.

The requirements for the installation of post-accident wireless communications and electronic tracking systems are stated in section 316(b)(2)(F)(ii) of the Act:

Post Accident Communications.—

Not later than 3 years after the date of enactment of the Mine Improvement and New Emergency Response Act of 2006, a plan shall, to be approved, provide for post accident communication between underground and surface personnel via a wireless two-way medium, and provide for an electronic tracking system permitting

Judge shall render his or her decision with respect to the plan content dispute within 15 days of the receipt of the submission.

30 U.S.C. §876(b)(2)(G).

² Commission Procedural Rule 24 specifies that, “The scope of [a hearing on an ERP dispute] is limited to the disputed plan provision or provisions.” 29 CFR § 2700.24. Respondent has filed a Notice of Contest of the citation under section 105(d) of the Act. *RS&W Coal Company, Inc.*, Docket No. PENN 2010-145-R. Challenges to the citation’s special findings dealing with negligence and gravity, if any, can be litigated in that contest proceeding or in the course of any subsequent civil penalty proceeding.

³ P.L. 109-236 (June 15, 2006).

surface personnel to determine the location of any persons trapped underground or set forth within the plan the reasons such provisions can not be adopted. Where such plan sets forth the reasons such provisions can not be adopted, the plan shall also set forth the operator's alternative means of compliance. Such alternative shall approximate, as closely as possible, the degree of functional utility and safety protection provided by the wireless two-way medium and tracking system referred to in this subpart.

30 U.S.C. § 876(b)(2)(F)(ii).

The Problem – Technical Discussion

Underground anthracite coal mines produce coal through “conventional methods,” i.e., using explosives detonated by electric detonators. It has long been recognized that devices that emit radio frequency (RF) energy, such as wireless communications systems, can pose a hazard when used in proximity to electric blasting circuits. The wires of a blasting circuit function like antennae, and RF induces an electric current in such circuits which could result in an unintended detonation.⁴

Safety standards for underground coal mines specify numerous requirements addressed to the safe handling of explosives. 30 C.F.R. §§ 75.1300-1328. Those standards require that blasting circuits be protected from sources of stray electric current, and recognize that stray electric current can be induced in blasting circuits by nearby electric powered equipment, cables or batteries. The Secretary’s regulations require that electric cables and equipment be deenergized or removed to at least 50 feet from blasting boreholes before the priming of explosives. § 75.1316(a)(1). Notably, the regulations also actually require the introduction of electric current in blasting circuits in order to test for continuity and resistance prior to blasting.⁵ Section 75.1323(j) requires that:

Immediately prior to firing, all blasting circuits shall be tested for continuity and resistance using a blasting galvanometer or other instrument specifically designed for testing blasting circuits.

⁴ A 2001 publication by the Institute of Makers of Explosives (IME), Safety Library Publication No. 20 (SLP-20), entitled “Safety Guide for the Prevention of Radio Frequency Radiation Hazards in the use of Commercial Electric Detonators,” notes that, “To date there have been a few authenticated cases of a detonator being fired accidentally by RF pickup.” Ex. P-13 at 2. Reports of several incidents, most of which involve unintended detonations caused by RF in the last 20 years, were introduced by RS&W. Ex. R-3, R-4, R-5, R-6.

⁵ Continuity and resistance testing assures that the blasting circuit is properly wired, and that all of the one-ohm resistance detonators have been included in the circuit.

Blasting galvanometers route electric current through the blasting circuit at an extremely low level that has been determined to pose no threat of activating a detonator, and have been used safely in mines for many years. MSHA-approved blasting galvanometers are allowed to introduce electric currents of up to 50 milliamps (mA) and, under some circumstances, up to 160mA. Not surprisingly, extensive testing has been done and studies undertaken to quantify the amount of electrical energy to which blasting circuits and detonators can be safely subjected. Studies by the U.S. Department of Interior's Bureau of Mines in 1973 and 1981, and the IME's SLP-20, published in 2001, have been referenced in this proceeding.⁶ The 50mA permissible limit is reflected in the Secretary's safety standards. Electric equipment and cables located at least 25 feet away from boreholes need not be deenergized or moved if "stray current tests conducted prior to priming the explosives detect stray currents of 0.05 ampere [50mA] or less through a 1-ohm resistor." § 75.1316(a)(2).

There are other generally recognized safe levels of electrical energy to which blasting circuits and detonators can be subjected. The IME and Bureau of Mines publications refer to a "no-fire level" of 0.04 watts (W), or 40 milliwatts (mW), for commercial detonators. Tr. 109-13; ex. P-13 at 14; P-15 at iii. The no-fire level is defined as a 0.1% firing (99.9% no-firing) probability with a 95% confidence level, which equates to an extremely low probability of firing. Chad Huntley, an electrical engineer at MSHA's Technical Support Approval and Certification Center, explained that the 0.1% figure must be considered along with the 95% confidence factor. Tr. 111-13. It *does not* mean that the firing probability is one in one-thousand. Rather the statistical probability of the occurrence of an event with a probability of 0.1% and a 95% confidence level is on the order of one in 909 million.⁷ The 40mW no fire level, which equates to an induced current of 200mA. Tr. 158. It is recognized as a "conservative" limit, because many commercially available detonators manufactured in North America have no fire levels higher than 40mW. Detonators tested in 1973 by the Bureau of Mines were found to have no-fire levels ranging from 77mW to 275mW. Tr. 114-23; ex. P-15 at 4-4. The Coalstar II detonator, which is currently approved for use in underground mines, has a no-fire level of 105mW. Tr. 123-25; ex. P-29. In light of the 200mA current associated with the 40mW no-fire level, the Secretary's 50mA permissible limit for stray currents in blasting circuits is quite conservative.

⁶ Franklin Institute Research Laboratories, Technical Report, "Evaluation and Determination of Sensitivity and Electromagnetic Interactions of Commercial Blasting Caps," (August 1973), prepared for the Bureau of Mines, U.S. Department of Interior. Ex. P-15; Comsol Ltd., Final Report for Bureau of Mines, "The Implementation of UHF Radio Communications and CCTV Monitoring Systems in a Room and Pillar Metal/Non-Metal Mine," March 1981. Ex. P-16.

⁷ At the hearing, Huntley was qualified as an expert witness in the field of electrical engineering and testified that he did not specifically recall the probability, but believed it was one in nine billion. Tr. 113. The Secretary represented in her post-hearing brief that Huntley had subsequently learned that he had been mistaken, and that the probability was actually one in 909 million. Sec'y Br. at 4, n. 2.

Tr. 158. It should be noted that permissible power and field strength levels are based upon the potential for induced current in one detonator.

The strength of the electromagnetic field generated by an RF device, and the current it will induce in an electrical circuit, are largely functions of the device's power (generally stated in Watts) and the distance from the device's antenna. Distance from the transmitting antenna is a very significant factor because the strength of the field drops rapidly as the distance increases. At a distance of one wavelength from an RF antenna the available power in the RF field is only one one-hundredth (0.01) of the power at the transmitting antenna.⁸ At a distance of two wavelengths it is four times lower, or one four-hundredth of the power at the transmitting antenna. Each time the distance is doubled, the available power drops by a factor of four. Tr. 127-31; ex. P-15 at 103.

The IME's SLP-20 provides tables of recommended safe separation distances to be maintained between blasting circuits and different types of RF equipment. It primarily addresses higher-powered RF sources used in or found near surface blasting operations, and notes that, "Because of the uncertainties of RF absorption and scattering within mine tunnels, the potential hazard can only be evaluated with the aid of consultants." Ex. P-13 at 4. An August 2008 addendum to SLP-20, intended to be more applicable in underground mines, consists of a "log-log plot" showing acceptable electromagnetic field strength, as a function of radio frequency, "that one ohm electric detonators can be exposed to while minimizing the risk of inadvertent initiation due to RF fields." Tr. 147-49; ex. P-14. The addendum also sets forth a formula for calculating the field strength produced by multiple RF sources.

Because of the importance of safe separation distances, MSHA requires that manufacturers of C&T systems specify, and provide justifications for, separation distances for each component of the system, and mine operators "must specify these safe distances in their ERPs . . . and account for the total amount of energy transmitted from all devices and other sources used in the vicinity of blasting circuits." MSHA PPL No. P09-V-13, (October 23, 2009). Ex. P-19. MSHA began certifying separation distances when approving equipment sometime prior to 2008, and some presently approved components do not reflect safe separation distances because they were not required when their approvals were processed. If no safe separation distance has been certified by MSHA, the operator is required to contact the manufacturer and obtain a justification for a proposed separation distance. Failing that, MSHA's Technical Support Approval and Certification Center would be consulted. Tr. 191-99. "MSHA has approved in ERPs a separation distance of up to 50 feet . . . when the mine operator was unable to specify a safe distance based on a manufacturer's recommendation." *Id.* at 2.

⁸ The wavelength of an RF transmission is a function of its frequency. A 400 MHz RF has a wavelength of approximately 2 feet, and a 900 MHz RF has a wavelength of approximately one foot.

Wireless C&T systems typically consist of three components; 1) two-way communications devices, that would be carried by a miner and transmit RF energy only when sending a message; 2) tracking “nodes” hard-wired to surface equipment that continuously transmit when activated and are installed roughly every 200 feet along mine entries; and 3) “tags” worn by miners that continuously transmit and are read by the nodes as the miners pass by. When transmitting, each of those components is a source of RF energy that produces an electromagnetic field. The Independent Miners and Associates (IMA), an association of anthracite miners, had expressed interest in two MSHA-approved wireless C&T systems for possible installation in anthracite mines, the L-3 Communications’ “Wireless Mesh Communication and Tracking System” and the Matrix Design Group, LLC’s, “RFID Miner Tracking and Text Messaging System.”

The L-3 system operates at 900MHz (one foot wavelength) and is composed of a radio handset, which operates at a power level of 1W (1000mW) and has a specified separation distance of 5 feet; a tracking node, which operates at a power level of 5W (5,000mW) and has a specified separation distance of 7 feet; and a tracking tag which apparently operates at virtually a zero power level and has a specified separation distance of 0 feet. Ex. P-17, P-24; tr. 193-203. The RF field strength generated by the node would be 5,000mW at its antenna, 50mW one foot from the antenna, 12.5mW two feet from the antenna and 3.125mW four feet from the antenna.

The Matrix system operates at 450MHz (two foot wavelength) and is composed of a 2-way text communicator which operates at a power level of 15mW and has a specified separation distance of 5 feet; a tracking node which operates at 10mW and has no specified separation distance; and a tracking tag which operates at a power level of 6mW and has no specified separation distance.⁹ Ex. P-17, P-24; tr. 193-203. The RF field strength generated by the text communicator would be 15mW at its antenna, 0.15mW two feet from the antenna, 0.0375mW four feet from the antenna and 0.009375mW eight feet from the antenna.

Events Leading to the Citation

As specified in the Act, as of June 15, 2009, ERPs were required to provide for post accident communication between underground and surface personnel via a wireless two-way medium, and an electronic tracking system permitting surface personnel to determine the locations of any persons trapped underground. Operators were also permitted to set forth within the plan the reasons such provisions could not be adopted, and to propose alternative means of compliance approximating, as closely as possible, the functional utility of the wireless systems.

⁹ Huntley testified that it is likely that a proposed separation distance of five feet would be approved for the lower-powered components of the Matrix system. Tr. 196-97. A justification for a zero separation distance for all components of the system has apparently been prepared. Tr. 199-202; ex. P-18. However, no formal application for separation distances other than those specified in MSHA’s approvals, has been made, and the separation distances certified by MSHA in its approvals remain as stated. Tr. 201-02.

Because fully wireless C&T systems were not yet technologically feasible, MSHA sought to offer guidance to operators on acceptable alternatives to fully wireless systems in formulating the required revisions to their ERPs. MSHA Program Policy Letter (PPL) No. P09-V-01, issued on January 16, 2009, stated, with respect to communications systems:¹⁰

General Considerations - An alternative to a fully wireless communications system used to meet the requirements of the MINER Act for post-accident communication either can be a system used for day-to-day operations or a stored system used in the event of an accident. Examples of currently available technologies that may be capable of best approximating a fully wireless communications system include, but are not limited to, leaky feeder, mesh, Wi-Fi and medium frequency systems. Any alternative system generally should:

- a. Have an untethered device that miners can use to communicate with the surface. The untethered device should be readily accessible to each group of miners working or traveling together and to any individual miner working or traveling alone.
- b. Provide communication in the form of two-way voice and/or two-way text messages. If used, pre-programmed text messages should be capable of providing information to the surface necessary to determine the status of miners and the conditions in the mine, as well as providing the necessary emergency response information to miners.
- c. Provide an audible, visual, and/or vibrating alarm that is activated by an incoming signal on each untethered device. The alarm should be distinguishable from the surrounding environment.
- d. Be capable of sending an emergency message to each of the untethered devices.
- e. Be installed to prevent interference with blasting circuits and other electrical systems.

Ex. P-4 at 3.

In a March 2009 meeting, anthracite coal miners raised safety concerns about the installation of wireless C&T systems using radio frequency equipment near blasting components and blasting operations. Tr. 48. The meeting was held at the headquarters of the Independent Miners and Associates, an association of anthracite coal miners in MSHA District 1. John Kuzar, MSHA's district manager for District 1, issued a memorandum on June 4, noting that, in response to the IMA's concerns, MSHA had agreed to participate in "several in-mine demonstrations of communication and tracking technology to jointly evaluate the RF levels emitted." Ex. P-30. Operators of anthracite mines using explosives were not required to submit purchase orders for such systems, but were required to comply with the MINER Act's requirement to submit updated ERPs providing for wireless C&T systems by June 15, 2009.

¹⁰ Similar characteristics were identified for tracking systems.

On June 16, 2009, MSHA received a letter from RS&W, entitled "Addendum to Emergency Response Plan" stating, in its entirety, that, "Any system that is guaranteed in writing and proved safe through extensive testing not to endanger my employees with radio frequency while using electronic detonators will be acceptable." Ex. P-3. On July 1, 2009, Kuzar responded to RS&W stating that "the addendum failed to provide essential details concerning the nature of the communication and tracking system." Ex. P-4. Kuzar instructed RS&W to submit an updated ERP that provided specific details of its wireless two-way communication and electronic tracking systems by July 16, 2009, and that failure to do so would result in the issuance of a citation. Kuzar also forwarded a copy of PPL P09-V-01, to provide guidance on what was required under the Act.

On July 21, 2009, MSHA's Technical Support Approval and Certification Center conducted extensive testing of the MSHA-approved L-3 C&T system at the Alfred Brown Coal Company's, 7 Ft Slope Mine in Hegins, Pennsylvania.¹¹ The L-3 system was selected because the IMA had expressed interest in it and the similar Matrix system. Tr. 139. The State of Pennsylvania's Bureau of Mine Safety, the IMA and representatives of L-3 and the Alfred Brown mine participated in the testing.

The testing was done in the gangway of the mine. Two components of the L-3 system were installed at the test location; the Access points (nodes), which have a 5W transmit power at 900-930 MHz and a Yagi (directional) antenna; and Mesh Radio Handsets, which have a 1W transmit power at 902-928 MHz and a whip antenna. The node's antenna was placed in nine different positions and orientations in the gangway. An instrument referred to as a "narda meter" was used to measure electromagnetic field strength at various locations in the gangway. At four locations one or two handsets were also transmitting, and the strength of the combined RF fields was measured. The specific equipment locations, antenna orientations, and measurements are presented in the test report. Ex. P-5 at 7-13. The highest measurement of field strength, 11.76 V/m, was recorded at the closest test distance, two feet directly in front of the node's directional antenna – well within the MSHA-approved safe separation distance for the node of seven feet.

In a second phase of the testing, a spectrum analyzer and current probe were used to measure the induced current in various lengths and configurations of simulated blasting circuits, with the node's antenna and/or the whip antenna of the handset transmitting at different locations and orientations. The results, as presented in the report, show that the highest reading, was obtained with 1.5-foot long leg wires shunted together, with the node's antenna 14 feet away and the handset antenna in direct contact with the wires. Ex. P-5 at 13-17. That reading, converted to electrical current, was 23mA.

¹¹ Huntley, who testified at the hearing, helped to conduct the tests, and was one of the authors of the test report.

The test report, entitled "Hazards of Radio Frequency (RF) Communication Equipment Operating Near Blasting Circuits at Anthracite Mines," was issued on August 27, 2009. The results of the test generally established that the equipment could safely be used in typical anthracite mining conditions.

None of the recorded measurements exceeded the Institute of Makers of Explosives (IME) Addendum to SLP-20 "Acceptable Field Strength for a One Ohm Electric Detonator" chart under a variety of conditions, nor did any induced currents, calculated from the recorded measurements, exceed 50mA. The highest readings of either measuring method were 11.76 V/m . . . and . . . 23mA These maximum numbers are below the IME acceptable limit of 20 V/m at 900 MHz and the MSHA maximum allowable current of 50mA (ref. 30CFR section 75.1316).

Ex. P-5 at 5.

Following the test, it was agreed that testing of the Matrix system was not needed, because its components operated at substantially lower power levels. Tr. 62, 74, 159-60. The highest powered component of the L-3 system is the node, with a power output of 5000mW. In contrast, the highest powered component of the Matrix system is the 2-way text communicator, with a power output of 15 mW. Ex. P-24.

On August 28, Kuzar forwarded a copy of the test report to RS&W, advised that the testing established that the L-3 system components could safely be operated in anthracite mines, and that RS&W was required to submit a revised ERP that provided for updated C&T capabilities. On September 10, RS&W submitted an ERP revision addressing post-accident communications and tracking. Ex. P-8. The ERP specified that no totally wireless communication or electronic tracking system had yet been developed, that the currently approved wireless C&T systems emit RFs which could inadvertently detonate explosives in the mine, and that none of the currently approved wireless C&T systems had been tested in an anthracite mine, most of which are configured differently than bituminous coal mines. Ex. P-8. RS&W proposed, as an alternative, enhancements to its existing hardwired intercom system, pledging to install additional intercoms at 100 foot intervals along the gangway, and a permissible phone system at 100 foot intervals along the secondary escapeway. RS&W also sought to continue use of its existing magnetic tracking board, which reflects miners' locations with color-specific markers on a copy of the mine map, as called in on the intercom system. Ex. P-8.

On October 5, 2009, Kuzar sent RS&W written notification that its current C&T provisions did not provide the level of protection mandated under the Act, and therefore, he would not approve the revised ERP. Ex. P-9.¹² Kuzar acknowledged that although totally

¹² Section 316(b)(2)(C) of the Act provides that, in reviewing and approving ERPs, the Secretary is required to:

wireless communication and/or electronic tracking systems had yet to be developed, there were several agency-approved "communication systems that closely approximate the degree of functional utility and safety protection provided by a wireless two-way communications system . . . Thus, operators may not rely on traditional, hard-wired intercom systems in lieu of more advanced systems that provide greater miner protection . . ." Ex. P-9. Kuzar went on to point out that MSHA believed that updated C&T systems could be used safely in anthracite mines, provided that sufficient separation distances were specified. He ordered RS&W to either specifically identify limitations with particular communication and tracking systems that would prohibit use in its mine, or update its ERP to include such systems no later than October 28, 2009.

On October 27, 2009, RS&W's President, Randy Rothermel, responded to Kuzar's October 5 letter stating that he was unable to find a system safe enough for its mine, and requested that Kuzar issue a citation for RS&W's failure to provide approved C&T systems. Ex. P-10. Consequently, MSHA issued Citation No. 7000435 on November 6, 2009, alleging a violation of Section 316(b) of the Act for RS&W's failure to develop, adopt, and submit an updated ERP that provided for wireless communications and electronic tracking systems and failed to state sufficient reasons for not adopting such systems. Ex. P-11. On November 10, 2009, pursuant to the Act, and Commission Procedural Rule 24, 29 C.F.R. § 2700.24, the Secretary referred the plan content dispute to the Commission. The referral prays that the citation be affirmed and that Respondent be ordered to submit a compliant revised ERP within 10 days of issuance of an order affirming the citation. Respondent prays that the citation be vacated and that the Secretary be directed to approve alternate C&T systems until such time that wireless C&T systems have been thoroughly tested and deemed safe for use in anthracite coal mines with a "100% confidence level." Resp. St. for Hearing Req. at 1.

take into consideration all comments submitted by miners or their representatives,
Approved plans shall –

- (I) afford miners a level of safety protection at least consistent with the existing standards, including standards mandated by law and regulation;
- (ii) reflect the most recent credible scientific research;
- (iii) be technologically feasible, make use of currently commercially available technology and account for the specific physical characteristics of the mine; and
- (iv) reflect the improvement in mine safety gained from experience under this Act and other worker safety and health laws.

30 U.S.C. §876(b)(2)(c).

Conclusions of Law - Further Factual Findings

The Applicable Law

The framework for resolution of Emergency Response Plan Disputes under the MINER Act was established by the Commission in its initial decision involving MSHA's refusal to approve an ERP provision. *Emerald Coal Res. LP*, 29 FMSHRC 956, 965 (Dec. 2007); see also *Twentymile Coal Co.*, 30 FMSHRC 736, 747 (Aug. 2008).

One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). The Commission has noted, "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996).

While the contents of a plan are based on consultations between the Secretary and the operators, the Commission has recognized that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market." *Id.* at 1746. As one court has noted, "the Secretary must independently exercise [her] judgment with respect to the content of ... plans in connection with [her] final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), quoting S. Rep. No. 181, 95th Cong., 25 (1977), reprinted in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary's part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) ("Peabody II"). "[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining*, 18 FMSHRC at 1746; see also *Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct throughout the process was reasonable).

Emerald, 29 FMSHRC at 966.

The Commission went on to hold that the appropriate standard of review in ERP dispute proceedings is whether the Secretary's refusal to approve a proposed ERP provision was arbitrary and capricious.

The standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in the plan approval process. In this regard, the Commission's decision in *Monterey Coal* is instructive. In affirming a citation for failing to supply data relating to impoundment pond construction, the Commission applied the "arbitrary and capricious" standard in reviewing MSHA's withdrawal of its approval of an impoundment plan:

We cannot conclude that MSHA's use of the Table [of recommended minimum design storm criteria] or its act of withdrawing the plan approval was arbitrary and capricious.... [P]rior to issuance of the citation Monterey was given unequivocal notice of and a reasonable opportunity to comply with MSHA's interpretation and use of the Table. In sum, we find the course of action taken by MSHA to have been a reasonable approach, and not arbitrary or capricious.

Monterey Coal, 5 FMSHRC at 1019 (citation and footnote omitted); accord *Peabody II*, 18 FMSHRC at 692 n.6 (in reviewing the Secretary's refusal to approve a ventilation plan provision, Commission noted that the plan approval process involves an element of judgment on the part of the Secretary that is reviewed under an arbitrary and capricious standard). This standard appropriately respects the Secretary's judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence test. See *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) ("abuse of discretion" has been found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law") (citations omitted). We therefore affirm the judge's application of the arbitrary and capricious standard to the plan review. (footnote omitted).

Emerald, 29 FMSHRC at 966.

Whether MSHA's Decision was Arbitrary, Capricious, or an Abuse of Discretion

As evidenced by the numerous communications from MSHA's district manager, RS&W was repeatedly requested to provide information regarding its evaluation of specific wireless C&T systems and problems or difficulties such systems would pose if operated in its mine. In response to RS&W's initial cursory "Addendum" to its ERP, Kuzar promptly advised on July 1, 2009, that because virtually no "essential details" had been provided, evaluation of the plan was impossible, and provided copies of PPL P09-V-01 and a list of Questions and Answers specific to the wireless C&T system ERP requirement. That letter advised RS&W that if an updated ERP was not received by July 16, 2009, a citation would be issued. However, no citation was issued. Rather, in conjunction with representatives of an association of anthracite miners and the State of

Pennsylvania, MSHA conducted the July 21 test of the approved L-3 wireless C&T system in the Alfred Brown Anthracite Mine. The testing established that the system could be safely operated in anthracite mines, provided that separation distances could be maintained and administrative controls could be developed to address situations where miners could not maintain such separations. The test report, which was issued on August 27, was forwarded to RS&W the following day. The forwarding letter noted that the requirement for submission of a revised ERP had been delayed to allow completion of the testing, and instructed that an updated ERP must be submitted no later than September 11, 2009. Ex. P-6. On September 4, Kuzar forwarded a second copy of PPL P09-V-01 and an ERP checklist to assist RS&W in developing its plan.

On September 11, RS&W submitted updated ERP provisions for post-accident communications and tracking, however, no wireless C&T system was included. RS&W asserted that no "safe distance tables" could be accurately proposed by MSHA or the manufacturers, and that installation of the systems would be impossible due to the "small narrow entries in our mine," which would threaten the safety of miners by subjecting them to premature detonation of explosives. Alternative plans were presented that enhanced existing hard-wired C&T systems. On October 5, Kuzar responded, advising RS&W that its submission did not provide the level of protection mandated by the Act, and could not be approved. Each of RS&W's asserted concerns was addressed. RS&W was referred to lists of MSHA-approved semi-wireless C&T systems that were commercially available. The test results were cited as establishing the safety of MSHA-approved systems, provided that sufficient separation distances were maintained "when tracking/communication components are operating (i.e., turned on or active) in the proximity of explosives and detonators," and proper procedures were established for situations when required separation distances must be breached to work with explosives.

Kuzar specifically requested that, to the extent that RS&W continued to contend that it was not feasible to safely conduct mining operations with any available wireless C&T system, it needed to provide the following information:

- (1) specifically identify MSHA approved systems that you have considered;
- (2) specify the separation distances that are needed to safely use such systems in the proximity of explosive devices;
- (3) detail each of the anthracite mining tasks that cannot be performed given these separation distances; and
- (4) explain why procedures cannot be adopted (e.g., leaving the tracking/communication component at the minimum separation distance) that would allow miners to safely perform these tasks.

Ex. P-9 at 3.

With respect to RS&W's protest that no testing had been done to determine whether approved systems would work in anthracite mines that "twist/turn and pitch upward towards the surface and contain severe undulations within the coal seams," Kuzar requested that RS&W

specify limitations that were determined to exist with respect to existing systems in light of RS&W's particular mine features and/or conditions. Ex. P-9 at 4. On October 27, RS&W responded by requesting that a citation be issued, asserting that no system could be found that was "safe enough" for the RS&W mine. Ex. P-10.

It is apparent, from the above, that MSHA fulfilled its obligation to negotiate in good faith over the disputed ERP provisions. It clearly stated its position on RS&W's submissions, provided or referred to extensive relevant materials, and requested specific information to evaluate RS&W's claim that no approved wireless C&T system could safely function in its mine. MSHA attempted to engage in a dialogue with RS&W, similar to the dialogue that it apparently was engaged in with other anthracite miners as of the time of the hearing.¹³ However, it was rebuffed by RS&W, which clearly indicated that it would not include post-accident wireless C&T systems in its ERP.

In contrast, RS&W provided only cursory information about its safety concerns, and did not describe any specific problems posed for its operations by the subject C&T systems. Nor did it attempt to explain how the testing that had been done in the Alfred Brown mine could not be related to its mine. MSHA no doubt anticipated some of RS&W's objections because it had considerable knowledge of RS&W's operations and was engaged in discussions with other anthracite miners.¹⁴ The task of attempting to maintain a crucial safe separation distance when traveling through a four, five or even a 10-foot wide entry that a blasting circuit also runs through poses obvious difficulties. Such difficulties might not be insurmountable, however, if proper

¹³ Respondent introduced as an exhibit portions of an approved ERP for the UAE Coal Corp. Associates' Harmony Mine, an underground anthracite mine. Ex. R-7. That plan specifies safe separation distances of 50 feet for wireless C&T system components. The Harmony mine is somewhat unique in that it is relatively flat and most coal extraction is done with mechanized equipment. Head testified that it had been represented to him that the UAE ERP was the only MSHA-approved anthracite mine ERP.

