

NOVEMBER 1998

COMMISSION DECISIONS

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NOVEMBER 1998

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

Secretary of Labor, MSHA v. Dynatec Mining Corporation, Docket No. WEST 94-645-M.
(Judge Manning, September 24, 1998)

Pamela Bridge Pero v. Cyprus Plateau Mining Corporation, Docket No. WEST 97-154-D.
(Judge Cetti, September 30, 1998)

Secretary of Labor, MSHA v. Black Diamond Construction, Inc., Docket No. EAJ 98-1.
(Judge Barbour, October 9, 1998)

Gilbert Ankrom v. Wolcottville Sand and Gravel, Docket No. LAKE 98-126-D.
(Judge Weisberger, October 14, 1998)

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

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 16, 1998

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

v.

BRENT ROBERTS,	:	Docket Nos. KENT 91-896-R
PAUL COTTON,	:	KENT 91-897-R
STEVE LITTLE,	:	KENT 91-898-R
BENNY JOHNSON,	:	KENT 91-934-R - 91-955-R
SYDNEY POE,	:	KENT 91-992-R
ROBERT BENNET,	:	LAKE 91-478-R
JAMES JACK,	:	LAKE 91-503-R - 91-529-R
JOHN S. BIBY,	:	LAKE 91-530-R - 91-605-R
LARRY FLYNN,	:	SE 91-538-R
KIMMIE NOAH,	:	SE 91-544-R - 91-655-R
SHARELL CLARK,	:	WEVA 91-1331-R
JAMES F. MATICS,	:	WEVA 91-1332-R
ROBERT E. PERSINGER,	:	WEVA 91-1333-R
EVERETTE E. BALLARD,	:	WEVA 91-1385-R
DANIEL SERGE,	:	WEVA 91-1386-R
	:	WEVA 91-1494-R - 91-1509-R
SANDRA EASTHAM,	:	WEVA 91-1414-R - 91-1435-R
KEVIN TUSTIN,	:	WEVA 91-1436-R - 91-1493-R
STEVEN PERKINS,	:	WEVA 91-1510-R - 91-1524-R
JIMMY HAYWORTH,	:	WEVA 91-1525-R
DONALD CASE, and	:	WEVA 91-1614-R
REGGIE PHILYAW	:	WEVA 91-1926-R

BEFORE: Riley, Verheggen, and Beatty, Commissioners¹

ORDER

¹ Chairman Jordan has recused herself in this matter and took no part in the consideration of this order. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

BY THE COMMISSION:

In these contest proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”), the Secretary of Labor has filed with the Commission a motion to consolidate and dismiss her appeals. The petitioners have not filed an opposition to the motion. For the reasons that follow, we grant the motion, vacate the directions for review, and dismiss these proceedings.

I.

Factual and Procedural Background

On April 18, 1991, the Secretary, through the Department of Labor’s Mine Safety and Health Administration (“MSHA”), proposed to revoke certifications that had been conferred, pursuant to 30 C.F.R. Parts 70, 71, and 90, upon certain persons to collect respirable dust samples and to maintain and calibrate respirable dust sampling devices.² The proposed revocations arose from citations that were issued, pursuant to 30 U.S.C. § 814(a), to various mine operators on April 4, 1991, alleging that the weight of respirable dust cassettes submitted to fulfill sampling requirements had been intentionally altered by removing dust from the cassette filters. On May 15, 1991, notices of contest were filed with the Commission, resulting in these contest proceedings.

On May 24, 1991, the Secretary filed a motion to dismiss these proceedings, asserting that the Commission lacked jurisdiction to review the matter. On September 4, 1991, following argument on the motion, Chief Administrative Law Judge Paul Merlin issued a decision dismissing the case of *Brent Roberts* on the ground that the Commission lacked jurisdiction to review the matter. 13 FMSHRC 1377 (Sept. 1991) (ALJ). He concluded that, under the Mine Act and its legislative history, the Commission is not empowered to legislate a system of administrative review for cases involving decertification of persons who are not mine operators, miners, or representatives of miners. *Id.* at 1383. The judge subsequently issued separate decisions dismissing each of the remaining cases based on his *Roberts* decision, which he found dispositive of the matter. *See id.* at 1385-1416 (decisions dismissing remaining cases).

² The Mine Act requires that mine operators maintain an average concentration of respirable dust in the mines below prescribed limits. 30 U.S.C. § 842(b); 30 C.F.R. §§ 70.100, 71.100, 90.100. Operators must take accurate dust samples and submit them to the Secretary for analysis. 30 U.S.C. § 842(a); 30 C.F.R. §§ 70.201-70.210, 71.201-71.210, 90.201-90.210. Respirable dust sampling can only be done by a person who has been certified by the Secretary to take dust samples. 30 C.F.R. §§ 70.2(c), 70.202-70.203, 71.2(c), 71.202-71.203, 90.2, 90.202-90.203.

On October 3, 1991, counsel in the *Roberts* case filed with the Commission a petition for discretionary review. Subsequently, in all except one of the remaining cases, counsel filed petitions for discretionary review that adopted and incorporated by reference the *Roberts* petition.³ On October 15, 1991, the Commission directed the proceedings for review. Shortly thereafter, the petitioners filed motions requesting that further proceedings be stayed until resolution of the proceedings against mine operators alleging alteration of respirable dust samples in *In re: Contests of Respirable Dust Sample Alteration Citations*, Master Docket No. 91-1 (“*Dust Cases*”), then pending before Administrative Law Judge James A. Broderick. On November 7, 1991, the Commission stayed the proceedings. On April 20, 1994, Judge Broderick issued a final decision dismissing the *Dust Cases* on the ground that the Secretary had failed to prove that the weight of respirable dust cassettes had been intentionally altered. 16 FMSHRC 857 (Apr. 1994) (ALJ). Subsequently, the Secretary filed a petition for discretionary review of the judge’s decision, which was granted by the Commission. On November 29, 1995, the Commission affirmed the judge’s *Dust Cases* decision. 17 FMSHRC 1819 (Nov. 1995). The Secretary subsequently appealed to the United States Court of Appeals for the District of Columbia Circuit. On August 21, 1998, that court issued its decision in the *Dust Cases*, affirming the Commission. *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

II.