¹⁴ At the hearing, the Secretary objected to evidence concerning information as to RS&W's mining operations. Tr. 212-15. She maintains that argument in her brief, contending that information that was not available to an administrative decision-maker should not be considered in evaluating the administrator's decision. Sec'y Br. at 22-24. I have no difficulty with the argument, as a proposition of law. However, MSHA's District 1 conducts inspections of the RS&W mine, and undoubtedly has detailed knowledge of its mining operations. Thomas Garcia, supervisory safety and health specialist at MSHA's District 1, testified that he was "familiar with the mining methods at the RS&W drift mine." Tr. 29. He also described entry dimensions in some detail, stated the number of miners, explained what they typically did, and discussed the various blasting operations. Tr. 32-44. In response to the Secretary's objection to information regarding the number of detonators used at RS&W's mine, Randy Rothermel, RS&W's president, explained that MSHA examines the records when it inspects the mine, and is "as aware as we are" of the numbers of detonators used. Tr. 214.

administrative controls could be developed that took into account that C&T equipment may not emit RF energy when not activated,¹⁵ that separation from blasting circuits need be maintained only when they are wired to detonators, and how such factors interfaced with RS&W's specific blasting procedures. Only by making a good faith effort to design wireless C&T systems, could it be demonstrated whether or not such systems could be used in the mine consistent with the Act's mandate. RS&W's intimate knowledge of its operations was essential to development of wireless C&T ERP provisions, and it was RS&W's statutory obligation to do so, or to "set forth within the plan the reasons such provisions can not be adopted."

RS&W's concerns about the hazards posed by introducing RF sources into the mine's blasting environment were, and are, understandable and well-founded. Cindy Rothermel, RS&W's representative and wife of its president, represented at the hearing, that her father was killed by a premature detonation likely due to stray current in a blasting circuit. RS&W's concerns were understandably heightened by the manner in which some of the technical information has been stated. A "no-fire" level, expressed as a 0.1% chance of firing, with a confidence level of 95%, suggests that there is a one in one thousand chance of a detonation, as RS&W appears to have understood it.¹⁶ The fact that the actual statistical probability of firing is several orders of magnitude lower, does not completely dispel that understanding. Moreover, statements in authoritative technical literature, such as SLP-20, to the effect that the "probability of an accidental firing from RF energy is practically nil," or "extremely remote," could easily not be very reassuring to a miner who has to connect detonator leg wires in close proximity to high explosives.

The fact that negotiations concerning C&T provisions apparently continue with other anthracite miners, is evidence that MSHA is sensitive to such concerns. Garcia acknowledged that such concerns were legitimate, and stated that MSHA was intent on working with operators of anthracite mines to satisfy their concerns. He explained that, in requesting specific information from operators, as in Kuzar's October 5 letter, MSHA was looking for explanations of tasks that could not be performed because of the C&T equipment, and why procedures could not be adopted to address such problems.¹⁷ "If they were uncomfortable with the system . . . are

¹⁵ PPL P09-V-1 states that the communication system "can be a system used for day-to-day operations or a stored system used in the event of an accident." Ex. P-4 at 3.

¹⁶ Cindy Rothermel's opening statement included the following, "My son works at the mine, and yes, I am fearful of the one in one thousand chance that a detonator may explode." Tr. 25.

¹⁷ H. John Head, an expert in the field of mining engineering called as a witness by RS&W, was concerned about whether separation distances could be maintained from a practical operational standpoint. While the main blasting circuit that runs to within 75 feet of the portal is used only to blast the gangway face - typically once per day, individual shots may be fired at the chute to clear the screen 100 or more times per day. A miner might be able to maintain a

there other administrative controls that they could possibly take to assure that it's – instead of 100 percent sure, it would be 150 percent [sure that] nothing could happen?" Tr. 64. He later added, "if they're reluctant to use the system, they felt that they were in danger because of these radio frequency waves, I'm sure there's something that could be worked out that would be appropriate – justified for both sides." Tr. 85-86. The give and take process described by Garcia never occurred, because RS&W did not fulfill its obligation under the Act to design systems for its mine, or submit a detailed statement of reasons why such systems could not be used, as Kuzar had requested.

MSHA was left with virtually no choice but to issue the citation that RS&W invited.¹⁸ It believed that wireless systems provide a more effective means of post-accident communication and tracking than conventional hardwired systems, and that Congress' mandate for such systems was well-directed. RS&W apparently has no quarrel with that assessment. Head agreed that "radios are the preferred means of communication if they can be used safely." Tr. 261. MSHA's testing in an anthracite drift mine had demonstrated that approved wireless C&T systems could be operated in that environment within safety parameters recognized within the blasting community and MSHA's own long-standing safety standards, provided that appropriate safe separation distances were maintained and appropriate administrative controls could be developed and implemented. RS&W did not submit sufficient reasons why such systems could not be used in its mine.

RS&W argues that the MINER Act requires that approved ERPs must "afford miners a level of safety consistent with existing standards, including standards mandated by law and regulation," and that requiring the introduction of RF sources into its mine would violate that provision. 30 U.S.C. 376(b)(2)(C)(ii). There is no question that requiring RF sources in its mine would create hazards that did not exist under RS&W's currently approved plan. MSHA's October 23, 2009, PPL P09-V-13, confirms that, "Communications and electronic tracking systems are sources of RF energy that can interfere with blasting circuits," and that "RF fields from tags and other electronic devices may or may not pose a threat to the detonator and its circuit." Ex. P-19 at 2. However, those hazards must be balanced against improvements to miner safety provided by enhanced post-accident communication and tracking systems. That

separation distance of 5 feet in the gangway, but he could not do so in the monkey or coal workings. Head believed that separation distances of under 7 feet fell into a "gray area," and that the issue was one of management – "Can we keep the miners consistently a safe distance from that entire blasting circuit every time we energize it or every time we hook it up? And I suggest to you that it's almost impossible to do from a practical standpoint." Tr. 260.

¹⁸ Under other circumstances, Kuzar may have exercised discretion to defer enforcement action against RS&W pending the outcome of the discussion of similar issues with the other anthracite miners. However, the MINER Act requires that disputes over ERP provisions be resolved on an expedite basis, by issuance of a citation and immediate referral to the Commission.

critical evaluation can be made only by considering the details of ERP provisions specifying precisely how such systems would be used in RS&W's mine.

The Secretary argues that it has been conclusively demonstrated that currently approved systems can be used safely in RS&W's mine.¹⁹ Whether or not the additional hazards posed by those systems' RF components can be maintained within acceptable limits is only one factor to be considered. One of the administrative controls recognized as necessary to protect blasting circuits from RF sources is to require that the devices be deactivated and/or removed a safe distance away. Development of specific plan provisions would clarify how often such devices would have to be "shelved," and could identify other procedures necessary to accommodate mining operations that would detract from the effectiveness of such systems.²⁰ Another factor that could impact the systems' effectiveness would be any measures necessary to minimize the effect of inadvertent non-compliance with administrative controls.²¹ Head was very concerned

¹⁹ To demonstrate that the systems are safe even if the safe separation distance were to be breached, the Secretary introduced a calculation of the cumulative RF field strength of multiple Matrix system components; six tags, six two-way text communicators and two tracking nodes, and demonstrated that in the unlikely event that the components were all transmitting at the same time, the resultant field strength at two meters' distance would be less than the recognized 40mW no-fire limit. Tr. 164-79; ex. P-23. While two meters is a generous separation distance, considering the layout of RS&W's mine, it should be noted that there is no separation distance specified in MSHA's approval of the Matrix tracking node and tag. Ex. P-17. Pursuant to Kuzar's instruction in the October 5 letter, RS&W would be required to use the "default" 50-foot separation distance for those components. Ex. P-9 at 3. How the required separation distances would be maintained, and what impact required administrative controls would have on the effectiveness of the systems and mine operations, are questions that have yet to be answered. Parenthetically, I note that the Secretary made no attempt to demonstrate that Kuzar was aware of the calculation when he made his decision.

²⁰ As Randy Rothermel and Alfred Brown explained, because the blasting circuits run virtually the entire length of the gangway, any C&T component that required a continuous 50-foot separation distance would "have to be checked at the portal," and would provide no post-accident enhancement to miner safety. Tr. 219, 237.

²¹ In evaluating the need to provide guarding for mining machinery, the Commission has instructed that the evaluation of the magnitude of the hazard must be considered in light of "inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness," i.e., "the vagaries of human conduct." *See, e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). In other words, it must be presumed that miners will make mistakes. Garcia and Brown raised concerns about miners responding to emergency situations, and whether they could be expected to maintain safe separation distances for RF equipment under such circumstances. Tr. 61, 236-37. As Garcia acknowledged, it is difficult to predict how miners will respond to emergencies and it must be assumed that miners will make mistakes. Tr. 61, 78-80.

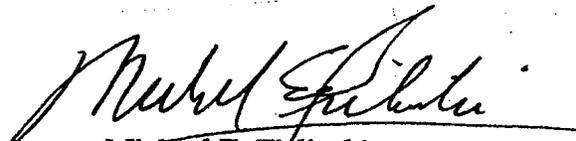
about the management issues associated with trying to use such systems safely, and observed that if, because of safe separation or other requirements, miners were disconnected from the system more often than not – “what’s to be gained.” Tr. 261-62. Another critical factor in the balancing exercise is the consideration that the hazards posed to miners by the introduction of RF sources will exist on a day-to-day basis, whereas, the enhancements to safety provided by wireless C&T systems would be realized only following an accident.

I find that the Secretary has carried her burden of proving that MSHA’s refusal to approve RS&W’s revised ERP provisions addressing updated C&T systems, which did not include such systems in its plan or state sufficient reasons why such provisions could not be included, was not arbitrary and capricious.

ORDER

I find that RS&W violated the MINER Act as alleged in Citation No. 7000435. Respondent is directed to submit to MSHA on or before January 15, 2010, proposed revisions to its Emergency Response Plan that comply with the MINER Act’s mandate. Included in its submission must be provisions for MSHA-approved wireless communications and tracking systems for use in its mine, complying with all MSHA instructions on the contents of such provisions, including separation distances for system components and specific administrative controls to assure safe operation of the systems. RS&W may also include reasons why such provisions can not be adopted, and propose alternative means of compliance. RS&W is further directed to engage in good faith negotiations with MSHA over the content of any disputed plan provisions.

The time specified for submission recognizes that development of comprehensive ERP provisions will not be a simple task, and that Respondent may need to secure from manufacturers any needed justifications for separation distances that are not specified in MSHA approvals. Ongoing discussions between MSHA and anthracite coal mine operators, hopefully, including RS&W, may result in reevaluation by either or both parties of the hazards posed by the introduction of RF devices in such mines and/or the enhancements to safety provided by wireless systems over alternative measures.


Michael E. Zielinski
Senior Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 9, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2007-844-M
Petitioner	:	A.C. No. 26-01977-123952
	:	
v.	:	
	:	
ROYAL CEMENT COMPANY, INC.,	:	Royal Cement Company
Respondent	:	

**ORDER GRANTING SECRETARY'S MOTION
FOR SUMMARY DECISION**

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* (the "Mine Act"). The case involves one citation alleging a violation of section 47.51 of the Secretary's regulations and a proposed civil penalty of \$60.00. 30 C.F.R § 47.51. The case was set for hearing in Las Vegas, Nevada. During a conference call before the hearing, the parties agreed that they do not dispute the essential facts. I suggested that both parties file briefs on the issues, which I would treat as cross-motions for summary decision, in lieu of holding an evidentiary hearing. The parties agreed to this procedure for the resolution of this case and each party filed a brief setting forth its position.

Royal Cement Company operated a quarry and cement plant in Clark County, Nevada. On April 16, 2007, MSHA Inspector Manuel Palma issued Citation No. 7985457 alleging a violation of section 47.51. The citation alleges that the company did not have a current materials safety data sheet for each hazardous chemical used at the site. The inspector determined that an injury or illness was unlikely and that the violation was not significant and substantial. The regulation provides that all mines must have a material safety data sheet available for each hazardous chemical it uses. There is no dispute that material safety data sheets were not present at the site. Royal Cement contends that the facility has been shut down since 2003 and that MSHA did not have jurisdiction to inspect the property.

Royal Cement was started by Aldo R. DiNardo in the late 1980s and the company has operated the facility on an intermittent basis since that time. Royal Cement states that it shut down the quarry in August 2003 and that it never reopened. The Secretary does not dispute this fact. No minerals were extracted from the quarry after that date. The citation was issued at the adjacent cement plant, which had also been shut down. At the time of the inspection, several

people were at the cement plant attempting to repair it. Royal Cement stated that in 2007 and 2008, it did some repair work at the plant "hoping to reopen the mine in the future." (DiNardo letter dated April 14, 2009). The MSHA inspector arrived while this repair work was taking place. DiNardo said "[w]hen it became obvious that reopening the mine was an impossible dream, we ceased all operations." *Id.* The issue in this case is whether the repair work that was being conducted at the plant subjected the facility to Mine Act jurisdiction.

I. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor.

The Secretary states that when Inspector Palma arrived, about 16 employees of Royal Cement were working at the kiln for the cement plant. They had torn out the old concrete and brick and were getting ready to rebrick it. The MSHA-OSHA Interagency Agreement ("Interagency Agreement") provides that MSHA has jurisdiction over "lands, structures, facilities, equipment, and other properties used in, to be used in or resulting from mineral extraction." (Written Arguments of Sec'y at 3). The cement plant is a facility that was "set up to crush, screen, and preheat clinker material to be milled through rod or ball mills in order to grind [the material] into cement powder." *Id.* As a consequence, the plant was subject to MSHA jurisdiction.

B. Royal Cement

Royal Cement does not deny that MSHA has authority to regulate and impose standards on mines and miners. It argues, however, that MSHA does not have this same authority over a mine that was shut down three years before the subject inspection. No minerals were extracted after August 2003. In 2007, Royal Cement began "deferred maintenance repairing machinery in the adjacent cement shop." (Written Arguments of Royal Cement at 1). When the MSHA inspector arrived, he was advised that no mining was taking place. In response, the inspector said "[y]ou are all miners." *Id.* Royal Cement contends that the citations are "unfair and illegal since a mine did not exist." *Id.* In the twelve months that this repair work was going on, the company had no accidents. The citation represents petty harassment. The Interagency Agreement with OSHA does not create a mine or justify MSHA overstepping its mandate. Mining stopped in 2003 and has never resumed. In 2004 another MSHA inspector visited the mine and stated that he was "closing the file." *Id.* at 2. "Absent any substantiation that MSHA is correct in labeling machinery maintenance employees as miners, Respondent requests that all proposed penalties be denied." *Id.* The Secretary failed to establish that "an active mine existed which the Mine Act empowers [her] to regulate." *Id.*

II. ANALYSIS

Section 67 of the Commission's Procedural Rules, 29 C.F.R. § 2700.67(b), sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

I find that there is no genuine issue as to any material fact. The quarry and plant operated intermittently until August 2003, at which point both were closed. Royal Cement was removed from MSHA's active mine records. Sometime in 2007, Royal Cement began repairing equipment and machinery at the cement plant with the intent of restarting operations. MSHA inspected the plant while these repairs were being made and issued several citations, including the one at issue in this case. Neither the quarry nor the plant ever reopened for production after this inspection. For purposes of this decision, I find that the only work performed at Royal Cement after 2003 was the repairs described above.

Section 3(h)(1) of the Mine Act defines the term "mine." 30 U.S.C. § 892(h)(1). For purposes of this case, a mine is defined as "structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, the milling of . . . minerals." *Id.* The Commission as well as courts have held that the term "mine" must be interpreted broadly to effectuate the intent of the Mine Act. *See, e.g. Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1118 (9th Cir. 1981). The Secretary, in interpreting the limits of her jurisdiction under the Mine Act and the Occupational Safety and Health Act ("OSH Act"), promulgated the Interagency Agreement to help remove any confusion as to the respective authority of those agencies. In the Interagency Agreement, the Secretary determined that cement plants are covered by the Mine Act rather than by the OSH Act. In section B(6) of that agreement, the Secretary specifically provided that MSHA has jurisdiction over "alumina and cement plants." 44 Fed. Reg. 22827 (April 17, 1979); <http://www.msha.gov/regs/1979mshaoshammu.HTM>.

In *Watkins Engineers & Constructors*, the Commission held that cement plants are mines under the Mine Act. 24 FMSHRC 669 (July 2002). The Commission agreed with the Secretary's argument that cement plants are "milling" operations and therefore fall within the Mine Act's definition of a "mine." *Id.* at 676. Specifically, the Commission found the Secretary's interpretation of "milling" to include cement plants to be consistent with "the general usage of the term within the mining industry, . . . the legislative history of the Mine Act, the Secretary's past enforcement, relevant precedent, and the [Interagency] Agreement." *Id.*

It is important to note that the respondent in *Watkins* was a construction contractor that was constructing a new facility at an existing cement plant owned by a different company. Thus, its employees were not "miners" in the everyday meaning of that word, yet their work was subject to the jurisdiction of the Mine Act. The respondent in *Watkins* challenged the authority of the Secretary to include cement plants under the jurisdiction of the Mine Act, but the Commission rejected these arguments. *Id.* 676-677.

Based on the above, I find that work being performed at a cement plant is subject to the jurisdiction of the Mine Act because the definition of the term "mine" includes mineral milling and "mineral milling" has been defined to include cement plants. The next issue is whether the repair work being performed at the Royal Cement plant was covered by the Mine Act given that the plant was not in operation and no extraction was taking place at the adjacent quarry.

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 not only facilities presently being used to mill minerals, but also facilities where mineral milling will be taking place in the future. 30 U.S.C. § 802(h)(1) (emphasis added). This interpretation is bolstered by a court of appeals decision referencing, with general approval, the interpretation of "to be used" to mean "contemplated use." *Lancashire Coal Co. v. Sec'y of Labor*, 968 F. D 388, 390 (3rd Cir. 1992). Another federal court held that activities conducted at a site in preparation for future mining may bring the site within the Mine Act's definition of "mine" for the same reason. *Cyprus Industrial Minerals Co.* at 1117-1118.

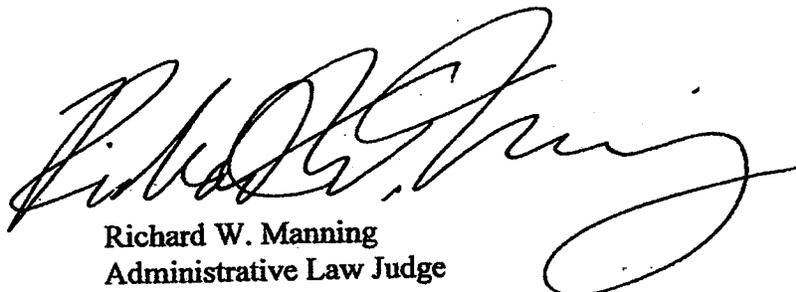
I find that the activities taking place at the plant on April 16, 2007, were subject to the jurisdiction of the Mine Act. Although no extraction was taking place at the quarry and cement was not being produced at the plant, Royal Cement employees were making repairs to the kiln at the cement plant. DiNardo stated that these repairs were being made in anticipation of reopening the facility. The repairs were being made to "structures," and "facilities," at the plant using "equipment" and "tools." These facilities had been previously used to make cement and it was Royal Cement's intention to use these facilities for that purpose again. Indeed, the only reason the repairs were being made was to get the plant ready to reopen. One of the principal arguments of Royal Cement is that there can be no jurisdiction if minerals are not being extracted from the ground. The Mine Act and associated case law make clear, however, that a cement plant is a "mine" and actions taken in preparation of opening a mine will bring the site within the jurisdictional reach of the Mine Act. As a consequence, the repair work being performed at the plant brought the site under the MSHA jurisdiction and Inspector Palma had the authority to issue the subject citation to Royal Cement.

III. APPROPRIATE CIVIL PENALTY

Citation No. 7985457 is affirmed. Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. 30 U.S.C. § 110(i). MSHA's online records show that Royal Cement plant had a history of nine citations in the two years prior to April 16, 2007. These same records show that Royal Cement was a small, intermittent operator that employed about 20 people and worked about 10,400 hours in the second quarter of 2007. The violation was abated in good faith. According to MSHA's website, the quarry and cement plant have now been abandoned. The violation was the result of the company's moderate to low negligence and the gravity was very low. Based on the penalty criteria, I find that the Secretary's proposed penalty of \$60.00 for the citation is appropriate.

IV. ORDER

The Secretary's motion for summary decision is **GRANTED** and Royal Cement's motion for summary decision is **DENIED**. Citation No. 7985457 is **AFFIRMED** and Royal Cement Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$60.00 within 40 days of the date of this decision.¹



Richard W. Manning
Administrative Law Judge

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RWM

¹ Payment should be sent to Mine Safety & 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

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December 11, 2009

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), :
Petitioner : Docket No. VA 2009-29
v. : A.C. No. 44-07137-165421-01
: :
PATRIOT MINING, LLC., : Mine: No.2
Respondent :

DECISION

Appearances: Francine Serafin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, Kentucky, for the Respondent.

Before: Judge Weisberger:

Statement of the Case

This case is before the Commission based on a petition for assessment of civil penalty filed by the Secretary of Labor alleging the violation by Patriot Mining ("Patriot") of various mandatory safety standards set forth in Title 30 Code of Federal Regulations.

The matter was initially assigned to Judge Michael Zielinski, who scheduled the matter for December 9, 2008. On December 5, 2008 the case was re-assigned to the undersigned Judge, and was heard on December 10 and 11, 2008, in Bristol, Tennessee.

The scope of the hearing was limited, pursuant to the parties' agreement, to the issue of significant and substantial relating to the following citations: 6641392, 6641363, 6641381, 6641385, 6641379 and 6641354.¹ Also, Respondent challenged the existence of the condition or

¹Patriot had filed a motion for an expedited hearing relating to the following "significant and substantial" violations; 6641354, 6641363, 6641369, 6641370, 6641379, 6641381, 6641385 and 6641392. The Secretary did not object to the motion. At the hearing, Respondent withdrew the request to expedite regarding Citation Nos. 6641369 and 6641370, and to have them litigated at a future date.

practices cited in Citation No. 6641392,²

I. Whether Citation Nos. 6641392, 6641363, 6641381, 6641385, 6641379 and 6641354 are significant and substantial

At the conclusion of the limited hearing, a bench decision was rendered which, with the exception of the correction of matters not of substance is set forth below:

A. Citation No. 6641392

1. Violation of 30 C.F.R. § 75.523-1(a)

Patriot operates an underground coal mine. A battery-operated scoop is used to transport materials down to the underground mine. The scoop is equipped with a parking brake. In addition a "panic bar" that consists of a bar on the left side, and another on the right side of the cab. If either of these bars is hit, it has the effect of de-energizing the equipment i.e. a breaker switch is thrown which completely cuts off electric power to the scoop.

On September 4, 2008, James Carroll, an MSHA inspector, inspected the scoop. After he tested the panic bar, he issued a citation alleging a significant and substantial violation of 30 C.F.R. § 75.523-1(a), which in essence, requires that all self-propelled electric face equipment used in active workings of underground mines, "shall be provided with a device that will quickly de-energize the tramming motors of the equipment in the event of an emergency." (Emphasis added).

On the morning of September 4, before the arrival of the inspector, the operator of the scoop, Jerry Tensel Freeman, was in the process of conducting his pre-shift examination prior to the use of the scoop. As part of his inspection he hit the panic bar in order to check the parking brake. The panic bar successfully put in operation the parking brake, which is one of its functions; however, Freeman felt that the parking brake needed adjustment to make it more firm, and he stopped his pre-shift examination.

After Freeman commenced to work on the parking brake, the inspector arrived on the section and asked Freeman to check the parking brake. He did it one time and it did not operate, i.e., it did not cut the power. According to Freeman, that day he hit the panic bar four times; three out of

²Regarding Citation Nos. 6641354, 6641363, 6641370, 6641379, 6641381, and 6641385, Respondent stipulated "... to the condition or practice as set out in the citation." (Respondent's Proposed Stipulations).

the four times it did work and did de-energize the equipment. After Freeman performed his test, the inspector hit the panic bar with normal pressure and it did not de-energize the equipment. He then used additional force and it did de-energize the equipment.

Regardless of whether Freeman tested the equipment four times or three times, it is clear that the panic bar did not consistently do what it was designed to do, i.e., de-energize the scoop in the event of an emergency. I find that the fact that it did function with the application of additional force equates to a lapse in time in de-energizing the scoop. Further, in investigations subsequent to the issuance of the citation, it was discovered that a certain piece of equipment that the panic bars were attached to, which was critical to the operation of de-energizing, had been bent and prevented the panic bars from being depressed quickly. Additional force was necessary. The bent piece was subsequently fixed, and the bar operated properly.

Based on all the above, I find that the evidence supports the finding of a violation in that the panic bar did not operate consistently and quickly. The fact that it didn't do it every time certainly indicates that it was not operating in the manner that it should in order to comply with the regulation.

The operator argues that Freeman was prevented from completing the examination, because he was in the process of his pre-shift examination, and had to stop the examination in order to comply with Carroll's requests. I note that Freeman testified and had he continued with the examination he would have fully tested the panic bar by hitting it on the left side and hitting it on the right side. Responds argues, as a defense to the citation, that had this been done he would have picked up on the fact that the panic bar was not operating quickly, and would have had it fixed. It is Respondents position that the citation should be dismissed.

Respondent relies on *Giant Cement Co.*, 13 FMSHRC 286 (February 18, 1991). (Melick, J.) I find that reliance on this case misplaced. In *Giant Cement*, supra, the issue before Judge Melick was not whether there was a violation of a standard dealing with equipment, not whether equipment was functioning in conformity mandatory with a regulation. Rather, the operator therein was charged with not having made corrections in a timely manner, and Judge Melick held that it was premature time to find a violation because the inspection had not been done yet. In contrast, the case at bar, the issue is not whether a violative condition was corrected in a timely manner. The operator herein was cited on the ground that a piece of equipment was in such a condition that it did not comply with a regulatory standard. It is too speculative to rely on the fact that this condition would have been picked up

on a pre-shift examination, and would have been acted upon, especially in light of the fact that at times the bar sometimes worked, and at other times sometimes it didn't work. It's just too hypothetical to rely on the independent judgment and action of a person as a way of defeating the violation.

For all these reasons, I find that the Secretary did establish a violation of Section 75.523-1, *supra*.

2. Significant and Substantial

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

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

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

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

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

Following the dictates of *Mathies, supra*, I find that the operator did violate a mandatory standard, and this contributed to the risk of an accident happening, i.e., a miner banging a head on a low roof or running over a cable. The key issue is the third factor in *Mathies*, i.e., whether the Secretary has established the reasonable likelihood of a of an injury-producing event.

-The scoop at issue does not have a canopy. The average height roof is 48 inches, according to the inspector's testimony that was not contradicted. There are places where as measured by him, the height was only 42 inches. Thus there was a risk of the scoop operator coming in contact with the low roof and having to push the panic bar very quickly. If it does not work quickly, any risk of resulting injuries would be exacerbated. In addition, the inspector described various physical conditions that would tend to support a reasonable likelihood of an injury occurring event in addition to the low height of the roof. The inspector described poor visibility, the fact that there were, at times, persons, machinery, and cables in the vicinity of the operation of the scoop. None of this testimony was impeached or contradicted. He also indicated that as the battery of the scoop runs down it creates a condition where the equipment could become stuck in the tramming mode, and as a result, "the brake" will not stop the scoop. (Tr. 35). Taking into account a combination of all the above, I find the Secretary has established a reasonable likelihood of an injury-producing event.

The inspector also testified that there was a reasonable likelihood of various injuries that he described as contusions, abrasions, broken limbs, and also crushing injuries. This testimony was not contradicted or impeached.

For all the above reasons I find that the third and fourth elements of *Mathies* have been met, and that the Secretary has established that the violation was significant and substantial.

B. Citation No. 6641363

1. Violation of 30 C.F.R. § 202(a)

Citation 6641363, alleges a violation of 30 C.F.R. § 75.202(a), and sets forth the existence of various conditions in that formed the basis for the issuance of the citation. The inspector testified regarding the existence of these conditions. In essence, the Company does not dispute the existence of those facts. Under these circumstances and, I find that a reasonably prudent person familiar with the industry would have recognized that additional support is necessary, and so I find a violation of Section 75.202(a).

2. Significant and Substantial

In addition to the existence of a violation of a mandatory standard, because of a lack of adequate roof support in the cited area, I find that the violation contributed to the hazard of a roof fall. With regard to the third and fourth elements set forth in *Mathies, supra*, i.e., the reasonable likelihood of a roof fall and resultant serious injuries, I note a combination of factors in the record. In addition to the cited conditions, the inspector testified to three cracks in the roof in the area, each 15 feet long and between 1/8th of an inch and 1/4 of an inch wide. This testimony was not impeached or contradicted. The testimony of the operator's witnesses indicated that the main function of the roof bolt heads and plates was to prevent drawrock from falling. The inspector testified that he observed drawrock, approximately five feet by two to three inches thick, on the floor under the area cited. The witness for the company, Jerry Maggard, indicated that when he was in the area he did not see any drawrock on the floor. I don't find this testimony sufficient to contradict that of the inspector. Maggard was not in the area at the same time that the inspector was. He was there about 10 hours later. Thus, his testimony does not contradict what was seen by the inspector at the time that he saw it. Also, I find the latter's demeanor credible on this point.

With regard to exposure of miners to the hazard, I note first of all that pumpers are required to go to the area once a week to examine a pump. Also, pre-shift examiners enter the area daily. I take cognizance of the argument of the company, in essence, that the shearing of the bolts and the creation of the conditions observed by the inspector would have been observed in any subsequent examination. Also, it is a standard operating procedure of the company to note any hazardous conditions and tag the area where they exist, in order for the conditions to be corrected. Whether that would have been done in this case is somewhat hypothetical. It depends upon the judgment of the respondent's examiner.

Considering all the above and the fact that the miner's are exposed to the cited area on a regular basis, I find that the third and fourth elements of *Mathies, supra*, have been met. I thus conclude that the violation was significant and substantial.

C. Citation No. 6641381

1. Violation of Section 75.202(a), supra

With regard to Citation 6641381, the operator has stipulated to the existence of the conditions referred to in the citation which indicates the

existence of various conditions, including a rock brow. The inspector elaborated on that condition with regard to the hazards of a roof fall. A reasonably prudent person would have recognized that the roof was unsupported, and that additional support should have been provided. Since none was, I find a violation of Section 75.202(a), supra, as charged.

2. Significant and Substantial

Essentially for the reasons I set forth above, infra, I find that the first two *Mathies, supra*, elements have been met. However, there is a serious issue with regard to the third element of *Mathies, supra*. The evidence would appear to indicate that there was probably a reasonable likelihood of a rock fall. However, in order to fit within the third element it must be established that there was a reasonable likelihood that the rock fall will result in serious injuries. There has to be evidence of exposure of miners on a somewhat regular basis. The inspector indicated that he saw tracks in the cited crosscut. However, the record is not clear. Although these tracks may have existed, was this a one-time event? There isn't any evidence to indicate that vehicles with tracks go into the area on a regular basis. The Secretary argued that individuals who perform examinations of the adjoining entries, (the track and the travelway entries), could enter the cited crosscut, and persons could traverse the crosscut to examine the pump. Certainly, these events are possible, but there isn't any evidence that travel into the area was reasonably likely to have occurred. The only evidence with regard to travel in that area based upon personal knowledge consists of the testimony of Mike Williams, the operator's mine forman. I found him a credible witness. He outlined his route of travel, both in examining the travelway and belt entries, and the pump which he does on a daily basis. In executing all these duties none of his routes took him through the crosscut at issue. He also indicated that in examining the travelway entry when he looks into the crosscut in question, he is able to observe violative roof conditions, without the necessity of entering into a crosscut. I find there is not any persuasive evidence that there was a reasonable likelihood that miners would enter the crosscut at issue on a somewhat regular basis.

Next, although there was a reasonable likelihood of a fall from the various conditions referred to, there isn't any evidence in the record that is persuasive with regard to the fall propagating out beyond the boundaries of the crosscut into areas where persons travel, i.e., the adjacent entries. There isn't any evidence as to the distance between the specific violative conditions, and the various entries. For all these reasons I find that the third element of *Mathies, supra*, has not been established and that the violation was not significant and substantial.

D. Citation No. 6641385

1. Violation of Section 75.202(a), supra

I take into account the stipulation by the company that it does not contest the existence of the conditions set forth in the citation. Basically the facts alleged in the citation, and set forth by Carroll in his testimony do not in any significant fashion differ from those presented regarding Citation No. 6641381. So for the reasons I set forth in my decision with regard to that matter, I find that a violation of Section 75.202(a), *supra* has been established.

2. Significant and Substantial

I do not find any significant distinction in the facts presented here and the facts presented regarding Citation No. 6641381. There is evidence of tracks in the crosscut in issue. Carroll referred to several tracks, three and four-wheelers. However, there wasn't any evidence adduced as to or how often vehicular traffic goes through this crosscut. The record is silent as to whether the presence of tracks was a one-time occurrence. Also, were is not any facts adduced relating to the reason why the vehicles went into the crosscut. There was adduced evidence that there was a rock duster in the area, but there wasn't any evidence adduced as to how frequently the crosscut is rock dusted. The Secretary has the burden on all these issues. I find that there is not clear and convincing evidence that miners are required to be present in the crosscut at issue on a regular or frequent basis. For these reasons, I find that the third element of *Mathies, supra*, has not been met and, therefore, the violation is not significant and substantial.

E. Citation No. 6641379

1. Violation of 75.202(a), supra

The uncontroverted evidence indicates the presence of a brow that extended 10 feet. The evidence adduced yesterday established the hazard that this condition creates. Therefore, I find that a violation of Section 75.202(a), *supra*, has been established.

2. Significant and Substantial

A critical issue is presented with regard to the specific location of the violative condition. It appears to be the Secretary argument that even if the violative condition was on the "tight side" ("back side") of the entry, miners

who shovel and rock dust would be exposed to the hazards contributed by the existence of a brow. I find that there is not clear and convincing evidence in the record to establish that miners do shovel or perform other duties on the back side of the belt. The record is silent regarding the distance between the belt and the rib on the tight side; whether it is physically possible to shovel and perform other duties on this side; and whether all such work can be performed from the wide side. There is not any credible evidence regarding under what conditions and how frequently work would have to be done on the tight side, if at all. The inspector offered his opinion regarding some of these issues. However, I find that the record does not contain any factual bases for his opinions. I focus on the fact that the Secretary has the burden of proving by a preponderance of evidence all elements of the citation at issue, specifically the third element of *Mathies, supra*, i.e., the reasonable likelihood of a rock fall causing a serious injury. In order to meet this burden the evidence adduced by the Secretary must be clear and convincing that the violative condition was on the wide side, which the evidence clearly establishes is the area where men regularly traverse to perform various duties, including maintenance.³ However, the inspector's testimony on this matter was not consistent. He first indicated that the violative condition was on the wide side or the walk side. However, on cross-examination he indicated that after the citation was issued, in preparation for abatement six timbers were installed on the back side. Further, I note the inspectors' statement on cross-examination that six timbers were installed on the back side. However, later on in the trial he changed his testimony and indicated that timbers were set on the wide side. He attempted to explain that inconsistency by indicating, in essence, that he just did not recall. Because his testimony was inconsistent, I find it somewhat unreliable.

Also, the inspector's notes indicate conditions on the walkway side of the belt. (Gov't Exhibit 10). However, his testimony was not clear whether this statement was based on his recollection, or upon his having read notes that were taken by a trainee who was along with him in the inspection. It is not clear and convincing and that the statement was based strictly on his own recollection.

Maggard testified that he was the person who actually installed the timbers in question. He testified unequivocally that the timbers that were installed that formed the basis of the abatement, were on the off side and not on the walk side of the belt. I observed his demeanor and found him a credible witness.

³I note that examiners travel the wide side on a daily basis.

For all these reasons I find that the Secretary has not established by clear and convincing evidence that the violative condition was on the walk side. The weight of evidence establishes that the condition existed, but on the narrow side. The evidence has not established that miners are subjected to being in that area on a regular basis.

Based on all of the above, I find that the Secretary has not established the existence of the third element set forth in *Mathies, supra*. Thus, I find that the violation was not significant and substantial.

F. Citation No. 6641354

1. Violation of Section 75.202(a), supra

Essentially the reasons that I indicated with regard to the other citations involving issues of inadequate roof support, I find that there was a significant area of unsupported roof as depicted on Joint Exhibits 2A and 2B, and testified to by the inspector. The existence of these conditions were not put into issue by the operator. Therefore, I find the Respondent did violate Section 75.202(a), *supra*.

2. Significant and Substantial

First of all, I note that this is de novo proceeding and in analyzing the third element of *Mathies*, I have to ascertain if the evidence establishes that the violative condition was such that an injury producing event, i.e. a roof fall, was reasonably likely considering continued normal mining operations. The fact that the Company took action after the conditions were pointed out by the inspector really doesn't have much relevance. The analysis must focus on the relevant of conditions within the context of continued mining operations. I note that, as distinguished from the last two cases, the violative condition was on the wide side of a belt entry, an area where people travel. This side is where belt examiners are in the area daily. Also, shovelers work at that side. I find the existence of a hazzard of a roof fall existed along with exposure of miners. Certainly any rock falling on persons would cause a very serious injury. I find that the third and fourth elements of *Mathies, supra*, have been met.

Therefore, I find the Secretary has established the violation therein was significant and substantial.

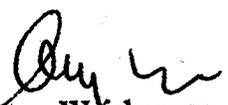
II. Penalty

After the hearing, the parties entered into extensive settlement negotiations, and reached a settlement regarding the remainder of the citations in this case, and the penalties for the citations that were litigated. On November 25, 2009, after numerous extensions, the Secretary filed a motion seeking approval of the parties' agreement. The original assessment was \$22,062 and the parties request approval of their agreement for civil penalties totaling \$12,094.

I reviewed the parties' representations, along with all the evidence and filings in this case, and find that the settlement is consistent with the Federal Mine Safety and Health Act of 1977 ("The Act"), and I approve it.

III. Order

It is **ORDERED** that within 30 days of this decision, the Respondent shall pay a total civil penalty of \$12,094.00.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9964 / FAX: 202-434-9949

December 28, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-778
<u>Petitioner</u>	:	A.C. No. 15-07082-142073-03
v.	:	
	:	
FREEDOM ENERGY MINING CO.,	:	Mine No. 1
<u>Respondent</u>	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, and Vicki Mullins, CLR, Mine Safety and Health Administration (MSHA), Pikeville, Kentucky, for the Petitioner; Carol Ann Marunich, Esq., Dinsmore & Shohl, LLC, Morgantown, West Virginia for the Respondent.

Before: Judge Weisberger

This case is before me based on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), alleging violations by Freedom Energy Mining Company ("Freedom") of 30 C.F.R. § 75.202(a) and § 75.400. Pursuant to notice, the case was heard in Richmond, Kentucky on October 15, 2009. Subsequent to the hearing, each party filed proposed findings of fact and a brief.

I. Violations of 30 C.F.R. § 75.202(a)

After both sides rested, the parties agreed to make oral arguments and accept the format of a bench decision. The decision, with the exception of corrections of non-substantive matters, is set forth as follows:

A. Citation No. 6657078

1. Violation of 30 C.F.R. § 75.202(a)

Freedom Energy operates the coal mine at issue. On February 7, 2008, MSHA Inspector Roger Workman inspected the underground operation. He examined the belt entry, and observed gaps in a corner of a rib located at crosscut No. 21 where it intersected with the belt entry.

He issued a citation alleging a violation of 30 C.F.R. § 75.202(a) which provides as follows: "[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."

The inspector testified that the gap was fourteen inches in the rib side and along the crosscut side, and six inches wide in the rib side along the belt entry. As a consequence of the gaps that extended to the top of the ribs, a block at the intersection of the track entry and the crosscut had separated from the ribs. The block was approximately three feet wide along the crosscut side and thirty inches wide along the entry side.

Respondent conceded that the facts established a violation. Further, the inspector's testimony as to the conditions he observed was not contradicted. Thus, I find that there was a violation of Section 75.202(a).

2. Significant and Substantial

The critical issue is whether or not the violation was significant and substantial as alleged in the citation.

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

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

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

a reasonably serious nature.

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

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

(emphasis added).

The record establishes that Respondent violated a mandatory standard, i.e., Section 75.202(a). Also, I find, based upon the testimony of the inspector, that people do work in the area, although it is not clear how frequently they work in the area and how close to the rib they are when they perform their duties. However, there certainly is a possibility, as explained by the inspector, that the rib could fall, and a person could be pinned between the rib and the belt, and crushed, or seriously injured. At this point, I am just recognizing that a hazard was created. I am not commenting at all upon the degree of the hazard.

The critical issue in this case is the third element set forth in *Mathies*, which requires a reasonable likelihood of an injury-producing event. Here the injury-producing event would be material falling off the rib. The record does not contain sufficient evidence that there were facts in existence that would have made the injury-producing event reasonably likely to have occurred.

The inspector indicated that portions of this rib or a rock could fall on persons working in the area. However, there is an absence of any evidence of the existence of any physical conditions that would lead to a conclusion that the hazard of a fall of either the entire rib or a portion was reasonably likely to have occurred. There was not any evidence of any of the ribs being under pressure. There was not any evidence adduced of deterioration of the rock pillars. There was not any evidence presented of any defects in the roof. Therefore, I find that the evidence is insufficient to

establish the third element of *Mathies*. Hence, I find it has not been established by a preponderance of the evidence that the violation was significant and substantial.

3. Penalty

-The Secretary conceded that the violation was abated in a timely fashion. The Secretary submitted a list of the company's history of violations. I find there is not anything in that exhibit to militate in favor of an increase or decrease in penalty.

The parties stipulated that the imposition of a penalty would not affect the operator's ability to continue in business. Also, the parties stipulated regarding the coal production of the company, as apparently relating to its size. However, there is not any other evidence relating production statistics to the size of the company. Therefore, I find that there is not sufficient evidence in the record to justify either an increase or a decrease in penalty based upon that factor.

I find the gravity of the violation to have been moderate. I find that, regarding gravity, the focus of the evaluation is the degree of seriousness in terms of the type of injury, even though the likelihood of its occurrence may be remote. Since there was a possibility of a person being crushed or suffering a broken bone, I conclude that the level of the gravity was moderate.

I find that the cited conditions were extensive and obvious due to the height and width of the gap in the ribs in two locations. However, there is not any persuasive evidence as to the length of time the conditions existed. The inspector indicated that he observed that there was rock dust in the cracks, which would indicate that the cracks were in existence first, and then the area was rock dusted. But the record does not contain any evidence when the last rock dusting occurred in relation to the cracks.

Brian Slone, Respondent's mine foreman, testified that the company had not been cited by previous inspectors for the cited conditions. This testimony was not impeached or contradicted. Further, there is not any evidence that the company had any prior knowledge of these conditions. I thus find the existence of factors significantly mitigating Respondent's negligence.

Taking into account all of the factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977 ("the Act"), I find that a penalty of \$250 is appropriate.

B. Citation No. 6657084

1. Violation of 30 C.F.R. § 75.202(a)

On February 12, 2008, Workman issued a citation based upon the existence of a crack in the roof in the No. 1 crosscut, alleging a violation of Section 75.202(a).

Workman indicated that the crack extended approximately twenty feet in the intersection. He approximated that it was between one inch and eighteen inches wide. According to Workman, some sections may have been smaller; some areas larger. Workman indicated that he observed jagged pieces of rock. He also indicated that miners do, on occasion, work in the area. Rodney Chapman, one of Respondent's mine foremen, who accompanied Workman, did not contradict Workman's testimony regarding the dimensions of the crack.

It is Respondent's position that cribs had been installed in the area, and as a consequence there was not any hazard.

I find, taking into account the length and width of the crack, and the inspector's observation of jagged pieces of rock, that there was some hazard related to a fall of the roof. I thus find that it has been established that Respondent violated Section 75.202(a).

2. Significant and Substantial

The inspector was asked for his opinion as to why he found the violation significant and substantial.¹ His testimony is as follows:

Q. Okay. And why did you think an accident was reasonably likely?

A. Well, this area is real muddy ...

... It's got mud and water on the mine floor, and you've got your noise from your belt head. And then you got miners that has to work in this place to maintain it. And that eliminates your -- you can't hear the -- if your roof made a noise, you wouldn't hear it for the belt head. And if you're standing in mud too long, it limits your mobility. So I -- if a piece of this

¹Some of his testimony was in response to questions regarding gravity, and some was given in response to specific questions regarding significant and substantial.

rock fall, I don't know if a person could move fast enough to get away from it or I don't think he'd hear it.

Q. Did you mark this particular violation as significant and substantial?

A. Yes, I did.

Q. Why?

A. Because you got men working in the area. The belt line's under violation to be cleaned and rock dusted. If an accident would occur, it would be the -- more than likely it would be a permanently disabling injury.

(Tr. 51-53.)

I note that the critical issue, the reasonable likelihood of an injury-producing event, i.e., a roof fall, was not addressed. There is not any persuasive evidence that would tend to establish a reasonable likelihood of the roof falling, i.e. the specific conditions that would have made such an event reasonably likely to have occurred. Therefore, I find that the Secretary has not met her burden of establishing that the violation was significant and substantial. Hence, I find the violation was not significant and substantial.

3. Penalty

A number of factors are in common with those I discussed with regard to the prior violation, except for the following; the cited condition was extensive and obvious due to its length and width; the company's witness testified that cribs had been installed a few days, or maybe a week, before the citation was issued, and an inference could be drawn that this condition had been in existence at least a few days before it was cited.

Considering all the factors in 110(i) of the Act, I find that a penalty of \$500 is appropriate.

II. Violations of 30 C.F.R. § 75.400

A. Citation No. 6656083

1. Violation of 30 C.F.R. § 75.400

On February 12, 2008, Workman inspected the tail end of the B-9 conveyor belt. He indicated that he observed accumulations of loose coal, float dust, fine coal, and coal inside the tail roller, which was sixty-eight inches off the ground. He indicated that the coal was piled at

both ends of the roller, extended one half the way up the shaft of the roller, and was twelve inches deep. He testified that there was coal inside the belt frame, and it was in contact with the bottom belt of the conveyor. According to Workman, the belt was running in the accumulations, which were black at the roller, and dry at the tail piece. Further, there was float coal dust on the mine floor under the tail piece. The float coal dust extended from rib for to rib for approximately 320 feet outby the tail. He described the accumulation as a thin coat on top of rock dust, and estimated that it was about a sixteenth of an inch to a one-eighth inch deep. However, he did not measure its depth. Essentially, the operator did not contradict or impeach the inspector's testimony with regard to the extent and location of the accumulations of coal.

The inspector issued a citation alleging a violation of 30 C.F.R. § 75.400 which, as pertinent, provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." I find based on the testimony of the inspector, and considering the extent of the accumulations, that the operator was not in compliance with Section 75.400.

2. Significant and Substantial

The inspector characterized the violation as being significant and substantial. In this connection, he concluded that a hazard existed at the tailpiece because he has "seen tailpieces when they allowed the coal to run in them to the bearing to get hot and start smoking and sometimes catch on fire. [sic]" (Tr. 167.) He explained his reasons for marking the gravity of the violation as "reasonably likely" as follows:

At the bearing, it wasn't running hot at that time, in a few minutes running it could dry the grease out. And then you'd have the metal inside the bearing running metal to metal. And it could become hot and ignite fire at the tailpiece because there's combustible material at the tailpiece.

(Tr. 170.) (emphasis added)

In this connection, he stated that coal dust was in contact with the bearing and was getting inside the bearing. He opined that with continued operations for two to three hours, the lubricant "probably" would dry out. (Tr. 174.) He testified that he "had that happen in the past in mines [he] worked at." (Tr. 175.) He was specifically asked to explain why he marked the violation as significant and substantial, and he indicated that there was "a good possibility" of ignition at the tailpiece because the bearing was being exposed to combustible material, "and due to people working outby and from being in smoke." (Tr. 176.)

I find that the record establishes the first two elements set forth in *Mathies*, 6 FMSHRC 1. Although the inspector opined that in normal operations the lubricant and the bearing would dry

out after two or three hours causing friction which will ignite the combustible material,² there was not any evidence adduced as to how frequently lubrication is checked, or more is added. Aside from proffering his opinion, the inspector did not provide any basis for his conclusion with regard to the amount of time it would take, in normal operations, for the lubricant to dry out.

Further, I note the absence of ignition sources or conditions which would have made it reasonably likely for a fire to have resulted with continued operations. Thus, there was not any evidence of a hot or red bearing or other metal members, metal to metal rubbing,³ float coal dust in the air, or inadequate air ventilation.

For all these reasons, I find, within this context, that it has not been established that the hazard of an injury producing event, i.e. a fire or explosion, was reasonably likely to have occurred. Thus, I conclude that it has not been established that the violation was significant and substantial.

3. Penalty

I incorporate herein the earlier discussion of penalty factors relating to the company's operation as set forth above, *supra* Section I. The Secretary indicated that the violative conditions were abated in a timely fashion. Because the accumulations existed for a length of 320 feet extending rib to rib, I find that they were extensive, especially considering that the entire length of the belt was only approximately 1,100 feet.

The evidence is not clear with regard to the length of time that the conditions had been in existence. There is not any evidence that the belt was out of alignment which could have caused the accumulations to have occurred very quickly. Also, Workman testified that the accumulations were dry at the tailpiece, which would tend to indicate that any spillage was not very recent. However, there was not any specific evidence adduced as to whether the

²It is significant to note that in earlier testimony, when he was specifically asked to provide his reasons for considering the violation to be "reasonably likely," he explained that as a consequence of the lack of lubricant and resultant metal to metal contact within the bearing, it "could become hot and ignite fire." (Tr. 170.) (emphasis added) This qualification dilutes the weight to be accorded his subsequent testimony that the dry condition of the bearing "will" ignite combustible material. (Tr. 171.)

³It is significant that at cross examination, Workman was asked whether he identified any heat source. He responded as follows: "Well, I think the tail burning is a heat source because even though it wasn't hot, it had a potential. And had the mine continued to run that way, I think you would have a hot bearing." (Tr. 191.) (emphasis added) In the absence of any further explanation, I find that this testimony is insufficient to predicate a finding that it was "reasonably likely" that continued operations would have resulted in a hot bearing.

accumulations were uniformly "dry" throughout their various locations, nor was there evidence adduced as to whether the inspector actually touched the accumulations and, if so, at what locations. On the other hand, Rodney Chapman, who accompanied Workman, testified that the accumulations were wet, and had a "shiny glow" (Tr. 229.), which indicated to him that the material had been sprayed when it came through the feeder, and that the accumulations had recently occurred. Considering all of the above, I find that the level of negligence was no more than moderate.

Because the accumulations could have resulted in burns or smoke inhalation, I find that the level of gravity was moderate.

Considering all of the factors of 110(i) of the Act, I find that a penalty of \$500 is appropriate for this violation.

B. Citation No. 6657082

1. Violation of 30 C.F.R. § 75.400

On February 11, 2008, Workman examined the interior of an electrical control starter box, which supplies power to a conveyor belt drive. He said that he observed float dust on the floor of the box and on the electrical components. He described the float dust as black and dry. He issued a citation alleging a violation of Section 75.400. Workman's testimony regarding the accumulation of float coal and dust was not impeached or contradicted. Thus, based upon his testimony, I find that Respondent violated Section 75.400.

2. Significant and Substantial

Workman opined that ignition inside the box due to a spark was reasonably likely to have occurred, because the box is powered by 480 volts. Also, should an arc occur, flames could shoot out and injure a miner as persons travel by the box. In this connection, he noted that one person services the box once a week. Also, the belt head in the area is serviced once every twenty-four hours. Workman indicated that a person could suffer burns or smoke installation.

Workman was asked specifically whether the violation was significant and substantial and he indicated in the affirmative because men work in the area, and if there was an arc inside the box it "could" cause an ignition of the coal dust inside the box "and create serious fire." (Tr. 184.)

On cross examination, he indicated that there was only one ignition source, which would be a short circuit inside the electrical box. He indicated that he did not observe any bare wires; the wires and cables were insulated. Further, significantly, Workman indicated that when he inspected the box there was not any arcing or sparking, "[j]ust the potential." (Tr. 206.)

Arnold Fletcher, an MSHA inspector and electrical specialist, accompanied

Workman during the latter's inspection on February 12. He indicated that he looked inside the starter box and that it was covered with float dust that was grey to black in color. He indicated that there were items in the box that "could be" ignition sources, such as the presence of several electrical components, including a breaker and transformers. (Tr. 215.) He indicated that all these components are "bonded" together with an open-end connection and are not insulated; there is not anything to keep the dust from getting on them. (Tr. 217.) According to Fletcher, when dust accumulates on the connections, "carbon tracking" results, causing a "very violent arc flash, ... [and the box will] burn down." (Tr. 217-18.) However, he indicated that he does not recall "seeing any type of evidence of any past history of violent arc flashes on [the] box." (Tr. 225.)

Chapman, who accompanied the inspector, opined that any material in the box was not reasonably likely to become explosive because he did not see anything that would put float coal dust in suspension inside the box. (Tr. 248-49.)

In evaluating the third element of *Mathies*, the likelihood of an injury-producing event, i.e. a fire, I note the absence of ignition sources. I take cognizance of the testimony of Fletcher regarding uninsulated connections or connectors within the box which could cause carbon tracking resulting in a short circuit and violent arcing and flashing, causing the box to burn. However, there is not any evidence in the record that there was any carbon tracking on any connection or connector, nor is there evidence that, in continued operations, carbon tracking would result, especially to the extent of causing violent arcing. Indeed, there was not any evidence of any arcing or sparking or flashing within the box. Significantly, neither inspectors testified that there was any dust in suspension, nor did they indicate the presence of any conditions that would be likely to cause the float dust to go into suspension. Moreover, it would appear that the presence of gaskets on the door of the box would somewhat reduce somewhat the likelihood of the entry into the box of air of a velocity sufficient to cause the interior float dust to become suspended. Within the above context, I find that the third element of *Mathies* has not been established.⁴

2. Penalty

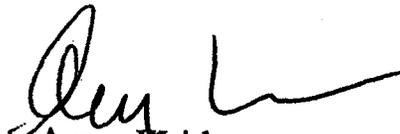
The Secretary has indicated that the citation was abated in a timely fashion. I find that should a fire have resulted, it could have caused burns or smoke inhalation. Accordingly, the level of gravity was moderate. There is not any evidence as to the length of time the violative conditions had existed, nor was evidence adduced regarding the last time prior to Workman's observations that the interior of the box was actually inspected. Workman opined that the accumulations existed more than a week because the box had "sealed lids on it." (Tr. 182.) I find

⁴I take cognizance of *Bob and Tom Coal Co.*, 16 FMSHRC 1974 (Sept. 1994) (ALJ) and *Beech Fork Processing Inc.*, 13 FMSHRC 576 (Apr. 1991) (ALJ). These cases were decided by fellow Commission judges and are not binding. To the extent that they are not consistent with the above decision, I choose not to follow them.

his opinion somewhat speculative. I thus find that the level of negligence was less than moderate. Taking to account all the remaining factors set forth in Section 110(i) of the Act as set forth above, *supra* Section I, I find that a penalty of \$450 is appropriate.