Disposition

The Secretary represents that, on September 10, 1998, “MSHA mailed a notice to all persons previously notified of the proposed revocation of certifications that the agency was withdrawing the proposed revocations.” Mot. at 5. She requests that, because the proceedings all involve similar issues, the Commission consolidate the proceedings. *Id.* at 5-6. In addition, she requests that, because MSHA has withdrawn its proposed revocations, the Commission dismiss the proceedings on the ground that they are moot. *Id.* at 6-7. The petitioners do not oppose the motion.

We hereby lift the stay in these proceedings. We agree with the Secretary that these proceedings may be properly consolidated under Commission Procedural Rule 12, 29 C.F.R. § 2700.12,⁴ and accordingly order consolidation. We further agree with the Secretary that these

³ The Commission’s Docket Office has no record of receiving a petition for discretionary review in the case of *Patrick Henry Fluty*, 13 FMSHRC 1401 (Sept. 1991) (ALJ) (Docket Nos. WEVA 91-1193-R through WEVA 91-1218-R).

⁴ Rule 12 provides:

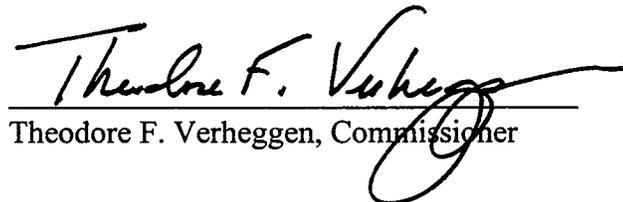
The Commission and its Judges may at any time, upon their

proceedings no longer present a justiciable controversy. A case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Here, the Secretary represents that MSHA has withdrawn its proposed revocations, which was the underlying controversy in these proceedings. Therefore, we find that there is no longer a live controversy between the Secretary and the petitioners as to the actions out of which the petitions for discretionary review arose. Thus, we conclude that these proceedings are moot and that dismissal is appropriate. *See Mid-Continent Resources, Inc.*, 12 FMSHRC 949, 955-56 (May 1990) (affirming judge's dismissal of case when Secretary had vacated underlying citation and withdrawal order making case moot).

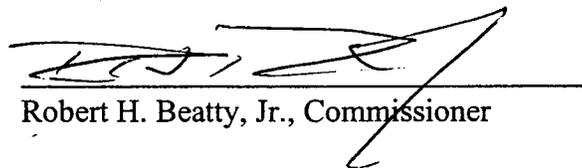
Upon consideration of the motion, we grant it. Accordingly, the Commission's directions for review in these matters are vacated and these proceedings are dismissed.



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

own motion or a party's motion, order the consolidation of proceedings that involve similar issues.

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dismissal of an S&S allegation. *Id.* at 425. The Commission sua sponte directed for review the judge's holding that he need not reach the unwarrantable failure issue. In addition, the Commission granted the petition for discretionary review filed by the Secretary of Labor, challenging the judge's determination that the violation was not S&S. For the reasons that follow, we reverse the judge's S&S determination, and remand for consideration of whether the violation was caused by Bellefonte's unwarrantable failure.

I.

Factual and Procedural Background

Bellefonte operates the Gentzel Quarry, a Valentine limestone quarry in Pleasant Gap, Pennsylvania. Beginning in approximately 1982, a spoil pile comprised of overburden was created in the northwest portion of the quarry.³ *Id.* at 416. The overburden was dumped on the top of the surface area of the pile by trucks that traveled haul roads, which were constructed over and about the spoil pile. *Id.* at 417. Overburden was last added to the pile in approximately 1991 or 1992. *Id.*

Beginning on November 9, 1994, the northwest cut area was stripped of its overburden in preparation for mining. *Id.* On February 2, 1995, miners began to extract Valentine limestone from the northwest cut area. *Id.* The right and left banks of the spoil pile were adjacent to the floor of the working area, and material was removed from the center of the pile. Tr. 169, 194-95; Gov't Ex. 6 (videotape). In order to remove the limestone, a loader traveled into the cut area, which measured approximately 30 to 40 feet across, gathered a bucket of material, backed up to haul trucks parked along the haul road, or near the right bank of the spoil pile, and loaded the trucks. 19 FMSHRC at 418; Tr. 164, 182, 194-96, 225-26.

On March 17, 1995, Edward Skvarch, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the mine in response to an anonymous telephone call made to his supervisor. 19 FMSHRC at 417; Tr. 32-33. The inspector observed two areas in the spoil pile that he believed presented hazardous ground conditions. Gov't Ex. 1.

The first area involved the right bank of the spoil pile. 19 FMSHRC at 417. Inspector Skvarch estimated that the right bank was 70 feet high, and that its slope was steeper than the angle of repose.⁴ *Id.*; Tr. 41-42, 47. He also observed that there were rocks near the top and at the face of the pile; there was no bench in the area to catch falling material; and the working area

³ The overburden was black stone that had originally laid on top of the limestone. Tr. 197, 225.

⁴ The angle of repose is the angle at which material will stand under its own weight without any outside influences. Tr. 259-60.

below the spoil pile was narrow. Tr. 41. The inspector did not measure the bank because he did not have any measuring instruments, and because he believed that it would be too dangerous to climb the slope. Tr. 42.