ORDER

It is **Ordered** that, within 30 days of this decision, Respondent shall pay a total civil penalty of \$1,700 for the violations found herein.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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December 31, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2007-318
Petitioner	:	A. C. No. 15-17587-118112-01
	:	
	:	Docket No. KENT 2007-319
	:	A. C. No. 15-17587-118112-02
	:	
v.	:	Docket No. KENT 2007-344
	:	A. C. No. 15-17587-119033-01
	:	
	:	Docket No. KENT 2007-345
OHIO COUNTY COAL COMPANY,	:	A. C. No. 15-17587-119033-02
Respondent	:	
	:	
	:	Freedom Mine

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Melissa M. Robinson, Esq., William B. King, II, Esq., Jackson Kelly, PLLC, Charleston, West Virginia, on behalf of Ohio County Coal Company.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties 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 Petitions allege that Ohio County Coal Company is liable for eleven violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines, and propose the imposition of civil penalties in the total amount of \$7,610.00. A hearing was held in Evansville, Indiana, and the parties filed briefs after receipt of the transcript. At the commencement of the hearing, the parties moved for approval of a settlement agreement resolving six of the alleged violations. The Secretary agreed to vacate two citations and Respondent agreed to withdraw its contest of four citations and to pay the assessed penalties in full. That proposed settlement will be approved herein. For the reasons set forth below, I find that Ohio County committed four of the five remaining violations, and impose civil penalties in the total amount of \$3,350.00.

Findings of Fact - Conclusions of Law

From November 2006 through April 2007, the Secretary's Mine Safety and Health Administration conducted inspections of Ohio County's Freedom Mine, located in Henderson County, Kentucky. The eleven citations at issue in these cases were issued during those inspections. Ohio County timely contested the violations and assessed civil penalties.

Citation No. 6692124

Citation No. 6692124 was issued by MSHA inspector Anthony Fazzolare on November 28, 2006. It alleges a violation of 30 C.F.R. § 75.202(a), which requires that coal mine roofs, faces and ribs, in areas where persons work or travel, be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock outbursts.

The violation was described in the "Condition and Practice" section of the Citation as follows:¹

Located at the XC 34 just inby the "2A" Belt tail there were 8 damaged roof bolts. These roof bolts have had draw rock fall from around them exposing areas of unsupported top measuring approximately 13 feet 7 inches by 6 feet 6 inches or 47.5 square feet. Another area measured approximately 15 feet by 10 feet, or 150 square feet. A breaker/feeder had been sitting in this spot and was just moved to the "2B" belt tail last shift. Failure to identify and correct this condition indicates a higher than moderate degree of negligence on the operator's part. Any miners working in this area could easily be hit by falling rock.

Ex. G-9.

Fazzolare determined that it was reasonably likely that the violation would result in a lost work days or restricted duty injury, that the violation was significant and substantial ("S&S"), that one person was affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of \$4,100.00 was proposed for this violation.

The Violation

As noted in the citation, the area in question was located in or near a crosscut, just inby the tailpiece of the 2-A belt. The citation was issued at 9:45 a.m. On the previous midnight shift, a feeder that had been at that location was moved about 240 feet onto a new beltline designated 2-B. That belt was at a right angle to the 2-A belt and dumped coal onto it. The

¹ Grammar and spelling errors have been corrected in quotations from documents prepared in the field.

feeder was a Stamler BF 17, a very large piece of equipment, approximately 40 feet long and 14 to 16 feet wide, weighing about 40 tons. It is a relatively tall piece of equipment, which makes it difficult to position properly in the Freedom mine, where the coal seam is only 42-48 inches high. Tr. 242-43. Walter Wood, Ohio County's maintenance manager, traveled with Fazzolare on the inspection and confirmed the observations noted in the Citation.

Ohio County does not contest the fact of violation. It argues that the violation was not S&S and that its negligence was less than moderate, and requests a corresponding reduction in the assessed penalty.

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 failure to properly support the mine roof.² An injury to a miner struck by material falling from the unsupported area would most likely be reasonably serious. Therefore, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event.

The area in question was located where the belt line made a 90 degree turn. Prior to the feeder move, miners had used the area as a regular travelway. However, a new route had been created, and it was no longer used for that purpose. Tr. 240. Persons were required to be in the area approximately three times per day. Belt examinations were done on each of two production shifts, and an on-shift examination was conducted on the third shift. Tr. 83-84, 257, 263, 266.

The likelihood of an injury producing event must be evaluated by considering the likelihood of two specific events occurring simultaneously, a rock or other material falling from the roof and the presence of a miner directly underneath it. The frequency with which rocks, sufficient to cause a reasonably serious injury, would fall from the inadequately supported area is unknown and unpredictable. There is no evidence that any material fell from the area while the inspection party was present. Persons passed through the area three times per day, although not necessarily under the inadequately supported roof. Fazzolare did not know for certain whether persons would travel under it. Tr. 83. Belt examiners traveled on one side of the belt, and could conduct their examinations without going into the area of danger. Tr. 83, 258. Moreover, it is likely that an examiner would have noticed the problem and avoided exposure to the inadequately supported roof. As Wood noted, "that's their job," and they should have seen and corrected the problem, "like we did." Tr. 257. Because of the uncertainty of potential rock falls, and the fact that those potentially exposed to the hazard were trained examiners who were in the area infrequently and should have observed and avoided the hazard, I find that the occurrence of an injury causing event was unlikely.

The Commission and courts have observed 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 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36

² As with Citation No. 6692129, Ohio County contends that fully grouted bolts continued to support the immediate roof in the absence of support plates. That contention is rejected. See the discussion, *infra*.

(7th Cir. 1995). Fazzolare certainly qualifies as an experienced MSHA inspector. However, while it is possible that a miner could have been injured as a result of the violation, I find that the Secretary has failed to prove that it was reasonably likely that an injury causing event would occur, as opposed to could occur. *See Amax Coal Co.*, 18 FMSHRC 1355, 1358-59 (Aug. 1996) (to prove S&S nature of violation, Secretary must prove that it is reasonably likely that an injury producing event *will* occur, not that one *could* occur). Accordingly, I find that the violation was not S&S.

Negligence

Fazzolare determined that Respondent's negligence was high because he believed that the condition existed prior to the move of the feeder, and should have been discovered during the preshift examination done before the third-shift crew started to work. Tr. 74-75. Ohio County contends its negligence was no more than low, because the damage occurred during the move of the feeder, and there had been no intervening examination. Fazzolare disagreed, because the damage to the roof was in a location consistent with it having been caused by ram cars, and believed that those moving the feeder would have known of any damage caused during the move.

I find Fazzolare's testimony more persuasive. From his experience, he believed that the damage had been caused by ram cars striking the mine roof while loading coal onto the feeder. Tr. 63-66, 74-75, 92. As he described it, ram cars would ride up on spilled coal as they backed up to the feeder's loading platform (referred to as the "duckbill"), and the tail of the car would hit the mine roof. Tr. 63-64. Wood confirmed that there is "inherently a lot of spillage" in the loading process. Tr. 250. The damage would have been done on production shifts and would have existed before the start of the non-production third shift, during which the feeder was moved. Fazzolare also believed that the location, nature and extent of the damage was consistent with damage caused by ram cars in the loading process.

Wood testified that the damage could "very easily" have occurred during the feeder move. Tr. 243. As Wood described the procedure, the feeder would first be trammed back away from the belt. The part of the feeder that dumped onto the belt would often be up against the mine roof, and would scrape the roof as it was trammed back. Tr. 244-45, 274-75. He stated that the damaged bolts were not actually in the crosscut, where the ram cars loaded, but were between coal pillars, where the feeder could have scraped the roof as it was trammed back. Tr. 254.

Fazzolare testified that the damage was extensive, and was located in the crosscut, where the ram cars would have dumped coal. Tr. 60, 74-75, 92. While his recollection of events on the day of the inspection was, admittedly, "vague," he had recorded in his contemporaneous field notes that the location of the roof damage was in the crosscut, which was consistent with his theory of causation. Tr. 56; ex. G-10. I find that the location of the inadequately supported roof was in the crosscut, where ram cars had loaded. The extensiveness of the damage also supports Fazzolare's version of events. He testified that, if the damage had been caused during the move of the feeder, it would not have been as extensive. Tr. 74-76, 92. Wood testified that the feeder

would be trammed back away from the belt only for a short distance, i.e., 18 to 20 inches, then lowered to facilitate the move. Tr. 274. Once lowered, Wood did not believe that further contact with the roof would be likely. Tr. 275. Wood's explanation of the cause of the damage is inconsistent with the extensiveness of the damaged area.

I find that the damage to the bolts had been caused prior to the feeder move, and should have been discovered during the preshift examination for the prior shift. Accordingly, I find that Ohio County's negligence was properly assessed as high.

Citation No. 6692129

Citation No. 6692129 was issued by Fazzolare on December 7, 2006. It also alleges a violation of 30 C.F.R. § 75.202(a). The violation was described in the "Condition and Practice" section of the Citation as follows:

Draw rock had fallen from around the permanent roof support on the haul road for MMU 001-0 exposing unsupported top measuring approximately 10 feet by 8 feet, or 80 square feet. A vehicle had traveled under the unsupported top.

Ex. G-11.

Fazzolare determined that it was reasonably likely that the violation would result in a lost work days or restricted duty injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$838.00 was proposed for this violation.

The Violation – S&S

This violation also involves an area of inadequately supported mine roof. As with the previous Citation, Ohio County does not challenge the fact of the violation. It disputes the Secretary's S&S and negligence allegations. The S&S analysis involves the same considerations as the preceding citation. There, because only trained mine examiners might encounter the hazard, and any exposure would have been infrequent, the violation was determined to be not S&S. However, the area in question here was located on a haul road, an area frequently traveled by rank and file miners. Tr. 97. Several types of vehicles traveled the road, some of which did not have canopies to protect the operators from falling rocks. Tr. 96-97. Material had fallen from around one bolt and loosened the plate, creating an area of inadequately supported roof approximately 8 feet by 10 feet. Tr. 194. At least one vehicle had traveled under the inadequately supported roof area. Tr. 95. These facts substantially alter the outcome of the S&S analysis.

Ohio County argues that the subject area was to the side of the entry, and that the grouted bolt still retained most of its holding power, making the fall of additional material, and an injury

causing event, unlikely. Fazzolare did not dispute that the bolts retained some support for the main roof. His concern was the "immediate" mine roof, where draw rock could become loose due to the effects of being exposed to the mine atmosphere, particularly drying during the winter season. Tr. 99-100. Plates held against the roof by the bolts provide the primary support for the immediate roof. I find his testimony more credible. The bolt's grouting did not substantially protect against falls of draw rock from the immediate roof, which was a recurrent problem at the Freedom mine. Tr. 202-03. At this location, even the plate had not provided sufficient support, because draw rock had fallen from close to the bolt, loosening the plate. While the inadequately supported area may have been more to the side of the entry, it extended almost to the mid-point, and vehicles using the haul road could travel under it. Charles Travis, the Freedom Mine safety manager, acknowledged that there were some vehicle tracks over to the side of the entry. Tr 199. As noted in the citation, at least one vehicle had traveled under the inadequately supported area.

I find that, as to this citation, the Secretary has carried her burden of proof, and that the occurrence of an injury producing event was reasonably likely. The violation was S&S.

Negligence

Fazzolare determined that Ohio County's negligence was moderate based on an assessment that the condition had existed for at least one shift. However, aside from that entry in his notes, he did not recall what formed the basis of that conclusion. Tr. 98. He did not know when the rock had fallen, or when a vehicle had traveled in the area. Tr. 109. As to the vehicle that had traveled the area, he admitted that the operator may have been an hourly person, and not realized that the condition existed. Tr. 107-08. In light of these concessions, I find Ohio County's negligence to have been low.

Citation No. 6692130

Citation No. 6692130 was issued by Fazzolare on December 7, 2006. It alleges a violation of 30 C.F.R. § 75.517, which requires that power wires and cables be insulated adequately and fully protected.

The violation was described in the "Condition and Practice" section of the Citation as follows:

The energized 995-volt trailing cable for the Joy 14/15 Continuous Miner, Co. No. M-13, located in MMU 001-0, was not adequately insulated. Upon close inspection, with the power locked and tagged, the inner wires of the cable could be seen. Continued dragging of this cable across the mine floor will eventually bare these inner wires and expose a potential shocking hazard.

Ex. G-12.

Fazzolare determined that it was reasonably likely that the violation would result in a lost work days or restricted duty injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$838.00 was proposed for this violation.

The Violation

The rubber-coated cable supplying 995-volt electrical power to the continuous miner runs from the miner, along the rib of the entry, to a power center. It consists of two power leads, two ground wires, and a monitor wire. It is also shielded, i.e., the cover includes a conductive layer that is designed to pick up any electric current leaking from the inner leads and cut off power to the cable through a ground fault system. Tr. 214. On the day in question, Fazzolare examined a spot on the cable where it had been spliced. The tape covering the splice had been "roughed up." Tr. 213. He examined it closely, bending and manipulating it, and was able to see the inner leads. Tr. 213. After the power had been cut off, the splice tape was cut away. The inner leads were intact and remained insulated, and the cable's shielding was also intact. Tr. 218.

While Ohio County argues that there was no defect in the cable before Fazzolare examined it, it does not challenge the fact of violation, but argues that the violation was not S&S and that its negligence was less than moderate, and requests a corresponding reduction in the assessed penalty.

S&S

Fazzolare believed that a miner could receive an electrical shock by handling the deteriorating splice in the cable. Tr. 117, 132. He did not dispute the fact that the insulation on the electrical conductors was intact, such that the splice did not present a shock hazard at the time of the inspection. His concern was that, with continued dragging of the cable along the mine floor, the opening would become larger allowing small rocks to enter, "eventually" wearing away the insulation of the inner leads "if not caught." Tr. 122, 129. The presence of the shielding and monitor wires did not alter his analysis, because he cited a recent example where a miner was injured handling an electrical cable by current that was below the threshold of the ground fault system. Tr. 125-26.

Travis, who traveled with Fazzolare, testified that the opening in the splice tape was extremely small, and would not have been perceived as a problem by most observers. Tr. 219-20. The shielding and insulation of the conductors was intact, and the violation was abated simply by re-taping the splice. Tr. 221. He agreed that the splice could deteriorate if not properly cared for, but noted that splices are checked on a regular basis and re-taped if necessary. Tr. 228-29. He also explained that miners are trained to not handle cables at splices when the cable is energized. Tr. 218. Cables are checked weekly, and miner operators examine them before operating the equipment. Tr. 126-27, 219-20. He also noted that the continuous miner

operates at 995 volts, which is classified as "low voltage," and that miners wear gloves, although he conceded that the gloves were not insulated to provide protection from electrical shock.
Tr. 23.

A cable splice that has been allowed to deteriorate to the point that electrical conductors are exposed would present a serious shock hazard. While classified as "low," the voltage was more than adequate to cause a serious or fatal injury. Neither the miners' work gloves, which were not insulated, nor the shielding system, would assure that no injury occurred. However, the condition cited was not hazardous at the time. According to Fazzolare, it could have become hazardous "eventually," "if not caught." There is no evidence as to the length of time that would have had to elapse before the condition became hazardous. At the time of the inspection, the splice was located some distance from the continuous miner, where the cable would have been handled less frequently. Tr. 221. Before the condition could result in an injury, it would have had to undergo multiple pre-operational examinations and weekly inspections, and not been identified as a problem in need of correction, and a miner would have had to ignore his training and handled the energized cable at the splice.

Considering all of these factors, I find that the Secretary has not proven that the violation was reasonably likely to have resulted in an injury producing event, and that the violation was not S&S.

Negligence

Travis testified that the tape of the splice was roughed up in spots, not "very pretty," and doubted "that anybody would have ever seen any problem with this." Tr. 219-20. Fazzolare conceded that the condition was "not very obvious," and was observable only on "close inspection." Tr. 126. I find that Ohio County's negligence was low.

Citation No. 6692131

Citation No. 6692131 was issued by Fazzolare on December 7, 2006. It alleges a violation of 30 C.F.R. § 75.503, which requires that electric powered equipment that is taken into or used in by the last open crosscut be maintained in permissible condition. The violation was described in the "Condition and Practice" section of the Citation as follows:

The operator failed to maintain the Fletcher Double Boom Roof Bolter in a permissible condition. When checked, the right front light had a loose packing gland where the cable enters the light fixture.

Ex. G-13.

Fazzolare determined that it was unlikely that the violation would result in a lost work days or restricted duty injury, that the violation was not S&S, that one person was affected, and

that the operator's negligence was moderate. A civil penalty in the amount of \$60.00 was proposed for this violation.

The Violation

Maintaining permissibility of electric-powered equipment in by the last open crosscut is critical to assuring that sparks or arcing from electrical components cannot cause an ignition or explosion of methane liberated by the mining process. The permissibility of housings of electrical components is typically determined by measuring to assure that openings are no greater than 0.004 of an inch. Inspectors probe openings in joints with a 0.005-inch feeler gauge and determine that permissibility is intact if the feeler gauge cannot be inserted. Tr. 141.

The wires that supply electricity to the lights on the roof bolter are encased in rigid conduit that is connected to an elbow joint that is, in turn, connected to the lamp housing. The connection to the housing is sealed by a packing gland in which a rubber grommet is encapsulated. Screwing down the top of packing gland compresses the grommet, forcing it to expand, sealing any openings. Tr. 139, 279. When properly compressed, the flexibility of the rubber grommet allows some movement of the lamp housing. Tr. 280. Previous fittings were similar in design, except that fiberglass rope was used instead of rubber. More force was needed to compress the rope. Consequently, the cap was screwed tighter, and the connection was rigid. Tr. 280-81.

The permissibility of the packing gland joint cannot be measured with a feeler gauge, and no other objective test for determining the permissibility of such fittings in the field was identified. Tr. 141, 287. Fazzolare did not attempt to measure the suspected opening. Tr. 145. He assesses permissibility by trying to move the lamp. If he can "rock it by hand," in his opinion, it is too loose, and he deems the joint non-permissible. Tr. 140. Wood testified that the newer rubber grommet packing glands allow movement of the lamp housing when the grommet is properly compressed, and that an over-tightened packing gland may result in a violation. Tr. 280-81.

Fazzolare testified that, in his experience, if the fitting was "that loose," there would be at least a 0.005-inch gap. Tr. 146. However, he did not explain the basis of that conclusion, and it is unlikely that it was the product of accurate measurements. More significantly, he admitted that he had no way of knowing whether the joint was actually sealed. Tr. 147. I find that the Secretary has failed to prove by a preponderance of the evidence that the packing gland joint had not been maintained in permissible condition. The Citation will be vacated.

Citation No. 6692601

Citation No. 6692601 was issued by MSHA inspector Charles Jones on April 10, 2007. It alleges a violation of 30 C.F.R. § 75.1107-16(b), which requires that fire suppression devices be maintained in accordance with requirements specified in the appropriate National Fire Code. The violation was described in the "Condition and Practice" section of the Citation as follows:

The take-up motor, electrical components and oil tank at the #5 belt drive were not provided with adequate fire suppression. The fire suppression water spray nozzle and piping had fallen down and were lying beside the motor on the mine floor.

Ex. G-1.

Jones determined that it was reasonably likely that the violation would result in a lost work days or restricted duty injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$217.00 was proposed for this violation.

The Violation

The motor, electrical components, and hydraulic oil tank for the #5 belt drive takeup unit were located in a crosscut adjacent to the belt entry, out of the main ventilation air current that flowed outby in the entry. The water spray nozzle was part of the belt drive fire suppression system, and was supposed to be suspended over the equipment in the crosscut. Heat generated by a fire would melt a plastic plug, allowing water to flow through the spray nozzle. The hazard contributed to by the violation was that a fire starting in the area of the motor would not be suppressed timely, would generate increased smoke and other products of combustion, and could spread to the main belt drive. The belt drive and the takeup unit, including 50 feet of the belt, were protected by a deluge water system, the components of which were in good working order.

Ohio County admits that the fire suppression nozzle had fallen to the mine floor and was not properly maintained at the time of the inspection. It argues that the violation was not S&S and that its negligence was less than moderate, and requests a corresponding reduction in the assessed penalty.

S&S

The Secretary contends that the violation was S&S because the "condition was likely to result in smoke inhalation or burn injuries as a result of a mine fire at [that] location." Sec'y. Br. at 12. Jones' S&S determination was based on a number of considerations, including that the nozzle would be ineffective in suppressing a fire, that notice of the fire would be delayed because of the location of the equipment, and that firefighting efforts would be delayed because of

difficulty ascertaining the location of the takeup motor from the secondary escapeway. Ohio County disputes those contentions, and argues that it was highly unlikely that a fire would occur at the takeup motor and, if a fire did occur, it was highly unlikely that a miner would be injured.

As to the possibility of a fire occurring at the takeup motor, Jones identified potential ignition sources as a possible arc from the electrical equipment and friction generated by the takeup unit.³ However, he did not identify any defects in the electrical equipment. Nor did he identify any defects in the takeup unit resulting in the generation of excessive heat due to friction. Concerns about friction at the takeup unit, which was located in the belt entry and was protected by the deluge system, bear little relevance to the seriousness of the condition at the equipment in question. He noted the close proximity of hydraulic fluid, but did not cite any leaks in the system, and conceded that the hydraulic fluid was an emulsion consisting of 40% water, which "would burn," but was "fire resistant." Tr. 38, 43. Travis explained that MSHA's mine safety and data sheet does not list a flash point for the fluid because it is 40% water. Tr. 156.

The history of fires at the Freedom mine tends to indicate that the likelihood of a fire occurring in the area of the takeup motor was remote. Jones was not aware of any fire occurring at the Freedom mine, and Travis was unaware of any belt fires at the Freedom mine. Tr. 50, 164. However, Wood, confirmed that a belt fire had occurred, apparently many years before, and was extinguished quickly enough that it was not reportable to MSHA.⁴ Tr. 289.

The fallen nozzle did not provide effective fire suppression. Lying on the mine floor, the plastic plug would not be exposed to significant heat from a fire until it had reached large proportions, and the spray would not cover the intended area. However, in the absence of anything more than a theoretical ignition source, I find that the occurrence of a fire at the takeup motor was unlikely. Moreover, other factors relied on by Jones to support his conclusion were not substantiated. The mine's fire suppression system would have provided effective and timely warning of a fire at the takeup motor, and the unmarked man doors would not have caused any

³ The Secretary cites several additional potential ignition sources. Sec'y. Br. at 12. However, those sources were considerably removed from the equipment in question. In order for the fallen nozzle to have had any impact on a fire originating some distance from the equipment, it would have had to spread over a considerable area, and would have activated the nearby deluge system. The fallen nozzle would have had a negligible impact, if any, on the hazards presented by such a fire.

⁴ Unplanned fires in underground mines that are not extinguished within 10 minutes of being discovered must be reported to MSHA. 30 C.F.R. §§ 50.2(h)(6), 50.10, 50.20. The regulation was amended in 2006 to shorten the time period from 30 to 10 minutes.

significant delay in responding to a fire.⁵ Consequently, I find that even if a fire had occurred at the takeup motor, it is unlikely that a serious injury would have resulted.

I find that the Secretary has failed to carry her burden of proving that the violation was reasonably likely to result in a reasonably serious injury. Consequently, the violation was not S&S.

Negligence

Jones evaluated Ohio County's negligence as moderate. He believed that the condition had existed for "a while," because there was rock dust and float coal dust on the nozzle, and that it should have been discovered and corrected in conjunction with belt examinations required to be conducted on the two shifts each day that production occurred at the Freedom mine. Tr. 28-31. Ohio County contends that the condition was not readily observable, and that there is no evidence that the condition had existed for any length of time, much less that it had existed long enough to have been discovered during an examination that had occurred at least two shifts earlier. It challenges Jones' testimony on the presence of rock dust and float coal dust on the nozzle, pointing out that it was contradicted by Travis, and that there is nothing in Jones' field notes regarding the presence of dust at that location. Tr. 189-92

The nozzle was lying on the mine floor near the takeup motor. Belt examiners traveled on the opposite side of the belt. While it may have been more difficult to see from that vantage point, it should have been seen in the course of an examination. I do not understand Ohio County to be contending that it is not part of a belt examiner's duties to confirm the presence of essential fire suppression equipment. Travis agreed that a fallen fire suppression hose should have been noted by a preshift examiner. Tr. 177. As to the presence of dust, I credit Jones' testimony, and find that there was some rock dust and float coal dust on the fallen nozzle, and that it had been in that condition long enough that it should have been discovered. I find that Ohio County's negligence with respect to this violation was properly assessed as moderate.

⁵ Freedom's carbon monoxide monitoring and fire suppression systems were in working order. The CO monitors are set to alarm at five parts per million, a very low threshold level, and a monitor was located nearby, downstream in the 245 foot-per-minute air flow. While there would have been less air flow in the crosscut where the equipment was located, some significant air flow would be required to supply oxygen to a fire, and the products of combustion would have been forced or drawn out into the belt entry's air flow, triggering the alarm. Freedom's miners and managers were properly trained to fight fires. A fire fighter approaching from inby would travel the belt entry, in its outby air flow of fresh air. Approach from outby would be through the intake entry, inby the fire, and into the belt entry through a man door. While the man doors to the belt entry were not marked, Travis explained that the location of the takeup unit was well known and readily identifiable, because the entries turned 45 degrees at that point, the only such turn in the mine. Tr. 160.

The Appropriate Civil Penalties

Ohio County is a very large operator, with a very large controlling entity. The assessment data reflects that, prior to an apparent change in organizational structure in 2007, it averaged 1.5-1.6 violations per inspection day during the relevant period, a relatively high incidence of violations. Ohio County does not contend that payment of the proposed penalty will affect its ability to continue in business. The violations were promptly abated.

Citation No. 6692124 is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. A specially assessed civil penalty of \$4,100.00 was proposed by the Secretary. The lowering of the level of gravity justifies a reduction in the proposed penalty. I impose a penalty in the amount of \$2,500.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6692129 is affirmed. However, Ohio County's negligence was found to be low, rather than moderate. A civil penalty of \$838.00 was proposed by the Secretary. The lowering of the level of negligence justifies a reduction in the proposed penalty. Informed by the Secretary's then applicable penalty assessment regulations, I impose a penalty in the amount of \$375.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6692130 is affirmed. However, the violation was not S&S and Ohio County's negligence was found to be low, rather than moderate. A civil penalty of \$838.00 was proposed by the Secretary. The lowering of the gravity of the violation and the operator's level of negligence justify a reduction in the proposed penalty. I impose a penalty in the amount of \$300.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6692601 is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. A civil penalty of \$217.00 was proposed by the Secretary. The lowering of the level of gravity justifies a reduction in the proposed penalty. I impose a penalty in the amount of \$175.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

The Settlement

The Secretary agreed to vacate Citation Nos. 6692627 and 6692628 in Docket No. KENT 2007-344. Ohio County agreed to withdraw its contest and pay the assessed penalties as to Citation No. 6689987 in Docket No. KENT 2007-319, Citation No. 6692605 in Docket No. KENT 2007-344, and Citation Nos. 6692620 and 6692622 in Docket No. KENT 2007-345. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

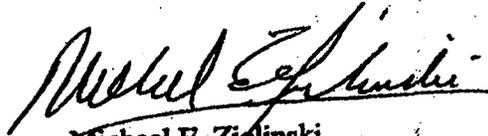
WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that, as to Citation Nos. 6692627 and 6692628 the petition in Docket No. KENT

2007-344 is hereby **DISMISSED**, and that Respondent pay a penalty of \$1,357.00 for the citations that are the subject of the settlement agreement.

ORDER

Citation No. 6692131 is **VACATED**. Citation Nos. 6692124, 6692129, 6692130 and 6692601 are **AFFIRMED**, as **modified**, and Respondent is **ORDERED** to pay civil penalties in the total amount of \$3,350.00 for the contested violations.

Respondent shall pay civil penalties in the total amount of \$4,707.00 for the settled and contested violations within 30 days.



Michael E. Zielinski
Senior Administrative Law Judge

Distribution (Certified Mail):

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

December 31, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2008-667
Petitioner	:	A.C. No. 01-03217-146922
	:	
v.	:	
	:	
SHELBY MINING COMPANY, LLC,	:	
Respondent	:	Mine: Coke Mine No. 1

DECISION

Appearances: Tom Grooms, Office of the Solicitor, U.S. Department of Labor, Nashville Tennessee, for Petitioner;
Warren B. Lightfoot, Maynard, Cooper and Gale, PC Birmingham, Alabama, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Shelby Mining Company, LLC, 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 the "Act"). This case involves one citation and one order issued by MSHA under section 104(d) of the Mine Act at the Coke Mine No. 1 operated by Shelby Mining Company, LLC. The parties presented testimony and documentary evidence at a hearing held in Birmingham, Alabama.