The second area involved a slope located near a turn on a haul road leading to the northwest cut. 19 FMSHRC at 417. Inspector Skvarch estimated that the haul road slope was at least 50 feet high, and that the angle of the slope was greater than the angle of repose. *Id.* at 417-18; Tr. 46. He also observed that the toe of the haul road slope was steeper than the remainder of the slope. 19 FMSHRC at 418. Inspector Skvarch made no measurements of conditions on the haul road slope. Tr. 47-48.

Based upon his observations, Inspector Skvarch determined that hazardous ground conditions existed in the two areas and issued a citation, pursuant to section 104(d)(1) of the Act, alleging an S&S violation of section 56.3200 that had been caused by Bellefonte's unwarrantable failure. Gov't Ex. 1. The inspector stated that he believed that the violation was S&S because bank height and slope steepness affected slope stability and made it reasonably likely that rocks would roll down the two banks or that a landslide would occur. *Id.*; Tr. 62. The inspector also based his S&S charge on statements made to him by an equipment operator that rocks, some the size of basketballs, had rolled off of the right bank and had to be removed from the floor of the pit before work could be resumed. Tr. 62-63, 90. He noted that a "sizable" rock could crash through the window of equipment and strike the operator, or fall into the haul road and cause a vehicular accident. Tr. 63-64. Inspector Skvarch stated that, because of the close proximity of operation to both cited areas, a slide could result in a fatality. Tr. 64.

The citation was abated when the cited areas were barricaded. Gov't Ex. 1. Bellefonte abandoned the northwest cut area permanently because there was only enough limestone remaining in the area to be extracted over one shift. 19 FMSHRC at 417; Tr. 52-53, 466-67. Bellefonte challenged the citation and the matter proceeded to hearing before Judge Weisberger.

The judge concluded that Bellefonte violated section 56.3200, but he vacated the special findings of S&S and unwarrantable failure. 19 FMSHRC at 420-27. As to the violation, the judge concluded that rocks fell off the cited areas at points in time "not significantly remote" from the date the citation was issued, and that miners working in the adjacent confined work area and haul road were exposed "in some degree" to the hazard of being hit by falling material.⁵ *Id.* at 422. Because miners were allowed to work and travel in the area, and the spoil pile was not supported or taken down to prevent rocks from falling, the judge determined that the Secretary had established a violation of section 56.3200. *Id.* The judge concluded that the violation was not S&S. *Id.* at 425. He reasoned that the likelihood of injury from subsequent rock falls had

⁵ The judge concluded, however, that the pile itself did not create a hazardous ground condition through the possible occurrence of a landslide. 19 FMSHRC at 422 n.1. The Secretary did not challenge this finding on review.

not been established because the record did not set forth with particularity evidence of loose rocks in the cited areas and because there was only one shift worth of limestone remaining to be mined in the area. *Id.* at 424-25. The judge did not reach the question of whether the violation had been caused by unwarrantable failure, based on his determination that, “in the absence of a finding that the violation was [S&S], the inclusion of a finding of unwarrantable failure in a citation is not proper.” *Id.* at 425. In his consideration of a civil penalty, however, he concluded that the violation involved a high level of gravity and more than ordinary negligence. *Id.* at 426. Accordingly, the judge amended the citation to a section 104(a) citation, and assessed the civil penalty of \$2,500 proposed by the Secretary. *Id.* at 426-27.

II.

Disposition

The Secretary argues that the judge erred in concluding that Bellefonte’s violation of section 56.3200 was not S&S. S. Br. at 5-14. She asserts that the judge failed to adequately consider evidence in the record regarding the frequency of rock falls in the right bank area and the haul road. *Id.* at 6-11. In addition, the Secretary contends that the judge erred in placing dispositive weight on evidence that the next shift in the cited area would have been the last. *Id.* at 10 n.3. She explains that such evidence did not mitigate the hazard in view of testimony that rocks fell off the pile on a regular basis. *Id.* Accordingly, the Secretary requests that the Commission reverse the judge’s S&S determination, and remand for consideration of whether the violation was caused by unwarrantable failure. *Id.* at 14.

Bellefonte responds that the judge correctly concluded that the violation was not S&S because there was “no evidence to support a conclusion that it was reasonably likely that an injury-producing rock fall would have occurred in the final mining shift in the northwest cut area.” B. Br. at 21. It maintains that the judge gave proper weight to evidence of falling rocks and of the amount of limestone remaining in the area, and that there was no evidence that the rocks in the cited areas were loose. *Id.* at 9-17. Accordingly, it requests that the judge’s decision be affirmed. *Id.* at 21.

The Commission has recognized that a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation;

(3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

At issue here is whether the judge erred in concluding that the third *Mathies* factor had not been satisfied. Central to this question are his findings that the “likelihood of further rock falls” had not been established because of the lack of evidence regarding the numbers or extent of loose rocks and since Bellefonte employees would have traveled or worked in the cited areas for only one more shift. 19 FMSHRC at 425. We agree with the Secretary that the judge erred.⁶

First, the judge incorrectly concluded that the likelihood of injury was “mitigated to a great degree” by evidence that mining would continue in the northwest cut for only one more shift. *Id.* During that last shift, limestone would have been extracted under the same conditions that gave rise to the citation, and miners would have been exposed to the same degree of hazard as miners working in the shifts preceding issuance of the citation. Compare *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2012-13 (Dec. 1987) (affirming determination that roof control violation was not S&S where mining had completely discontinued in an area and danger signs had been posted to prevent entry into area) with *Halfway, Inc.*, 8 FMSHRC 8, 12-13 (Jan. 1986) (concluding that roof control violation was S&S because, although mining had discontinued in the cited area, the area remained accessible and travelways to the cited area would be used by miners). Accordingly, contrary to the judge’s finding, the S&S allegation was not ameliorated by short term exposure of the miners to the cited hazard.