At all pertinent times, Shelby Mining Company, LLC, operated the Coke Mine No. 1 mine in central Alabama. The Coke Mine No. 1 mine, although now closed, mined coal and/or coal byproducts which affected commerce. The mine is subject to the Mine Act.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Shelby Mining Company, LLC ("Shelby") operated an underground coal mine, the Coke Mine No.1 ("Coke Mine"), near Montevallo, Alabama. Like most mines in the area, it is "gassy," liberating over seven million cubic feet of methane per day. As a result, it is subject to 5-day spot inspections by MSHA, pursuant to section 103(i) of the Act. 30 U.S.C. § 813(i); (Tr.

21-22). On November 27, 2007, Randall Weekly, an MSHA inspector, conducted a spot inspection at the Coke Mine. He was accompanied on that inspection by Randy Clements, Shelby's safety supervisor at the mine. The inspection took place on the regular day shift, during which mining normally occurs. (Tr. 95-96). Weekly cited two violations that are subject to this decision: (1) a citation for failure to follow the ventilation plan, and (2) an order for failure to conduct an adequate preshift examination.

a. *Citation No. 7692075*

As a result of the inspection, Inspector Weekly issued Citation No. 7692075 alleging a violation of 30 C.F.R. § 75.370(a)(1), which requires that mine operators "develop and follow a ventilation plan approved by the [MSHA] district manager." The citation described the violation as follows:

At the Coke mine on the #1 section in the #5 entry the ventilation plan was not being followed. The entry had been mined a full cut of 30 feet, the blowing curtain was 12 feet from the last row of bolts or 42 feet from the face,[sic] There is no evidence of an exhaust curtain or back drop ever being in place while this area was mined. The air was traveling through the cross cut between #4 and #5 then straight to the return never going to the face. This mine has had 6 ignitions from 3/30/2006 until 11/2/2007, one resulting in 2 employees receiving burns. The mine operator has engaged in aggravated conduct by failure to follow the ventilation plan. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 2.

The citation was later modified to clarify that it was issued for a violation of item 7 on page 2 of Shelby's ventilation plan. *Id.*

Weekly determined that it was "reasonably likely" that the violation would result in "lost workdays or restricted duty," that the violation was significant and substantial, that three employees were affected, and that the operator's negligence was high. A civil penalty in the amount of \$2,473.00 has been proposed for this violation.

1. The Violation

Weekly is an MSHA mine inspector who has held that position since 2005. (Tr. 19). Prior to joining MSHA he worked in the mines in Alabama for twenty-five years. He held a number of positions in the mining industry where he accrued a working knowledge of ventilation systems and ventilation controls. (Tr. 20-21).

Weekly arrived at the Shelby Coke Mine during the day shift on November 27, 2007. At 7:00 a.m. he left the surface to travel underground with Mr. Clements and the two arrived at the

#5 entry at approximately 9:00 a.m. (Tr. 32, 57). While production was the norm on the day shift, there was no activity at the #5 entry when Weekly and Clements arrived. (Tr. 22-24).

Immediately upon arriving at the #5 entry, Weekly observed that a full cut of 30 feet had been made in that entry, but it had not yet been roof bolted. He observed that the line curtain outby the #5 entry had been pulled back 12 feet from the last row of bolts. He further observed that there was no exhaust curtain across the entry and air was short-circuiting directly to the return instead of traveling into the entry or face area. (Tr. 30). Clements confirmed Weekly's observations. (Tr. 112).

The ventilation plan and the citation issued by Inspector Weekly refer to two curtains in the area of the #5 entry that act as ventilation controls: (1) a "blowing curtain," also known as a "line curtain," and (2) an "exhaust curtain."

The Coke Mine's ventilation plan requires that a "line curtain" be maintained "no greater than 30 feet from the point of deepest penetration in all *unbolted idle working places*." Gov. Ex. 3 at 5 ¶ 7(emphasis added). (Tr. 26-28). According to Weekly, the line curtain was 12 feet from the last row of roof bolts and 42 feet from the face (i.e., more than 30 feet). Gov. Ex. 2.

I credit Weekly's testimony and find that the line curtain was more than 30 feet from the point of deepest penetration and, therefore, was in violation of the ventilation plan. Weekly explained that the position of the curtain prevented air from reaching the #5 entry, and instead of reaching the face, caused the air to short circuit into the return. (Tr. 24). Clements agreed that the curtain was inby the rib in the crosscut and was 42 feet from the face. (Tr. 111-112). Clements was unable to explain exactly why the line curtain had been pulled back or how long it had been in that position.

The mine's ventilation plan also requires that an "exhaust curtain" be maintained "within 30 feet of the face" while mining is occurring. Gov. Ex. 3 at 5 ¶ 3; (Tr. 26-28). According to Weekly, and confirmed by Clements, there was no exhaust curtain present when the inspection was conducted. (Tr. 114). Weekly determined that the area had recently been mined, most likely on the last production shift the evening prior to the inspection. Weekly testified that he looked carefully for any sign that a curtain had been hung in the area, specifically to determine if the curtain had been in place when the 30-foot cut had been made. He examined the roof and the bolts, and looked for evidence of nails or marks that would have indicated the previous presence of an exhaust curtain. (Tr. 69). He did not see the "pogo sticks" that are often used to hold the curtain in place, and he saw no material that could have been used as a curtain. (Tr. 68). Based on his observations, Weekly determined that an exhaust curtain had never been in place as required by the plan. (Tr. 38, 68-69).

Clements, referencing the company production report, testified that on November 26, 2007, coal was cut for 28 feet in the #5 entry. Resp. Ex. 9 at 3; (Tr. 121-122). However, the following morning, when the two arrived on the section, there was no activity. Shelby argues, therefore, that an exhaust curtain is only required when miners are working at the face, and, at the time of the inspection, coal was not being mined in the area; hence no one was working at the face and no violation of the ventilation plan existed.

While no one was working at the face, there is credible testimony that there was work conducted in the area without the proper ventilation. Weekly's testimony that he made a careful search for any sign of the previous existence of an exhaust curtain in the area, and none could be found, demonstrates that no curtain was ever in the area, even while the work was being done on the prior shift. When it came time to abate the violation and hang the curtain, Clements was unable to locate one in the area of the #5 entry and had to travel to another area in the mine to retrieve a curtain and return it to the #5 entry to be hung as required by the plan. (Tr. 77). While coal was not being mined at the time of the inspection, there was no sign that an exhaust curtain had ever been in place. Because an exhaust curtain was never in place, and a cut had been made which would have necessitated miners working at the face, Shelby was in violation of its ventilation plan for the second time. See Gov. Ex. 3 at 5 ¶ 3.

After the citation for the plan violation was issued, Clements conducted an internal investigation to determine why the ventilation plan was not being followed in the #5 entry. (Tr. 129). He spoke to Jerry Wells, the foreman on the production shift on the evening prior to the inspection. Wells told Clements that he had observed a curtain in place; however, he could not confirm which curtain (i.e., line or exhaust) he saw during the production. (Tr. 119-120). Wells could not explain who removed the curtain after he left the area, why the curtain was removed, or when it was removed. He also could not address why or when the line curtain had been pulled back twelve feet in violation of the ventilation plan. Clements confirmed that he could learn nothing further about the position of either curtain but he recalls that someone told him that they took down the exhaust curtain to "scoop up some muck." (Tr. 123). There was no explanation about why the curtain had not simply been pulled aside or why it had not been returned when the clean up was complete.

Shelby argues that the curtain had to be in place to make the cut in order for the continuous miner to operate. Clements reasoned that a cut could not be made without the ventilation controls in place because, without the air moving to the face, methane levels would rise and automatically shut down the continuous miner. He believes that the safety device on the machine would have prevented mining if proper ventilation were not in place. Wells agreed with Clements and confirmed that so much gas is emitted while the coal is being mined that it could not be done without ventilation in place. (Tr. 15). Therefore, Clements opined, the exhaust curtain had been in place during mining but was removed to clean the area, and therefore, was not a violation. Wells on the other hand explained that cleanup is done only after the roof is bolted because it is not safe to clean in an unbolted area, such as was the case in the #5 entry. (Tr. 155). Given the discrepancy in the testimony of Shelby's witnesses, I do not credit the theory advanced by Clements, that the curtain had been removed to clean.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Secretary has met her burden of proving that the mine was not following its ventilation plan in two specific areas on the day of the inspection.

2. Significant and Substantial Violation

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. Further, I find that the violation contributes to the danger of an explosion or ignition of methane at the #5 entry. In analyzing the hazard presented by methane, the critical question is whether there was any likelihood of explosive concentrations of methane coming into contact with an ignition source. *See Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Although Weekly was unable to go to the face of the #5 entry to take a methane level reading because the roof of the entry had not yet been supported, the condition clearly pointed to a buildup of methane in the working area. The ventilation had been short circuited in two regards, both with the pulled back curtain and the absence of the exhaust curtain, resulting in no air movement at the face. It would take little time for methane to build up to a dangerous level in that entry. The mine’s history of ignitions, coupled with a build up of methane, clearly creates a hazard.

The third element of the *Mathies* criteria often presents difficulties in determining whether a violation is S&S. 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 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 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 length of time that the violative condition existed prior to the citation was significant. Weekly testified that, after a diligent search, he saw no evidence that an exhaust ventilation curtain had ever been in place at the #5 entry and therefore the condition had existed on the prior evening shift, through the night shift and into the day until Weekly arrived. Wells, on the other hand, testified that he observed a curtain in place about twelve hours prior to the violation. I have credited the testimony of Weekly that no exhaust curtain had ever been put in place, and that the violation existed the evening before the inspection, giving ample time for methane to build in the area.

Weekly testified that he believed an injury was reasonably likely to occur. He based this conclusion on his determination that the #5 entry was an unventilated area where gas was being allowed to build up. Given his experience, and the direction of the air flow, he had no doubt that the face had no air movement and hence, methane was building in that area. (Tr. 40). The fact that this is a gassy mine with a history of ignitions, along with the fact that roof bolting would next occur in the area, made it reasonably likely that an ignition or explosion would occur in the unventilated area resulting in an injury. In the normal mining sequence, the roof bolter would have been brought in to begin bolting the area so that mining could continue. Weekly explained that he is aware of a number of methane ignitions caused by roof bolters. (Tr. 41). When the bolter drills the hole in advance of placing the roof bolt, the hot bit can hit the methane that has not been carried away or hit a bleeder and ignite. This mine has many methane bleeders, and without ventilation in place the roof bolter would, not only ignite the methane that had accumulated without ventilation, but would be more likely to ignite the stream of gas from the bleeder, resulting in an explosion or at the very least a burn injury to those working in the area. A previous ignition at the mine which caused burn injuries to two miners substantiates the Secretary's argument that the injuries could be sustained and those injuries would be serious.

Weekly indicated that three people were affected by the lack of ventilation. Gov. Ex. 2. He determined that two roof bolters and one service person who would be working the scoop would have been exposed to the condition he cited. Shelby agrees that roof bolters would have entered the area next to secure the roof, while the service man would operate the scoop to clean up.

Shelby disputes the S&S designation and presented evidence that the continuous miner would automatically stop cutting and shut down if dangerous methane levels were present.

Therefore, Shelby argues, it is impossible to operate without air flow to the face. The argument was not extended to the roof bolting machines, however, that were scheduled to enter the area next in the normal course of mining.

Shelby also argues that the previous ignitions in the mine occurred during the production shift and had nothing to do with ventilation curtains and therefore ignition is unlikely in this idle area. Clements testified that, normally, the continuous miner would hit an area with methane, causing the various ignitions that had been reported to occur. One of the ignitions was investigated by Weekly and he agreed that it was during a production shift and that the ventilation plan was being followed at the time of the ignition. (Tr. 46-48). However, without the ventilation in place, as it had been for the previous ignitions, it is even more likely that a hazard exists, as there is nothing to move the methane away from the source of ignition.

Shelby's failure to comply with its approved ventilation plan resulted in extremely hazardous conditions in locations where persons were scheduled to travel and work. Weekly said that the mine was "setting itself up to have another ignition." (Tr. 44). Any injury that might result from an ignition of methane or exposure to oxygen-deficient air would be serious, and potentially fatal. Therefore, I find it was reasonably likely that the hazard would result in an injury and that injury would be serious.

3. 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, 193-194 (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 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); *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.

In October 2006, the mine began to experience a number of ignitions at the face. Steps were taken by MSHA and Shelby to modify the ventilation plan as needed to prevent such ignitions. *See* Gov. Ex. 16. MSHA personnel were present at the mine for many days, and, with each new ignition, worked with Shelby to modify the ventilation system as needed. The ignitions were dangerous and, most importantly, occurred while ventilation was in place. With the history of ignitions, the presence of MSHA, the investigations and the ventilation changes, it is safe to say that everyone at the mine was aware of the methane problems. The ignitions were ongoing with at least four occurring between October and the time of the citation near the end of

November. Proper ventilation should have been a high priority for everyone at the mine, yet it appears that it was not. Government exhibits six through sixteen describe the ignitions that were occurring regularly, and explain that in at least one case miners were seriously injured during an ignition. Gov. Exs. 6-16.

The Secretary established that Shelby was on notice that it needed to do more to ensure that the faces were adequately ventilated at all times. However, the problem with ignitions persisted. Based on the evidence presented at the hearing, I conclude that the ventilation was restored to the cited #5 entry only after Weekly pointed out that there was no air movement. Had he not arrived at the entry at that time, the ventilation would not have been immediately restored. As the inspector explained “[t]hey knew their past history of the gas in [the] mine[] and that they needed to keep their ventilation up, and to just have no ventilation anywhere in the area and no evidence that ventilation had ever been there[,] to me[,] was aggravated conduct.” (Tr. 67). The violation was exceedingly obvious and Shelby demonstrated aggravated conduct constituting more than ordinary negligence.

Shelby argues that the violation was not unwarrantable because the curtain had been in place during the mining cycle the day before and it had been taken down to clean up around the area. I have addressed the differences of opinion regarding whether the curtain was in place or why or when it was removed. The operator’s argument as to why the curtain was removed is difficult to understand. The cleaning up of muck generally occurs after the roof is bolted and supported so as to be safe. Further, even if mucking were occurring, the curtains would only be moved aside so that the air would continue to be moved to the face. (Tr. 75). After the mucking occurs, the curtain must be returned to its original location. There is no evidence that any effort was made to restore the ventilation, and it seems likely that none would have been made had Weekly not arrived on the scene.

Shelby also argues that the previous methane ignitions occurred while coal was being mined, and consequently no higher degree of negligence can be imputed for ignoring ventilation in idle areas. Shelby further contends that the history of ignitions is not important for determination of gravity and negligence because the earlier ignitions occurred in working areas, as opposed to idle areas, as is the issue in this case. Given that the Coke Mine is a gassy mine subject to ignitions, Shelby has a duty to see that the ventilation plan is strictly adhered to. While ignitions during the mining process certainly require Shelby to be extra vigilant during the operation of the continuous miner, they also put Shelby on notice that there are unknown bleeders in the mine which have the known potential for ignitions. Additionally, the fact that ignitions occurred in spite of the presence of the automatic shutoff safety feature on the continuous miner is further evidence that Shelby was aware of the high potential for ignitions and the necessity of taking extra precautions to prevent such from happening.

I find that the mine was more than careless, and exhibited more than ordinary negligence in having two key ventilation controls moved or missing in an area where methane can build and work will shortly occur. The mine was clearly on notice that ignitions are a problem, that the mine was gassy, and that leaving the entry without any ventilation at the face is a formula for disaster.

b. *Order No. 7692076*

Inspector Weekly issued Order No. 7692076 on November 27, 2007 for an unwarrantable violation of 30 C.F.R. § 75.360(b)(3). The order describes the violation as follows:

An inadequate pre-shift examination was performed on the #1 section at the Coke mine on 11/27/07 on the owl shift. The pre-shift examiner did not correct the ventilation in the #5 face, the blowing curtain was 12 feet from the last row of bolts, 42 feet from the face and there was no back drop or exhaust curtain in place allowing the air to short circuit directly to the return and not ventilate the #5 face. This mine has had 6 ignitions from 3/3/0/2006 until 11/2/2007, one resulting in 2 employees receiving burns. If this condition is allowed to exist methane will build in this entry and would cause a ignition or explosion.

Gov. Ex. 4

Weekly determined that it was "reasonably likely" that the violation would result in an injury involving "lost work days or restricted duty," that the violation was S&S, that three employees were affected, and that the operator's negligence was high. The Order was issued pursuant to section 104(d)(1) of the Act, and alleges that the violation was the result of Shelby's unwarrantable failure to comply with the standard. A civil penalty in the amount of \$5,211.00 has been proposed for this violation.

The fact that the conditions, as cited by Weekly and discussed above, existed at the time of the inspection is not disputed. Clements, who traveled with Weekly during the inspection, confirmed the existence of the conditions. He testified that there was not an exhaust ventilation curtain and that the blowing curtain was more than 30 feet back from the face. In addition to the ventilation violation, Weekly also found a number of roof control violations which he included in his determination that a preshift examination was not adequately conducted.

1. The Violation

Order No. 7692076 alleges a violation of 30 C.F.R. § 75.360(b), which requires that preshift examinations be conducted in areas where miners are scheduled to work or travel, and that the certified person conducting the examination "examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction."

Joel Stevens, a certified preshift examiner, conducted the preshift examination for the 7:00 a.m. to 3:00 p.m. day shift on November 27, 2009. (Tr. 130-131, 139). The examination began around 3:00 a.m. and was completed around 5:00 or 6:00 a.m. (Tr. 127). The examination report did not list any hazardous conditions or violations. However, a few hours later, Weekly, while conducting a spot inspection, found what he believed to be violations of safety standards and issued the ventilation citation discussed herein, as well as roof control citations. (Tr. 34-35). The preshift examiner's report does not mention any ventilation problems, nor does it mention the roof areas that were cited by the inspector. (Tr. 131).

The Secretary's position is that the miner charged with the duty of conducting the preshift examination conducted an inadequate preshift examination because he did not report the ventilation and roof control problems, nor did he correct the ventilation problems as required. (Tr. 78, 81, 33-35). The roof control citations referred to unsupported roof in the #1, #4 and #5 entries. (Tr. 34). Respondent, on the other hand, contends that the preshift examination was timely completed and accurately reflected that no hazardous conditions existed when the examination was made (i.e., that the conditions did not exist until after the preshift). Specifically, the Respondent avers that the ventilation curtains were in place and, therefore, were not required to be noted on the preshift examination report. The Respondent did not address why the areas of the roof that were cited by Weekly were not included in the preshift examination.

The critical question is whether the conditions existed at the time of the preshift examination. The hazardous conditions most likely developed, as Weekly believed, during the production shift, more than twelve hours before the preshift was conducted. (Tr. 72-75). Weekly cited the condition as having been present for five hours, based on the time when the preshift examination was to have occurred. I have already credited Inspector Weekly's testimony that the ventilation violations existed at the time the coal was cut from the #5 entry on the second shift on November 26th. It follows that the ventilation controls were missing, and violation apparent, when Stevens conducted his preshift examination in the early hours of November 27th.

During his testimony Clements identified Joel Stevens, a foreman at the Coke Mine, as the preshift examiner. Clements testified that he did not follow up with Stevens to determine whether or not the conditions, as cited by Weekly, existed at the time Stevens conducted the preshift examination. (Tr. 131-132). Moreover, Clements did not provide any justification for the bad roof area or raise any defense that the roof violation occurred during the period after the preshift examination but prior to the inspection.

Upon consideration of the above factors, I find that, at the time of the preshift examination, hazardous roof and ventilation conditions existed. Further, I find that, the conditions should have been discovered, corrected and reported during a proper preshift examination and, hence, a violation is proven.

2. 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).

I find that there was a violation of an underlying mandatory safety standard. The preshift examiner not only failed to record the presence of hazardous conditions, but also, and more

importantly, failed to even identify those hazards. In doing so, Shelby violated both section 75.360(a)(1), requiring the preshift examination, and section 75.360(b), requiring the examiner to look for "hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction." 30 C.F.R. §§ 75.360(a)(1), 75.360(b). Second, I find that the failure to identify the conditions and note them on the preshift examination report would have resulted in at least three miners entering and working in a dangerous area that was both unbolted and unventilated.

With regard to the third element of the *Mathies* factors, the Commission has held that judges should ordinarily not rely on presumptions. *Manalapan Mining Co.*, 18 FMSHRC 1375, (Aug. 1996). Shelby argues that the violation is not S&S because it is unlikely that there would have been any activity in the area prior to the ventilation being restored. Hence, failure on the part of the examiner to notice this violation cannot result in an injury. I must analyze whether there was a reasonable likelihood that the hazards contributed to by the violation would result in an injury in the event that the hazards that went unnoticed by the preshift examiner were not corrected prior to normal mining operations. While Shelby argues otherwise, the fact that the cited area was idle at the time of the citation has little bearing on the S&S finding. Weekly confirmed that while the #5 entry was idle during his inspection, other areas were not. The men had already entered the mine for the day shift when Weekly observed the violations of the roof and the ventilation plans and, therefore, the miners were already placed in a dangerous situation; one intended to be corrected by the requirement of the preshift examination.

The Commission has recognized that the preshift examination requirements are "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995); *see also* 61 Fed. Reg. 9764, 9790 (Mar. 11, 1996) ("The preshift examination is a critically important and fundamental safety practice in the industry. It is a primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof."). In *Buck Creek*, the Commission concluded that the third *Mathies* element had been proven when miners were allowed to work in a preshifted area even though another area of the mine that should have been examined was not. 17 FMSHRC 8 (Jan. 1995). There, the Commission found that "hazards in an unexamined portion of the mine could affect" the area in which miners were working. *Id.* at 14; *Jim Walter Resources Inc.* 28 FMSHRC 1068 (Dec 19, 2006). The failure of the preshift examiner to recognize the dangers presented by the unbolted and unventilated area of the #5 entry could result in an ignition, explosion, or potentially a roof fall in the areas cited. The occurrence of any of these events is reasonably likely to result in injuries to the roof bolters or the service man that would be running the scoop. Finally, as I have indicated above, the injuries associated with methane ignitions and explosions are serious in nature.

Preshift examinations play a crucial role in ensuring that miners work in a safe environment. I credit the testimony of Weekly that conditions which presented an explosion hazard were present in the area and were not noted by the examiner. The hazards created by lack of ventilation and unsupported roof in several locations, and the failure of the preshift examiner to warn miners, or correct the conditions, exposed miners to a reasonable likelihood of serious injury.

3. 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, 193-194 (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 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); *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 the result of an unwarrantable failure because the conditions were extensive, obvious and existed for more than one shift, that they posed a high degree of danger, and that the failure to note or record them on the preshift report evidenced an indifference to safety. The evidence justified a finding that the conditions, as Weekly found them, had existed at the time of the preshift examination and hence, the Secretary's argument is well founded.

Shelby offered little evidence to contradict the Secretary's allegation of unwarrantable failure to comply with the requirement of a thorough and meaningful preshift examination. Clements testified that he looked into the ventilation violation, but offered little information about the violation for the preshift examination beyond providing the name of the individual who was responsible for conducting it. Clements did not investigate the allegations of an inadequate preshift, as he alleged he had done regarding the ventilation citation, and offered no explanation as to why the examiner failed to notice the violative conditions.

The history of the mine demonstrates an institutional lack of interest in demanding that the preshift examinations be done adequately at this mine. *See Gov. Ex. 1.* In February 2007, the mine received an unwarrantable failure order for failure to conduct an adequate preshift examination. Two months later a citation was issued for failing to meet the requirements of the preshift. During the nine months prior to this violation the mine was warned about the inadequacy of its preshift examinations. Everyone at the mine, including the preshift examiner, knew that the ventilation system presented a challenge because the mine had at least six ignitions from March 2006 until just a few weeks before Weekly issued his citation. The actions of the preshift examiner constitute high negligence. The examiner failed to do his job even in a cursory fashion. It was obvious that the ventilation controls were not in place, one curtain was missing and another was pulled back 12 feet. Yet, the preshift examiner did not mention the problem and subsequently didn't correct the problem prior to the workers entering the mine.

I find that the evidence establishes that the failure to conduct an adequate preshift examination constituted more than ordinary negligence on the part of Shelby. Shelby's behavior and lack of interest in the importance of the preshift examination can be accurately characterized as "intentional misconduct," which the Commission has concluded "is a form of unwarrantable failure for purposes of the Mine Act." *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991).

II. PENALTY

The principles governing the authority of 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 of 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).

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 at 292. 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 purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

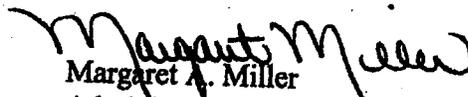
I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business, and that the violations were abated in good faith. The history is normal for this size operator, with the exception of the violations discussed above. I find that the Secretary has established high negligence on the part of Shelby for both violations. Further, I find that the Secretary has established the gravity as listed in each citation.

Both violations in this case are extremely serious, given this mine's history of ignitions and the possibility for a major accident. Not only was the ventilation violation obvious to any person who approached the #5 entry, it was not recorded by the person charged with ascertaining that the mine was safe for miners who were, or would be, working in the area. The mine had at least six ignitions prior to this incident and each had been investigated. It is fair to say that the

mine paid little attention to the safety of its miners in ignoring its history and the potential for disaster.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$5,000.00 for each violation. Shelby Mining Company, LLC is hereby **ORDERED** to pay the Secretary of Labor the sum of \$10,000.00 within 30 days of the date of this decision.¹


Margaret A. Miller
Administrative Law Judge

Distribution:

Thomas Grooms, Office of the Solicitor, U.S. Department of Labor, 618 Church St.
Suite 230, Nashville, TN 37219 (Certified Mail)

Warren Lightfoot, Maynard, Cooper & Gale, PC, 2400 Regions/Harbert Plaza, 1901 Sixth
Avenue North, Birmingham, AL 35203. (via Certified Mail)

/atc

¹ Payment should be sent to Mine Safety and Health Administration, U.S. Department of Labor, Payment Office,
P.O. Box 790390, St. Louis, MO 63179-0390.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

(202) 434-9980

November 6, 2009

BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 2009-302-D
	:	BARB CD 2008-07
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198
	:	
BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 2009-1225-D
	:	BARB CD 2009-07
	:	
PANTHER MINING, LLC and	:	
MARK D. SHELTON,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
on behalf of BILLY BRANNON,	:	
Complainant,	:	Docket No. KENT 2009-1259-D
	:	BARB CD 2009-09
v.	:	
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION TO COMPEL
ORDER REQUIRING PRODUCTION OF DOCUMENTS
AND
PROTECTIVE ORDER

In Docket No. KENT 2009-1225-D the Respondent, Panther Mining LLC ("Panther Mining" or "the company"), moves to compel the Complainant, Billy Brannon, to respond to several interrogatories in the company's First Set of Interrogatories and to produce certain

documents requested in the company's First Request for Production of Documents. According to the company, Brannon either has objected to the interrogatories and requests and/or has provided incomplete information. Brannon replies that the Respondent's motion is not well taken. In addition, he seeks specific protection from production for a particular document claiming it is shielded by attorney-client privilege. For the reasons stated below, the motion and request are granted in part and denied in part, and the claimant's invocation of attorney-client privilege is recognized in part.

INTERROGATORIES, ANSWERS AND RULINGS

Interrogatory 1. With regard to the allegations in paragraph 6 of the Complaint of Discrimination ("the Complaint")¹:

(a) Identify each document, including witness statements, which relates to the facts alleged. Motion; Exh. A at 1.

Answer: Brannon objects to this interrogatory as being overly broad and not reasonably calculated to lead to the discovery of admissible evidence. For example, as [the company] is well aware, Brannon has filed a civil lawsuit against Cloverlick Coal Company [(Brannon's then employer and a "sister" company of Panther)], and Robert Salyer[,] [a Cloverlick foreman] ("Salyer"), in Harlan [Kentucky] Circuit Court. Every document in that case arguably "relates to the facts alleged" in [paragraph] 6 of the instant Complaint of Discrimination. In addition, every document related to Black Mountain Resources' investigation of the incident "relates to the facts alleged."