In addition, the judge erred by confining his consideration to the “likelihood of further rock falls” during continued normal mining operations. 19 FMSHRC at 425 (emphasis added). The third *Mathies* element requires the Secretary to establish a reasonable likelihood that the

⁶ Commissioner Marks agrees that this violation is S&S. However, for the reasons set forth in his concurring opinions in *United States Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (Feb. 1997), he continues to urge that the ambiguous language of the Commission’s *Mathies* test, 6 FMSHRC at 3-4, be replaced with a clear test that is consistent with Congressional intent. On February 5, 1998, MSHA issued a lengthy Interpretive Bulletin, setting forth a new agency interpretation of S&S and announcing that MSHA would challenge the Commission’s narrow interpretation of S&S. 63 Fed. Reg. 6012 (1998). However, on April 23, 1998, MSHA suspended that Interpretive Bulletin with little explanation. *Id.* at 20,217. Commissioner Marks is curious as to MSHA’s change in position on the S&S question and requests, as he has done on numerous occasions, that the Secretary promptly advise him on this important issue.

hazard contributed to will result in an event in which there is an injury. *See U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The “operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued.” *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

The judge failed to consider whether there was a reasonable likelihood of injury during the “operative time frame . . . [of when the] violative condition existed prior to the citation.” *Id.* Having credited evidence that rocks fell from the cited areas prior to the issuance of the citation (19 FMSHRC at 418, 421-22), the judge was required to consider whether there was a reasonable likelihood that injury would have resulted from those rock falls. The judge failed to make his S&S determination based on the ground conditions that he had considered in finding a violation. For his S&S determination, the judge, in effect, required the Secretary to prove the probable occurrence of new hazardous ground conditions during the last mining shift. The judge should not have confined himself to a prospective analysis, asking only whether an injury-producing event was reasonably likely to occur during continued operations where, as here, the event creating the potential for injury had occurred prior to issuance of the citation.⁷ *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1033 (June 1997); *Walker Stone Co.*, 19 FMSHRC 48, 53 (Jan. 1997) (affirming S&S findings without prospective consideration of continued normal mining conditions where injury-producing event had occurred prior to issuance of citations).

In viewing the record and the credibility determinations made by the judge in finding a violation, we conclude that substantial evidence does not support the judge’s conclusion that Bellefonte’s violation was not S&S.⁸ Neither party has challenged the judge’s finding that rocks and other materials had fallen from the cited areas “at points in time not significantly remote from the cited date.”⁹ 19 FMSHRC at 418; *see id.* 421, 422. Testimony of witnesses credited by

⁷ That the rock falls that occurred prior to issuance of the citation did not actually result in injury is not dispositive of the S&S determination. *See Buffalo Crushed Stone*, 19 FMSHRC at 238 (“[T]he fact that no injuries had been reported as a result of the condition of the walkway is not determinative of a conclusion that the third *Mathies* element has not been established.”).

⁸ 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)).

⁹ Bellefonte does not challenge the judge’s finding that rocks fell from the cited areas prior to March 17, 1995. B. Br. at 12 n.2. Rather, it argues that there is no evidence that an

the judge (*id.* at 420-21) revealed that rocks falling from the right bank ranged in size up to two feet in diameter, and that, depending upon how fast they came down, rocks sometimes rolled all of the way across the working area. Tr. 203-04, 230-31. In addition, it is undisputed that the areas were not benched to catch falling material, that the working area below was confined, and that the loader operated at times approximately ten feet away from the spoil pile. 19 FMSHRC at 421; Tr. 41, 63, 164, 166, 227-29. The judge also credited evidence that miners in the working area were exposed to the falling material, discrediting testimony by Bellefonte's expert witness, Lawrence Beck, that a rock falling off the pile would not be high enough to hit an equipment operator in the area. 19 FMSHRC at 421-22. Bellefonte has offered no compelling reason to overturn that credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Accordingly, we reverse the judge's determination that the violation was not S&S and remand for the judge to consider whether the violation was caused by Bellefonte's unwarrantable failure. Consequently, the question of whether the unwarrantable failure allegation survived dismissal of the S&S allegation is moot, and we do not reach it.¹⁰

injury producing rock fall would have occurred during the final mining shift. *Id.* at 12-17, 21. Because we consider only those rock falls that occurred prior to March 17, we need not address Bellefonte's argument.

¹⁰ In Commissioner Marks' opinion, the unwarrantable failure finding survived the modification of the section 104(d)(1) citation to a section 104(a) citation, and consideration of the special finding by the judge would have been appropriate.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that Bellefonte's violation of section 56.3200 was not S&S. We remand to the judge for his consideration of whether the violation had been caused by Bellefonte's unwarrantable failure to comply with the standard, and for the reassessment of the civil penalty, if appropriate.



Mary Lu Jordan, Chairman



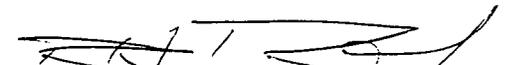
Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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November 30, 1998

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

v.

ROGER RICHARDSON

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Docket No. KENT 98-308
A.C. No. 15-07475-03560A

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, 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. (1994) ("Mine Act"). On September 16, 1998, the Commission received from Roger Richardson ("Richardson") a Request for Hearing on a proposed penalty assessment that allegedly had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Richardson.

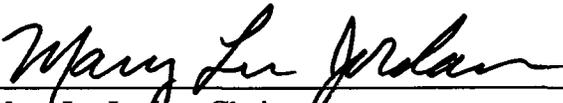
Section 105(a) of the Mine Act, and the Commission's procedural rules implementing that section, provide that a person against whom a penalty is proposed to be assessed shall inform the Secretary that he intends to contest the proposed penalty assessment "30 days from the receipt of the notification issued by the Secretary." 30 U.S.C. § 815(a); 29 C.F.R. § 2700.26. If the operator or person fails to so notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.27.

In his request, Richardson submits that he first received notice of the proposed assessment on approximately August 3, 1998, when he received documents from the Department of Labor's Mine Safety and Health Administration ("MSHA") in response to a Freedom of Information Act request that he had made to MSHA through counsel. Mot. at 1-2. He asserts that he requested a hearing on August 11. *Id.* at 2. Richardson states that on approximately September 5, his counsel received a letter from MSHA denying the hearing request as untimely.

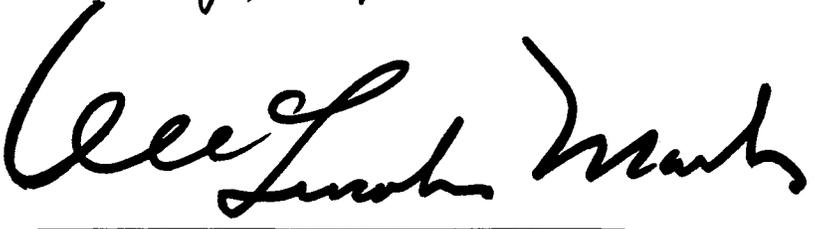
Id.; Ex. D. Richardson states that upon review of the September 5 letter, it appeared that the proposed assessment had been sent to an address where he no longer resided, had been signed for by his former wife, and that she had not forwarded the assessment to his new address. Mot. at 2. Richardson claims that, since he contested the proposed penalty within 30 days after receiving notice, he acted within the time limit imposed by the Mine Act. *Id.* He also requests that any final order be set aside and that he be granted a hearing. *Id.* at 2-3.

Here, the proposed penalty assessment was mailed to an address where Richardson no longer resided. Richardson was not required to notify MSHA of his change of address under 30 C.F.R. § 41.12. Richardson received a copy of the proposed penalty assessment on August 3, 1998, through a FOIA request that he initiated through counsel. Under these circumstances, we conclude that Richardson did not “receive” the penalty assessment within the meaning of section 105(a) of the Mine Act and the Commission’s Procedural Rules until August 3. Because Richardson contested the proposed penalty assessment on August 11, well within the 30-day time period, we conclude that Richardson timely notified the Secretary that he contests the proposed penalty.

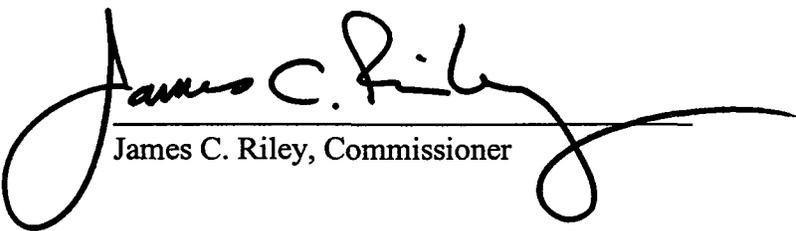
Accordingly, the proposed penalty assessment is not a final order of the Commission. We remand this matter for assignment to a judge. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



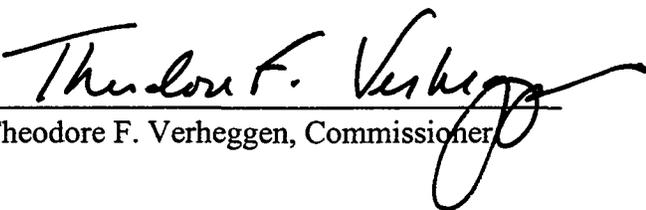
Mary Lu Jordan, Chairman



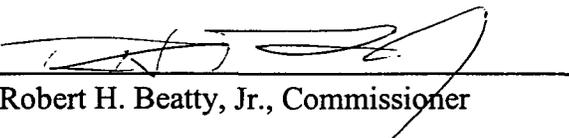
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James C. Riley, Commissioner



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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NOV 18 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-235
Petitioner	:	A. C. No. 42-01280-03644
v.	:	
	:	Docket No. WEST 96-338
WHITE OAK MINING	:	A. C. No. 42-01280-03654
AND CONSTRUCTION CO., INC.,	:	
Respondent	:	White Oak #2 Mine

DECISION ON REMAND

Before: Judge Hodgdon

This case is before me on remand from the Commission. *White Oak Mining & Construction Co., Inc.*, Docket Nos. WEST 96-235 and WEST 96-338 (October 30, 1998).¹ The Commission vacated the determination that White Oak did not violate section 48.7(a), 30 C.F.R. § 48.7(a), in task training Keith Smith as a continuous miner operator and remanded the case for further analysis of whether the training given Smith constituted “the type of training that a reasonably prudent person would have provided in order to meet the protection intended by the standard's requirements.”² *Id.* at 6. For the reasons set forth below, I find that it did.

On March 24, 1995, Blue Samples, a 20-year old, inexperienced miner, who had worked only 15 shifts at the mine, was hit and killed by the tail boom of a continuous-mining machine being operated by Smith. At the time, Samples was working as Smith's miner helper. As the result of an investigation into the accident, the Mine Safety and Health Administration (MSHA) concluded that neither Samples nor Smith had been properly task trained. The original decision found that Samples had not been adequately trained, but that Smith had. *White Oak Mining & Construction Co., Inc.*, 19 FMSHRC 1414 (August 1997).

¹ Forthcoming as *White Oak Mining & Construction Co., Inc.*, 20 FMSHRC 1130 (October 1998).

² Section 48.7 requires that miners assigned to new work tasks as mobile equipment operators shall not perform those tasks until they have been trained in the health and safety aspects and safe operating procedures for the equipment, have had supervised practice during non-production or supervised operation during production and have demonstrated safe operating procedures for the equipment to the operator or the operator's agent.