Without waiving said objection, a "mine incident report" regarding Salyer's unprovoked assault of Brannon was also completed on 1/23/08. [The company] already has a copy of this

¹Paragraph 6 of the Complaint states:

On January 23, 2008, while he was working underground at Cloverlick Coal's No. 1 mine, Brannon was physically assaulted by a [Cloverlick] foreman, Robert Salyer ("Salyer"). After Brannon complained about said assault to officials of Cloverlick Coal and Black Mountain Resources, [(Black Mountain is the parent company of Cloverlick and Panther)], he was transferred to [Panther's] No. 1 mine by [Black Mountain]. Brannon worked at said mine until the discriminatory acts took place that form the bases of this case.

Complaint at 3.

document. Motion; Exh. C at 1-2.

The company states that Brannon's answer is not responsive, because the company asked Brannon to "identify" each document, including witness statements, relating to the facts alleged and Brannon "did not identify a single document in his possession, nor did he state he has none." Motion 2. The company maintains it is entitled to know the bases for Brannon's claims, and that Brannon knows he need not specifically identify documents filed in formal legal proceedings to which the company is a party, but that he can identify them generically and that Brannon is required to identify each document in his possession that relates to the facts alleged. *Id.*

Brannon responds that he attempted to answer Interrogatory 1 in good faith, that paragraph 6 was included in the complaint as background information, and that for Mine Act's purpose the important thing in the paragraph is not the allegation of assault, but that Brannon complained about the assault to officials of Cloverlick and Black Mountain. Resp. at 3. Moreover, because Panther's attorney represents Cloverlick in the civil suit, Panther is well acquainted with the basis of the suit. Further, since Cloverlick's attorney has deposed Brannon and interviewed everyone with knowledge of the assault, it is pointless to ask Brannon to identify each person about whom the company already knows.²

Ruling: The motion **IS GRANTED IN PART**. I agree with Brannon that the pertinent facts for Mine Act purposes are that Brannon complained to officials of Cloverlick and Black Mountain about the alleged assault and that Brannon was subsequently transferred to Panther's No. 1 mine, where he worked until his employment was terminated. Therefore, within 20 days of the date of this Order, Brannon shall respond to Interrogatory 1(a) by identifying each document, including witness statements, of which he is aware that relates to Brannon's complaint(s) about the alleged assault to Cloverlick and to Black Mountain officials, and he shall identify each document of which he is aware that relates to his subsequent transfer to Panther's mine.

(b) Identify each person who knows about the facts alleged. Motion; Exh. A at 2.

Answer: Brannon, Salyer, the miners who were in the buggy with Brannon at the time of the assault; Rick Raleigh . . . who interviewed the miners o/b/o Panther; Denise Davidson; Otis Doan; Steve Hodges . . . ; Tony Opegard . . . ; Tracy Stumbo (OMSL, P.O. Box 907, Martin, KY 41649); various unknown officials at Black Mountain. Motion; Exh.C at 2.

The company objects that "the miners who were in the buggy with Brannon at the time of

²Counsel for Brannon also makes unflattering observations about the way the company's interrogatories are framed and about opposing counsel's "lawyering" skills. Resp. at 3. Counsel is requested to desist from such observations. Those appearing before the Commission are expected to treat one another with civility at all times. If comments are necessary concerning an attorney's manner of practice, they are made by the Commission and its judges, not by opposing counsel.

the assault” and “various unknown officials at Black Mountain” are vague statements. Motion at 2. It asserts that Brannon should “identify these persons by names[,] or[,] if not by name, in some other manner.” Motion at 3

Brannon responds, *inter alia*, that Interrogatory 1(b) seeks “virtually pointless information.” Resp. at 5.

Ruling: As stated above, as I read the interrogatory, for Mine Act purposes it asks Brannon to identify each person who knows about Brannon’s complaints to officials of Cloverlick and Black Mountain officials about the assault and to identify each person who knows about his subsequent transfer to Panther’s No. 1 mine. The motion **IS GRANTED** as follows: Within 20 days of the date of this Order, Brannon shall identify those of whom he is aware (both miners and company officials) who have knowledge of his complaint(s) and subsequent transfer.

Interrogatory 2: With regard to the allegations in paragraphs 7 and 8 of the Complaint [³] [,]please:

(a) Identify each document, including witness statements, which relates to the facts alleged. Motion; Exh. A at 2.

Answer: Brannon objects to this interrogatory as being overly broad and not reasonably

³Paragraphs 7 and 8 of the complaint state:

7. On April 29, 2008, Brannon’s attorney wrote to Johnny Greene, the Executive Director of the Kentucky Office of Mine Safety & Licensing (“OMSL”), and asked OMSL to file disciplinary charges against Salyer – with the Kentucky Mine Safety Review Commission (“MSRC”) because of Salyer’s assault of Brannon. Brannon, through his attorney, asked OMSL to seek the revocation of Salyer’s foreman’s certificate.
8. As a result of the letter . . . OMSL conducted an investigation of Salyer’s assault of Brannon, OMSL’s chief accident investigator, Tracy Stumbo (“Stumbo”) subpoenaed and interviewed the witnesses to the assault, and Stumbo also subpoenaed and interviewed Salyer, who was still employed by [Black Mountain.] [Footnote deleted].

Complaint at 3-4.

calculated to lead to the discovery of admissible evidence. For example every document in OMSL's investigatory file regarding Salyer arguably 'relates to the facts alleged' in ¶¶ 7-8.

Without waiving the objection, the letter of Johnny Greene referenced in ¶ 7 is being provided. Motion; Exh. C at 2-3.

The company notes that aside from the Greene letter, Brannon merely referred to "every document in OMSL's investigatory file" and that Brannon "should be required to identify and produce every document in his possession relating to the facts alleged." Motion at 3.

Brannon responds that he views the letter of April 28, 2009, as a "protected activity" under § 105(c) of the Mine Act and that he already has provided the letter to the company, despite the fact the company's attorney has a copy. As far as the identities of each person who knows about the facts alleged, Brannon asks why his attorney should "waste his time listing people whom the company already knows – i.e. [Oppegard;] [Brannon;] Johnny Greene; Tracy Stumbo; Salyer and Raleigh." Resp. at 7.

Ruling: The motion **IS GRANTED IN PART**. The company asks Brannon to identify each document, including witness statements, relating to the facts alleged in paragraphs 7 and 8 of the complaint. The pertinent facts alleged in Paragraph 7 are that on April 29, 2009, Oppegard wrote the letter to Greene asking OMSL to file disciplinary charges against Salyer because of the alleged assault. The document relating to the facts alleged is the letter, which the Complainant has identified. Therefore, Brannon has complied with this part of the interrogatory. However, he has not complied with the interrogatory as it relates to Paragraph 8 of the Complaint. As I read the interrogatory, the pertinent facts alleged are that Stumbo subpoenaed and interviewed the witnesses to the assault and that Stumbo subpoenaed and interviewed Salyer. The interrogatory requires Brannon to identify the documents of which he is aware relating to Stumbo's interview of the witnesses and Stumbo's subpoena and interview of Salyer. Within 20 days of the date of this Order, Brannon is ordered to comply by sending the company a list of the documents of which he is aware that relate to Stumbo's interview of the witnesses and Stumbo's subpoena and interview of Salyer. If known, Brannon must describe each document by type (e.g., letter, statement, affidavit, etc.) date, author, and subject matter (a brief summary is sufficient).

(b) Identify each person who knows about the facts alleged, including those who were interviewed by Stumbo. Motion; Exh. A at 2.

Answer: Oppegard; Brannon; Johnny Greene; . . . Stumbo; Raleigh; Salyer. The employees of Cloverlick Coal, a subsidiary of Black Mountain . . . who were interviewed by Stumbo are known to Raleigh. Motion; Exh. C at 3.

The company objects to that part of Brannon's response which states: "[T]he employees of Cloverlick . . . who were interviewed by Stumbo are known to Raleigh." The company

asserts that Brannon should be required to identify the persons if he knows their identities. Motion at 3.

Brannon responds that it is a waste of time for his attorney to identify people who the company already knows, that the only other persons who would have knowledge of those interviewed are the interviewees themselves, and that Brannon "does not actually know who was interviewed." Resp. at 7-8. Brannon goes on to state his "understanding" that the "miners who were interviewed were the same miners that Raleigh already interviewed." Resp. at 7.

Ruling: The motion **IS GRANTED**. The statement to which the company objects is a non-response. The interrogatory asks Brannon to identify each person who was interviewed by Stumbo, and Brannon must respond to the interrogatory as asked. This means he must identify by name (assuming he knows the name) each person he knows who was interviewed by Stumbo. If Brannon cannot identify the person(s), he should so state. Within 20 days of the date of this Order, he is directed to answer the interrogatory as asked.

Interrogatory 3. With regard to the allegations in paragraph 9 of the complaint[,] [⁴] please:

(a) Identify each document[,] including witness statements, which relates to the facts alleged. Motion; Exh. A at 2.

Answer: Brannon objects to this interrogatory as being overly broad and not reasonably calculated to lead to the discovery of admissible evidence. For example, every document in MSHA's investigation file arguably "relates to the facts alleged" in ¶ 9, which Panther already has in its possession. Motion; Exh. C at 3.

The company asserts that "Brannon should be required to produce the documents in his possession, [and] not refer generally to broad categories of documents." Motion at 4.

Brannon responds that every document in MSHA's investigatory file "relates to" Brannon's discrimination complaint [filed with MSHA], but that Brannon does not have access

⁴Paragraph 9 of the Complaint states:

On September 7, 2007, while Brannon was working in the Panther mine, he filed a discrimination complaint with MSHA . . . regarding [Panther's] discriminatory treatment of him because, among other things, he had documented safety problems regarding the buggy he was assigned to operate.

Complaint at 4.

to the file and cannot identify each document therein. Further, every document in Brannon's §105(c)(3) complaint arguably "relates to" the initial discrimination complaint, and Brannon asks what purpose is served to identify every pleading in a case file the company already has. Resp. at 4.

Ruling: The motion IS GRANTED. Brannon's answer is a non-answer. Paragraph 9 of the complaint states that Brannon engaged in protected activity at the mine by filing a discrimination complaint with MSHA. It further asserts that Brannon was subjected to discrimination because of prior protected activity regarding his documentation of safety problems with his assigned buggy and "other things." Within 20 days of the date of this Order, Brannon shall respond to the interrogatory as asked by identifying each document of which he is aware that relates to the fact he filed the September 7 complaint with MSHA and to the allegations within it. Obviously, he should identify the complaint. He also should identify any documents, including witness statements, filed with the complaint and any documents, including witness statements, that relate to Brannon's assertions of discrimination due to his documentation of safety problems associated with his assigned buggy and other protected activities that he maintains form the bases for the company's alleged discrimination.

(b) Identify each person who knows about the facts alleged. Motion; Exh. A at 2.

Answer: Opegard, Wes Addington . . . , Brannon, Hodges, Raleigh; Gary Harris, various other MSHA personnel. Motion; Exh. C at 3.

The company states that Brannon should be required to identify the "various other MSHA personnel." Motion at 4.

Brannon responds that the requirement is "frivolous." Resp. at 9.

Ruling: The motion IS GRANTED. Brannon must answer the interrogatory as asked. The interrogatory does not require him to speculate as to whom might know he filed a September 7 complaint or who might be aware of the nature of his complaints about the buggy or his other unspecified protected activities, it asks him to identify those he "knows." Within 20 days of the date of this Order, Brannon shall identify those he knows are aware of (1) his filing of the September 7 complaint; (2) his documentation of the safety problems associated with his assigned buggy; and (3) other protected activities that he alleges form the bases for the discrimination he asserted on September 7.

Interrogatory 4. With regard to the allegations of paragraph 11 of the Complaint [⁵][,]

⁵Paragraph 11 states:

On September 23, 2008, Brannon's attorney wrote a letter on Brannon's behalf to Ivan T. Hooker, the

please:

(a) Identify each document which relates to the facts alleged. Motion; Exh. A at 3.

Answer: Brannon objects to [the] interrogatory as “overly broad and outside . . . his knowledge.” For example, “every document regarding the issuance of a citation as a result of the letter arguably “relates to the facts alleged” in ¶ 11. If Panther contested said, citation, then every document related to that contest proceeding is arguably “related to the facts alleged.”

Without waiving said objection, the letter referenced in [paragraph] 11 (a copy of which was mailed to Raleigh on 9/23/08), [C]itation [No.] 7496827 issued by MSHA to Panther . . . and the accompanying MSHA inspection notes:⁶ Motion; Exh. C at 4.

The company asserts that Brannon’s response is “vague” and that Brannon “should be required to identify and produce responsive documents. Motion at 4.

Brannon states the crux of the allegation in paragraph 11 is that Brannon engaged in a protected activity through his attorney when the attorney wrote to Hooker, and that even though the interrogatory is “overly broad,” Brannon nonetheless identified three documents, all of which are in the company’s possession. Resp. at 10.

Ruling: The motion IS DENIED. As I read the Complaint, the pertinent facts alleged are that Brannon’s attorney wrote a letter on September 23 to the MSHA District Manager regarding the company’s alleged failure to provide Brannon with SCRS’s. As Brannon notes, the company does not deny that it was sent and presumably still has a copy of the letter. Brannon identified the citation that was issued as a result of the inspection and the inspector’s notes associated with the citation. He need not do more.

(b) Identify each person who knows about the facts alleged. Motion; Exh. A at 3.

Answer: Oppegard; Wes Addington . . . ; Brannon; Hodges; Gary Harris; other MSHA personnel. Motion; Exh. C at 4.

MSHA District Manager responsible for regulating the Panther mine, regarding Panther’s Mining’s failure to provide Brannon with the required SCRS’s.

Complaint at 4.

⁶Brannon asserts Citation No. 7496827 and the accompanying MSHA inspector’s notes already have been given to the company as a result of the company’s production of documents request in Docket No KENT 2009-1259-D.

The company states that Brannon should be required to identify the "other MSHA personnel." Motion at 4.

Brannon responds he does not know who the "other MSHA personnel" are, but he "assumes" there are unnamed employees of MSHA who know about the letter. Resp. at 10.

Ruling: The motion IS DENIED. I conclude Brannon has answered the interrogatory to the best of his ability. His reference to "other MSHA personnel" is based on his assumption that there are other MSHA employees who know about the September 23 letter, but that he does not know this for a fact. Brannon's assumption is reasonable, and I find that he has done what he could to respond to the interrogatory.

Interrogatory 5. With regard to the allegations in paragraph 13 of the Complaint [⁷], identify all facts, persons with knowledge and documents, including witness statements, regarding the investigation conducted by Guy Fain. Motion; Exh. A at 3.

Answer: Brannon objects to this interrogatory as being overly broad and outside the scope of his knowledge. Without waiving said objection, Brannon states that . . . [the company] sat in on the interviews of numerous witnesses who were interviewed by [Fain], including the interview of Shelton, whereas Brannon did not attend any of these interviews. Motion; Exh. C at 4.

The company states that Brannon should be required to identify the persons known to him, as well as the facts and documents that support the allegations in paragraph 13, that it is not responsive for Brannon to assume that Panther has all of the information requested. Motion at 4. According to the company, although Brannon refers to statements he gave to MSHA, he gave "numerous" such statements and he should be required to identify them.

⁷Paragraph 13 states:

As a result of Brannon's filing of the safety discrimination complaint referred to in ¶ 9, MSHA assigned a special investigator, Guy Fain ("Fain"), to investigate the case. As part of his investigation, Fain interviewed employees of Panther Mining, including Shelton, regarding Brannon's allegations of discrimination and unsafe mining practices.

Complaint at 4-5.

Brannon does not specifically respond to the company's assertions.

Ruling: The motion IS GRANTED. Brannon must respond to the interrogatory as asked. This means that within 20 days of the date of this Order, Brannon must identify facts and documents within his knowledge regarding Fain's investigation. For example, if Brannon has a letter from MSHA informing him of Fain's appointment as the investigator, it must be identified. If Brannon knows the names of persons who assisted Fain in his investigation, the persons must be identified, and if Brannon or anyone he knows provided a written statement(s) to Fain as part of Fain's investigation, the statement(s) must be identified. If Brannon has no knowledge of such facts and/or documents, he must so state.

Interrogatory 6. With regard to the allegations of paragraph 14 of the Complaint [⁸][.] please;

(a) Identify each document, including witness statements, which relates to the facts alleged. Motion; Exh. A at 3.

Answer: Brannon objects to this interrogatory as being overly broad. For example, all documents filed in said case - which already are in the possession of Panther - arguable "relates to the facts alleged." in ¶ 14. Motion; Exh. C at 5.

The company asserts that Brannon should be required to identify responsive documents relating to the allegations in paragraph 14 and produce them. It also notes that Panther advised Brannon he can "generically identify" and need not produce officially filed documents in identified legal proceedings. Motion at 5.

Brannon does not specifically respond to the company's assertions.

Ruling: The motion IS GRANTED. Within 20 days of the date of this Order, Brannon must respond to the interrogatory as asked. Paragraph 14 states that on November 20, 2008, Brannon filed a complaint of discrimination with the Commission. Brannon's response should identify the complaint, any documents filed with it, and any documents upon which the

⁸Paragraph 14 states:

On November 20, 2008, while Brannon was still working at the mine, he filed a Complaint of Discrimination against Panther Mining - with the . . . [Commission] - under § 105(c)(3) of the Mine Act, regarding the matters set forth ¶[¶] 10-12 herein.

Complaint at 5 (footnote deleted).

complaint was based.

(b) Identify each person who knows about the facts alleged. Motion; Exh. A at 3.

Answer: Opegard; Brannon; Hodges; Chief Judge Lesnick; Judge Barbour; Raleigh; various other employees of Panther Mining. Motion; Exh. C at 5.

The company asserts that Brannon should be required to identify the “various other employees of Panther Mining.” Motion at 5.

Brannon does not specifically respond to the company’s assertions.

Ruling: The motion **IS GRANTED**. If Brannon knows the identity of the any of the “various other employees,” within 20 days of the date of this Order, he must provide Panther with the names of said employees. If Brannon does not know the identity of any of the “various other employees,” within 20 days of the date of this Order, he must so state.

Interrogatory 7: With regard to the allegations in paragraphs 15 and 16 of the complaint [?][,] please:

⁹Paragraph 15 of the complaint states:

On Friday, February 27, 2009, at the end of Brannon’s work shift, he drove to the MSHA field office in Harlan, Kentucky[,] to file another safety discrimination complaint against Panther Mining, pursuant to § 105(c) of the Mine Act, and to report to MSHA various unsafe conditions at [the company’s] No. 1 mine. Brannon arrived at the MSHA office at approximately 4:30 p.m.

Complaint at 5.

Paragraph 16 of the complaint states:

After he filed the discrimination complaint [footnote deleted], Brannon spoke with Craig Clark, a[n] MSHA coal mine inspector, for about ½ hour outside the MSHA office. During this conversation, Brannon told Inspector Clark about various unsafe conditions at the mine.

(a) Identify each document, including witness statements, which relates to the facts alleged. Motion; Exh. A at 4.

Answer: Brannon objects to this interrogatory as being overly broad. For example, every document filed or produced in said case, including witness statements taken by MSHA (the interviews of which Panther sat in on)[,] arguably “relate to the facts alleged in ¶¶ 15-16.

Without waiving said objection, the complaint referenced in ¶ 15 . . . already is in the possession of Panther. Motion; Exh. C at 5.

The company argues that Brannon “should be required to identify and produce the requested documents or make clear reference to documents filed in specific legal proceedings.” Motion at 5-6.

Brannon does not specifically respond to the company’s assertions.

Ruling: The motion **IS GRANTED**. Brannon has not responded fully to the interrogatory. Brannon identified the complaint. However, it seems likely there are other documents relating to the February 27 complaint that Brannon has not identified and/or documents relating to the reporting of alleged unsafe working conditions. Within 20 days of the date of this Order, Brannon must identify any documents filed with the complaint. He also must identify any documents that relate to the allegedly unsafe working conditions upon which the complaint is based. If no such documents exist, he must so state. In addition, he must identify any documents that relate to his half-hour discussion with Inspector Clark about alleged unsafe conditions at the mine. If Brannon gave Clark any such documents, he must so state and identify them. If Brannon discussed any such documents with Clark, he must so state and identify them.

(b) Identify each person who knows about the facts alleged. Complaint; Exh. A at 4.

Answer: Brannon; Craig Clark . . . ; Opegard; Addington; Raleigh; Ross Kegan . . . ; Hodges; Gary Harris . . . ; and other MSHA personnel. Motion; Exh. C at 5.

The company asserts that Brannon should identify the “other MSHA personnel.” Motion at 5.

Brannon does not specifically respond to the company’s assertions.

Ruling: The motion **IS GRANTED**. Within 20 days of the date of this Order, if Brannon knows the identities of any of the “other MSHA personnel,” he must so state. If he does not know the identities, but simply assumes there are “other MSHA personnel” who know about the facts alleged, he must so state.

Complaint at 5.

Interrogatory 8: With regard to the allegations in paragraphs 18-23 of the Complaint [10][,] please:

(a) Identify each document[,] including witness statements, which relates to the facts alleged. Motion; Exh. A at 4.

Answer: Brannon objects to this interrogatory as being overly broad. For example, every document in MSHA's investigatory file and every document in this discrimination proceeding arguably "relate to the facts alleged" in ¶¶ 18-23. Motion; Exh. C at 6. In addition, Panther's interviews of the employees who were present during all or part of the meeting between Shelton and Brannon "relate to the facts alleged." *Id.*

The company argues that Brannon should be required to identify the documents as requested and should produce them. Motion 6.

With regard to production, Brannon responds he does not have MSHA's investigatory file, and he does not have the statements Panther took of its employees who were present during the meeting on February 28. Response 12.

Ruling: The motion **IS GRANTED**. Brannon has not responded fully to the interrogatory which simply asks that Brannon identify each document, including witness statements, which relates to the facts alleged in paragraphs 18-23 of the Complaint. If there are documents within his knowledge that he can identify arising out of or related to the February 28 meeting, Brannon must identify them within 20 days of the date of this Order. For example,

¹⁰Paragraphs 18 - 23 of the Complaint relate to the alleged events of Saturday, February 28, 2009. Brannon asserts he went underground at 5:55 a.m. While traveling to his work area, Brannon was told by a mine foreman that Shelton, the mine superintendent, wanted to have a crew meeting, and Brannon returned to the surface. The meeting began at 6:40 a.m. in Shelton's office. Management officials and hourly employees were present. Brannon asserts that Shelton stated Brannon was "corrupting . . . [the] day shift and . . . [the] mine, that he wasn't performing his job satisfactorily, and that he was causing all of the mine's problems." Complaint at 6. The complaint further states that during the meeting, Shelton cursed Brannon, gave him a "written warning" for his alleged unsatisfactory job performance, threatened to fire him, and transferred him from the day shift to the second shift effective Monday, March 2. *Id.* The Complaint quotes Shelton as telling Brannon, "Whenever a day shift job comes open, you can think to yourself, 'If I wasn't suing this company, that job might have been mine'" (*Id.*) and that as long as he worked for Panther or another Black Mountain company, he would remain on the second shift. Complaint at 6-7. Finally, the Complaint states that during the February 28 meeting, Shelton mentioned Craig Clark, the MSHA inspector with whom Brannon had spoken in the Harlan MSHA office on February 27, and that Shelton said he knew Brannon and Clark were related. Complaint at 7. The Complaint asserts that Shelton also said of Clark, "I can't stand the ground he walks on either." *Id.*

Brannon asserts Shelton gave him a "written warning"; yet he does not mention it in his answer to the interrogatory.

(b) Identify each person who knows about the facts alleged. Motion; Exh. A at 4.

Answer: Brannon; Shelton; all of the miners who were present during the "meeting"; Opepgard; Addington; Hodges; Harris; MSHA's special investigators. Motion; Exh. C at 6.

The company argues that Brannon should be required to identify the miners at the meeting, as well as the special investigators. Motion at 6.

Brannon responds that he has produced the names of those he knows who were present at the meeting and who are not miners, and that those he knows who are miners are protected by the miner witness rule, Commission Rule 62 (29 C.F.R. §2700.62), and that under the rule he is not required to identify the miners until two days prior to the hearing. Resp. at 13.

Ruling: The motion **IS GRANTED IN PART**. If Brannon knows the names and addresses of any MSHA special investigators who know about what allegedly happened during the February 28 meeting, he must state as much. He also must state the names of the investigators. He must do these things within 20 days of the date of this Order.

With regard to the identity of miners, the names of those miners who Brannon knows have knowledge of the facts relating to the February 28 meeting and who he does not intend to call as witnesses must be disclosed to the company by December 15, 2009, which is 30 days before the close of discovery. Between receiving the disclosure and the end of discovery, the company must complete any additional discovery with regard to the named miners.

If there are miners who Brannon believes have knowledge of the facts relating to the February 28 meeting and who he intends to call as witnesses, he must disclose the names and contact information of the witness miners to the company two business days before the hearing convenes.¹¹ 29 C.F.R. § 2700.62.

Interrogatory 9: With regard to the allegations in paragraphs 24-25 of the Complaint [12][,] please:

¹¹The hearing is presently scheduled to begin on March 2, 2010, which means the names must be disclosed by 8:30 a.m., Friday, February 26, 2010.

¹²Paragraphs 24 and 25 of the Complaint state the complaint's "1st Cause of Action": to wit, that the company "verbally abused and threatened Brannon on February 28, 2009, because of Brannon's 'protected activities' as set forth in paragraphs 6, 7, 9, 11, 14, 15 and 16 of the complaint," and that the "verbal abuse" and "threats" were "discriminatory and retaliatory" and in violation of section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). Complaint at 7.

(a) Identify each document, including witness statements, which relates to the facts alleged. Motion; Exh. A at 4.

Answer: Brannon objects to this interrogatory as being overly broad and redundant. Motion; Exh. C at 6.

The company argues Brannon has not responded to the interrogatory as asked and should be required to do so. Motion at 7.

Brannon responds he rests on his previous responses. Resp. at 13.

Ruling: The motion **IS DENIED**. Paragraphs 24 and 25 of the Complaint do not raise factual assertions new to the case. Rather, they present the legal conclusion that the company alleges results from previously asserted facts. Those facts have been the subject of prior interrogatories and rulings, and Brannon is correct in describing Interrogatory 9(a) as redundant.

(b) Identify each person who knows about the facts alleged. Motion at 5.

Answer: Brannon objects to this interrogatory as "overly broad and redundant." Motion; Exh. C at 6.

The company argues Brannon has not responded to the interrogatory as asked and should be required to do so. Motion at 7.

Brannon responds that he rests on his previous responses. Resp. at 13.

Ruling: For the reason given regarding Interrogatory 9(a), the motion **IS DENIED** with regard to Interrogatory 9(b).

(c) State all facts and identify all documents and persons with knowledge that support your allegations that Shelton verbally abused or threatened you because of "protected activities." Motion; Exh. A at 5.

Answer: Brannon objects to this interrogatory as being overly broad and redundant. Without waiving said objection, Brannon states that the "persons . . . who support [his] allegations are unknown at this time. In addition, the names of any such witnesses need not be provided . . . until two days before the hearing, pursuant to 20 C.F.R. § 2700.62." Motion; Exh. C at 6-7.

The company argues that Brannon has not responded to the interrogatory as asked and should be required to do so. Motion at 6-7.

Brannon responds that he rests on the answers and objections given in his original

response. Resp. at 13

Ruling: The motion **IS DENIED** with regard to Interrogatory 9(c). Like Interrogatories 9(a) and 9(b), Interrogatory 9(c) is redundant and need not be answered further.

Interrogatories 10 and 11. The interrogatories will be ruled on together.