Order No. 3415831 alleges that Keith Smith was not “adequately” task trained as a continuous miner operator because his training did not include the information that “[r]emote control operations of continuous miners create special safety considerations with respect to tramming the machine” as set out in *Joy Service Bulletin No. FG-176* (9/24/91). Other than tramming the continuous miner, the order makes no mention of what health and safety information should have been included in the training, but was not. Furthermore, in her post hearing brief, the Secretary did not state what health and safety information was required by section 48.7(a), but seemed to rely entirely on the fact that the training only took 15-30 minutes and that it did not involve use of the *Joy Service Bulletin*, as evidence of the violation.

There is no Commission precedent concerning what health and safety information and supervised practice or supervised operation during production are required by section 48.7(a). The only evidence offered by the Secretary on such requirements was the testimony of Donald E. Gibson, Electrical, Educational and Training Supervisor for MSHA District 9. To the extent his testimony was germane, it was, for the most part, generic and not tailored to specific facts of this case. For instance, when asked what health and safety aspects should be included in the task training of an experienced miner who had not operated a continuous miner in the previous 12 months, he replied:

Health first. Health would be -- and in conjunction with health we're going to take into consideration the ventilation plan because those run hand in hand and in our office when we evaluate the ventilation plan for any coal mine, we do that hand in hand. We look at the spray configuration on the machine, we look at if it's a scrubber, we look at if it's a spray fan system, we look at the water pressure, we look at the amount of water in gallons per minute, we look at the flow rate, again, as gallons per minute, orientation of the sprays when cutting left side, right side. All that is for the prevention of pneumoconiosis and also silicosis, so those are health aspects.

Another aspect of the health issue would be possibly hearing protection, the operator is required to do noise survey, so is there something causing abnormal or more than what is required noise levels to be addressed in a hearing conservation plan?

(Tr. 384-85.) As can be seen, no indication is given of what training concerning the ventilation plan was required in this case, nor are the deficiencies of the training given Smith pointed out.

In fact, little training was provided in this area because Smith had worked with Shane Hansen, the person training him, for three months as a miner helper and Hansen was aware that Smith was already familiar with the ventilation plan, and the roof control plan as well. Section 48.7(a) provides that task training is not required for “miners who have performed the new work

tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment.” Consequently, I find that Smith’s training met the requirements of the section 48.7(a) in these two health and safety areas.

Gibson stated that Smith should have been trained in safe operating procedures for the continuous miner. Once again he did not relate what specifically should have been covered, or how Smith’s training may have been deficient. However, based on the evidence, I find that Smith was task trained in operation of the remote control, tramming the miner and the extent to which the miner could swing, how to split the miner’s tracks when turning, how to turn in crosscuts, safe positions for miner’s helpers to stand and the avoidance of pinch points at the head and at the boom, specific methods of maneuvering the machine to cut coal, cutting coal downhill, the cutting cycle, cleaning the scrubber, handling the cable, examining the cable for damage, activation of the fire suppression system, scaling the roof and ribs, how to take gas checks every 20 minutes, examination of the continuous miner, including the lights, bits, sprays, scrubber, cable and fire hose and examination of the working area, including ventilation, before commencing work. Accordingly, I conclude that Smith was adequately task trained in the safety aspects of operating the continuous miner.

With regard to supervised practice or operation, Hansen testified as follows:

Q. During this time you were task training Mr. Smith did you ever supervise him while he practiced operating the equipment?

A. Yeah.

Q. And was that during production or non-production?

A. Well, he just took just a few minutes to play with the controls and get used to everything and then we trammed it into the face and that was probably in production.

Q. Okay. And then he started cutting coal?

A. Yeah. And then I was probably there with him most of the day.

(Tr. 510-11.) The Secretary did not present any evidence to rebut this testimony. Therefore, I find that Smith’s training did include supervised operation during production.

I conclude that the task training provided to Smith amounted to the type of training that a reasonably prudent person would have provided in order to meet the protection intended by the requirements of section 48.7(a). At the time that Smith was trained on the continuous miner he had almost 20 years mining experience. He had previously operated the miner when employed at this same mine by Valley Camp some 15 months prior to his training. Furthermore, he had

served as a miner helper to Hansen on the same miner he was trained on for 3 months since coming to work for White Oak. As even Gibson admitted, “[h]ad he been properly trained as the miner helper . . . the only difference [between miner helper training and miner operator training] is it may be the operation of the machine because maybe they didn’t train the helper to operate the machine.” (Tr. 394.) Needless to say, there is no evidence that Smith was not properly trained as a miner helper.

The Secretary, relying mainly on the length of the training and the fact that the *Joy Service Bulletin* was not used in the training, has failed to show that the training was not adequate. While it is true that the service bulletin was not used in the training, it appears that the materials in the bulletin with respect to tramming the miner and avoiding pinch points were covered. Everything in White Oaks training plan, which had been approved by MSHA, was covered in the training given to Smith, except changing bits and servicing the continuous miner. These two items are also included in miner helper training, which Smith had already received.

The Secretary did not present any evidence concerning how the requirements of section 48.7(a) should have been met in this instance, nor did she demonstrate what was missing from Smith’s training that was required by the regulation. In fact, it is apparent that no one from MSHA even bothered to interview Shane Hansen, Smith’s trainer, concerning what the training included. Accordingly, I conclude that White Oak did not violate section 47.8(a) when it task trained Keith Smith as a miner operator.

ORDER

In view of the above, Order No. 3415831 is **VACATED**.


T. Todd Hodgdon
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

NOV 9 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-145
Petitioner	:	A. C. No. 01-00851-04031 A
v.	:	
	:	Oak Grove Mine
WAYNE JONES, Employed by	:	
UNITED STATES MINING COMPANY	:	
LLC,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-146
Petitioner	:	A. C. No. 01-00851-04032 A
v.	:	
	:	Oak Grove Mine
MIKE SUMPTER, Employed by	:	
UNITED STATES MINING COMPANY	:	
LLC,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-147
Petitioner	:	A. C. No. 01-00851-04033 A
v.	:	
	:	Oak Grove Mine
DANNY JOE COOK, Employed by	:	
UNITED STATES MINING COMPANY	:	
LLC,	:	
Respondent	:	
	:	

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-148
Petitioner	:	A. C. No. 01-00851-04034 A
v.	:	
	:	Oak Grove Mine
ROBERT CUNNINGHAM, Employed by	:	
UNITED STATES MINING COMPANY	:	
LLC,	:	
Respondent	:	

**ORDER DENYING RESPONDENT'S
MOTION TO DISMISS**

These cases are before me base upon Petitions for Assessment of Civil Penalty filed pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1997 (the Act), 30 U.S.C. § 820(C). On October 7, 1998, Respondents filed a Motion to Dismiss the Secretary's Petitions asserting that the Secretary did not notify Respondents within a reasonable time that it intended to assess civil penalties against them; that it did not investigate and file the instant Petitions in a timely manner; and that it did not issue citations with reasonable promptness. On October 29, 1998, the Secretary filed its opposition to Respondents' motion.

Sequence of Events

The following is the sequence of events in these cases as set forth in Respondents' motion, and not challenged in the Secretary's opposition:

1. On August 16, 1996, MSHA inspector O. L. Jones issued a Section 104(d) Order, No. 4478893, to U.S. Steel Mining Company ("USM") alleging a violation of 30 C.F.R. § 75.204(f)(4). USM did not contest the Order and paid the penalty it was assessed.

2. On August 17, 1996, MSHA inspector O. L. Jones issued a Section 104(d)(1) Order, No. 4478891, to USM alleging a violation of 30 C.F.R. § 75.202(b). USM did not contest the Order and paid the penalty it was assessed.

3. These orders arose out of an investigation of a fatal accident at an overcast construction site in the Main North Area of USM's Oak Grove Mine on August 16, 1996. The conditions alleged in the two orders did not cause or contribute to the accident according to the report MSHA prepared concerning the accident.

4. Mr. Cunningham was the Area Manager in the Main North Section in August 1996.
5. Mr. Sumpter was the general mine foreman at the Oak Grove Mine.
6. Mr. Jones was a section foreman at the Oak Grove Mine but was not present at the mine on August 16, 1996.
7. Mr. Cook was a construction foreman at the Oak Grove Mine.
8. On August 30, 1996, a determination was made by the MSHA District Manager with responsibility over the Oak Grove Mine, that a special investigation should be performed to determine if individual liability under Section 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 820(c), should be imposed.
9. Despite MSHA's determination on August 30, 1996 that special investigation should be initiated, the case was not assigned to a special investigator until February 21, 1997. Special Investigator Mike Belcher conducted the investigation in conjunction with Mr. Deason, at that time a special investigator-in-training.
10. Mr. Belcher and Mr. Deason did not work on the case full time after it was assigned to them but did interview six witnesses before March 18, 1997. At that point, Mr. Belcher ceased to be part of the investigation but Mr. Deason and another MSHA special investigator, conducted another witness interview on March 20, 1997. This was the last interview conducted in the special investigation before Mr. Deason submitted his report over six months later.
11. In late March into early May, 1997, Mr. Deason sought to arrange interviews of management personnel. He was unable to do so but if he had done so, he would have had to obtain a special investigator to actually conduct the interview.
12. On or about May 14, 1997, MSHA District Manager, Michael J. Lawless, notified Ron Osborne, General Manager of the Oak Grove Mine, that Mr. Deason was seeking to interview him and others in the special investigation and that if such an interview was not conducted by May 20, 1997, the special investigator's report would be forwarded to MSHA's headquarters for processing.
13. According to MSHA's Program Policy Manual, investigative reports are to be submitted to MSHA's Headquarters Technical Compliance and Investigation Division ("TCID") within 240 days from the date the subject citation or order is issued. The Program Policy Manual also indicates "the maximum time for

submission to the investigative report on TCID is 365 days from the date of the issuance of the citation or order. TCID monitors all special investigations “to ensure compliance with the 240-day time frame.” Chapter 4 of MSHA’s Special Investigation Procedures Handbook contains the same time deadlines.

14. Despite these guidelines, the investigative report in this matter was not submitted to TCID until October 10, 1997, approximately 14 months later.

15. As part of the review process with MSHA, the cases are referred to the Solicitor’s office. This was done on October 23, 1997.

16. The Solicitor’s office completed its review of the file on or before February 13, 1998, the date of the letters notifying Respondents of MSHA’s intent to prepare penalties. That review is to be completed within 60 days of submission of the file to the Solicitor’s Office. Such timeframe was apparently not met in this case.

17. Respondents were notified by letters dated February 13, 1998, that MSHA intended to assess individual civil penalties against them as a result of MSHA’s investigations. Mr. Cunningham is charged with respect to both Orders No. 4478891 and 4478893. Mr. Cook, Mr. Jones and Mr. Sumpter are charged only with respect to Order No. 4478891.

18. A Part 100 Manager’s Conference was held on February 24, 1998. By Proposed Assessments dated May 27, 1998, Respondents were notified of their proposed individual penalties. Respondents notified MSHA of their intent to challenge the penalties and on June 25, 1998 the Secretary filed the instant Petitions for Assessment of Civil Penalties.