Interrogatory 10: With regard to the allegations in paragraphs 26-27 of the Complaint [13][.] please:

- (a) Identify each document, including witness statements, which relates to the facts alleged.
- (b) Identify each person who knows about the facts alleged.
- (c) Identify all facts, documents, and persons which have knowledge that support your allegations that Shelton gave you a written warning because of alleged "protected activities." Motion; Exh. A 4-5.

Interrogatory 11: With regard to the allegations in paragraphs 28-29 of the Complaint [14][.] please:

- (a) Identify each document, including witness statements, which relates to the facts alleged.
- (b) Identify each person who knows about the facts alleged.
- (c) Identify all facts, documents and persons with knowledge that support your allegations that Shelton transferred you to the 2nd shift because of the alleged protected activities." Motion; Exh. A at 5-6.

¹³Paragraphs 26 and 27 state the Complainant's "2nd Cause of Action": to wit, that the company and Shelton issued a "written warning" to Brannon on February 28 because of alleged "protected activities" as set forth in paragraphs 6,7, 9, 11, 14, 15, and 16, and that the "written warning" was "discriminatory and retaliatory" and violated section 105(c)(1) of the Mine Act. Complaint at 7.

¹⁴Paragraphs 28 and 29 state the complainant's "3rd Cause of Action": to wit, that effective March 2, 2009, the company and Shelton transferred Brannon to the second shift, that the second shift is a "less desirable shift," a shift that Brannon had told the company he preferred not to work, that the transfer took place because of "protected activities" set forth in paragraphs 6, 7, 9, 11, 14, 15 and 16, that the transfer was "discriminatory and retaliatory" and that it violated section 105(c)(1) of the Mine Act. Complaint at 7-8.

Answer: Brannon objects that the interrogatories are “very broad and redundant.” Motion; Exh. C at 7.

The company asserts that Brannon should be required to respond to the interrogatories as asked. Motion at 7.

Brannon responds that he rests on his previous answers and objections. Resp. at 13.

Ruling: The motion **IS DENIED** with regard to Interrogatories 10 and 11. Paragraphs 26, 27, 28 and 29 of the Complaint do not raise facts or assertions new to the case. Rather, they summarize the legal conclusions the Complainant alleges result from previously asserted “facts.” Those “facts” have been the subject of prior interrogatories and rulings, and Brannon is right to describe Interrogatories 10 and 11 as redundant.

PRODUCTION OF DOCUMENTS

The company has moved for the production of all documents “identified or referred to” in the Complainant’s answers to the interrogatories. Motion at 7; *see* Motion; Exh. B. Pursuant to the rulings set forth above, within 20 days of the date of this Order, the Complainant shall produce all documents in his possession that are identified or referred to in the responses he has been ordered to give. The documents shall be produced at the company’s office: 158 Central Street, Benham, Kentucky.

PRODUCTION OF E-MAILS

Brannon, through his attorney, Tony Oppegard, seeks to exclude from production an e-mail message Brannon sent to Oppegard on February 28, 2009. Oppegard maintains the message, a copy of which he has submitted for my review, memorializes Brannon’s recollection of what was said during the meeting between Shelton and Brannon on the morning of February 28. Oppegard invokes attorney-client privilege for the e-mail and essentially seeks an order barring its production.

I have reviewed the message, the first part of which is dated February 28, 2009. In it Brannon describes a meeting, presumably on February 27, that he had with others at the mine. He describes his version of who said what to whom and he hypothesizes about actions the company might take. Later in the e-mail, Brannon states his understanding of the relationships of various miners. Finally, in the penultimate part of the e-mail, Brannon gives his recollection of a topic discussed on February 28 and who said what to whom about it. The e-mail closes with Brannon telling his attorney to call if his attorney has any questions.

I conclude a majority of the February 28 e-mail is, as Complainant’s attorney maintains, protected by the attorney-client privilege. The message relates to the confidential communication of information by a client to his lawyer to facilitate the rendering of legal services by the

attorney. The information is in the form of the client's recollection of conversations and facts that relate to issues in the case the attorney is presenting on the client's behalf. These parts of the e-mail are not subject to disclosure.¹⁵

However, three small portions of the e-mail fall outside the attorney-client privilege. They are Brannon's description of his understanding of the relationships of various persons who may or may not be involved in the case, Brannon's suggestion his attorney call him if his attorney has questions, and Brannon's closing words and "signature." These are subject to disclosure and must be produced.

Accordingly, within 20 days of the date of this Order, Brannon **SHALL PRODUCE** for the company at its Benham, Kentucky, office a redacted copy of the February 28 e-mail. Parts of the copy that are not redacted shall be: (1) the paragraph beginning with the name "Josh Napier" and ending with the sentence, "So where's that leave me at lol"; (2) two sentences in the last paragraph, the first beginning "If you need any help. . ." and the second beginning, "Tony . . ."; and (3) the last four words of the e-mail, those being Brannon's closing words and name.


David F. Barbour
Administrative law Judge

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¹⁵I have placed the copy of the February 28 e-mail in the record under seal, where it is subject to review only by the Commission or another reviewing body.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

(202) 434-9980

November 13, 2009

BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 2009-302-D
	:	BARB CD 2008-07
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198
	:	
BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 2009-1225-D
	:	BARB CD 2009-07
	:	
PANTHER MINING, LLC and	:	
MARK D. SHELTON,	:	No. 1 Mine
Respondent	:	Mine ID 36-00017
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
on behalf of BILLY BRANNON,	:	
Complainant,	:	Docket No. KENT 2009-1259-D
v.	:	BARB CD 2009-09
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198

ORDER DENYING MOTION FOR PARTIAL SUMMARY DECISION

The Respondent, Panther Mining, LLC ("Panther" or "the company") has moved for partial summary decision in the proceeding docketed as KENT 2009-302-D on the grounds that certain alleged activities claimed as a basis for discrimination under the Mine Act are not protected and that certain acts claimed as adverse actions do not justify Mine Act remedies. The Claimant opposes the motion. Commission Rule 67 provides a judge may grant summary decision as to all or part of a proceeding if there is no genuine issue as to any material fact and if the moving party is entitled to such a decision as a matter of law. 29 C.F.R. § 2700.67. Because I conclude genuine issues as to material facts remain, I cannot grant the motion.

THE COMPLAINT

Docket No. KENT 2009-302-D is a discrimination case based on a complaint brought under section 105(c)(3) of the Mine Act by Billy Brannon against Panther. The case has been consolidated with two related proceedings: KENT 2009-1225-D, a second section 105(c)(3) discrimination case brought by Brannon against Panther; and KENT 2009-1259-D, a section 105(c)(2) discrimination case brought by the Secretary on behalf of Brannon against Panther. The consolidated cases will be heard beginning on March 2, 2010.

In KENT 2009-302-D, Brannon charges he was discriminated against because he engaged in protected activity by: (1) having his attorney write to mine management of Black Mountain Resources (Black Mountain), the parent company of Cloverlick Coal Company, LLC (Cloverlick), where Brannon then worked, and inform management that Brannon would file a civil suit in Kentucky state court against Black Mountain and Cloverlick because Brannon was allegedly assaulted with a hammer by Robert Salyer, a Cloverlick foreman (Complaint at ¶ 6 [1]); (2) having his attorney write to the executive director of the Kentucky Office of Mine Safety and Licensing (OMSL) and ask the OMSL to file disciplinary charges against Salyer because of Salyer's alleged assault on Brannon (Complaint at ¶ 7); (3) filing a discrimination complaint with MSHA regarding Panther's alleged discriminatory treatment because of Brannon's alleged documentation of safety problems with a buggy Brannon was assigned to operate at Panther's mine (Complaint at ¶ 9); (4) having his attorney write to the MSHA district manager regarding the company's alleged failure to provide Brannon with required self-contained, self-rescue devices (SCSR's) (Complaint at ¶ 11); (5) filing the instant discrimination complaint with the Commission (Complaint at ¶ 14); (6) filing another discrimination complaint against the company at the MSHA field office in Harlan, Kentucky and reporting to MSHA various, unsafe conditions at the company's mine (Complaint at ¶ 15); and (7) telling an MSHA inspector about various, unsafe conditions at the mine, including safety problems with the buggy he was assigned to operate. (Complaint at ¶ 16). See also Complaint at ¶ 17.

Because of the way the complaint was worded, it was not clear to me whether Brannon was indeed claiming that all of the listed activities were protected under the Mine Act. I, therefore, requested he supplement the record by listing all of the activities for which he was claiming protection. Order to Supplement the Record (May 29, 2009). In response, Brannon revised his list of protected activities as follows:

1st Cause of Action:

[1] Complaining to management . . . about . . . Salyer assaulting him[;]

¹Cloverlick and Panther are sister companies. Both are controlled by Black Mountain. After the alleged assault, Brannon was transferred from Cloverlick's mine to Panther's mine, where he continued to work until he was discharged. Following his discharge, he was economically reinstated pending the outcome of these cases.

- [2] Notifying Rick Raleigh that Brannon would be filing a civil lawsuit against Cloverlick Coal . . . , as set forth in ¶ 6 of the [c]omplaint[;]
- [3] Requesting OSML to file disciplinary charges against . . . Salyer, as set forth in ¶ 7 of the [c]omplaint[;] and
- [4] The filing of Brannon's civil law suit as set forth in ¶ 9 of [the c]omplaint[.]

2nd Cause of Action:

- [1] [A]ll of the protected activities set forth in the "1st Cause of Action"[;]
- [2] [A]ccurately completing the forms and checklists set forth ¶ 12 of . . . [the c]omplaint[;]²
- [3] Complaining to . . . management officials about having to walk from head drive to head drive, during which he did not have access to two SCSR's, as set forth in ¶ 15 of the [c]omplaint.³

Supplementation of Record (June 15, 2009).

MOTION FOR PARTIAL SUMMARY DECISION

Following the receipt of Brannon's supplementation of the record, the company filed its motion for partial summary decision. For the purposes of the motion, the company accepts as true the following facts as stated in the complaint and in the supplement:

1. [On January 23, 2008,] Brannon was physically assaulted . . . by a mine foreman, Salyer, while working at a mine operated by a Panther affiliate, [Cloverlick]. Complaint at ¶ 4.

²Paragraph 12 of the complaint asserts that Brannon completed pre-printed company checklists regarding the condition of the battery operated buggy he was assigned, as well as the condition of the head drives and belt take up areas that he was responsible for maintaining and that in completing the forms he documents unsafe conditions on several occasions. Complaint at 3.

³Paragraph 15 of the complaint asserts that having to walk from head drive to head drive was hazardous because Brannon was not always within 25 feet of two SCSR's as required by the company's SCSR storage plan and that Brannon complained about the hazard to the mine superintendent and to the mine foreman. Complaint at 4.

2. On April 25, 2008, Brannon's attorney informed Cloverlick's representative, Raleigh, that Brannon intended to file suit against Cloverlick over the Salyer incident. Complaint at ¶ 6.
3. On April 29, 2009, Brannon's attorney wrote . . . [the OMSL] requesting that it take certain actions against Salyer for the alleged assault, and OMSL conducted an investigation. Complaint at ¶ 7.
4. On June 26, 2009, Brannon filed a civil suit against Cloverlick and Salyer in a Kentucky state court for compensatory and punitive damages for assault and battery and intentional infliction of emotional distress. Complaint at ¶ 9.

In addition, the company notes Brannon's assertions that[,] because he engaged in protected activity, the company discriminated against him when company officials "spoke disparagingly" about him, encouraged his co-workers "to shun him," and imposed "more onerous[,] unsafe working conditions on him." Complaint at ¶¶ 21, 22. The company argues that neither of the alleged protected activities nor the alleged discriminatory acts are covered by the Mine Act.

THE PARTIES' ARGUMENTS

THE ASSAULT AND THE RESULTANT STATE MATTERS

In the company's view, the fact that Brannon's attorney wrote to the OMSL, advised it of Salyer's assault and requested state disciplinary action against Salyer, as well as the fact the letter triggered an investigation of the incident by the OMSL, are not activities protected under the Mine Act. Motion at 3. Therefore, even if they resulted in management personnel speaking disparagingly about Brannon, urged his shunning and imposed unsafe working conditions on him (Complaint at ¶¶ 20, 22), the company's actions would not violate the Act, because the actions in which Brannon (and through Brannon, his attorney) engaged are not protected. The company states that section 105(c)(1) of the Act bars discrimination because, *inter alia*, a miner has filed or made a complaint "under or related to the Act" (30 U.S.C. § 815(c)(1))[,] and Brannon's asserted protected actions arise under state law[,] not under the Mine Act. Motion at 3. Therefore, the threat to file a suit in state court based on the January 23, 2008, assault and the filing of the suit are not protected. Nor is writing to the state agency requesting it discipline Salyer and asking for and being granted an investigation of the Salyer/Brannon incident by the agency. In fact, according to the company, "None of Brannon's actions alleged in the complaint's paragraph 4 [(Salyer's assault on Brannon)]; paragraph 6 [(Brannon's attorney

informing the company that Brannon would sue the company and Salyer over the assault)]; paragraph 7 [(the April 29, 2008 letter of Brannon's attorney to OMSL and the state agency's subsequent investigation)] are 'complaints under or related to' the Mine Act." Motion at 5; *see also* Resp.'s Supplemental Memo. at 2-3 (September 29, 2009).

Brannon responds that the activities with which the company takes issue are protected under the Act and that Brannon "need not invoke the Mine Act to be protected under it." Response at 2. Brannon cites several Commission decisions which he argues establish the proposition that a miner's contacting of state agencies regarding health or safety hazards is protected. *Id.* at 2-3.

THE ALLEGED ADVERSE ACTIONS

The company also takes issue with Brannon's charge in ¶ 20 of the complaint that Brannon was discriminated against when company officials "spoke disparagingly" of him and "encouraged [his] co-workers to shun him" because of the above alleged, protected activities. Even if Brannon's activities are protected – and the company maintains they are not – in the company's view, speaking disparagingly and encouraging shunning are not types of conduct prohibited by section 105(c). This is because section 105(c) does not "address every slight or negative action which can occur in the workplace, especially those which are vague and subjective[,] such as encouraging shunning and talking disparagingly. Motion at 6-7; *see also* Resp.'s Supplemental Memo. at 3.

Brannon, citing to *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corporation*, 6 FMSHRC 1842, 1847-1848 (August 1984), argues that such actions can indeed constitute prohibited discriminatory actions in that they can subject a miner to a detriment in his employment relationship. Resp. at 6-7. He also notes that the Act should be construed liberally. *Id.* at 7-8 (quoting *Secretary of Labor on behalf of Mark Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (January 2005)).

RULING

PROTECTED ACTIVITY

As the company correctly points out, the Act bars discrimination because, *inter alia*, a miner has filed or made a complaint "under or related to the Act" (30 U.S.C. § 815(c)(1)). Beginning with its seminal case, *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), the Commission made clear that when an alleged protected activity is not expressly protected under the language of section 105(c)(1) of the Act – for example, when the complaint does not assert he or she suffered discrimination because the complainant filed or made a safety complaint related to the Act and its implementing regulations, instituted proceedings or testified in proceedings brought under or related to the Act or suffered discrimination because of any other activity expressly permitted by the Act – the activity still

may be protected if it furthers the purpose of the Act, always being mindful that the Act “is remedial legislation, and is[,] therefore[,] to be liberally construed.” 2 FMSHRC at 2789.

In legislative findings set forth at the beginning of the Act, Congress stated that the first priority of the mining industry must be the “health and safety of [the industry’s] most precious resource – the miner” (30 U.S.C. § 801(a)) and that there is an “urgent need to provide more effective means and measures for improving . . . practices in the Nation’s mines in order to prevent . . . serious physical harm [to miners]” 30 U.S.C. § 801(c). Congress sought to implement these findings by directing the Secretary of Labor and the Secretary of Health Education and Welfare to develop and promulgate mandatory safety and health standards with which operators and miners must comply. 30 U.S.C. § 801(g). It further afforded miners specific protections. It did not, however, afford miners protection from all workplace hazards. In this regard it is significant that under the Mine Act, unlike the OSH Act, operators are under no obligation to provide equipment and a place of employment “free from recognized hazards that are causing or are likely to cause . . . serious physical harm.” 29 U.S.C. § 654(a)(1). As a consequence, conditions or practices may exist at a mine that are likely to cause or that actually cause serious physical harm yet, which do not contravene the Act. In like manner, miners may engage in activity that is arguably related to safety but, because the activity is not “under or related to the Act,” the activity is not protected. 30 U.S.C. § 815(c)(1). Thus, when ruling on whether an activity is protected, the question before a judge is not whether the activity is related to safety, *per se*, but, as *Pasula* teaches, whether it is related to the activities specified in section 105(c)(1) or whether the activity furthers rights granted miners by the Act or otherwise furthers the purposes of the Act.

Turning to the motion at hand, the Complainant lists as its first cause of action that Brannon complained to mine management about Salyer’s alleged assault. Supplement (June 15, 2009). As noted, the company accepts the allegation as true. Therefore, the question is whether complaining to management about the assault is a protected activity. It may be or it may not be. Because I cannot determine the answer on the basis of the record as it now stands, I must deny the motion as it relates to the allegation and Brannon’s first cause of action. In denying the motion, I am nonetheless cognizant that, in the abstract, complaining to mine management about an assault does not necessarily relate to complaining about a violation of a mandatory standard, instituting and testifying in a proceeding brought under the Act, being the subject of medical evaluations and potential transfer under a mandatory health standard, or to the exercise of any other right specifically granted by the Act or to furthering the Act’s purposes. However, without hearing the evidence, I cannot rule out the fact that Brannon might be able to show that his complaint about the assault is related to his espousal of a specific right afforded by the Act; or that his complaint furthers rights guaranteed miners by the Act or furthers the Act’s purposes. If he can do any of these things, he will establish he engaged in protected activity when he complained to management about the assault. If he cannot, his assertion of protected activity related to the assault complaint will fail. Trial of the issue is necessary.

THE STATE COURT SUIT
AND
CONTACTING THE STATE AGENCY

In like manner, I conclude that while filing a civil suit in state court against a sister company and its foreman based on an assault and seeking state disciplinary action against the foreman because of the assault – actions the company accepts as true – are not activities specifically protected under the Act, at trial Brannon might be able to show that filing the suit against Salyer and Cloverlick and seeking state disciplinary action by the OMSL against Salyer for the assault is related to Brannon's espousal of a specific right afforded by the Act; or, alternatively, that filing the suit and seeking state discipline furthered rights guaranteed miners by the Act or otherwise furthered the Act's purposes. If he can do any of these things, he will establish he engaged in protected activity when he complained to management about the assault. If he cannot, his assertion of protected activity related to the assault and his complaint to OMSL will fail. The issue must be tried before it can be properly decided.

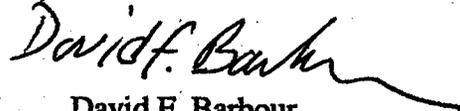
In reaching this conclusion, I have fully considered the fact the Complainant brought suit in a *state* court and complained to a *state* agency and have not found either way of proceeding to run afoul of Brannon's claim of protected activity. It is not the venue that is determinative. It is whether the activity relates to an activity specifically protected by the Act, whether the activity relates to an alleged violation of a mandatory safety or health standard, or whether the activity otherwise furthers rights guaranteed miners by the Act or furthers the Act's purposes. There is nothing novel or unprecedented in this conclusion. Commission judges long have held that otherwise protected activities does not lose Mine Act protection if it takes place in at a site not regulated or authorized by the Act. *See, e.g., Johnson v. Boren, Inc.* 3 FMSHRC 926, 933 (April 1981) (Judge Lasher) (*complaint to county health department protected*); *see also, Response at 3, n.2.*

ADVERSE ACTIONS

While I agree with the company that section 105(c) does not "address every slight or negative action which can occur in the workplace" (Motion at 6-7), I disagree that actions such as "encouraging shunning" or "talk[ing] disparagingly" necessarily fall outside of the Act's parameters. *Id.* They might or they might not. Although there is some disagreement in the federal circuits on this point, I concur with Brannon that the better view is, if the actions are motivated by a complainant's protected activity, they can constitute prohibited behavior if they subject a miner to a detriment in his or her employment relationship or if they chill the exercise of protected rights by a reasonable complainant and/or by the complainant's reasonable co-workers. *Resp. at 6-7 (and cases cited therein).* As with determining protected activity, the factual context within which the actions take place is vital. Therefore, on the basis of the present record, it would be premature to rule the actions of which the company complains are outside the boundaries of the Act.

ORDER

For all of these reasons, the company's motion for partial summary decision **IS DENIED.**


David F. Barbour
Administrative law Judge

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(202) 434-9980

November 18, 2009

BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2009-302-D
v.	:	BARB CD 2008-07
	:	
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198
	:	
	:	
BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2009-1225-D
v.	:	BARB CD 2009-07
	:	
	:	
PANTHER MINING , LLC and	:	
MARK D. SHELTON,	:	No. 1 Mine
Respondent	:	Mine ID 36-00017
	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
on behalf of BILLY BRANNON,	:	
Complainant,	:	Docket No. KENT 2009-1259-D
	:	BARB CD 2009-09
	:	
	:	
v.	:	
	:	
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198

ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION TO COMPEL

In Docket No. KENT 2009-1225-D, the Complainant, Billy Brannon ("Brannon"), moves to compel the Respondents, Panther Mining, LLC ("Panther" or the "company") and Mark D. Shelton ("Shelton"), the superintendent of Panther's No. 1 mine, to answer Interrogatory 16 of Brannon's 1st Set of Interrogatories and to provide the documents sought in Request No. 16 of Brannon's 1st Request for Production of Documents. According to Brannon, Panther and Shelton have improperly failed to identify and produce documents that may come within the interrogatory.

Panther and Shelton object to the interrogatory and request, and oppose the motion. They state Brannon's use of discovery is too broad and for the most part it is not directed at issues in the case. They also maintain they have already produced all documents relating to the allegations at issue and they need not produce more. For the reasons that follow, the motion **IS GRANTED IN PART AND DENIED IN PART.**

THE COMPLAINT

Docket No. KENT 2009-1225-D is a discrimination case based on a complaint brought under section 105(c)(3) of the Mine Act by Brannon against Panther. The case has been consolidated with two related proceedings: KENT 2009-302-D, another section 105(c)(3) discrimination case brought by Brannon against Panther; and KENT 2009-1259-D, a section 105(c)(2) discrimination case brought by the Secretary on behalf of Brannon against Panther.¹ The consolidated cases will be heard beginning on March 2, 2010.

In Docket No. KENT 2009-1225-D, Brannon lists as activities leading to his alleged discriminatory treatment many of the activities set forth in his first filed complaint, Docket No. KENT 2009-302-D. He asserts, as he did in his first complaint, that these activities are "protected" under section 105(c) of the Act. What is new in Docket No. KENT 2009-1225-D is Brannon's assertion of additional discriminatory treatment at the hands of Panther and Shelton. (Shelton was not named as a respondent in the first-filed complaint.) Brannon alleges that on Saturday, February 28, 2009, he was underground when he was summoned to a meeting in Shelton's surface office. Those present were Shelton, the rest of the underground crew and others from mine management. Complaint at ¶¶ 18, 19. Brannon asserts he was the "main subject" of the meeting, and that during the meeting Shelton told Brannon that Brannon was "corrupting" the shift and the mine, that he was not doing his job satisfactorily and that he was the cause of all of the mine's problems. *Id.* at ¶ 20. Brannon also asserts Shelton "cussed" him, threatened to fire him, gave him a written warning about his alleged unsatisfactory job performance and transferred him to the second shift effective the next Monday, March 2, 2009. *Id.* at ¶ 21. Brannon quotes Shelton as telling him in effect that he would never return to the day shift because he was suing the company², and that from March 2 on, he would always work on the second shift.³ Finally, Brannon quotes Shelton as telling him that Shelton knew that Brannon had spoken with an MSHA inspector on the evening of February 27, and that he also knew

¹Docket No. KENT 2009-1225-D is the second-filed of the three cases.

²Brannon previously filed a civil suit against a sister company of Panther's (Cloverlick Coal Company) and a Cloverlick supervisor (Robert Salyer) over Salyer's alleged assault on Brannon at the Cloverlick mine where Brannon then worked. *See* Docket No. KENT 2009-302-D, Complaint at ¶¶ 6, 9.

³According to Brannon, Shelton knew that Brannon preferred to work on the first shift and considered second shift hours to be less desirable. Complaint at 7.

Brannon was related to the inspector. Of the inspector, Shelton allegedly said, "I can't stand the ground he walks on either."⁴ *Id.* at ¶ 22.

The discriminatory actions to which Brannon charges he was subjected because of his alleged protected activities are the "verbal abuse" and "threats" he received from Shelton on February 28 (Complaint, 1st Cause of Action at ¶ 24); the "written warning" he received from Panther and Shelton on February 28 (*Id.*; 2nd Cause of Action at ¶ 26); and his transfer to the second shift effective March 3, 2009. *Id.*; 3rd Cause of Action at ¶ 28.

INTERROGATORY, REQUEST, AND ANSWER

Interrogatory 16. With the exception of "the Shelton meeting," please state whether any Panther . . . employees made any contemporaneous or non-contemporaneous notes regarding Brannon's job performance or non-contemporaneous notes regarding Brannon's job performance or any other event involving Brannon at the No. 1 mine prior to February 28, 2009.

If the answer to this interrogatory is "yes," please see Request [No.] 16 in Brannon's 1st Request for production of Documents. Motion at 1-2.

Answer. Objection to the part of the interrogatory addressing "any other event at the No. 1 mine prior to February 28, 2009" as vague, overbroad and not reasonably calculated to lead to admissible evidence. Without waiving its objection Panther states that notes concerning Brannon's job performance were made on some occasions. Motion at 2.

Request No. 16. With the exception of notes regarding "the Shelton meeting," copies of any and all contemporaneous or non-contemporaneous notes made by any Panther employee prior to February 28, 2009, regarding Brannon's job-performance or any other event involving Brannon at the No. 1 mine. Motion at 2

Answer. Objection as to "any other event involving Brannon at the No. 1 mine" as overly broad, unduly burdensome and not reasonably calculated to lead to admissible evidence. Further objected to . . . the extent it would include communications between Panther's managers and their attorney. Further, this request overlaps with other requests. Without waiving its objection, Panther is providing herewith notes made by Panther's employees prior to February 28 . . . regarding Brannon's job performance as documents 000801-000836. Motion at 2-3.

⁴Brannon maintains that on February 27, he went to the MSHA office in Harlan, Kentucky, to file a discrimination complaint with MSHA, and while at the office he spoke with an MSHA inspector for about one half hour. The alleged topic of their discussion was "various unsafe conditions" at the mine. Complaint at ¶ 16.

ARGUMENTS

Brannon states that upon receipt of the company's answer to the interrogatory, his attorney "e-mailed" the attorney for Panther and Shelton and asked that his clients answer the interrogatory and provide all of the requested documents or "at least state the specific nature of the documents that you are withholding." Motion at 3. When the company's and Shelton's attorney did not respond by the date Brannon's attorney specified, Brannon filed the motion to compel.

Brannon argues it is relevant whether the company and/or its employees were keeping notes about Brannon – regardless of whether or not they were job-related– prior to the date of the February 28 meeting. According to Brannon, he is "entitled to know whether Panther was 'building a case' against him in order to discharge him." Motion at 4. Brannon states he "would want to further delve into why employees were keeping notes about him (and at whose instruction)." *Id.* He also asserts he is entitled to know whether the company was keeping notes about other employees – or whether Brannon was being singled out for this treatment. *Id.*

The company and Shelton argue the motion should be denied. They object to answering the parts of the interrogatory and request relating to "any other event involving Brannon at the No. 1 mine." Interrogatory 16. They point out that nowhere in his complaint does Brannon assert he was discriminated against by having notes taken about him by Panther employees. By asking for notes taken by anyone at the mine at any time prior to February 28, on any subject involving Brannon, the Complainant is casting a "dragnet" that would include things beyond the scope of the complaint, which is about Brannon being "written up" and transferred after the February 28 meeting. Opposition to Motion at 3-4. Finally, the company notes it already has provided Brannon with 48 pages of notes taken by various employees concerning Brannon's job performance. *Id.* at 5.

RULING

Interrogatories must be reasonably related to the issues at hand. The issues as set forth by Brannon are whether he was discriminated against when he was "verbally abused and threatened" by Shelton at the February 28 meeting, was issued a "written warning" by Panther and Shelton, and was transferred to the second shift (a less desirable shift that Brannon did not want) all because of his alleged protected activities. A topic discussed at the February 28 meeting was Brannon's allegedly unsatisfactory job performance. One result of the meeting was a written warning issued to Brannon by Shelton about Brannon's performance. It is clear that Brannon's work performance and the company's and Shelton's perception of it are at issue in Docket No. KENT 2009-1225-D. To the extent the interrogatory asks the company and Shelton to identify and produce employees' notes referring to Brannon's work performance before February 28, 2009, the interrogatory is proper and must be answered. Further, any written notes identified in response to the interrogatory must be produced pursuant to Request 16.

Therefore, within 15 days of the date of this Order, notes made by Panther's employees relating to Brannon's job performance that the company and/or Shelton have **MUST** be described by the company for Brannon. Pursuant to Request 16, copies of the described notes **MUST** be produced to Brannon. If the company already has described and turned over all of said notes, it may comply with the interrogatory and request by stating as much.

If there are notes made by company employees that relate to Brannon's pre-February 28 job performance that the company claims are exempt from production because they are privileged, within 15 days of the date of this Order the company **MUST** identify the notes and submit copies to me for my review and state the grounds on which the company is claiming exemption from production. After reviewing the notes and considering the grounds, I will rule as to whether or not the notes are subject to production. Any copies that I conclude are protected from production, I will place under seal in the record, where they will be subject to review by only the Commission or another reviewing body.

As for the part of Interrogatory 16 that asks the company to state whether its employees made notes as to "any other event involving Brannon at the No. 1 mine prior to February 28, 2009" and the part of Request 16 that asks the company to produce any such notes, the Motion to Compel **IS DENIED**. The interrogatory and request are not targeted at issues alleged by Brannon in his complaint and, thus, are not reasonably related to the complaint. The company is right to describe the interrogatory and request as "overbroad." Opposition to Motion at 3. I agree with the company that Brannon should not be allowed to use discovery as a "dragnet" (*Id.*) to obtain every note in the company's and Shelton's possession relating to "any other event involving Brannon." Interrogatory 16: Were such discovery allowed, the case would soon be unmanageable.

The company **IS ORDERED** to respond to Interrogatory 16 and Request 16 **ONLY** as set forth above.



David F. Barbour
Administrative law Judge

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December 2, 2009

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

v.

GILBERT DEVELOPMENT CORP.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2008-201-M
A.C. No. 42-02159-130699

Mine: SR9/ Harrisburg Pit

**ORDER DENYING RESPONDENT'S MOTION TO REOPEN RECORD
TO SUBMIT WITNESSES TO POLYGRAPH EXAMINATION**

Respondent filed a motion to reopen the record in this proceeding for the limited purpose of subjecting several fact witnesses to a polygraph examination. It states that it filed the motion because there were so many conflicting facts presented at the hearing. The Secretary opposes the motion because neither the Commission's procedural rules nor the Federal Rules of Civil Procedure sanction the introduction of post-trial evidence to bolster witness credibility. In addition, she argues that Respondent did not set forth any special circumstances that would justify the use of polygraph testing. For the reasons discussed below, I deny Respondent's motion.

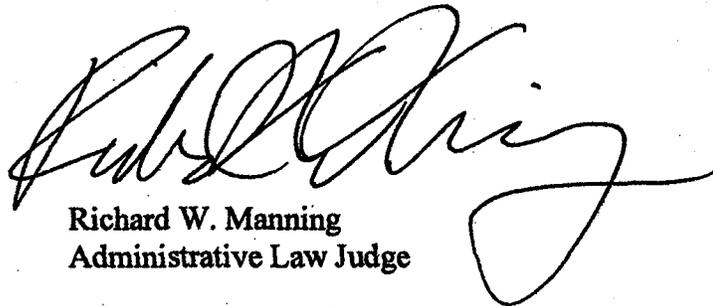
Commission Procedural Rule 55 empowers Commission judges to, among other things, regulate the course of hearings, rule on offers of proof and receive relevant evidence, and dispose of procedural motions. 29 C.F.R. § 2700.55. This authority can be used, in appropriate circumstances, to reopen the record for the submission of new evidence.

The Commission addressed a motion to reopen the record in *Kerr-McGee Coal Corp.*, 15 FMSHRC 352 (March 1993). In that case, the mine operator sought Commission review of a judge's order denying the operator's motion to reopen the record. Relying on Rule 59 of the Federal Rules of Civil Procedure, the judge denied the motion. On review, the Commission held that the decision to grant or deny a motion to reopen is "committed to the sound discretion of the trial judge." 15 FMSHRC at 357. The Commission affirmed the judge's decision and set forth three factors that should be considered. These factors are: (1) the timeliness of the motion; (2) the character of the newly proffered evidence; and (3) the effect of granting the motion. *Id.* See also, *Meek v. Essroc Corp.* 15 FMSHRC 606, 614 (April 1993).

Although the motion in this case was filed soon after the close of the hearing, I find that, based on the character of the newly proffered evidence, the motion should be denied. Four witnesses testified for each party. Both parties were given the opportunity to cross-examine the

opposition's witnesses and to test their credibility. Commission administrative law judges act as the finders of fact in Commission proceedings and, in doing so, make necessary credibility determinations. The judge in this case is charged with making these determinations based on his observations of the witnesses and the testimony presented. The Supreme Court, in *United States v. Scheffer*, questioned the reliability of polygraph evidence. 523 U.S. 303, 309 (1998). In addition, federal courts have expressed their disfavor of the use of polygraph evidence. *See, e.g., United States v. Swazye*, 378 F.3d 834, 837 (8th Cir. 2004) (The court stated that "[w]hen two witnesses contradict each other, juries, not polygraph tests, determine who is testifying truthfully."). Judges act as juries in Commission proceedings. Conducting polygraph tests would "interfere with the [judge's] role in making credibility determinations" and has the potential to raise collateral issues. *SEC v. Kopsky*, 586 F. Supp. 2d 1077, 1080 (E.D. Mo.) (citing the opinion of four justices in *Scheffer*, 523 U.S. at 313-315). The effect of granting the motion would be to further delay the proceedings to allow for the submission of polygraph evidence. This evidence would be of little value, given the unreliability of polygraph tests, and would conflict with and add confusion to credibility determinations made by the judge.

For the reasons set forth above, the motion to reopen is **DENIED**.



Richard W. Manning
Administrative Law Judge

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December 3, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-479
Petitioner	:	A.C. No. 12-02147-150573
	:	
	:	
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	
Respondent	:	Mine: Francisco

DECISION DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Miller

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The Secretary of Labor ("Secretary") filed a motion to approve settlement. The case involves twelve citations issued under section 104(a) of the Act with a total penalty assessed at \$104,464. In denying the Secretary's request to settle this matter, I take into consideration the enormous volume of cases pending and the pressure on the CLR's to settle cases and move them along. However, I have signed off on a number of settlements with this particular mine operator in the past few weeks and did so reluctantly on many of them for that reason. The settlements have given more than generous reductions in penalties and modifications of citations with little explanation.

I conclude that the reduced penalties proposed by the Secretary against Black Beauty Coal Company ("Black Beauty") would not adequately effectuate "the deterrent" purpose underlying the Act's penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). I reach this decision based upon my conclusion that the penalties proposed by the Secretary are greater than an 80% reduction of the original penalties and such a reduction encourages mine operators to contest the penalties in the hope of receiving such a reduction. The fact that a mine operator can obtain such a drastic reduction does not encourage the mine to comply with the requirements of the Act.

The principles governing the authority of 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).

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 at 292. 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 purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising this discretion, the Commission has recently reiterated that in determining the amount of a penalty, a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The Commission also emphasized that when a penalty determination "substantially diverge[s] from those originally proposed, it behooves the . . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed. *Id.* The Commission warned in *Sellersburg* that without an explanation for such a divergence, the "credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." 5 FMSHRC at 293. The information provided by the Secretary in this case does not allow me to provide a sufficient explanation for the penalty reduction.

The Secretary's representative in this case has proposed to modify six of the twelve citations to non-S&S violations, to vacate two citations, and to modify the gravity of citations. The operator has agreed to pay one violation as issued. The overall proposal calls for a reduction in the penalty from \$104,464 to \$20,394. On the penalty amount issue alone this proposal is not appropriate. In addition to the total penalty I also base my decision on the lack of factual bases to modify six violations to non-S&S and modify the gravity of three others. The Secretary included in its proposal that the Francisco mine had "28 previous violations in the 15 month period preceding these violations" and that the payment of \$20,394 will not affect the mine's ability to continue in business. While I can accept the stipulation regarding the mine's ability to pay, the history of violations was not included and was in error. First, the history

included only 15 months, and, second, it did not take into consideration the more than 25 violations issued between the date of the first citation in this docket and the date of the most recent citation.

Citation No. 6672623 charges a violation of § 77.502 of the Secretary's regulations because the "outer insulation on the cord that supplies 110 V.A.C power to the shop light has a cut/tear exposing the bare inner conductor leads in one location. The shop light was in service in the train load out facility." The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in a "fatal" injury, and found moderate negligence. The Secretary proposes to modify the violation to non-S&S and reduce the penalty from \$13,268 to \$807 because the electrical circuit was protected with a ground fault circuit interrupter breaker. A number of cases have found similar violations to be significant and substantial. *Ely Fuel Coal Co.*, 13 FMSHRC 488 (Mar. 1991)(ALJ)(An admitted violation of § 77.502-2 for failure to conduct a monthly examination of electrical equipment was S&S because serious injuries can occur from malfunctioning electrical equipment.); *Laurel Run Mining Co.*, 11 FMSHRC 1815 (Sept. 1989)(ALJ)(Violation of § 77.502 was significant and substantial because of risk of electrical malfunctions.).

Citation No. 4263736 charges a violation of § 77.1606(c) because the "No. 303--013 Driltech drill being used in the No. 4 pit was not being maintained in a safe condition. When inspected the offside camera was found defective, preventing the operator from seeing anything along the offside area of the drill." The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in "lost workdays," and found moderate negligence. The Secretary proposes to modify the violation to non-S&S, with low negligence and reduce the penalty from \$3,143 to \$285. The Secretary states that even with the inoperable camera, the operator had useable mirrors and an audible warning system to prevent an accident. A number of decisions have deemed a violation of this standard to be significant and substantial. *S&M Construction Inc.*, 19 FMSHRC 566 (Mar. 1997)(ALJ)(An area of missing tread on the rear tire of a trailer attached to a truck was an S&S and "unwarrantable" violation of § 77.1606(c).); *Quarto Mining Co.*, 15 FMSHRC 1311 (June 1993)(ALJ), *rev. denied* (July 16, 1993)(Malfunctioning steering wheel was an S&S violation of § 77.1606(c).); *Triple B Corp.*, 8 FMSHRC 833 (May 1986)(ALJ)(Citation for violation of § 77.1606(c) due to cracked rear view mirror and excessive play in mine truck's steering system was found to be significant and substantial because cracked mirrors could cause driver to back into pedestrians or over highwall, and steering defect made it extremely difficult to handle truck; both violations were reasonably likely to cause serious or fatal injuries.).

Citation No. 6672625 charges a violation of § 77.1104 because "accumulations of combustible material in the form of oil and oil soaked fines was allowed to accumulate on the Taylor fork truck 450 Co. #320-036. These accumulations ranged in depth from 1/8" to 1/4" approximately. Engine oil was leaking out of the valve cover gasket area and running on the exhaust manifold and down the side of the engine block to the belly pan." The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in "lost workdays," and found moderate negligence. The Secretary has proposed to modify the citation to non-S&S and reduce the penalty from \$3,143 to \$634 because if a fire were to occur,

the operator could easily stop and exit the equipment. Accumulation violations may potentially be determined to be significant and substantial. *Little Sandy Coal Co.*, 17 FMSHRC 1638 (1995)(ALJ). (A surface coal mine operator's admitted violation of combustible materials standard, § 77.1104, was S&S. An inspector observed several leaks in the hydraulic system of a Hitachi shovel used to load overburden into haulage trucks, and also observed pools of oil under and around the operator's cab and oil on the equipment's frame. There was a reasonable likelihood of an ignition of the "extensive" accumulations of oil and grease.)

Citation No. 6672746 charges a violation of § 77.1711 and states "[n]o person shall smoke or use an open flame where such practice may cause a fire or explosion. A miner was observed smoking in the immediate area of flammable and combustible material located on the company grease truck." The items on the grease truck included starting fluid, kerosene, grease, oil and fuel soaked rags, and other oils. The fuel truck was within 30 feet of the grease truck and both were servicing a dozer. The inspector determined that the violation was S&S, marked the gravity as "highly likely" to result in a "fatal" injury, and found high negligence. The Secretary has proposed to modify the citation to non-S&S with moderate negligence and reduce the penalty from \$42,944 to \$362, because it is not likely that the combustible materials would be ignited by someone smoking next to the vehicle. The Secretary proposes to reduce the negligence because management was not aware of the violation. The reduction in penalty is extreme, as is the modification from S&S to a non-S&S violation without some further explanation regarding the facts and the factual basis for making such modification.

Citation No. 6672771 charges a violation of § 77.205(b) because the travelway in the conveyor rail tunnel was strewn with debris creating a trip hazard near the belt and rollers. The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in "lost workdays," and found moderate negligence. The Secretary proposes to modify the violation to non-S&S with a reduction in penalty from \$3,996 to \$807 because the "single obstacle could be easily recognized and avoided." Travelways can be particularly hazardous in mining conditions, and violations of regulations pertaining to them have often been found to be significant and substantial. *Summit Anthracite Inc.*, 29 FMSHRC 1062 (Nov. 2007)(ALJ)(An operator committed an S&S violation of § 77.205(b), for failing to keep a travelway clear of stumbling hazards in the generator building.); *Cyprus Emerald Resources Corp.*, 11 FMSHRC 2750 (Dec. 1989)(ALJ)(Where coal refuse and hoses were found in preparation plant and refuse bin building walkways which provided access to areas where persons were required to work or travel, a S&S violation of §77.205(b) occurred.); *Consolidation Coal Co.*, 8 FMSHRC 1735 (Nov. 1986)(ALJ)(Obvious, long-term accumulation of slurry and water on floor of slurry pump house where miners were required to work caused slipping hazard, is significant and substantial violation of § 77.205(b), and was due to unwarrantable failure of operation to comply with standard.); *J.A.D. Coal Co.*, 7 FMSHRC 733 (May 1985)(ALJ)(Violation of § 77.205(b) was the result of high negligence because travelway leading to head roller of belt was covered completely with loose coal and it appeared that coal accumulations had been present for several days. The violation was serious because it exposed employees to fall hazard which could have resulted in serious injury or death.)

Citation No. 6672786 charges a violation of § 77.1608(b) because the spoil dump site near the employee parking lot "has an extensive cracking." The cracks measure up to 18 inches wide by 27 inches deep, for a distance of approximately 200 feet. The inspector observed a dump truck back up between the crack and the face of the dump site. There was the potential for a failure of the ground to support the weight of the dump truck. The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in a "fatal" injury, and found moderate negligence. The Secretary proposes to modify the citation to non-S&S with a reduction in penalty from \$3,405 to \$207 because the condition was "not likely to result in an accident considering the size and location of the crack in relation to the size and location of the highwall." The decisions bear out the fact that spoil dumps with cracks may well be cited as significant and substantial. *Kerry Coal Co.*, 17 FMSHRC 2110 (Nov. 1995)(ALJ)(A surface coal mine operator committed an S&S violation of § 77.1002, which requires "necessary precautions" to minimize the possibility of spoil material rolling into the pit when box cuts are made. The unstable condition of the cited spoil banks showed that the operator had not taken "necessary precautions," and falling material included two- to three-foot rocks. The company's MSHA-approved ground control limit on the angle of spoil banks was clearly a "precaution" the company was required to observe under § 77.1002, and the inspector testified the spoil banks were not sloped at a 60-degree angle as required by the plan, but were cut close to a 90-degree angle. The violation was S&S because a front-end loader was operating under one spoil bank as rocks and other material fell near the machine. The violation also resulted from high negligence because the company knew or should have known of the sloping requirements and the "dangerous angle of the walls was obvious."); *Cyprus Emerald Resources Corp.*, 20 FMSHRC 790 (Aug. 1998), *aff'g in part, vacating and remanding in part, and rev'g in part* 17 FMSHRC 2086 (Nov. 1995)(ALJ)(An operator committed an S&S violation of § 77.1608(b) in connection with an April 1993 refuse pile collapse, based on photographs showing tire tracks going to the edge of the area that broke away and the testimony of a truck driver.); *Hobet Mining & Construction Co.*, 7 FMSHRC 1175 (Aug. 1985)(ALJ)(Operator committed an S&S violation of § 77.1608 where inspector observed truck dumping too close to edge of embankment in presence of foreman. The hazard was reasonably likely to cause serious injury and the foreman's failure to abate hazard demonstrated serious lack of reasonable care.); *Zapata Coal Corp.*, 6 FMSHRC 2639 (Nov. 1984)(ALJ)(Dumping of coal 30 feet beyond edge of high wall is significant and substantial violation of § 77.1608(b) requirement that dumping occur at safe distance back from edge of bank which may fail to support truck weight.).

The Secretary has not provided sufficient information to determine if the six citations listed above should be modified to non-S&S violations. A significant and substantial 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).

In *U.S. Steel Mining Co., Inc.*, 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).

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.

In the Motion to Approve Settlement the Secretary does not state a factual basis for concluding that the alleged violation did not present a substantial possibility of resulting in injury within the context of continued normal mining operations. For example, in the electrical violations listed above, the Secretary does not present a factual bases to show that there was not a possibility that a miner would suffer electric shock if the condition continued as it was found. Similarly, in Citation 6672746 the Secretary did not provide a bases to understand why it is believed that someone smoking in an area where flammable or combustible materials were, does not present a possibility of a fire or explosion and of someone being injured as a result. There is no basis presented to reduce the original penalty for this citation from \$42,944 to \$362. The Secretary gives me little information to believe that an accident will not occur as alleged in Citation No. 6672786. The same is true of each violation that is proposed to be modified to non-S&S.

Citation No. 6672765 charges a violation of § 77.210(b) because a delivery driver was observed standing in the bed of a pickup truck while a miner was hoisting a 1100 pound load from the bed of the pickup. The driver had both hands on the load and no tag-line in place as the load was removed from the bed. The inspector determined that the violation was S&S and marked the gravity as "reasonably likely" to result in a "fatal" injury. The Secretary has proposed to modify the violation to "permanently disabling" with a reduction in penalty from \$3,996 to \$1,795. The reason given is that the injuries would not be fatal due to the position while the load was being moved.

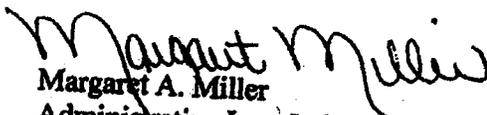
Citation No. 6672787 charges a violation of § 77.1608(e) because no berm, backstop or spotter was in place at the spoil dumpsite. The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in "fatal" injuries, and found moderate negligence. The Secretary proposes to modify the violation to "lost work day" with a reduction in penalty from \$3,405 to \$1,026 because the truck would "have gotten stuck in the soft dump site material before it could have backed off the highwall."

Citation No. 6672772 charges a violation of § 77.502 because an electrical box "[was] not being maintained in safe condition." When the electrician opened the box, water poured out, and it was seen that water and coal dust had accumulated inside the box where energized wires were spliced. The inspector determined that the violation was S&S, marked the gravity as "reasonably likely" to result in a "fatal" injury, and found moderate negligence. The Secretary proposes to modify the citation to "lost workdays" with a reduction in penalty from \$3,996 to \$1,203 because several safety features would have to fail before a miner would be fatally injured.

The above three citations are proposed to be changed by modifying the gravity from fatal to some other designation without providing a basis for doing so. The facts as set forth in the citations provide a basis for designating the injuries as fatal on their face. The Secretary has not provided sufficient information to prove otherwise.

The two citations that are proposed to be vacated are Citation No. 6672747 for a grease truck with flammable materials stored without a proper warning sign, and Citation No. 6672749 for lack of task training of the miner who was caught smoking near combustible material. The Secretary vacated these citations because "the cited condition was not found to be a violation of any applicable standard."

I have considered the representations and documentation submitted and I conclude that the proposed settlement is not appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve settlement is **DENIED**.


Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001

December 18, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2009-273-M
Petitioner	:	A. C. No. 36-09655-170239-02
	:	
v.	:	
	:	Mine: Buckhorn
LITTS & SON STONE COMPANY,	:	
Respondent	:	

ORDER GRANTING SECRETARY’S MOTION TO DISMISS COUNTERCLAIM

This case concerns a proposal for assessment of civil penalty filed pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(d), seeking a civil penalty assessment for 13 alleged violations of mandatory safety standards found in Parts 47 and 56, Title 30, Code of Federal Regulations. The Secretary filed the Petition for Assessment of Civil Penalty on February 19, 2009, and the Respondent answered and asserted a counterclaim on March 19, 2009. The Secretary has filed a motion to dismiss the Respondent’s counterclaim.

The respondent alleges that it has been the victim of a series of retaliatory and/or vindictive actions since the spring and summer of 2008 by MSHA inspectors, in violation of the First Amendment to the Constitution. Answer at 6. In the Secretary’s motion, she moves that the counterclaim be dismissed. She asserts the Commission does not have jurisdiction to decide the issue, or, if it does, that the Respondent has failed to state a cognizable cause of action. Motion at 3.

In ruling on the Secretary’s motion, it is important to first identify the relief the Respondent seeks. The Respondent argues that because employees of the agency created by the Act (MSHA) deprived the company of the full exercise of the company’s First Amendment rights, I should enjoin the agency “from taking further vindictive retaliatory actions against [the Respondent]” and direct MSHA to assign “a fair and impartial inspector . . . to [the Respondent’s] facilities.” Answer at 6-7. I cannot fulfill these requests. As counsel for the Secretary rightly points out, my jurisdiction is restricted to that which is granted by the Act. Motion at 2. Administrative agencies such as the Commission have only the jurisdiction that Congress gives. This core principle of administrative law has long been recognized as applicable to the Commission and its judges. *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (September 1988). While the Act establishes specific enforcement proceedings, contest proceedings and other forms of action over which the Commission presides, nowhere does it grant to the Commission and its judges the authority to rule on and to direct MSHA’s internal

personnel policies and practices. Because there is no way under the Act that I can grant what the Respondent asks, the counterclaim must be dismissed. *See Agronics, Inc.*, CENT 98-151-M (Order Denying Motion to Dismiss and Remand) (August 21, 1998) (Chief ALJ Merlin) (*unpublished*). This is not to say the Respondent is without a remedy.¹ It is simply to say that the remedy it seeks is not available before the Commission. Accordingly, the Secretary's Motion to Dismiss Alleged Counterclaim **IS GRANTED**, and the parties are directed to comply with the Order to Confer and Report dated November 5, 2009.



David F. Barbour
Administrative Law Judge

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¹A long line of cases recognizes a right of action in the federal courts for damages when agents of the government abridge constitutional rights. *See, e.g. Bivens v. Six Narcotic Agents*, 403 U.S. 388 (1971) (*and cases arising thereunder*).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
303-844-3577/FAX 303-844-5268

December 10, 2009

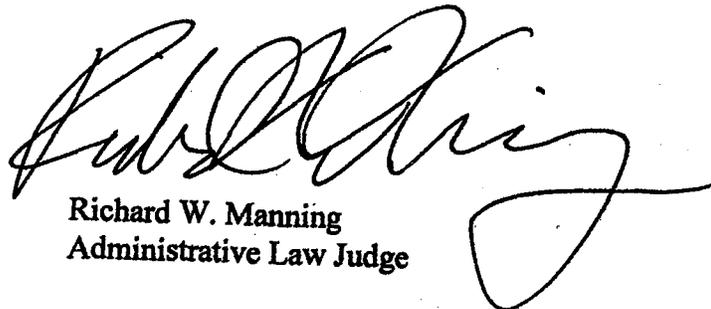
MOUNTAIN COAL COMPANY, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	
v.	:	Docket No. WEST 2007-409-R
	:	Citation No. 7291353; 3/26/2007
	:	
SECRETARY OF LABOR,	:	West Elk Mine
MINE SAFETY AND HEALTH	:	Mine Id. 05-03672
ADMINISTRATION, (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-129
Petitioner	:	A.C. No. 05-03672-128598
	:	
v.	:	
	:	West Elk Mine
MOUNTAIN COAL COMPANY, LLC,	:	
Respondent	:	

ORDER CORRECTING CLERICAL ERROR IN DECISION

On October 16, 2009, I issued a decision on the merits in these cases. (31 FMSHRC 1220). In the decision, I held that the Secretary established a violation of section 75.1725(a), as alleged in Citation No. 7291353, but I determined that the Secretary did not establish that the violation was of a significant and substantial nature ("S&S").

The Secretary has filed a motion to correct a clerical error in the decision. She moves that the decision be amended to reflect the fact that, at the start of the hearing, she agreed to amend the citation to delete the S&S determination. (Tr. 7). She asks that my discussion of the S&S issue on page 19 of the decision be modified to reflect her concession that the citation was not S&S. (31 FMSHRC 1238). In response to the motion, Mountain Coal stated that it did not object to the motion but asked that the amended decision include my discussion of the gravity criterion and some of the S&S discussion. The Secretary does not object to this request.

For good cause shown, the motion is **GRANTED**, in accordance with the authority vested to me under 29 C.F.R. §2700.69(c). Page 19 of my October 16, 2009, decision (31 FMSHRC 1238) is **STRICKEN** from the decision and is replaced by the modified page attached to this order. In all other respects, the decision in these cases remains unchanged.



Richard W. Manning
Administrative Law Judge

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RWM

MOUNTAIN COAL COMPANY, WEST 2007-409-R & WEST 2008-129
This page replaces page 19 of the decision issued by Judge Manning on October 16, 2009
31 FMSHRC 1220, 1238

hose replacement policies to make sure that the policies are sound and are understood by its maintenance personnel. It also may want to consider reducing its policies to writing.

2. Significant and Substantial; Gravity; Negligence.

At the start of the hearing, the Secretary agreed to modify the citation by deleting the inspector's S&S determination. (Tr. 7). I find that this modification is reasonable. The hoses were in the back walkway, which is behind the leg cylinders. Miners do not work in that area. The back walkway is a confined area where it is difficult to move around.⁵ The most common reason for anyone to be in the back walkway is to conduct a permissibility inspection, when the supply hoses are not pressurized, or to replace a hose. As stated above, miners are generally not near the supply hoses when they are pressurized as the shields are moved. Angel testified that a miner would have to be within inches of a hose in order to sustain an injury from the resulting spray. The return hydraulic hoses, which are always pressurized during production, operate at 100 to 200 psi. The return hoses were rated at 5,800 psi and they have four layers of wire braiding. In addition, the miners working along the long wall typically wear protective clothing, as described above. This clothing would protect them from injury. I credit the testimony of Kunde on this issue.

I find that the gravity was low because, if a hose were to leak hydraulic fluid, it is unlikely that anyone would be seriously injured as a result. An injury from a fluid injection or from a whipping hose was unlikely. The most likely injury would be from a slip and fall on a deck plate that was covered with spilled hydraulic fluid.

I also find that Mountain Coal's negligence was low. I credit the company's evidence that it has been using the same criteria for determining when a hydraulic hose should be replaced.

⁵ In a previous decision, I determined that "[e]ven a small individual would have difficulty walking along the 'back walkway' [in a longwall section at the West Elk Mine]." *Mountain Coal Co.*, 26 FMSHRC 853, 855 (Nov. 2004). That finding is equally applicable here.



Federal Mine Safety & Health Review Commission

Calendar Year 2009 Index

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