Discussion

Section 105(a) of the Act requires that operators must be notified of penalty proposals “within a reasonable time.” This requirement, by reason of fairness, should also apply to individuals against whom penalties are sought pursuant to section 110(c) of the Act. Further, section 104(a) of the Act, requires that citations be issued by the Secretary to operators “within reasonable promptness.” However, there is no binding legal authority which would require dismissal of the instant proceedings because of any delay by the Secretary in its investigation of these matters, and in the initiation of proceedings against the individual Respondents. There is no Commission decision on point. The cases cited by Respondents on page 14 of their brief are by Commission Judges and thus have no precedential value under the Commission’s Rules, 29 C.F.R. § 2700.72. Further, the cases relied on by Respondents time are distinguishable. In *Doyal Morgan et al*, 20 FMSHRC 38 (Chief Judge Merlin, January 1998), the 110(c) proceedings were dismissed by Judge Merlin who held that the record did not indicate any

difficulties in the investigation or acceptable reason to explain the delay. In *Reymond P. Ernst employed by Lyon Sand and Gravel Company*, 18 FMSHRC 1674 (Chief Judge Merlin, September 1996), the 110(c) action was dismissed by Judge Merlin based on the failure of the Secretary to present reasons explaining the cause of the delay. In *Robert J. Cox*, 19 FMSHRC 1094 (Judge Fauver, 1997) a 110(c) proceeding was dismissed as being untimely, but the decision does not discuss whether the Secretary presented any reason to explain the delay. In contrast, in the case at bar, an affidavit of Fredrick R. Schell sets fourth credible reasons for the delays encountered in this case. Schell avers as follows:

* * *

8. The Section 110(c) investigation at issue was not a routine special investigation. It arose out of investigation of a fatal roof control accident which occurred at an overcast location in the Main North area of United States Steel's Oak Grove Mine. The special investigation was conducted concurrently with three Section 105(c) discrimination investigations, which arose out of the same violations issued in this matter. The two roof control violations, which are subject to this Section 110(c) investigation, were in the same location of the mine as a fatal roof fall accident.

9. During the time period when this Section 110(c) investigation was being conducted, the District's Special Investigation Unit had a very heavy case load, including more than 50 Section 110(c) and 110(d) violations to investigate, and only one trained special investigator. Also there was a number of concurrent Section 105(c) investigations which were being investigated by the District Special Investigation Unit. This caused a delay in starting and completing this special investigation. As a result, the nonmandatory guidelines for completing this investigation, stated in MSHA's Program Policy Manual, were not met.

10. This was a complex case which contained 15 separate interviews and numerous documents to determine which of the operator's agents knowingly violated the regulation. Based upon my review of this file, I believe the time period to investigate this case was reasonable.

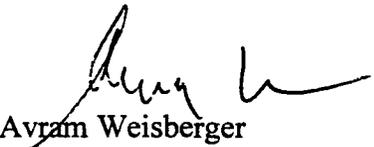
I find that the delays in this case were not so egregious as to require the harsh remedy of dismissal (see, *White Oak Mining and Construction, Inc.*, 20 FMSHRC 551 (Judge Hodgdon) (May 1998)). Respondents also assert prejudice occasioned by the Secretary's delay citing the fading of witnesses memories which inevitably occurs with the passage of time. Respondents have not set forth any specifics in this case to support their assertion, and I reject it. I concur with Chief Judge Merlin that prejudice will not be incurred from passage of time alone (*James Lee Hancock employed by Pittsburgh and Midway Coal Co.*, 17 FMSHRC 1671, 1675 (Judge Merlin, September 1995)). The only specific allegations of prejudice asserted by Respondents are references to the death J. T. Williams a potential witness to the events in issue,

and Walter Deason the MSHA investigator who conducted the investigation at issue. I find these assertions inadequate to establish legal prejudice. Williams died 2 months after the citations were issued and thus in all likelihood would not have been available to testify at a hearing. Deason, as the MSHA investigator, would, in all likelihood, have been a witness for the Secretary as part of its prima facie case. Hence, his death would appear to be a detriment to the Secretary and not to Respondents.

Accordingly, for all the above reasons, I find that Respondents have failed to establish that dismissal of these proceedings is appropriate. Accordingly, Respondents motion to dismiss is **DENIED**.

ORDER

It is **ORDERED** that Respondents Motion to Dismiss Because of Unreasonable Delay by the Secretary is **DENIED**.


Avram Weisberger
Administrative Law Judge

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NOV 10 1998

GREGORY BENNETT, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 98-115-D
: WE MD 97-21
NEWMONT GOLD COMPANY, :
Respondent : Twin Creeks Mine
: Mine ID 26-01942

ORDER

By motions dated October 7 and 16, 1998, and November 9, 1998, Gregory Bennett seeks: 1) citing Commission Rule 80, that I take disciplinary action against Newmont Gold employees Blas Duran, Cindy Jones, Chris Conley, Richard Tucker and David Stacy, for alleged false testimony during the hearing on his discrimination complaint, and 2) citing Commission Rule 81, that I withdraw from his case, because I am biased and have denied him the right to fully present his case.

Noting one occasion that I addressed the perjury concerns, on August 11, 1998, my secretary, Maggie Herrera, read my handwritten message to Mr. Bennett that he should reference untruthful and contradictory testimony from the transcript in his post-hearing memorandum, and that I make rulings on the credibility of witnesses. Discipline of Newmont Gold's employees is simply not authorized under Commission Rule 80, nor is it within the purview of my authority under any other Commission Rule.

Respecting Mr. Bennett's motion that I withdraw from his case, I have carefully considered all the reasons advanced in support of his request and conclude that they are without foundation.

WHEREFORE, Gregory Bennett's motions for discipline of Newmont Gold employees and my withdrawal from his case are **DENIED**.


Jacqueline R. Bulluck
Administrative Law Judge

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